

Discrimination Law

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- 1 Why do we need a logical analysis of discrimination?
 - Confusion
 - Subjectivity
- 2 Cases
 - Manhart
 - Bostock & Zarda
 - Dekker
 - Struck
- 3 Analysis
 - Keeping things fixed
 - Pregnancy discrimination
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The parties have in their briefs, have all of these comparisons, and they will make your head spin if you – if you try to figure them all out.

— Justice Alito, *Bostock* oral argument, 8 October 2019¹

¹Oral argument transcript, *Bostock v. Clayton County* 17-1618 and *Zarda v. Altitude Express* 17-1623, argued October 8, 2019
<https://www.oyez.org/cases/2019/17-1618>

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Hypothetical reasoning can be subjective

Example (Christmas dinner)

“Thankfully, my parents share my political beliefs: if they had different beliefs, Christmas dinner would be a lot more tense”



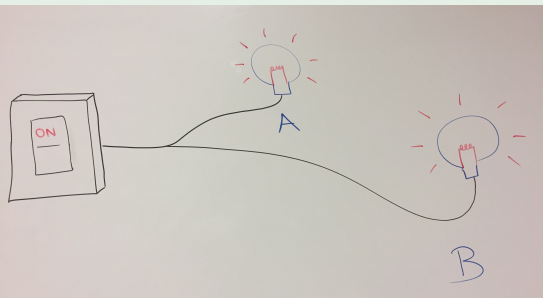
“If my parents had different political beliefs, then as their child, I would hold those beliefs too, and Christmas dinner would still be fun”



- Formal analysis can help diagnose:
 - 1 Where subjectivity appears, and therefore,
 - 2 What could change to achieve objectivity

Backtracking interpretations of counterfactuals

Example (Two lights)



- 1 If light A were off, light B would be off.
- 2 If light A turned off, light B would turn off.

- Counterfactual dependence is generally seen as evidence of causation
- There is a reading where (1) and (2) are true
- But light A turning on/off **did not cause** light B to turn on/off
- \therefore Causal judgements are determined by **intervention**, without backtracking

- Hypothetical reasoning is subjective, but many questions of law require hypothetical reasoning to be answered
- Subjectivity is a **threat to legal certainty**
- Formal analysis can help diagnose:
 - ① The source of the subjectivity, and therefore,
 - ② What is needed to achieve objectivity

Example (Subjectivity in counterfactual interpretation)

- Counterfactuals admit both backtracking and non-backtracking interpretations
 - The choice of which to use is subjective
- But causal reasoning only admits non-backtracking interpretations
- Appreciating this helps insulate the interpretation of causal claims from some subjectivity present when interpreting counterfactuals

A rule to enhance objectivity: When using counterfactuals to determine causation, only admit non-backtracking interpretations

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Title VII of the Civil Rights Act

It shall be an unlawful employment practice for an employer 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.

— Civil Rights Act (1964), section 703(a)(1) [[link](#)]

See Murray and Eastwood (1965) for a good analysis of the relationship between sex discrimination and the Civil Rights Act

L.A. Department of Water & Power v. Manhart (1978)

- L.A Department of Water & Power required female employees to pay higher pension contributions
- The reason: on average, women live longer than men, and therefore require a larger pension

Syllabus available at <https://www.loc.gov/item/usrep435702/>

Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men.

The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics.

<https://www.loc.gov/item/usrep435702/>

Justice Stevens, *Manhart* Opinion

If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

[T]here is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based. Many of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire

Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."

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Justice Kagan: *[...] [W]hen you look at individuals, which Manhart insisted one do, one should do, and when you apply the test that Manhart insisted you apply, would this woman have been treated differently if she were a man? The answer was yes.*

— Oral argument transcript pp. 43

<https://www.oyez.org/cases/2019/17-1618>

Mr. Harris: *Here's the problem with the test. In Manhart, in Newport News, in Martin Marietta, the comparator test makes perfect sense because you know exactly what you're testing for, so the comparator helps you draw inferences from the evidence.*

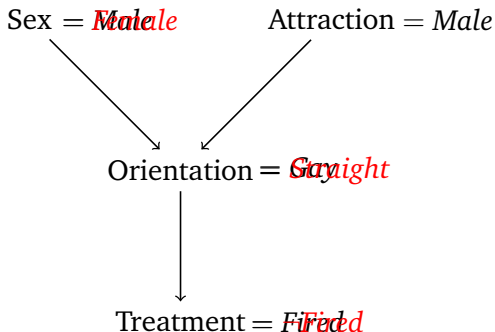
*The problem here is, unless the plaintiffs can point to something outside the comparator to tell us **why we need to hold sexual orientation** to tell us why that is irrelevant, they're just assuming their conclusion. So their comparator would say, you would ask if a gay man has suffered sex discrimination by comparing him to a heterosexual woman, which that version of the comparator can't isolate if it's the sex or the sexual orientation.*

*And so I do think, unless they can point to something outside the comparator, **to justify putting sexual orientation off limits** [...] the comparator doesn't answer the ultimate question.*

— Oral argument transcript pp. 43–44

If Gerald Bostock had been female,
what would his sexual orientation have been?

