

THREE TALES OF FEMALE MASCULINITY

Zachary A. Kramer*

I. INTRODUCTION

This Essay uses an untapped resource in masculinities theory—female masculinity—as a jumping-off point to sketch a new vision of sex equality in the workplace. More specifically, the Essay considers three case studies of masculine women who raised and lost sex discrimination claims. These women present three distinct expressions of female masculinity. The first is a lesbian woman who was fired from her job at a hair salon because of her “butch” appearance.¹ The second is a bartender who lost her job because she refused to wear makeup.² And the third is a transgender woman who had a job offer withdrawn after her supervisor learned that she was transitioning from male to female.³

All told, this Essay makes both a narrow and a broad contribution. In terms of its narrow contribution, the Essay seeks to carve out a space for female masculinity within masculinities theory. Masculinities theory has taken off like a rocket in legal scholarship, but it has done so by thinking almost exclusively about masculinity as constructed by and around men.⁴ It is time to open up the discussion to include constructions of masculinity that uniquely affect women. As for its broad contribution, the Essay seeks to initiate a conversation about the future of sex discrimination. Specifically, the Essay uses three stories about female masculinity to frame a critique of sex discrimination law’s prevailing vision of equality. It argues that modern sex discrimination demands a legal regime that caters to individuals rather than groups.

II. THREE TALES OF FEMALE MASCULINITY

This Part describes three distinct stories about female masculinity. These stories share two things in common. First, all three involve women who faced discrimination because of their masculinity, although their masculinity

* Associate Dean for Intellectual Life and Professor of Law, Arizona State University, Sandra Day O’Connor College of Law. For helpful comments and conversations along the way, thank you to Rhiannon Cornelius, Andy Hessick, Liz Glazer, and Judy Stinson. Thanks also to Ann McGinley for inviting me to participate in this symposium, as well as to Aaron Haar, Tom Chittum, and the rest of the staff at the *Nevada Law Journal*. Finally, a special thank you to Craig B. Haircuth for his wonderful research assistance.

¹ Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005).

² Jespersen v. Harrah’s Operating Co., Inc., 444 F.3d 1104, 1105–06 (9th Cir. 2006) (en banc).

³ Schroer v. Billington, 577 F. Supp. 2d 293, 299 (D.D.C. 2008).

⁴ One important exception is Judith Halberstam’s wonderful book on female masculinity, which remains the seminal account of female masculinity in our culture. See JUDITH HALBERSTAM, FEMALE MASCULINITY (1998).

manifests in distinct ways. Second, all three ultimately lost their claims. To be clear upfront, I am not offering these stories as a means to argue that sex discrimination law harbors some sort of deep bias against masculine women. My goal instead is to use these stories of masculine women to frame a larger discussion about the future of sex discrimination law.

A. *The Butch Lesbian*

Dawn Dawson worked as a hair assistant and stylist-in-training at Bumble & Bumble, a high-end hair salon in New York City.⁵ A self-described masculine lesbian woman,⁶ Dawson had a hard time fitting in at work. Despite being a group of outsiders themselves,⁷ Dawson's coworkers ridiculed her on a regular basis, often in front of clients. For instance, a coworker called her "Donald."⁸ One said that Dawson "needed to have sex with a man"⁹ while another said that she needed "to get fucked."¹⁰ And, another said that she wore "her sexuality like a costume."¹¹ As if the name-calling and taunts were not enough, Bumble & Bumble eventually fired Dawson. When her supervisor informed Dawson that she was being let go, the boss explained that Dawson would never be able to get a stylist position outside New York City, because her appearance and demeanor would frighten people.¹²

Dawson challenged her firing under Title VII of the Civil Rights Act. The thrust of her Title VII claim was that Bumble & Bumble engaged in unlawful gender-stereotyping by harassing and firing Dawson, because she did not conform to the stereotypical conception of femininity. The gender-stereotyping theory traces to the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,¹³ where the Court declared, in strikingly broad terms, that "we are beyond the day when an employer could evaluate employees by assuming or insisting that [employees] match[] the stereotype associated with their group"¹⁴ Like Ann Hopkins, the plaintiff in *Price Waterhouse*, Dawson argued that her employer penalized her for failing to look and act as would a stereotypically feminine woman.

