COMMENTS

Sex Stereotyping and Statistics—Equality in an Insurance Context

I. INTRODUCTION

Women on the average live longer than men.[1] This fact is widely used by the insurance industry in calculating costs and benefits. The use of sex-specific characteristics, however, confronts courts and legislatures with difficult questions concerning discrimination in insurance practices.

The issue of sex discrimination is central to three cases granted certiorari in the 1982 term of the Supreme Court: *Peters v. Wayne State University*[2] ("*Peters*"), *Spirt v. Teachers Insurance and Annuity Association*[3] ("*Spirt*"), and *Norris v. Arizona Governing Committee for Tax Deferred Annuity*[4] ("*Norris*").[4.1]

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1. Life expectancy at age 65 for males increased from 11.35 years in 1900 to 14.02 years in 1980, while life expectancy at age 65 for females increased from 12.01 years to 18.35 years. Thus the sex gap in life expectancy at age 65 has increased from .66 years to 4.33 years between 1900 and 1980. At age 65, the widening of the sex gap in life expectancy has not stabilized during the 1970's. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SSA PUB. No. 11-11534, LIFE TABLES FOR THE UNITED STATES, 1900-2050, (1982) [hereinafter cited as LIFE TABLES].

2. 691 F.2d 235 (6th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3427 (U.S. Nov. 30, 1982) (No. 82-794).

3. 691 F.2d 1054 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3427 (U.S. Nov. 30, 1982) (No. 82-791).

4. 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3187 (U.S. Sept. 21, 1982) (No. 82-52).

4.1 Immediately prior to publication of this article, the Supreme Court rendered its decision in *Norris*, 51 U.S.L.W. 5243 (U.S. June 28, 1983) (No. 82-52). The Court upheld the Ninth Circuit's finding that Arizona's third insurance option (*see infra* notes 100 & 101 and accompanying text) violated Title VII by providing a privilege of employment based on sex. The majority opinion was written by Justice Marshall, joined by Justices Brennan, White, Stevens and O'Connor. A dissenting opinion was written by Justice Powell, joined by the Chief Justice, and Justices Blackmun and Rehnquist. Justice O'Connor joined the Powell opinion in part to form a majority in reversing the lower court's imposition of retroactive application of gender-neutral annuities.

The effect of the decision is to impose gender-neutral requirements on all employer-provided insurance initiated *after* the judgment date. In her opinion, Justice O'Connor limited the application of gender neutrality by stating: "[f]inally, our decision must

In all three cases, female employees claimed that unequal retirement benefits based on sex-segregated mortality tables violated Title VII of the Civil Rights Act of 1964, which forbids discrimination in employment.[5] The appellate courts in each case relied heavily on the Supreme Court's 1978 decision in *City of Los Angeles, Department of Water and Power v. Manhart*,[6] but disagreed with its application. The *Manhart* Court had found that an employer-provided retirement plan violated Title VII because women were required to make larger monthly contributions than men in order to receive the same monthly retirement benefits. The larger contributions reflected the higher cost of providing for women's greater longevity.[7]

In legislative action related to sex discrimination in insurance, the Senate Committee on Commerce, Science and Transportation favorably reported the Fair Insurance Practices Act

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ignore (and our holding has no necessary effect on) the larger issue of whether considerations of sex should be barred from all insurance plans, including individual purchases of insurance, an issue that Congress is currently debating." The Court did not express an opinion regarding the other insurance cases that were granted certiorari; however, the effect of the *Norris* decision appears to make those cases moot.

5. Section 703(a) of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a) (1976), reads:

> 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. 435 U.S. 702 (1978). Many commentators have analyzed the *Manhart* decision. *See, e.g.*, Freed and Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 A.B. FOUND. RESEARCH J. 583; Kimball, *Reverse Sex Discrimination: Manhart*, 1979 A.B. FOUND. RESEARCH J. 83; Note, *The End of Sex Discrimination in Employer-Operated Pension Plans: The Challenge of the Manhart Case*, 1979 DUKE L.J. 682 (1980) [hereinafter cited as DUKE L.J.]; Gold, *Of Giving and Taking: Applications and Implications of City of Los Angeles Department of Water & Power v. Manhart*, 65 VA. L. REV. 663 (1979); *City of Los Angeles, Department of Water and Power v. Manhart: A Statutory Decision Without a Constitutional Basis*, 11 U. WEST L.A. L. REV. 83 (1979) [hereinafter cited as U. WEST L.A. L. REV.]; Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer Sponsored Insurance*, 47 U. CHI. L. REV. 505 (1980) [hereinafter cited as Brilmayer]; and Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489 (1982).

7. The parties in *Manhart* disputed neither women's greater longevity, nor the added costs of women's retirement benefits. *Manhart*, 435 U.S. at 707-08.

(FIPA)[8] in the fall of 1982. Whereas Title VII applies only to discrimination in employment, FIPA would extend gender-neutral requirements to all insurance. Proponents of this bill justify its passage on civil rights principles.[9] As will be discussed below, FIPA is not required to fulfill civil rights goals. Moreover, it is contrary to basic insurance concepts which tie insurance costs to benefits received.

Providing insurance as employee compensation falls directly within Title VII's scope and involves considerations different from those attending insurance offered to the private buyer on the open market, a difference recognized in *Manhart*.[10] The mandatory nature of employer-provided group plans[11] clearly sets them apart from individually purchased policies. The *Peters* and *Spirt* insurance plans violate Title VII by providing greater retirement benefits to men than to women. Because these benefits represent a form of deferred wages, basing these benefits on gender constitutes discrimination in employment. The *Norris* plan, however, is based upon open market principles and represents an insurance plan that is compatible with nondiscrimination goals. While congressional action may be needed to clarify some issues that will not be resolved in current litigation, the expansive reach of FIPA effectively undermines basic insurance concepts and fails to meet traditional nondiscrimination goals.

This comment will first outline a few basic insurance concepts and distinguish employer-provided plans from individually purchased policies. It will then examine discrimination criteria and *Manhart's* application of Title VII and apply those principles to the pending Supreme Court cases. This Comment will

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8. S. 2204, 97th Cong. 2d Sess. (1982), reintroduced in 1983 as S. 372 and H.R. 100. *See infra* note 107 and accompanying text.

9. The Senate Report for FIPA lists groups supporting the bill, including among others, American Civil Liberties Union, NAACP, National Organization for Women (NOW), and National Federation of Business and Professional Women's Clubs, Inc. S. REP. No. 97-671, 97th Cong., 2d Sess. 2 (1982) [hereinafter cited as SENATE REPORT]. *See also* Cohodas, *Women Shift Focus on Hill to Economic Equity Issues*, 41 CONG. Q. 781 (1983).

10. "Nothing in our holding implies that it would be unlawful for an employer 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 market." *Manhart*, 435 U.S. at 717-18.

11. While the phrase "group plans" will be used in this article to refer to all employer provided plans, technically not all such plans are group insurance as defined by state insurance laws. Under this paper's analysis, all employer provided plans are considered mandatory because an employee would have to forego compensation to refuse coverage. *See infra* text accompanying notes 52-54.

also suggest that FIPA be revised to extend its gender-neutral requirements only to employer provided group plans.

II. Insurance Concepts

A. Assignment of Risks

Insurance represents a present purchase by the insured to protect against a future risk. The insurer seeks to collect premiums to match the risks assumed, and, to the extent possible, collect from the insured only the amount necessary to cover each individual risk.[12] A death benefit[13] insures against the risk of early death and the consequent financial hardship to the insured's dependents. The person with a high probability of early death would pay more for this type of policy than would a person with an anticipated long life. A lifetime annuity,[14] on the other hand, insures against longevity—the risk that an individual will outlive his savings. Consequently, the person with a high probability of long life would pay more for an annuity, and the person likely to die early would pay less.[15]

Both the insured and the insurer engage in a process of selection.[16] The insured bases his insurance purchase on his best

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12. Brief Amicus Curiae of American Council of Life Insurance at 7, Norris v. Arizona Governing Comm. for Tax Deferred Annuity, 671 F.2d 330 (9th Cir. 1982) [hereinafter referred to as Insurance Council Brief].

13. A death benefit (commonly referred to as life insurance) is a contract to pay a designated amount to the beneficiary on the death of the insured, 1 G. Couch, Cyclopedia of Insurance Law, § 1:69 (2d ed. 1959).

14. An annuity typically is the payment to the recipient of a specified monthly sum, and is frequently used for retirement income.

> The pure form of single life annuity, usually referred to as "straight life annuity," provides periodic, usually monthly, income payments that continue as long as the annuitant lives and terminates upon his death. The annuity is considered fully liquidated upon the death of the annuitant, and no guarantee is given that any particular number of monthly payments will be made. Because of the absence of any benefit after death, this type of single life annuity provides the largest monthly income per dollar of purchase price outlay.

