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THE GAY PERJURY TRAP

CHRISTOPHER R. LESLIE[†]

ABSTRACT

In Bostock v. Clayton County, the Supreme Court held Title VII's prohibition on sex-based employment discrimination applies to discrimination based on sexual orientation and gender identity. Although the opinion is an important victory, if history is any guide, Bostock was only one battle in a larger war against invidious workplace discrimination based on sexual orientation and gender identity. Prejudiced employers and managers will seek alternative, less obvious ways to discriminate. Judges and civil rights lawyers must prepare themselves to recognize and reject pretextual rationales for adverse actions taken against lesbian, gay, and bisexual employees. A better understanding of history can inform those efforts.

This Article examines an unexplored chapter in the United States' history of anti-gay discrimination in the workplace: punishing gay workers for concealing their sexual orientation. Beginning in the 1960s, as federal and state law implemented procedural protections for public-sector workers, employers developed a new mechanism to evade those protections: the gay perjury trap. At its core, the strategy is simple. An employer asks job applicants about their sexual orientation. If they reveal that they are gay, decline to hire them. If gay workers conceal their sexual orientation and it is later discovered, terminate them for

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[†] Chancellor's Professor of Law, University of California, Irvine School of Law. The author thanks Alafair Burke, Erwin Chemerinsky, Kari Ferver, Catherine Fisk, Michele Goodwin, Tim Holbrook, Rebecca Lee, Doug NeJaime, Tony Reese, Trilby Robinson-Dorn, and the participants in faculty workshops at Emory University School of Law, Maurice A. Deane School of Law at Hofstra University, and University of California, Irvine School of Law for comments on earlier drafts. Gohar Abrahamyan, Ryan Aymard, Samrah Mahmoud, Andrea Smith, and Emily Yu provided excellent research support.

their dishonesty. Either way, gay workers are purged from the workforce.

This Article provides historical examples of the federal government and local school districts using this strategy to terminate high-performing workers who were later discovered to be gay. After discussing the inherent unfairness of the gay perjury trap, this Article explains how prejudiced employers may attempt to deploy this strategy as a means of circumventing Title VII liability in the post-Bostock era. Finally, this Article discusses how courts should prevent employers from using the gay perjury trap in the post-Bostock work environment. Dismantling the gay perjury trap entails three components. First, courts should interpret Title VII as prohibiting employers from inquiring about an applicant's or employee's sexual orientation. Second, courts should not afford employers a general right to penalize gay workers for concealing or misrepresenting their sexual orientation. Third, courts should construe Title VII to protect employees who refuse to answer questions about their sexual orientation.

Whether Title VII can effectively deter and remedy anti-gay discrimination will in significant part depend on courts' ability to recognize and prohibit employers from using the gay perjury trap. The post-Bostock Title VII cannot succeed if employers can use alleged dishonesty about sexual orientation as a means of punishing gay workers and avoiding liability.

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Thus if [a gay man] dares to show his true inclinations, there is awaiting the road of the outcast—discrimination, social ostracism, economic defeat. And if, in self-protection, he is forced to make a pretense, there comes denunciation for living a life that is a lie!

—Donald Webster Cory, 1951¹

INTRODUCTION

After graduating from The Pennsylvania State University (“Penn State”) in the early 1970s, Joseph Acanfora III achieved his goal of becoming a science teacher.² Pennsylvania officials had delayed a decision on his application for a teaching certificate. So Acanfora secured a job teaching science at a junior high school in Montgomery County, Maryland. The school district was happy with Acanfora’s performance. But after Acanfora was settled in his new job, Pennsylvania’s secretary of education took the unusual action of

1. DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* 47 (1951).

2. *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 844–45 (D. Md. 1973), *aff’d*, 491 F.2d 498 (4th Cir. 1974). The facts of the *Acanfora* case are fully discussed and cited *infra* notes 118–48 and the accompanying text.

holding a press conference to announce that Acanfora's application for teacher certification would be approved despite his homosexuality. The public stunt seemed designed to sully Acanfora's reputation, not to reward him with his hard-earned teaching certificate. Upon learning that Acanfora was gay, the Montgomery County deputy superintendent of schools removed him from the classroom. Acanfora discussed the school district's actions against him on *60 Minutes*, the Public Broadcasting Service ("PBS"), and other television news programs. In response, the school refused to renew his contract.

When Acanfora challenged his removal from the classroom, courts informed school district officials that they could not punish Acanfora for his media appearances. The officials came up with a different reason to remove him from his prized teaching position: when Acanfora applied for his teaching job, he had not disclosed to the school district his prior membership in a gay student organization at Penn State. The officials admitted that they would not have hired Acanfora if he had disclosed his affiliation—and, thus, his sexual orientation. Instead of defending its anti-gay policy, however, the school district attacked Acanfora as dishonest. And the Fourth Circuit concurred, holding that the school district could justify taking adverse action against Acanfora for not listing his membership even though the officials did not know about Acanfora's omission when they punished him.³ Acanfora became one of the early prominent victims of the "gay perjury trap," a Kafkaesque device in which gay people are denied employment if they disclose their sexual orientation, but are terminated for mendacity if their employer discovers that they concealed their sexual orientation. This Article tells the history of the gay perjury trap and its relevance in the modern era.

For most of the twentieth century, institutionalized homophobia made it difficult for millions of gay individuals to secure and retain meaningful employment across the United States. Major employers engaged in witch hunts designed to identify and punish lesbian, gay, and bisexual ("LGB") people.⁴ Government employers—most notably

3. *Acanfora*, 491 F.2d at 503.

4. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 137–38 (2000) [hereinafter Leslie, *Creating Criminals*]; Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 20 (2003); Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court*, 28 COLUM. J. GENDER & L. 229, 264 (2015).

the military, federal security agencies, and local police and fire departments—maintained official policies of terminating all known gay workers.⁵ Public schools prohibited gay people from working as teachers.⁶ Many private employers, too, had policies against hiring gay employees.⁷

Because sexual orientation is not a visible characteristic, many gay people can “pass” as heterosexual. Historically, most had to do so to earn an income. Both government and private employers sought to root out gay people by asking job applicants and current employees about their sexual orientation. Many employers administered psychological tests and lie detector tests to identify gay people.⁸ Once detected, gay applicants were rejected, and gay workers were subject to termination, harassment, transfer, or demotion.

By 2020, as more Americans came to understand the toll and the irrationality of anti-gay discrimination, almost half of the states included sexual orientation protections in their employment nondiscrimination laws. That year, the Supreme Court’s decision in *Bostock v. Clayton County*⁹ expanded such protections nationwide when the six-to-three majority interpreted Title VII’s federal prohibition on sex-based employment discrimination to bar discrimination based on sexual orientation and gender identity.¹⁰

5. See ROBIN A. BUHRKE, A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT 26, 118 (1996); Leslie, *Creating Criminals*, *supra* note 4, at 137–39.

6. See, e.g., *Rowland v. Mad River Loc. Sch. Dist.*, 730 F.2d 444, 446 (6th Cir. 1984); *Gaylord v. Tacoma Sch. Dist.*, 559 P.2d 1340, 1341 (Wash. 1977); see also Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1615 (2017) [hereinafter Leslie, *Geography of Equal Protection*] (“Local school districts routinely discriminate against teachers and school administrators.”).

7. See David E. Morrison, *You’ve Built the Bridge, Why Don’t You Cross It? A Call for State Labor Laws Prohibiting Private Employment Discrimination on the Basis of Sexual Orientation*, 26 U. MICH. J.L. REFORM 245, 258–59 (1992).

8. See *infra* notes 20–22 and accompanying text.

9. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

10. *Id.* at 1741. Although *Bostock* applied Title VII to both sexual orientation and gender identity, this Article focuses on a form of discrimination that was historically targeted against gay workers. Sexual orientation discrimination has its own unique history and some of this Article’s reasoning does not map neatly onto gender identity. Employment discrimination based on gender identity is invidious and should be deterred and penalized in the post-*Bostock* era. Some (but not all) of the Article’s reasoning may apply to gender identity, which is discussed at *infra* notes 228 to 231 and accompanying text. The issue of how employers may try to evade Title VII’s application to transgender workers—and how to identify and prevent such circumvention—is an important topic that warrants its own article.

Bringing gay employees within the protection of Title VII represents a major achievement. But, if history is any guide, *Bostock* was just one battle in a larger war against invidious workplace discrimination based on sexual orientation and gender identity. Just as the enactment of Title VII did not eliminate racial and gender discrimination, the Supreme Court's recognition that Title VII protects gay workers is not a panacea. The ultimate impact of *Bostock* will largely be a function of two related reactions to the opinion: how prejudiced employers attempt to circumvent the decision, and how robustly courts interpret Title VII's application to gay employees.

Before *Bostock*, employers in half of the states could legally fire or refuse to hire lesbian, gay, bisexual, or transgender ("LGBT") people.¹¹ In the absence of legal protections, many employers exercised their prejudice openly. The former bosses of Gerald Bostock, Donald Zarda, and Aimee Stephens, the named employees in the three separate cases that the Supreme Court consolidated in the *Bostock* opinion, certainly did so.¹² These cases were by no means aberrations; employers have routinely fired, refused to hire, or otherwise discriminated against gay workers.¹³

The *Bostock* opinion will do little to quench prejudiced employers' urges to discriminate based on sexual orientation and gender identity. Those individuals with hiring and firing authority who wish to purge gay workers from their payrolls will try to circumvent Title VII's application to sexual orientation via alternative, less obvious means of discrimination. Long before *Bostock*, employers fashioned pretextual reasons for terminating gay employees.¹⁴ The *Bostock* opinion will undoubtedly reinvigorate such gamesmanship.

11. KERITH J. CONRON & SHOSHANA K. GOLDBERG, THE WILLIAMS INST., LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES 2-3 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf> [<https://perma.cc/8ZKP-A47U>].

12. See *Bostock*, 140 S. Ct. at 1737-38.

13. See BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 1 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Effects-LGBT-Employ-Discrim-Jul-2011.pdf> [<https://perma.cc/97NV-HQOK>] (finding that over 37 percent of gay workers who were out at work suffered sexual orientation discrimination in the previous five years). One 2014 study found that "more qualified LGBT applicants were 23 percent less likely to be called back for interviews than less qualified non-LGBT applicants." *Federal Contractors Show Anti-LGBT Hiring Bias*, EQUAL RTS. CTR., https://equalrightscenter.org/wp-content/uploads/freedom_to_work_6_16_14.pdf [<https://perma.cc/D7PD-WJTT>].

14. See *infra* notes 203-06 and accompanying text.

Judges and civil rights lawyers must prepare to recognize and reject pretextual rationales for adverse actions taken against gay employees.

History can inform those efforts to prevent and remedy more subtle discrimination based on sexual orientation. Ensuring that Title VII will protect gay workers against invidious discrimination requires a solid understanding of how employers exercised their anti-gay prejudice in the pre-*Bostock* era. Decades before *Bostock* provided substantive nondiscrimination protections by interpreting Title VII to prohibit discrimination based on sexual orientation and gender identity, federal law provided procedural and other protections to government employees.¹⁵ Government employers nonetheless circumvented these legal safeguards and continued to improperly terminate gay employees. In all likelihood, bigoted employers will attempt to similarly evade Title VII.

This Article identifies one particularly insidious method that employers have historically used to discriminate against gay workers: the gay perjury trap.¹⁶ The gay perjury trap refers to situations in which employers inquire about job applicants' sexual orientation in order to force gay people into a bind. Applicants who identify themselves as gay are denied employment, generally without explanation. Gay applicants may therefore seek to conceal their sexual orientation, and, if successful, they may be hired. Prejudiced employers may have more difficulty terminating a gay employee, or taking other adverse actions, if they do not discover that worker's sexual orientation until after the worker is hired, particularly if the worker has established an exemplary record. A gay applicant who successfully conceals their sexual orientation and receives the job may, for example, be entitled to certain procedural protections. If, however, that employee lied during the application process by misrepresenting their sexual orientation, the misrepresentation provides the pretext for termination.

Part I of this Article describes the gay perjury trap, examines historical examples, and discusses why employers have used the trap against gay members of the labor force. At its core, the gay perjury trap is simple: Ask job applicants about their sexual orientation. If they reveal their sexual orientation, decline to hire them. If they conceal

15. See *infra* notes 27–28 and accompanying text.

16. Traditionally, a perjury trap refers to the situation “when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury.” *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991).

their sexual orientation and it is later discovered, terminate them for lying.¹⁷ Either way, gay workers are purged from the workforce.

Part II explains how the historical cases presented in Part I remain relevant post-*Bostock*. The days of employers investigating the sexual orientation of applicants and employees may seem relegated to the past. But those days are now, and employers continue to set the trap. Given the intensity of anti-gay prejudice in some regions and employers, the *Bostock* opinion is unlikely to end employment discrimination against gay workers. As with other antidiscrimination regimes, employers determined to discriminate against gay workers will search for ways to evade the law, such as the gay perjury trap. The Equal Employment Opportunity Commission (“EEOC”), the courts, and civil rights lawyers must prepare to recognize and respond to these attempts.

Part III discusses how courts should prevent employers from using the gay perjury trap in the post-*Bostock* work environment. Dismantling the gay perjury trap entails three components. First, courts should interpret Title VII as prohibiting employers from inquiring about sexual orientation. Second, courts should not afford employers a general right to penalize gay workers for concealing or misrepresenting their sexual orientation. Even in an era in which Title VII applies to sexual orientation, millions of gay Americans will remain closeted in their workplaces. Third, courts should construe Title VII to protect employees who refuse to answer questions about their sexual orientation. Ultimately, courts should be suspicious of employers who justify adverse employment decisions on the grounds of a worker’s misrepresentation of—or refusal to discuss—sexual orientation.

I. THE HISTORY OF THE GAY PERJURY TRAP

From the beginning of the modern gay rights movement, employers have utilized gay perjury traps to discriminate based on sexual orientation. The trap involves three components. First, the employer sets the trap by asking job applicants about their sexual

17. Deception is not perjury unless the falsehood is told under oath. Some employment applications are, in fact, signed under penalty of perjury. See *Hargett v. N.Y.C. Transit Auth.*, 640 F. Supp. 2d 450, 462 (S.D.N.Y. 2009), *aff’d sub nom. Hargett v. Metro. Transp. Auth.*, 381 F. App’x 12 (2d Cir. 2010). Some inquiries into a current employee’s sexual orientation require the employee to sign official forms that state a failure to answer all questions fully and truthfully will result in dismissal. See, e.g., FRANK BUTTINO, *A SPECIAL AGENT: GAY AND INSIDE THE FBI 95* (1993). In others, the inquiry is less formal.

orientation. This can be done directly or indirectly through proxy questions, such as asking an applicant to identify any organizations of which she has been a member. The employer declines to hire any applicant who identifies as gay, lesbian, or bisexual. Second, the employer springs the trap by terminating any employee who is later discovered to have concealed their sexual orientation during the application process. In doing so, the employer asserts that the termination is because the applicant lied, not because of their sexual orientation. Third, the employer prevents gay workers from evading the trap by refusing to hire anyone who will not answer questions about sexual orientation. Part I discusses each of these steps in turn.

A. *Setting the Gay Perjury Trap*

The first step of the gay perjury trap entails employers inquiring into all job applicants' sexuality. In the past, those applicants who did not represent themselves as heterosexual did not receive job offers. This was official government policy during the Cold War when federal, state, and local governments all implemented anti-gay employment policies.¹⁸ Because government agencies discriminated against gay individuals and “[l]icensing boards restricted homosexuals from many occupations, and private employers banned homosexuals officially or unofficially[,] . . . lesbians and gay men were officially barred from at least 20 percent of the nation’s jobs.”¹⁹ This system prevented millions of gay people from practicing their professions.

Understanding this situation, yet needing a paycheck, gay workers concealed their sexual orientation. Employers responded by trying to identify the gay people in their midst through a variety of techniques, including questionnaires, lie detector tests, arrest records, and organizational affiliations. This section reviews those methods.

1. *Direct Questioning.* Perhaps the most straightforward method of determining an individual’s sexual orientation is to ask them. And during the McCarthy era, the federal government did just that. The State Department’s fixation on gay men became an obsession. In his

18. See DAVID K. JOHNSON, *LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 147–78 (2004).

19. Gregory B. Lewis, *Lifting the Ban on Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees Since the Cold War*, 57 *PUB. ADMIN. REV.* 387, 389 (1997) [hereinafter Lewis, *Lifting the Ban*] (citing ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* 269–70 (20th ed. 1990)).

study of anti-gay federal policies during this period, Professor David Johnson explained: “All male applicants were subject to a personal interview by security personnel who specialized in uncovering homosexuals. If suspicions were raised, the applicant would be given a lie detector test.”²⁰ Those who confessed to homosexual activity were denied jobs.²¹ In 1960, the State Department rejected almost one-third of all job applicants due to suspected homosexuality following questioning and investigation.²²

Long after Senator Joseph McCarthy had been exposed as a dangerous fraud, federal anti-gay policies continued in full force. Under the Kennedy and Johnson administrations, all applicants for federal jobs were asked “Have you ever had, or have you now, homosexual tendencies?” as part of their medical history on the Standard Form 89.²³ Those who answered in the affirmative were denied employment.²⁴

The government’s inquiry was often more intrusive than a single question about an individual’s sexual orientation. An applicant suspected of homosexuality could face “five pages of highly invasive interrogatories about his sexual life,” including explicit questions about oral sex, anal sex, “and how many times and with how many people he might have engaged in these acts and where, when, and how these acts might have occurred.”²⁵ The questions appeared designed to humiliate suspected gay people, rather than to officially discern their sexual orientation.

After they hired job applicants, federal employers continued their hunt for gay people who made it through the initial filters calibrated to create heterosexual-only workplaces. In the early 1970s, the Civil Service Commission (“the Commission”) spent \$12 million—over \$80 million in current value—annually to investigate charges that civil

20. JOHNSON, *supra* note 18, at 72–73.

21. *Id.*

22. *Id.* at 197.

23. *Id.* at 196.

24. *Id.*; *cf. id.* at 197 (“Testifying before a House appropriations subcommittee in 1966, William Crockett, deputy undersecretary of state, testified that all male applicants to the department were asked directly, ‘Have you ever engaged in a homosexual act?’”).

25. GENNY BEEMYN, *A QUEER CAPITAL: A HISTORY OF GAY LIFE IN WASHINGTON, D.C.* 189 (2015).

servants were gay.²⁶ By the end of 1973, the Commission began to adopt modest protections for gay workers when it

issued a bulletin to all agencies stating that [it] could not “find a person unsuitable for Federal employment merely because that person is a homosexual,” but that [it] could dismiss or refuse to hire a person whose “homosexual conduct affects job fitness—excluding from such considerations, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.”²⁷

The policy, however, was often honored in the breach.²⁸

Importantly, the new policy did not apply to the intelligence agencies.²⁹ Consequently, the Federal Bureau of Investigation (“FBI”) continued to ask its applicants if they were gay and reject them if they answered affirmatively, regardless of their qualifications. Dana Tillson applied for a special agent position with the FBI in 1987; after her interview, she was informed that “she was the highest-rated female applicant in San Francisco and that she would be hired assuming her background investigation was satisfactory.”³⁰ The FBI subsequently rejected Tillson’s application when she truthfully responded to the interviewers’ inquiries about her sexual orientation, acknowledging that she “engage[d] in private sexual conduct with consenting adult women.”³¹ In another example, when one Midwestern applicant with a graduate degree and an honorable discharge from the military interviewed to be a special agent, the FBI interviewer asked the applicant why he had left the military.³² Upon the FBI hopeful responding that he left because he was gay, the FBI agent replied: “The FBI does not hire second-class citizens.”³³ The agent was too modest about the FBI’s influence. The FBI did not merely shun second-class citizens; it created them.

By classifying Americans based on their sexual orientation and aggressively discriminating against gay Americans, the FBI sought to

26. Lewis, *Lifting the Ban*, *supra* note 19, at 392.

27. *Id.* at 392–93.

28. *Id.*

29. *Id.* at 393; *see* BEEMYN, *supra* note 25, at 190 (noting that “the guidelines did not apply to the FBI, CIA, and Foreign Service, which continued to have employment policies and practices that discriminated against gay people until the 1990s”).

30. *Buttino v. FBI*, 801 F. Supp. 298, 310 n.5 (N.D. Cal. 1992) (citation omitted).