Making attraction exogenous



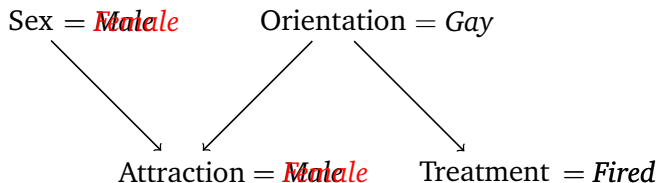
Orientation = Gay if (Sex = Attraction)

Treatment = Fired if Gay

Prediction:

- If Bostock had been female, he wouldn't have been fired
- Written formally, $(M, u) \models [\text{Sex} = \text{Female}] \text{Treatment} = \neg \text{Fired}$

Making orientation exogenous



Attraction = Male if $(\text{Sex} = \text{Male} \wedge \text{Orientation} = \text{Gay})$

Treatment = Fired if Gay

Prediction:

If Bostock had been female, he would have still been fired.

If Gerald Bostock had been female,
what would his sexual orientation have been?

Is these question answerable?

Consider:

- ➊ Given that Gerald Bostock is attracted to men, if he had been a woman, he would have been a woman who is attracted to men
- ➋ Given that Gerald Bostock is gay, if he had been a woman, he would have been a gay woman

Our judgements seem flexible

Issues:

- Why fix attraction rather than orientation, or vice versa?
- Are these questions that judges can decide?

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Dekker v VJV Centrum (ECJ, 1990)

- June 1981: Elisabeth Dekker applied for a job at Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus
- 15 June 1981: Dekker informed the hiring committee that she was three months' pregnant
- The hiring committee recommended her as the best candidate
- The VJV wrote a letter explaining why they will not hire her

- VJV employees insured by the Risicofonds Sociale Voorzieningen Bijzonder Onderwijs ('the Risicofonds')
- Article 6 of the Ziekengeldreglement: the Risicofonds can refuse to pay an employer all or part of the benefits:
 - If an employee becomes unable to perform their duties within six months of starting the job
 - And if at that time it was foreseeable from the health of the employee that such incapacity would intervene within those six months
- If the VJV were to employ Dekker, its insurer would not reimburse the daily benefits that the VJV would be obliged to pay her during her maternity leave
- So the VJV would be financially unable to employ a replacement during Mrs Dekker's absence and would thus be short-staffed

Council Directive 76/207/EEC (1976)

Article 2 §1 The principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

Article 3 §1 Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

Question before the court:

Is the employer in breach of the principle of equal treatment laid down in the above articles?

only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

Court opinion available at

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61988CJ0177>

The adverse consequences of a refusal to pay the daily allowance on account of pregnancy and confinement can affect only female workers. An employer who points to those adverse consequences is thus pleading an excuse which is available only for one sex and is thereby drawing a distinction prohibited by the Directive.

As the Dekker case clearly shows, the difficulty lies far more with the existence of laws which make the employer liable for part-payment of the daily benefits during maternity leave.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61988CC0177&from=EN>

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Struck v. Secretary of Defence

US Court of Appeals for the 9th Circuit (1972)

- Susan Struck, Air Force Captain
- Became pregnant in 1970
- Air Force Regulation 32-12, §40a: “A woman will be discharged from the service with the least practical delay when a determination is made by a medical officer that she is pregnant.”
- Struck forced to choose: Have an abortion or leave the Air Force
- Struck chose not to have an abortion
- Eventually appealed to the 9th Circuit with the ACLU
- Brief written by Ruth Bader Ginsburg



- 1 Did the Air Force's rule discriminate on the basis of sex?
- 2 How can we show this?

This regulation – if you're pregnant, you're out, unless you have an abortion – violated the Equal Protection principle because no man was ordered out of service because he had been the partner in the conception. No man was ordered out of service because he was about to become a father.

— Ruth Bader Ginsburg
Senate confirmation hearings, August 1993

<https://youtu.be/-VfUB7PgW4o?t=299>

For a brief overview of *Struck v. Secretary of Defence* see Glenza and Casanova-Burgess, The US air force gave her a choice: your baby or your job, *The Guardian* 13 December 2019 [link]

See also Siegel and Siegel (2010)

Analysing *Struck v. Secretary of Defence*

- A man and a woman are both partners in a conception
 - The man keeps his job
 - The woman must choose between being fired and having an abortion
- In other words, a man and a woman want to do **the same thing**, but are treated differently
- **Task:** How can we show that this sex discrimination?²

²To make the analysis work, we should also suppose that some men would also choose not to have an abortion, had they been women and become pregnant

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A bright line rule for discrimination

There is an intuitive parallel between dependence and discrimination:

- To be discriminated against on the basis of a given protected trait is to be treated unfavourably **because** of that trait;
- In other words,
 - For one's maltreatment to **depend** on how one has that trait
 - For one's possession of that trait to **cause** their maltreatment

The conditional but-for test

X actually caused Y just in case:

- (1) X and Y actually occurred, and at least one of (2)–(3) holds:
- (2) If X had not occurred, Y would not have occurred.
- (3) There is some event Z that actually occurred such that, if X and not occurred but Z had still occurred, Y would not have occurred.

