

A new test for discrimination: The existential *but-for* test

Dean McHugh (ILLC, University of Amsterdam)

CEPDISC'23 Conference on Discrimination

12-13 October 2023, Aarhus, Denmark





Eighty-eighth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the seventh day of January,
one thousand nine hundred and sixty-four

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

TITLE I—VOTING RIGHTS

SEC. 101. Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and as further amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), is further amended as follows:

(a) Insert "1" after "(a)" in subsection (a) and add at the end of subsection (a) the following new paragraphs:

"(2) No person acting under color of law shall—

"(A) in determining whether any individual is qualified under State law or laws to vote in any Federal election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

"(B) deny the right of any individual to vote in any Federal election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

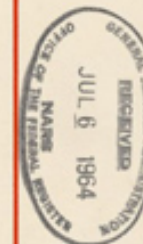
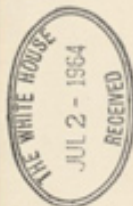
"(C) employ any literacy test as a qualification for voting in any Federal election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 (42 U.S.C. 1974-74e; 74 Stat. 88): *Provided, however,* That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

"(3) For purposes of this subsection—

"(A) the term 'vote' shall have the same meaning as in subsection (e) of this section;

"(B) the phrase 'literacy test' includes any test of the ability to read, write, understand, or interpret any matter."

(b) Insert immediately following the period at the end of the first sentence of subsection (c) the following new sentence: "If in any such proceeding literacy is a relevant fact there shall be a rebuttable



**DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL
ORIGIN**

SEC. 703. (a) 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

because

because of such individual's race, color, religion, sex, or
national origin



Clayton County, Georgia, USA, April 2013







Long Island, 2010



ABERCROMBIE





No job protection for LGBT workers

There are 28 U.S. states that have no state laws prohibiting discrimination targeting gay and transgender workers.



Source: Associated Press analysis

**DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL
ORIGIN**

SEC. 703. (a) It shall be an unlawful employment practice for an employer—
to discharge any individual,

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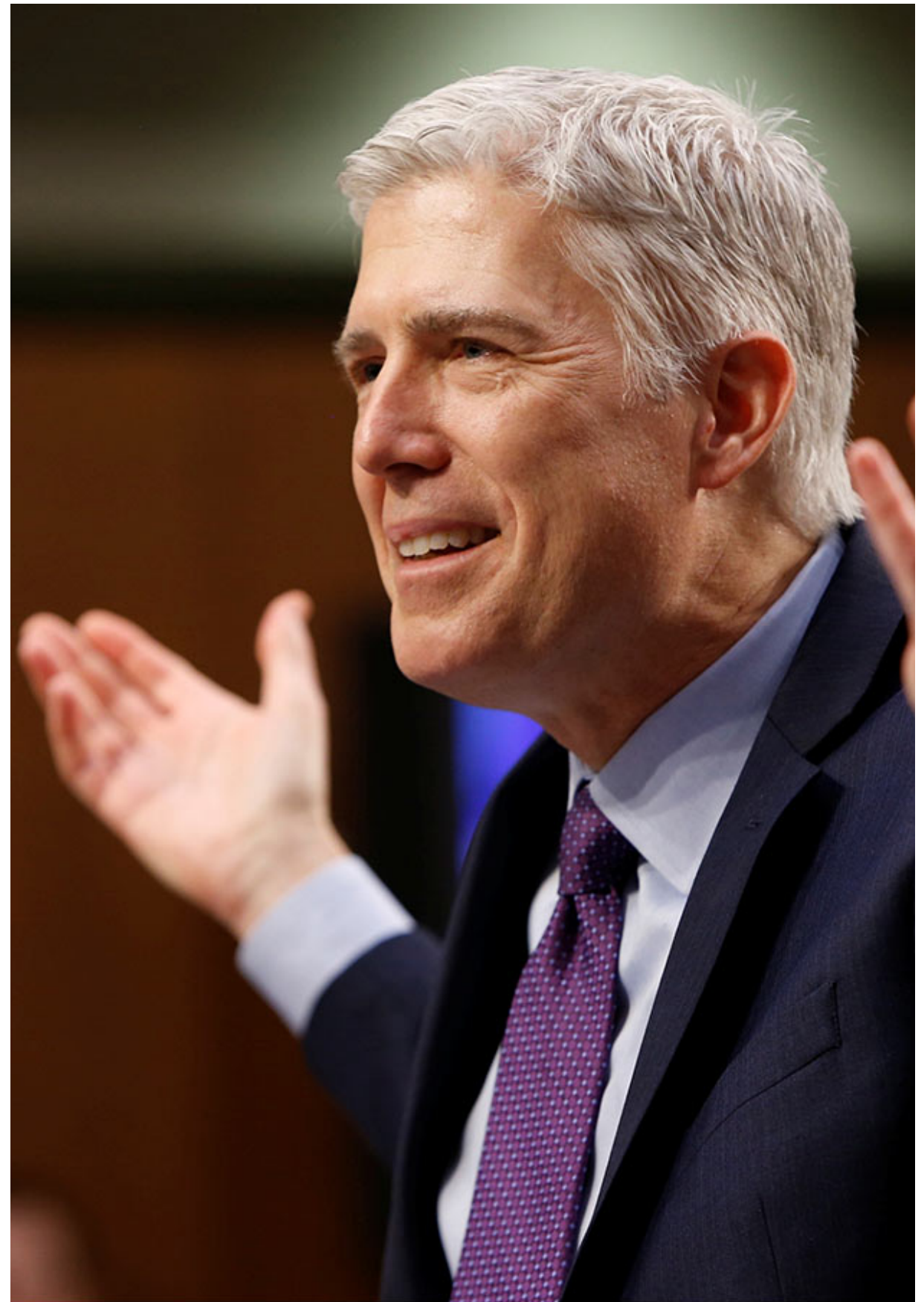
The plain meaning rule

