

2015

# Don't Ask, Must Tell—and Other Combinations

Adam M. Samaha

Lior Strahilevitz

Follow this and additional works at: [https://chicagounbound.uchicago.edu/  
public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

---

## Recommended Citation

Adam Samaha & Lior Strahilevitz, "Don't Ask, Must Tell—and Other Combinations" (University of Chicago Public Law & Legal Theory Working Paper No. 500, 2015).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# CHICAGO

COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 715

(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 500



COASE-SANDOR INSTITUTE  
FOR LAW AND ECONOMICS

THE UNIVERSITY OF CHICAGO LAW SCHOOL

## DON'T ASK, MUST TELL — AND OTHER COMBINATIONS

*Adam M. Samaha and Lior Jacob Strahilevitz*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

January 2015

This paper can be downloaded without charge at the Institute for Law and Economics Working Paper Series: <http://www.law.uchicago.edu/Lawecon/index.html> and at the Public Law and Legal Theory Working Paper Series: <http://www.law.uchicago.edu/academics/publiclaw/index.html> and The Social Science Research Network Electronic Paper Collection.

## DON'T ASK, MUST TELL—AND OTHER COMBINATIONS

Adam M. Samaha\* & Lior Jacob Strahilevitz\*\*

103 CALIFORNIA LAW REVIEW \_\_\_\_ (forthcoming 2015)

*The military's defunct Don't Ask, Don't Tell policy has been studied and debated for decades. Surprisingly, the question of why a legal regime would combine these particular rules for information flow has received little attention. More surprisingly still, legal scholars have provided no systemic account of why law might prohibit or mandate asking and telling. While there is a large literature on disclosure and a fragmented literature on questioning, considering either part of the information dissemination puzzle in isolation has caused scholars to overlook key considerations. This Article tackles foundational questions of information policy and legal design, focusing on instances in which asking and telling are either mandated or prohibited by legal rules, legal incentives, or social norms.*

*Although permissive norms for asking and telling seem pervasive in law, the Article shows that each corner solution exists in the American legal system. "Don't Ask, Don't Tell," "Don't Ask, Must Tell," "Must Ask, Must Tell," and "Must Ask, Don't Tell" each fill a notable regulatory space. After cataloguing examples, the Article gives accounts of why law gravitates toward particular combinations of asking and telling rules in various domains, and offers some normative evaluation of these strategies. The Article emphasizes that asking and telling norms sometimes—but only sometimes—are driven by concerns about how people will use the information obtained. Understanding the connection to use norms, in turn, provides guidance for a rapidly advancing future in which big data analytics and expanding surveillance will make old practices of direct question-and-answer less significant, if not obsolete. In any event, the matrix of rule combinations highlighted here can reveal new pathways for reforming our practices of asking and telling in life and law.*

---

\* Professor of Law, New York University School of Law.

\*\* Sidley Austin Professor of Law, University of Chicago Law School. Earlier drafts of this Article benefited greatly from presentations at the University of Chicago, the University of Tulsa, the Law, Economics, and Politics Colloquium at NYU, and the 2014 Privacy Law Scholars Conference. For other helpful discussions and comments, we thank Derek Bambauer, Jane Bambauer, Omri Ben-Shahar, Corey Brettschneider, Paul Crane, Ryan Doerfler, Liz Emens, Lee Fennell, John Ferejohn, Stephen Galoob, William Hubbard, Clare Huntington, Aziz Huq, Lewis Kornhauser, Daryl Levinson, Saul Levmore, Jonathan Masur, Richard McAdams, Martha Nussbaum, Randy Picker, Ariel Porat, Eric Posner, Victoria Schwartz, and Laura Weinrib. For helpful research assistance, we thank Rucha Desai, Michelle Hayner, Ben Mejia and Hillel Nadler. We are grateful to the Filomen D'Agostino and Max E. Greenberg Research Fund, as well as the Russell J. Parsons and Bernard Sang Faculty Research Funds for their generous support. Those responsible for mistakes will be identified upon request.

