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Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case

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A little more than two years ago, the AAUP entered an emerging dispute with TIAA-CREF, by far the largest insurance carrier in higher education. The question at issue was whether women who contribute the same amount as men should also receive the same monthly benefits as men who retire at the same age. The view which prevailed within the AAUP emphasized the fact that most women do not outlive most men; accordingly, it was deemed to be unfair to "penalize" all women because of a class characteristic which in fact would describe the status of but a minority of women. The view which did not prevail within the Association emphasized that women as a group enjoy a significantly greater life expectancy than men as a group; accordingly, it was deemed to be unfair to return more benefits to women as a class than to men as a class, i.e., to "penalize" men in compelling them, in this sense, to "subsidize" women.

Both sides to this controversy offered highly attractive analogies for the good sense of their position. Few of those supporting equal monthly benefits for women were prepared to disallow age from being taken into account in determining the amount of payment to be made each month between two persons with identical aggregate contributions but retiring at different ages. On the other hand, few on the other side were prepared to allow race to be taken into account even in areas of insurance where the comparable cohorts of insured persons, grouped by race, exhibited significantly different life expectancies. Yet, in both these instances, similar observations for both sides of the argument could equivalently be offered. The disagreement as to which approach was more equitable with regard to sex was generally (although not uniformly) an honorable one, argued in good faith among bright people on both sides. After two years of consideration, however, within the AAUP itself the issue was resolved in favor of equal monthly benefits for equal contributions: women retirees, many of whom would live fewer months than most men, and most of whom would live no greater number of months than most men, were not to be personally disadvantaged despite the fact that women retirees as a total class exhibit a validated statistical characteristic (not subject to more individualized determination) of greater life expectancy.

The disagreement within the Association regarding the proper policy nonetheless continued to be reflected in the disagreements of others: *e.g.*, sociologists, economists, actuaries, biologists, various groups of employees and employers, and the courts. From a legal perspective, the debate was largely indistinguishable from earlier controversies involving the permissible or impermissible use of race-related or sex-related differences of measurable statistical significance. The general dispute was of long-standing familiarity to students of equal protection theory: does the principle of equal protection focus upon an entitlement to equal treatment as an *individual*, in disregard of a statistically significant difference that holds for a group with which the individual can be identified by an immutable characteristic but that is nonetheless *not true* of the majority of persons within that class? Or does the principle focus upon an entitlement to equal treatment fully cognizant of statistically significant personal characteristics employed to provide parity *between groups*?

In matters of race, it was already substantially well established as a legal matter that a person might not be individually disadvantaged even under circumstances where significant statistical differences were readily ascertainable between or among racial groupings. In matters of sex, the social and legal tradition was undergoing change—but clearly moving in the same direction as the laws which already disallowed such disadvantaging distinctions to be drawn according to race even when

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such distinctions were carefully related to aggregated, statistically accurate, statistically validated group differences. A review of the Civil Rights Act of 1964, and particularly of Title VII, seemed to be professionally instructive. On the face of the statute, Congress appeared to have resolved this controversy, at least in the field of employment: certain categories (namely, race, religion, national origin and sex) were believed by Congress to operate with such overall unfairness to individuals grouped in such ways for differential treatment by employers, that such uses should be prohibited at least as a general proposition. To be sure, as in nearly all legal controversies Title VII was open to other possible interpretations, and, indeed, other interpretations were brought forward with considerable skill.

On April 25, 1978, a significant part of the disagreement was terminated for most practical purposes by decision of the Supreme Court in *City of Los Angeles Department of Water and Power* v. *Manhart*. What the Court held, and what it implied for universities as employers, should be of considerable interest. I shall treat the *Manhart* decision in two parts. First, a brief review of the case and of its holding. Second, some personal conjectures regarding the probable application of Title VII to universities as employers, with particular reference to their relationships with TIAA-CREF.

A Summary and Explanation of Manhart

The case arose under 42 *U.S. Code* §2000e-2(a) (1) which provides:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex. . . .