If the ordinary meaning of a statute is clear,
judges must interpret the statute
according to its ordinary meaning.

The plain meaning rule in the *Bostock* opinion:

“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.”

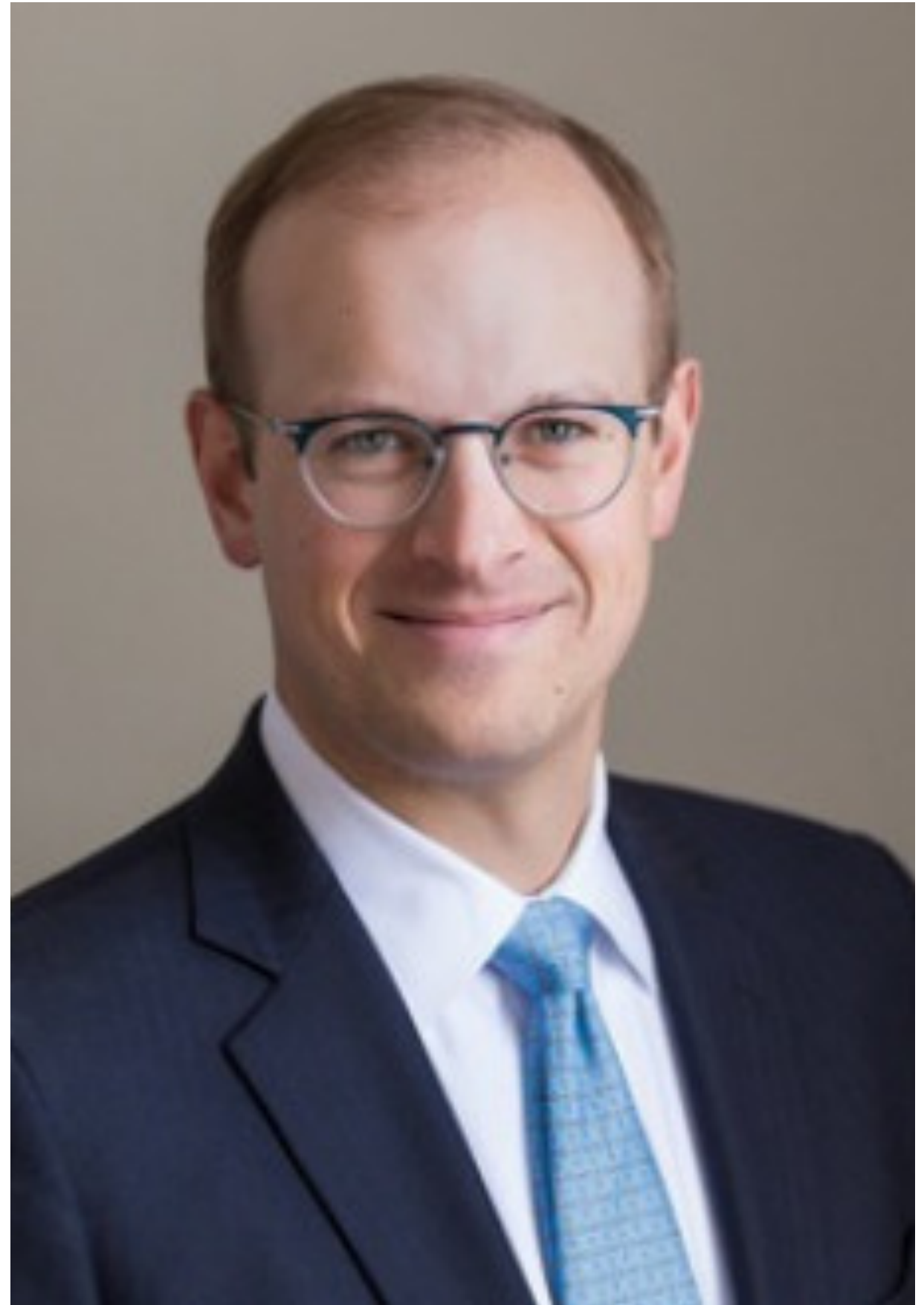
“With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII’s command that it is “unlawful . . . for an employer ... to discharge any individual, ... because of such individual’s ... sex.” ”