## CONTENTS

Introduction .....	3
I. Working Concepts and Theories .....	6
A. Asking and Telling .....	6
B. General Theories .....	8
1. Why Q&A? .....	8
2. Q&A Unbound .....	10
3. Regulating Telling .....	12
4. Regulating Asking .....	15
II. Curious Combinations .....	19
A. Don't Ask, Don't Tell (DADT) .....	20
1. Military Policy .....	21
2. Antidiscrimination law .....	23
B. Don't Ask, Must Tell (DAMT) .....	27
1. Personal relationships .....	28
2. Workplace regulations .....	30
C. Must Ask, Must Tell (MAMT) .....	33
1. Background checks .....	34
2. Taxes .....	35
D. Must Ask, Don't Tell (MADT) .....	37
1. Meet the Press and Codes of Silence .....	38
2. Civil Discovery .....	39
E. Partially Permissive Rules .....	42
III. Themes, Trends, and Implications .....	45
A. Use Rules .....	45
B. Beyond Q&A .....	47
C. Reform .....	51
Conclusion .....	56

## INTRODUCTION

Life is filled with rules about what to ask and what to tell. In a given situation, a particular question might or might not be appropriate, and so too for disclosure of information—depending on the applicable mix of law, social norms, ethical commitments, and other factors. At some level, everyone is aware that a mixture of forces influences our decisions to seek information and to offer it up. But legal scholars have not yet dug into how these rules work and interact, nor into what their content should be. Rules for disclosure are the subject of longstanding scholarly attention, of course, covering everything from the duty to warn to the protection of classified information.<sup>1</sup> But rules for asking questions have received less systematic study,<sup>2</sup> and the possible combinations of rules for asking and telling seem to lack any systematic treatment at all.

In this Article, we examine several intriguing combinations of rules for asking and telling. “Don’t Ask, Don’t Tell” (*DADT*) already has drawn repeated scrutiny from legal scholars because of the now-abandoned policy regarding gay people serving in the military.<sup>3</sup> Other combinations of asking and telling norms can be equally interesting, however. Below we pay special attention to extreme combinations beyond *DADT*, including the trust-based “Don’t Ask, Must Tell” (*DAMT*), the ostensibly redundant “Must Ask, Must Tell” (*MAMT*), and the often regrettably adversarial “Must Ask, Don’t Tell” (*MADT*). To our knowledge, no one has examined these extreme combinations together, yet each occupies a pocket of existing law and social life.

Many of the lessons that we offer below are localized within particular combinations of asking and telling rules. These combinations are interesting and important enough on their own, but we also want to suggest broader lessons. We extend and integrate strands of scholarship in law and economics as well as law and social norms.<sup>4</sup> The notion that asking and telling norms

---

<sup>1</sup> See *infra* notes 34-37.

<sup>2</sup> See *infra* notes 39-43.

<sup>3</sup> See, e.g., Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don’t Ask, Don’t Tell*, 18 WM. & MARY J. WOMEN & L. 35 (2011) (discussing the repeal as a triumph of servicemembers); Suzanna Danuta Walters, *The Few, the Proud, the Gays: Don’t Ask, Don’t Tell and the Trap of Tolerance*, 18 WM. & MARY J. WOMEN & L. 87 (2011) (raising concerns about continued heteronormativity); Eugene R. Milhizer, “Don’t Ask, Don’t Tell”: A Qualified Defense, 21 HOFSTRA LABOR & EMPLOYMENT L.J. 249, 350 (2004) (presenting *DADT* as a compromise between people with different normative views on homosexuality); Tobias B. Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOK. L. REV. 1141, 1145 (1998) (arguing that, partly because of an assumption of heteronormativity, *DADT* effectively “compel[ed] gay servicemembers falsely to identify themselves as straight”); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 YALE L.J. 485, 540 (1998) (“[T]he policy simultaneously dampens the empowering aspects and amplifies the disempowering aspects of gay invisibility.”). An example of a *DADT* proposal in a non-military context is Osamu Muramoto, *Bioethics of the Refusal of Blood by Jehovah’s Witnesses*, 25 J. MED. ETHICS 463, 466 (1999) (recommending *DADT* for a religious organization and its members to protect “autonomous decisions” about blood transfusions).

