

THE 'ASSOCIATIVE' DISCRIMINATION FICTION

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Abstract

Associative Discrimination is a consequence of the open formulas used in the UK (and EU) equality legislation to define direct discrimination. The treatment needs only to be 'because of *a* protected characteristic' (such as race, sexual orientation, etc) rather than because of *his* (or *her*) protected characteristic. Hence, a white worker dismissed for marrying a black person could sue for direct (racial) discrimination. The open formula is not limited to such cases, and so treating associative discrimination as a term of art is a mistake, as this could unnecessarily restrict the reach of the deliberately open legislative formula. This article identifies the Supreme Court judgment in *Lee v Ashers* as an example of this mistake. It further asserts that any compromise for conflicting rights is found in the Human Rights Act 1998, and not by distorting the definition of discrimination.

Key words: Associative Discrimination, Lee v Ashers.

1. INTRODUCTION

A white worker is dismissed from her job because she married a black man,¹ or a bar denies service to a white woman because she is accompanied by a black man.² No one is likely to have to think too long over the policy and technical issues raised in these two scenarios. Any lawyer, let alone a layperson, would consider that the white person should win a claim of racial discrimination. Although atypical, these are ‘simple’ examples of what has become known as associative discrimination. The white person can sue for discrimination because the treatment was based on her association with a black person. The principle is not confined to race; it applies to the 2010 Equality Act’s protected characteristics (or ‘suspect classes’) of age, disability, gender reassignment, religion or belief, sex, and sexual orientation.

Now consider this, more complex, scenario.

A bakery refused to ice a cake with the slogan ‘Support Gay Marriage’; it was requested by a customer whose sexual orientation was unknown, and intended for a gay rights group and its celebration of anti-homophobia week.

This occurred, of course, in *Lee v Ashers Bakery*.³ It may surprise some that the Supreme Court, reversing all below, utilised the ‘associative’ theory to *limit* the reach of the UK’s discrimination law, which underpinned the decision that the bakery had *not* discriminated because of sexual orientation.

The principal thesis of this paper is that any notion of associative discrimination as a term of art is a fiction. An analysis of this case shows that recourse to the legislative provisions would produce much simpler questions to be asked, which were whether there was less favourable treatment because of sexual orientation, and if so, did such a finding violate the bakery’s human rights. It seems instead that the Court’s reasoning was (mis)led by the associative theory into a convoluted and overly restrictive definition of discrimination. The core error was treating the notion of associative discrimination as a term of art, when it has no more utility than providing our vocabulary with a convenient description of

¹ See e.g. Lord Simon, obiter, *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289-290 (on the premise that foster parents discriminated against a local authority for refusing to foster children of colour).

² See the suggestion by James Comyn QC, approved by Lord Denning MR: *Applin v Race Relations Board* [1973] QB 815 (CA) 828, and 831 (Stephenson LJ), affirmed [1975] 2 AC 259 (HL).

³ [2018] UKSC 49.

a certain factual scenario. Accordingly, in arguing that associative discrimination is not a term of art, this paper highlights the likely missteps when treated as such. It does so using this more complex scenario and the reasoning deployed by the Supreme Court to decide the matter.

Ahead is a brief theoretical overview of the notion of associative discrimination followed by an appreciation of the governing statutory regimes and general principles of discrimination. Both inform the subsequent missteps. The substance of the discussion centres on the reasoning deployed in *Lee v Ashers*. The Court's associative theory as set out is examined in detail, followed by the other discernible bases of the decision. These comprise the 'message case' exemption and a refusal 'applying to all'.

2. A THEORETICAL BASIS FOR ASSOCIATIVE DISCRIMINATION?

It is surprising, perhaps, that the notion of associative discrimination has attracted little scholarly attention. Most is from the United States, where the literature tends towards textual analyses⁴ with a predominant purpose of utilising associative discrimination as a vehicle to overcome the omission from the Civil Rights Act of sexual orientation as a protected class.⁵ By exception, Victoria Schwartz draws upon the moral philosophy that Western rights are rooted in personal autonomy. Building upon this is

⁴ See e.g. Mark W II Honeycutt and Van D Jr Turner, 'Third-Party Associative Discrimination under Title VII' (2001) 68 Tenn L Rev 913. See also, below, n 5

⁵ Civil Rights Act 1964, Title VII (employment, 42 USC s 2000e-2), see n 11 below. The basic argument being that a woman attracted to a woman is treated less favourably than a man attracted to a woman, and so can amount to *sex* discrimination. See e.g. V Schwartz, 'Title VII: A Shift from Sex to Relationships,' (2012) 35 Harvard Journal of Law and Gender 209; M Clark, 'Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available after *Rene v MGM Grand Hotel*' (2003) 51 UCLA L Rev 313; A Reed, 'Associational Discrimination Theory & Sexual Orientation-Based Employment Bias,' (2018) 20 U.Pa.J.Int'l Bus L 731. Similar arguments were made in the UK before sexual orientation became a protected characteristic: see e.g., R Wintemute, 'Recognising new kinds of direct sex discrimination: transsexualism, sexual orientation and dress codes' (1997) 60 MLR 334, 347-348. The argument was rejected in *Smith v Gardner Merchant* [1999] ICR 134 (CA) 148-150 (paras 6-7) on the basis that the comparator would be a person of the opposite sex but homosexual also, this being a *sex* discrimination claim. However, liability *can* arise where a homosexual man is treated less favourably than a homosexual woman is, or would be, treated (*ibid*). The goal of these theories has been overwhelmingly satisfied by the recent US Supreme Court decision that there is liability under the Civil Rights Act where sex is a factor when discriminating against homosexuals: *Bostock v Clayton County Georgia* 140 S Ct 1731 < https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf > accessed 7 September 2020.

the notion that, ‘individuals do not develop their notions of self in an abstract vacuum.’⁶ Hence, development of the self involves association with others:⁷

‘Therefore, in the employment discrimination context, the relational discrimination interpretation expands the definition of an individual’s characteristics to encompass not only her own protected characteristic when viewed in isolation, but also a complete protection of the individual’s rights including consideration of the individual in relationship to others.’⁸

In preference to the term ‘associative’, Schwartz favours the label ‘relationship discrimination’.⁹ The ‘relationship’ element is key. It is *via the relationship* that the treatment of the targeted victim damages the third party’s autonomy. Victims are targeted because of their relationship with persons from a protected class. The white woman dismissed because she married a black man was so treated because *she is white*.¹⁰ This is discrimination because of the worker’s (white) race. Hence, it remains essential that the treatment (in part at least) is because of the protected characteristic of the targeted victim. This limited theory aligns with a literal reading of the US Civil Rights Act’s prohibition of employment discrimination, requiring the victim to belong to a relevant protected class.¹¹

In Europe, a theoretical basis was offered in Advocate General Maduro’s Opinion for the case of *Coleman v Attridge Law* (where a worker suffered discrimination because of her disabled child).¹² AG Maduro began at much the same place as Professor Schwartz, assuming that equality law was rooted

⁶ (2012) 35 Harvard Journal of Law and Gender 209, 233, citing Holning Lau, ‘Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law’ (2006) 94 Cal L Rev 1271, 1281.

⁷ *ibid*, citing P Jones, ‘Group Rights and Group Oppression’ (1999) 7 J Pol Phil 353, 353.

⁸ *ibid* 234.

⁹ This also distinguishes this notion from freedom of association, citing *Ripp v Dobbs Housing* 366 F Supp 205 (ND Ala 1973) as a case confusing the two notions. See (2012) 35 Harvard Journal of Law and Gender 209, respective accompanying texts to nn 25 and 47, within.

¹⁰ See e.g. *Tetro v Elliot Popham Pontiac* 173 F 3d 988, 994 (6th Cir. 1999) (white worker dismissed because his child was mixed race).

¹¹ Civil Rights Act 1964, Title VII, s 706 (42 USC s 2000e-2): ‘It shall be an unlawful employment practice for an employer...to discriminate against any individual ... because of such individual’s race, color, religion, sex, or national origin...’

¹² Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27.

in dignity¹³ and personal autonomy.¹⁴ Hence, for AG Maduro, discrimination denies the intrinsic importance of every human life and the autonomy of persons to choose ‘valuable options’, such as employment.¹⁵ Moreover, targeting workers because of their association with a person belonging to a ‘suspect class’ can have the same negative effects. Thus, ‘A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications.’¹⁶

Although not expressed as such, this relies on a relationship between the targeted victim and the third party. Putting aside any doubts over dignity as a basis of equality law,¹⁷ the notable feature here is that for the claimant to succeed, the third party ‘associate’ must have suffered some harm (a loss of dignity and/or autonomy, it is presumed) as a result of the treatment. The rather odd consequence of this view would transpire when *claimants* seek (and are awarded) a remedy for *their own* (not the third party’s) loss. Although it is necessary that third parties suffer harm, the theory does not necessitate that they have a remedy. It is also notable that AG Maduro (whose task lies much closer to litigation than an academic paper) neither lamented the absence of a remedy for this person nor proposed any solutions. A theory dependant on harm to a person without a remedy is somewhat incomplete to support a cause of action.¹⁸

The theory also falls short when considered in the broader context of other extended forms of discrimination structurally similar to associative discrimination. First, the ‘harm’ requirement would undermine the established principle of ‘third party’ discrimination. In *Showboat Entertainment Centre v Owens*,¹⁹ a white manager of an amusement centre was dismissed for refusing to obey an instruction

¹³ *ibid*, paras AG8-9, citing, R Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press, 2006) Ch 1; J Raz, *The Morality of Freedom* (Oxford University Press, 1986).