31. *Id.*

32. BUTTINO, *supra* note 17, at 289.

33. *Id.*

stigmatize LGB applicants as deviant and un-American. The FBI also applied its anti-gay policy to its own agents after years of loyal employment.³⁴ While officials sought to proffer legitimate rationales for their anti-gay policies, the FBI's targeting was always driven by "an overarching and intense fear and loathing of gays"—or, in Professor Douglas Charles's words, "an irrepressible animus."³⁵

The federal government was not alone in asking job applicants about their sexual orientation. State governments pursued similar policies.³⁶ During the height of the Cold War, for example, the state of Florida actively hunted for gay and lesbian teachers in an attempt to remove them from classrooms.³⁷ A state committee hired a team of investigators to collect the sexual histories of teachers suspected of homosexuality.³⁸

Local governments, too, utilized anti-gay screens. During the 1970s, New York's Suffolk County required job applicants to fill out a questionnaire that inquired, "Homosexual Tendencies: yes or no."³⁹ At the end of the twentieth century, police departments continued to ask applicants about sexual orientation in order to weed out gay men and lesbians. In Connecticut, John Doe achieved the highest score of anyone taking the Hamden Police Department qualifying exam in

34. See, e.g., *id.* at 94–95.

35. DOUGLAS M. CHARLES, *HOOVER'S WAR ON GAYS: EXPOSING THE FBI'S "SEX DEVIATES" PROGRAM* xv (2015).

36. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* 213 (2d ed. 1998); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2425 (1997) ("State and federal governments invested substantial resources in campaigns to search out and expose homosexuals in big cities, in the armed forces, and in state and federal employment.").

37. See JUDITH G. POUCHER, *STATE OF DEFIANCE: CHALLENGING THE JOHNS COMMITTEE'S ASSAULT ON CIVIL LIBERTIES* 86–109 (2014).

38. Stacy Braukman, "*Nothing Else Matters but Sex*": *Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963*, 27 *FEMINIST STUD.* 553, 559 (2001); see also *id.* at 568 ("The interview began with the basic facts of the witness's life—full name, age, educational background, and employment history. But the inquisitor wasted little time in getting to the point, asking some variation of 'Have you ever been involved in any type of homosexual activity?'").

39. BRAD SEARS, NAN D. HUNTER & CHRISTY MALLORY, *THE WILLIAMS INST., DOCUMENTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT* 5-33 (2009) (footnote omitted), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ENDA-5-History-Sep-2009.pdf> [<https://perma.cc/SRW8-6KRZ>].

1994.⁴⁰ Because of Doe’s exam score, physical condition, and grades in a graduate-level criminal justice program, the department offered “conditional employment” as a police officer, subject to Doe completing psychological, medical, and polygraph examinations, during which the polygraph examiner asked Doe’s sexual orientation.⁴¹ After Doe answered truthfully, the polygraph report led with the statement “He is gay,” and Hamden’s police chief announced that Doe was not the “best candidate for the job.”⁴² Similarly, the Dallas Police Department maintained a policy of asking job applicants their sexual orientation and rejecting otherwise qualified applicants who answered they were gay or lesbian.⁴³ Such anti-gay policies were common for police departments in both major cities and small towns.⁴⁴

Private employers, too, asked applicants about their sexual orientation. In the 1990s, Target Stores required applicants for security officer positions to answer a series of true-or-false questions, including “I am very strongly attracted by members of my own sex.”⁴⁵ Other job applicants asked about their sexual orientation include pharmacists,

40. *Id.* at 12-50 (citing HUM. RTS. CAMPAIGN FOUND., DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA’S WORKPLACES (2001), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ENDA-12-Examples-Sep-2009.pdf> [<https://perma.cc/5TDN-W6TW>]).

41. *Id.*

42. *Id.*

43. For example, in *City of Dallas v. England*,

England applied for a position with the Dallas Police Department in 1989. She was invited to interview for the position and, when asked about her sexual orientation, she responded truthfully that she was a lesbian. The interviewer then informed England that under the police department’s hiring policy her homosexuality made her ineligible for employment.

846 S.W.2d 957, 958 (Tex. Ct. App. 1993) (footnote omitted); *see also* Childers v. Dall. Police Dept., 513 F. Supp. 134, 136 (N.D. Tex. 1981) (declining to hire an applicant who, in response to a question from an interviewer, identified himself as gay), *aff’d mem.*, 669 F.2d 732 (5th Cir. 1982).

44. *See, e.g.,* Leslie, *Creating Criminals*, *supra* note 4, at 143 (“Police departments traditionally discriminate against gay men and lesbians both in hiring and promotion decisions in ways that affect both police officers and administrators.”); *Woodland v. City of Hous.*, 940 F.2d 134, 137 (5th Cir. 1991) (noting how the City of Houston’s Police Department, Fire Department, and Airport Police Division asked job applicants about “homosexual behavior” during mandatory polygraph exams); *see also* Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 513 (2005) [hereinafter Leslie, *Perfect Storm*] (“Police departments and prosecutors’ offices refused to hire gay men and lesbians, reasoning that sodomy laws rendered them criminals, and criminals could not be hired in any field related to law enforcement.”).

45. *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 79–80 (Ct. App. 1991), *dismissed as moot in accordance with the parties’ stipulation*, 24 Cal. Rptr. 2d 587 (Nov. 10, 1993).

police officers, teachers,⁴⁶ coaches, camp counselors,⁴⁷ administrators, clerical workers, health program coordinators,⁴⁸ software development administrators,⁴⁹ and even professional football players.⁵⁰

Today, major employers continue to ask applicants and employees about their sexual orientation in order to discriminate against gay job candidates or employees.⁵¹ The discrimination can take the form of being denied a new job or being terminated from an existing job.⁵² In one of the more infamous anti-gay purges by an American company, the Cracker Barrel restaurant chain announced an official policy for its one hundred restaurants in the 1990s: it refused “to continue to employ individuals . . . whose sexual preferences fail to demonstrate normal heterosexual values.”⁵³ To implement this policy, “[t]hroughout the chain, individual store managers, acting on orders of corporate officials, began conducting brief, one-on-one interviews with their employees to see if any were in violation of the new policy.”⁵⁴

46. See *Jantz v. Muci*, 976 F.2d 623, 626 (10th Cir. 1992).

47. See Jennifer Levitz, *Fundraiser Puts Scout Policy on Gays Back in Spotlight*, PROVIDENCE J., Oct. 1, 1999, at A1 (“The local scouting organization came under attack this summer when officials fired an Eagle Scout from his job at Camp Yawgoog after his boss asked him if he was gay, and he said yes.”).

48. See *Klimer v. Haymarket/Maryville*, No. 91-E-117, 1993 WL 839792, at *1 (Chi. Comm’n on Hum. Rels., June 16, 1993).

49. See Kemba J. Dunham, *Stay-at-Home Dads Fight Stigma*, WALL ST. J. (Aug. 26, 2003, 12:01 AM), <http://online.wsj.com/article/SB106184492170212200.html> [<https://perma.cc/ZU4R-9H8J>].

50. In 2010, the Cincinnati Bengals asked a draft prospect to disclose his sexual orientation before being drafted. *Team Executives Ask NFL Draft Prospects the Darnedest Things*, NFL (May 10, 2010, 11:15 AM), <https://www.nfl.com/news/team-executives-ask-nfl-draft-prospects-the-darnedest-things-09000d5d817f452b> [<https://perma.cc/N98Q-FLM3>]; *Another Fun Rookie Interview Question: Sexual Orientation*, NBC SPORTS (May 5, 2010, 4:44 PM), <https://profootballtalk.nbcsports.com/2010/05/05/another-fun-rookie-interview-question-sexual-orientation> [<https://perma.cc/5H54-4KC5>].

51. See *infra* notes 220–25 and accompanying text; see also Gregory B. Lewis, *Barriers to Security Clearances for Gay Men and Lesbians: Fear of Blackmail or Fear of Homosexuals?*, 11 J. PUB. ADMIN. RSCH. & THEORY 539, 551 (2001) (noting that interviewers “who said that homosexual relations were always wrong were nearly three times as likely as those who said they were not wrong at all to say the government definitely should have the right to ask detailed, personal questions about sexual orientation”).

52. See *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 532 (W.D. Ky. 2001) (“As a part of the hiring process, Dr. Hyman is said to have inquired into two applicants’ sexual orientation intending to take this fact into account in reaching an employment decision.”), *vacated on standing grounds*, 53 F. App’x 740 (6th Cir. 2002).

53. John Howard, *The Cracker Barrel Restaurants*, in UNDERSTANDING AND MANAGING DIVERSITY 166, 167 (Carol P. Harvey & M. June Allard eds., 6th ed. 2015) (alteration in original).

54. *Id.*

Employees who answered truthfully that they were gay were terminated on the spot without any severance.⁵⁵

For many employees, someone other than a boss or supervisor may inquire into sexual orientation in the workplace. For example, coworkers have asked fellow employees whether they were gay.⁵⁶ These inquiries into sexual orientation often arise in the context of anti-gay slurs being hurled at an employee.⁵⁷ In this scenario, the employee is subjected to a combination of verbal assault and sexual inquisition.⁵⁸ The question can also come from nonemployees, such as students in educational settings.⁵⁹ Whatever the source of the question about homosexuality, if answered affirmatively, the gay worker is subject to harassment and termination.

It is hardly surprising that in the years before the Stonewall riots and during the first decades of the modern gay rights movement employers sought to identify and discriminate against LGB individuals. Public and private employers alike asked both broadly worded and offensively pointed questions regarding sexuality. When asked about sexual orientation, gay people had a choice: tell the truth and be denied a job, or lie. Many lied. If one needed the job, lying was the rational decision. But this meant one got the job based on a lie—a lie that could come back to haunt the employee.

55. *See id.* Some employees weren't even asked; they were just terminated for being gay. Michael Cunningham, *If You're Queer and You're Not Angry in 1992, You're Not Paying Attention; If You're Straight It May be Hard to Figure Out What All the Shouting's About.*, 17 MOTHER JONES 60, 64 (1992) ("In all, eighteen lesbians and gay men were fired from Cracker Barrel's outlets. Some managers called the employees they suspected into their offices and formally asked if they were homosexual. Others just convened staff meetings and announced that certain employees were being terminated in accordance with company policy.")

56. *Bryan v. Mem'l Sloan-Kettering Cancer Ctr.*, OATH Index No. 183/06 (N.Y.C. Comm'n on Hum. Rts. July 25, 2006), 2006 WL 6632708, at *4 (N.Y.C. Comm'n on Hum. Rts. July 25, 2006) (describing police officers asking their fellow officers whether they were gay), *aff'd*, Comm'n Decision (Sept. 29, 2006); STEPHEN LEINEN, GAY COPS 49 (1993).

57. *See Bahena v. Adjustable Clamp Co.*, No. 99-E-111, 2003 WL 23529561, at *3 & *6 (Chi. Comm'n on Hum. Rels. July 16, 2003) (observing coworkers asking another employee whom they suspected of being gay "why he was" gay).

58. *See, e.g., Fontáñez-Núñez v. Janssen Ortho LLC*, 447 F.3d 50, 53 (1st Cir. 2006) ("According to Fontáñez, Natal also made offensive comments referencing homosexual activity, once noting that Fontáñez was a pharmacist and expressing an opinion, in vulgar terms, that all pharmacists are homosexuals. Fontáñez stated that co-workers would then call him (Fontáñez) gay or would ask him whether he was gay.")

59. KIM I. MILLS WITH DARYL HERRSCHAFT, HUM. RTS. CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS 25 (1999).

2. *Arrest Records.* Historically, some employers justified their inquiries into homosexuality as part of a larger inquiry into applicants' criminal activities. At the beginning of the gay rights movement, all state penal codes contained statutes that proscribed private consensual sodomy between adults.⁶⁰ Although criminal charges were not widely prosecuted—due primarily to the private nature of the illegal conduct—police often used sodomy laws to arrest people suspected of being gay.⁶¹ Police departments in many jurisdictions executed sting operations employing decoys—cops who pretended to be gay in an effort to convince gay men to make passes, at which time they would be arrested for soliciting illegal sex.⁶² Other arrests were not for actual sexual activity or solicitation, but for visiting a gay bar, innocently touching or dancing with a member of the same sex, or anything else that a police officer considered “indecent.”⁶³ In other words, arrests were not necessarily for illegal sexual conduct, but rather for any observed indicator of homosexuality. LGBT historian Eric Cervini reports on this period: “After World War II, homosexual arrests—including those for sodomy, dancing, kissing, or holding hands—occurred at a rate of one every ten minutes, each hour, each day, for fifteen years. In sum, one million citizens found themselves persecuted by the American state for sexual deviation.”⁶⁴

Police departments maintained vice squads whose sole function was to find and expose gay men. For example, during the post-war era, Washington, D.C., employed a so-called “morals squad” of four policemen working full-time to detect and arrest gay men.⁶⁵ Some

60. Leslie, *Creating Criminals*, *supra* note 4, at 106.

61. *Id.* at 127–35.

62. NAN ALAMILLA BOYD, WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965, at 137–38, 207–08 (2003); Leslie, *Creating Criminals*, *supra* note 4, at 131–32. *See generally* JOHN GERASSI, BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY (1966) (discussing use of anti-gay police stings in Boise, Idaho during the 1950s); MARTIN S. WEINBERG & COLIN J. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS 48 (1974) (noting that the California criminal statute was used “frequently in connection with arrests involving the soliciting of decoys by homosexuals”). These tactics continue today. *See infra* note 298.

63. Lewis, *Lifting the Ban*, *supra* note 19, at 389; BOYD, *supra* note 62, at 137–38.

64. ERIC CERVINI, THE DEVIANT’S WAR: THE HOMOSEXUAL VS. THE UNITED STATES OF AMERICA 4 (2020).

65. Lewis, *Lifting the Ban*, *supra* note 19, at 388.

officials complained that this number was insufficient to confront the “homosexual menace.”⁶⁶

Several vice squads existed primarily to create arrest records used to terminate gay men from federal employment.⁶⁷ D.C. police officials estimated that the nation’s capital was home to five thousand gay men, three-fourths of whom worked for the federal government.⁶⁸ These officials saw reducing that percentage as part of their mission. Local law enforcement, the FBI, and the Civil Service Commission worked in tandem to eliminate gay people from the federal workforce. The Commission chairman

suggested that if local police departments would report all morals arrests with sufficient detail to the FBI, then the FBI could give the information to the Civil Service Commission. The commission could then pass the information on to relevant agencies to remove current employees, and the FBI could maintain the lists so that job applicants could be screened against them. Indeed, [one D.C. police lieutenant] testified that he was already furnishing names and fingerprints of all morals arrests to the FBI.⁶⁹

For example, in 1963, the D.C. morals squad arrested National Aeronautics and Space Administration (“NASA”) budget analyst Clifford Norton for allegedly picking up another man in Lafayette Circle.⁷⁰ The police, unbeknownst to Norton, brought NASA’s security chief to observe their interrogation.⁷¹ Norton was subsequently transferred to NASA headquarters and questioned for several more hours, through the night until 6:30 in the morning, about his sexual orientation.⁷² Despite a fifteen-year record of unblemished government service, NASA fired Norton for his “immoral, indecent

66. *Id.*

67. *See* JOHNSON, *supra* note 18, at 138.

68. Lewis, *Lifting the Ban*, *supra* note 19, at 388.

69. *Id.*; *see also* LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 84 (1998) (noting that the FBI turned over the names of suspected homosexuals to the U.S. Civil Service Commission, which used the information to terminate gay employees).

70. Lewis, *Lifting the Ban*, *supra* note 19, at 391; CERVINI, *supra* note 64, at 303.

71. *Id.*

72. *Id.*; David K. Johnson, “Homosexual Citizens”: Washington’s Gay Community Confronts the Civil Service, WASH. HIST., Fall/Winter, 1994–1995, at 44, 45 [hereinafter Johnson, *Homosexual Citizens*]; *see* Norton v. Macy, 417 F.2d 1161, 1163 (D.C. Cir. 1969).

and disgraceful conduct.”⁷³ Gay men who confessed their sexual orientation during such an interrogation were summarily fired, no matter how valuable their service or skill set, even when their bosses supported them.⁷⁴ Government investigators used this basic process of interrogation against thousands of gay civil servants in the nation’s capital, almost all of whom “resigned” quietly in the hopes of perhaps finding a job in another city where their sexual orientation was unknown.⁷⁵

While the D.C. morals squad inflicted the most damage, many cities followed its lead by maintaining anti-gay squads.⁷⁶ The linkage between arrest and job termination was, in fact, a national phenomenon. Professor John D’Emilio explains that the FBI

took the initiative of establishing liaison with police departments throughout the country. Not content with acting only on requests to screen particular individuals, it adopted a preventive strategy that justified widespread surveillance. The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued.⁷⁷

Federal government officials “were instructed not only to check police records but to establish a ‘close working relationship’ with the vice squad in their area and to be aware that in some jurisdictions acts of sex perversion might only be prosecuted as ‘disorderly conduct.’”⁷⁸ The goal was to use arrest records to identify gay men.⁷⁹

Adverse employment action based on arrest was not limited to government jobs. Private employers, too, requested arrest records, and those applicants whose arrests indicated homosexuality were not

73. Johnson, *Homosexual Citizens*, *supra* note 72, at 45.

74. See BEEMYN, *supra* note 25, at 129 (discussing the entrapment, interrogation, and dismissal of Bill Youngblood, “a technician for the Department of Defense on their guided missile and atomic bomb programs”).

75. See Johnson, *Homosexual Citizens*, *supra* note 72, at 47 (explaining that after investigators accused a worker of being gay, “the civil servant was usually granted ‘the opportunity’ to resign quietly”).

76. See Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 688–725 (1966); Lewis, *Lifting the Ban*, *supra* note 19, at 389.

77. D’EMILIO, *supra* note 36, at 46.

78. JOHNSON, *supra* note 18, at 72–73.

79. Although LGB individuals of any gender could fall victim to the gay perjury trap, law enforcement officials targeted men.

hired.⁸⁰ Some New York employers hired private agencies to investigate job applicants for any signs of homosexuality in either their daily habits or their arrest and draft records.⁸¹ More generally, in an early 1970s survey, a quarter of over one thousand gay men nationwide responded that they had been arrested on charges related to homosexuality, and more than 15 percent reported that they had lost a job when employers learned of their homosexuality.⁸²

In sum, gay job applicants rationally sought to conceal any prior arrests that would expose their sexual orientation. But such concealment, if successful, could entail negative consequences down the line.

3. *Association Memberships.* Some employers also sought circumstantial evidence of sexual orientation by asking about applicants' memberships in private associations. Given the discrimination faced by gay Americans, many nascent gay rights organizations maintained strict confidentiality among members, including the use of code names so that even group members did not know the actual identities of their fellow members.⁸³ As the stigma against gay people began to dissipate in some cities and regions, members became more open with each other, though still closeted to the outside world.

The FBI attempted to infiltrate early gay rights groups in order to identify members and to monitor their activities.⁸⁴ The Mattachine

80. See WEINBERG & WILLIAMS, *supra* note 62, at 280 (“In the United States, for example, if one has ever been arrested for a homosexual offense, whether convicted or not, he may find his employment opportunities limited. Many employers, both public and private, ask whether a job applicant has ever been arrested.”).

81. TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 197 (1981).

82. WEINBERG & WILLIAMS, *supra* note 62, at 108–09. Five percent reported more than one job termination because employers discovered their sexual orientation. *Id.* at 109.

83. See JOANNE MYERS, *HISTORICAL DICTIONARY OF THE LESBIAN AND GAY LIBERATION MOVEMENTS* 8 (2013) (noting that while the two founders of the lesbian organization Daughters of Bilitis did not use aliases, “the names of the others remain[ed] confidential,” and that, in early gay organizations, “members usually adopted code names because of fear of harassment”); STUART TIMMONS, *THE TROUBLE WITH HARRY HAY: FOUNDER OF THE MODERN GAY MOVEMENT* 141–51 (1990) (recounting that the Mattachine Society “was to be composed of members ‘anonymous to the community at large, and to each other if they so choose’”).

84. *Cf.* Lewis, *Lifting the Ban*, *supra* note 19, at 390 (“FBI Director J. Edgar Hoover played a leading role in justifying the crackdown and pursued homophile and gay liberation organizations for decades (perhaps in response to a fear that a small homophile magazine, *One*, would ‘out’ him as a homosexual).” (citation omitted)).

Society of Washington, an early gay rights group, used code names for its members in order to reduce the risk of FBI infiltrators determining members' true identities, as well as to prevent members from being pressured into exposing their co-members in exchange for leniency when threatened by the FBI or a government employer.⁸⁵ The FBI sometimes asked government employees whether they belonged to Mattachine.⁸⁶ Some gay government employees were afraid of lying to the FBI and admitted their membership in Mattachine.⁸⁷ But during the 1960s, listing a gay rights organization on one's job application would render that person ineligible for government employment.⁸⁸

These organizations provided an opportunity for employers to make inquiries about applicants' proclivities. By requiring job applicants to disclose all current and prior organization memberships, employers asked indirectly about sexual orientation. A gay person who had ever belonged to a gay-related organization faced a dilemma. If a gay applicant answered honestly about membership in a gay rights organization, an employer would construe this as an admission of homosexuality, and no job offer would issue.⁸⁹ Alternatively, if one failed to disclose prior or current memberships, the gay perjury trap had been set.