**Was Gerald Bostock
fired because of his sex?**

Harris' argument

"Sex and sexual orientation are independent and distinct characteristics, and sexual orientation discrimination by itself does not constitute discrimination because of sex under Title VII."



The *but-for* test

The *but-for* test

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?”



**If Gerald Bostock
had been a woman,
would he still have been fired?**

Karlan's argument

"When you tell two employees who come in, both of whom tell you they married their partner Bill last weekend, when you fire the male employee who married Bill and you give the female employee who married Bill a couple of days off so she can celebrate the joyous event, that's discrimination because of sex."



Gerald
Bostock

Bostock's
partner



Gerald
Bostock

Bostock's
partner



Gerald
Bostock

Bostock's
partner



Fired



Hired

Gerald
Bostock

Bostock's
partner



Fired



Hired

Gerald
Bostock

Bostock's
partner



Fired



Hired

Different treatment



Discrimination

"All the News
That's Fit to Print"

The New York Times

Late Edition

Today, mostly sunny, high 78. Tonight, partly cloudy, low 61. Tomorrow, mostly sunny, low humidity, high 80. Wind east at 5 to 10 miles per hour. Weather map, Page C8.

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\$3.00

LANDMARK RULING PROTECTS L.G.B.T. WORKERS



Citing the 1964 Civil Rights Act, the Supreme Court said Monday that people could not be fired for being gay, bisexual or transgender.

NEWS ANALYSIS

A 6-to-3 Decision Few Expected

By ADAM NAGOURNEY
and JEREMY W. PETERS

When Donald J. Trump was elected president, gay and lesbian leaders warned that their far-reaching victories under Barack Obama — including the Supreme Court's decision legalizing same-sex marriage in 2015 — were in peril, endangered by the imminent arrival of scores of conservative judges and full Republican control of the federal government.

So it would be an understatement to say that gay rights leaders and supporters were surprised by the court's ruling on Monday that the 1964 Civil Rights Act protects gay and transgender Americans from workplace discrimination. They were stunned. Stunned that two conservative justices had sided with them. Stunned that this happened on top of a Republican appointee writing the marriage ruling, too.