¹⁴ See e.g. Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (1785), (Hutchinson 1948) 434 – 440, especially 436.

¹⁵ (n 12) Opinion of AG Maduro, paras AG10-11.

¹⁶ *ibid*, para AG12.

¹⁷ See R O’Connell, ‘The role of dignity in equality law: lessons from Canada and South Africa’ (2008) 6(2) *IJCL* 267-286. In *R v Kapp* [2008] 2 SCR 483 (SCC) [19]-[24], the Canadian Supreme Court abandoned dignity as a mainstay of applying its Charter of Rights, because it was, ‘an abstract and subjective notion that [can be] confusing and difficult to apply ... [and] an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.’

¹⁸ A procedural solution (*locus standi*, or standing) is suggested in in the US case, *Trafficante v Metropolitan Life Insurance* 409 US 205 (1972, US Sup Ct) 208.

¹⁹ [1984] ICR 65 (EAT).

to ban black youths. The Employment Appeal Tribunal (EAT) held that this employer was liable to the manager for racial discrimination. In coming to the decision, Browne-Wilkinson J concluded that, ‘the words “on racial grounds” are perfectly capable in their ordinary sense of covering any reason for an action based on race, whether it be the race of the person *affected by the action* or *of others*’.²⁰ Whether the employer’s act caused harm to the black youths was irrelevant to liability.²¹ If the EAT were bound to align its reasoning with notions of loss of dignity or autonomy, it would have demanded evidence of a black youth somehow harmed, which would seem most unlikely given the manager’s refusal to carry out the instruction.²²

Second, the requirement even for the existence of a third party belonging to a protected class undermines the notion of perceived discrimination, where the defendant acts upon a mistaken belief that the victim possesses a protected characteristic. Here, there is no person with a protected characteristic.²³

A common feature to these three forms of extended discrimination (‘associative’, ‘third party’, ‘perceived’) is that there is discriminatory conduct harming a person *without* a relevant protected characteristic, suggesting that these are the only two elements required for liability. More is required than merely uttering bigotries in an empty room; there must be a targeted victim. Nonetheless, for the sake of ease of terminology, these three forms of discrimination could fall under a common label of ‘discriminatory conduct per se’.

²⁰ *ibid* 70. Emphasis supplied. The phrase ‘racial grounds’ was superseded in the Equality Act 2010 with ‘because of’; this was not intended to change the meaning: Explanatory Note (61) to the Equality Act 2010, s.13. *Showboat* is commonly regarded as ‘third party’ discrimination case. See e.g. *Weathersfield v Sergeant* [1999] ICR 425 (CA) 429 (Pill LJ), 434 (Swinton-Thomas LJ); *English v Sanderson Blinds* [2009] ICR 543 (CA) [30] Laws LJ, [68] (Collins LJ).

²¹ In any case, on these particular facts, any black person refused admission would have a right to sue, the refusal falling under the provision of services. See now EA 2010, s 29. In many cases, including *Coleman*, and where the white worker is dismissed because her husband is black, it is not certain that AG Maduro’s third party would have standing to sue.

²² Much the same can be said for the notion of third-party victimisation recently established in the US Supreme Court (*Thompson v North American Stainless* (2011) 562 US 170). An act of retaliation against a friend, relative, or loved-one of a person who, say, had made a complaint of discrimination, is actionable, irrespective of whether the retaliation harmed the principal complainant. See generally, (2010) 35 E L Rev 822.

²³ Where say, a shopkeeper bans a Sikh believing him to be a Muslim. See e.g. *English v Sanderson Blinds* [2009] ICR 543 (CA) [38] (Sedley LJ); *Chief Constable of Norfolk v Coffey* [2018] ICR 812 (EAT). The matter is not settled in the US. According to its enforcement commission, it is actionable: https://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm < accessed 8 October 2019 > accessed 12 October 2019. For an argument that *EEOC v Abercrombie & Fitch* 135 S Ct 2028 (2015, US Sup Ct) endorsed ‘perception theory’, see DF Flake, ‘Religious Discrimination Based on Employer Misperception’ [2016] Wis L Rev 87, 126-129.

Indeed, later in his Opinion, AG Maduro appeared to depart from his theoretical requirement of harm to the third party associate, writing,

‘The distinguishing feature of direct discrimination and harassment is that they bear a necessary relationship to a particular suspect classification. The discriminator relies on a suspect classification in order to act in a certain way. ... An employer’s reliance on those suspect grounds is seen by the Community legal order as an evil which must be eradicated. Therefore, the Directive prohibits the use of those classifications as grounds upon which an employer’s reasoning may be based.’²⁴

The ECJ’s Judgment appeared to agree: ‘The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Art.1.’²⁵ This characterisation of direct discrimination shifts the focus away from the protected status of the victim (or anyone) towards the conduct of the defendant (in this example, an employer). In doing so, it departs from the dignity theory. The ‘evil which must be eradicated’ is conduct informed by a protected characteristic (race, sex, disability etc.) rather than any harm caused to the third party associate. This aligns with the ‘discriminatory conduct per se’ label.

That said, the notions of dignity and ‘conduct per se’ were explored in the English Court of Appeal in *English v Sanderson Blinds*,²⁶ on facts where there was no relevant person with a protected characteristic (real or perceived). In this employment case, Mr English was harassed by colleagues using homophobic sexual innuendo, suggesting he was homosexual. However, Mr English was heterosexual, *and* his tormentors neither assumed nor perceived Mr English to be gay. Further, Mr English was aware throughout that his tormentors never mistook him for being homosexual. If you like, *he knew that they knew* he was heterosexual. A majority (2-1) found that this conduct could amount to

²⁴ Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, para AG19.

²⁵ *ibid*, para 38 (and 50). The ‘grounds’ alluded to were sexual orientation, religion or belief, disability, and age (‘Framework’ Directive 2000/78/EC, art 1). The principle was applied to the Race Directive 2000/43/EC in Case C-83/14 *CHEZ* [2016] CMLR 14, para 56.

²⁶ [2009] ICR 543 (CA).

unlawful *harassment* (on the ground of sexual orientation).²⁷ The statutory definition is more open and elaborate than that for direct discrimination. It requires unwanted conduct ‘related to’ a protected characteristic (or of a sexual nature) with the purpose or effect of ‘violating a person’s dignity’ or creating ‘an intimidating, hostile, degrading, humiliating or offensive environment’.²⁸ As well as the expressed reference to ‘a person’s dignity’, any of these effects could be supported by notions of dignity.

Apart from a textual reading of the legislation (which was open enough for such a finding), Sedley LJ underpinned the decision with a policy concern, which was the prospect of a victim having to declare his sexual orientation before being able to complain.²⁹ At the root of this is respect for persons keeping their sexual orientation a private matter. An alternative finding would mean that persons suffering harassment would have the options of ‘coming out’ or suffering in silence, either being an affront to the person’s dignity. By the same principle, respect for privacy should apply with other protected characteristics. For instance, a worker being abused with mental-health epithets should be able to complain without disclosing any disability of his own. Others may prefer to keep private matters of religion, race, gender, or age, for example. Thus, driven by the ‘privacy’ concern, Sedley LJ threw a ‘dignity’ blanket over all cases of harassment per se, to include instances where the only person suffering harm did *not* belong to the relevant suspect class. The point is, unlike the theories of Schwartz or AG Maduro, the matter of dignity in anti-discrimination law need not be confined to that of those belonging to a relevant suspect class. Bearing in mind that neither the claimant nor anyone else possessed the relevant protected characteristic, the *decision* in *Sanderson* endorses the notion of *harassment* per se, and by implication recognises another variety of *discrimination* per se.³⁰

²⁷ On facts, the case failed: *English v Sanderson Blinds (No 2)* [2011] Eq LR 688 (EAT) [41]. The EAT upheld a finding that as he joined in the banter and remained genuine friends with his tormenters, the claimant did not perceive a violation of dignity nor a hostile environment.

²⁸ The claim in *English v Sanderson* was made under the since repealed Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1660, reg 5. See now EA 2010, s 26; Framework Directive 2000/78/EC, art 2(3).

²⁹ [2009] ICR 543 (CA) [39] (Sedley LJ).

³⁰ Sedley LJ found that the distance between this case and perceived *discrimination* was ‘barely perceptible’. In both instances, the ‘imaginary’ sexual orientation was the ground of the conduct. Collins LJ aligned the statutory formula with the *conduct*, rather than the victim’s protected characteristic, and assumed that the same logic applied to discrimination. See [2009] ICR 543 (CA), respectively [38], [46]. Note, although no opinion was offered, the decision in *Lee v Ashers* [2018] UKSC 49 suggests that *Sanderson* does not apply to discrimination. See (2019) 48(2) ILJ 240.

It is not the purpose of this paper to provide a theoretical basis for associative discrimination. Indeed, its main thrust is to debunk it as a term of art in need of an exclusive theoretical underpinning. The suggestion merely is that any theoretical support for associative (or ‘relational’) discrimination is incomplete. It is confined to the dignity of the third party associate (with the relevant protected characteristic), yet provides no remedy for this person. It also falls short in the context of other extended notions of discrimination (‘third party’ and ‘perceived’) that require no harm to a third party, or indeed, no third party at all (‘perceived’, ‘*Sanderson*’). The only distinguishing feature of these associative theories is that the third party should suffer harm because of the association with the targeted victim, which, without a remedial basis, renders the distinction a rather hollow one. Any distinction is in fact reliant on a creative textual interpretation of the American statutory provision insisting that the targeted victim possesses the relevant protected characteristic.³¹ It has the flavour of devising a theory to support the text.