<sup>4</sup> By “social norm” we mean a standard for conduct that might be enforced by non-legal sanction or incentive, such as shaming or refusal to deal (or commendation or acceptance). Like law’s normative propositions, a social norm in this sense might or might not be internalized; either way, laws and social norms can influence behavior. Also, in this Article we do not take a general position on how social norms and laws come about, either as a matter of design or spontaneous generation. Cf. Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1 (2001) (providing one rich account of norm development). Knowing the sources of a given rule can provide insight on the feasibility and methods of changing the rule, and even a reason to believe that the rule is good

are best understood when taken together appeared no later than 1994, in *Game Theory and the Law*.<sup>5</sup> But there the focus was on comparing “Don’t Ask, May Tell” with “Don’t Ask, Don’t Tell.” Moreover, positive and normative evaluations will be incomplete without accounting for social in addition to legal norms. The real-world set of asking and telling rules changes when social norms are added to legal norms, and so might one’s evaluation of them.<sup>6</sup> If nothing else, this Article facilitates integrated thinking on the actual and proper assortment of rules for acquiring and disclosing information. We hope our matrix of combinations is itself an important advance, but a good typology also can help reveal policy options that would not be obvious otherwise. We do some of that work along the way.

Part I of the Article sets out functional definitions for asking and telling, and then offers the beginnings of positive and normative theories for regulating asking and telling. Part II turns to concrete situations, emphasizing interesting and counterintuitive combinations of norms. This part concentrates on fairly simple social interactions between two parties, in which party *A* might ask party *B* for information and *B* might tell information to *A*. Part III adds the possibility that *A* might ask a third-party *C* for information about *B*, where *C* could be a person or a database. Our discussion of these “Ask *C*” situations is even more provisional than the rest of the Article. But raising the ask-*C* issue allows us to think about a future in which the social practice of interpersonal Q&A becomes ever less significant. What legal norms are likely and appropriate for that future?<sup>7</sup> Part III concludes by pointing to a few situations in which we believe that legal and social norms for asking and telling are probably suboptimal, and suggests reforms.

In suggesting answers for the future, we will spotlight use rules. Sometimes people’s use of information is regulated, as distinguished from how people collect information in the first place. For example, law might prohibit hiring decisions based on certain applicant characteristics, such as race, whether or not law regulates asking and telling about race. Often use concerns must be considered to understand asking and telling rules. In other situations, however, asking and telling rules are justified quite apart from any use rule. One of our goals is to consider when asking and telling rules are part of a larger regulatory mission involving the use of information, and when such rules stand on their own. Seeing this difference in justifications for Q&A rules has important implications for a world of rapidly expanding ask-*C* options.

Before going forward, caveats are in order. First, our analysis references occasionally controversial distinctions among may, must, and don’t.<sup>8</sup> Readers will differ on whether, for

---

or bad. But we will not present a general theory of origin for the rules we study, and we trust that any oscillation between a design perspective and a spontaneous generation perspective will not seriously undercut our analysis.

<sup>5</sup> DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 91-93 (1994) (discussed below at text accompanying notes 101-103). A recent article that is sensibly concerned about the ability of regulated parties to evade don’t-ask norms using, for example, big data is Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1153, 1190 (2011).

<sup>6</sup> See Eric Talley, *Disclosure Norms*, 149 U. PA. L. REV. 1955, 1960-61 (2001). Another insightful contribution is Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2279-82 (1996). A kind of DADT rule can arise from efficient social norms of privacy, which prevent gathering and disseminating information more harmful to a gossip target than helpful to the gossipers. McAdams claims that anti-blackmail laws might make sense if combined with such privacy norms.

<sup>7</sup> Our treatment of database queries is much like surveillance, in which *A* monitors *B* without any questions. In at least some cases, surveillance can be analyzed in the same way as our ask-*C* situations.