B. Springing the Gay Perjury Trap: Punishing the Lie

When asked about sexual orientation, many gay job applicants tell untruths in order to avoid being denied a job. This concealment, however, allows employers who subsequently fire a gay employee to claim that they terminated the employee because she lied about her sexual orientation. This represents a gay perjury trap—the pretextual assertion by the employer that the issue is not the employee's sexual orientation, but her mendacity. This shifts focus from the employer's

85. Cf. CERVINI, *supra* note 64, at 90 (noting that Mattachine members were “very careful about divulging their true names and consequently they usually use codes names at the meetings and when they receive mail from the Society”).

86. *Id.* at 90–91.

87. *See id.* at 91.

88. *See* BEEMYN, *supra* note 25, at 189 (observing that Otto Ulrich was terminated from his Department of Defense job when government investigators realized that he had listed his membership in Mattachine).

89. *See* High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 569 (9th Cir. 1990) (“Plaintiff Weston, a homosexual, has a Secret clearance and in 1984 submitted an application for Top Secret clearance as required for his job at Lockheed Missiles & Space Co. Lockheed never forwarded his application to the DoD because his application revealed he belonged to a gay organization.”).

anti-gay policy to the individual gay employee's "dishonesty." This section provides historic examples of the gay perjury trap in action, with gay workers being punished for concealing their sexual orientation, their memberships in gay organizations, and the details of gay-related arrests.

1. *Punished for Concealing Sexual Orientation.* As discussed above, public and private employers have long sought to rid their workforces of gay personnel. Federal intelligence and law enforcement agencies have been particularly aggressive in investigating their own staffs in the hopes of punishing gay employees who evaded detection during the hiring process. Thousands were harassed and terminated. Very few ever fought back. Frank Buttino did. An FBI special agent for decades, Buttino performed undercover work, including investigating espionage and terrorism.⁹⁰ During his tenure, he received four special commendations, among other honors.⁹¹

Buttino's unblemished career with the agency came to a halt in the 1990s after the FBI's San Diego office received an anonymous tip accusing Buttino of being gay.⁹² The FBI began an investigation of its own agent, focusing largely on one piece of evidence: a love letter written from one man to another.⁹³ The FBI set the gay perjury trap by handing Buttino a form that stated in part: "This inquiry pertains to an anonymous allegation of homosexual activity."⁹⁴ The document said Buttino "had to answer all questions fully and truthfully or face possible dismissal."⁹⁵ When asked by FBI investigators, Buttino denied that he had authored a romantic letter to another man.⁹⁶ Five weeks later, however, Buttino corrected himself and acknowledged having written the letter in question.⁹⁷ But it was too late. The FBI asserted that because Buttino had been "deceptive" during their investigation,

90. Buttino v. FBI, 801 F. Supp. 298, 300 (N.D. Cal. 1992).

91. *Id.*

92. John D. Cramer, *Ex-FBI Agent, Fired for Being Gay, Fights To Get Back Job*, L.A. TIMES, Aug. 30, 1990, at 1.

93. BUTTINO, *supra* note 17, at 94–95.

94. *Id.* at 95.

95. *Id.*

96. *See Buttino*, 801 F. Supp. at 300.

97. *Id.* Buttino explained that he had initially denied being gay because he feared admitting his homosexuality would result in his termination. *Id.*

he would lose his Top Secret security clearance and consequently, his job.⁹⁸

Unlike the many gay FBI agents who had been terminated or forced to resign, Buttino defended himself, bringing a lawsuit challenging the FBI's discriminatory policy.⁹⁹ The FBI defended its action by arguing that Buttino was not terminated for being gay but for being *deceptive* about being gay.¹⁰⁰ The FBI argued that there could be no constitutional infirmity in its firing of Buttino because Buttino had been deceptive in affirmatively concealing his homosexuality.¹⁰¹

The FBI was being disingenuous, however, when it claimed that it was terminating Buttino for his mendacity. Under the FBI's policy at the time, if Buttino had been truthful at the outset, the FBI would have fired him.¹⁰² In these circumstances, it would be irrational for any gay FBI agent to acknowledge his or her sexual orientation to FBI officials.

The FBI's alleged reliance on Buttino's deception was mere pretext. The FBI's unhealthy obsession with homosexuality was illustrated by its blanket policy against gay agents and its treatment of suspected violators. Agents suspected of homosexuality—but with otherwise sterling records—were investigated mercilessly and drummed out of the agency.¹⁰³ Although the FBI enforced its anti-gay policy for decades, Buttino was the first agent to fight back.¹⁰⁴

The district court in Buttino's lawsuit noted that one special agent, a heterosexual individual who had worked for the FBI for twenty-six years, had stated "unequivocally that the FBI did, during my years as a Special Agent, have a policy of discriminating against gays, or what we in the FBI often referred to as homosexual deviates, queers, fags, faggots, fruits, punks and limp wrists."¹⁰⁵ The FBI's 1990 internal

98. *Id.* at 300, 309 n.2 ("Because all FBI employees must have a Top Secret security clearance, plaintiff's employment was, by necessity, terminated after his security clearance was revoked.").

99. *See id.* at 298–300.

100. Irvin Molotsky, *Gay Workers Gain Bias Rule at F.B.I.*, N.Y. TIMES, Dec. 3, 1993, at A29 ("The bureau has responded that the agent, Frank Buttino, was dismissed because he gave deceptive answers when he was first asked if he was homosexual, not because he was gay.").

101. *See Buttino*, 801 F. Supp. at 300–01.

102. *See CHARLES*, *supra* note 35, at xv.

103. *See Buttino*, 801 F. Supp. at 304–05.

104. Cramer, *supra* note 92.

105. *Buttino*, 801 F. Supp. at 310 n.5.

employment policy mirrored its external investigative policies of the 1960s: search and destroy.

Furthermore, the FBI generally treated suspected gay agents far differently—and worse—than it treated heterosexual agents suspected of sexual indiscretions. The questions addressed to gay employees were far more intrusive and invasive than those asked of straight agents.¹⁰⁶ Agents accused of homosexual activity were asked about “specific private sexual acts” and their “childhood sexuality.”¹⁰⁷ The questions could be quite graphic. For example, the FBI investigators pressed Buttino with statements like “We need to know the kind of sex you engage in with other men.”¹⁰⁸ The penalties exacted, too, were disproportionately harsh, as

the FBI’s own documents . . . indicate[] that the measures taken against Buttino (revocation of his security clearance and dismissal) were more severe than the FBI otherwise takes in cases of similar—or more serious—findings of “lack of candor” and improper disclosure of information. Those documents suggest that the typical punishment for indiscretions of roughly similar seriousness appears to be censure, probation of six months to one year, and suspension without pay for 7 to 60 days.¹⁰⁹

The FBI did not terminate heterosexual agents who lied about their sexual indiscretions.¹¹⁰ Given the so-called lack of candor resulted in wildly harsher penalties based on the target’s presumed homosexuality, the FBI was punishing sexual orientation—not deception.¹¹¹

106. Cf. *Holbrook v. Reno*, 196 F.3d 255, 258–59 (D.C. Cir. 1999) (documenting how the FBI “repeatedly asked [a female agent] . . . whether she had had sexual relations with . . . [a male agent]” but apparently not asking about specific details of the alleged encounters).

107. *Id.* at 305.

108. BUTTINO, *supra* note 17, at 115. The FBI’s obsession with specific acts mimics Florida’s hunt for gay teachers during the Cold War. See Braukman, *supra* note 38, at 559 (“Investigators scrutinized virtually every conceivable aspect of their targets’ sex lives, compelling them to describe specific acts and the role played in each (most often articulated by questioners as ‘passive’ or ‘aggressive’) to measure their potential for corrupting Florida’s children.”); see also *id.* at 568 (“Then came the coaxing and prodding to elicit intimate details about sexual activity and exhaustive naming of specific acts performed with other women.”).

109. *Buttino*, 801 F. Supp. at 304 (citation omitted).

110. See BUTTINO, *supra* note 17, at 290.

111. See *Buttino*, 801 F. Supp. at 308 (“The court cannot help but wonder, moreover, whether there is anything to indicate that Buttino’s lack of candor would ever have been an issue *but for* the FBI’s history of anti-gay discrimination . . .”).

The *Buttino v. FBI*¹¹² case illustrates fundamental aspects of the gay perjury trap. The FBI questioned all job applicants about their sexual orientation and steadfastly refused to hire anyone who acknowledged being gay.¹¹³ Any gay agent who made it through the initial screen worked in fear that the question would be asked again because candor and lack of candor were punished equally—via revocation of security clearance and termination from employment. The district court recognized the catch-22 in which gay agents were caught, and the judge “question[ed] . . . the rationality of a policy which punishes gay employees for being less than candid about their homosexuality when it is undisputed that . . . the FBI would clearly have purged any employee for being candid about one’s homosexuality.”¹¹⁴ In essence, the FBI forced the employee into this “lack of candor” through its anti-gay policies and then subsequently punished this same “lack of candor” that it had compelled.¹¹⁵ Ultimately, the *Buttino* court recognized that the FBI’s revocation of a security clearance based on a lack of candor regarding sexuality was “a mere pretext for the implementation of a discriminatory policy.”¹¹⁶ In 1993, Attorney General Janet Reno announced an end to the FBI’s official policy against gay employees, though de facto discrimination remains a problem.¹¹⁷

112. *Buttino v. FBI*, 801 F. Supp. 298 (N.D. Cal. 1992).

113. *See supra* notes 102–105 and accompanying text.

114. *Buttino*, 801 F. Supp. at 308.

115. *Id.* at 312 (“[T]here is a viable question as to whether plaintiff’s ‘lack of candor’ and ‘uncooperativeness’ would ever have been an issue but for the FBI’s alleged anti-gay practices.”).

116. *Id.* at 301. The district court certified Buttino’s case as a class action against the FBI, challenging the agency’s anti-gay policies as a whole. *Buttino v. FBI*, No. C–90–1639SBA, 1992 WL 12013803, at *1 (N.D. Cal. Sept. 25, 1992). The class action was rendered moot when the Justice Department under Attorney General Janet Reno changed the FBI antidiscrimination policy to include sexual orientation. *Cf. Reno Orders FBI To Discard Anti-Homosexual Hiring Policy*, L.A. TIMES, Dec. 4, 1993, at A18 (“Reno has ordered the FBI to discard a policy making it difficult for homosexuals to be hired, and the bureau now will forbid discrimination based on sexual orientation. . . . Reno’s statement came as a federal class action case brought by former FBI agent Frank Buttino, 48, began in San Francisco.”). Subsequently, Buttino settled his individual lawsuit. *Litigation Notes – Federal*, LESBIAN/GAY L. NOTES (Lesbian & Gay L. Ass’n of Greater N.Y., New York, N.Y.), Apr. 1994, <http://www.qrd.org/qrd/usa/legal/lgl/1994/04.94> [<https://perma.cc/2MV2-GW5D>]. Under the settlement, Buttino received some damages, but not reinstatement. *See id.* (“In exchange for dropping his request for reinstatement, Frank Buttino will receive a cash settlement of about \$100,000, \$53,000 in legal fees, and a civil service pension when he reaches age 62 in 2007.”).

117. *See Molotsky, supra* note 100.

2. *Punished for Concealing Membership in Gay Rights Association.* In addition to penalizing false denials of homosexuality, some employers have sought to punish concealing indicia of homosexuality, such as belonging to a gay rights organization. In 1972, Joseph Acanfora III graduated from Penn State with the goal of being a high school science teacher.¹¹⁸ His junior year had been momentous for two reasons. First, Acanfora changed his major from meteorology to education, so that he could pursue a profession in which he worked with people.¹¹⁹ Second, he joined a student organization, Homophiles of Penn State (“HOPS”), which sought to increase public understanding of homosexuality.¹²⁰ When Penn State refused to recognize the group, its members—including Acanfora—brought a successful lawsuit against the university.¹²¹

Because Acanfora had acknowledged his sexual orientation during that litigation, state officials debated Acanfora’s suitability for teacher certification.¹²² They ultimately forwarded his application for certification to the Pennsylvania Secretary of Education without recommendation.¹²³ While the certification process proceeded out of the public eye in Pennsylvania, Acanfora successfully applied for a teaching position at a junior high school in Montgomery County, Maryland.¹²⁴ The school was satisfied with Acanfora’s classroom performance as a science teacher, and Acanfora taught without incident.¹²⁵

After Acanfora had been teaching science at a junior high school for several weeks, the Pennsylvania Secretary of Education held a press conference and announced that Acanfora’s application for teacher certification would be approved despite his homosexuality.¹²⁶ Upon

118. See *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 844–45 (D. Md. 1973), *aff’d*, 491 F.2d 498 (4th Cir. 1974).

119. *Id.*

120. *Id.* at 845.

121. See *Acanfora*, 491 F.2d at 500. Former U.S. Supreme Court Justice Thomas Clark sat on the three-judge panel by designation. *Id.* at 499.

122. *Id.*

123. *Id.* at 500.

124. See *id.*

125. *Acanfora*, 359 F. Supp. at 845–46 (“The Board has in no way attacked Acanfora’s classroom performance, nor has it charged Acanfora with bringing up the subject of homosexuality in the school environment. The evidence is that he is competent and that he did not discuss his private life while at school.”).

126. *Id.* at 845.

learning that Acanfora was gay from the Pennsylvania official's press conference, which seemed designed to invite discrimination against Acanfora, the Montgomery County Deputy Superintendent of Schools transferred Acanfora out of the classroom and into administrative work, where he would have no contact with students.¹²⁷ The transfer to a nonteaching position, even without a loss of salary, was "at heart, the functional equivalent of an injury inflicted upon plaintiff's reputation, an implicit allegation that his homosexuality determines unfitness to teach."¹²⁸

In response to this adverse job action, Acanfora granted several journalists' requests for interviews, including a segment on *60 Minutes*.¹²⁹ At a time in American history when homosexuality was still equated with criminality and moral deviance, Acanfora attempted to increase public understanding of homosexuality. Among his many television, radio, and press interviews, Acanfora appeared with his parents on a PBS program to discuss how gay people and their families confront problems like discrimination and societal intolerance.¹³⁰ Throughout his interviews, Acanfora "stressed that he had not, and would not, discuss his sexuality with the students."¹³¹

When Acanfora sued the Montgomery County Board of Education to reinstate his teaching position, the school board argued that it would neither reinstate Acanfora nor renew his contract because his appearances in the media had sparked controversy.¹³² Reversing the district court, the Fourth Circuit held that Acanfora had a First Amendment right to speak to the media as he did because "a teacher's comments on public issues concerning schools that are neither knowingly false nor made in reckless disregard of the truth afford no ground for dismissal when they do not impair the teacher's performance of his duties or interfere with the operation of the schools."¹³³ The Fourth Circuit noted that "[t]here is no evidence that

127. *Acanfora*, 491 F.2d at 500.

128. *Acanfora*, 359 F. Supp. at 857; *see id.* at 849–50 ("And it is no defense that the Board merely transferred Acanfora, for the measurement of abridgment of constitutional rights is not confined to dollars and cents. To rule otherwise would facilitate subtle circumvention of the law so carefully developed by the highest court of this land.").

129. *Id.* at 846.

130. *Acanfora*, 491 F.2d at 500.

131. *Id.*

132. *Id.*

133. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said.”¹³⁴ The court held that the First Amendment protected Acanfora’s public statements and, thus, the school board could not penalize Acanfora for his press interviews.¹³⁵

In anticipation of this holding, the school board advanced a second argument: Acanfora’s deception. In its employment application, the school board requested applicants to list their past and present organizational affiliations.¹³⁶ While Acanfora listed his student membership in the Pennsylvania State Education Association, he did not list HOPS.¹³⁷ Acanfora refrained from disclosing his membership in HOPS precisely because he believed that the school board would discriminate against him.¹³⁸ During the litigation, the school board relied on Acanfora’s omission to justify its punishment even though it was unaware that Acanfora had been a member of HOPS—and had consciously decided not to mention it on his application—until *after* the deputy superintendent had taken the adverse action against Acanfora.¹³⁹ Instead, according to a school board official, the decision to remove Acanfora from the classroom was based on the fact that he “was an advertised, activist homosexual.”¹⁴⁰

By invoking Acanfora’s alleged deception, the school sought to spring a gay perjury trap. The strategy worked. The Fourth Circuit held that the school board could transfer Acanfora to a non-teaching position because of Acanfora’s decision to conceal his sexual orientation despite the board not knowing of Acanfora’s HOPS omission when they decided to transfer him.¹⁴¹ The Fourth Circuit used

134. *Id.* at 500–01.

135. *Id.* (citations omitted).

136. *Id.* at 501.

137. *Id.*

138. *See id.* at 501 (“[H]e realized that this information would be significant, but he believed disclosure would foreclose his opportunity to be considered for employment on an equal basis with other applicants.”).

139. *Id.* at 503 n.4.

140. *Id.*

141. *See id.* at 503 (“It was Acanfora’s testimony that furnished the school system a factual basis for the defense of misrepresentation. After Acanfora testified, the superintendent of schools unequivocally assigned the conscious withholding of information as a reason for his unwillingness to reassign Acanfora to a teaching position.”); *see also id.* (“We conclude, therefore, that the school system should not be prejudiced because it did not include in the administrative file, as a

Acanfora's decision to conceal his sexual orientation as an excuse not to reach the merits of Acanfora's claim that the school district's policy was unconstitutional.¹⁴² The court reasoned:

Not every omission of information in an employment application will preclude an employee from attacking the constitutionality of action taken by the governing body that employs him. But here Acanfora wrongfully certified that his application was accurate to the best of his knowledge when he knew that it contained a significant omission. His intentional withholding of facts about his affiliation with [HOPS] is inextricably linked to his attack on the constitutionality of the school system's refusal to employ homosexuals as teachers. Acanfora purposely misled the school officials so he could circumvent, not challenge, what he considers to be their unconstitutional employment practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid.¹⁴³

The Fourth Circuit in *Acanfora v. Board of Education of Montgomery County*¹⁴⁴ held that if a gay applicant conceals his sexuality to be hired by an employer with a policy against hiring gay people, then the applicant does not have standing to challenge the employer's anti-gay policy.¹⁴⁵ This legitimized the gay perjury trap set by the school board, which required applicants to sign—in the presence of a notary, no less—the following statement: “I understand that falsification of any information submitted on this application shall be cause for dismissal from service.”¹⁴⁶ One school official swore in an affidavit:

This litigation by reason of plaintiff's false application, is contrived in every sense of the word. He ought not to bootstrap his way into a constitutional issue out of such untruthfulness. Had he been truthful, defendants would not have been involved in this litigation as they would not have hired him in the first place.¹⁴⁷

reason for denying Acanfora a teaching position, information about his motives that were known to Acanfora but unknown to the school officials until he testified.”).

142. *Id.* at 499.

143. *Id.* at 503–04.

144. *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974).

145. *Id.* at 504 (quoting *Kay v. United States*, 303 U.S. 1, 6 (1938)).

146. *Id.* at 501 n.1.

147. *Id.* at 503 n.3.

Shockingly, the school official scolded Acanfora for lying because, but for the lie, the school district could have quietly exercised its anti-gay policy and avoided litigation by not hiring Acanfora in the first place.

Acanfora ended up the victim of a gay perjury trap.¹⁴⁸ If he had told the truth, the school board—by its own admission—would have discriminated against him based on his sexual orientation.¹⁴⁹ But because he omitted his membership in HOPS, he suffered the same fate. Although the school’s anti-gay policy would now violate Title VII, inquiry into memberships remains a method of setting the gay perjury trap.

3. *Punished for Not Elaborating on Arrest Record.* Employers have historically used accusations of deception regarding arrest records to justify terminating gay employees. Although police departments across the country arrested approximately one million gay men for offenses related to their sexual orientation,¹⁵⁰ Frank Kameny represents one of the most famous cases. Kameny had been a university professor before applying to work for the Army Map Service in the late 1950s.¹⁵¹ On the job application’s request for arrest history, Kameny responded he had been arrested in San Francisco for “disorderly conduct,” but the charge had been dismissed.¹⁵² Kameny was hired and started work as an astronomer just before the Soviet Union’s launch of Sputnik started the space race.¹⁵³

After only a few months, federal investigators approached Kameny with the news that the Civil Service Commission had received information indicating he was homosexual.¹⁵⁴ When asked for details

148. See ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 53 (1995) (“[T]he court upheld the transfer because he had failed to disclose his membership of a gay student organization in his application for a teaching position, in order to circumvent the school’s policy of refusing to employ gay teachers, which his ‘deception’ precluded him from challenging!”); JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 179 (2001) (“Acanfora could not challenge the constitutionality of an anti-gay employment policy because he had used ‘deception’ to try to avoid it . . .”).