The case itself was a class action brought in behalf of female employees of the Los Angeles Department of Water and Power. In respect to the compensation of such employees, each female received exactly equal monthly retirement payments from the Department's pension fund as males of the same age, seniority, and salary. Each female, however, was made to contribute slightly more each month than was required of each male. The larger monthly contribution required of each female employee was actuarially accurate inasmuch as the retired female employees as a class had a life expectancy longer than that of male employees retiring at the same age. As the monthly retirement benefit was paid to each employee until death, and as women retiring at the same age as men did, as a total class, "outlive" men, the difference in the larger sum each female was made to contribute into the pension fund was an accurate statistical reflection of the larger aggregate monthly benefits women retirees would receive as a class. Nevertheless, the Supreme Court held the plan to violate Title VII. From the date of the decision (April 25, 1978), unequal contributions may no longer be required as a condition of eligibility for equal monthly benefit payments.

The key to the decision is the following series of propositions by the Court: (a) the statute focuses upon protection of individuals; (b) it forbids disadvantage to the individual when resulting entirely from the individual's sex (or race, religion, or national origin); (c) it disallows disadvantage to the individual even when based on a *correct* observation of difference about such persons who, when lumped in with others by sex (race, etc.) would as a class not be treated disadvantageously but exactly equally; and (d) it disallows such disadvantaging of each individual of whom the class characteristic cannot be shown to be true even under circumstances where it will not be possible to foretell whether the class characteristic will, or will not, be true of the individual. The essence of the case is contained in the following excerpt:

> "The statute makes it unlawful" to discriminate against any *individual* with respect to his compensation . . . because of such *individual's* race, color, religion, sex, or national origin. . . . The statute's focus on the individual is unambiguous. . . . *Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply* [Emphasis added].
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> It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. [98 S. Ct. pp. 1340, 1775-76 (1978)]

The outcome of the case should not have been startling to anyone, in my opinion, except for the sheer ubiquitousness of actuarial habits persisting even after enactment of the Civil Rights Act of 1964. The majority of women in any given cohort do not in fact live longer than the majority of men of an equivalent cohort: i.e., the majority of a group of 1,000 women retiring at age sixty-five can be paired against the majority of a group of 1,000 men retiring at the same age, in terms of the age at which they die. From this perspective, the effect of the actuarial grouping by sex is to compel an *intra*-group subsidy among women: *all* women are compelled to contribute more to a retirement fund than *any* man is required to contribute because some women will live longer than most women and most men. (Alternatively, as in the TIAA-CREF situation, all women will receive less per month than any man will receive each month following retirement, because particular women will live longer than most other women and most men.) The disadvantaging of individuals because of their sex is forbidden by Title VII. Accordingly, the essence of the holding in *Manhart* is quite straightforward: a person may not be singled out by sex for the purpose of imposing a greater burden (higher contributions into a fund) or for the purpose of denying an equal benefit (lower monthly payments from the fund) because of a characteristic statistically identifiable to the group (greater life expectancy of women) but empirically false in respect to the majority of individual members within that group.

Indeed, had the subject matter of the case been anything other than insurance, it is implausible to suppose that the issue would have been felt worth contesting. A single illustration may suffice. Suppose it to be true that in a given large employer's work force it happened to be the case that the turnover among female or among black workers were 15 per cent higher than among male or among white workers. Suppose also that, from the employer's point of view, this accurately translated into added business expenses for the employer exactly equal to five cents per hour "average" extra cost per female or per black worker. Though the "average" cost to the employer in respect to its female or black work-force cohort is thus five cents per hour per female or black employee more than the average cost per male or white employee, Title VII disallows the employer to offset that expense by paying each female or each black employee five cents per hour less than he pays each male or each white. What is a true observation of each person viewed solely as a member of a statistically significant class will manifestly not be true of each member of that class when considered individually. It will not even be true of a majority of the members of that class as individuals. At the same time, neither is there any feasible way for the employer to refine his extra costs per employee on an individual basis, i.e., at the time of hiring there is no efficient (and feasibly inexpensive) "test" pursuant to which he can accurately identify the individual female, black, male, or white workers whose personal early drop-out will account for the employer's added expense. The absence of any such feasible individualized "cost accounting" in no event, however, permits the employer to assign an average cost to each female or to each black employee as a substitute: a woman who *individually* cannot be shown to be a source of added expense (and a majority of whom will not in fact present such an added expense) may not be paid a lesser wage than a man doing the same work. Insofar as an employer would nonetheless attempt to burden each such person by paying five cents an hour less solely because of sex or race, it is a practice precisely forbidden to the employer by Title VII (and, in this illustration, by the Equal Pay Act as well).