Where the statutory formula has no such restriction (as in the EU and UK), no such distinction is required. In this more open legislative context, associative discrimination has more in common with other extended forms of discrimination, whose recognition seems to be a policy commitment to outlawing the ‘evil’ of discriminatory conduct per se. Nonetheless, there are strong doctrinal reasons not to treat ‘associative’ discrimination as a term of art. These are explained next with a textual analysis of the legislative framework and its reach.

3. ASSOCIATIVE DIRECT DISCRIMINATION - THE LEGISLATIVE FRAMEWORK

For Northern Ireland (where *Lee v Ashers* originated), direct discrimination is defined thus, ‘a person (“A”) discriminates against another person (“B”) if— (a) on grounds of sexual orientation, A treats B

³¹ As in the US Civil Rights Act 1964. See n 11 and accompanying text; for some exceptional restrictions in the UK (see below, n 37 and accompanying text).

less favourably than he treats or would treat other persons’.³² The Equality Act 2010 (EA 2010), section 13(1), provides, ‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.’

The formulas are substantially the same. The obvious difference here is that the phrase ‘on grounds of’ appears as ‘because of’ in the Equality Act 2010. However, in the British legislation, ‘because of’ was expressed to have the same meaning as ‘on grounds of’.³³ The definition does *not* state ‘because of *his* (or *her*) protected characteristic’. The omission of a possessive adjective is key here. Rather than identifying the targeted victim with a protected characteristic, the conduct need only be because of *a* protected characteristic, a somewhat more abstract term. EU equality directives are similarly formulated. For example,

‘[D]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin...’³⁴

As indicated above, this is in contrast to the US Civil Rights Act 1964, whose employment discrimination provisions express that the protected characteristic belongs to the victim-claimant.³⁵

The requirements under section 13’s formula are, (1) a comparison of how a person in the same circumstances (save for the protected characteristic element) would have been treated. In the ‘simple’ examples,³⁶ for instance, the husband, or companion at the bar, would be white. But the comparator can be hypothetical. (2) Treatment ‘because’ of (3) the protected characteristic in question. In the simple examples, the conduct was because of the race of the third party, or perhaps, the interracial relationship.

³² Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 SR 2006/439 (SORs), reg 3(1). FETO SR 1998/3162, art 3 is substantially the same.

³³ Explanatory Notes to the Equality Act 2010, para 61.

³⁴ Race Directive 2000/43/EC, art 2(2)(a).

³⁵ Civil Rights Act 1964, Title VII, s 706 (42 USC s 2000e-2), see n 11.

³⁶ See p 0000, ‘Introduction’.

Thus, the key to the statutory formulas encompassing associative discrimination is the absence of any requirement that the victim-claimant holds the relevant protected characteristic. This goes much further than necessary for the ‘simple’ examples of associative discrimination outlined above, which could be explained by the targeted victim’s own race, or perhaps the interracial relationship. This broader legislative intent is confirmed by the inclusion of expressed exceptions that require the targeted victim to hold the relevant protected characteristic.³⁷

Having considered and provided exceptions, Parliament must be presumed to expect that the definitions of discrimination should not be read down out of sympathy to any particular reason other than those it expressed.³⁸ As Lord Simon once opined on the same formula in the Race Relations Act 1968, it would be ‘impermissible’ to read it as if it referred to *his* (or *her*) race, as ‘this would involve reading into the subsection a word which is not there’.³⁹ As noted above, the ECJ has stated much the same thing: that the equality legislation is to combat discrimination by reference to a particular protected characteristic rather than ‘a particular category of person’.⁴⁰ The open formula gives considerable scope for case law to mark the boundaries of direct discrimination law.

Accordingly, in arguing that associative discrimination is not a term of art, the starting point is that the statutory text does nothing to encourage it. A good reason for this is the risk of missteps. Yet, in *Lee v Ashers*, the Supreme Court seemed transfixed by the ‘associative’ notion to the exclusion of all other thinking.

³⁷ e.g. pregnancy and maternity (EA 2010, ss 17, 18), being married or in a civil partnership (s 13(4)). Religious organisations can discriminate because of the victim-claimant’s sexual orientation or religion, in the fields of Services, Public Functions, Associations, and Premises (Sch 23, para 2). For the extensive employment exceptions, see Sch 9, and for services, Sch 3.

³⁸ See *Bull v Hall* [2013] UKSC 73 [38] (Lady Hale), on the predecessor to EA 2010, Sch 23 (ibid): ‘Parliament was very well aware that there were deeply held religious objections to what was being proposed and careful consideration had been given to how best to accommodate these within the overall purpose. Parliament did not insert a conscientious objection clause for the protection of individuals who held such beliefs. Instead, it provided... a carefully tailored exemption for religious organisations and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation.’

³⁹ *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289-290, commenting on section 13’s predecessor, RRA 1968, s 1(1), which similarly omitted a possessive adjective.

⁴⁰ On the Race Directive 2000/43/EC, Case C-83/14 *CHEZ* [2016] CMLR 14, para 56; on the Framework Directive 2000/78/EC (sexual orientation, age, disability, and Religion or belief), Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, para 38 (also para 50).

4. THE CASE OF *LEE V ASHERS BAKERY*

In *Lee v Ashers Bakery*,⁴¹ a customer, whose sexual orientation was found to be irrelevant, ordered a cake to be iced with the slogan ‘Support Gay Marriage’ and the logo ‘QueerSpace’ (a gay rights group for which the cake was intended). This occurred in Northern Ireland, at a time when same-sex marriage was not legally recognised.⁴² The bakers refused to supply the slogan because same-sex marriage was against their religious belief. The Supreme Court rejected the claim of sexual orientation discrimination. The initial misstep in this case came when, giving judgment for the unanimous Court, Lady Hale wrote, ‘This was a case of associative discrimination or it was nothing.’⁴³ Given this premise, the reasoning was not entirely clear, but three bases can be detected from the judgment: (1) any association was not ‘close enough’; (2) ‘message cases’ were exceptional; (3) the refusal ‘applied to all’, and so could not be because of sexual orientation. Each related to a notion of associative discrimination, although the first was at the heart of it, while the second and third bases were supplementary with broader implications.

(1) The ‘Close Enough’ Rubric

On the facts, the Supreme Court held that the connection with sexual orientation had to be ‘closer’: treatment that ‘has something to do with the sexual orientation of some people’ was ‘very far from’ the association required. Lady Hale observed that in addition to gay and bisexual people, the ‘message’,

‘could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring’.⁴⁴

⁴¹ [2018] UKSC 49.

⁴² See now, Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019/1514, in force 13 January 2020.

⁴³ [2018] UKSC 49 [34].

⁴⁴ *ibid* [33].

In other words, as the slogan could be associated with such a wide range of persons, many of whom were heterosexual, any association with sexual orientation was not close enough. This has a ring of authenticity about it. The label ‘associative’ implies a degree of closeness, or proximity. It is also more liberal than Schwartz’s ‘relationship’ theory, suggesting a looser connection than a relationship is sufficient, and not requiring the targeted victim to hold any protected characteristic. Of course, the accompanying problem is the imprecision. The judgment expressly declined to define the degree of closeness required, considering this ‘unwise’.⁴⁵ This suggests that it is not confined to an exhaustive list of ‘close personal relationships’, including, say, a spouse, a cousin, a second cousin, a great uncle, and so on. Instead, it could be something more generic, such as *any* ‘close personal relationship’, each case depending on a factual enquiry into the actual proximity and cogency of the relationship. It could include old school friends, and exclude, perhaps, distant family members who have never met, or even close family members who have not spoken for years. However, the explanation given implies something broader than that. The observation that the ‘benefit’ could accrue to a diluted group of persons (by sexual orientation), implies that if the only persons in support of the cause (of gay marriage) were homosexual, then the association would have been ‘close enough’. Thus, a ‘close personal relationship’ is not a prerequisite. This renders a ‘close enough’ rubric not just vague in terms of proximity, but also terms of the protected characteristic of those with whom the association could be.

The vagueness is just one problem that comes with treating associative discrimination as a term of art. The resultant missteps become apparent upon revisiting Lady Hale’s analysis of the ‘association’. It turns as much on her choice of ‘associates’ as it does on the ‘close enough’ rubric. Rather like making comparisons in claims for equal pay,⁴⁶ or direct⁴⁷ and indirect discrimination,⁴⁸ there are likely to be

⁴⁵ *ibid* [34].

⁴⁶ See e.g. *Pickstone v Freemans* [1988] ICR 697 (HL).

⁴⁷ See e.g. *Showboat Entertainment Centre v Owens* [1984] ICR 65 (EAT), discussed, text to nn 19 and 66.

⁴⁸ See e.g. *Orphanos v QMC* [1985] AC 761, 771 (Lord Fraser); I Leigh, ‘Of racial groups and non-groups’ (1986) 49(2) MLR 235; M Connolly, *The Judiciary, Discrimination Law and Statutory Interpretation: Easy Cases Making Bad Law* (Routledge, 2018) Ch 8, pp 174-182. For equal pay, see e.g. *Pickstone v Freemans* [1988] ICR 697 (HL).

many possibilities, with the choice being critical to the outcome. A risk with deploying the associative concept, especially when implemented with a ‘close enough’ rubric, is that in any one case, the possibilities are many and multifarious. The irony is that the whole exercise serves only to limit the law’s reach. Some possibilities are explored below, if only to demonstrate the folly of going down the associative blind alley. The possibilities considered here are associations with ‘diluted’ classes and specific identifiable persons. First though, some consideration is required of the relationship between these possibilities and the targeted victim.