<sup>8</sup> Logically, the opposite of “must ask” is “mustn’t ask,” rather than “don’t ask.” But in light of the way we use the term “don’t” and our focus on essentially free societies, we do not distinguish “mustn’t” from “don’t.” Free

instance, loss of face or litigation incentives or grant conditions are enough to locate a rule beyond “may.”<sup>9</sup> We are curious about even modest influences on behavior, regardless, and the categorization problems are not special to Q&A rules. Our analysis will provide insight wherever one draws lines around contested concepts such as coercion. In the same spirit, we will not isolate a specific normative framework to evaluate Q&A combinations. We will offer some provisional judgments and we will introduce a soft presumption against regulating Q&A. Still, our analysis is designed for use by people of many different ideological stripes. Our goal is to open up a fascinating set of social interactions for review, allowing evaluation from a wide range of normative perspectives. Often this inclusive goal and ordinary caution will prevent conclusive recommendations. But the upside is relevance to a much larger audience.

Furthermore, we cannot cover every possible Q&A combination. There might be a good article to be written on “Don’t Ask Twice,”<sup>10</sup> “May Ask Thrice,”<sup>11</sup> and even “Must Ask Thrice,”<sup>12</sup> but ours will not be it. Nor will we explore variations like “May Lie” or “Must Lie,” since those have been examined fruitfully elsewhere.<sup>13</sup> We generally presume truthful telling and non-deceptive silences.<sup>14</sup> As well, many Q&A combinations are highly contextual and embedded in larger relationship webs. Norms change as people progress from first dates to longstanding marriages, for instance, or from one-shot interactions to repeat play.<sup>15</sup> Norms also can shift

---

societies virtually never *literally* compel individuals to do things, with the primary exception being the status of institutionalized persons, who are sometimes compelled to eat, sleep, or refrain from travel against their will. *See, e.g.,* Dan Lamothe, *Judge Allows Force-Feeding of Detainee at Guantanamo*, WASH. POST., May 24, 2014, at A1. By contrast, when free citizens refuse to engage in an action, they may be subjected to legal penalties (such as fines or incarceration) or severe social sanctions, but their willingness to endure these harms typically ensures that they ultimately can disregard a “must” or a “mustn’t.” *See generally* Jonathan Jorissen, Note, *Katrina’s House: The Constitutionality of the Forced Removal of Citizens from their Homes in the Wake of Natural Disasters*, 5 AVE MARIA L. REV. 587 (2007) (examining forced evacuations during natural disasters). In the cases we describe herein, people may confront strong or moderate legal and social pressure if they fail to comply with an obligation, but the “or else” that follows non-compliance falls short of force-feeding or compelled sedation. Our choice of “must ask” and “don’t tell” rather than “must ask” and “mustn’t tell” is driven by stylistic, not philosophical, considerations.

<sup>9</sup> *See, e.g.,* 7 C.F.R. § 4285.58(c)(6)(ii) (stating that applications for agricultural-cooperative research grants should include CVs but, “[u]nless pertinent to the project, it should not include . . . personal data such as birth date, marital [sic] status, or community activities”). Some people really want agricultural-cooperative research grants. And some people really “may” exit the regulatory jurisdiction to avoid regulation. *See* Adam B. Cox and Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 81-83, 92-97 (2013) (examining viable exit options).

<sup>10</sup> When asked about his weight by a reporter, NBA player Darryl Dawkins responded, “It’s more than I want to tell you. And don’t ask again, because I haven’t hit a reporter in five years.” *The Last Word*, HOU. CHRON., Oct. 3, 1995, at 9.

<sup>11</sup> *See* WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2 (“Antony: You all did see that on the Lupercal I thrice presented [Caesar] a kingly crown, Which he did thrice refuse: was this ambition?”).

<sup>12</sup> “Do you swear to tell the truth, the whole truth, and nothing but the truth?” *See* AM. JUR. PL. & PR. FORMS 25B *Witnesses* § 155 (2007). The apparent norm is to answer this conjunctive question once, rather than three times.

<sup>13</sup> *See, e.g.,* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); Saul Levmore, *A Theory of Deception and Then of Common Law Categories*, 85 TEX. L. REV. 1359 (2007); Ariel Porat & Omri Yadlin, *Valuable Lies* (2014) (unpublished manuscript on file with the authors).

<sup>14</sup> *But cf. infra* Part II.E (examining codes of silence and evidentiary privilege assertions).