149. *Acanfora*, 491 F.2d at 501 (“The school officials admit that if Acanfora had revealed his affiliation with the Homophiles they would not have employed him.”).

150. CERVINI, *supra* note 64.

151. See *id.* at 23–25.

152. MURDOCH & PRICE, *supra* note 148, at 51–52.

153. *Id.*; see CERVINI, *supra* note 64, at 23–25.

154. MURDOCH & PRICE, *supra* note 148, at 52.

of his sex life, Kameny refused to answer, invoking his desire to keep his private life private.¹⁵⁵ Soon thereafter, the government fired Kameny—not for being gay but for allegedly misrepresenting the nature of his prior arrest in San Francisco.¹⁵⁶ Although the arrest documents only cited the penal code section without description, the government accused Kameny of being arrested for “lewd and indecent acts,” not “disorderly conduct,” as he had claimed on his application.¹⁵⁷ Both were catch phrases used by police departments to arrest men for suspected homosexuality.¹⁵⁸ Yet, the government focused on the difference in nomenclature to accuse Kameny of dishonesty and to justify his termination on those grounds.¹⁵⁹

Kameny’s situation constituted a version of the gay perjury trap. If Kameny had been completely forthright in explaining that he had been arrested on suspicion of homosexual conduct, the government agency would never have hired him.¹⁶⁰ Because Kameny acknowledged his arrest but stated the charge neutrally, the government agency accused him of duplicity and fired him on that basis. Kameny sued.¹⁶¹ The *Kameny* case represents the government’s time-tested strategy of painting gay employees as blameworthy by attacking their alleged deception—all the while diverting attention from the government’s own exclusionary policy. Kameny lost his lawsuit but started a lifelong quest to hold the government accountable.¹⁶²

155. *Id.* Even after Frank Kameny had become the public face of the American gay rights movement, well into the 1970s and beyond, he avoided discussing his 1956 arrest. CERVINI, *supra* note 64, at 391.

156. *See* CERVINI, *supra* note 64, at 28.

157. MURDOCH & PRICE, *supra* note 148, at 52; *see* CERVINI, *supra* note 64, at 28 (“Kameny had not been arrested for disorderly conduct, but rather for loitering and ‘lewd, indecent, or obscene’ conduct. According to the [Army Map Service], Kameny ‘failed to furnish a completely truthful answer,’ and for that reason, it terminated him.”).

158. MURDOCH & PRICE, *supra* note 148, at 52.

159. *See* CERVINI, *supra* note 64, at 28 (“The AMS’s official reason [for terminating Kameny] appeared to have nothing to do with homosexuality. According to the AMS personnel officer, Kameny had falsified an official government document.”).

160. *See supra* notes 18–35 and accompanying text.

161. *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960).

162. After Kameny lost his legal challenge to the government’s policy, he became the most prominent leader of the growing gay rights movement and its litigation strategy to get civil service protections for gay workers. *See* PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 55–56 (2000).

Federal officials used inquiries into arrest history as part of a gay perjury trap. In his study of the federal government's anti-gay employment policies during the Cold War, Johnson explained:

Applications for federal employment contained questions about past arrests and membership in subversive organizations that were designed less to solicit information than to provide a clear basis for firing those who lied about their pasts. If, for example, a gay male employee was found to have been arrested on a sex charge in a known gay cruising area but had failed to properly disclose it on his federal application form, he could be terminated for the criminal offense of falsifying a federal form. As Civil Service Commission general counsel H. Patrick Swygert acknowledged, "These questions are primarily used to impeach persons who falsely answered the questions in the negative or to dissuade persons from applying who believe their backgrounds might raise suspicions."¹⁶³

For gay men desiring federal employment, a previous arrest under circumstances that indicated homosexuality could end one's career before it even began.

States sometimes employed a similar approach. At the close of the 1960s, the Florida bar disbarred attorney Ronald Kay following his arrest for so-called homosexual solicitation.¹⁶⁴ The bar association cited both the "homosexual activity" and Kay's "lack of candor" because he tried to conceal the nature of his arrest from the bar, his family, and associates.¹⁶⁵ Kay's reluctance to be open about his homosexuality is hardly surprising given the loss of family, job, and status that gay men suffered when their sexual orientation was revealed.

Failing to disclose an arrest that exposed one's homosexuality could lead to even harsher consequences than losing one's government job. For example, when FBI Director J. Edgar Hoover began investigating Charles Thayer, a high-level employee in the State Department, Hoover discovered evidence that Carmel Offie was also gay.¹⁶⁶ Offie worked for the Central Intelligence Agency ("CIA") Office of Policy Coordination.¹⁶⁷ Hoover was working with Senator

163. JOHNSON, *supra* note 18, at 138.

164. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 73–74 (1999).

165. *Id.*

166. CHARLES, *supra* note 35, at 99.

167. *Id.*

McCarthy to coerce the State Department to fire Thayer, whom Hoover considered a “degenerate” and a “high-class homosexual.”¹⁶⁸ Hoover and McCarthy learned of Offie’s homosexuality because Offie had been arrested on the morals charge of “hanging around the men’s room in Lafayette Park.”¹⁶⁹ Without mentioning Offie’s name, McCarthy intimated on the Senate floor that there was a homosexual within the CIA.¹⁷⁰ Understanding McCarthy’s threat, the White House demanded Offie’s immediate resignation on the “pretext . . . that, in 1948, when filling out his application to work at the CIA, Offie failed to disclose his 1943 arrest in Lafayette Park.”¹⁷¹

But Offie’s termination did not satiate Hoover, who demanded further investigations into Offie on the grounds he had gained his job at the CIA “by concealing his past . . . in failing to disclose his 1943 arrest.”¹⁷² Hoover argued this constituted fraud.¹⁷³ While the Department of Justice declined to pursue criminal charges, FBI agents continued to investigate Offie, following him “everywhere to ascertain his ‘contacts and activities.’”¹⁷⁴ Not content with physical surveillance, “FBI officials authorized an illegal break-in of [Offie’s] Washington, DC, home either to search his personal papers and belongings or to surreptitiously install a microphone.”¹⁷⁵ The FBI justified its pursuit of Offie as necessary to facilitate his prosecution for failing to report his 1943 arrest on his employment application for the CIA.¹⁷⁶

4. *Summary.* In general, it seems relatively noncontroversial to fire someone for lying.¹⁷⁷ Some employers exploit this fact by requiring applicants to agree that if they have misrepresented or omitted any information called for in the hiring process, they are subject to “immediate discharge.”¹⁷⁸ The employer then asks applicants if they

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 100.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 101.

176. *See id.* at 102.

177. *See infra* notes 314–40 and accompanying text.

178. The Head Start program in Dallas had such a requirement as well as suggesting that “Homosexual Conduct” disqualifies an applicant from employment. *See Head Start of Greater Dallas, Inc. Application For Employment*, HEAD START OF GREATER DALL.,

are gay, refusing to hire honest gay people and later terminating any “deceptive” gay people who were hired. This creates a bind that can prevent gay people from working in their chosen field.

C. Preventing Escape from the Gay Perjury Trap

It might seem that job applicants could escape the gay perjury trap simply by refusing to answer employers’ questions about sexual orientation. By taking this approach, gay applicants neither acknowledge their homosexuality nor lie about it. Historically, however, this third path has not been a viable option for three related reasons.

First, some employers have interpreted the refusal to answer questions about sexual orientation as proof of homosexuality and have rejected the applicant as they would any other gay applicant. When the State Department’s Bureau of Security and Consular Affairs investigated employees suspected of homosexuality during the Cold War, officials could interrogate a government employee for hours; they often hooked him up to a polygraph machine and treated any refusal to answer explicit questions about sexual activity as an admission of homosexuality.¹⁷⁹ For example, when government investigators asked about his private sexual activity, Frank Kameny declined to give the details of his sex life, responding that “as a matter of principle one’s private life is his own.”¹⁸⁰ The government punished Kameny’s refusal to answer intensely personal questions about his so-called “moral conduct.”¹⁸¹ The Civil Service Commission had no actual evidence against Kameny; it “simply interpreted his refusals to cooperate during his . . . interrogations as admissions of guilt.”¹⁸²

Second, employers have historically treated an applicant’s refusal to answer questions about sexual orientation as itself disqualifying. During the 1960s and 1970s, applicants who refused to answer questions regarding homosexuality would not be hired, even if they had

<https://web.archive.org/web/20081121194059/http://www.hsgd.org/PDF/HSGDEmploymentApplication.pdf> [<https://perma.cc/ZJE7-CJPE>] (last visited Oct. 23, 2009) (“I understand that if the information I have provided is found to be false, misrepresented or omitted, it will be sufficient cause to cancel the employment process as immediate discharge from HEAD START of Greater Dallas, Inc. service when it is disclosed.”).

179. See JOHNSON, *supra* note 18, at 128.

180. CERVINI, *supra* note 64, at 27.

181. *Id.* at 41.

182. *Id.* at 42.

been ranked as qualified following the federal civil service's competitive examinations.¹⁸³ For example, the D.C. Circuit held that a job applicant was properly "rated ineligible" for his "refusal to comment or to furnish information as to whether or not [he had] engaged in homosexual acts."¹⁸⁴ For public employees who had somehow "attract[ed] public notice," the D.C. Circuit explained, "the Commission will ask, and presumably will disqualify, if either there is a refusal to respond or an admission of a homosexual act."¹⁸⁵

More recently, under the FBI's anti-gay policy, an applicant or employee who refused to answer explicit questions about same-sex sexual activity would be labeled "uncooperative"; this would serve as the basis for termination, as happened in Frank Buttino's case in the 1990s.¹⁸⁶ The targets of the FBI's anti-gay witch hunts understood this, as "[e]mployees were told that failure to answer any questions put to them during the inquiry could result in their being fired for failure to cooperate."¹⁸⁷ Even in the late twentieth century, some courts held that employers could demand that job applicants reveal their sexual histories, including sexual orientation.¹⁸⁸ These courts reasoned that a job applicant's refusal to answer questions about their sexual orientation is sufficient grounds for terminating or refusing to hire an employee.¹⁸⁹

183. See *Scott v. Macy*, 349 F.2d 182, 182–83 (D.C. Cir. 1965); see also *Richardson v. Hampton*, 345 F. Supp. 600, 603 (D.D.C. 1972) (reviewing the termination of a postal clerk for "refus[ing] to admit or deny that he had engaged in homosexual conduct"); *Baker v. Hampton*, No. 2525-71, 1973 WL 274, at *1 (D.D.C. Dec. 21, 1973) (stating that National Bureau of Standards clerical workers were terminated because they "refused to answer inquiries about their sexual preferences, practices and associations, claiming such questions were unrelated to job performance and were, moreover, invasions of their right to privacy").

184. *Scott v. Macy*, 402 F.2d 644, 645–46 n.2 (D.C. Cir. 1968).

185. *Id.* at 649. Scott later prevailed because the Commission had not provided him sufficient notice of the policy under which he was being penalized. See *ESKRIDGE*, *supra* note 164, at 126.

186. See *BUTTINO*, *supra* note 17, at 175 ("Toward the end it accused me of not furnishing the names and identities of those I associated with 'in what appears to be a secret homosexual society.' The letter said I displayed 'a lack of candor during the inquiry and a refusal to cooperate.'").

187. *Id.* at 286.

188. See *WINTEMUTE*, *supra* note 148, at 75 ("Refusing to answer the question would not seem to be an option. Several courts have interpreted *Hardwick* as permitting public employers or officials to ask, through questionnaires or polygraph tests, whether a person has engaged in same-sex sexual activity.").

189. See, e.g., *Walls v. City of St. Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (finding no violation of the constitutional right to privacy where a police officer is discharged after refusing to answer employer questions about homosexual relations); *Truesdale v. Univ. of N.C.*, 371 S.E.2d

Relatedly, in many cases—at a time when government officials automatically denied security clearances to gay people¹⁹⁰—interrogators considered any refusal to refute accusations of homosexuality as sufficient to deny individuals any security clearance, rendering them ineligible for employment.¹⁹¹ The government has routinely asked citizens about their sexual orientation as a prerequisite to obtaining a security clearance necessary to pursue one’s career.¹⁹²

Third, in some cases, those individuals who refused to cooperate with government inquiries into their sexual orientation were threatened with public exposure. For example, when Florida state officials began their search for lesbian teachers in the state during the Cold War, some women refused to answer the most invasive of questions.¹⁹³ These teachers were told that failure to cooperate candidly would result in a public hearing in which the target’s sexual history would be announced for all to hear.¹⁹⁴ This tactic made outright refusals to reply quite rare.¹⁹⁵

D. The Inherent Unfairness of the Gay Perjury Trap

For decades, millions of gay workers have lived and labored in fear. Personal correspondence from the 1960s reveals that many gay men worried about the dilemma they faced when seeking employment: “be honest . . . about his homosexuality and almost certainly not be hired,” or be dishonest and risk being fired when their employer discovers the truth.¹⁹⁶ Lesbian teachers similarly suffered a double bind. A lesbian teacher “loses her job whether she admits her sexual

503, 509 (N.C. Ct. App. 1988) (same), *overruled on other grounds by* *Corum v. Univ. of N.C.*, 413 S.E.2d 276 (N.C. 1992).

190. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1770 (2020) (Alito, J., dissenting) (“In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered.”).

191. See *BEEMYN*, *supra* note 25, at 189; *Marks v. Schlesinger*, 384 F. Supp. 1373, 1375–76 (C.D. Cal. 1974).

192. See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 580 (9th Cir. 1990).

193. *Braukman*, *supra* note 38, at 566–67.

194. *Id.* See generally *POUCHER*, *supra* note 37 (discussing Florida’s targeting of teachers suspected of being gay or lesbian); *STACY BRAUKMAN, COMMUNISTS AND PERVERTS UNDER THE PALMS: THE JOHNS COMMITTEE IN FLORIDA, 1956-1965* (2012) (same).

195. *Braukman*, *supra* note 38, at 567.

196. *CRAIG M. LOFTIN, MASKED VOICES: GAY MEN AND LESBIANS IN COLD WAR AMERICA 1–2* (2012).

orientation (fired because the bureaucracy fear parental reaction) or denies the same (fired because she lied on a bureaucratic form).”¹⁹⁷ Although the historic examples of the gay perjury trap skew towards men, the mistreatment of lesbian teachers demonstrates that the trap was not limited to gay men.¹⁹⁸

Employers’ anti-gay policies forced LGB employees to lie and to remain in the closet. In this way, the gay perjury trap reinforces the presumption of an exclusively heterosexual workforce. As Professor William N. Eskridge explains,

A major effect [of state interrogation] was to force or enable people to self-identify, to take an affirmative position as to their sexual orientation. Where the mask could be silence about one’s sexuality, the newly pervasive state questioning precluded silence and put homosexuals on the spot. They could affirmatively lie and commit to a never-ending masquerade, where one lie led to another and often to a life brimming with hypocrisy. Or they could tell the truth and face ruin, including jail or an asylum.¹⁹⁹

The gay perjury trap further prevents these individuals from living lives of either open and proud proficiency or quiet competence. That is the epitome of irrational discrimination. As Part II demonstrates, Congress intended Title VII to remedy such invidious discrimination in the workplace. But even after the Supreme Court’s decision in

197. ESKRIDGE, *supra* note 164, at 5.

198. The relatively higher number of male examples may be for one or more related reasons. First, men were overrepresented in the workforce and in the published reports regarding anti-gay employment discrimination. For example, the reported cases challenging the federal government’s anti-gay policies were challenged by men who had been fired. *See, e.g.*, *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969) (reviewing the discharge of a male budget analyst at NASA for immoral conduct); *Scott v. Macy*, 349 F.2d 182, 183 (D.C. Cir. 1968) (reviewing the disqualification of a male applicant for immoral conduct); *Dew v. Halaby*, 317 F.2d 582, 583 (D.C. Cir. 1963) (reviewing the discharge of a male air traffic controller for past homosexual acts). Second, many American leaders seemed more concerned with male homosexuality than female homosexuality, as indicated by the fact that most vice squads were tasked with detecting and arresting gay men, not lesbians. *See* Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine To Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 84 (2001) (“Many police departments employ undercover operations designed to entrap gay men into offering or requesting oral sex.”). Regardless of the gender-skewed historical record, the lessons of this Article are gender neutral. Unless courts and the EEOC interpret and apply Title VII correctly, homophobic employers can use the gay perjury trap against both men and women who conceal their sexual orientation.

199. ESKRIDGE, *supra* note 164, at 56.

Bostock, the gay perjury trap may interfere with gay workers receiving full protection from prejudiced employers.

II. THE RELEVANCE OF THE GAY PERJURY TRAP POST-*BOSTOCK*

Prior to the Supreme Court's *Bostock* opinion, prejudiced employers operating in one of the majority of states that failed to protect against discrimination on the basis of sexual orientation did not have to muster a pretextual excuse for terminating—or refusing to hire—LGB workers. They could legally verbalize their intent to discriminate. And many did.

The Supreme Court's *Bostock* decision should preclude private employers from openly discriminating against gay employees. The opinion decided three consolidated cases involving two gay employees and one transgender employee who had been fired for their sexual orientation and gender identity, respectively.²⁰⁰ In each case, the fired employee challenged the termination as violating Title VII.²⁰¹ Writing for the majority, Justice Neil Gorsuch employed a textualist approach to hold that Title VII's prohibition on employment discrimination "because of" an individual's sex barred an employer from firing employees based on sexual orientation and gender identity.²⁰²

By bringing sexual orientation discrimination within the ambit of Title VII, *Bostock* forces homophobia into the closet. Now, homophobic employers will articulate alternative reasons for refusing to hire a gay job applicant or for firing a gay employee. In jurisdictions where nondiscrimination protections covered sexual orientation, employers have historically invoked a litany of pretextual justifications for terminating gay employees, from "economic reasons"²⁰³ to vague references about wanting "to go in a 'new direction.'"²⁰⁴ To justify their firing, businesses have falsely accused gay employees of misuse of

200. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737–38 (2020).

201. *Id.* at 1738.

202. See *id.* at 1741.

203. *E.g.*, *Portugues Santa v. B. Fernandez & Hnos., Inc.*, 438 F. Supp. 2d 33, 34 (D.P.R. 2006).

204. *E.g.*, *Badanish v. Lake Cnty. Gov't*, No. 2:18-CV-351-TLS-APR, 2020 WL 2572516, at *1 (N.D. Ind. May 20, 2020).

company resources,²⁰⁵ sexual harassment,²⁰⁶ or other alleged misconduct.²⁰⁷

Many of the pretextual arguments invoked by employers are premised on factual disputes, such as whether the fired employee was insubordinate or had violated a company policy. But one pretextual argument had a more solid factual foundation: it is often undisputed that an employee has concealed their sexual orientation. If an employee's attempt to pass as heterosexual provides legal grounds for termination, then post-*Bostock*, prejudiced employers could attempt to resurrect the same pretextual argument used against, among many others, teacher Joseph Acanfora, FBI agent Frank Buttino, and government astronomer Frank Kameny.

Given that the examples discussed in Part I are largely historical (though all part of the modern gay rights movement in America), the gay perjury trap may appear to have gone dormant. Furthermore, in light of *Bostock*, it might seem unnecessary to revisit the anti-gay employment discrimination of the past. This conjecture, however, assumes a level of compliance chronically absent in the context of other antidiscrimination laws.

Some might think that the gay perjury trap is no longer relevant because most employment in the United States is at-will, which generally means that employers can terminate workers without reason.²⁰⁸ Although the examples presented involve government jobs

205. See, e.g., *Rabe v. United Air Lines, Inc.*, 636 F.3d 866, 869 (7th Cir. 2011) (reviewing a lesbian flight attendant's firing after she was falsely accused of "misusing company-issued travel vouchers").

206. See, e.g., *Ceslik v. Miller Ford, Inc.*, 584 F. Supp. 2d 433, 439 (D. Conn. 2008) (discussing false claims made that a gay male employee sexually harassed female co-workers); see also *Garvey v. GMR Mktg.*, No. 5:16-CV-1072, 2016 WL 11477427, at *1 (N.D.N.Y. Oct. 6, 2016) ("[P]laintiff contends that defendant GMR Marketing terminated his employment based on false accusations that he offered sexual favors to customers, and that those accusations were pretext for discriminating against him based on his sexual orientation.").