At the same time, Dawson also brought a claim under the New York State and New York City Human Rights Laws, which, unlike Title VII, provide protection against sexual orientation discrimination.¹⁵ It is important to highlight a conceptual challenge presented by the facts of Dawson's case. Statutory

⁵ *Dawson*, 398 F.3d at 213.

⁶ *Id.*

⁷ *Id.* at 214 (noting that during Dawson's time at the salon, her coworkers included numerous lesbian and gay men, a bisexual, a female-to-male transsexual, and a pre-operative male-to-female transsexual who was transitioning while on the job).

⁸ *Id.* at 215.

⁹ *Id.*

¹⁰ *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301, 307 (S.D.N.Y. 2003).

¹¹ *Dawson*, 398 F.3d at 215. In all honesty, I have no idea what this comment means, though I know it's not a nice thing to say about someone.

¹² *Id.* at 215–16.

¹³ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁴ *Id.* at 251.

¹⁵ See New York State Human Rights Law, N.Y. EXEC. LAW §§ 290–301 (McKinney 2012); New York City Human Rights Law, N.Y.C. ADMIN. CODE § 8-107 (2011).

antidiscrimination law tends to take a strictly categorical approach to the issue of discriminatory causation. As a result, plaintiffs have had little success pursuing theories of intersectional discrimination.¹⁶ The discrimination alleged by Dawson was not categorical in nature; it lay at the intersection of Dawson's sex gender nonconformity and her homosexuality. Although she raised two distinct claims, Dawson faced an uphill battle—a battle she ultimately lost.

1. *By the Bootstraps*

The court rejected Dawson's gender-stereotyping claim on grounds that she was trying to "bootstrap" protection for sexual orientation into Title VII.¹⁷ The path the court took to reach this conclusion is worth spelling out in detail. It took the court three moves to reject Dawson's gender-stereotyping claim. First, the court issued a warning: when brought by an "avowedly homosexual plaintiff,"¹⁸ the gender-stereotyping theory presents a problem for an adjudicator.¹⁹ Second, the court elaborated on the problem: "Stereotypical notions about how men and women should behave will . . . necessarily blur into ideas about heterosexuality and homosexuality."²⁰ Finally, the court stated a prohibitory rule: "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'"²¹

From a distance, the analysis seems methodical. It's not. The court's analysis is problematic for two reasons. First, no court would ever rule that way in a case brought by a heterosexual employee, so the court is adopting a special rule for a subgroup of people.²² Second—and more importantly—the court is focusing on groups when it should instead be focusing on traits. The court's analysis bars lesbians and gay men from raising gender-stereotyping claims not because they cannot prove these claims but because of who they are. By highlighting the status of an "avowedly homosexual" employee, the court effectively transforms a gender-stereotyping claim into a sexual-orientation claim in disguise, even if the plaintiff employee did not seek to do so.

2. *A Curious Spot*

To make matters even more complicated, the court also rejected Dawson's sexual-orientation claim. Its reason for doing so was that Dawson did not raise sufficient evidence to support her sexual-orientation claim, which is another way of saying she could not prove that alleged discrimination was "because of" sexual orientation. Thus, Dawson found herself stuck in a curious spot: her claims were at once too gay and not gay enough. The court rejected Dawson's gender-stereotyping claim as impermissible bootstrapping (too gay). Yet the

¹⁶ *But see* Lam v. Univ. of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994). *Lam* is unusual because the court explicitly embraces intersectionality theory in considering the issue of discriminatory causation.

¹⁷ *Dawson*, 398 F.3d at 217–18.

¹⁸ *Id.* at 218.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)).