<sup>15</sup> *See* Talley, *supra* note 6, at 1958-61 (noting that disclosure laws and social norms may complement each other in repeat play situations, even with an error-prone judiciary).

depending on whether the asker or teller moves first.<sup>16</sup> And interactions between *A* and *B* might be governed by one combination, while other norms simultaneously govern interactions between *A* and *C* or *B* and *C*.<sup>17</sup> We will take up much of this complexity without exhausting it. For the time being, we lay a foundation for heavier lifting by focusing on relationships with relatively simple dynamics. So let's get started.

## I. WORKING CONCEPTS AND THEORIES

### A. Asking and Telling

The concepts of asking and telling might seem self-evident. To an extent, they are. Asking questions is a part of ordinary child development that begins when toddlers realize the prospects for “social information gathering.”<sup>18</sup> Questions directed at others are inspired by the simple yet powerful recognition that people are repositories of information. The ability to tell others what you need or what you know also develops early in life,<sup>19</sup> and might have arisen earlier in human history.<sup>20</sup> Q&A is literally child's play. But there are nuances to these ideas, and we want to be adequately clear about our subjects of interest.

We are interested in a set of information problems in social settings, and thus we concentrate on certain informational functions of asking and telling. What people ordinarily call asking and telling have other functions that we want to distinguish. *A* can ask *B* about something, which is our focus here, and *A* also can ask *B* to do something (as in a favor) or to agree to something (as in a contract).<sup>21</sup> The latter two statements are designed to prompt action beyond information disclosure, and we are interested in them only if they involve a request for information from someone else.<sup>22</sup> For the same reason, we are not studying rhetorical questions

---

<sup>16</sup> Cf. J. Money, *Why Are You Asking About My Salary Again?*, MSN MONEY, Nov. 4, 2009 (indicating that it is socially acceptable for *A* to ask *B* about his salary if *B* asked *A* first), <http://money.msn.com/saving-money-tips/post.aspx?post=00000065-0000-0000-92f4-140000000000>.

<sup>17</sup> See, e.g., McAdams, *supra* note 6, at 2280-81 (canvassing gossip norms, which can depend on why and to whom communications are made).

<sup>18</sup> See, e.g., Dare A. Baldwin & Louis J. Moses, *The Ontogeny of Social Information Gathering*, 67 CHILD DEVEL. 1915, 1925-27 (1996) (offering some theory on social information gathering, in pre-internet terms); Lois Bloom, Susan Merkin & Janet Wootten, “Wh”-Questions: Linguistic Factors that Contribute to the Sequence of Acquisition, 53 CHILD DEVEL. 1084, 1086 (1982) (reporting results of a small-*n* study indicating that “wh” questioning started around age two or three).

<sup>19</sup> Cf. Stanka A. Fitneva, Nietzsche H.L. Lam & Kristen A. Dunfield, *The Development of Children's Information Gathering: To Look or to Ask?*, 49 DEVELOPMENTAL PSYCH. 533, 534 (2013) (“By age four, children are able to answer simple yes/no questions . . . [but] the limitations apparent in 4-year-olds' action selection [in pursuit of an informational goal] suggest that they may . . . have difficulty selecting between direct experience and asking others.”).

<sup>20</sup> See C.E.M. Struyker Boudier, *Toward a History of the Question*, in QUESTIONS AND QUESTIONING 9, 10-11 (Michael Meyer ed. 1988) (collecting and critiquing suggestions that human beings as a class developed the ability to make assertions before the ability to pose questions).

<sup>21</sup> The Employee Polygraph Protection Act illustrates such distinctions. Covered employers may not request that employees take a lie detector test, see 29 U.S.C. § 2002(1); cf. *id.* § 2006 (listing numerous exemptions), and they may not ask about the results of any lie detector test that employees happen to take, see *id.* § 2002(2).

<sup>22</sup> See Tanya Stivers, *An Overview of the Question-Response System in American English Conversation*, 42 J. PRAGMATICS 2772, 2776-77 (2010) (distinguishing information requests from questions initiating repair or clarification, seeking agreement, requesting something, seeking an assessment, and so on). Professors' classroom questions inhabit an interesting border area. See Anna-Brita Stenstrom, *Questioning in Conversation*, in QUESTIONS



or self-questioning.<sup>23</sup> Telling has similar breadth in ordinary usage that reaches beyond our study: *B* can tell *A* *about* something, which is our focus here, and *B* also can tell *A* *to do* something (as in a command to an inferior). Commands surely reveal information about those who issue them, as do questions and requests of all kinds, but we are interested in such statements only if they involve the production of information.