207. See, e.g., *Miguel v. Guess*, 51 P.3d 89, 98 (Wash. Ct. App. 2002) (discussing a lesbian employee terminated for allegedly "copying and sharing patient records and for being a disruptive employee"); *Doe v. Casino*, 381 F. Supp. 3d 425, 427–28 (E.D. Pa. 2019) (discussing a terminated casino card dealer, "claim[ing] that '[her employer] used a negative interaction with a customer as a pretext to terminate [her] employment, and the real reason . . . was [her] sexual orientation (lesbian)"); *Berghorn v. Xerox Corp.*, No. 3:17-CV-01345-S, 2018 WL 3242276, at *1 (N.D. Tex. July 3, 2018) (discussing a gay employee who claimed that a firm used his alleged use of a corporate credit card for personal expenses as a pretext for terminating him because of his sexual orientation).

208. See *Davis v. N.Y.C. Dep't of Educ.*, 804 F.3d 231, 236 (2d Cir. 2015) ("As most employees work 'at will,' most aspects of their conditions of employment are within the

with civil service protections, the gay perjury trap problem also affects at-will employees who lack general job protections. These employees are protected by Title VII and other antidiscrimination laws, and thus cannot be fired for an *illegal* reason, which after *Bostock* includes sexual orientation and gender identity. Employers can more easily conceal their illegal discrimination if they exercise it during the hiring process. If there are twenty-four candidates for an advertised position, twenty-three of them will not get the job. One of the twenty-three might be gay and might not have gotten the job because of the employer's illegal anti-gay discrimination, but it may be difficult for the applicant to know and to prove that she did not get the job for a reason different than the other twenty-two disappointed applicants. In contrast, when an employer fires a current employee, that person alone is generally singled out for adverse treatment.²⁰⁹ That singled-out employee is more likely to investigate and pursue litigation if evidence exists that the firing violated Title VII. Consequently, even private employers with an at-will labor force will prefer to exercise their unlawful prejudice during the hiring process instead of during retention decisions.

This Part explains why gay employees cannot take complete solace in the dormancy of the gay perjury trap. If history is any guide, prejudiced employers will evade, thwart, or ignore laws designed to defend workers from invidious discrimination. Post-*Bostock* Title VII will likely prove no different. Understanding the discriminatory tactics of the past will help to better ensure genuine equality in the future.

A. *The Perceived Dormancy of the Gay Perjury Trap*

The gay perjury trap might seem an artifact of bygone times. But the lack of recent, publicized cases provides cold comfort; most anti-gay discrimination goes unreported because most victims of the trap do not fight back.²¹⁰ For example, before changing its anti-gay policy, the

employer's discretion."); see also *Bucci v. Hurd Buick Pontiac GMC Truck, LLC*, 85 A.3d 1160, 1186 (R.I. 2014) (Goldberg, J., concurring in part and dissenting in part) ("As most employees are at-will, the consideration of an employee's at-will status as a factor weighing against discrimination would render the statute meaningless.").

209. In the context of mass firings—for example, during economic downturns—when many employees are fired, it may be harder to identify discrimination absent obvious patterns or common characteristics among the group of terminated employees.

210. *Amici Curiae Brief of Scholars Who Study the LGB Population in Support of the Employees at 19, Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623), 2019

FBI threatened gay agents to “‘resign quietly’ or risk being fired,” and the agents before Frank Buttino succumbed to the threat.²¹¹ Buttino’s decision to fight back is the primary reason that we have any insight at all into how the FBI treated its gay agents. During his legal battle with the agency, Buttino wondered whether it would have been better to have resigned, as all the other outed gay agents before him had done.²¹²

Resignation—not litigation—is the most common response for several reasons. First, the graphic questions asked by many employers were designed to intimidate and exhaust gay people by “subject[ing them] to surveillances, polygraphs, and interrogations regarding the most intimate details of their sex lives.”²¹³ Those gay FBI agents who resigned under fire stated they had wanted to remain at the agency, but the FBI threatened to reinterview friends, family, and neighbors to ask about the employees’ homosexual conduct.²¹⁴ Such threats made quiet resignation the only palatable option for every gay agent who preceded Buttino.

Second, those who refused to resign quickly were sometimes threatened with prosecution for perjury. This is a literal embodiment of the gay perjury trap. Some employers actually ask applicants about

WL 3003461, at *19 (“[C]ountless other acts of employment discrimination across the country go unreported given the stigma, embarrassment, and perception that there is no adequate remedy on the part of LGB employees.”); see Johnson, *Homosexual Citizens*, *supra* note 72, at 54 (“Most did remain silent. In the early 1950s, no fired gay or lesbian employee stepped forward to challenge his or her dismissal, as publicity would only have compounded the problem.”).

211. As Judge Armstrong described in *Buttino v. FBI*,

The declarations evidence the FBI’s extensive inquiries into its gay employees’ private sexual activities—including detailed inquiries into specific private sexual acts and the exploration of childhood sexuality. The declarations describe the FBI investigators’ attempts to obtain the names of *other* gay employees in the FBI. The declarations describe the FBI’s threats that gay employees “resign quietly” or risk being fired. And, significantly, at least one of the declarations asserts that the FBI investigators made allegations of “lack of candor” by “twisting” the gay employee’s words “at every turn.”

801 F. Supp. 298, 305 (N.D. Cal. 1992).

212. BUTTINO, *supra* note 17, at 257 (“I wondered, too, if I should have resigned when all this began. Not only were the costs mounting, but I also wanted to get on with my life.”); see also *id.* at 284 (“The files showed that most resigned ‘for personal reasons.’”).

213. *Id.* at 284; see *id.* at 145 (“‘It sounds like they’re trying to wear you down so you’ll quit,’ he said. ‘That they’ll continue to harass you like this until you eventually resign.’”).

214. *Id.* at 286 (“The investigation . . . would include interviews with the employees’ parents, family, friends, neighbors, and co-workers. The interview would focus on the employee’s homosexual conduct. . . . It was the bureau that threatened to expose its employees’ homosexuality if they wouldn’t resign.”); *id.* at 272 (discussing one lesbian FBI agent who “had acknowledged her sexual orientation to OPR investigators, and the bureau threatened to reinterview her neighbors and friends if she refused to resign”).

sexual orientation under oath. For example, FBI investigators implicitly threatened Buttino with criminal prosecution for lying under oath about sexual orientation.²¹⁵

Third, gay individuals who fight discrimination in court often transform into public figures, becoming targets of vitriol, hate, and further discrimination. For example, Joseph Acanfora's participation in HOPS' successful lawsuit to be recognized as a valid student group—coupled with his efforts to secure his Pennsylvania teaching credential—exposed him and caused him to lose his teaching job in Maryland.²¹⁶ Acanfora's endeavors to protect his legal rights ultimately cost him his livelihood. Similarly, when Miriam Ben-Shalom challenged the military's anti-gay policy through the late 1970s until 1990, she became a hero of the gay rights movement.²¹⁷ But “[e]very time a court ruled in her case, she'd had to cope with the negative side effects of publicity, including being denied an apartment, being fired from a civilian job and receiving anonymous death threats.”²¹⁸ In certifying a class action to challenge the FBI's anti-gay policy, the district court in *Buttino* observed that “many individual claimants would have difficulty filing individual lawsuits out of fear of retaliation, exposure, and/or prejudice, such that it is unlikely that individual class members would institute separate suits.”²¹⁹ In short, given this dynamic, it is not surprising that most people faced with dismissal for lying about their sexual orientation quietly resign and seek other employment, leaving it impossible to quantify the number of employees (let alone applicants) caught in the gay perjury trap.

Ultimately, many current victims of anti-gay employment discrimination may remain silent because they perceive a lack of legal remedies. This provides another important reason for courts and the EEOC to ensure that Title VII is interpreted and enforced in a manner

215. *See id.* at 110 (“Fowler said that this was an official administrative inquiry and that there was a potential criminal problem if I had lied under oath in the statement I had signed for Hughes on October 31.”).

216. *See supra* notes 120–127 and accompanying text.

217. Julia Diana Robertson, *Miriam Ben-Shalom: The Woman Who Fought ‘Don’t Ask Don’t Tell’*, HUFFPOST (last updated July 5, 2017), https://www.huffpost.com/entry/miriam-ben-shalom-the-jewish-woman-that-started-the_b_5952ca6be4b0f078efd985a8 [<https://perma.cc/J8VQ-C6F5>].

218. MURDOCH & PRICE, *supra* note 148, at 393.

219. *Buttino v. FBI*, No. C-90–1639SBA, 1992 WL 12013803, at *2 (N.D. Cal. Sept. 25, 1992).

that conceives potential plaintiffs to step forward and document illegal discrimination.

B. The Ongoing Threat

Although the case studies in Part I involved uses of the gay perjury trap during the early era of the modern gay rights movement, employers today continue to ask about job applicants' and employees' sexual orientation. Major companies—including such behemoths as Facebook, AT&T, IBM, JPMorgan Chase, American Express, Wells Fargo, and Deutsche Bank—collect data on their employees' sexual orientation.²²⁰ American Express has been doing so for over fifteen years.²²¹ However, many of these policies are relatively new; for example, in 2016, JPMorgan Chase began “asking employees for the first time . . . if they'd like to disclose their sexual orientation or gender identity.”²²² The Human Rights Campaign's 2020 Corporate Equality Index reported that 54 percent of firms invite their employees to voluntarily disclose their sexual orientation anonymously.²²³ But many inquiries are not anonymous. In addition to official policies collecting information about employees' sexual orientation, there are several contemporary examples of managers and supervisors asking individual

220. Jeff Green, *Your Boss Wants To Know If You're Gay*, BLOOMBERG (Mar. 8, 2016), <https://www.bloomberg.com/news/articles/2016-03-08/straight-or-gay-your-boss-wants-to-know-but-don-t-worry> [<https://perma.cc/7ZL4-TU5L>].

221. *Id.*

222. *Id.*

223. *Self-Identification of LGBTQ Employees*, HUM. RTS. CAMPAIGN FOUND., <https://www.hrc.org/resources/self-identification-of-lgbt-employees> [<https://perma.cc/X97N-UMKM>].

employees whether they are gay, including in retail environments,²²⁴ banks,²²⁵ and regional hospitals.²²⁶

Although some employers ask about sexual orientation to be responsive and sensitive to the needs of their workforce, employees continue to be terminated for lying about their homosexual relationships.²²⁷ Furthermore, although the origin and historical examples of the perjury trap lie in discrimination against gay men, a version of the trap has recently been used against a transgender job candidate. In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*,²²⁸ an employer rescinded its job offer to a transgender woman.²²⁹ The employer asserted that it was not discriminating based on the applicant's transgender status but because she had "lied during the interview process, and that it was her failure to affirmatively reveal her status as biologically male that led to the decision to rescind the job offer."²³⁰ The court did not embrace the employer's "misrepresentation" argument, but this was in part because the employer did not actually ask the applicant "to reveal her sex, either orally or on . . . application and hiring forms."²³¹ The court thus reached the correct result, but it did so through reasoning that is easily

224. See, e.g., *Sanderson v. Leg Apparel LLC*, No. 1:19-cv-08423-GHW, 2020 WL 3100256, at *2–3 (S.D.N.Y. June 11, 2020) (discussing an apparel company supervisor repeatedly asking their male employee whether a client was their boyfriend); *Troutman v. Hydro Extrusion USA, LLC*, 388 F. Supp. 3d 400, 401 (M.D. Pa. 2019) (discussing a senior extruder getting asked if he was gay shortly after beginning his position, and being subject to sexual harassment by his coworkers and managers as a result); *Helmer Friedman LLP, Helmer Friedman Files Suit Against Trader Joe's for Alleged Sexual Orientation Discrimination*, CISION PR NEWSWIRE (Sept. 20, 2016, 2:27AM), <https://www.prnewswire.com/news-releases/helmer-friedman-files-suit-against-trader-joes-for-alleged-sexual-orientation-discrimination-300331189.html> [<https://perma.cc/FFV8-697T>] (alleging that the grocery chain Trader Joe's fired a store manager due to their sexual orientation).

225. See, e.g., *Slay v. Bank of Am. Corp.*, No. CA 10–408 ML, 2011 WL 1045629, at *1 (D.R.I. Mar. 9, 2011) (discussing allegations that Bank of America's new hire questionnaire included questions about sexual orientation), *adopting recommendations* No. CA 10–408 ML, 2011 WL 938309 (D.R.I. Mar. 16, 2011).

226. See, e.g., *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1251 (11th Cir. 2017) (discussing allegations that a hospital human resources manager asked the plaintiff about their sexuality).

227. See, e.g., *City of Neodesha v. BP Corp. N. Am.*, 50 Kan. App. 2d 731, 774–75 (Ct. App. 2014) ("Lord Browne was terminated after the London newspapers reported that he had a homosexual affair. Browne was reportedly terminated by the board for lying about the relationship.").

228. *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

229. *Id.* at 656.

230. *Id.* at 663.

231. *Id.*

circumvented if the employer asks direct questions, as the government historically did regarding sexual orientation.

The *Lopez* case illustrates two points. First, present-day employers are using perjury traps to justify anti-LGBT discrimination. Second, the lessons from the gay perjury trap should inform judges how to respond to other types of discrimination, including against transgender employees and job candidates.

The dearth of modern court opinions documenting the gay perjury trap may reflect a self-selection issue. Those states that voluntarily enacted antidiscrimination laws extending to sexual orientation are relatively liberal states with relatively liberal employers. In contrast, those states that successfully resisted such protections pre-*Bostock* are relatively conservative, as are many of the business owners in those states, which is why the employers in the *Bostock* cases felt emboldened to openly terminate employees for their sexual orientation. Those conservative states—the ones most affected by the *Bostock* decision—are most likely to harbor employers who will deploy the gay perjury trap to discriminate against gay workers, especially now that open discrimination violates federal law.

In addition, in the post-*Bostock* era, employers may refashion the gay perjury trap as an issue of religious liberty. Modern churches have employed the classic trap to justify terminating employees who lied to conceal their homosexuality. In *Gunn v. Mariners Church, Inc.*,²³² church leaders justified firing their director by emphasizing that he “had been asked 40 or 50 times if he were gay and had lied and said that he was not.”²³³ But *Bostock* leaves room for more creative maneuvers. Unfortunately, Gorsuch’s majority opinion in *Bostock* signaled approval of anti-LGBT discrimination by employers claiming that their religious beliefs include homophobia.²³⁴ If the Supreme Court creates a broad religious exemption to Title VII’s protection of LGBT employees, homophobic employers will likely wave the flag of religion to justify their inquiries into sexual orientation and mistreatment of gay employees and job candidates.²³⁵

232. *Gunn v. Mariners Church, Inc.*, 84 Cal. Rptr. 3d 1 (Ct. App. 2008).

233. *Id.* at 3.

234. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

235. *Cf. Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 690 (2014) (evaluating the defense presented by the corporation invoking religious freedom to evade contraceptive mandate).

C. *The Need for Vigilance in the Post-Bostock Era*

One can hope that the *Bostock* opinion will consign these uses of the gay perjury trap to legal history books. But even with nondiscrimination policies in place, the gay perjury trap remains an ever-present threat in many occupations, such as law enforcement, “a profession in which you may not necessarily be fired for being gay, but you will absolutely be fired for lying.”²³⁶ Supervisors eager to fire gay employees are willing to invoke the most convenient excuse for termination. In many local police departments, “a homophobic police chief or sheriff” would find it “much easier and accepted as proper and ethical to fire a gay officer for lying than . . . for simply being gay.”²³⁷ In many occupations and localities, gay workers will continue to worry that their discretion could be penalized as dishonesty.

The *Bostock* opinion is a promising and welcome development on the road to legal equality for LGBT Americans. Unfortunately, however, the passage of antidiscrimination laws does not eliminate discrimination. The enactment of the Civil Rights Act of 1964 did not eradicate racial discrimination. Despite the presence of Title VII, gender discrimination persists. These laws, however, have not been failures. They have reduced discrimination and have provided a means of compensation for victims of illegal discrimination.

Bostock, too, will not end employment discrimination against LGBT workers. The intense hatred directed against gay people in America is too deep and fervent to be eliminated simply by a judicial act of statutory interpretation. Although many employers who would otherwise discriminate against gay workers will stop doing so to comply with the law, others will attempt to skirt it.

To determine how anti-gay employers may attempt to circumvent Title VII—or simply violate the law without being held accountable—it is instructive to recall how employers in the pre-*Bostock* era successfully flouted general job protections that sheltered gay employees and job applicants from arbitrary discrimination. After *Bostock*, Title VII prohibits an employer from firing workers based on sexual orientation. Employers wishing to remove LGBT employees from their workforce may look for another justification for terminating these workers. In a post-*Bostock* workplace, employers may justify

236. GREG MIRAGLIA, AMERICAN HEROES COMING OUT FROM BEHIND THE BADGE: STORIES FROM POLICE, FIRE, AND EMS PROFESSIONALS OUT ON THE JOB 173 (2010).

237. *Id.* at 173–74.

firing a gay employee by claiming that the termination was based on the employee's prior dishonesty regarding their sexual orientation. If future courts follow the *Acanfora* opinion's reasoning, these employers may be able to circumvent Title VII as applied to gay employees. Thus, if employers can ask about sexual orientation during the application process through direct and indirect questions, they can still set the trap.

If a gay job applicant acknowledges their sexual orientation during the interview process, the employer may later politely inform the applicant that the position was filled by someone else. The main difference after *Bostock* is that the employer cannot announce its anti-gay policy. In the past, the FBI, police departments, and private employers felt no shame in telling gay applicants to their faces: we "do[] not hire second-class citizens."²³⁸ After *Bostock*, such statements invite liability. While abhorrent, the anti-gay policies of the pre-*Bostock* era were at least often transparent. By driving discrimination underground, *Bostock* may make it more difficult for gay applicants to prove discrimination under Title VII.

If gay applicants successfully conceal their sexual orientation, they may get the job. But they will work in fear, as Buttino, *Acanfora*, Kameny, and others in the pre-*Bostock* era did. Because the law generally permits employers to terminate employees for lying during the application process,²³⁹ once the employee's sexual orientation is revealed, their job is potentially in jeopardy. The employer can claim that it is not terminating the gay employee due to their sexual orientation—now an illegal basis for termination—but rather because of the employee's fraud during the application process—a seemingly legitimate reason for termination.

If courts allow employers to utilize the gay perjury trap post-*Bostock*, the Supreme Court victory will prove pyrrhic. Prejudiced employers would be able to rid their workforces of openly gay employees. Detected gay workers will be rejected or terminated. Undetected gay employees will toil in quiet desperation, vulnerable and fearful that any misrepresentation of their sexual orientation made during their application process could result in their immediate termination. Part III explores how courts should interpret Title VII to prevent employers from circumventing *Bostock* through deployment of a gay perjury trap.

238. BUTTINO, *supra* note 17, at 289.

239. See *infra* notes 332–33 and accompanying text.

III. DISMANTLING THE GAY PERJURY TRAP

Bostock holds the promise of reducing discrimination against gay workers if courts properly interpret Title VII moving forward. For *Bostock* to be effective, courts must disable the gay perjury trap. Part I explained how the trap has three components. First, the employer asks about sexual orientation—directly or indirectly—and either refuses to hire or fires gay workers who truthfully reveal their sexual orientation. Second, if gay employees conceal their sexual orientation to get and retain a job and their sexual orientation is later discovered, then they are fired for their earlier dishonesty. Third, the employer declines to hire applicants who attempt to evade the gay perjury trap by refusing to answer questions about their sexual orientation. This Part argues that courts should interpret Title VII in a manner that dismantles each of these steps.

A. *Prohibiting Employer Inquiries into Sexual Orientation*

If an employer inquires about an employee’s sexual orientation and, after learning that an employee is LGB, takes adverse action against that employee, this alone should create a presumption of illegal discrimination. Of course, the employer can rebut this presumption by presenting evidence that the adverse job action had nothing to do with the employee’s sexual orientation. This section explains why inquiries into sexual orientation are sufficient—but not necessary—to create a presumption of illegal discrimination.

1. *Prohibitions on Employer Inquiries into Protected Categories.* Inquiries about a job applicant’s race, religion, sex, or national origin are not generally considered to be per se violations of Title VII.²⁴⁰ Nevertheless, the EEOC cautions employers against asking these

240. See 1 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 12.04 (2021) [hereinafter LARSON ON EMPLOYMENT DISCRIMINATION] (“Traditionally, pre-employment inquiries as to race, color, religion, sex, and national origin have been frowned upon under civil rights laws. . . . It is important to understand, however, that inquiries per se are not among the discriminatory employment actions explicitly banned by Title VII” (emphasis omitted)). *But see* Snyder v. Yellow Transp., Inc., 321 F. Supp. 2d 1127, 1131 (E.D. Mo. 2004) (mentioning that the Eighth Circuit has considered questions about an applicant’s marriage and child plans to be “a per se violation of Title VII”).

questions.²⁴¹ Such a query appears discriminatory.²⁴² Questions about an employee's protected status are generally considered evidence in discrimination cases because such inquiries are "suspected of laying the groundwork for illegal discrimination."²⁴³ An employer's ignorance about an applicant's protected characteristics ultimately protects the employer.²⁴⁴

Such inquiries are not per se illegal under federal law because the questions can serve a legitimate function. For example, employers may ask about race, religion, or gender to comply with EEOC recordkeeping requirements or to implement a legal affirmative action program.²⁴⁵ Also, inquiries into gender may be permitted when the

241. See Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365, 382 (1997) ("[T]he EEOC Guide cautions against the use of questions that directly inquire about protected class status such [as] date of birth, religion and national origin.").