²² *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 229–30 (2009).

court concluded that she could not prove her sexual-orientation claim (not gay enough). In this regard, Dawson's case highlights the limitations of existing discrimination analysis, sex discrimination law has continually proven itself ill-equipped to handle complex discrimination claims.²³ The problem, of course, is that modern discrimination, as a social experience, is messier than ever before, with employees raising intersectional claims and other complex claims that focus on an employee's individuality rather than group membership. Thus, Dawson's case—like the other cases of female masculinity discussed in this Essay—foreshadows a coming crisis in discrimination law.

B. *The Woman Who Wouldn't Wear Makeup*

In 2000, Darlene Jespersen lost a job that she loved.²⁴ For over twenty years, Jespersen worked as a bartender at Harrah's Casino, in Reno, Nevada.²⁵ During her career at Harrah's, Jespersen accumulated a strong work record, earning the praise of coworkers and customers alike.²⁶ Things went downhill for Jespersen, however, when Harrah's adopted a new appearance code for its beverage service personnel.²⁷ The new policy—which Harrah's called the "Personal Best" program—required female employees to, among other things, wear makeup during their shifts.²⁸ The makeup requirement posed a problem for Jespersen, as she never wore makeup on or off the job.²⁹ Jespersen explained that wearing makeup made her feel "ill," "degraded," "exposed," and "violated."³⁰ She felt that makeup robbed her of her "credibility as an individual and as a person," so much so that she could not do her job well if forced to wear makeup during her shifts.³¹

Despite her many years of service and her exemplary record, Harrah's would not budge on the makeup requirement, and Jespersen soon found herself out of a job.³² She responded by bringing a sex discrimination claim under Title VII of the Civil Rights Act,³³ alleging that Harrah's "Personal Best" program—specifically the makeup requirement—amounted to unlawful sex discrimination.³⁴ Jespersen's theory of discrimination was that the makeup

²³ I make this point in greater depth in Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287 (2011).

²⁴ *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1107–08 (9th Cir. 2006) (en banc).

²⁵ *Id.* at 1106–07.

²⁶ *Id.* at 1107–08 (describing Jespersen's work as "exemplary" and noting her favorable customer reviews and employer evaluations).

²⁷ *See id.* at 1107.

²⁸ *Id.* The "Personal Best" program was part of Harrah's "Beverage Department Image Transformation" program.

²⁹ *Id.* at 1107–08.

³⁰ Appellant's Corrected Opening Brief at 33–34 n.8, *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. June 25, 2003) (No. 03-15045). For a useful and comprehensive discussion of Jespersen's case, see Devon Carbado, Mitu Gulati, & Gowri Ramachandran, *The Story of Jespersen v. Harrah's: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 105–152 (Joel Wm. Friedman ed., 2006).

³¹ *Jespersen*, 444 F.3d at 1108.

³² *Id.*

³³ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

³⁴ *Jespersen*, 444 F.3d at 1109.

requirement compelled female employees to conform to a stereotypical standard of femininity, a variation on the gender-stereotyping theory developed by the Supreme Court in *Price Waterhouse v. Hopkins*.³⁵

1. *The Individual and the Group*

In the end, Jespersen could not sustain her stereotyping claim against Harrah's. The Ninth Circuit concluded that Jespersen's injuries were too subjective to support a gender-stereotyping claim. According to the court, "[t]he record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job."³⁶ The court made clear that, as a general matter, an employee can challenge a grooming code on gender-stereotyping grounds: "We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance" ³⁷ But the "subjective reaction of a single employee," the court explained, is not sufficient to support such a claim.³⁸

It is important to spell out why Jespersen lost her claim and what it means for sex discrimination law more generally. Jespersen lost because, according to the court, her injuries were personal in nature. Had she been able to show that a makeup requirement was bad for *all* women, she would have been able to make use of the gender-stereotyping theory. To be clear, I think she could have made such a showing given the very real costs in time and money that come with wearing makeup,³⁹ not to mention the pervasive cultural burden, borne uniquely by women, of having to conform to a particular idea of beauty.⁴⁰