D. McGill, Fundamentals of Private Pensions 122 (1979). A legislative prohibition against use of gender distinct tables (e.g., FIPA) would affect all forms of insurance, including disability and automobile. This article, however, is limited to a discussion of death benefits and annuities, the issues in the cases before the Court.

15. Brief of Teachers Insurance Annuity Association (TIAA) and College Retirement Equities Fund (CREF) as Amici Curiae in Support of Petitioners at 4-6, Norris v. Arizona Governing Comm. for Tax Deferred Annuity, 671 F.2d 330 (9th Cir. 1982).

16. Selection refers to an exercise of choice by the insured and the insurer based on self-interest. Compare the lack of selectivity by the insured in group plans to this description by an actuary:

> [S]election is performed by different persons in life insurance, from what it is

estimate of life expectancy, his personal needs, and the cost to him. The insurer relies on the characteristics of the insured and on statistical probabilities to determine the risk. Each tries to win a competitive advantage by outguessing the other. In mandatory group plans, individual selection does not exist. The insurer accepts all covered risks regardless of classification and the individual gains coverage regardless of personal classification or need.[17]

B. Classification of Risks

In writing an individual policy, an insurer can consider a number of factors affecting mortality such as health, family history, and sports activities.[18] The premiums charged to the

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in annuity insurance. In both instances there is selection (trying to outguess the other party) by both the insured and the insurer. In life insurance, the risk being borne by the insurer is the risk of early death. The insurer, then, must guard against the insured's having knowledge the insurer does not have, i.e. knowledge that he has not been feeling well, that he has a certain disease, that his family history indicates a certain disease, that he sky dives on Sundays, i.e. knowledge that will put him in a special "extra cost" class. So these characteristics, along with age and sex, are information the insurer needs to know to classify the risk properly. In life insurance, then, selection is done by the insurer. . . .

Why, then, are not these questions of health, occupation, avocation, etc. as well as the questions on age and sex asked when an annuity is issued? If a person knows he or she has a higher probability of dying because of any of the elements—health, occupation, family history, avocation—would he or she not be unwise to buy an annuity which pays only for long life, not short life? In the case of an annuity then, self-selection is done by the insured (annuitant) in advance for all the elements except age and sex. Hence those are the only questions that need to be asked by the insurer.

Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?* 2 EMPLOYEE BENEFITS J. 8 (Fall 1976).

17. It is the broadness of the group covered and the generally mandatory nature of group plans that makes them financially feasible. The risks are pooled over a large population which can exercise little adverse selection. *See infra* notes 26-31 and accompanying text, explaining adverse selection. "The design of a risk classification system is affected by the degree to which the insurance program is compulsory or voluntary. For programs which are largely or entirely compulsory and where there is no voluntary choice among competing institutions, broad classifications are sometimes used, the extreme being a single class." AMERICAN ACADEMY OF ACTUARIES, RISK CLASSIFICATION STATEMENT OF PRINCIPLES 1, 12 (1980) [hereinafter cited as RISK CLASSIFICATION].

18. The grouping of risks with similar risk characteristics for the purpose of setting prices is a fundamental precept of any workable private, voluntary insurance system. This process, called risk classification, is necessary to maintain a financially sound and equitable system. It enables the development of equitable insurance prices, which in turn assures the availability of needed coverage to the public. This is achieved through the grouping of risks to determine averages and the application of these averages to individuals. . . .

insured reflect each factor's effect on probability of long life for that individual. In group policies, however, isolating individual characteristics has not been economical, particularly since it would require continual monitoring of the groups. Some factors are sufficiently reliable and easily determined so that taking them into account is economically significant.[19] Age[20] and sex, for example, are two of the most accurate predictors of longevity.[21] The correlation is clear and acknowledged.[22] Unlike factors such as marriage, smoking, and health habits,[23] these character-

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> Determining average experience for a particular class of risk is not the same as predicting the experience for an individual risk in the class. It is both impossible and unnecessary to predict experience for individual risks. If the occurrence, timing and magnitude of an event were known in advance, there would be no economic uncertainty and therefore no reason for insurance.

RISK CLASSIFICATION, *supra* note 17, at 1.

19. Freed and Polsby, *supra* note 6, at 625.

20. The law specifically exempts age consideration in insurance from equal pay requirements. 29 U.S.C. §§ 621-24 (1976), provides in part:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . (2) to observe the terms of a bona fide seniority system or *any bona fide employee benefit plan such as a retirement, pension, or insurance plan*, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

Id. § 623 (f) (emphasis added). But at least one commentator has questioned the distinction between age and sex:

> A man who retires at age sixty, with a given dollar accumulation, will ordinarily receive a smaller (periodic) pension benefit than a man who retires at age seventy. If one cannot consider the greater life expectancy of the average sixty-five year old woman as compared to the average sixty-five year old man, can periodic benefits be based upon the greater life expectancy of the average sixty-year old man as compared to the average seventy-year old man? Certainly, some retirees at age sixty will have fewer post-retirement years than seventy year old retirees. . . .

DUKE L.J., *supra* note 6, at 702 (quoting from Halperin and Gross, *Sex Discrimination and Pensions: Are We Moving Toward Unisex Tables?* 30 N.Y.U. CONF. ON LAB. 235, 249-50 (1977)).

21. Kimball, *supra* note 6, at 118-20. See Kimball at 109 for an explanation of the methods used in developing female mortality tables.

22. *Id.* at 118-20.

23. The *Manhart* Court noted factors other than sex which could contribute to longevity: "Other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential." 435 U.S. at 710 n.17 (citing R. RETHERFORD, THE CHANGING SEX DIFFERENTIAL IN MORTALITY 71-82 93 (1975)). "A study of life expectancy in the United States for 1949-1951 showed that 20-year-old men could expect to live to 60.6 years of age if they were divorced. If married, they could expect to reach 70.9 years of age, a difference of more than 10 years." 435 U.S. at 710 n.18 (citing R. RETHERFORD, THE CHANGING SEX DIFFERENTIAL IN MORTALITY 93 (1975)).

istics are immutable.[24] Therefore, group plans universally base premium rates on the age and gender composition of the group.[25]

C. Adverse Selection

Classification of risks can be justified on the basis of fairness; that is, that the young should not subsidize the old, nor should the healthy subsidize the sickly. But the insurance industry goal of tailoring individual premiums to risks is largely dictated by economics. Were an insurer to charge all his death benefit policy holders the same premiums regardless of age, adverse selection would likely force the company out of business.[26] Adverse selection refers to the assumption that insurance, like any commodity, will respond to the economic forces of the market place where self-interest motivates individual purchases. In a competitive market, younger men are unlikely to purchase insurance from a company that bases premiums on the average life expectancy of all policy holders. Older men, however, would be attracted to the company's bargain rates. The average age would increase, along with the premiums, and cause more young and middle aged men to avoid the company. As the process continues, the company ultimately becomes unable to attract new policy holders. In this manner, adverse selection, occurring whenever options are available to an individual, distorts the basis for any group premium rate.

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24. "The use of age and sex also commends itself to insurers in another way: both factors are hard to lie about and easy to check up on. On the other hand, the insured has every incentive to lie about whether she is or is not a smoker, goes in for or does not go in for helmetless motorcross, is or is not an obsessive-compulsive ('Type A') personality, worships or does not worship God by handling snakes." Freed and Polsby, *supra* note 6, at 625 (footnote omitted).

25. Age is the singular most prevalent basis for calculating insurance rates. An example of its use by the industry illustrates the need for classification. A man of 25 is expected to live on the average an additional 47 years. Under existing level-premium whole life plans, the premium charged to him would be fairly low. The insurer anticipates that the insured's payments to the company, plus interest earned, will cover the payment to his survivors at age 72, his average expected age of death. He may, of course, die the day after paying his first premium, and the insurer would be liable for the face amount of the policy. The mortality table for 25 year-old males reflects the rareness of this occurrence. The insurance company collects sufficient funds from all other 25 year-old males carrying life insurance to spread the cost of this minor risk. Without this age distinction, a 25 year-old male with a 47 year life expectancy would pay the same premium as a 75 year-old male with a 9 year life expectancy. (Figures derived from LIFE TABLES, *supra* note 1, at 62-63).