In many ways, the decision is the strongest evidence yet of how fundamentally, rapidly and, to some degree, unpredictably American views about gay and transgender people have

Court Guarantees Rights Pursued for Decades

By ADAM LIPTAK

WASHINGTON — The Supreme Court ruled on Monday that a landmark civil rights law protects gay and transgender workers from workplace discrimination, handing the movement for L.G.B.T. equality a long-sought and unexpected victory.

"An employer who fires an individual merely for being gay or transgender defies the law," Justice Neil M. Gorsuch wrote for the majority in the 6-to-3 ruling.

That opinion and two dissents, spanning 168 pages, touched on a host of flash points in the culture wars involving the L.G.B.T. community — bathrooms, locker rooms, sports, pronouns and religious objections to same-sex marriage. The decision, the first major case on transgender rights, came amid widespread demonstrations, some protesting violence aimed at transgender people of color.

Until Monday's decision, it was legal in more than half of the states to fire workers for being gay, bisexual or transgender. The vastly consequential decision thus extended workplace protections to millions of people across

ANNA MONEYSMAKER FOR THE NEW YORK TIMES

The Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. ... We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~

Woman attracted to men

~~Woman attracted to women~~

Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

as has been shown ... discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex.



Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian.

The employer with animosity against women (animosity based on sex) will fire the two women.

The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. ...

To treat one as a form of the other ... misapprehends common language, human psychology, and real life.



Gerald
Bostock

Bostock's
partner



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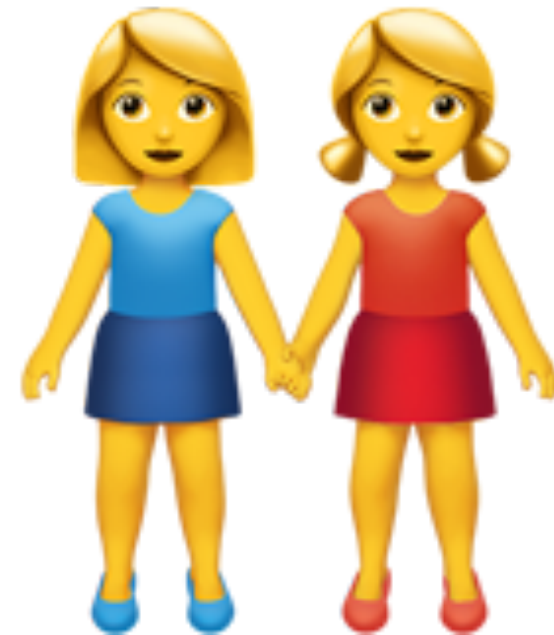


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Fired



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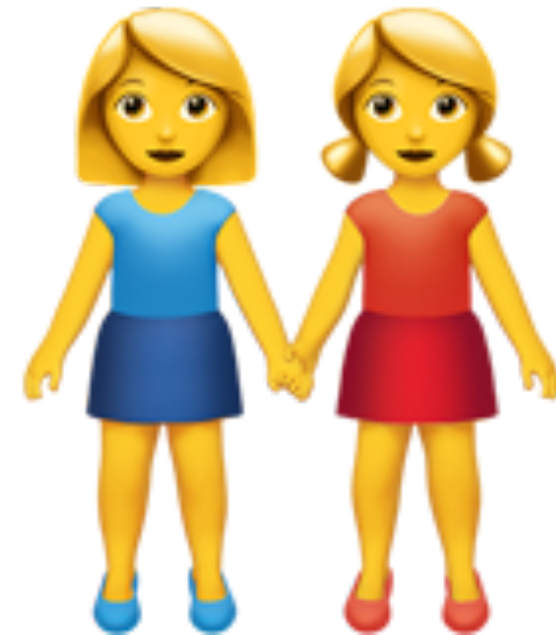
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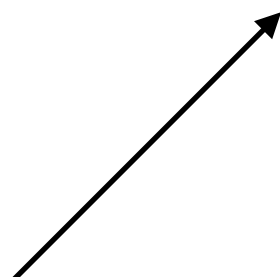