2. *The Past and Future of Sex Discrimination*

There is a larger matter to consider, however. The court in *Jespersen* drew a line in the sand. On the good side of the line are sex discrimination claims that arise from group harms. Consider a prominent example of such a claim. The Water and Power Department for the City of Los Angeles administered a retirement benefits system for its employees, which it funded, in part, through employee contributions.⁴¹ The Department required female employees to contribute greater monthly payments to its pension fund than male employees, which meant that female employees took home less pay than their male coworkers.⁴² The Department's reason for making women contribute more than men was that, on average, women tend to live longer than men.⁴³ The discrimination was formal in nature and it targeted women as a group.

³⁵ *Id.* at 1112 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

³⁶ *Id.*

³⁷ *Id.* at 1113.

³⁸ *Id.* ("This record, however, is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer.")

³⁹ Judge Kozinski makes this point in a dissenting opinion in *Jespersen*. See *id.* at 1117 (Kozinski, J., dissenting).

⁴⁰ See generally Carbado, Gulati, & Ramachandran, *supra* note 30.

⁴¹ *City of L.A. Dep't of Water and Power v. Manhart*, 435 U.S. 702, 704–05 (1978).

⁴² *Id.*

⁴³ *Id.* at 705.

Darlene Jespersen's claim, by contrast, falls on the bad side of the line, as it arises from an individualized harm. Unlike the women who worked for the Water and Power Department in Los Angeles, Darlene Jespersen was not discriminated against because she was a woman but because she chose to express her womanhood in a particular way. Yet there is no question that Darlene Jespersen's claim represents the future of sex discrimination, while the group-based claim, like the one in the Water and Power Department case, represents the past of sex discrimination.⁴⁴ The problem is that sex discrimination law has not kept pace with the lived experience of sex discrimination, and plaintiffs like Darlene Jespersen (and, for that matter, Dawn Dawson) are finding themselves shut out of an antidiscrimination regime that still views the group as the focal point of discrimination.

C. *The Transgender Woman*

Diane Schroer was hired as a terrorism expert for the Library of Congress only to lose the job a few days later.⁴⁵ The Library's stated reason for rescinding the offer was that Schroer was "not a good fit."⁴⁶ Yet, there were internal documents to the contrary, which suggest that Schroer did not get the job because she is transgender.⁴⁷ At the time of her application, Schroer was in the early stages of transitioning from male to female.⁴⁸ She applied for the job as a man named David Schroer.⁴⁹ Shortly after receiving the initial offer, Schroer had a casual lunch with her future supervisor, during which Schroer explained that she was transitioning and would begin the job as a woman named Diane Schroer.⁵⁰ Schroer further explained that she would be living as a woman for a year before having sex reassignment surgery.⁵¹

Schroer challenged the Library's decision not to hire her as sex discrimination in violation of Title VII. Specifically, Schroer argued that the Library engaged in unlawful sex discrimination for two reasons. The first was that discrimination against a transgender person is itself a form of unlawful sex discrimination.⁵² The second reason was that the Library rejected Schroer, because she failed to conform to gender stereotypes about how women are supposed to look and act.⁵³ The Library responded by arguing that it had a number of nondiscriminatory reasons for not hiring Schroer—including questions about her trustworthiness and whether she would be able to get the same security

⁴⁴ After all, the case is old; the Supreme Court handed down its decision in the case in 1978. *See id.* at 702.

⁴⁵ *Schroer v. Billington*, 577 F. Supp. 2d 293, 296, 299 (D.D.C. 2008).

⁴⁶ *Id.* at 299.

⁴⁷ *Id.*

⁴⁸ *Id.* at 295.

⁴⁹ *Id.*

⁵⁰ *Id.* at 296.