26. Insurance Council Brief, *supra* note 12, at 8-11.

Adverse selection also applies to gender based annuity options. Consider an employer that contracts with an insurer to provide an annuity plan with cashout options[27] which differ by gender, but are actuarially equivalent[28] to the annuities.[29] Because of this equivalence, the insurer need not be concerned about the proportion of male to female employees who cash out their annuities. If gender-neutral cashout option factors are imposed,[30] the balance is upset. In that case a man could benefit by taking the lump sum and investing in a private retirement policy that would offer the advantage of gender based tables. Conversely, a woman gains an advantage in drawing an annuity from the group plan. The higher costs of funding gender-neutral cashout options for men combined with the all female annuities increases the overall cost of the group plan.[31]

III. Title VII and Manhart

A. Title VII Discrimination

Classifying individuals on the basis of group characteristics is the essence of unlawful discrimination.[32] Yet classifying indi-

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27. Some plans allow the insured the option of taking a lump sum on retirement. "Most plans that permit a full withdrawal of the actuarial value of the accrued benefits attempt to protect themselves against adverse selection [by those anticipating a short life] by requiring the participant to elect the cash option some years in advance of retirement." D. McGill, *supra* note 14, at 128 n.10.

28. Actuarial value approximates current market value, based on specified assumptions. Actuarial equivalents are payments of similar value. *Final Report of Actuaries' Committee on Pension Terminology*, Pens. Rep. (BNA) No. 353, at R-2 to R-5 (Aug. 3, 1981).

29. The cash value of a woman's annuity would be approximately 15% more than a man's, based on her longer life expectancy. In *Manhart*, women's contributions were 14.84% higher than men's. 435 U.S. at 705.

30. Gender-neutral factors would provide equal cashouts for equal monthly payments, regardless of the sex of the annuitant.

31. This example hypothesizes the imposition of gender-neutral factors on existing contracts, much as proposed legislation (FIPA) would do. Such legislation would affect future contracts in a different way. Presumably the insurer would anticipate that most men would cash out their annuities and that most women would not. The legislation would not adversely affect insurers of future contracts, but would effectively limit the choice of future employees. *See also* Kimball, *supra* note 6, at 134-35.

32. The Supreme Court has found gender discrimination illegal under both Title VII and the equal protection clause of the fourteenth amendment. *See, e.g., Manhart*, 435 U.S. 700 (1978) (Title VII violation); Orr v. Orr, 440 U.S. 268 (1979) (declaring a state law which authorized courts to impose alimony obligations on husbands but not wives unconstitutional). Title VII, by its terms, forbids employment discrimination based on race, color, sex, or national origin. Title VII applies to both private and governmental employers. The Constitution is binding only on governmental actions, but goes

viduals on the basis of group characteristics is an essential tool of the insurance industry.[33] While it is possible to test individuals for job skills, one cannot forecast when an individual will die.[34] The insurance industry's necessary reliance on past group experience to predict future events complicates the application of discrimination criteria.

The Supreme Court has found gender classifications discriminatory under Title VII[35] on the basis of the stigma that attaches to such classifications.[36] The Court's rationale for finding discrimination, however, does not logically apply to insurance. Women are not stigmatized by an assumption that

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beyond the scope of employment. Although the Court has indicated that the standards are not identical for statutory and constitutional violations, Washington v. Davis, 426 U.S. 229, 247 (1976), the reasoning closely parallels in both types of cases. Noting that Congress has not defined "discrimination" for Title VII purposes, the Court has relied on its experience in interpreting the equal protection clause: "[T]hose cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII." General Elec. Co. v. Gilbert, 429 U.S. 125, 133 (1976). Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) probably presents the most current and complete expression of the Court's reasoning in constitutional discrimination cases. The Court cited Craig v. Boren, 429 U.S. 190 (1976) as requiring a higher level of judicial scrutiny for classifications by gender. "Classifications based on gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." (citations omitted) *Feeney*, 442 U.S. at 273.

33. *See supra* notes 17-25 and accompanying text.

34. Justice Blackmun, in his concurring opinion in *Manhart*, recognized the inherent dilemma: "Unlike the possibility, for example, of properly testing job applicants for qualifications before employment, there is simply no way to determine in advance when a particular employee will die." 435 U.S. at 724.

35. The *Manhart* Court found that "treatment of a person in a manner which but for that person's sex would be different" violated Title VII. 435 U.S. at 711. "Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708. *See also* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (finding Title VII discrimination in employer's policy regarding pregnancy leaves).

36. *Manhart* quoted from Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) in its Title VII analysis:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.

Manhart, 435 U.S. at 707 n.13. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court held that the armed services practice of treating female dependents differently than male dependents violated the equal protection clause of the fourteenth amendment. "[I]n part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." (footnote omitted) *Id.* at 686.

they will live a greater number of years than men. The attribution of long life neither perpetuates past stereotypes nor hampers women in attaining full access to jobs and education.[37] Although the Court frequently determines unlawful discrimination on the basis of an immutable characteristic such as sex,[38] in an insurance context the immutable characteristic is not being used to oppress women. To the contrary, gender classification provides both a burden and benefit. For example, women pay more than men for annuities, but less for life insurance, because of their greater longevity.

The insurance industry must be able to rely on some group classifications even though any classification will inevitably disadvantage some group on the basis of its past history. It is true that insurance distinctions can be limited to such factors as whether the insured is married or unmarried,[39] fat or thin, or sick or healthy. From an insurance standpoint, some health classifications are as immutable as sex and may be considered as unfairly discriminatory.[40] If one accepts the premise that fairness means matching premiums to individual risks, then all factors are legitimate predictors. Since there is no absolute test for life expectancy, a prediction will be more accurate when consideration is given to as many individual characteristics as are feasible. The matching of premiums to risks will be more individualized[41] when sex is one of the predictive factors.

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37. *See supra* note 36.

38. Footnote number four in United States v. Carolene Products, 304 U.S. 144 (1936) referring to "prejudice against discrete and insular minorities" has formed the basis for heightened scrutiny of governmental classifications based on immutable characteristics. *Id.* at 153 n.4. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1090 (1978). One commentator lists three characteristics common to race, color, sex, religion, and national origin which argue against their use under Title VII: first, "ascriptive" and "immutable," meaning characteristics over which the individual has no control; second, characteristics that "have been widely misused throughout history;" and third, characteristics that "are generally irrelevant to employment decisions." Brilmayer, *supra* note 6, at 526-27. *But see* Kimball, *supra* note 6, at 103-05, discussing "fair" and "unfair" discrimination.

39. *See supra* note 23 (other criteria suggested in *Manhart*).

40. *See* analysis of FIPA, *infra* notes 107-25 and accompanying text.

41. Chief Justice Burger's dissent in *Manhart* made this argument: "Individually, every woman has the same statistical possibility of outliving men. This is the essence of basing decisions on reliable statistics when individual determinations are infeasible or, as here, impossible." 435 U.S. at 728. The Chief Justice was arguing in the context of a mandatory group policy.

B. Title VII Application in Manhart

Gender should be an allowable factor for determining premiums and benefits for individually purchased policies. Because of the lack of selection in employer-provided group plans, however, gender distinctions in such plans are unfairly discriminatory. Under this criteria, the Court correctly decided *Manhart*. Therein the Court found "no reason to believe Congress intended a special definition of discrimination in the context of group insurance coverage."[42]

In *Manhart*, the Court held that an employer's mandatory pension plan violated Title VII by withholding larger contributions from women than from men. The women paid 14.84% more than men in monthly contributions to receive the same monthly benefit at retirement. The higher costs reflected women's longer life expectancies.[43] The Court reasoned that women's higher contribution rates decreased their take-home pay in relation to men, thus discriminating against women in terms of compensation.

The Court found that the *Manhart* plan violated Title VII on the basis of disparate treatment[44]—an intentional disadvantaging of every individual in the class on the basis of sex. The Court relied on Title VII's emphasis on the individual to

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42. *Manhart*, 435 U.S. at 710.

43. "It involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two classes are in fact different." *Manhart*, 435 U.S. at 707-08.

44. Title VII discrimination is based on two theories—disparate treatment and disparate impact. The difference between the two hinges on intent or lack of intent.

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (setting forth burdens of proof reiterated by the Court in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)).

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Teamsters, 431 U.S. at 336 n.15 (citations omitted). *See also Burdine*, 450 U.S. at 252 n.5 (recognizing discriminatory effect on protected classes and suggesting the distinction between disparate impact and disparate treatment).

reject the argument that fairness to the entire class could offset discrimination against the individual.[45] Under a system of gender-neutral contributions, men as a group would receive fewer annuity payments because of their shorter lifespans, although men and women contributed equal amounts.[46] The Court, however, denied the Water Department's defense that men were thus illegally discriminated against.[47]

In disallowing the Department's contention that equal contributions would discriminate against males, the Court found that "each retiree's total pension benefits are ultimately determined by his actual life span."[48] Thus, while sex may be an

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45. The Court's reasoning can be analyzed in terms of disparate treatment versus disparate impact analysis. Brilmayer, *supra* note 6, argues that Congress's intent in passage of Title VII, the Equal Pay Act, and the Bennett Amendment (*see infra* note 48) was to assure individual rather than group protection:

> Equal periodic annuity benefits are not illegal discrimination against men, for the amendment permits disparate impact on either sex in compensation. If it happens that men as a group collect less than women as a group, the difference is due to some "factor other than sex," namely, actual longevity. Just as men as a group may get higher wages if they have greater average seniority, women as a group may collect higher total pension benefits if more of them live longer.