(a) *Association between Whom (or What)?*

While the focus rests on the identity of any ‘associate’, it is largely overlooked that there are two sides to any ‘association’. On ‘this’ side of the equation is the targeted victim or ‘subject’. Schwartz’s relationship model requires the targeted victim to be in a relationship with the person bearing the relevant protected characteristic. Here, identifying both parties is straightforward. *Lee v Ashers* demonstrated that the notion of associative discrimination, when taken out of the context of Schwartz’s rigid model, becomes erratic, even for this seemingly straightforward task. This alone should be enough to undermine the utility of associative discrimination as a vehicle to identify liability. At all three levels of the litigation, there was no analysis of this point, just some assumptions. The county court found an association between the *customer* and sexual orientation (via gay marriage).⁴⁹ The Court of Appeal was less specific, indicating, if anything, that it was between the *slogan* and the Northern Ireland gay community.⁵⁰ In reversing these decisions, the Supreme Court seemed to be looking for an association

⁴⁹ [2015] NI CtY 2 [39], [60]. See also R Wintemute, ‘Lesbian and gay inequality 2000: the potential of the Human Rights Act 1998 and the need for an Equality Act 2002’ (2000) 6 EHRLR 603 (arguing for legal protection on the basis that homosexuality is better aligned to religion as a mutable characteristic).

⁵⁰ [2016] NICA 39 (Morgan LCJ, for the Court) [58] ‘There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community.’ Although this seems to confuse associative and indissociable theories, the conclusion points to associative.

between the *customer* and sexual orientation⁵¹ (which, unlike the county court, it did not find). But the finding that the ‘benefit’ of the slogan could accrue to a wide ‘diluted’ group, artfully shifted the focus from the *customer’s* association with sexual orientation to that of the *slogan* and its apparent broader, diluted, reach. Indeed, later in her speech, Lady Hale insisted that, ‘The less favourable treatment was afforded to the message not to the man’,⁵² implying that to succeed, the ‘subject’ had to be the victim-claimant (the customer), and not the slogan (or ‘message’), or anything else. This was not expressed in concrete terms, and neither was any reasoning provided underpinning such a requirement. It is arguable, at least, that the targeted ‘subject’ could have been, say, the request, or the refusal. Either of which would be more closely associated with sexual orientation. Similarly, the *customer*, by ordering the cake to be decorated with the slogan alongside the QueerSpace logo, must have been associated by the bakery with QueerSpace – a gay rights group – and thus associated with sexual orientation.⁵³ Upon this, it could be argued that the Supreme Court found the answer it wanted by picking the two remotest contenders for its own ‘closeness’ test (the message and the diluted group). Assuming, as we must, that this was not the case, the irregularity demonstrates the susceptibility to manipulation if associative discrimination is treated as a term of art.

(b) The Potential Associates

The next step is to explore the potential ‘associates’. These have been sub-divided thus: (i) a ‘diluted’ class of persons, and (ii) specifically identifiable persons.

(i) The ‘Diluted’ Class of Persons

⁵¹ [2018] UKSC 49 [32], citing the Explanatory Notes to the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, para 7.3: ‘when a person treats another person less favourably on the grounds of his/her sexual orientation... or the sexual orientation/perceived sexual orientation of another person with whom *they* associate.’ (Emphasis supplied.) See also *Gill v Northern Ireland I Council for Ethnic Minorities* [2002] IRLR 74 (NICA) [33] (Carswell LCJ).

⁵² [2018] UKSC 49 [47].

⁵³ See below, text to n 57.

A feature of the ‘associative’ decision in *Lee v Ashers* was the choice of persons by which the ‘close enough’ rubric was tested. It was noted above that the group ‘benefitting’ from the slogan included ‘the children, the parents, the families and friends of gay people’.⁵⁴ This was the widest possible group of persons who could be associated with the slogan. It meant that, in terms of the relevant protected characteristic (sexual orientation), it was somewhat ‘diluted’, including as it did, homo- and heterosexual persons. As we know, this association was not ‘close enough’ for Lady Hale. The criticism here is that it would have been more realistic to consider some sub-categories, such as those attending the event for which the cake was intended, or just those persons wishing to have a same-sex marriage. The Court’s analysis turned a blind eye to the cake’s intended purpose, which was QueerSpace’s celebration of the end of ‘Northern Ireland Anti-homophobic Week’ and to mark the momentum towards legalising same-sex marriage. It was a *private* event⁵⁵ for this ‘small volunteer group’.⁵⁶ Bear in mind the group’s logo - dominated by the word ‘QueerSpace’⁵⁷ - was also to be iced on the cake. It you were to associate the slogan with ‘beneficiaries’ at all, it would have been more straightforward to associate it with the QueerSpace group or its members, who were the obvious ‘beneficiaries’. It is reasonable to presume that the cake was intended to be eaten, and so not even the slogan would have survived beyond this event to ‘benefit’ per chance a heterosexual non-member. No enquiry was made as to the composition of the QueerSpace group, whose membership, on the face of it, was unlikely to comprise any heterosexuals. When the cake was intended for a temporary purpose for an exclusive group at a private function, it was unrealistic to associate the slogan with *anyone* who supported same-sex marriage.

An alternative association could be drawn from the *refusal*. The basic reason for the refusal was, ‘I do not agree that homosexuals should be able to register a same-sex marriage.’ Upon this, an association could be with just those wanting, but prevented from registering, a same-sex marriage, a narrower and certainly more exclusive class, comprising a sub-category of homosexual persons in Northern Ireland.

⁵⁴ [2018] UKSC 49 [33].

⁵⁵ *ibid* [10]. See also [2015] NI Cty 2 [6]; [2016] NICA 39 [5]. Emphasis supplied.

⁵⁶ [2015] NI Cty 2 [60].

⁵⁷ See < <http://www.queerspace.org.uk/> > accessed 23 December 2019.

Thus, in this case there existed ‘associated’ groups that were far more realistic. It would have been reasonable to presume that less favourable treatment because of either of these classes of persons was ‘close enough’ to be treatment because of sexual orientation.

(ii) Association with Specific Identified Persons

Another feature of Lady Hale’s ‘associative’ judgment was the citation of the ECJ decision *Coleman v Attridge Law*.⁵⁸ It will be recalled that the Court held that it was directly discriminatory to treat a mother less favourably because of her child’s disability. Lady Hale noted pertinently, ‘In that case, there was a specific identified person whose disability, the protected characteristic, was the reason for the less favourable treatment.’⁵⁹ This suggests that for the Supreme Court, associative discrimination does not go beyond the protected characteristic of a real identifiable (third party) person. There are four particular talking points here.

First, as demonstrated above, the members of QueerSpace could have been a group of ‘specifically identifiable’ persons, yet no inquiry was made into this. Second, the implication of Lady Hale’s observation that the ‘benefit’ could accrue to a ‘diluted’ group of persons (including heterosexuals and ‘the children, the parents, the families and friends of gay people’⁶⁰), is that if the only persons ‘benefitting’ were homosexual, the association could have been ‘close enough’. For Lady Hale then, the claimant’s associative argument failed because not all of this group were homosexual and wanting to register a gay marriage. However, sharing the same protected characteristic does not make these persons necessarily ‘specific identified persons’. It is quite likely, for example, that those in Northern Ireland wanting a same-sex marriage are not all known to the customer, or the bakery, or indeed, to each other. It is almost certain that they could not be identified for the Court. This suggests a

⁵⁸ Case C-303/06, [2008] 3 CMLR. 27.

⁵⁹ [2018] UKSC 49 [29].

⁶⁰ [2018] UKSC 49 [33].

contradiction in the judgment. It implies the association could be close enough with persons unknown while demanding an association with specific identified persons.

Third, it bears repeating that the legislative provision does not restrict direct discrimination to any (known or unknown) particular person's protected characteristic.⁶¹ Therefore, to restrict its scope to an association with a 'specific identified person', a court would have to read words into the statute, something ordinarily impermissible.⁶² Of course, conflicting EU law would be a valid reason to depart from the rule. Lady Hale deployed *Coleman*, but *Coleman* in no way limited the scope of the domestic definition of direct discrimination. Quite the opposite. It actually extended the UK's definition of direct disability discrimination, which at the time was limited to claimants with a disability, and thus excluded associative discrimination.⁶³ The ECJ did this under a principle of discrimination per se, rather than against 'a particular category of person'.⁶⁴ This certainly rules out restricting associative discrimination to a connection with just one particular identifiable person. If anything, the rationale of *Coleman* undermines the seemingly restrictive finding in *Lee v Ashers*.

Fourth, case law *not* cited in *Lee v Ashers* demonstrates the limitation of confining an analysis to the associative notion, which is to neglect the broader reach of direct discrimination. Consider again the case of *Showboat Entertainment Centre v Owens*,⁶⁵ where a white manager of an amusement centre was dismissed for refusing to obey an instruction to ban black youths. In a well-received decision, the EAT held that the definition of direct discrimination, not being qualified with a possessive adjective (*his* or *her* race), was broad enough to cover the manager's claim of direct racial discrimination. Thus, there can be liability where the treatment was rooted in the race of a third party (the black youths). This did not depend on any relationship, or association, with the black youths, other than at some time in the future, these yet-to-be identified persons would attempt to enter the Amusement Centre. At the time of the dismissal, they were purely hypothetical. Again, it did not matter whether or not the employer or

⁶¹ See above, p 0000, '3 ASSOCIATIVE DIRECT DISCRIMINATION - THE LEGISLATIVE FRAMEWORK'.