The Distinction between Employers and Insurance Companies

I have been at some pains to reiterate the principle confirmed by *Manhart* in order that its general application might be clear. The particular holding of the Court was addressed, of course, only to the particular facts of the case:

> All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. 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.* [98 S. Ct., p. 1380 (Emphasis added.)]

In clarification of this observation, the Court noted in its footnote 33:

> Title VII and the Equal Pay Act govern relations between employees and their employer, *not between employees and third parties.* [*Idem.* (Emphasis added.)]

The *caveat* was a sensible one. So far as Title VII is concerned, insurance companies are not subject to its prohibitions at all. So, too, with respect to the Equal Pay Act. Whether an insurance company might have to answer to certain policyholders under other statutes, whether they might be reached as an "agent" of an employer under Title VII (2000e[b]), or whether they may not have to answer at all, however, does not displace the full applicability of Title VII to *employers.* Where it is the employer's plan, whether that plan be mandatory or whether it be optional, Title VII will apply. The distinction may be shown in the following illustrations:

A1. Oxbridge University has no on-campus parking facilities at all. To preserve its green spaces, moreover, Oxbridge is firmly resolved to maintain the *status quo,* i.e., in no way whatever does it intend to make *any* arrangements regarding parking. Unipark, Inc. is a wholly independent corporation which happens to operate the only commercial parking facility convenient to the Oxbridge campus. Unipark restricts access to men only. Question: Is Oxbridge liable under Title VII to its female employees?

A2. Suppose exactly the same case as in A1, except that Unipark charges all women drivers fifty cents per day more to park than it charges men, based on its verified figures admittedly establishing that women parkers as a group cost it an average of fifty cents more per day to accommodate. Is Oxbridge liable to its female employees under Title VII?

Assuming you (correctly) answered both of the above questions "No," compare each of the following cases:

B1. Oxbridge withholds from each employee's pay five dollars per week pursuant to its "mandatory parking plan." Oxbridge matches each such mandatory employee contribution with a like sum. The resulting sum is paid over to Unipark in exchange for which Unipark issues parking stickers to all Oxbridge employees who would otherwise be eligible to use Unipark's lot at its standard commercial rate. But as women drivers are *not* eligible to use Unipark's lot under any circumstances (see case A1 above), Unipark issues no parking stickers to any of Oxbridge's female employees. Is Oxbridge's liability to its female employees under Title VII contingent on Unipark's liability?

B2. Same case as B1, except that Unipark will extend equal parking privileges to any female employee holding a Unipark sticker (issued pursuant to the Oxbridge mandatory parking-fee plan), upon *additional* payment by such employees of fifty cents at the parking entrance (as in case A2). Is Oxbridge liable to its female employees under Title VII?

B3. Because Unipark itself does not wish to collect any money at its parking entrance but wishes, rather, simply to park only such cars as have Unipark stickers, Oxbridge itself collects fifty cents per week *more* from each female employee than from each male employee, paying the resulting aggregate amount to Unipark which then treats all employees identically. Is Oxbridge liable to its female employees under Title VII?

B4. The Oxbridge plan in B3 is not mandatory, but entirely optional for each employee. It is, however, the only parking plan which Oxbridge provides. Is Oxbridge liable to its female employees under Title VII?

Case Bl is actually the bellwether case in this series, as in fact each succeeding case is but a less dramatic variation on Bl itself. One way of analyzing Bl is as follows. It is superficially logical. It is also wholly incorrect.