Id. at 520 (citations omitted). *But see* U. WEST L.A. L. REV., *supra* note 6 (asserting that *Manhart* should have been decided under a disparate impact analysis, rather than disparate treatment).

46. It is interesting to note that in *Manhart* the Court recognized that the Department provided life insurance to all employees without distinction as to sex, but the Court did not say whether this factor influenced its decision. Gender neutral life insurance is one area where women subsidize men. 435 U.S. at 710, n.19.

47. Two commentators criticized the *Manhart* assumption that equality of compensation should require access to equal monthly annuity benefits. Kimball, *supra* note 6, contends equality under Title VII can be defined as equal employer contributions. Benston, *supra* note 6, agrees with Kimball's basic analysis, but in a more complex formulation, insists equal compensation means equal market value. This is the same conclusion reached by the Sixth Circuit in *Peters*. *See infra* text accompanying note 86. Benston also asserts that where sex is used as a predictor of longevity in calculating costs, it would be discriminatory *not* to use sex as a predictor in calculating benefits. He recognizes that it is not efficient to take into account factors other than sex and age, but that the management savings which result from the use of these two factors benefit all insureds by producing lower cost insurance than would be available on the individual market. He concludes that this cost advantage justifies the gender distinction.

48. *Manhart*, 435 U.S. at 710 n.20. The Court rejected defense contentions that the Bennett Amendment exempted the use of sex-segregated tables as a "factor other than sex," but found actual longevity was such a factor:

> A variation on the Department's fairness theme is the suggestion that a gender-neutral pension plan itself violates 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 ultimately 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.

accurate predictor of group life expectancy, an individual's death cannot be predicted from group statistics. Therefore, it cannot be said that any individual man will receive less in compensation any more certainly than any individual woman will receive more.[49]

The *Manhart* Court recognized a legal distinction between employer-provided group insurance and the private market. The Court specifically exempted from Title VII a plan that would provide men and women employees with equal funds to purchase insurance on the open market.[50] The Court implicitly acknowledged that in a mandatory employer-provided group plan the employee is a captive consumer, and that the "better risks always subsidize the poorer risks."[51] Although an employer's contribution to a benefit plan may be fairly charac-

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435 U.S. at 710 n.20 (citations omitted).

To understand the Court's reasoning, it is necessary to read Title VII in conjunction with the Bennett Amendment and the Fair Labor Standards Act. The Bennett Amendment became part of Title VII, § 703(h), which provides in part:

> It shall not be an unlawful employment practice under this subchapter 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 206(d) of Title 29.

42 U.S.C. § 2000e-2(h) (1976).

The Fair Labor Standards Act, 29 U.S.C. § 206(d) (The Equal Pay Act) provides, in part:

> No employer . . . shall discriminate . . . between employees on the basis of sex . . . except where such payment is made pursuant to . . . (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on *any other factor other than sex*. . . .

U.S.C. § 206(d) (1976) (emphasis added).

49. This concept may be explained by a hypothetical situation: An employer who provides on-the-job meals to his employees might find that males eat 30% more than females. The employer might consider it more efficient to predict the amount of food needed on the basis of the ratio of males to females in the workforce, rather than try to anticipate how much each individual eats. This does not mean that each male will eat more than each female. Some women may have hearty appetites, and some men may be watching their weight. No one is being discriminated against on the basis of sex. Each employee has equal access to the food; each eats according to individual preference. The group trait is merely being used to forecast the amount of food needed. Extending this analogy to conditions represented in group insurance plans based on gender, it would be discriminatory to the individual to deduct the 30% greater food costs from each male's salary on the basis (no matter how accurate) of the group trait.

50. *See supra* note 10.

51. 435 U.S. at 710. Gold, *supra* note 6, expresses the policy inherent in the Court's decision: "If as a result of this rule [*Manhart*] men have to subsidize women, [in the purchase of annuities] as blacks already subsidize whites and single persons now subsidize married persons, that is a policy judgment that Congress has reached." *Id.* at 687.

terized as deferred wages,[52] the employee has little choice in how these wages will be spent.[53] However, the insurer provides coverage automatically without imposing selective devices (such as physical examinations for life insurance). In other words, a healthy person with no dependents might not want death benefits, but might prefer an annuity because of expected longevity. Under a typical employer plan, the insured could not opt out of the death benefit coverage and receive the difference in increased wages. In many plans no cash option is available, and an employee is provided an annuity whether or not he desires it.[54]

This lack of selectivity distinguishes employer-provided group plans from individually purchased insurance. In mandatory group plans, the insured trades an opportunity to make choices for the greater bargain provided by a group plan's economy of scale. Additionally, the insured is granted coverage regardless of individual habits or characteristics, and retains coverage despite any adverse changes in those habits or characteristics. The insurer, in turn, trades selection criteria for a stable group of premium payers who cannot exercise adverse selection. Compulsory membership provides the insurer with a broad pool of risks where the deaths will average out. In the open market, on the other hand, the individual lacks the security and economic advantages of group coverage, but is able to purchase insurance tailored to personal needs. The cost of that insurance also will reflect individual risk characteristics.

Because of administrative convenience, only age and sex are used to calculate benefits in a group plan. Under *Manhart's* interpretation of Title VII, administrative convenience does not justify classification on the basis of sex. When employee compensation is given in the form of insurance without an opportu-

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52. *See generally* D. McGILL *supra* note 14, at 16-21.

53. *See supra* note 10.

54. The plans in *Spirt* and *Peters* did not offer a cashout option. In a case involving the same type of annuity at issue in *Spirt* and *Peters*, Judge Coffin expressed this concept in his concurring opinion:

> The plan that is before us, as I see it, fails because it is as if a company paid its male and female employees equal salaries, but in the form of chits that could be redeemed only in a particular store which, the company knew, would give to one sex more for the same number of chits than to the other sex. That company could hardly claim that it was not discriminating between men and women.

EEOC v. Colby College, 589 F.2d 1139, 1146 (1st Cir. 1978) (Coffin, J., concurring).

nity to select the coverage desired or purchase a contract based on individual characteristics, benefits should be gender-neutral. In the purchase of individual policies, however, *Manhart's* open market concept should prevail. Insurers must rely on classifications to predict future events. Stereotyping is justified as an attempt at individualization on the only basis possible. The narrower the risk classifications are drawn, the more closely they will approximate actual experience.[55] Since an insurer cannot know a particular woman's life expectancy, it will come closest to matching her premiums to her risk if it bases her premiums on women's life expectancy, rather than the combined life expectancy of men and women. Women will profit in some areas and pay more in others, but individuals should be free to negotiate for coverage on any mutually agreeable basis.

C. Issues Remaining After Manhart

The line between individual coverage and employer-provided benefits is not always clear. Although *Manhart* held retirement benefits in general to be "compensation" under Title VII,[56] the Court narrowed its decision to the plan before it.[57] Left unresolved was the question whether all employer-provided schemes, including cashouts, joint and survivor options,[58] and defined contribution plans,[59] must be gender-neutral.

The Court's "open market" concept could imply that cashout options should be gender-neutral, giving men and

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55. Competition encourages insurers to determine and use only accurate predictors. "To be more successful than its competitors would motivate an insurer to become more refined in its risk classification system and thus its pricing structure, so that it could serve both lower cost and higher cost risks in the marketplace." RISK CLASSIFICATION, *supra* note 17, at 10. *See also* Benston, *supra* note 6, at 529-31.

56. "We need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII." 435 U.S. at 712 n.23 (citations omitted). *See supra* note 48, explaining Bennett Amendment.

57. "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.

58. A joint and survivor option is a type of annuity which "provides periodic payments as long as either of two persons shall live. For most combinations of ages, this is the most expensive of all annuity forms. This type of contract is primarily designed to provide old-age income to a husband and wife." D. MCGILL, *supra* note 14, at 123. *See* Probe v. State Teachers' Retirement System, 2 EBC 2423 (C.D. Cal. 1982). In this case, the District Court found that a system that paid male retirees who chose a joint and survivor annuity less than female retirees was in violation of Title VII.