242. *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 552 (9th Cir. 1991) ("Pre-employment questioning concerning the applicant's national origin, race or citizenship exposes the employer to charges of discrimination if he does not hire that applicant.").

243. 1 LEX K. LARSON, EMPLOYMENT SCREENING § 9.02 (2020) ("[E]mployer inquiries are relevant primarily as evidence that some other action, such as a refusal to hire, was undertaken with discriminatory intent."); U.S. EQUAL EMP. OPPORTUNITY COMM'N, FACTS ABOUT RACE/COLOR DISCRIMINATION (1997), <http://www.eeoc.gov/eeoc/publications/fs-race.cfm> [<https://perma.cc/W7V6-3F4P>] ("[I]f members of minority groups are excluded from employment, the request for such pre-employment information [regarding applicant's race] would likely constitute evidence of discrimination."); see also Ian Byrnside, Note, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites To Research Applicants*, 10 VAND. J. ENT. & TECH. L. 445, 463 (2008) ("Although questions regarding [race, color, religion and other statuses] are not necessarily illegal, employers generally avoid asking them because they typically have 'no legitimate, job-related reason for asking them, and they are suggestive of unlawful discriminatory motives.'").

244. See Naomi Schoenbaum, *It's Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an "Information-Shifting" Model*, 30 HARV. J.L. & GENDER 99, 100 (2007) ("[E]mployment law utilizes ignorance as a means of achieving fairness by blocking access to information that would otherwise enable employers to make discriminatory hiring decisions.").

245. To comply with federal regulations,

Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B of this section, in order to determine compliance with these guidelines.

29 C.F.R. § 1607.4 (2020); see also FREDERICK T. GOLDBER & DAVID R. GOLDBER, LABOR AND EMPLOYMENT LAW: COMPLIANCE AND LITIGATION § 4:218 (3d ed. 2021) ("The EEOC recognizes an exception for preemployment inquiries regarding race, color, religion, and national origin when made for the purpose of complying with federal, state, or local equal employment agencies."); LARSON ON EMPLOYMENT DISCRIMINATION, *supra* note 240 ("The EEOC requires extensive recordkeeping as to the race, color, religion, sex, and national origin of an employer's

question addresses a bona fide occupational qualification (“BFOQ”).²⁴⁶

In addition to federal protections, state laws also condemn many forms of employment discrimination. Some state laws restrict pre-employment inquiries more than federal law does.²⁴⁷ Others explicitly prohibit certain pre-employment inquiries into various protected statuses, including sexual orientation.²⁴⁸ While other state statutes do not prohibit such inquiries outright, their state commissions “advise employers that it may be unlawful to inquire into these aspects of an applicant.”²⁴⁹

Mirroring federal law, some states tether the legality of the inquiry to the presence of a BFOQ.²⁵⁰ Sexual orientation, however, is not a

work force, including applicant data. Furthermore, the EEOC and the courts have endorsed voluntary affirmative action on the part of private employers.” (footnotes omitted)).

246. See 29 C.F.R. § 1604.7 (2020) (“Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.”). The EEOC advises,

Questions about an applicant’s sex, (unless it is a bona fide occupational qualification (BFOQ) and is essential to a particular position or occupation), marital status, pregnancy, medical history of pregnancy, future child bearing plans, number and/or ages of children or dependents, provisions for child care, abortions, birth control, ability to reproduce, and name or address of spouse or children are generally viewed as non job-related and problematic under Title VII.

Pre-Employment Inquiries and Gender, U.S. EQUAL EMP. OPPORTUNITY COMM’N, http://www.eeoc.gov/laws/practices/inquiries_gender.cfm [<https://perma.cc/X9Y5-ENNS>].

247. See Befort, *supra* note 241, at 386 (“The statutes of many states also limit pre-employment inquiries relating to protected class status and some do so in a manner more restrictive than federal law. . . . To the extent that these state laws provide the same or greater protection against discrimination, they are not preempted by federal law.” (footnote omitted)).

248. Schoenbaum, *supra* note 244, at 103. For example, Maine’s Human Rights Act makes it unlawful for an employer prior to employment to “[e]licit or attempt to elicit information directly or indirectly pertaining to race or color, sex, sexual orientation, physical or mental disability, religion, age, ancestry or national origin” ME. REV. STAT. ANN. tit. 5, § 4572 (2020).

249. Schoenbaum, *supra* note 244, at 103.

250. For example, Minnesota’s statute provides that pre-employment,

[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice for an employer . . . to: (1) require or request the person to furnish information that pertains to race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.

MINN. STAT. § 363A.08 (2020). Similarly, Pennsylvania law provides:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . [f]or any employer . . . to: (1) Elicit any information or make or keep a record of or use any form of application or application blank containing questions or entries concerning the race, color, religious creed, ancestry, age, sex, national origin

BFOQ for any occupation.²⁵¹ For example, asserting customers may not like gay people is not a BFOQ.²⁵² Sexual orientation is not indicative of analytical abilities, physical strength, or any other job-related quality.²⁵³ The inquiry into sexual orientation is therefore inherently suspect and should be presumptively illegal.

Post-*Bostock* courts should condemn inquiries into sexual orientation even though Title VII does not make it per se illegal to ask applicants about their racial background (or other protected characteristics). Inquiries about race are permitted to comply with EEOC recordkeeping requirements or to implement a legal affirmative action program. But neither rationale is relevant to sexual orientation. Therefore, the justifications for allowing questions about race do not apply to questions about sexual orientation. At a minimum, EEOC guidance should be revised to state that inquiries regarding sexual orientation are evidence of intent to discriminate. Alternatively, the EEOC could follow state approaches and treat such inquiries as per se Title VII violations.

2. *Privacy Rights.* Interpreting Title VII as precluding inquiries into sexual orientation is consistent with protecting job applicants and employees. Though the constitutional right to privacy is generally thought of as a right of autonomy, it includes a right to nondisclosure in some contexts. In *Whalen v. Roe*,²⁵⁴ the Supreme Court recognized a

43 PA. STAT. AND CONS. STAT. ANN. § 955 (West 2020); see also W. VA. CODE § 5-11-9 (2016) (outlawing inquiries as to an applicant's "race, religion, color, national origin, ancestry, sex or age" except when based upon a BFOQ).

251. See Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 LAW & SEXUALITY 1, 7–8 (2010) ("ENDA, as it was last introduced and passed, did not contain a BFOQ defense. . . . Without a BFOQ, ENDA will never allow or entertain that someone's sexual orientation may be a job requirement or necessity.").

252. See 804 MASS. CODE REGS. 3.01 (2020) ("A mere customer or coworker preference is not a BFOQ, e.g., 'customers prefer to deal with people of the same race' or 'employees are uncomfortable working with people of different sexual orientation.'"); cf. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1274, 1276–77 (9th Cir. 1981) (holding that the assertion that "Latin American clients would react negatively to a woman vice president" is not a legitimate reason for considering gender as a bona fide occupational qualification).

253. Some may argue that religious organizations have a BFOQ in discriminating against gay employees. That issue is beyond the scope of this Article but warrants serious attention.

254. *Whalen v. Roe*, 429 U.S. 589 (1977).

privacy right in nondisclosure of sensitive facts,²⁵⁵ while upholding a New York statute that required doctors to provide copies of prescriptions written for particular drugs to the state.²⁵⁶ Although the Court deemed the right unfringed on the facts before it, it nonetheless held that a constitutional privacy right to nondisclosure exists.²⁵⁷ Federal courts have embraced and expanded *Whalen*, holding that the constitutional right to privacy encompasses the nondisclosure of certain medical information,²⁵⁸ including prescription drug records,²⁵⁹ psychiatric records,²⁶⁰ and AIDS status.²⁶¹ Courts have also extended *Whalen* beyond medical information to include financial information.²⁶²

These privacy rights also extend to employees' interests in nondisclosure of personal information. For example, in *Shuman v. City of Philadelphia*,²⁶³ the plaintiff's employment with a police department was conditioned on him answering questions about his alleged participation in an extramarital heterosexual affair.²⁶⁴ The court held that "a party's private sexual activities are within the 'zone of privacy' protected from unwarranted government intrusion."²⁶⁵ Consequently,

255. *Id.* at 606 (Brennan, J., concurring) (citation omitted) ("The Court recognizes that an individual's 'interest in avoiding disclosure of personal matters' is an aspect of the right of privacy . . .").

256. *Id.* at 593, 600 (majority opinion).

257. *See* *State v. Skinner*, 10 So. 3d 1212, 1216 (La. 2009) (noting that *Whalen* recognized that the right to privacy includes "the individual's interest in avoiding disclosure of personal matters"); *see also* E. Lauren Arnault, *Status, Conduct, and Forced Disclosure: What Does Bowers v. Hardwick Really Say?*, 36 U.C. DAVIS L. REV. 757, 768 (2003) ("In *Nixon v. Administrator of General Services*, decided just four months after *Whalen*, the Court acknowledged a complimentary [sic] right to privacy with respect to dissemination of personal information.").

258. *See* *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577–80 (3d Cir. 1980); *see also* Arnault, *supra* note 257, at 769 ("Following *Whalen*, courts have continued to expand the protection of personal medical records, solidifying a constitutional right to privacy of medical records.").

259. *See* *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995).

260. *See* *Haw. Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1043 (D. Haw. 1979).

261. *See* *Doe v. Borough of Barrington*, 729 F. Supp. 376, 382 (D.N.J. 1990).

262. *See* *Barry v. City of New York*, 712 F.2d 1554, 1558–59 (2d Cir. 1983) (endorsing an approach that weighs the individual's privacy interest against the state's interest in seeking the disclosure of the individual's financial information); *see also* Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 560–61 (1995) ("A limitless sharing of information about such topics as one's medical history, sexual behavior, or financial affairs raises a threat to . . . self-determination.").

263. *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979).

264. *Id.* at 453.

265. *Id.* at 459.

the court ruled that the police department's policy of requiring employees to answer all questions about their private sex lives "even though the questions have no bearing upon an officer's job performance, is unconstitutional."²⁶⁶ While *Shuman* involved public employers, courts have extended the principle to private employers.²⁶⁷ The Massachusetts Supreme Court has explained that "in the area of private employment there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged with impunity for failure to answer such requests."²⁶⁸

This jurisprudence raises the issue of whether sexual orientation is included within these nondisclosure rights. Initially, some federal courts declined to protect information regarding sexual orientation. For example, in *Truesdale v. University of North Carolina*,²⁶⁹ a North Carolina court held that an employer could require job applicants and employees to answer questions about "homosexual activity" and "unusual or unnatural sex acts"²⁷⁰ because, under *Bowers v. Hardwick*,²⁷¹ "[t]here is no fundamental right to engage in homosexual activity."²⁷² Similarly, in *Walls v. City of Petersburg*,²⁷³ the Fourth Circuit held that a city could terminate an employee for refusing to answer questions about her sexual orientation.²⁷⁴ The court reasoned that "because the *Bowers* decision is controlling, we hold that [a question asking an employee whether she has 'ever had sexual relations with a person of the same sex'] does not ask for information that [the employee] has a right to keep private."²⁷⁵

266. *Id.* at 461.

267. *See* *Bratt v. Int'l Bus. Machs. Corp.*, 467 N.E.2d 126, 135 (Mass. 1984) ("In evaluating whether the information sought from employees could amount to an unreasonable interference with their right of privacy, we stated that the employer's legitimate interest in determining the employees' effectiveness in their jobs should be balanced against the seriousness of the intrusion on the employees' privacy.").

268. *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 912 n.9 (Mass. 1982).

269. *Truesdale v. Univ. of N.C.*, 371 S.E.2d 503 (N.C. Ct. App. 1988).

270. *Id.* at 509.

271. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

272. *Truesdale*, 371 S.E.2d at 509 (citing *Bowers*, 478 U.S. 186).

273. *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

274. *Id.* at 193; *see* *Arnault*, *supra* note 257, at 783 (criticizing *Walls* because "[d]ue to the administrative nature of Walls's job, the state interest was relatively low. Thus, Walls should have received privacy protection in this instance." (footnote omitted)).

275. *Walls*, 895 F.2d at 193; *see also* *Condon v. Reno*, 972 F. Supp. 977, 988 (D.S.C. 1997) (interpreting *Walls* to hold that "no privacy interest was involved with respect to whether the

This line of cases is not controlling today. Even when *Bowers* was good law, some courts held that *Bowers* was not decisive on the issue of informational privacy. In *Sterling v. Borough of Minersville*,²⁷⁶ the Third Circuit held that “sexual orientation [is] an intimate aspect of [one’s] personality entitled to privacy protection under *Whalen*. The Supreme Court, despite the *Bowers* decision, and our court have clearly spoken that matters of personal intimacy are safeguarded against unwarranted disclosure.”²⁷⁷ The Third Circuit has explained that information regarding “one’s sexual orientation . . . is intrinsically private”²⁷⁸ and falls into the protection of the right to informational privacy.²⁷⁹

Most significantly, the legal landscape changed dramatically in 2003 when the Supreme Court decided *Lawrence v. Texas*.²⁸⁰ In *Lawrence*, the Court explicitly overruled *Bowers* and recognized a substantive privacy right for consenting adults to engage in same-sex sexual activities.²⁸¹ This suggests that cases like *Shuman*, which protect heterosexual privacy,²⁸² now also protect homosexual privacy. With *Bowers* repudiated, the foundation of the *Truesdale* and *Walls* opinions has been eliminated.²⁸³ After *Lawrence*, even the narrow reading of *Whalen* advanced by *Truesdale* and *Walls* protects against coerced disclosure of sexual orientation, because homosexual conduct is now covered by the autonomy branch of the constitutional right of privacy.

The *Bostock* opinion strengthens the constitutional case against allowing employer inquiries into sexual orientation. Before *Bostock*, some courts held that when an employer could “lawfully have discharged [an employee] on the basis of her sexual preference, when allegations surface[] about [an employee’s] sexual preference [the

plaintiff had engaged in homosexual relations”), *aff’d*, 155 F.3d 453 (4th Cir. 1998), *rev’d*, 528 U.S. 141 (2000); *Dawson v. State Law Enf’t Div.*, No. 3:91–1403–17, 1992 WL 208967, at *5 (D.S.C. Apr. 6, 1992) (interpreting *Shuman* as “recogniz[ing] that some portions of a public official’s private sexual life may be within the zone of protected privacy, but it in no way states that the constitutional right of privacy extends to sexual conduct committed between two males”).

276. *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000).

277. *Id.* at 196.

278. *Id.* at 196 n.4.

279. *See id.* at 194 (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

280. *Lawrence v. Texas*, 539 U.S. 558 (2003).

281. *Id.* at 578.

282. *See supra* notes 263–268 and accompanying text.

283. *See supra* notes 269–275 and accompanying text.

employer has] a right to question her about it.”²⁸⁴ Consequently, this reasoning goes, the employee’s privacy rights are not infringed.²⁸⁵ Similarly, older opinions held that government agencies could inquire into a job applicant’s sexual orientation because it was legal to deny security clearances to gay people.²⁸⁶ Now that it is no longer legal to condition either employment or security clearances on heterosexuality, the inquiry into an applicant’s sexual orientation serves no legal purpose. By bringing sexual orientation discrimination within the ambit of Title VII, *Bostock* reinforces the position that employers violate job applicants’ and employees’ constitutional rights to privacy when interviewers pry into sexual orientation.

The right to not disclose personal information, however, is not absolute.²⁸⁷ To determine whether collecting or disseminating information violates the constitutional right to nondisclosure, courts must balance “the state’s interests in disclosure . . . against the privacy needs of the individual.”²⁸⁸ There may be legitimate reasons to inquire into employees’ off-duty sexual relations. For example, a police department, in its role as employer, may investigate an employee’s off-duty sexual activities for various reasons, such as when there are claims that an officer has committed sexual assault,²⁸⁹ is sleeping with a mobster’s wife,²⁹⁰ or is in a relationship with a subordinate.²⁹¹

284. *Madsen v. Erwin*, 481 N.E.2d 1160, 1172 (Mass. 1985) (O’Connor, J., concurring in part and dissenting in part).

285. *Id.*

286. *See Marks v. Schlesinger*, 384 F. Supp. 1373, 1376–77 (C.D. Cal. 1974).

287. *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000).

288. *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 458 (E.D. Pa. 1979). The *Shuman* court explained,

In the area of privacy, the hesitation to compel disclosure may rest upon different grounds. If there is a constitutionally protected “zone-of-privacy”, compelled disclosure in and of itself may be an invasion of that zone, and therefore, a violation of protected rights. Absent a strong countervailing state interest, disclosure of private matters should not be compelled.

Id.

289. *See State Trooper Fraternal Ass’n v. New Jersey*, No. 08–3820, 2008 WL 4378343, at *6–7 (D.N.J. Sept. 23, 2008) (explaining that the officer’s assertion that sexual conduct was consensual does not make further inquiry into the incident an unconstitutional invasion of privacy).

290. *See Baron v. Meloni*, 556 F. Supp. 796, 798–800 (W.D.N.Y. 1983), *aff’d*, 779 F.2d 36 (2d Cir. 1985).

291. *See, e.g., Puzick v. City of Colorado Springs*, 680 P.2d 1283, 1285 (Colo. App. 1983) (upholding a male sergeant’s suspension for off-duty sexual relations with a probationary policewoman); *see also Cronin v. Town of Amesbury*, 895 F. Supp. 375, 385 (D. Mass. 1995)

Employers must have a legitimate reason to inquire into applicants' and employees' sexual orientation. As the Third Circuit noted in *Sterling*, “[i]f there is a government interest in disclosing or uncovering one’s sexuality that is ‘genuine, legitimate and compelling,’ then this legitimate interest can override the protections of the right to privacy.”²⁹² The balance, however, weighs heavily against disclosure because “[i]t is difficult to imagine a more private matter than one’s sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity.”²⁹³

The Supreme Court’s *Bostock* decision makes the right-to-privacy argument against coerced disclosure of sexual orientation even more compelling because the balance in favor of privacy rights becomes stronger as the employer’s interest in uncovering the private information becomes less convincing. The employer must show a legitimate need to know an applicant’s sexual orientation. *Bostock* should make it harder for employers to argue that they have a legitimate interest in discovering the sexual orientation of applicants and employees, because a federal statute now provides that sexual orientation cannot be the basis for employment decisions. Before *Bostock*, courts held that an employee’s privacy rights trump an employer’s desire to know about “off-duty personal activities” unless they “have an impact upon his on-the-job performance.”²⁹⁴ *Bostock* is

(noting that the police chief’s “liberty interest in his private sexual activities and fantasies which are constitutionally protected against unwarranted government intrusion and disclosure . . . must be balanced against the town’s justifiable concerns about [his] effectiveness as a police chief, his trustworthiness as custodian of prisoners, and his susceptibility to blackmail”), *aff’d*, 81 F.3d 257 (1st Cir. 1996).

292. *Sterling*, 232 F.3d at 196 (quoting *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1141 (3d Cir. 1995)). As the Ninth Circuit explained,

The City must show that its inquiry into appellant’s sex life was justified by the legitimate interests of the police department, that the inquiry was narrowly tailored to meet those legitimate interests, and that the department’s use of the information it obtained about appellant’s sexual history was proper in light of the state’s interests.

Thorne v. City of El Segundo, 726 F.2d 459, 469 (9th Cir. 1983).

293. *Sterling*, 232 F.3d at 196; *cf.* *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (“The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.”).

294. *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979); *see also State Trooper Fraternal Ass’n*, 2008 WL 4378343, at *6 (“[W]hen a police officer’s private sexual conduct adversely affects job performance, a police department may investigate and regulate that conduct.”); *Sylvester v. Fogley*, 383 F. Supp. 2d 1135, 1140 (W.D. Ark. 2005) (“In the absence of a nexus between private activity and poor job performance, investigation into private affairs is unconstitutional. Where an officer’s private life affects his job performance, a police agency may

based on the premise that sexual orientation has no relationship to job performance and therefore strengthens the argument that the employer's desire to know does not outweigh the employee's privacy right in nondisclosure.²⁹⁵

3. *Indirect Questions.* Employers intent on discriminating against gay workers may attempt to circumvent any prohibition on direct questions regarding sexual orientation by inquiring indirectly. As explained in Part I, employers historically asked about arrest records and organizational memberships.