Fired

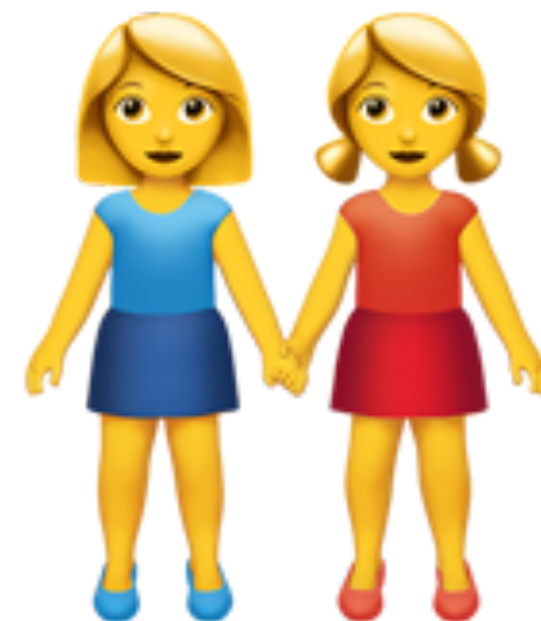
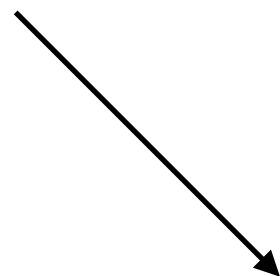
Same treatment



No discrimination



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The *but-for* test

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Was Gerald Bostock fired because of sex?

If Gerald Bostock had been a woman,
would he still have been fired?

chose Charlie and Trinity for the bottom 2. They lip-synced and due to Charlie's prior injury in the cheerleading challenge where she cracked a rib along with the fact that she is not use to lip-syncing, he did not move at all during the lip-sync and was asked to sashay away.

Biography

Charlie Hides was born in Boston, Massachusetts. He has nine siblings. He attended Massachusetts College of Art and Design, where he studied fashion and design. When he was 33, he moved to London in the United Kingdom, where he currently resides. He has an American passport because he was born in Boston; a British passport because he married his British partner in 2004; and an Irish passport due to his grandparents. In 2011, Hides started his YouTube channel "Charlie Hides TV". This was because YouTube started supporting HD video, so he decided to upload the videos that he used during his live performances. Since then, he has amassed over 100,000 subscribers and over 19,000,000 views. His videos were notable for his impersonations of celebrities such as Cher, Madonna, Lady Gaga, and Lana Del Rey. His videos often depicted events in pop culture and satirizing feuds and relationships between celebrities. In 2013, he appeared in a video with Australian singer Kylie Minogue. Charlie Hides



He has an American passport
because he was born in Boston.

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

The Bolton News

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“My big holiday will be next year when I save some money to go to India. I’d love to see where my late grandma grew up when she was a child. Me and Tom have said one of our trips should involve seeing elephants, especially ones that have been rescued so we can help where we can.”

Reyna, was born at Royal **Bolton** Hospital but received a Danish passport because her mother was born in Copenhagen, and her father was not registered on her birth certificate. Aged 21, the Danish Embassy told her that a change in law meant she could not renew her passport unless she had lived in the country recently, or spoke the language.

Her parents did not marry and separated when she was aged eight. Her mother died in 2009.

Reyna received a Danish passport
because her mother was born in Copenhagen.

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

Local Man Paralysed After Eating 413 Chicken Nuggets



Local Man Paralysed After Eating 413 Chicken Nuggets



swissguy25  3h

So the Limit is 412

REPLY




54



MemZilla.com


Local Man Paralysed After Eating 413 Chicken Nuggets



swissguy25  3h

So the Limit is 412

REPLY

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MemZilla.com

He was paralysed because he ate 413 chicken nuggets.


Local Man Paralysed After Eating 413 Chicken Nuggets



swissguy25  3h

So the Limit is 412

REPLY

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MerneZila.com

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If he hadn't eaten 413 chicken nuggets, he wouldn't have been paralysed.

The universal *but-for* test

If the cause had not occurred,
it is **necessary** that the effect would not have occurred.

i.e. in **all** scenarios we consider, the effect does not occur

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The existential *but-for* test

If the cause had not occurred,
it is **possible** that the effect would not have occurred.