59. The plans at issue in *Spirt* and *Peters* are defined contribution plans. *See infra* text accompanying note 71.

women equal dollar amounts with which to purchase an annuity. Alternatively, *Manhart* could be interpreted to require that men and women receive lump sum settlements of equal actuarial value.[60] Either basis has pitfalls. Equal sums not only invite adverse selection, but also disadvantage women in the market place,[61] where equal dollars buy a smaller annuity for women. The problem of adverse selection could be solved by adjusting cashouts to reflect the actuarial value of a retiring employee's pension rights.[62] With her higher cashout, a woman could then purchase an annuity of the same value as a man's. However, it is difficult to see how this alternative would square with Title VII and the Court's emphasis in *Manhart* on equal compensation to the individual. Individual men would receive lower benefits in this option. This distinction in benefits would not be based on actual life span, but would be based on sex, a distinction prohibited by *Manhart*.[63]

Yet another approach to the problem of adverse selection would be to reduce or eliminate cashout options, but this prevents employee choice.[64] Regulation of the entire industry, requiring unisex tables for all insurance,[65] would also reach these problems. FIPA[66] would do exactly that, extending Title VII antidiscrimination principles to all insurance. This problem, however, does not justify such a far-reaching congressional remedy.

While some incentives to adverse selection in options exist, there are countervailing disincentives. One court[67] noted that economies of scale in group plans largely offset possible advan-

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60. *See supra* note 28.

61. *See* Gold, *supra* note 6 (contending that women would be discriminated against when seeking employment because of their higher pension costs, and that application of the "open market" to cashouts would further disadvantage women). *See also* Gold, at 683 n.58, 705 n.117 (describing an unpublished paper by William Frey).

62. Gold, *supra* note 6, at 707-09.

63. *See supra* note 48.

64. The basic issue is whether a pension plan is to be regarded as a general savings program with all the flexibility that one would want in such a program or as an instrument of business and social policy designed to ensure a dependable source of income throughout the remaining lifetime of retired workers.

D. McGILL, *supra* note 14, at 128. Congress considered and rejected legislation which would have prohibited cashout options. *Id.* at 128.

65. Frey, cited in *Gold*, *supra* note 61, at 705-06, n.117, recommending regulation of the entire industry, or alternatively a tax-supported national program replacing private insurance plans.

66. S. 2204, *supra* note 8. *See infra* notes 107-25 and accompanying text.

67. *Spirt*, 691 F.2d 1054.

tages in individually purchased plans.[68] That court further noted that the majority of men opt for joint-survivor coverage, thus equalizing their benefits.[69] Perhaps most telling is the fact that the majority of private businesses now provide their employees with gender-neutral insurance plans.[70] If experience indicates a serious adverse selection problem, an employer can make retention of annuities more attractive by reducing the cashout value, or cashouts can be eliminated. When insurance is a form of employee compensation, with no opportunity for selection on the basis of individual characteristics, there should be no sex differentiation in options.

As well as leaving open the question whether Title VII would extend gender neutrality to options, the Court gave no guidance as to whether defined contribution[71] plans require the same neutrality. The plan at issue in *Manhart* was a defined benefit plan wherein a beneficiary is assured of a specific monthly income upon retirement. The contribution rate varies according to the amount necessary to fund the plan. In a defined contribution plan, the employer agrees to contribute a fixed amount to the plan. Monthly benefits at retirement vary on the basis of accumulated contributions.

IV. Pending Cases

The questions raised in *Peters*,[72] *Spirt*,[73] and *Norris*[74] are

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68. *Id.* at 1069.

69. *Id.* at 1069. Generally, joint and survivor options involve husband and wife; their combined life expectancies, therefore, average male and female risks.

70. Most private businesses use a defined benefit plan without any employee contribution. For the majority of plans, there is no distinction in the amount of employee benefits paid to males and females. "Under a defined benefit plan, male and female employees accrue pension benefits on the same basis, and the employer absorbs the additional cost associated with female annuitants." D. McGill, *supra* note 14, at 99. However, this may not be true where options are involved. Different conversion rates are often used for male and female joint and survivor annuities, and cashout rates. *Id.* at 125. Pension plans in which only the employer contributes are defined as "non-contributory." The majority of plans in the United States now fall in this category. In public employee plans, however, the reverse is true: "[O]ver 90 percent of the members of public employee retirement systems are required to make contributions." T. Bleakney Retirement Systems for Public Employees 26 (1972).

71. *See* Gold, *supra* note 6, at 673-76 (asserting that a defined contribution plan is actuarially the same as a defined benefit plan and should thus be based on unisex tables).

72. Peters v. Wayne State University, 691 F.2d 235 (6th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3427 (U.S. Nov. 30, 1982) (No. 82-794).

73. Spirt v. Teachers Ins. and Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), *cert.*

the inevitable outgrowth of *Manhart*. The *Manhart* decision was limited to "employer operated pension funds" that require "unequal contributions from men and women."[75] The Court did not address plans which pay employees unequal benefits (defined contribution plans) as do *Peters* and *Spirt*. *Norris* tests *Manhart's* open market exception.

The appellate courts in *Peters* and *Spirt* faced nearly identical fact situations, yet came to opposite conclusions. Both cases involved universities—Wayne State University was the original defendant in *Peters*; Long Island University was added as a defendant in *Spirt*.[76] Both schools cooperate[77] with Teachers Insurance and Annuity Association (TIAA), and a companion corporation, College Retirement Equities Fund (CREF), to provide retirement benefits to their employees.[78] A major feature of TIAA-CREF plans is that contributions vest immediately and irrevocably in the individual employee, allowing complete portability.[79] Both TIAA and CREF use sex-segregated mortality tables to calculate benefit rates. In *Peters*, the court found that their use created pensions of equal actuarial value, and therefore did not violate Title VII. The *Spirt* court, however, found the use of sex-segregated tables reduced compensation to individual women, and was thus discriminatory under *Manhart*.

The plan offered by Wayne State in *Peters* was unusual in that it allowed voluntary participation by employees. Participating employees contributed 5% of their salaries. For such employees the University contributed 10%.[80] The court distinguished *Peters* from *Manhart* because in the latter case the employer managed the plan and determined the disbursement

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granted, 51 U.S.L.W. 3427 (U.S. Nov. 30, 1982) (No. 82-791).

74. Norris v. Ariz. Governing Comm. for Tax Deferred Annuity, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3187 (U.S. Sept. 21, 1982) (No. 82-52).

75. *Manhart*, 435 U.S. at 717.

76. The District Court found that the university was an "active participant" and joinder was required. Spirt v. Teachers Ins. and Annuity Ass'n, 416 F.Supp. 1019, 1022 (S.D.N.Y. 1976).

77. TIAA-CREF contracts directly with employees. *Spirt*, 416 F.Supp. at 1021.

78. "TIAA and CREF manage retirement plans for faculty and staff members at 85% of all private four-year colleges and universities and over 40% of all public colleges and universities in the United States." *Spirt*, 691 F.2d at 1057.

79. Portability allows an employee to transfer accumulated benefits when accepting employment at another college or university utilizing the TIAA-CREF system.

80. It is a basic assumption of this Comment that a plan is not voluntary when it represents part of an employee's compensation. *See supra* notes 52-54 and accompanying text.

rate.[81] The *Peters* court noted that Wayne State had no control over disbursements and, in fact, had "repeatedly and unsuccessfully attempted to persuade Teachers Annuity to alter its payment policy."[82]

In reversing the lower court's finding of liability for Wayne State, the Court of Appeals concluded that Wayne State's actions did not violate Title VII under either a disparate treatment or disparate impact analysis.[83] The court found that Wayne State had rebutted a "prima facie showing of disparate treatment by articulating a legitimate nondiscriminatory reason for treating female and male annuitants differently."[84] Because women live longer than men, their retirement benefits are of equal value to men's, and TIAA-CREF had followed accepted actuarial principles in calculating benefits. Nor did the court find any intent to disadvantage women, thus dismissing a *pretext* theory of disparate treatment.[85]

The court also dismissed a claim of disparate impact, emphasizing factual differences between the instant case and *Manhart*. It concluded that men and women receive equal compensation and neither group is disadvantaged in its receipt of benefits. Because employee contributions were equal, take-home pay was the same for men and women, and their benefit values were actuarially equivalent.[86]

The *Peters* court's reasoning cannot stand with *Manhart*. The only real distinction between *Peters* and *Manhart* relates to a defined benefit plan as contrasted with a defined contribution plan. In *Peters*, women contributed the same percentage of their salaries as men, but received smaller monthly benefits when they retired. In *Manhart*, women contributed larger monthly sums than their male coworkers, but received the same benefits when they retired. The *Manhart* Court acknowledged that the cost of a woman's pension was greater because women live longer, but held that the greater actuarial value did not justify the greater

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81. The court observed that if TIAA-CREF's use of sex-segregated mortality tables were discriminatory, Wayne State would be liable for selecting them to serve its employees, so this factual distinction is not relevant. *Peters*, 691 F.2d at 240.