The arrest records issue might appear superseded for two reasons: First, states can no longer criminalize private, same-sex conduct.²⁹⁶ And, second, many states have enacted “ban-the-box” laws prohibiting employers from asking job candidates about their criminal records in initial job applications.²⁹⁷

Although these improvements represent progress, the underlying problem remains. First, many gay job candidates have arrest records or convictions for private, consensual sex in the pre-*Lawrence* era. These people deserve protection from the gay perjury trap. Furthermore, despite the *Lawrence* opinion's invalidation of state sodomy laws, many local police departments still conduct stings and mass arrests of men suspected of being gay.²⁹⁸ These police raids are likely unconstitutional, but they nonetheless create arrest records for the

inquire into that distinct, job-related portion of the officer's private affairs.” (citations omitted)), *aff'd*, 465 F.3d 851 (8th Cir. 2006).

295. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (“An individual's homosexuality or transgender status is not relevant to employment decisions.”).

296. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); Leslie, *Perfect Storm*, *supra* note 44, at 526–31 (explaining how the *Lawrence* Court's substantive due process approach eliminated sodomy laws in a way that an equal protection approach would not have).

297. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 n.101 (2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [<https://perma.cc/2T5L-SCCW>]. Some states have distinguished between arrests and convictions in their ban-the-box laws. See, e.g., *King v. Gen. Info. Servs., Inc.*, 903 F. Supp. 2d 303, 312–13 (E.D. Pa. 2012) (“In Pennsylvania, employers are allowed to consider an applicant's felony and misdemeanor convictions, but not mere arrests, in connection with hiring decisions.”).

298. See, e.g., J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 465–66 (2019) (documenting the use of a police sting against gay men in Palm Springs in 2010).

innocent gay men who are targeted. Those records could prompt employment discrimination if employers can inquire about arrests and their circumstances.²⁹⁹

Second, ban-the-box laws do not solve the problem of arrest records being used as part of a gay perjury trap. These laws are necessary; empirical studies show that checking the box on an employment application drastically reduces an applicant's likelihood of receiving a call back.³⁰⁰ Further, these effects are highly racialized, with Black applicants in particular enduring discrimination.³⁰¹ Unfortunately, however, many employers can continue to misuse arrest records. First, although two-thirds of states have ban-the-box laws, one-third do not.³⁰² Also, some such laws apply to only a subset of employers.³⁰³ Most importantly, these laws prohibit questions about applicants' criminal records on initial applications, but they allow these inquiries later in the application process.³⁰⁴

Appreciating the history of the gay perjury trap can inform ongoing legislative debates. The use of arrest records in the gay perjury

299. Furthermore, independent of homophobia, the mere fact of being arrested could render an otherwise qualified gay applicant ineligible for employment, even though the arrest was for constitutionally protected conduct. See Joni Hersch & Jennifer Bennett Shinall, *Something To Talk About: Information Exchange Under Employment Law*, 165 U. PA. L. REV. 49, 88 (2016) (“Advocates for . . . ban-the-box laws are concerned that employers will automatically throw out applications that check the wrong box . . . without any further consideration.”).

300. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 958–59 (2003) (“While the ratio of callbacks for nonoffenders relative to ex-offenders for whites is 2:1, this same ratio for blacks is nearly 3:1.”).

301. *Id.* at 957–59; Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 951 (2014) (“The unfettered access to arrest and conviction data currently enjoyed by employers perpetuates bias, stigma, and discrimination against people with criminal records and widens racial disparities.”).

302. See BETH AVERY & HAN LU, NAT'L EMP. L. PROJECT, BAN THE BOX 2 (2020), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2020.pdf> [<https://perma.cc/RHJ6-P52Q>] (“Nationwide, 36 states and over 150 cities and counties have adopted what is widely known as ‘ban the box’ so that employers consider a job candidate’s qualifications first—without the stigma of a conviction or arrest record.”).

303. Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 216 (2014) (“Moreover, even in locations where ban the box policies are in effect, for the most part they cover only a subset of employers.”).

304. See Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1459 (2014) (“[M]ost of the new ban the box measures merely prohibit employers from asking about convictions on an initial application form, [but] . . . employers are free to inquire at later stages.” (emphasis omitted)).

trap provides yet another reason for those holdout state legislatures to enact ban-the-box laws and for all states to ensure that their ban-the-box statutes are sufficiently broad to protect the civil rights of all minorities.

Although it may seem harder to prevent employers from inquiring about organizational memberships as a proxy for sexual orientation, EEOC guidelines already discourage inquiries into organizations that “indicate the applicant’s race, sex,” or other protected status.³⁰⁵ In a similar spirit, the EEOC should permit job applicants to omit references to clubs or organizations that would implicitly disclose the applicants’ sexual orientation.

In addition to the inquiries discussed in Part I, the recent legal recognition of same-sex marriages provides employers an additional avenue for asking about sexual orientation. Family structures are different now than when Frank Kameny and Joseph Acanfora were fired from their jobs. Instead of asking about arrests and memberships, curious interviewers today are more likely to ask seemingly innocent questions about the applicant’s family life. An honest answer may reveal the applicant’s sexual orientation.

Indeed, same-sex marriage has proved a double-edged sword for some. In the wake of marriage equality, some employers use inquiries into marriage and emergency contacts to uncover the sexual orientation of applicants and employees.³⁰⁶ Before *Bostock*, in states without LGBT-inclusive nondiscrimination laws, gay employees could get married on a weekend and then be fired for their sexual orientation upon returning to work on the following Monday.³⁰⁷ *Bostock* should

305. THOMSON REUTERS ED. STAFF, 1 CHECKLISTS FOR CORPORATE COUNSEL § 1:65 (Apr. 2021 ed. 2021) (“Inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant’s race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided.”).

306. See, e.g., *Barrett v. Fontbonne Acad.*, No. NOCV2014–751, 2015 WL 9682042, at *1 (Mass. Super. Ct. Dec. 16, 2015) (evaluating the termination of a new employee after he listed his husband as his emergency contact). While a firm can collect information about a same-sex spouse on an insurance policy, the firm cannot misuse that information. An employer telling others that an employee has listed a same-sex partner as an insurance beneficiary could constitute the tort of invasion of privacy. See *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030, 1035 (Ohio Ct. App. 1995) (reversing dismissal of privacy tort in which lawyer sued his law firm employer because “information about his male partner was shared ‘with persons who had no responsibility for the administration of the benefit programs and no need to know the information’”).

307. See Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 617 n.12 (2020) (“Until *Bostock*, same-sex couples who exercised their

put an end to employers punishing gay newlyweds. But a problem remains: employers can ask job applicants about their marital status during job interviews. Some federal opinions have treated questions about marriage status and plans as a per se violation of Title VII when followed by an adverse job action.³⁰⁸ The *Bostock* opinion provides another reason to embrace this line of precedent.

B. Precluding Penalties for Employees Misrepresenting Their Sexual Orientation

The gay perjury trap is premised on the notion that employees can be fired for lying. This section reviews that premise and argues that lying about sexual orientation in a post-*Bostock* work environment should not be grounds for firing or other adverse employer actions.

Even if courts interpret Title VII to forbid inquiries into sexual orientation—as they should—and even if employers have a policy of not asking, many employers will still ask. Our national experience with the military’s failed Don’t Ask, Don’t Tell (“DADT”) policy proves the point. Although DADT contained an explicit prohibition on military officers asking about sexual orientation or investigating rumors that a servicemember was gay, officers continued to ask, harass, and discharge gay military members.³⁰⁹ Due to this type of rampant noncompliance with the policy, it is not sufficient to merely prohibit employers’ inquiry into sexual orientation. When illegally asked about their sexual orientation, gay servicemembers generally lied to protect their jobs.³¹⁰ Many gay employees in the civilian sector are likely to respond similarly.

constitutional right to marry could be fired the next day due to their sexual orientation in a majority of states.”); Gene Robinson, *State of LGBT Rights: Married on Sunday, but Fired on Monday*, DAILY BEAST (Apr. 14, 2017, 1:19 PM), <https://www.thedailybeast.com/state-of-lgbt-rights-married-on-sunday-but-fired-on-monday> [<https://perma.cc/RAP7-WHS3>] (same); see also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 166 (2d Cir. 2018) (Lynch, J., dissenting) (“In its *amicus* submission, the EEOC quite reasonably asks whether it is just that a gay employee can be married on Sunday, and fired on Monday—discriminated against at his or her job for exercising a right that is protected by the Constitution.”), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

308. See, e.g., *Snyder v. Yellow Transp., Inc.*, 321 F. Supp. 2d 1127, 1131 (E.D. Mo. 2004) (“The Eighth Circuit has considered such questions [about marriage status and plans] a per se violation of Title VII.”).

309. See NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 167–99 (2009).

310. See Kim D. Chanbonpin, “*It’s a K kou Thing*”: *The DADT Repeal and a New Vocabulary of Anti-Subordination*, 3 U.C. IRVINE L. REV. 905, 919 (2013) (“Because LGBTQ

Misrepresenting one's sexual orientation in this context should not constitute a fireable offense because, as the *Bostock* Court recognized, Title VII does not "care if other factors besides sex contribute to an employer's discharge decision."³¹¹ Combining sexual orientation and lying about sexual orientation does not change the calculus because the terminated employee's sexual orientation "need not be the sole or primary cause of the employer's adverse action."³¹² As long as an employer treats sexual orientation as a factor, Title VII is violated. Although an employer may try to argue that the employee's misrepresentation is the sole ground for termination, courts should be wary of such arguments, as the following sections explain.

1. *Lying as a Fireable Offense.* Employers may argue that even if their inquiries into sexual orientation are illegal, an employee can still be fired for lying. Courts routinely hold that employers may penalize employees for having lied during the application process. This is one of the lessons from *Acanfora*: dishonesty provides sufficient cause for termination.³¹³ In the past, when fired employees sued claiming violations of Title VII on the basis of racial or gender discrimination, courts rejected their claims where the employer could show that the termination stemmed from the employee's misrepresentation during the application process or a subsequent internal inquiry.

For example, in *Hargett v. New York City Transit Authority*,³¹⁴ a terminated employee sued, alleging that he was being discriminated

service members feared separation from service, many of them were forced to lie or mislead their colleagues, thereby actually undermining unit cohesion."); *Able v. United States*, 880 F. Supp. 968, 979 (E.D.N.Y. 1995) ("The policy of the Act is not only inherently deceptive. It also offers powerful inducements to homosexuals to lie."), *vacated*, 88 F.3d 1280 (2d Cir. 1996); *see also* *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 907 (C.D. Cal. 2010) (noting a gay servicemember "testified that the Don't Ask, Don't Tell Act effectively made it impossible to honor the 'Integrity First' value of the credo, because on occasion, he felt forced to lie rather than violate the Act"), *vacated*, 658 F.3d 1162 (9th Cir. 2011); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1153 (1997) ("The lies that gay and lesbian servicemembers are forced to tell about themselves under the Don't Ask, Don't Tell policy are, to say the least, a matter of active concern for them.").

311. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1748 (2020).

312. *Id.* at 1744.

313. *See supra* notes 119–148 and accompanying text.

314. *Hargett v. N.Y.C. Transit Auth.*, 640 F. Supp. 2d 450 (S.D.N.Y. 2009), *aff'd sub nom.* *Hargett v. Metro. Transp. Auth.*, 381 F. App'x 12 (2d Cir. 2010).

against based on his race.³¹⁵ The employer, the New York City Transit Authority (“NYCTA”), responded that the employee was fired because on his employment application, he represented that he had never been disciplined by an employer nor resigned while a disciplinary action was pending against him.³¹⁶ This was a lie.³¹⁷ The employee swore, under penalty of prosecution, he had left a previous position because of a bank merger.³¹⁸ This, too, was not true.³¹⁹ The plaintiff argued it was unfair for the NYCTA to investigate him because he had already passed a background check and was an employee.³²⁰ The court rejected this argument, characterizing the plaintiff’s argument as “since the NYCTA Defendants failed to [discover] that he lied to them in 1998, they missed their chance.”³²¹ The court reasoned “there is no such rule. It was only good luck—and perhaps shoddy work by the human resources department—that NYCTA did not discover that Hargett had been twice fired, and was lying on his employment application.”³²² Those lies constituted good cause for his termination, and the district judge accordingly granted summary judgment to the employer.³²³

Courts have also rejected discrimination claims when employers terminate an employee for falsely representing his or her educational achievement. For example, in *Gilty v. Village of Oak Park*,³²⁴ Selester Gilty applied to be a law enforcement officer in Oak Park, Illinois, and represented that he had a bachelor’s degree and was pursuing his master’s degree, when in reality he held only a high school diploma.³²⁵ When his employer discovered the lie, it terminated him.³²⁶ Gilty sued, alleging racial discrimination.³²⁷ Although the position did not require a bachelor’s degree, the Seventh Circuit ruled in favor of the city: “[T]he point [was] not that Gilty needed, but did not have, a bachelor’s

315. *Id.* at 455, 471–72.

316. *Id.* at 462–63.

317. *Id.*

318. *Id.* at 462.

319. *Id.*

320. *Id.* at 477.

321. *Id.*

322. *Id.* at 477–78.

323. *Id.* at 477–79, 482.

324. *Gilty v. Village of Oak Park*, 919 F.2d 1247 (7th Cir. 1990).

325. *Id.* at 1248–49, 1251.

326. *Id.* at 1249.

327. *See id.*

degree or master's degree. The point [was] that he lied."³²⁸ Similarly, in *Williams v. Boorstin*,³²⁹ the D.C. Circuit rejected a Title VII claim by a terminated employee, Joslyn Williams, who alleged racial discrimination but who had falsely represented in the application process that he had a law degree, a requirement for the position.³³⁰ The court explained that both the lack of credentials and the lying were independent grounds for dismissal: "The lying itself, also from the outset, made him an unfit employee of the Library of Congress, wholly apart from the question of his not being a lawyer or his serving well in assigned tasks."³³¹

Many pro-employer decisions stand for the basic proposition that "an employer is entitled to expect and to require truthfulness and accuracy from its employees."³³² The Seventh Circuit held it "obvious that companies must be able to discharge . . . an untruthful employee."³³³ The Eleventh Circuit reasoned that "[f]alse statements impair the employer's ability to make sound judgments that may be important to the employer's legal, ethical and economic well-being."³³⁴

This line of cases does not, however, stand for the proposition that *any* lie justifies termination. To fire an employee for lying on an employment application or during a pre-employment inquiry, the misrepresentation must have been both material in the decision to hire the applicant and directly related to employment duties.³³⁵ Officer Gilty lied to make himself look more qualified for the job.³³⁶ Mr. Williams lied to satisfy the minimum qualifications for his job.³³⁷ Both lies were material. An employer can terminate an employee for

328. *Id.* at 1251.

329. *Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980).

330. *Id.* at 110–11. In contrast to *Gilty*, see *supra* note 328, the job at issue specifically required a law degree, *id.* at 110.

331. *Id.* at 118.

332. *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000); see also *Serrano v. Cintas Corp.*, No. 04-40132, 2008 WL 2512921, at *14 (E.D. Mich. June 19, 2008) ("[B]asic honesty is an objective qualification for any legitimate position of employment.").

333. *6 W. Ltd. v. NLRB*, 237 F.3d 767, 778 (7th Cir. 2001).

334. *Total Sys. Servs., Inc.*, 221 F.3d at 1176.

335. *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 414 (6th Cir. 1992).

336. See *supra* note 325 and accompanying text.

337. See *supra* note 330 and accompanying text.

misrepresenting educational credentials,³³⁸ employment history,³³⁹ a medical condition relevant to necessary licensing,³⁴⁰ or violation of the firm's fraternization policy.³⁴¹ Each of these lies relates to the applicant's or employee's qualifications to hold the position at issue. Lies about sexual orientation do not, as the following discussion explains.

2. *Why Misrepresenting One's Sexual Orientation Should Not Be a Fireable Offense.* Employees trying to evade the gay perjury trap face a burden; when deciding employment discrimination cases, "[c]ourts of law are very fond of the truth and favor it on almost every occasion."³⁴² Inquiries into sexual orientation, however, represent the exceptional occasion in which an employer is not necessarily entitled to the truth. Despite precedent suggesting that those who answer improper questions dishonestly should not be able to challenge the legality of the question,³⁴³ Title VII should be interpreted in a manner that protects gay employees' ability to conceal their sexual orientation. Courts should hold that Title VII precludes employers from terminating or disciplining employees for misrepresenting their sexual orientation. This is true for the following four reasons.

a. *Sexual Orientation as Immaterial.* Those cases in which courts held that an employee could be terminated for lying during the application process are distinguishable from instances in which a gay employee is terminated for lying about their sexual orientation. The lies in the former set of cases went to the applicant's qualifications to

338. See, e.g., *Robinson v. U.S. Air Force*, 635 F. Supp. 108, 110–11 (D.D.C. 1986) (upholding termination of employee due to his false claim that he had an M.A. degree on his employment application).

339. See, e.g., *Grier v. Casey*, 643 F. Supp. 298, 309 (W.D.N.C. 1986) (explaining while "[i]ntegrity, honesty, and a concerted effort in one's duties are legitimate qualifications to demand of any employer [sic] in any position, whether a corporate President or a postal clerk," "[t]he Plaintiff d[id] not have those qualifications," as the employee had lied on her job application about having been fired from several previous jobs).

340. See, e.g., *Smith v. Chrysler Corp.*, 155 F.3d 799, 802–804, 809 (6th Cir. 1998) (concluding lying about a medical condition relevant to a license needed to do part of a job justifies termination).

341. See *Gooden v. Ryan's Rest. Grp., Inc.*, No. 5:04-CV-179-R, 2007 WL 855326, at *1, *13 (W.D. Ky. Mar. 14, 2007) (concluding lying about violation of fraternization policy justifies termination).

342. *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1176 n.6 (11th Cir. 2000).

343. See *infra* note 349.

hold the job in the first place. It would have been perfectly legal for the employer to decline to hire the applicant based on the concealed information. For example, the employer could tell an applicant that she will not be hired because she does not have the necessary education or experience.

In contrast, after *Bostock*, the employer cannot ask applicants about their sexual orientation in order to classify them as qualified or unqualified for the job.³⁴⁴ *Bostock* holds that sexual orientation is not relevant to employment decisions.³⁴⁵ Consequently, any misrepresentation about sexual orientation is immaterial to a hiring decision, and the employer's purported reason for firing the employee could be seen as a pretext for discrimination.

Under general principles of employment discrimination law, after a plaintiff has proven their prima facie case, they can rebut a defense that the termination was justified by showing that the employer's asserted reason for taking adverse action is pretextual.³⁴⁶ When a Title VII plaintiff shows that the employer's stated reason for adverse action is pretextual, this "can be strong evidence that a defendant has acted with discriminatory intent."³⁴⁷ Firing gay employees for concealing their sexual orientation should be treated as a pretext for termination based on orientation, not deception.

An employer who takes adverse action upon learning that a supposedly straight worker is gay is most likely motivated by that employee's homosexuality, not by any previous misrepresentations of heterosexuality. The alleged deception is a red herring. As seen in

344. This was true before *Bostock* in those states and localities with gay-protective statutes. See Schoenbaum, *supra* note 244, at 103.

345. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("An individual's homosexuality or transgender status is not relevant to employment decisions.").

346. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49–50 n.3 (2003) ("[After] the employer . . . articulate[s] a legitimate, nondiscriminatory reason for its employment action . . . [t]he plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual."); *Long v. AT & T Info. Sys., Inc.*, 733 F. Supp. 188, 200 (S.D.N.Y. 1990) ("[S]hould the defendant carry this burden [of showing a legitimate, nondiscriminatory reason for its employment action], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not true reasons, but were a pretext for discrimination." (quoting *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981))).

347. *Woodard v. Fanboy, LLC*, 298 F.3d 1261, 1265 (11th Cir. 2002); see *Hinson v. Clinch Cnty. Bd. of Educ.*, 231 F.3d 821, 831 (11th Cir. 2000) ("[I]n some Title VII cases 'it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.'" (citations omitted)).

Buttino, an employer's invocation of deception is often a pretext for implementing a broader anti-gay policy.³⁴⁸ An employee should not be penalized for giving an untruthful answer to a question that, as the next section explains, should never have been asked.

b. *The Inquiry as Improper.* Courts should interpret Title VII to prevent employers from penalizing gay employees for concealing or misrepresenting their sexual orientation because any workplace-initiated questions about sexual orientation are inherently improper. A discriminatory firm's request for assurances that job applicants are heterosexual is inappropriate, and any answers given in response should not provide the basis for later retribution. The real question is not why employees lie about their sexual orientation, but why employers ask.