⁵¹ *Id.*

⁵² Amended Complaint at ¶ 55 *Schroer v. Billington*, 577 F. Supp. 2d 293, (D.D.C. July 5, 2007) (No. 05-cv-1090 (JR)), 2005 WL 5519038, at 11.

⁵³ *Id.* at ¶¶ 56–57.

clearance she had as a man—⁵⁴and that Title VII's prohibition against sex discrimination does not reach gender identity discrimination.⁵⁵

1. *A Victory*

The court agreed with Schroer on both counts. As to her gender-stereotyping argument, the court agreed that the Library's decision to withdraw Schroer's offer was motivated by unlawful gender stereotypes.⁵⁶ To reach this conclusion, the court looked to statements by Charlotte Preece, the employee tasked with filling the position. For instance, Preece said that she could not help but see Diane Schroer as a man dressed up as a woman.⁵⁷ Moreover, Preece was concerned that other employees, as well as members of Congress and their staffs, would likewise view Schroer as a man dressed in drag,⁵⁸ which would hurt both Schroer's and the Library's credibility. The sticking point for Preece grew out of Schroer's background in Special Forces. Preece said she perceived Schroer to be an especially masculine man, which made it all the more difficult for her to accept Schroer as a woman.⁵⁹

The court went even further with its sex discrimination analysis. Pushing back against a long line of cases holding that gender identity is beyond the reach of Title VII,⁶⁰ the court determined that the Library's refusal to hire Schroer after learning that she planned to change her sex was "*literally* discrimination 'because of . . . sex.'" ⁶¹ Here, the court analogized Schroer's situation to a person who converts from Christianity to Judaism.⁶² The court's analysis is elegant: if Title VII protects an applicant whose job offer was withdrawn after the employer learned that the applicant was planning to convert from one religion to another, then it should also protect an applicant who plans to convert from one sex to another.⁶³ The important thing, in the eyes of the court, is not the category that Diane Schroer fit into (i.e., transsexual), but rather the language of Title VII itself. Because the Library revoked the offer when it learned that David would soon become Diane, the Library discriminated on the basis of sex in violation of Title VII.⁶⁴

2. *Of Sorts*

Schroer's victory is a mixed blessing, however. While the court's latter point—the conversion analogy—is novel, and perhaps even transformative for

⁵⁴ *Schroer*, 577 F. Supp. 2d at 300.

⁵⁵ *Id.*

⁵⁶ *Id.* at 308.

⁵⁷ *Id.* at 305.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See, e.g.*, *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977); *Doe v. U.S. Postal Service*, No. 84–3296, 1985 WL 9446, at *2 (D.D.C. 1985).

⁶¹ *Schroer*, 577 F. Supp. 2d at 308.

⁶² *Id.* at 306–07.

⁶³ *Id.*

⁶⁴ *Id.* at 306.

the transgender community,⁶⁵ the court's gender-stereotyping analysis causes some concern. To the extent that the court credited Schroer's gender-stereotyping argument, it did so to the benefit of David Schroer rather than Diane Schroer. Pay careful attention to the comments by Charlotte Preece, the supervisor who ultimately withdrew Schroer's offer, which the court cited in support of its gender-stereotyping analysis.⁶⁶ The core of each of these comments is Preece's belief that Diane is a man dressed in women's clothing. Which raises a considerable problem for Diane Schroer: her discrimination claim is inconsistent with her sense of self.

What Diane Schroer wanted from her new employer was the freedom to assert in the workplace her identity as a woman. When she revealed her plans to begin the job as Diane, Schroer was effectively asking the Library to accommodate her sense of self. The Library refused to make this accommodation. By doing so, the Library rejected Schroer in her capacity as a woman. Schroer's theory of discrimination, by contrast, only makes sense if it treats Schroer as a man who wants to dress and act like a woman while on the job. As Liz Glazer and I argued elsewhere, the trouble with applying the gender-stereotyping theory to transgender employees is that it reduces a person's gender identity to a choice about clothing.⁶⁷ But Diane Schroer was not a crossdresser. The thrust of her claim—both legally and socially—was that she wanted to enter and participate in the workplace as a woman. Put more broadly, she wanted the Library to accept her for who she is.