82. *Peters*, 691 F.2d at 238.

83. *See supra* note 44 and accompanying text.

84. *Peters*, 691 F.2d at 239.

85. *Id. See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (describing pretext for discrimination).

86. *See* both Benston and Kimball, *supra* note 47 and accompanying text.

charge to women.[87] This reasoning is completely opposite to that used in *Peters*.

The *Spirt* Court recognized the *Manhart* rationale. The plan in *Spirt* was "mandatory for most eligible employees."[88] Under this plan, both Long Island University and each employee contributed a set percentage of each employee's yearly earnings to the fund. Benefits were based on sex-segregated mortality tables, resulting in monthly payments approximately 11.3% greater to men than to similarly situated women under the single life option.

The Second Circuit Court of Appeals upheld the lower court's finding of a violation of Title VII.[89] It determined that there was no legal distinction between defined contribution and defined benefit plans:

> In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII. Each female TIAA-CREF plan participant is maintained at a lower economic level than her male counterparts for as long or short a time as she is alive to receive benefits, regardless of whether she is ultimately one of the few who outlives the average male participant or is one of the 84% of all women who do not outlive their male counterparts (citations omitted).[90]

The *Spirt* court emphasized *Manhart's* mandate that Title VII requires fairness to individuals, rather than classes.[91] In

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87. In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. That argument might prevail if Title VII contained a cost justification defense comparable to the affirmative defense available in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII.

Manhart, 435 U.S. at 716-17 (citations omitted).

88. *Spirt*, 691 F.2d at 1057.

89. The court also agreed with the lower court that TIAA and CREF "are so closely intertwined" with LIU that they are considered employers for purposes of Title VII. *Spirt*, 691 F.2d at 1063.

90. *Spirt*, 691 F.2d at 1061. The fact that between 84% and 85% of women do not outlive men is referred to as "overlap." A similar overlap would occur in a statistical profile comparing males of 60 with males of 65 because not all 60 year-olds outlive all 65 year-olds. *See* Kimball, *supra* note 6, at 120-23. *See also infra* notes 108-10 and accompanying text.

91. "[T]he clear mandate is that compensation, conditions and benefits of employment are to be tested by their disparate effect on individuals rather than groups." *Spirt*,

rejecting the argument that equalizing benefits would constitute unfairness to men, the court explained that the risk of longevity was simply being spread across the entire group "rather than being imposed on one sub-group."[92] The court found further support for this spreading of risks in Congress's response to the decision in *General Electric v. Gilbert*.[93] The *Gilbert* Court held that omission of pregnancy benefits from an employer-provided disability plan did not violate Title VII. Congress subsequently amended Title VII to include pregnancy related disabilities in benefit plans.[94] The *Spirt* Court interpreted this amendment as an indication of congressional intent to grant equal benefits to individuals without regard to sexual classification. Pregnancy benefits increase costs to the employer, not unlike equal pension benefits to women.

The Court of Appeals correctly decided *Spirt*.[95] A defined contribution plan based on gender is equally disadvantageous to women as the defined benefit plan in *Manhart*, and equally violative of Title VII. The annuity plans provided in *Peters*, *Spirt*, and *Manhart* represent compulsory insurance plans that discriminate on the basis of sex. *Spirt* should be upheld; *Peters* should be reversed.

Norris involved an Arizona plan[96] that permitted state

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691 F.2d at 1062.

92. *Id.*

93. 429 U.S. 126 (1976). "In *Gilbert* the Supreme Court held that an employer's disability benefits plan that failed to provide coverage for pregnancy-related disabilities did not discriminate against women in violation of Title VII. Congress quickly responded to this decision by adding 42 U.S.C. § 2000e(k) to Title VII." *Spirt*, 691 F.2d at 1062.

94. 42 U.S.C. § 2000e(k) provides in part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e(k) (Supp. IV 1980).

95. The court's action here concluded litigation which had continued for more than eight years. *See generally Spirt*, 691 F.2d at 1058-60. TIAA and CREF had made several attempts to negotiate plans that would satisfy the requirements of EEOC and the New York State Superintendent of Insurance.

96. Involvement of a state in discriminatory practices raises constitutional questions. Plaintiff Norris originally alleged both a violation of Title VII and the fourteenth amendment. The District Court could have decided on the basis of Title VII only, without reaching the question of fourteenth amendment liability. Nevertheless, the court found:

> From the facts agreed upon, it is clear that this classification was not made by

employees to save taxes by deferring a portion of their wages. The plan was voluntary and involved no employer contributions.[97] However, fewer than 5% of state employees availed themselves of this opportunity which was supplemental to the State's general pension plan.[98] Under the Arizona plan, employees who chose to participate were allowed to select from three options for collection of deferred compensation, only one of which treated men and women differently. Participating employees, by exercising personal choice in determining how they collected their savings,[99] could elect these options at the time of

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> the defendants but rather are [sic] the results [sic] of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the fourteenth amendment.

Norris, 486 F. Supp. at 651 (D. Ariz. 1980).

The Court of Appeals did not address the issue of defendant's liability under the fourteenth amendment, simply noting the trial court's finding that the plan was not intentionally discriminatory. The court's characterization of Arizona's plan as *nonintentional* for fourteenth amendment purposes does not readily reconcile with its characterization of the plan as facially discriminatory, and hence *intentional*, for Title VII purposes. The Supreme Court has acknowledged that Title VII and the fourteenth amendment do not have identical application. In the latter, official actions will be entitled to greater deference than in the former. Nonetheless, the Court has applied the same standards in nearly identical situations—General Elec. v. Gilbert 429 U.S. 125 (1976) (Title VII) and Geduldig v. Aiello, 417 U.S. 484 (1974) (fourteenth amendment), which fell under a disparate impact analysis. Where a disparate treatment analysis is used, intent is the critical element. Intent is also the critical element in equal protection violations. Where, as in *Norris*, a governmental action has been found to be discriminatory on its face and therefore intentional for Title VII purposes, but nonintentional for equal protection purposes, the Court is faced with either refining its definition, finding the lower court in error, or remanding to the lower court for further analysis of the constitutional questions. The Court could, of course, avoid these issues by finding that Arizona has not violated Title VII.

Arizona asserts a tenth amendment defense, arguing that because the lower courts found no fourteenth amendment violation, National League of Cities v. Usery, 426 U.S. 833 (1976) denies Congress power to invoke Title VII against a state. Appellants' Opening Brief at 9, Norris v. Ariz. Governing Comm., 671 F.2d 330 (9th Cir. 1982) [hereinafter referred to as *Norris* Appellants' Brief]. The Court may decide *Norris* on federalism grounds; however, resolution of the constitutional issues is not necessary to the conclusion of this Comment—that *Norris* does not violate Title VII and should be reversed.

97. Arizona specifically forbids state contributions to deferred compensation plans. ARIZ. REV. STAT. ANN. § 38-871(C)(1) (1974).

98. "Arizona has an entirely separate and independent state retirement plan. The retirement plan is mandatory, and contributions and benefits are equal for similarly situated males." *Norris* Appellants' Brief, *supra* note 96, at 6 n.3 (citations omitted). Arizona employs approximately 35,000 employees. "As of August 18, 1978, there were 1,675 employees participating in the plan, of whom 681 were women." *Id.* at 6. Had Arizona supplemented women's annuity costs, it would have been providing additional compensation only to the women who could afford to defer wages.

99. At the time plaintiff becomes eligible to receive benefits some years from

retirement.

Under the first option, an employee could collect in a lump sum the total amount of his savings plus accumulated interest.[100] Second, an employee could elect to take his total savings in monthly payments over a set number of years—calculated to give a complete return of his earnings. Third, an employee could select a lifetime annuity from several plans offered by independent companies selected by the Arizona Governing Committee.[101] The Ninth Circuit court found that this third option violated Title VII because the annuities provided larger monthly sums to men than to women.

Arizona asserted that it offered an option consistent with the *Manhart* "open market" proviso, allowing its employees to accept full wages or to defer a portion to purchase a contract with a private insurer. The state further argued that it did not operate the plan, but instead contracted with private companies. No gender-neutral plans were available from private insurers.[102]

The *Norris* Court found the voluntary tax deferral a "privilege" of employment and a "fringe benefit,"[103] bringing it under the provisions of Title VII. Furthermore, the court found the provision of options did not meet equal treatment standards,

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> now, she can then make an entirely different election as to the form in which she would like to receive her benefits. Regardless of the form of payment she chooses, her benefits will be calculated on the basis of the accumulated cash reserve of all of her contributions together with any earnings thereon. Depending upon plaintiff's estimate of her longevity, retirement needs, and other considerations, plaintiff can elect options. . . .