⁶² Bear in mind here Lord Simon's edict against doing this to exclude associative discrimination from the legislation: *Race Relations Board v Applin* [1975] 2 AC 259 (HL) 289-290; see text to n 39.

⁶³ Disability Discrimination Act 1995, s 3A(5): 'A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably ...'.

⁶⁴ Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, para 38 (also para 50).

⁶⁵ [1984] ICR 65 (EAT).

the manager knew any of the black youths. As such, *Showboat* appears to offer a much more fluid approach to the closeness required in associative cases.

It is *Showboat* perhaps, that offers a key to unlocking the problem under the UK regime. The decision did not even rely on the existence of the third parties. Browne-Wilkinson J reasoned, ‘The only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations.’⁶⁶ Thus, for the ‘less favourable’ element, Browne-Wilkinson J deployed as the (hypothetical) comparator, a white manager who *would have* obeyed the instruction, and so would not have been dismissed. Had there been no black youths in the vicinity, and the instruction was uttered solely out of bigotry, the manager’s claim would stand if, say, he had objected and was dismissed as a result, or just resigned out of disgust.⁶⁷ The point is that there need not be *any* persons with a protected characteristic in the scenario. This chimes with the ‘discrimination per se’ edict from *Coleman*.

Once the reasoning goes down the associative route, it becomes blinkered to all other possibilities offered by the broader definition of direct discrimination, which, as amplified in *Showboat*, is not confined by notions of ‘close enough’, ‘associative’, the protected characteristic of ‘specific identifiable persons’, or that of *any* person. Indeed, during the passage of the Equality Bill, the Government rejected an amendment to specify ‘associative’ discrimination, for fear of unduly narrowing the scope of direct discrimination:

‘Here is the core of why we do not think that we should accept the amendment. The “because of” turn of phrase in clause 13 is broad enough and is intended to be broad enough to cover much more than just cases in which the less favourable treatment is due to the victim’s association with someone who has the characteristic or because the victim is wrongly thought to have that characteristic.’⁶⁸

⁶⁶ *ibid*, 71. He repeated the point at p 73.

⁶⁷ He may have objected because, say, he was new to the area and/or the job, and assumed that there would be black customers; or he was simply disgusted by the employer’s bigotry. Note that in *Weathersfield v Sergeant* [1999] ICR 425, the Court of Appeal held that *Showboat* applied to constructive dismissal, where a similarly instructed worker merely resigned without defying the instruction.

⁶⁸ Hansard HC ‘Equality Bill’ Solicitor -General HC 17 June 2009, col 254: < <https://publications.parliament.uk/pa/cm200809/cmpublic/equality/090616/pm/90616s04.htm> > accessed 23 December 2019.

Lady Hale's reasoning demonstrated much that could go wrong when associative discrimination is treated as a term of art, instead of resorting to the section 13 formula as Parliament had intended. It led to needless speculation as to the identity of those who could be associated with the 'message' or the customer (this was not clear), and then, to retain some control over the outcome, required the devising of a vague and subjective 'close enough' rubric. This facilitates a unilateral choice of 'associates', allowing a court to pick the remotest, or closest, depending on the desired outcome. Here, Lady Hale's selection of the diluted class was the remotest, with the inevitable result. This was done with little fidelity to the statutory formula, without reference to *Showboat v Owens*, and with a selective citation of *Coleman*.

(2) Should 'Message Cases' be Immune from Discrimination Law?

If the 'close enough' rubric was too vague to explain the rejection of the associative claim in *Lee v Ashers*, other reasons are apparent in the judgment. As noted above, the refusal was about the slogan, or 'message', as it became characterised in this case. The judgment made a feature of this, seemingly suggesting that 'message cases' were immune from discrimination claims. As noted above, in removing the customer from the associative equation, Lady Hale insisted that the refusal was to 'the message not to the man.'⁶⁹ And later,

'The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed.'⁷⁰

⁶⁹ [2018] UKSC 49 [47].

⁷⁰ *ibid* [55].

In furtherance of this point, the judgment drew upon a recent case from the United States Supreme Court, *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*.⁷¹ For Lady Hale, the ‘important message’ (no pun was apparent) from *Masterpiece* was a ‘clear distinction between refusing to produce a cake conveying a particular message ... and refusing to produce a cake for the particular customer who wants it because of that customer’s characteristics.’⁷² In other words, refusing to supply a wedding cake for a same-sex marriage is quite distinguishable from refusing to supply a message.

The policy implications of this distinction are discussed below. Before then, it is important to identify a number of countervailing legal principles that were not referenced when making the distinction. First of all, the default legal position is that withholding one service, while providing other services, is no defence to a discrimination claim. Without a clear distinction, a willingness to provide the customer with a different slogan or other patisserie ought not to make a difference,⁷³ just as a hotel refusing a double room to a same-sex couple cannot escape liability by offering single rooms.⁷⁴

The effect of this message distinction was not only to undermine the ‘associative’ claim, but to immunise ‘message cases’ entirely from discrimination law. One might expect that such a wholesale exemption would be marked with a clear-cut, legally sound and durable boundary. A caution from Lord Nicholls is appropriate here. He advised that ‘in the application of this [discrimination] legislation... legalistic phrases, as well as subtle distinctions, are better avoided so far as possible’.⁷⁵ Moreover, the distinction was made without reference to the *Coleman* edict (noted above) that equality law is to combat discrimination by reference to a particular protected characteristic and ‘not to a particular category of person’.⁷⁶ It was also made without an opinion on the seemingly germane *Sanderson*

⁷¹ (2018) 138 S Ct 1719.

⁷² [2018] UKSC 49 [62].

⁷³ In *Gill v El Vino* [1983] QB 425 (CA) a wine bar’s practice of providing women with table while excluding them from the bar area amounted to direct sex discrimination.

⁷⁴ See *Bull v Hall* [2013] UKSC 73. See also, R Wintemute, ‘Recognising new kinds of direct sex discrimination: transsexualism, sexual orientation and dress codes’ (1997) 60 MLR 334, pp 354–55, noting, ‘For the woman who wants badminton at the same price as a man, free swimming is no consolation.’

⁷⁵ *Nagarajan v LRT* [2001] AC 501 (HL) 513.

⁷⁶ Case C-303/06 *Coleman v Attridge Law* [2008] 3 CMLR 27, para 38 (also para 50); see above, text to n 58. See also Case C-83/14 *CHEZ* [2016] CMLR 14, para 56.

decision that homophobic abuse without reference to any particular person's sexual orientation amounted to unlawful harassment.⁷⁷

Equality law mandates that businesses must provide its services without discrimination. Yet, it seems, someone in the business of providing slogans is exempt, unless a refusal is about the customer or someone 'closely associated'. A bakery was in business inter alia to provide slogans on its cakes. It refused to supply one favouring same-sex marriage when it would have provided one for opposite-sex marriage. Distinguishing between the service and the customer (or 'the message and the man') could not only seem overly subtle, but a touch flippant. This is not a case of a business refusing to provide certain services beyond its speciality or abilities, such as a hairdresser specialising in Afro-Caribbean hair refusing to cut European hair, or vice versa. As it happens, such an exception is provided by the Equality Act 2010,⁷⁸ and so a *statutory* boundary already exists, the need for which demonstrates that cases falling inside of it would otherwise amount to discrimination. Instead of devising another boundary, Lady Hale could have drawn on this.⁷⁹ If a dividing line were required, this is it, and a service in the business of providing messages dictated by the customer does not fall within it.

Not only is the message distinction a statutory outlier, it is full of uncertainty, evoking the question of when words, or images, become a 'message'. This could see tribunals descending into such debates with refusals to provide cakes iced with, say, a Union Jack, or the words, 'It's Christmas', 'Bar Mitzvah', or 'Jesus' (which could be merely honouring a family member with his not uncommon Hispanic name).⁸⁰ Given the existing legal markers and the subtleties and uncertainties inherent in the distinction, one would expect clear and cogent reasons for this statutory outlier.

Instead, the judgment merely muddied the waters further with reasoning that actually undermined the message distinction. First, the distinction became even finer with Lady Hale finding that the refusal to supply the message *did* amount to direct discrimination on the ground of Political

⁷⁷ *English v Sanderson* [2009] ICR 543 (CA) (discussed above, text to n 26). Extracts from the majority and dissenting judgments were cited, but no opinion was given: [2018] UKSC 49 [30]-[31].

⁷⁸ See EA 2010, Sch 3, Part 7, para 30; Explanatory Notes, para 745.

⁷⁹ The case was heard under the SORs 2006 SR 2006/439, which do not provide this exception. But the Supreme Court was not creating an exception just for Northern Ireland.

⁸⁰ A case here could be assembled around the protected characteristic of Latino, or Spanish, for example. The matter could become more complex if the refusal is wrongly based on religious grounds, generating an argument for perceived direct discrimination, instead of indirect discrimination.

