

Discrimination Without Comparison

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Standard Discrimination. Y discriminates X on the basis of C if and only if Y treats X worse than a suitable comparator X' because X has C .

Causal Discrimination. Y discriminates X on the basis of C if and only if Y treats X worse because X has C .

Causal/standard

An employer rates male applicants for a position higher than female applicants due to prejudice. As a result, the female applicant X is not hired and a man is hired instead.

Comparative

Without looking at the resumes, an employer tosses a coin to decide whom to hire. As a result, the best candidate, X , a woman, is not hired, and a man is hired instead.

Group

An employer adopts a policy that requires a minimum height for all new hires. Height is only marginally important for work at this company. As a result, fewer women are hired.

- **My overarching project:** for the measurement of discrimination in social sciences we need better definitions.
- **Courts around the world** use the standard definition of discrimination, including the **ECJ**, **ECtHR**, and national European courts. But the concept of standard discrimination creates confusion in practice.

- i** Standard/causal discrimination requires a characteristic 'C' to be a **cause of worse treatment**. But what is this cause really?
- Just *C*. (*characteristic but-for*)
 - The discriminator has unconscious biases against people with *C*.
 - The discriminator takes having *C* to be a reason to deny the benefit in question.
 - Society treats people with *C* badly, causing *X* to miss a quality *C'* which the discriminator considers a valid reason to deny the benefit in question.
 - People with *C* also often have a characteristic *C'*, and the discriminator takes *C'* to be a reason to deny the benefit in question.

Let's generalise:

definition *C-events* are the events related to a characteristic *C* that are 'inappropriate' when they cause worse treatment.

- ➔ There is standard/causal discrimination only if a ***C-event*** causes worse treatment.
- ⚠ For a more precise and implementable definition, one needs an **account of *C-events***.

name	cause of interest (C-event)	adherents
conscious motivation	Y uses a C-related reason to treat X worse	Shin (2010); U.S. Supreme Court; European Court of Justice
characteristic but-for	X has characteristic C	Eyer (2021); U.S. Supreme Court; U.K. courts
perception but-for	Y perceives X to have characteristic C	Eidelson (2015); Greiner and Rubin (2011)
(un)conscious motivation	(Y perceiving) C plays a role in Y's motivation to treat X worse	Krieger (1995)
dimensional motivation	(Y perceiving) any property P in the dimension of D plays a role in Y's motivation to treat X worse	Eidelson (2022)
acting on category	Y acts on a stereotype or nefarious social meaning related to C	Dembroff, Kohler-Hausmann, and Sugarman



Definition A person X is discriminated against by Y on the basis of characteristic C if and only if

- (SD1) Y treats X worse than Y would treat a suitable comparator X' without C , and
- (SD2) Y treats X worse because of a C -event (“because X has C ”).

Definition A person X is discriminated against by Y on the basis of characteristic C if and only if

(CD1) Y treats X worse because of a C -event (“because X has C ”).

- 👉 For every reasonable interpretation of **Standard Discrimination**, there is a reasonable interpretation of **Causal Discrimination** such that
1. Every case of **Standard Discrimination** is a case of **Causal Discrimination**.
 2. Almost every case of **Causal Discrimination** is a case of **Standard Discrimination**.

-  SD1 and Causal Discrimination *look* the same.
- (SD2) Y treats X worse because X has C.
- (CD1) Y treats X worse because X has C.
- But Standard Discrimination can be interpreted interpersonally:
(SD2) Y treats X worse than X' because X has C.
 - I argue that the reasonable interpretation of SD1 is *intrapersonal*.
-  So standard discrimination implies causal discrimination.



(SD1) Y treats X worse than Y would treat a suitable comparator X' without C .

The broad view X' is a suitable comparator for X **iff** a better-worse comparison of Y 's treatment is possible (i.e., makes sense).

The narrow view X' is a suitable comparator for X **iff**

1. A better-worse comparison of Y 's treatment is possible, and
2. Y 's treatment of X is not motivated by a set of reasons such that
 - 2.1 these reasons are legitimate (given the circumstances), and
 - 2.2 these reasons do not apply to X' .



- **No comparability:** Hendrik is stopped by the police while driving in Leiden. He claims he is discriminated against because Hannes is not stopped by the police while driving in Munich on that same day.
- **Possibly comparable:** Mr Hlozek, at age 54, did not receive a *bridging allowance* after being dismissed at his job. A woman aged 54 did receive it, because she was closer to retirement age. (*Viktor Hlozek v Roche Austria Gesellschaft mbH* 2004)
- **Probably comparable:** A woman was denied child adoption in part because she was in a same-sex relationship, while similar people in heterosexual relationships were not denied child adoption. (*E.B. v. France* 2008)

- Broad view:
 -  Take any case of Causal Discrimination. If there is only one hypothetical comparator without C who is treated better, then there is Standard Discrimination **on the broad view**.
 -  “ \implies ” Highly likely, because X themselves would have been treated better in the absence of the C -related cause of being treated worse.
- Narrow view: two types of **problem** cases
 1. Everyone without C (real or hypothetical) would have been treated even worse
 2. Having C (or something related to C) is a legitimate reason for worse treatment

Example

The state provides women an allowance to cover costs related to menstrual health. A biological man complains to be discriminated against because he does not receive the allowance.

- ! **Objection:** *this is not standard discrimination, but it is causal discrimination.*
- **Response:** only “inappropriate” C-related causes are C-events.

-  Consider this interpretation of the “inappropriateness” of treating someone worse because of a protected characteristic C :
Any C -related cause is inappropriate unless C is a legitimate reason (given the circumstances) for treating X worse.
-  Now the second type of “problem case” is also not causal discrimination.

Example

Mr Hlozek, at age 54, did not receive a *bridging allowance* after being dismissed at his job. Women aged 54 did receive it, because they were closer to retirement age.

- **Standard Discrimination** argues as follows (ECJ judgment):
 1. Only people who are close to retirement age need a bridging allowance.
 2. Mr Hlozek did not get the allowance because he did not need it.
 3. The absence of a need for the allowance is a legitimate reason to refuse it.
 4. This reason (“absence of need”) does not apply to a comparator who *is* close to retirement age.
 5. There are no people *not* close to retirement age who do get the allowance.
 6. Therefore, there are no suitable comparators.
 7. Therefore, there is no standard discrimination.

Example

Mr Hlozek, at age 54, did not receive a *bridging allowance* after being dismissed at his job. Women aged 54 did receive it, because they were closer to retirement age.

- **Causal Discrimination** argues as follows:
 1. Only people who are close to retirement age need a bridging allowance.
 2. Mr Hlozek did not get the allowance because he did not need it.
 3. The absence of a need for the allowance is a legitimate reason to refuse it.
 4. Therefore, the motivation for refusing the allowance is not a C-event.
 5. Therefore, there is no causal discrimination.

- ⚠ Cases in which everyone without C (real or hypothetical) would have been treated even worse are **Causal Discrimination** but not **Standard Discrimination**.
- 👉 I argue (1) that such cases are very rare and (2) that the moral status of such cases is unclear.
 - Hence, there are little to no costs of adopting Causal Discrimination as a replacement of Standard Discrimination.

1. Standard Discrimination is difficult to measure; but social scientists have tools available for measuring Causal Discrimination.
2. It's very difficult and confusing to interpret comparability, leading to a large amount of mistakes in courts.
3. Comparability on the narrow view conceals the underlying moral reasoning about the legitimacy of reasons.
4. The requirement of finding a comparator places an undue burden on claimants in court.

paper



presentation