Norris Appellants' Brief, *supra* note 96, at 9-10 (citations omitted).

100. This option could be considered equal in value to the third option, making the latter unnecessary. Employees could have used the lump sum to purchase an individual annuity just as they do in the third option. However, selection of the first option partially defeated the tax advantage because it was not an approved plan subject to "roll over" provisions of Internal Revenue Code, 26 U.S.C. § 401. Insurance Council Brief, *supra* note 12, at 20 n.31.

101. Plaintiff Norris contends that the Committee's selection of companies did not provide freedom of choice. Further, Norris disputes the state's contention that no insurance companies offer gender neutral annuity plans, (Brief for Plaintiff, Norris v. Ariz. Governing Comm., 786 F. Supp. 645 (D. Ariz. 1980)) but offers no evidence to the contrary.

102. "Accordingly, if the State of Arizona is to make available to its employees the option of receiving their deferred income in the form of a life annuity, it has no choice but to offer one of the type complained of by plaintiff." *Norris* Appellants' Brief, *supra* note 96, at 2.

103. *Norris*, 671 F.2d at 333. Title VII makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. . . ." 42 U.S.C. § 2000e(a). *Manhart* was based on discrimination in compensation. *Manhart*, 435 U.S. at 712 n.23.

where one of the options favored one class over another. "In this case, Arizona did not merely refuse to provide an annuity plan to women which treated them equally. It affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against women."[104]

Factual differences between *Norris* and *Manhart* do not support a Title VII violation in *Norris*. A major distinction between *Norris* and the three earlier cases, *Manhart*, *Peters* and *Spirt*, is the completely voluntary nature of the plan. Because there is no employer contribution, an employee is not foregoing wages by her nonparticipation. She is simply participating in her own personal savings account. The plan cannot be considered unequal compensation because a woman has the option of not joining and receiving her "entire compensation each pay day."[105] The "privilege of employment" represented by the deferred compensation plan is the opportunity to participate, and there is no allegation that the options are not equally available to men and women. This is not a fringe benefit within the meaning of Title VII since a participating employee receives no economic interest contributed from the employer. Each individual employee is free to select the plan most advantageous to him or her—or to invest his or her salary in the private market. This fits the "open market" exception invited by *Manhart*.

Arizona's plan does not violate Title VII. The state is merely acting as a broker[106] for its employees, allowing them to benefit from the tax advantage of deferred compensation in the only way available. It is only when an employee chooses to purchase an annuity from a private insurer that a distinction on the basis of sex exists. An employee in *Norris* is exercising individual choice in the purchase of insurance protection and is free to select on the basis of perceived benefit. This freedom to select justifies the use of sex based mortality tables.

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104. *Norris*, 671 F.2d at 335. The court's reference to a "better plan" is based on the tax advantage inherent in the third option as opposed to the first. *See supra* note 100.

105. *Norris*, 671 F.2d at 333.

106. In a related case involving a private college and TIAA-CREF, the First Circuit Court of Appeals held that Colby College "is more than a broker, or other intermediary, that enables the parties to enter into the arrangement." EEOC v. Colby College, 589 F.2d 1139, 1141 (1st Cir. 1978). *Norris* differs from that case in that Colby required all employees to join the plan; Colby set the contribution rate, and Colby contributed a set amount to the plan.

V. Legislative Solutions

Many of the same arguments aimed at the use of sex-based tables in employer group plans are advanced against the use of sex-based tables in individually purchased plans. FIPA[107] relies on these arguments to outlaw all insurance distinctions based on "race, color, religion, sex, or national origin." The policy arguments for prohibiting use of sex as a risk predictor fall under four major headings: overlap, women's needs, invalidity of data, and civil rights principles.

The fact that the ages of most men and women are equal at death is referred to as "overlap."[108] The Senate Committee Report on FIPA noted statistics showing that 86% of the women in one group had the same death age as 86% of the men.[109] This overlap is a statistical inevitability.[110] No factor for predicting death will show a 100% correlation. All smokers do not predecease all nonsmokers. All obese persons do not predecease all thin persons. There is, however, a statistical correlation between smoking and body weight, and health and longevity, which an insurer can use in assigning risks.

The Senate Committee Report quoted testimony on disadvantages to women as they increasingly enter the workforce, and

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107. S. 2204, 97th Cong. 2d Sess. (1982) (reintroduced in 1983 as S. 372, sponsored by Oregon Senators Hatfield and Packwood and South Carolina Senator Hollings, and H.R. 100, sponsored by Michigan Congressman Dingell) provides in part:

> 2(b) The Congress therefore declares that it is the policy of the United States that no insurer shall, on the basis of the race, color, religion, sex, or national origin of any individual or group of persons, (1) refuse to make insurance available to any applicant for insurance, (2) with respect to insurance contracts to which this Act applies, treat any such applicant or insured differently than any other applicant or insured with respect to the terms, conditions, rates, benefits, or requirements of any such insurance contract. . . .

108. While the actuarial tables indicate that the average sixty-five year-old man will die at age eighty-two and the average sixty-five year-old woman will die at age eighty-six, individual statistics will show that eighty-four percent of the females will actually die at the same age as their male counterparts. The greater average life expectancy of females may be accounted for by the sixteen percent of the women and the sixteen percent of the men whose death ages do not match. . . . Classification by sex places a significant number of people into the wrong risk grouping, and is therefore unfair to those individuals.

Duke L.J. *supra* note 6, at 682 (footnotes omitted). *Compare supra* note 87.

109. Senate Report, *supra* note 9, at 4.

110. The 14% of lives that do not overlap is a measure of the statistical correlation between male and female life expectancy. For example, in *Manhart* the additional monthly contribution required from women was 14.84%, consistent with the mortality that did not overlap. *Manhart*, 435 U.S. at 705.

as they increasingly find themselves heads of households.[111] It is impossible to argue with assertions that women's need for income in old age is fully as great as men's.[112] But it is not the role of insurance to recognize this need by shifting the costs to men. If need is the criterion, the healthy person should subsidize the life insurance costs of the person in ill health—the needs of their families are the same. The basic concept of insurance is that premiums will be matched to risks to the extent practicable; otherwise everyone would pay the same premium.[113] Tying the cost of insurance to need denies this goal and fails to recognize the economic effect of adverse selection.

While the Senate Committee Report does not directly contradict data indicating greater life expectancies for women than men, it questions the relevancy of the data by pointing to social and economic reasons for the distinctions. The Report asserts that race is an equally significant predictor as sex, but is not used by the insurance industry.[114] Race, however, is outlawed as a factor in many states.[115] Additionally, race is less reliable. The fact that an individual can have a multiracial heritage makes race an unstable factor.[116]

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111. SENATE REPORT, *supra* note 9, at 4.

112. Whatever the economic rationale for the differences in treatment of male/female pensioners and male/female life insureds, social justice demands that they be treated equally. . . . The survivors who receive a man's life insurance benefits when he dies have the same needs as the survivors of a woman, but there is less money for those needs. Mutual subsidization through a unisex mortality table is one way of providing equally for these individuals. This is essentially an income redistribution approach to economic inequality based on sex, designed to speed the changes in society that the Equal Pay Act, Title VII and the Equal Rights Amendment were intended to bring about.

Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624, 653 (1973).

113. "In general, economic incentive operates over time to favor classification systems that result in a price for each risk which most nearly equals the expected cost associated with the class to which that risk is assigned." RISK CLASSIFICATION, *supra* note 17, at 10. *See supra* notes 12-18 and accompanying text.

114. SENATE REPORT, *supra* note 9, at 7.

115. *Manhart* noted that some states have outlawed higher life insurance rates for blacks since the nineteenth century. *Manhart*, 435 U.S. at 709 n.16. This would at least partially explain why race is not used as a predictor.

116. The use of race as a classifier is generally repugnant because of this nation's sorry history in discriminating against racial minorities. This Comment, however, contends that discrimination issues are not the same in an insurance context. *See supra* notes 32-41 and accompanying text. There are clear countervailing advantages in insurance rates tailored to group statistics. If blacks were charged more for life insurance (where their group experience indicates shorter life), they should be charged less for annuities. Benston, *supra* note 6, at 512, contends race is inherently as fair as sex as a

The Report points to the fact that religion is also a significant predictor of longevity, but is not used by insurance companies. The Report apparently infers that since insurance companies do not use race or religion as predictors, they can also dispense with sex as a predictor. The bill recommended by the Committee would prohibit the use of race, sex, and religion as factors in calculating insurance premiums or disbursements.

A number of commentators have attacked and counterattacked on the significance of the data on women's life expectancy.[117] None has satisfactorily explained why insurers use the

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predictor.

