

A new test for discrimination: the existential but-for test

Summary. In this talk we apply a new insight into the meaning of *because* to a landmark US discrimination law case, *Bostock v. Clayton County*.

Abstract. Title VII of the US Civil Rights Act of 1964 provides that

“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual ... because of such individual’s ... sex.”

The meaning of this statute hinges on the meaning of a small but important word: *because*. In ordinary life it is often clear what *because* means, but cracks in our understanding appear under the weight of legal scrutiny. Take the 2020 US Supreme Court case, *Bostock v. Clayton County*. Gerald Bostock worked for Clayton County, Georgia. In 2013 he joined a gay softball league and mentioned it at work. A few weeks later he was fired for “conduct unbecoming a county employee” ([Court opinion](#), p. 3). Bostock took his employer to court, arguing that the firing was illegal under Title VII.

While Title VII mentions sex discrimination, it makes no mention of sexual orientation. The question before the US Supreme Court was whether Gerald Bostock was fired because of his sex. One might initially think that, since sex and sexual orientation are distinct traits, it is possible to fire someone because of one trait without firing them because of the other. However, in a 6–3 majority, the Court held that discrimination on the basis of sexual orientation constitutes discrimination on the basis of sex, and therefore violates Title VII. The landmark ruling immediately extended employment protection to millions of LGBTQ Americans.

As soon as the Court's Opinion was published, however, it came under attack. Some legal scholars have gone so far as to declare that “*Bostock* was bogus” (Berman & Krishnamurthi [2021](#); see also Brett Kavanaugh’s dissent, Cain [2021](#) and Cohen [2022](#)).

Was *Bostock* rightly decided? The standard legal test for causation is the *but-for* test; in legal parlance, *but for the cause, the effect would not have occurred*. In contemporary terms: if the cause had not occurred, the effect would not have occurred. As Justice Elena Kagan put it at oral argument:

“What you do when you look to see whether there is [sex] discrimination under Title VII is, you say, would the same thing have happened to you if you were of a different sex?”

Under the but-for test, then, we have to ask whether the following sentence is true.

- (1) If Gerald Bostock had been a woman, he wouldn't have been fired.

When we imagine what would have happened if he were a woman, intuitively there are many possibilities to consider. If Gerald Bostock were a woman, he could have been a woman who is attracted to men, in which case he would have kept his job, or he could have been a woman who is attracted to women, in which case he still would have been fired (given that the employer had a blanket rule against gay people in general). Samuel Alito and Brett Kavanaugh

raise this point in their dissents, which emphasise the possibility that, had Bostock been a woman, he could have been attracted to women, in which case he still would have been fired. They use the existence of this possibility to argue that sex discrimination does not constitute sexual orientation discrimination. And sure enough, given this possibility, we cannot say that (1) is true. If Gerald Bostock had been a woman, he might have been fired, he might not. The but-for test appears to fail, or is at least inconclusive.

However, we propose that the *but-for* test is an incorrect approximation of the meaning of *because*. Take the following naturally-occurring examples. (For further examples see [McHugh 2020](#); ‘Are causes ever too strong?’).

(2) He has an American passport because he was born in Boston. [[Source](#)]

(3) Reyna received a Danish passport because her mother was born in Copenhagen. [Source: [The Bolton News](#)]

These sentences are perfectly acceptable. Now look what happens when we apply the but-for test:

(4) If he hadn't been born in Boston, he wouldn't have received an American passport.

(5) If Reyna's mother hadn't been born in Copenhagen, Reyna wouldn't have received a Danish passport.

These are clearly unacceptable. When we imagine, say, Reyna's mother not being born in Copenhagen, there are intuitively many places where she could have been born instead. In some of these cases, Reyna would still have received a Danish passport, in others not.

The conclusion we draw from these data is that *because* does *not* require that, had the cause not occurred, in **every** case we consider, the effect would not have occurred; rather, it is enough that if the cause had not occurred, in **some** case we consider the effect would not have occurred. Accordingly, we may distinguish a *universal* but-for test (the current legal standard) from an *existential* but-for test – the test we propose in this talk.

The plain meaning rule – which Alito and Kavanaugh accept – requires interpreting Title VII according to the meaning of the words it actually contains; in this case, the meaning of *because*. The data above show that our interpretation of Title VII will be more faithful to the meaning of *because* if we adopt the existential but-for test in place of the universal but-for test.

This switch to the existential but-for test serious ramifications for the outcome of *Bostock*. All parties agree that if Gerald Bostock had been a woman, there is a possibility in which he would have kept his job; namely, if he had been a woman attracted to men. This is not enough to pass the universal but-for test – as Alito and Kavanaugh's dissents make abundantly clear – but it is enough to satisfy the existential but-for test, which as we have seen better reflects the meaning of *because*. According to the existential but-for test, *Bostock* was not “bogus” but rightly decided.