Because we are studying functional requests for information and functional disclosures, we have to look beyond form and pay attention to contextual nuance. Our idea of “telling” and related terms has to go beyond flat declarations. Questions are themselves telling, in the sense that statements correctly formulated as questions usually reveal something about the questioner’s interests or beliefs. Every lawyer knows about phony questions, in which an advocate during *voir dire* or a judge during oral argument thinly disguises an innuendo as a formal question.<sup>24</sup> We should recognize the asking and telling aspects of these statements if our analysis is to be well grounded. Even a nominal silence can reveal information via an observer’s rational inference. In a related vein, a nominal question might be understood by listeners partly as a command, depending on the parties’ perceived roles.<sup>25</sup> We are on the lookout for such intermingled functions in order to understand such social interaction and the applicable norms of good behavior. In the same spirit, we cannot restrict our idea of “asking” and related terms to statements with an interrogative syntax. It does not matter for our purposes whether a statement that effectively requests information ends with a question mark, a rising tone, or any other conventional marker for a question. “I am interested in learning about subject *X*” is an informational question under our functional definition.<sup>26</sup>

A functional perspective like ours can make categorization difficult, of course. *Rhode Island v. Innis*<sup>27</sup> is a famous illustration. In police custody, “interrogation” is supposed to stop if the detainee clearly asks for a lawyer’s help.<sup>28</sup> *Innis* was arrested for armed robbery and he asked

---

AND QUESTIONING 305, 312 (Michael Meyer ed. 1988) (“Qs in the classroom are pseudo-Qs in that they are not primarily intended to elicit new information, their main purpose being to check the pupils’ knowledge.”). If you are a professor, think about what workshop questions are.

<sup>23</sup> Cf. Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 266 (2002) (“The questions I ask are the fundamental tool by which I discover what I do not know.”).

<sup>24</sup> See, e.g., *Williams v. Bartow*, 481 F.3d 492, 495-96, 500-01 (7th Cir. 2007) (involving a factual assertion embedded in a prosecutor’s question); *Robinson v. State*, 297 N.E.2d 409, 411-12 (Ind. 1973) (granting a mistrial for *voir dire* questions and condemning “interrogat[ion] not with a view towards culling prospective jurors because of bias or prejudice but to the end that bias and prejudice may be utilized to advantage and prospective jurors cultivated and conditioned, both consciously and subconsciously”).

<sup>25</sup> See Esther N. Goody, *Towards a Theory of Questions*, in QUESTIONS AND POLITENESS 17, 39 (Esther N. Goody ed. 1978) (considering “the conditions under which *real*, that is, genuine, pure information questions are possible”). The line between request and command has been addressed in Fourth Amendment seizure cases, for instance. See, e.g., *United States v. Drayton*, 536 U.S. 194, 201 (2002) (“[L]aw enforcement officers . . . may pose questions . . . provided they do not induce cooperation by coercive means.”) (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)).

<sup>26</sup> Cf. John Heritage, *The Limits of Questioning: Negative Interrogatives and Hostile Question Content*, 34 J. PRAGMATICS 1427, 1427-28 (2002) (offering a simplistic definition of “question” as “a form of social action, designed to seek information and accomplished in a turn at talk by means of interrogative syntax” and then highlighting exceptions to the syntax requirement).

<sup>27</sup> 446 U.S. 291 (1980).