Opinion (specific to Northern Ireland⁸¹). This was because (in contrast to the sexual orientation claim) ‘there is here a much closer association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are “indissociable”’.⁸² And so, the *same* customer, requesting the *same* service with the slogans *QueerSpace* and *Support Gay Marriage* could be associated with a political opinion but *not* with sexual orientation. While the context may render the question a fact-sensitive one, it remains a distinction difficult to comprehend, and as Lord Nicholls once advised, better avoided.

Second, the US case (*Masterpiece*), cited in support, in fact decided (6-2) that the state had unlawfully interfered with a baker’s constitutional freedom of religion in bringing an action for refusing to supply a cake (apparently without a slogan) intended for a same-sex wedding.⁸³ The principal reason was that during the initial hearings the state had expressed undue hostility towards the baker’s religious beliefs, which was a breach of the baker’s constitutional rights under the First Amendment.⁸⁴ Some obiter dicta by two of the majority (plus the two minority Justices) was that the state had good reason not to have taken similar action against another three bakers for refusing to supply a cake iced with *anti-gay* messages. Such refusals were distinguishable because *these* bakers would have refused *anyone* such a cake.⁸⁵ The two minority Justices added that these were distinguishable as ‘message cases’.⁸⁶ Against this, three of the majority expressly rejected the message distinction,⁸⁷ with Justice Gorsuch finding it ‘irrational’, because no one could ‘reasonably doubt that a wedding cake without words conveys a message... it celebrates a wedding’.⁸⁸ (The remainder offered no opinion.) It would seem then, that citing *Masterpiece* as an authority for the message distinction is perhaps placing undue weight upon the case where a majority (3-2) of those who were concerned enough to cast an opinion were against it. Just two from a court of eight favoured it.

⁸¹ FETO 1998, SR 1998/3162, Art 3. The finding of discrimination was outweighed by the baker’s human rights of freedom of speech and religion (ECHR, Arts 9 and 10): [2018] UKSC 49 [56].

⁸² [2018] UKSC 49 [48].

⁸³ The Colorado Anti-Discrimination Act outlaws sexual orientation discrimination in the provision of services.

⁸⁴ (2018) 138 S Ct 1719, 1732 (Justice Kennedy, giving the Court’s judgment).

⁸⁵ *ibid* respectively, 1733-1734 (Justices Kagan and Breyer); 1750-1751 (Justices Ginsburg and Sotomayor).

⁸⁶ *ibid* 1750-1751 (Justices Ginsburg and Sotomayor).

⁸⁷ *ibid* 1735 (Justices Gorsuch and Alito); 1743-1745 (Justice Thomas).

⁸⁸ *ibid* 1738 (with whom Justice Alito concurred).

In fact, the ‘important message’ that the *Lee v Ashers* reasoning could draw from *Masterpiece* is apparent from the Court’s judgment given by Justice Kennedy, who wrote:

‘[T]he delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor...’⁸⁹

This shows that there are two competing bodies of law, the Colorado Anti-Discrimination Act and the US Bill of Rights, here the First Amendment guaranteeing freedoms of speech and religion.⁹⁰ If anything, the lesson to be taken from this is that apparently discriminatory refusals to provide a service for reasons of religion or free speech should be adjudged under the Human Rights Act 1998. Isolating claims as ‘message cases’ should not insulate them from discrimination law; if the defendant’s human rights are sufficiently violated, the discrimination law in question should be read down to comply, or declared incompatible.⁹¹

Thus, the existing legal markers - of withholding one service, subtle distinctions, the *Coleman* edict, the *Sanderson* principle, the existing in statutory boundary - combined with a more appropriate avenue to assess the merits of the refusal, the finding of political opinion discrimination on the same facts, and the unhelpful opinion from American case law, all indicate that the message distinction is technically troublesome and has no utility. As such, these cases should not be immune from discrimination law. In *Lee v Ashers*, the associative analysis led the Court to distinguish between the customer and the service requested. This was another misstep, with more than just technical consequences, as the following policy considerations demonstrate.

⁸⁹ (2018) 138 S Ct 1719, 1724. This was in fact cited in the *Lee v Ashers* judgment: [2018] UKSC 49 [60].

⁹⁰ The first ten Amendments (ratified in 1789) to the US Constitution are known as the Bill of Rights. See e.g. MJ Douma, ‘How the First Ten Amendments became the Bill of Rights’ (2017) 15 Georgetown Journal of Law & Public Policy 593. See also TM Massaro and ET Sullivan ‘Due process exceptionalism’ (2011) 46 Irish Jurist 117.

⁹¹ HRA 1998, s 3 and s 4, respectively. Indeed, that was the approach taken with the political opinion claim: [2018] UKSC 49 [56].

Policy Considerations

Even without these reasons against the homogenisation of ‘message cases’, it is possible to cast the distinction in a somewhat darker light on policy grounds. Lady Hale supported her ‘message’ analysis by deploying this simile: ‘It is more akin to a Christian printing business being required to print leaflets promoting an atheist slogan.’⁹² The simile remains in the field of services, and smacks of the old common law approach to commerce once characterised by Lord Diplock. Commenting on the relatively unambitious Race Relations Act 1968, he lamented,

‘This is a statute which, however admirable its motives, restricts the liberty which the citizen has previously enjoyed at common law to differentiate between one person and another in entering or declining to enter into transactions with them.’⁹³

However lamentable some judges may find the erosion of the Englishman’s liberty to discriminate, modern societies have recognised in law that some of these liberties are objectionable, if not thoroughly poisonous. As Lord Kerr more recently observed in the context of a religious-based refusal with race-based consequences,

‘[W]hen the answer to that religious question has consequences in the civil law sphere, its legality falls to be examined. If the decision has consequences that are not permitted under the law, the fact that it was taken for a religious purpose will not save it from the condition of illegality’.⁹⁴

⁹² [2018] UKSC 49 [47].

⁹³ *Dockers Labour Club and Institute Ltd v Race Relations Board* [1976] AC 285 (HL) 295–296. See also *Taiwo v Olaigbe* [2016] UKSC 31, [21] (Lady Hale).

⁹⁴ *R (E) v Governing Body of JFS* [2009] UKSC 15 [119]. A school giving priority to Orthodox Jews, thus discriminating against all other racial groups (as well as non-Orthodox Jews). Faith schools enjoy some exemptions from religious, but not racial, discrimination.

This is a reminder that any business providing services to the public has entered the ‘civil law sphere’. Consequently, the starting point must be that anyone in the business of supplying slogans is obliged to provide them without discrimination because of certain specified protected characteristics. Bear in mind also that a generally accepted purpose of discrimination law, at least when concerning minorities, is to address social exclusion.⁹⁵

Christian printers should be obliged to supply atheist⁹⁶ slogans, just as a Muslim printer should be obliged to provide Christian slogans. It is no different from a Christian hotelier being obliged to supply double rooms to same-sex couples.

Obliging businesses to provide personally disagreeable slogans is better supported by considering the potential harm caused by this apparent liberty to refuse. It may have been assumed that Mr Lee easily would have found another bakery willing to supply his slogan. But what if no one in town would supply the slogan, and thus treat gay persons as social outcasts, depriving them of the equality that discrimination law is assumed to protect? Now the matter seems more sinister. Suppose all the bakers or printers in an English town, somewhat resentful of recent eastern European immigration, refused to produce a slogan, ‘Support the Polish Veterans’, celebrating the Polish World War II servicemen (who in fact had settled in the town after the War). Some of these suppliers may have felt intimidated by the local resentment, and with no legal imperative to resist (because of *Lee v Ashers*), played their part in alienating people defined by their national origin, marginalising both war heroes and recent immigrants as social outcasts. One could imagine any number of pernicious embargos on causes or slogans associated with a protected characteristic. Take a scenario from an era that informs us of the need for equality law: in anticipation of the Nazis taking power, every baker in a German town refused to ice a cake, ‘Support the Synagogue’, or for that matter, ‘Support Gay Marriage’. Few, if any, would argue here that the bakeries’ liberty to trade with whom they choose should prevail over the poisonous harm caused by the embargo. These apparently extreme examples show the potential of *Lee v Ashers*. Minorities, notably Roma and Travellers, still face populist *and* institutional persecution

⁹⁵ See e.g. H Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66(1) MLR 16; S Bunbury, ‘Unconscious bias and the medical model: how the social model may hold the key to transformative thinking about disability discrimination’ (2019) 19(1) IJDL26.

⁹⁶ Atheism is a ‘belief’ under the EA 2010, s 10; see Explanatory Notes, para 53.

throughout Europe, including blanket bans and segregation.⁹⁷ The point is twofold. Neither such blanket bans, nor the harm they can cause, are unrealistic suppositions.

Yet, in principle, each refusal is the same as the one in *Lee v Ashers*. The only difference is the extent of harm caused, a consideration not within the Supreme Court's principled reasoning. Bear in mind also, that in these 'slogan' cases, the customer's protected characteristic is irrelevant, as anyone would be refused. Therefore, if the customers were all Polish, Jewish, Roma, or homosexual, as the case may be, a blanket embargo would remain lawful, or at least untested as long as there were some with a different protected characteristic who could reasonably be imagined to agree with the message in question.

Against this, there is the risk of abuse. Lady Hale's 'Atheist' simile evokes more offensive slogan requests, such as a pro-Nazi slogan from a Jewish business, or images of Mohammed from a (Sunni) Muslim printer. On the basis that these requests (and subsequent refusals) relate to the protected characteristics of race or religion, as the case may be, it could be deduced that *Lee v Ashers* saves such refusals from being discriminatory and removes any obligation on the businesses to supply. However, this need not be so, for two reasons.