> If the goal is avoiding unfair discrimination against individuals with respect to insurance, all traits associated with a person should be used to estimate the risk that the insured-against event will occur to that person. For example, if sickle cell anemia increases the risk of death, and if it is found only in blacks, and if there is no efficient way to determine which particular black individuals have or are likely to get this disease, but it can readily be determined who is black, then the additional risk should be accounted for. If this is not done for annuities, blacks would not only have an immutably greater risk of death, but they would not be compensated for this risk.

Id. Kimball, *supra* note 6, points out the unreliability of race as a predictor.

> [T]here are problems in the use of race as a class for ratemaking that are not duplicated in the use of sex. One intractable problem is the determination of race. No race is "pure," and certainly not in America. Some unknown percentage of the "white" population of this country has genes from black ancestors. Much more important, a large percentage of the "black" population would by any rational classification be considered white. . . . For annuities . . . there is evidence that those nonwhites . . . who reach the retirement ages have life expectancies closely comparable to corresponding whites.

Id. at 111-12 (footnotes omitted).

117. *See supra* note 1. *But see* Brilmayer, *supra* note 4. Brilmayer argues against the reliability of gender-based mortality tables, contending socioeconomic factors contribute to any observed distinctions in mortality, and these factors are changing. *Contra* Benston, *supra* note 6. Benston disputes the validity of Brilmayer's arguments with statistical data. He concludes that insurers have no reason to discriminate unfairly, and, in fact, have an economic incentive to use only accurate predictors. *Id.* at 529. *See also* Kimball, *supra* note 6. The Court in *Manhart* speculated that women's changing lifestyles would tend to even out the disparity in male and female longevity. *Manhart*, 435 U.S. at 709-10 & 710 n.17. The reverse is occurring. Despite women's increased smoking and increased involvement in the working world, the gap is widening. *See supra* note 1. Figures show an overall decline in cigarette smokers as a percentage of both male and female adults since 1964. The ratio of women smokers to male smokers has, however, increased. In 1964 the ratio of men to women smokers was 168%. In 1975 it had declined to 136%. SMOKING AND HEALTH—A REPORT OF THE SURGEON GENERAL, U.S. DEPT. HEW, DHEW PUB. NO. PHS (79-50066) (1979). Women as a percentage of the work force aged 10 and over has increased from 18% in 1900 to 52.2% in 1981. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE U.S., COLONIAL TIMES TO 1957 (1960), and Statistical Abstract. Judge Atteburn, in a concurring opinion in Reilly v. Robertson, 360 N.E.2d 171, 181 (Ind. 1977), ascribed women's greater longevity to the fact that "traditionally men engage in more hazardous or stressful occupations (such as mining, steel

data if it is not reliable. If changing social and economic factors are reflected in new statistics, insurers will find it economically advantageous to use them.

The Report asserts that individuals should not be judged by group characteristics.[118] Because sex, like race, color, religion, or national origin, is an immutable characteristic, civil rights principles dictate against its use to disadvantage individuals. The Report fails to explain why its suggested criteria of weight, build, physical condition, personal and family history, or marital or socioeconomic status[119] are any more fair. Many of these factors have often been used as a basis for discrimination.[120] Physical condition and family history may be equally as immutable as sex.[121]

Congress can, of course, determine as a national policy that some classifications should not be used, regardless of their statistical accuracy. But the usual antidiscrimination criteria and goals do not apply to insurance.[122] Limiting risk classifications serves no legitimate governmental purpose other than forcing the better risks to subsidize the poorer. At some point, the process of adverse selection would dictate self-insurance for the better risks. The poorer risks would remain in the pool, and their

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construction) while many women are engaged in household activities." However, this assumption is not borne out by general experience, and statistics from the teaching profession (the workforce being addressed in *Reilly*) indicate no such correlation. The experience of California teachers shows a widening gap similar to that for the nation as a whole. "On the average male mortality rates have decreased at 1.7% per year and female rates at 2.1% per year." W. Smith, *Mortality Differences by Sex for California Teachers* (1983) (unpublished paper available in University of Puget Sound Law Review office). Given these facts, mortality tables based on experience within a profession (as suggested by Judge Atteburn) would yield the same results—that women generally live longer than men.

118. "This 'separate but equal' treatment [by the insurance industry] results in persons being evaluated within the context of their sex first, rather than being evaluated on their own personal characteristics." SENATE REPORT, *supra* note 9, at 5.

119. SENATE REPORT, *supra* note 9, at 15.

120. Congress has recognized that employment discrimination occurs on the basis of physical handicap (Rehabilitation Act, 29 U.S.C. § 791 (1976)); on the basis of age (Age Discrimination in Employment Act, 29 U.S.C. § 631 (1976)); and on the basis of marital status (Merit System Principles, 5 U.S.C. § 2302(b)(1)(e) (Supp. V 1981)). Yet insurance distinctions on these bases are allowed in FIPA.

121. "[N]one of the witnesses [before the Senate Committee] ever explained why immutability should be a factor in actuarial decisions. People also can't control their genetic heritage. If you're born with some life-threatening genetic defect, should you get insurance at the same price as someone who's in normal health?" Seligman, *Insurance and the Price of Sex*, FORTUNE, Feb. 21, 1983, at 84.

122. *See supra* notes 32-41 and accompanying text.

costs would rise to match their experience.[123]

Insurance is unique. The only way in which it can be individualized is to take into account group expectations as applied to an individual.[124] Where a free market exists, insurers will compete to find accurate predictors. There is no economic incentive to discriminate with inaccurate predictors. Because of the mandatory nature of employer-provided group insurance, fairness in an employment context dictates against sex-based tables. In individually purchased insurance, however, fairness dictates the matching of costs and benefits to individual risk characteristics, including sex.[125]

Employers have not been required to make drastic changes in the aftermath of *Manhart*. Because the Court refused to enforce back payments, the effect has been to require prospective application of unisex tables in defined benefit plans operated by employers. Nonetheless, confusion exists as to whether defined contribution plans fall under Title VII's prohibition and whether insurance retirement plan options, such as cashouts and joint and survivor, should be gender-neutral.

Even if the Court decides *Peters*, *Spirt*, and *Norris* as advocated in this article, unresolved issues will remain. Employers, not knowing the legal guidelines for cashout plans and joint and life survivor options, could face large financial risks. It is not clear whether cashouts should be based on actuarial equivalencies (greater value for women) as advocated by some, or on a gender-neutral basis. Nor is it clear whether joint and survivor options should take into account the sex of the nonemployee spouse.

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123. *See supra* notes 26-31 and accompanying text.

124. All insurance premiums are based on some type of discrimination, and without which classifications, all policyholders would pay the same rate regardless of their risk. . . . [I]f the bill should pass, women would have to pay more for auto insurance, even though they cause fewer losses, and more for life insurance although they live longer than men and today pay a commensurately lower premium over a longer period.

Proposed Law Would End Insurance Sex Rate Bias, 68 A.B.A. J. 1350, 1351 (1982) (attributing remarks to George Bernstein, lawyer for the American Insurance Association). On the other side, "The overall impact of insurance discrimination on women is negative. Women who need health or disability coverage must pay more for less protection." *Id.* (quoting Judy Schub, director of legislation and program development for the National Federation of Business and Professional Clubs). *Id.* at 1351.

125. *See* Minority Views of Senator Goldwater, SENATE REPORT, *supra* note 9, at 26, on the fairness of insurance access and calculations. The Senator notes that state laws generally require that any distinctions in insurance rates must be statistically valid.

FIPA would resolve these questions by forbidding the use of sex-segregated tables for any insurance policy. But it reaches too far by extending Title VII principles to the private market. As a resolution, Congress should mandate gender-neutral disbursement of funds to employees in all employer-contribution plans. Such legislation would require the same cashout rates for men as women. Requiring equal cashout rates closely approximates the open market. It should be noted that nothing in the law requires cashouts which are more attractive than retention of annuity benefits. Under this proposal, an employer would be free to design options which encourage retention. The insurance industry should be free to design competitive policies that reflect individual risk predictors. An individual should be free to negotiate a policy which reflects his personal risk factors, sex being one of those factors. An open market constitutes the fairest way of providing individual insurance tailored to individual characteristics.

VI. Conclusion

Manhart was correctly decided and its principles should be extended to retirement plans in *Peters*, *Spirt*, and *Norris*. Further, the principles of *Manhart* should be extended into the legislative realm as Congress attempts to define fairness in an insurance context. FIPA, which would prohibit sex discrimination in all insurance coverage, should not be passed. It prohibits choice in private insurance and prevents individualization in the only manner possible—predictions based on group experience. Congress should instead adopt legislation which would prohibit any distinctions on the basis of sex in disbursements under an employer-contribution plan and leave individual insurance to the competitive market.

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