<sup>28</sup> See *Davis v. United States*, 512 U.S. 452, 458 (1994); *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). That is, if the police want to preserve the suspect’s statements as evidence against the suspect at trial.

for a lawyer. On the ride to the station, two noticeably chatty officers discussed how there was a school for disabled children nearby and that a missing shotgun might end up hurting one of them—at which point Innis asked the officers to turn the car around so that he could show them where the gun was.<sup>29</sup> The Court majority was willing to define interrogation broadly enough to include both “express questioning” and its “functional equivalent” based on a reasonable likelihood of a response,<sup>30</sup> but the Court was not willing to classify the officers’ speech as interrogation via appeal to conscience.<sup>31</sup> Two of the dissenters basically agreed with the majority’s test but were “utterly at a loss” to understand the majority’s conclusion.<sup>32</sup> Analogous disputes pop up on the boundary of telling and revealing by other means. Judges dealing with Fifth Amendment claims try to decide whether someone was compelled to be a “witness” via testimonial communication of fact or opinion, or instead revealed incriminating information via some other method such as an involuntary blood draw or compliance with economic regulation.<sup>33</sup> This distinction is not always easy to see or understand.

The importance of categorizing such behavior increased once legal consequences attached. Judicial efforts to regulate police questioning or self-incrimination required definitions of things like “interrogation” and “witness,” and disputes over the boundaries of those ideas were sure to follow. Conceptual work will not resolve disputes like *Innis*, however, which depend on normative goals. And whether or not the Court got things right in *Innis*, there certainly will be borderline cases. Residual vagueness surrounds the ideas of asking and telling, which are subjects of ongoing study by linguists, anthropologists, sociologists, and others. But wherever one comes down on borderline cases, there are more than enough consensus cases of asking and telling to investigate different combinations of norms.

## B. General Theories

### 1. Why Q&A?

When it comes to telling, a tall stack of scholarship offers assistance. Academics have worked on mechanisms and normative theories for information disclosure for many years. We already know that information is a valuable resource and public good that “wants to be free” in some sense,<sup>34</sup> and that, nonetheless, useful information flows may require encouragement. Often enough *A* and *B* are in a situation of asymmetric information regarding a physical or financial risk to *A*, for instance. From the perspective of economic efficiency, we can hope or recommend that any duty to disclose what *B* knows about the risk to *A* will draw from a sense of how cheaply each person can prevent a legally recognized harm along with the effects on ex ante incentives to obtain such information in the first place.<sup>35</sup> Factors like these are familiar in analyzing tort and

---

<sup>29</sup> *Innis*, 446 U.S. at 294-95.

<sup>30</sup> *Id.* at 300-01; *see id.* at 301.

<sup>31</sup> *See id.* at 302-03.

<sup>32</sup> *Id.* at 305 (Marshall, J., dissenting); *see also id.* at 311-13 (Stevens, J., dissenting) (offering a different functional test).

<sup>33</sup> *See* *United States v. Hubbell*, 530 U.S. 27, 34-35 (2000).

<sup>34</sup> STEWART BRAND, *THE MEDIA LAB* 202 (1989).

<sup>35</sup> *See, e.g.*, Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1060-61 (1972) (describing a cheapest-cost-avoider approach to tort liability); Kronman, *supra* note 13, at 2 (distinguishing between information casually acquired and deliberately discovered with reference to investigation incentives). For a famous case, see *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980).

contract law. On the flipside, legal scholars understand that *B* often should keep secrets from *A* to support contractual, agency, and trust relationships with third parties.<sup>36</sup> Alternatively, a disclosure by *B* may enable *A* to make a decision based on legally forbidden grounds, and so law might restrict such information flows to prop up anti-use rules.<sup>37</sup>

Of course our goal here is not to resolve when disclosure is better than privacy, but the disclosure literature suggests a challenge for those interested in questions: One might wonder whether getting society's telling rules right kills the significance of asking rules. If a legal and social system can accurately identify when *B* must, may, and must not disclose information to *A*, perhaps developing asking norms for *A* is superfluous. Moreover, as we will emphasize, questions themselves are almost invariably telling. Perhaps questions can be re-described as a kind of disclosure without need for a separate category. And existing theory on asking is indeed more limited, especially in relation to telling norms.