First as to Oxbridge. Oxbridge has paid each of its employees equal pay for equal work. Similarly, it has withheld the same amount from each employee and it has matched each such amount, all without any distinction or differences linked with the sex of any employee. Oxbridge has also negotiated the very best deal for its employees which it was able to secure. The policy pursuant to which female employees are barred is not a policy approved or promulgated by Oxbridge. It is a policy adopted, rather, solely by Unipark as a separate commercial concern, not answerable to Oxbridge's employees because it is not their employer. We may even suppose that Oxbridge protested in a good faith effort to secure a change in Unipark's policy, at least insofar as it affected Oxbridge's employees, but that Unipark was obdurate. Oxbridge, having treated all of its employees alike, and itself not responsible for the policy of Unipark over which it lacks control, is therefore not liable for Unipark's discriminatory exclusion of Oxbridge's female employees.

Second, as to Unipark. In exchange for the university's payover of a weekly sum equal to ten dollars per employee, as an independent contractor Unipark agreed to do only what it said: to issue stickers to all of Oxbridge's employees *otherwise* eligible to park at its standard commercial rate. It has done all that it promised to do and, accordingly, Unipark is not liable either to Oxbridge or to Oxbridge's female employees. Q.E.D.: neither Oxbridge nor Unipark is liable! Plausible as this analysis may seem, a moment's reflection (note what the women were compelled to contribute and yet what they received) should indicate how incorrect it is.

Rather, the proper way to analyze case Bl (and all the ensuing cases) is quite simple. It involves a single question: If the employer had himself furnished the service, would he have been in compliance with Title VII? If the answer is "yes," the employer is still in compliance though he furnishes the *same* service through a third party. If the answer is "no" the employer remains liable though he furnished the *same* service through a third party.

In case Bl, had Oxbridge acquired a parking lot of its own, deducted five dollars from each employee's pay, matched that sum with a like amount of its own to cover the costs of owning and operating that lot while excluding all female employees from its use solely because of their sex, liability under Title VII would be absolutely clear. Identically, Title VII will operate to forbid Oxbridge from dealing with an outside company whose policies would violate Title VII as applied to Oxbridge itself vis-à-vis its own employees.

The Court's example in *Manhart* is *not* to the contrary. In that example, the employer sets aside equal retirement contributions for each employee, regardless of sex. All employees are treated identically by the employer in respect to the trust fund thus accumulated by the employer: at the date of retirement, each employee withdraws a *like* lump sum, enabling each to go out "in the open market" to purchase whatever some third party is willing to sell them by way of an annuity, at whatever price any third party may insist upon. That all such third parties might charge women more than men, or that some such third parties might altogether refuse to sell to women at any price, is regrettable but of no Title VII significance. It is of no greater significance than when the employer pays his male and female employees equal take-home wages for equal work in a community in which all of the local merchants charge women a higher price for identical goods that the merchants sell for less to men. The employer has completely fulfilled *its* duty of strict nondiscrimination among *its* employees. Nothing more is demanded by Title VII. Title VII does not apply to merchants as vendors.

Suppose, instead, that the employer wanted to provide the *same* "retirement plan" as that described above, but with a single difference. Rather than accumulating the employee contributions in a trust account held and managed by the employer, it wished instead to utilize a bank for that purpose. Again, however, the bank will itself do *exactly* as the employer would itself have done had the employer kept hold of the trust fund: i.e., when each employee reaches retirement age, that employee will be paid by the bank the *same* lump sum he or she would have been authorized to withdraw had the employer maintained control of the funds in its "own" account. The plan thus furnished through the third party (the bank) is truly "the same" as that furnished by the employer directly. No Title VII violation is involved. The fact that identical lump sums available from the bank to women retirees may not be as useful to them as to men retirees (assuming all sellers of annuity plans in the open market persist in discriminating against women) changes nothing.