Many courts, however, have suggested that even if the question posed is illegal, a person does not have a right to lie with impunity. For example, in nonemployment contexts, in cases involving questions about a person's Communist affiliations, the Supreme Court has rejected the principle that

a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.³⁴⁹

The *Acanfora* court asserted, in the employment context, "courts have sustained discharges of government employees for furnishing false information pertaining to their qualifications despite the fact that the government's questions were considered to be an unwarranted intrusion into constitutionally protected rights."³⁵⁰ Even if courts

348. See *BUTTINO*, *supra* note 17, at 316–17, 326–27.

349. *Bryson v. United States*, 396 U.S. 64, 72 (1969) (upholding a criminal conviction where the defendant falsely claimed not to be a Communist to the NLRB). Similarly, in a criminal case dealing with a false filing of a non-Communist affidavit, required to satisfy the Taft-Hartley Act, the Supreme Court held, "There is no reason for this Court to consider the constitutionality of a statute at the behest of petitioners who have been indicted for conspiracy by means of falsehood and deceit to circumvent the law which they now seek to challenge. This is the teaching of the cases." *Dennis v. United States*, 384 U.S. 855, 866 (1966).

350. *Acanfora v. Bd. of Educ.*, 491 F.2d at 501–02 (citing *Rodriguez v. Seaman*, 463 F.2d 837 (D.C. Cir. 1972)); *Williams v. United States*, 434 F.2d 1346, 1354 (Ct. Cl. 1970) (Nichols, J., concurring).

interpret Title VII to forbid employer questions about sexual orientation, this line of cases would suggest that employees cannot answer deceptively and, if they do, termination is permissible.

Given the historical use of the gay perjury trap, courts should interpret Title VII to preclude terminations based on deceptive answers to inappropriate inquiries into sexual orientation. In other contexts, courts have recognized the bind that job applicants find themselves in when asked illegal questions and have sided with the applicants in discrimination lawsuits. For example, after the Police Commissioner of Boston fired a police officer for “falsely stat[ing] certain information about his medical history,” the Massachusetts Supreme Court in *Kraft v. Police Commissioner*³⁵¹ held that a police “commissioner had no authority to discharge [an officer] for giving false answers to questions that the commissioner under law had no right to ask.”³⁵² The justices explained their reasoning in a subsequent opinion: “Any result other than the one reached in *Kraft* at best would have ignored the employer’s unlawful inquiries, and at worst would have rewarded the employer for them. In either event, employers in the future would have been encouraged to violate the law.”³⁵³ A federal court interpreting claims brought under the Americans with Disabilities Act similarly concluded that “an employer that violates its employees’ rights by asking impermissible questions ought not be able to base adverse employment decisions on the resulting answers (to which it was not entitled in the first place).”³⁵⁴

These opinions essentially highlight the problem of the gay perjury trap. When asked an improper question by a job interviewer—for example, “Are you gay?”—the gay applicant can do one of two things: Tell the truth, and risk being the victim of illegal—but difficult to prove—discrimination, or lie and get the job but face the possibility of dismissal for dishonesty. As in the decades before *Bostock*, many prudent LGB individuals in need of work will lie. That lie should not be a punishable offense; otherwise the gay perjury trap survives, and, as the *Kraft* court noted, employers will essentially have “been encouraged to violate the law”³⁵⁵—in this case, Title VII.

351. *Kraft v. Police Comm’r*, 571 N.E.2d 380, 381 (Mass. 1991).

352. *Id.* at 382.

353. *Lysak v. Seiler Corp.*, 614 N.E.2d 991, 993 (Mass. 1993).

354. *Downs v. Mass. Bay Transp. Auth.*, 13 F. Supp. 2d 130, 140 (D. Mass. 1998).

355. *Lysak*, 614 N.E.2d at 993.

c. *Denial May Not Be a Misrepresentation.* Courts also should not permit employers to terminate or penalize employees who previously indicated their heterosexuality during the application process, but later came out as gay, because the prior representation may not have been an actual lie at the time. Understanding one's own sexual orientation is a process for many people. Many employees may not realize they are gay or bisexual until some time after they have been hired.³⁵⁶ For example, Frank Buttino did not realize he was gay until he was twenty-six years old, two years after he had become an FBI agent.³⁵⁷ Statements by those who are unaware of their sexual orientation at the relevant time are not lies.

Some gay people may be deceiving themselves about their sexual orientation. Many otherwise healthy gay people are affected by internalized homophobia or self-hatred. This is particularly common for individuals raised in religious institutions that preach condemnation of homosexuality. Many religions proclaim homosexuality is a sin. Some continue to decree that gay people are an affront to God and should be killed.³⁵⁸ Many individuals infected by such teachings feel shame and try to convince themselves they are heterosexual. Until a person is ready to accept his true orientation, he is clearly not ready to discuss his sexual orientation with a job interviewer or a boss. For this reason, the inability to recognize or acknowledge one's sexual orientation should not constitute cause for termination in the post-*Bostock* world.

d. *Valid Reasons to Misrepresent Sexual Orientation.* Finally, employees should not be punished for untruthful answers to questions about sexual orientation because some people may realize their sexual orientation but not acknowledge it publicly for a variety of valid reasons. First, many gay people are closeted to their friends and family.³⁵⁹ The decision to conceal one's sexual orientation may be a

356. See LEINEN, *supra* note 56, at 16 (“All, however, reported that some time passed (on the average, ten years) before they actually came to identify this interest as homosexual.”).

357. Cramer, *supra* note 92; see *supra* notes 90–117 and accompanying text (discussing the *Buttino* case).

358. Ashley Milosevic, *The Tides of Transgressions: An Analysis of Defamation and the Rights of the LGBT Community*, 82 ALB. L. REV. 323, 336 (2018) (“Certain religions, such as the Abrahamic religions, believe homosexuality is a sin, an abomination, or worthy of death.”).

359. LEINEN, *supra* note 56, at 27 (“One officer who expressed such concerns added that his greatest single worry was that someone in the precinct would leak the knowledge of his

matter of self-preservation for those gay people who live where others are particularly hostile—and sometimes violent—toward gay people. For many workers, “the threat of forced disclosure means revealing and explaining a facet of life that they have worked very hard to conceal for many years.”³⁶⁰ Many gay people feel compelled to conceal their sexual orientation in order to ensure that they are not disowned by their families, shunned by their friends, and/or excommunicated from their churches, mosques, or synagogues. It is not the role of a job interviewer to force such people to publicly acknowledge their true sexuality and endure animosity from friends, family, and community.

Second, some employees may consider all aspects of their private lives off limits to bosses and coworkers. Many people—regardless of their sexual orientation—are private by nature. They have no desire to share with an employer details of their lives outside the workplace, whether it is the fact they take salsa dancing lessons, collect commemorative plates, or live with their same-sex partner. The forced disclosure of intimate details of their private lives, especially sexual orientation, can be unnecessarily stressful for gay individuals.³⁶¹ If asked about their sexual orientation, these people may reflexively do what society has demanded of them since birth—maintain their privacy, which creates presumptive heterosexuality.³⁶²

Third, some job applicants may rightly conceal their sexual orientation because they believe if they volunteer the information, the employer will discriminate against them. Even in the aftermath of *Bostock*, many employers will want to discriminate against employees and job applicants perceived to be gay. This may be a function of unofficial corporate policy or an individual interviewer’s or supervisor’s prejudice, and it provides a powerful incentive for gay workers to conceal their sexual orientation.³⁶³ In fact, studies report a

homosexuality to an unsuspecting member of his family.”). Indeed, some may be married to a member of the opposite sex. These are often the same people who were raised in anti-gay religious traditions.

360. Brad S. Weinstein, *A Right with No Remedy: Forced Disclosure of Sexual Orientation and Public “Outing” Under 42 U.S.C. § 1983*, 90 CORNELL L. REV. 811, 824 (2005).

361. Arnault, *supra* note 257, at 785 (“Forced disclosure of sexual orientation is potentially damaging for a homosexual. The reverse is seldom true for a heterosexual.”).

362. See LEINEN, *supra* note 56, at 57.

363. This is the great dilemma that many job applicants, including law students, face when drafting their resumes: to be out or not to be out. A resume can implicitly communicate one’s sexual orientation if the applicant has held a leadership position in a gay student organization or has worked for a gay rights group. (Of course, many straight people also work for such

majority of LGBT employees feel compelled to conceal their LGBT identity at work.³⁶⁴ Many gay individuals lead bifurcated lives in which they are open with their friends but closeted to their bosses and colleagues. These people do not conceal their sexual orientation to pad their resumes or make themselves look more qualified than they are; they conceal their sexual orientation to avoid invidious discrimination. Further, some gay people may perceive the need to lie about their sexual orientation at work to avoid discrimination in other aspects of their lives, such as their eligibility to adopt children.³⁶⁵

Fourth, even after a gay person has secured a position with an employer, they may decide to conceal their sexual orientation to avoid uncomfortable situations, including being the target of ostracism, taunting, or even physical violence.³⁶⁶ On-the-job harassment against gay employees extends from “‘a seemingly endless stream of homosexual jokes and anti-gay slurs’ to . . . vandalism and threats of violence directed toward openly gay people on the job.”³⁶⁷

organizations and may incorrectly be labeled as “gay.”) Some students may worry that if they include such gay-oriented affiliations on their resumes, prejudiced employers will not interview them. (Others may conclude that if the employer is prejudiced, they would rather not work for that employer anyway, so nothing is lost by being out on one’s resume.) The omission, however, does a disservice to the gay job applicant whose resume does not demonstrate the full set of leadership abilities or other skills that the person has developed. Nevertheless, if the job applicant decides that it is wiser—especially in a down economy—to omit these experiences, the omission should not provide the basis for adverse action should the employer later discover the employee’s involvement with such organizations.

364. HUM. RTS. CAMPAIGN FOUND., *DEGREES OF EQUALITY: A NATIONAL STUDY EXAMINING WORKPLACE CLIMATE FOR LGBT EMPLOYEES* 5 (2009), https://assets2.hrc.org/files/assets/resources/DegreesOfEquality_2009.pdf [<https://perma.cc/9LNF-7GY7>].

365. See LESLIE COOPER & PAUL CATES, ACLU LESBIAN & GAY RTS. PROJECT, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 42 (2005); see also Cynthia R. Mabry, *Opening Another Exit from Child Welfare for Special Needs Children – Why Some Gay Men and Lesbians Should Have the Privilege to Adopt Children in Florida*, 18 ST. THOMAS L. REV. 269, 285 (2005) (“[S]ome gay and lesbian prospective parents intentionally conceal their sexual orientation for fear that their opportunity to adopt a child will be denied.”). See generally *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (finding that the city’s refusal to contract with a Catholic-affiliated foster agency that discriminated against same-sex couples violates the agency’s First Amendment rights).

366. See MICHELANGELO SIGNORILE, *OUTING YOURSELF: HOW TO COME OUT AS LESBIAN OR GAY TO YOUR FAMILY, FRIENDS, AND COWORKERS* 137–54 (1995).

367. Gregory B. Lewis, *Gay Issues in the Workplace*, 55 PUB. ADMIN. REV. 201, 201 (1995) (book review).

This is a particular risk in police departments.³⁶⁸ In many locations, the anti-gay prejudice within police departments is deep-seated.³⁶⁹ This compels gay officers to conceal their sexual orientation even when gay-inclusive antidiscrimination policies are in place.³⁷⁰ Once their homosexuality becomes known at work, police officers are treated worse by their commanding officers and supervisors.³⁷¹ For example, when his fellow officers in New York's Nassau County Police Department learned he was gay, one officer was subjected to constant torment, ranging from being called a child molester and having his uniform and equipment hidden to having "[h]is colleagues put rocks in the hub caps of his police car so that criminals would hear his noisy approach."³⁷² In some departments, gay police officers feel compelled to conceal their sexual orientation at work because their homophobic coworkers may not provide back up in life-threatening situations.³⁷³

Gay teachers, too, may still find it necessary to conceal their sexual orientation to avoid daily harassment from coworkers, students, and parents.³⁷⁴ Tommy Schroeder was driven to quit his job as a school teacher after students regularly called him a "faggot" in the hallways, made harassing phone calls while chanting "faggot, faggot, faggot" at him, and slashed his car tires; this occurred while the students' parents falsely accused him of being a pedophile, and Schroeder's supervisors did nothing to protect him.³⁷⁵ Harassment of gay teachers is sufficiently common and cruel that discretion is a matter of self-preservation in many regions of the country.

368. See LEINEN, *supra* note 56, at 35 (noting one gay police officer found "the word *Beware* was written on his personal car while it was parked in a police parking lot").

369. See *id.* at 8.

370. *Id.* at 2, 14; see also David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1222–23 (2006) ("Even today, gay and lesbian officers can feel strong pressures to keep their sexual orientation hidden, or at least unadvertised. This is particularly true for gay male officers.").

371. See, e.g., *Lathrop v. City of St. Cloud*, No. 10–2361, 2012 WL 185780, at *2 (D. Minn. Jan. 23, 2012).

372. *Quinn v. Nassau Cnty. Police Dep't*, 53 F. Supp. 2d 347, 351 (E.D.N.Y. 1999).

373. LEINEN, *supra* note 56, at 55; *cf. id.* at 49 (quoting a closeted gay police officer as saying, "You know cops say real disgusting things like they [gays] should all die or they should be put away somewhere or something. That closes the door a little more. That sort of solidifies why I shouldn't come out" (alteration in original)).

374. See, e.g., *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 948 (7th Cir. 2002); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 321 (E.D.N.Y. 2002).

375. *Schroeder*, 282 F.3d at 948–49.

Bostock does not change this calculation for gay employees working in anti-gay police departments, school districts, or many other workplaces. Most gay workers would rather have a stable job than an uncertain Title VII lawsuit. As a matter of safety and wellbeing, some employees may conceal their sexual orientation during the workday. Given these legitimate reasons for applicants and employees to do so, and given the illegitimacy of employers' inquiries about sexual orientation, courts should recognize that untruthful answers to employers' questions about sexual orientation are not valid grounds for terminating or penalizing employees. This right to prevaricate should also extend to omitting references to clubs or organizations that would implicitly disclose applicants' sexual orientation. Otherwise, employers could employ the gay perjury trap that ensnared Joseph Acanfora.³⁷⁶

This recommendation should not be interpreted as encouraging gay people to stay in the closet. Gay people should come out of the closet for their own wellbeing, but not because of employer pressure. LGB individuals should be out. It is better for the person, the gay community, and society.³⁷⁷ Many gay employees hate having to misrepresent their sexual orientation at work and find the subterfuge causes stress, anxiety, and depression.³⁷⁸ But, at the same time, it would be wrong to overlook the utility of the closet as a temporary or situational means of avoiding discrimination. Passing lets the gay individual get a foot in the door. The bisexual man, for example, can prove himself a valuable employee and disprove the stereotypes and fallacies used to deny opportunities to gay people. After all, the irrationality of the military's anti-gay policies was proven by gay service members who served valiantly.³⁷⁹ American workplaces should never adopt policies of Don't Ask, Don't Tell. Instead, they should follow a different rule: Don't Ask, But Employees Are Free to Tell.

376. See *supra* notes 119–148 and accompanying text. Of course, no job applicant should be allowed to falsely claim membership in a club or organization to which they do not belong. That comes close to professing a credential that one does not possess, which is a legitimate reason for termination. See *supra* notes 325–334 and accompanying text.

377. See Steve W. Cole, Margaret E. Kemeny, Shelley E. Taylor & Barbara R. Visscher, *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 HEALTH PSYCH. 243, 243–51 (1996).

378. Lewis, *supra* note 367, at 202.

379. See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 897–909 (C.D. Cal. 2010).

C. *Precluding Penalties for Employees Refusing to Answer Questions About Sexual Orientation*

In the pre-*Bostock* era, some courts held that an employee's refusal to reveal their sexual orientation when asked was grounds for termination. Most notably, the courts in *Walls*³⁸⁰ and *Truesdale*³⁸¹ held that an employee could be penalized for declining to answer questions related to sexual orientation on an employer's questionnaire. Both courts, however, relied on sodomy statutes.³⁸² Now that private sexual conduct between consenting adults is constitutionally protected and employment discrimination based on sexual orientation is illegal, the legal premise that refusal to answer questions about sexual orientation warrants termination has evaporated.³⁸³

Post-*Bostock*, job applicants and employees should be able to decline to answer employers' inquiries about their sexual orientation. The inquiry is improper and should be considered presumptive evidence of discrimination under Title VII. Post-*Bostock* Title VII is premised on the fact that sexual orientation is irrelevant to job performance.³⁸⁴ By analogy, Title VII would not tolerate a job applicant being rejected for declining to tell an employer their complete racial background. Even in those circumstances in which an employer is allowed to ask,³⁸⁵ the employee cannot be punished for refusing to answer.

In addition to being able to rebuff discussions of her sexual orientation, the job applicant should still retain the right to prevaricate. The right to refuse to answer, alone, is insufficient. Some courts have suggested that the refusal to answer invasive personal questions does not give rise to a cause of action for illegal termination because one's privacy is not invaded if one refuses to provide the private information.³⁸⁶ Such reasoning fails to appreciate the context in which the improper question is asked. Refusing to answer a question—even

380. *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990).

381. *Truesdale v. Univ. of N.C.*, 371 S.E.2d 503, 509 (N.C. Ct. App 1988).

382. *See supra* notes 269–275 and accompanying text.

383. *See supra* notes 269–280 and accompanying text.

384. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (“An individual’s homosexuality or transgender status is not relevant to employment decisions.”).

385. Generally, an employer should not make such inquiries, but these are permissible for EEOC record-keeping purposes and voluntary affirmative action plans. *See supra* note 245.

386. *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 910 (Mass. 1982).

an illegal one—can make a job applicant appear evasive and combative.³⁸⁷ Any employer who is inclined to ask questions about homosexuality would probably interpret the refusal to answer as an admission.³⁸⁸ More importantly, it would be exceedingly difficult to prove that one would have gotten the job but for the refusal to answer the inappropriate question. The closet is both a prison and a shield. For all the damage that the closet inflicts, gay individuals should be able to strategically deploy the closet to avoid unlawful discrimination.

CONCLUSION

Truthfulness is generally considered to be a virtue—but not when an honest answer would trigger illegal, but challenging to prove, discrimination. Depending on the context, mendacity can have utility. In some circumstances, an early deception can expose the false premises of anti-gay policies. We know that the FBI's assertion that gay people cannot be outstanding agents was erroneous precisely because gay Americans—like Frank Buttino—concealed their sexual orientation, evaded the FBI's anti-gay policy, and became exemplary agents.

Historically, however, major employers have sought to prevent gay people from disproving the false underpinnings of anti-gay policies by concealing their sexual orientation to get hired and then performing exceptionally. In the pre-*Bostock* era, public and private employers exploited the gay perjury trap to fire or penalize gay employees for lying about their sexual orientation. Prejudiced employers focused on the lie precisely because the gay employees had performed their jobs well and could not be fired on the merits.

The *Bostock* opinion will not end workplace discrimination against gay employees. Many employers, managers, and supervisors who harbor anti-gay views will continue to discriminate against gay workers in ways big and small. Some may try to resurrect the gay perjury trap. Federal authorities must be prepared to blunt these efforts. The EEOC has a major role to play. It should pursue complaints of employees being penalized for concealing or misrepresenting their sexual orientation. Although federal courts are

387. Prior to *Lawrence*, job applicants may have enjoyed a Fifth Amendment right to refuse to answer questions about gay conduct because, where such activity was illegal, the admission of homosexual conduct would be self-incriminating. But exercising this right would hardly endear the applicant to the interviewer.

388. See *supra* notes 179–195 and accompanying text.

the ultimate arbiters of the breadth of Title VII, EEOC decisions can protect individual employees who face discrimination and can influence judicial interpretations of Title VII.

Judges, too, should recognize how homophobic employers have historically set and utilized the gay perjury trap as a way to discriminate against gay job applicants and workers. At no point should employers be able to use an employee's concealment or discretion about their sexual orientation as a justification for termination, demotion, or any other adverse action. Federal judges should interpret Title VII to preclude both inquiries about sexual orientation and penalties for concealing one's gay status. Otherwise, the gay perjury trap will survive the *Bostock* opinion. And gay workers will lack genuine protection from invidious discrimination.

The post-*Bostock* Title VII cannot succeed if employers can use alleged dishonesty about sexual orientation as a means of justifying anti-gay discrimination and of avoiding liability. Courts should not fall for the distraction. The relevant question is not "Why did the applicant lie?", but "Why did the employer ask?"