First, such 'anti-protected characteristic' requests at the least fall foul of any policy considerations and can be marginalised. Anti-discrimination law is not in place to protect racism or any other prejudice covered by the legislation. The issue arose in *Redfearn v Serco*,⁹⁸ where the claimant used the logic of discrimination law to claim that his dismissal for belonging to a racist political party was in fact discriminatory. The Court of Appeal rejected the claim, albeit on rather unsatisfactory

⁹⁷ The accounts are numerous. See, e.g. *any* volume of the European Roma Rights Journal, or the Roma Rights Quarterly; for example, Panayote Dimitras, 'Greece's Non-Implementation of International (Quasi-)Judicial Decisions on Roma Issues' [2010] (1) Roma Rights Q 29 (charting racist police violence, inadequate housing and evictions and exclusion or segregation in education, ignored by Greek authorities). For Ireland see e.g. 'Nimbyism is the national sport of south Dublin' *The Irish Times* October 19, 2015 (residents blockading attempts to provide emergency accommodation for surviving Travellers now without homes following tragic fire); 'Publicans to defy law with blanket ban on Travellers', *Irish Independent* 2 August 2002. For the UK, see *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12 (Council's blanket ban on camping on open spaces ruled unlawful); 'Gypsy and traveller families "hounded out" of areas in act of "social cleansing" as councils impose sweeping bans', *The Independent* 18 November 2018. For human or social rights violations, see e.g. *European Roma Rights Centre (ERRC) v Bulgaria* (2019) 69 EHRR SE (systemic discriminatory practices targeting Romani women); *R (ERRC) v Immigration Officer at Prague Airport* [2005] 2 AC 1 (HL) (Roma targeted by immigration authorities); on inadequate housing and eviction rights, see *ERRC v Ireland* (2016) 63 EHRR SE9, *ERRC v Portugal* (2016) 62 EHRR SE6, *ERRC v France* (2010) 51 EHRR SE1.

⁹⁸ *Redfearn v Serco (t/a West Yorkshire Transport Service)* [2006] EWCA 659. See also, *Wheeler v Leicester CC* [1985] AC 1054 (CA and HL).

reasoning.⁹⁹ However, it is well within the traditions of statutory interpretation to reject such claims simply because using the legislation in this way would create an absurdity or anomaly not envisaged by the drafter.¹⁰⁰ It certainly would be absurd if anti-discrimination law came to the aid of someone *because* he was a racist (or homophobe, xenophobe, Islamophobe, misogynist, and so on). Likewise, the ECJ has the means to reject any such dissonant claims under its teleological approach to interpretation.¹⁰¹ Thus, it is possible to hold that the refusal of abusive requests is not discriminatory at all.

Of course, *Lee v Ashers* evokes the question of ‘anti-gay’ message requests. What if a baker (perhaps gay) is asked to ice a cake with the slogan, ‘Ulster says no to same-sex marriage’ or perhaps ‘Protect the traditional family’? The first refusal is explicit enough to be ‘on grounds of’ (heterosexual) sexual orientation, or at least indissociable¹⁰² from it. The second would depend on context. If it were the case (as encouraged under the Thatcher Government in the 1980s) that the ‘traditional family’ mantra was common currency for demeaning gay relationships,¹⁰³ then of course, this ‘convenient shorthand’¹⁰⁴ could be indissociable from sexual orientation, suggesting that a refusal was on that ground. At a time when same-sex marriage was not lawful, but same-sex relationships were, a court may entertain an argument that the first message is *relatively* benign, as it is distinguishable from gay relationships and restates the status quo (but see the baker’s human rights, below). As such, it would have held that the message was not anti-protected characteristic. Once same-sex marriage is legal, the argument would fail, of course. The request, demeaning to gay marriage and gay persons, would be ‘anti-protected characteristic’. Assuming the second ‘traditional family’ message carried an anti-gay

⁹⁹ See e.g. M Connolly, ‘The Multiple Definitions of Harassment and Direct Discrimination: a “Pandora’s Attic” (2009) 10 IJDL 101, 102-104 and 106-107.

¹⁰⁰ Commonly labelled the Golden Rule. See e.g. *Stock v Frank Jones (Tipton)* [1978] 1 WLR 231 (HL) 237 (Lord Simon) 238-239 (Lord Scarman); O Jones, *Bennion on Statutory Interpretation* (6th edn LexisNexis 2013) Div 5, Introduction to Pt XXI, and Pt XXI, s 312. Note that Redfearn won a human rights claim based on political opinion under ECHR, Art 11 (Freedom of Association): *Redfearn v United Kingdom* [2013] IRLR 51 (ECtHR).

¹⁰¹ See the explanation given in *R v Henn and Darby* [1981] 1 AC 850 (HL) 904-905 (Lord Diplock). In the US case, *Bellamy v Mason’s Stores* 508 F 2d 504, at 505 (4th Cir 1974) affirming 368 F Supp 1025, at 1026 (ED Va 1973), it was held that the Ku Klux Klan was not a religion under the Civil Rights Act 1964: ‘[T]he proclaimed racist and anti-Semitic ideology ... takes on a ... narrow, temporal and political character inconsistent with the meaning of “religion”’.

¹⁰² *Bull v Hall* [2013] UKSC 73, holding that ‘marriage’ and sexual orientation were indissociable.

¹⁰³ ‘Children who need to be taught to respect traditional moral values are being taught that they have an inalienable right to be gay. And children who need encouragement—and children do so much need encouragement—so many children—they are being taught that our society offers them no future. All of those children are being cheated of a sound start in life—yes cheated.’ Prime Minister Thatcher, Conservative Party Conference, Blackpool, 9 October 1987. < <https://www.margaretthatcher.org/document/106941> > or < *The Times* 10 October 1987 > both accessed 15 June 2020.

¹⁰⁴ *James v Eastleigh BC* [1990] 2 AC 751, 764 (Lord Bridge) equating ‘pensionable age’ with sex as, at the time, men and women had different state retirement ages.

sentiment, it would be also anti-protected characteristic. As such, a refusal here would not amount to unlawful discrimination.

Second, even if this ‘anti-protected characteristic’ policy did not apply, and any refusal were found to be discriminatory, the next consideration is the provider’s freedoms of speech and religion under the separate human rights regime. (Bear in mind that free speech includes a refusal to express something.¹⁰⁵) As noted above, during the *Masterpiece* discussion,¹⁰⁶ this is the proper forum to weigh the defendant’s human rights against the policy considerations favouring anti-discrimination law, such as those previously outlined. Further examples could include mischievous or malicious requests for slogans, deliberately to antagonise, humiliate, or even bankrupt the business,¹⁰⁷ knowing that it would find them offensive. An example of this justification exercise was given in the Canadian case *Brockie v Ontario*,

‘If any particular printing project ordered ... contained material that conveyed a message proselytizing and promoting the gay and lesbian lifestyle or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of [the supplier’s] religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of [the supplier’s] religious beliefs.’¹⁰⁸

¹⁰⁵ See e.g. *Lee v Ashers* [2018] UKSC 49, citing *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 [42].

¹⁰⁶ Text et al, to n 83.

¹⁰⁷ If a business is obliged to supply a service with which it profoundly disagrees, it might feel necessary to cease trading for fear of litigation. See e.g. *Bull v Hall* [2012] EWCA 83 [3].

¹⁰⁸ *Brockie v Ontario (Human Rights Commission)* (2002) 222 DLR (4th) 174 (Ontario Superior Court of Justice) [56].

Using this approach, (European) human rights jurisprudence provides enough discretion with its margin of appreciation,¹⁰⁹ justification (including proportionality),¹¹⁰ and ‘Living Instrument’¹¹¹ doctrines, to decide each case on its merits. What a court should not be doing is winking out an overly subtle exception in an attempt to hold that there was no discrimination in the first place. This can be applied just as readily to any ‘anti-gay’ requests. A message ‘proselytizing and promoting’ the heterosexual lifestyle and demeaning same-sex relationships may directly conflict with the baker’s religious or free speech rights.

Suppliers of ‘messages’ therefore, should have no reason to fear abusive or demeaning requests, as a refusal need not be discriminatory, and in any case, it would be protected by their overriding human rights of freedoms of speech or religion. The human rights consideration could apply even where the request was inadvertently offensive to the supplier, as appeared to be the case in *Lee v Ashers*. The advantage of this approach is that even if a supplier is entitled to refuse, it does so only because of its own particular genuine and cogent legally recognised beliefs. This means that the likelihood of social exclusion is minimalised, as suppliers more generally are less likely to have such a defence (as in the anti-Polish refusals, above).

(3) Treatment ‘Applying to All’

In *Lee v Ashers*, Lady Hale’s characterisation of the refusal as affecting ‘People of all sexual orientations’¹¹² was an observation deployed to hold that this could *not* be direct discrimination, associative or otherwise. As well as drawing on dicta from *Masterpiece*,¹¹³ Lady Hale cited a well-

¹⁰⁹ On the limited margin afforded in domestic cases, see *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 [118] (Lady Hale); *Steinfeld v Secretary of State for Education* [2018] UKSC 32.

¹¹⁰ See e.g. *Karner v Austria* (2003) FLR 623 (ECtHR).

¹¹¹ *Öcalan v Turkey* (App No. 46221/99) (2005) 41 EHRR 45, [163]: ‘The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.’ See also, *Zaunegger v Germany* (2010) 50 EHRR 38, para 60.

¹¹² [2018] UKSC 49 [25].