To complete the picture, suppose instead that the employer's *own* plan requires equal contributions by male and by female employees but at retirement time pays out a smaller lump sum to females than to males. Without doubt, Title VII is violated. Just so if the "same plan" were furnished by the employer through a third party. Thus, if the employer collected equal contributions from male and from female employees, paid over the sums to a bank, and the bank paid out at retirement larger lump sums to male than to female retirees, the employer remains fully liable under Title VII. What the employer cannot do directly, the employer cannot do indirectly. If the employer cannot find a third party agreeable to the employer's own duty of nondiscrimination toward its employees, it has two choices under Title VII: provide the service itself (on nondiscriminatory terms) or abandon it altogether. What an employer may *not* do, however, is to provide it in any manner (including by arrangement with a third party) which discriminates among the employer's own employees by race, sex, religion, or national origin.

To return one last time to our list of Oxbridge hypotheticals, cases A1 and A2, and cases B1 through B4, the answers are clear and consistent. In cases A1 and A2, the employer provides no parking for anyone. It pays all employees the same for the same work, without any discrimination whatever. That its female employees may experience serious problems at the hands of Unipark may well affect the morale of the Oxbridge female employees. It may also be unfair. It may even be subject to redress under some other statutes. But it provides no evidence that Oxbridge itself discriminates against its female employees. No more so than if Oxbridge furnished no dining facilities—and the only commercial tearooms convenient to Oxbridge refused service to men (or charged men higher prices).

In cases B1 through B4, however, Oxbridge is in violation of Title VII. Oxbridge as an employer could either furnish parking under its own auspices, on a nondiscriminatory basis consistent with Title VII, or it could deal with an outside parking company *insofar as that outside company would treat Oxbridge employees as Oxbridge itself is under a Title VII duty to treat them.* None of its plans conforms in either way, however, and all are well calculated to result in successful actions being brought against Oxbridge.

The AAUP, Universities as Employers, and TIAA-CREF

If this analysis is sound, then it is easy to understand the problem which universities can readily anticipate if they continue to do business in the *same* way with TIAA-CREF and if TIAA-CREF (and other carriers who offer indistinguishable plans) does not at once modify its practice of paying less per month to each woman retiree than to each man retiree, though each has the same accumulation as of the same retirement date, under an employer-matching plan, whether mandatory or optional. It is quite clear that women employees making contributions identical to those of their male counterparts after April 25, 1978 (the *Manhart* decision was *not* made retroactive) must thereafter receive identical monthly payments insofar as they elect the single-life annunity benefit. Failure of the employer to bring this about will place *the employer* in violation of Title VII.

It is less clear what alternatives are available to universities. The alternative the AAUP has preferred contemplates a change in TIAA-CREF's own policy. That change would be to determine average life expectancy of teachers and professors eligible for TIAA-CREF, keyed of course to life expectancy of such persons at such age as they may elect to claim the benefit of a single-life annuity. In figuring that average life expectancy, TIAA-CREF may most certainly take into account the proportion of men and women within the whole group. The *individual* premium charge for the same single-life annuity paying the same monthly benefit, however, would not itself be different for men than for women. In brief, a "merged table" prospectively applied, is one answer.

Alternatively, although the AAUP has not favored this solution, it is probably possible for universities as employers to maintain the current arrangement with TIAA-CREF with no change in TIAA-CREF policies, but with the universities as employers contributing additional sums by way of "topping up" payments in behalf of their women employees. Tested by the model I have suggested earlier, I believe this would be a legally permissible answer. For if a university were literally a self-insurer, insofar as women were made to contribute no more than men for a single-life annuity paying equal monthly benefits from the date of retirement, presumably the manner in which the university internally accounts to itself to produce this result is without legal interest.

Some members of the AAUP, however, have expressed two reservations with this approach. First, it may be a poor policy in the sense that it is calculated to perpetuate divisiveness among male and female employees (the former being more inclined under this approach to regard the latter as being "subsidized" at "their" expense; the latter being more inclined to see in the university's policy a sentiment that "women cost more" as employees, a policy stigmatizing them and suggesting an incentive for employers to discriminate against them in hiring). As a policy, it has the same unwelcome flavor as would be true if black academics had shorter life expectancies than white academics within the same university—and the policy of the university were to charge equal premiums for a life insurance benefit, "topping up" the premiums of blacks.