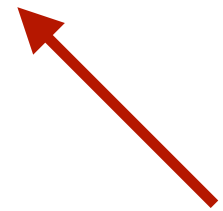
i.e. in **at least one** scenario we consider, the effect does not occur

The meaning of *E because C* has three components:

1. *C* and *E* are true,
2. *C* is sufficient to produce *E*, and
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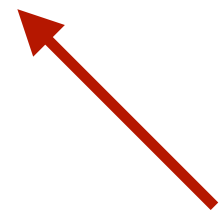
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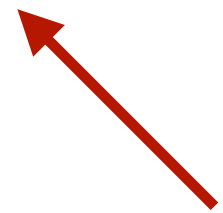


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A is sufficient for B just in case
in **every** relevant case where A is true, B is true.

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The ‘difference-making’ condition

A is sufficient for B just in case
in **every** relevant case where A is true, B is true.

If A is sufficient for B and B entails C, A is sufficient for C.

C producing E entails E.

So: the difference-making condition is satisfied if $\neg C$ is not sufficient for E.

The difference-making condition is satisfied if $\neg C$ is not sufficient for E.

i.e. if C had not been true,
there is **some** possibility in which E is not true.

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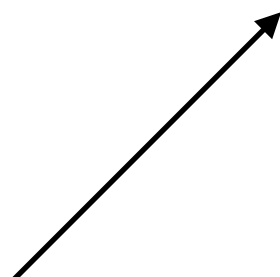
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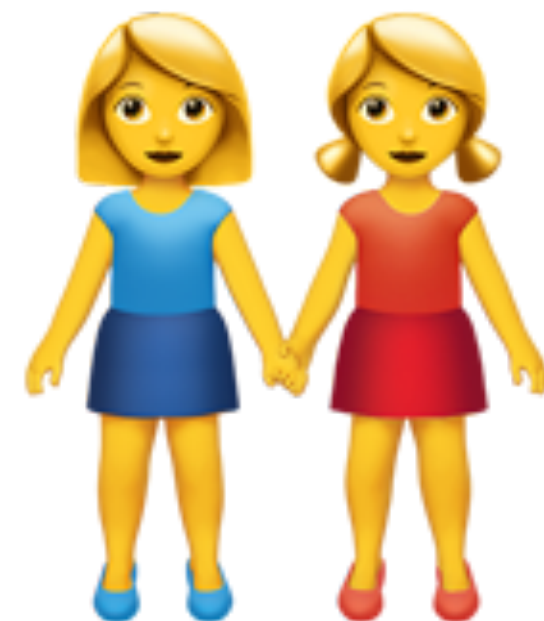
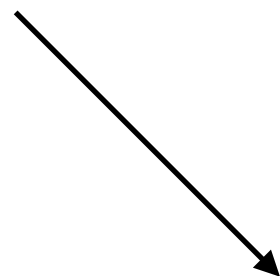
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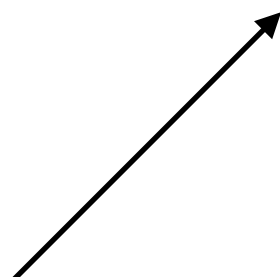
If he hadn't been born in Boston,
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Maybe, maybe not.

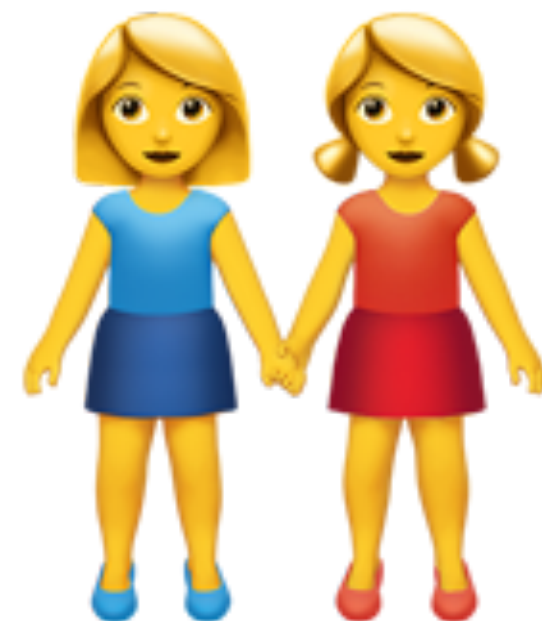
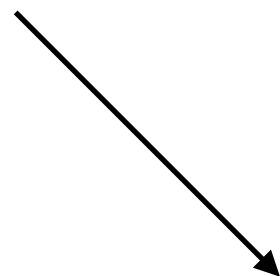