¹¹³ *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 138 S Ct 1719 (2018 US Sup Ct). See above, text et al, to n 83.

known rubric, ‘It cannot constitute direct discrimination to treat all employees in precisely the same way.’¹¹⁴ The citation is from the Court of Appeal in *Islington LBC v Ladele*.¹¹⁵ Here, a registrar was subjected to disciplinary proceedings for refusing to conduct (same-sex) civil partnerships, for reasons of her religious beliefs. After rejecting the registrar’s direct discrimination claim because all disobedient registrars would be treated in the same way, the Court of Appeal went on to analyse the case as indirect discrimination.

There are two observations to be made here. First, while the refusal in *Lee v Ashers* would have been made to all *customers*, it concerned a service specific to a protected characteristic. This is akin to an employer refusing to hire all *applicants* who were married to a black man. Both refusals apply to all, but each is specific to a protected characteristic, and expressed to be so, or in the jargon, the treatment was ‘facially discriminatory’. By contrast, the discipline in *Ladele* applied to all acts of disobedience and was *not* specific to any protected characteristic. It was not facially discriminatory.

Second, assuming for the moment that the characterisation was correct, and the refusal was not specific to any protected characteristic, the next step for any discrimination lawyer would be a consideration of *indirect* discrimination. Yet, Lady Hale refused to consider this, and without providing reasons.¹¹⁶ If she had done so, the analysis might have run as follows.

The elements of indirect discrimination require an unjustified practice applied to all that puts a protected group, as well as the claimant, at a particular disadvantage.¹¹⁷ Thus, the refusal to supply the message, which applied to all, was intrinsically liable¹¹⁸ to have particularly disadvantaged the predominantly homosexual members of QueerSpace (for whom the cake was intended), as well as Mr Lee (who, being gay, suffered the same disadvantage). The outcome would have then turned on objective justification, which could appreciate the bakery’s human rights of freedom of speech and

¹¹⁴ *Islington LBC v Ladele* [2007] ICR 387 (EAT) [53] (Elias J), adopted by [2010] 1 WLR 955 (CA) [29] (Lord Neuberger), cited by Lady Hale, and in *Lee Ashers* [2018] UKSC 49 [23].

¹¹⁵ *ibid.*

¹¹⁶ [2018] UKSC 49 [21]. Contrast *Onu v Akwivu, Taiwo v Olaigbe* [2016] UKSC 31 [31]-[33], where, despite the claimant’s concession that there was no indirect discrimination, Lady Hale discussed the matter.

¹¹⁷ SORs, SR 2006/439 reg 3(1)(b); EA 2010, s 19.

¹¹⁸ See Case - C237/94 *O’Flynn v Chief Adjudication Officer* [1996] ECR I-2617; and on the EA 2010, *Homer v Chief Constable of West Yorkshire* [2012] ICR 704 (SC) [14] (Lady Hale).

religion. Note here, although the claimant must share the same protected characteristic as the group, it is irrelevant that the bakery might not have known, or perceived, Mr Lee was homosexual.

This ‘refuse-all’ analysis was as flawed as the message distinction. It attempts to disguise the element of sexual orientation within the treatment. Thus, even if the direct discrimination analysis was watertight, the matter should have defaulted to a consideration of indirect discrimination.

(4) **The Missteps in *Lee v Ashers***

The discussion on *Lee v Ashers* argues that the three possible reasons underpinning the decision are deceptive devices, unable to disguise the discriminatory element in the bakery’s refusal. The ‘close enough’ rubric, the ‘message distinction’, and the ‘refuse-all’ theory were missteps that do not stand scrutiny. The vague and subjective ‘close enough’ rubric led to unconvincing speculation as to the identity of the ‘associates’ and is susceptible to manipulation in favour of a desired result. It was made with little fidelity to the statutory formula, and without reference to obvious sources of authority, such as *Applin*,¹¹⁹ *Showboat v Owens*, and the broader bases of *Coleman* and *English v Sanderson*.

There is no support in the equality legislation for the message distinction. This statutory outlier was also contrary to a number of legal principles and even the judgment’s own reasoning on the political opinion claim. In addition, there are strong policy reasons why ‘message cases’ should not be immunised from discrimination law, with abuse, and freedoms of speech and religion, being addressed under the separate respective interpretive and human rights regimes. These have the benefit of minimalizing any consequent social exclusion. Additional missteps were the reliance on the unavailing *Masterpiece* case and ‘Atheist’ simile.

The final misstep was the deployment of *Ladele*. While the case was used to close down the direct discrimination claim, its partial citing facilitated an unexplained avoidance of the usual consequence of an indirect discrimination analysis.

¹¹⁹ *Applin v Race Relations Board* [1973] QB 815 (CA) 828 and [1975] 2 AC 259 (HL). See above, text to nn 1,2 and 39.

It may appear that much of the criticism in this article, notably the speculation as to potential ‘associates’, is following *Lee v Ashers* down the associative blind alley. The purpose in doing this was to highlight the unnecessary complications that can arise if associative discrimination is treated as a term of art under a statutory regime that dictates no such notion, and certainly no such bespoke restrictions. Almost to the exclusion of any other thinking, this notion supplanted the basic questions posed by the statutory formulas of direct and indirect discrimination. This was surprising, not least because a ‘simple’ example of associative discrimination recognised by the House of Lords as early as 1974 was done so on the straightforward interpretation of the open statutory formula and the ‘mischief’ of the Act.¹²⁰ This was another relevant authority that went uncited in *Lee v Ashers*. A simple resort to the statutory text and its mischief, or purpose (notably the ‘message’ policy considerations), would have resolved the case without these missteps.

(5) The Correct Approach?

It is not the purpose of this paper to provide a detailed alternative judgment for this case. Rather, it is to highlight that the Supreme Court asked the wrong questions and in doing so endorsed principles that have no place in the statutory regime, thus reducing the potential for some meritorious claims. What can be said is that for direct discrimination, the question should have centred on whether less favourable treatment because of same-sex marriage was less favourable treatment because of sexual orientation. Current jurisprudence suggests that the matter would turn on whether a court considered that gay marriage was indissociable from sexual orientation. Precedent suggests that it is,¹²¹ and on this basis there would be liability (subject to the defendant’s human rights). Should it be found that that this was not direct discrimination, then the question is whether the refusal amounted to (prima facie) indirect

¹²⁰ *ibid.*

¹²¹ *Bull v Hall* [2013] UKSC 73, holding that ‘marriage’ and sexual orientation were indissociable.

discrimination. As noted above, it is suggested that this would be the case, with the matter turning on the justification defence, including again the defendant's human rights.¹²²

5. CONCLUSION

Associative discrimination has two origins in modern discrimination law. One, from the United States, is a narrow but manageable theory dependent upon a *relationship* between the targeted victim and a third party. The *claimant's* protected characteristic must be a factor motivating the treatment. Its limited reach is down to the 'closed' (US federal) legislative formula. The other, stemming from the more open UK formula, has no such limitation. Hence, as early as 1973, the Court of Appeal, and subsequently, the House of Lords, recognised that associative scenarios fell within the UK open formula and its mischief, or purpose.¹²³ Its open formula meant that the claimant's protected characteristic need not be a factor.

The *Lee v Ashers* judgment appeared to have no knowledge of either origin. It did little more than serve to expose that under UK (and EU) legislation, the notion of associative discrimination as a term of art is a fiction. It has no complete theoretical basis and no utility other than providing our vocabulary with a convenient description of a certain factual scenario. The most obvious evidence of the haphazard reasoning is the conclusion on direct discrimination. The Supreme Court's indulgence in the 'associative' notion blinkered it to the broader potential of the direct discrimination formula. Seemingly unaware of the existing statutory exception for specialist services, and in what must surely be an affront to the statutory purpose, the 'message case' doctrine ring-fences a significant sector of commerce from its obligation to provide services without discrimination. An anti-abuse and alternative human rights approach would have minimalised this to just those instances of countervailing rights,

¹²² See above, text to n 117.

¹²³ *Applin v Race Relations Board* [1973] QB 815 (CA) 828 and [1975] 2 AC 259 (HL). See above, text to nn 1,2 and 39.

such as free speech. Meanwhile, the judgment's refusal to go further after holding that the practice 'applied to all' leaves unclear meaning of indirect discrimination in the UK's equality legislation.

The recommendations for either the Supreme Court, or Parliament, are as follows. First, either must clarify that associative discrimination is not a term of art, and in any case must not be used to the exclusion of the broader principles of discrimination legislation. Until such a time, litigants in anything beyond a 'simple' associative scenario, would be prudent to avoid pleading it as such, instead couching a case in terms of the broader statutory formulas, and relying on, if anything, a fluid but sound comparison (demonstrated in *Showboat v Owens*).

Second, the lawmakers must express that 'message cases' should be analysed only under an anti-abuse interpretation and human rights freedoms of speech and religion, and not under the definitions of discrimination.¹²⁴ Third, although there seems little can done on the 'apply to all' aspect of *Lee v Ashers* (Parliament can do no more than repeat the existing statutory formula), tribunals and courts could ignore it on the basis that no reasoning (and so no ratio decidendi) was apparent.

The use of 'associative' discrimination as a term of art is one open to so much manipulation discrimination law should steer well clear of it as a legal benchmark.

¹²⁴ Mr Lee's claim may be heard in the Strasbourg Court. If it distinguishes discrimination from objective justification, it may force a change in the law. See < <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-202151%22%7D> > accessed 16 June 2020.