Second, it is not entirely free of legal questions. In relation to TIAA-CREF, insofar as TIAA-CREF would continue to do business as usual but the university would act to insure monthly benefits to women by "topping up" the university's contribution on their behalf, the situation is just the same as in one of our parking hypotheticals. In the case (B2) in which Unipark would permit women to park if, but only if, they paid fifty cents more per day than each man (and *also* held a parking sticker furnished through the university's mandatory parking plan pursuant to which the university charges women the *same* as men for the stickers), Oxbridge might have attempted to rescue its plan by "topping up" its own payment to Unipark in behalf of women. That is, Oxbridge would "bribe" Unipark by paying Unipark fifty cents per day extra for each woman employee eligible to park there, thus fulfilling its obligation that the *same* parking privilege is available to women and to men all of whom had the *same* amount withheld from their pay.

The possible legal objection is that, from one point of view, while Title VII may be satisfied under such an arrangement (in that male and female employees enjoy identical, employer-furnished parking privileges for identical contributions), a separate federal statute, the Equal Pay Act, may now be violated. If one focuses narrowly on the sums of money the employer pays out in consideration of each woman employee performing the same work as a male counterpart, plainly it is a larger sum. Viewed this way, men may complain that they do not receive "equal pay" for "equal work."

Even so, the analysis is misplaced and almost certain to fail. The proper test under the Equal Pay Act is not cost to the employer, but benefit to the employee. Women employees have no option to *receive extra dollars* for the same work; rather, they are entitled to receive only the same benefit as men doing equal work. That furnishing the same benefit to its women employees as to its men employees may cost the employer more (because of third-party commercial practices themselves not reachable either under Title VII or under the Equal Pay Act) is of no consequence. It is not different from the employer's distributing free groceries on equal terms to all employees, after purchasing them from an idiosyncratic wholesaler who charged the employer a price partly dependent upon the proportion of men and women employed by that particular employer. Whatever the grievance of employees against the grocer (and they will need some statutory or constitutional basis to do anything about it), they plainly have none against the employer.

Thus, though it may not be the desirable long-term solution (assuming that TIAA-CREF declines to alter its practice), universities may presumably come into conformity with the implications of *Manhart* by an internal policy, prospective in character, of "topping up" its contributions to assure women employees who make equal contributions an entitlement to equal monthly annuity benefits upon retirement.

The fact that this alternative is immediately available to universities as employers, moreover, may also weigh heavily against any insitution which is dilatory in making a change in its policy. Quite understandably, a number of institutions may momentarily believe that they are caught in a legal quandary. If TIAA-CREF itself cannot be made legally answerable (an issue which remains to be decided in the courts) and if it is not practical to shift to another insurance carrier offering otherwise comparable plans utilizing merged mortality tables, a university might very well conclude that it has an adequate reason at law to defer any change pending further legal developments. But insofar as the "topping up" alternative is at once both legal and available (and budget stringency from complying will itself clearly not excuse a continuing violation of Title VII), it is very unlikely that any such defense will be accepted by the courts.

Conclusion

This article, like *Manhart* itself, has been unavoidably narrow. The reader may be rightly impatient with the legalisms, the proliferation of hypotheticals, the excessive preoccupation with so slender a subject as "single-life annuities." In drawing back from the subject, however, a second, wider view of the *Manhart* case may enlist the interest of the profession in much larger issues. The tension in the *Manhart* case, it will be recalled, was basically the tension between justice to individuals considered personally, and justice to individuals considered as members of validly significant groups. It is, in its way, a companion case to *Bakke* v. *The Regents of California.* It may be worth pausing over, to think through its comparisons with that preoccupying problem.

A response to this article by TIAA-CREF will be published in the next issue of the *Bulletin*.