III. A NEW VISION OF EQUALITY

Things are not all bad for masculine women in employment discrimination law. A bright spot that comes to mind is a case out of Oregon, where a lesbian employee was able to bring a successful sex discrimination claim against her employer.⁶⁸ There, a supervisor harassed the employee by subjecting her to a steady barrage of taunts and crass questions about her sexuality and her relationship with another woman.⁶⁹ The employee brought, and won, a gender-stereotyping claim against the employer. The court concluded that the supervisor, a man named Cagle, harassed the employee because she "did not conform to Cagle's stereotype of how a woman ought to behave."⁷⁰ Specifically, the employee did not so conform because she "is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."⁷¹ In ruling in this way, the court demonstrates that courts can dig deep into gender stereotypes without being sidetracked by concerns for group

⁶⁵ In earlier work, Liz Glazer and I argue that the *Schroer* court's analysis lays the foundation for a transformative approach to thinking about identity in discrimination law. See Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 659–60 (2009).

⁶⁶ See *supra* text accompanying notes 56–59.

⁶⁷ Glazer & Kramer, *supra* note 65, at 666.

⁶⁸ See *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1212 (D. Or. 2002).

⁶⁹ *Id.* at 1217–20.

⁷⁰ *Id.* at 1224.

⁷¹ *Id.*

subordination. Yet my larger point is still worth considering, if for the sole reason that victories for masculine women are few and far between.

The lesson I draw from the three tales of female masculinity discussed above is that we need to develop a new vision of equality in sex discrimination law. The prevailing vision of equality that undergirds sex discrimination law is rooted in the idea of sameness. According to this view, equality is cast in neutral terms, providing formal protections for the sexes as against each other. We can see the equality-as-sameness mentality at work in each of the three tales of female masculinity discussed above. For Dawn Dawson, the court insisted on simplifying what was in reality a messy case of discrimination, one that did not fit cleanly within the boundaries of treating men and women the same. Darlene Jespersen's case likewise demonstrates the limitations of the equality-as-sameness mentality. Darlene Jespersen sought a remedy as an individual, not as a member of a larger class of women who want the same treatment as men. Diane Schroer wanted her employer to accept her for who she is, yet the court's analysis forced her to adopt a status that was inconsistent with—indeed, even harmful to—her sense of self as a woman.

Taken together, these stories of female masculinity suggest that we need to take seriously the idea that we can strive toward a vision of sex equality that is rooted in difference rather than sameness. Indeed, victims of modern sex discrimination need a vision of equality that understands that no two women (and no two men) are the same. The central task of sex discrimination law going forward should be to better recognize—and in turn protect—the distinctive ways in which employees express their maleness and femaleness. It is these differences, after all, that shape the way employees experience modern sex discrimination.

How we strive toward this new vision is a question that reaches beyond the scope of this symposium, and it is a project on which I am currently working.⁷² But I will close by mentioning that there are models of discrimination in use today that define equality in terms of difference rather than sameness. Both disability discrimination law under the Americans with Disabilities Act and religious discrimination law under Title VII are based on the idea that the law can treat employees equally but differently. These bodies of law recognize that some employees need particular accommodations in order to be treated equally. Unlike our existing sex discrimination model, these bodies of law do not presume that all members of a group are the same and want the same things. Instead, these bodies of law presuppose that employees are different, that these differences matter, and that law can protect employees from discrimination while accounting for their differences. As such, these models of discrimination cater to the needs of individuals in a way that is currently impossible in sex discrimination law. My point, simply, is that it is worth thinking about reworking sex discrimination law to make it more like these other models of discrimination.

⁷² See Zachary A. Kramer, *The New Sex Discrimination* (Jan. 14, 2013) (unpublished manuscript) (on file with author).