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E



Dekker v. VJV

European Court of Justice (1990)

- Elisabeth Dekker applied for a job in Amsterdam when she was three months' pregnant
- The employer: Dekker is the most qualified candidate
- The employer's insurer's rule:

If it is clear at interview that the candidate will be unable to work during the first six months, we will not pay for a replacement.



Dekker v. VJV

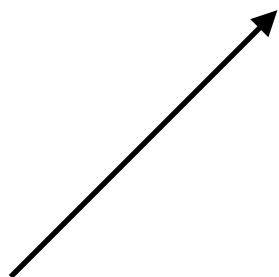
European Court of Justice (1990)

- The employer's argument:

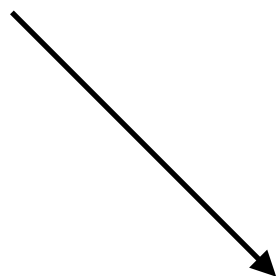
We didn't refuse to hire Dekker because she is pregnant, but because our insurer won't pay for a replacement.

We would refuse to hire any man whose replacement will not be paid by the insurer.





E



Wrapping up

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It may not be right,
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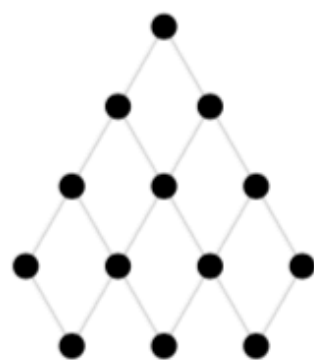
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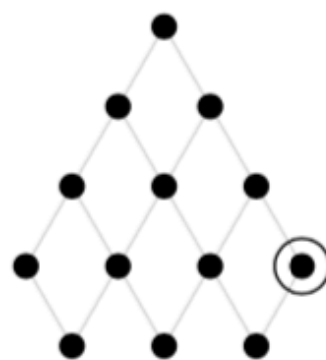
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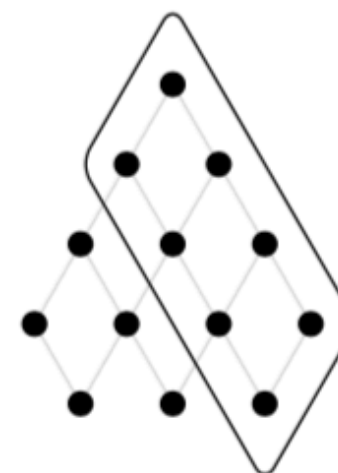
Under the existential *but-for* test, *Bostock* was correctly decided.



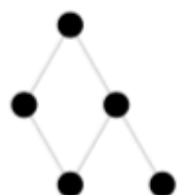
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at a moment in time t



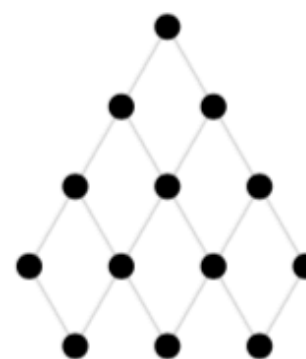
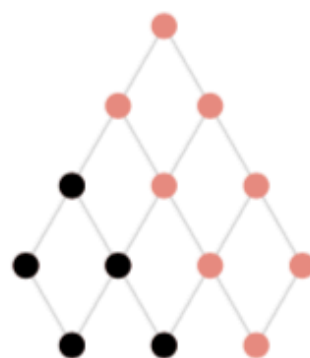
States A is about



Parts of w at t overlapping
a state A is about



Background of A



A -variants of w at t