- To show causation, we do not need to find the one “right” comparator
- Instead, it is enough to find **some** comparator
- In more logical vocabulary, anti-discrimination law requires equal treatment to be **closed under subpopulations**

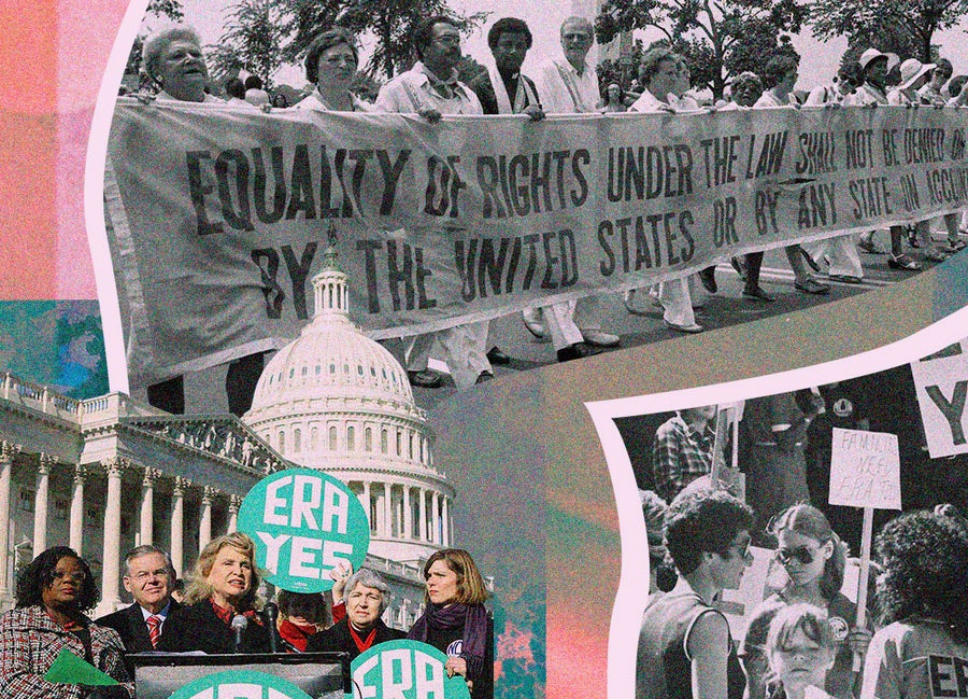
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At the expense of stating the obvious, motherhood can only ever affect women; taking account of it in order to justify a refusal of employment is therefore ipso facto direct discrimination on grounds of sex.

If a candidate applied for Dekker's job, but had a sex-specific illness (such as prostate or ovarian cancer), would it be sex discrimination to refuse to hire them?

- Suppose a man has prostate cancer, and must miss six months' work
- As a result, he is not hired for the job at VJV Centrum
- Now suppose, if the man had been a different sex, would he have gotten the job?
 - He wouldn't have had prostate cancer
 - But so much would have been different, that he might have gotten the job, or might not
- Is there anything we can fix which guarantees, that if he had been a different sex, he would have gotten the job?

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The Equal Rights Amendment

- Section 1** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
- Section 2** Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 1 Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2 Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.

On the benefits of the new version, see MacKinnon (2014)

Why is discrimination wrong?

- i.e. what is the moral basis of anti-discrimination law?

One answer: discrimination is wrong because it creates inequality

- Anti-discrimination law is justified because it promotes fairness and equality
- Anti-discrimination law is a means to an end: equality
- ∴ Anti-discrimination law is justified to the extent that it promotes equality
 - And discriminatory practices are justified to the extent that they promote equality

An Equal Rights Amendment for the twenty-first century is best conceptualized as a right to egalitarian institutions rather than a right against discrimination.

— Suk (2017, p. 384)



Figure: Julie C. Suk

A twenty-first-century ERA can significantly disrupt the remaining manifestations of gender inequality, such as pay inequity; women's economic disadvantages related to pregnancy, maternity, and caregiving; women's underrepresentation in positions of economic and political power; and violence against women. But in order to do so, the legal imagination of the ERA would have to stretch beyond strict scrutiny, disparate impact, and other familiar antidiscrimination tools to which ERA proponents continue to cling.

— Suk (2017, pp. 384–385)

Legislating exceptions

Two forms of equality of treatment:

- 1 Formal equality
- 2 Substantive equality

EU law is committed to **substantive equality**:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

— Treaty Establishing the European Community
(Consolidated version 2002) Article 141 §4

http://data.europa.eu/eli/treaty/tec_2002/oj

- Catherine A MacKinnon. Toward a renewed equal rights amendment: Now more than ever. *Harvard Journal of Law & Gender*, 37:569, 2014. URL <https://heinonline.org/HOL/P?h=hein.journals/hwlj37&i=585>.
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