Yet questions do hold a special place in social interaction—special enough to ground ongoing conceptual, theoretical, and empirical work across several disciplines. Social scientists have offered conceptions of questions to distinguish information requests from other statements, for example.<sup>38</sup> Scholars also have studied how often people ask different types of questions and how people tend to respond to differently formulated questions,<sup>39</sup> partly to understand norms of politeness.<sup>40</sup> Survey researchers, for instance, have developed strategies for getting reliable answers to “sensitive questions.”<sup>41</sup> Much of this research is foundational descriptive work without offering positive or normative lessons that are conclusive. Thus anthropologist Esther Goody helped unsettle the partition between asking and ordering. She found that people may have difficulty asking those in a different social status purely information-seeking questions, given the audience's tendency to perceive questions as bundled with either a command or an inappropriate challenge to their status.<sup>42</sup> Such findings suggest that designing effective norms for asking and telling can be tricky, whether or not Goody's ethnographic study generalizes perfectly.<sup>43</sup>

---

<sup>36</sup> See, e.g., Edmund W. Kitch, *The Law and Economics of Rights in Valuable Information*, 9 J. LEGAL STUD. 683, 699-70 (1980) (discussing trade secrets and incentives to invest in innovation); 24 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5472 (1st ed. 1986) (collecting historical justifications for attorney-client privilege, including encouragement of candid client disclosure). For a famous case, see *United States v. Nixon*, 418 U.S. 683, 711 (1974) (supporting a qualified privilege based on ex ante incentives to deliver candid advice to the President).

<sup>37</sup> See *infra* Part II.B.2.

<sup>38</sup> See *supra* notes 18-23

<sup>39</sup> See, e.g., Heritage, *supra* note 26, at 1433-44 (studying news interviews for different reactions to negative framing at the beginning compared to the end of interviewer statements).

<sup>40</sup> See, e.g., Penelope Brown & Stephen Levinson, *Universals in Language Usage: Politeness Phenomena*, in QUESTIONS AND POLITENESS, *supra* note 25, at 56, 60.

<sup>41</sup> See, e.g., Kent H. Marquis et al., *Response Bias and Reliability in Sensitive Topic Surveys*, 81 J. AM. STATISTICAL ASS'N 381, 386-87 (1986) (attempting to measure the magnitude and character of the self-reporting problem).

<sup>42</sup> See Goody, *supra* note 25, at 38-39 (stressing that questions “carry messages about relationships”); see also Karen L. Pliskin, *Verbal Intercourse and Sexual Communication: Impediments to STD Prevention*, 11 MED. ANTHROP. Q. 89, 92, 99 (1991).

<sup>43</sup> See Goody, *supra* note 25, at 20 (presenting her study of a Ghanaian community as a beginning for understanding connections between asking and commanding).

Even these modest beginnings are enough to indicate distinctive functions for informational questions. A question is a special device for information collection, an interactive call for information that alerts an audience to the collection effort and that usually reveals something about the questioner,<sup>44</sup> but in a special sense and with a special function. Questions reveal somebody's interest in and comfort with additional information on a given topic, unlike concealed surveillance and other non-interactive research. And these revelations tend to increase the probability of a responsive disclosure without guaranteeing an answer.<sup>45</sup> Questions alert audiences to curiosities that might otherwise be ignored, which enables audiences to provide thoughtful answers or silence, and to avoid wasteful guessing about the interests or comfort level of other people. All of this is fairly obvious but still important. Merely permitting disclosure is an awfully hit-or-miss way to achieve informed, targeted, and voluntary communicative exchanges. Furthermore, social and legal systems cannot, in fact, accurately identify all and only the true informational interests of a diverse population across all circumstances. People writing mandatory disclosure rules for prescribed conditions cannot possibly foresee every instance in which information should be exchanged, even if those rules were perfectly enforced.

Try imagining a world without people asking each other questions and therefore without answers to questions. This is a nightmare scenario, is it not? People would not be entirely silent, but the lack of social interaction through Q&A would be terrible. All too often the social system would misfire, with people dumping unwanted information on others and failing to provide wanted information that they would be happy to give. Adding questions to our social practices can facilitate individually and socially enriching information exchanges in a world—our world—where everybody knows something and nobody knows everything.

## 2. *Q&A Unbound*

At this early stage and bracketing the disclosure rules referenced above,<sup>46</sup> a normative presumption in favor of individual choice in asking and telling might be attractive. This is consistent with what some people do when they contemplate the voluntary exchange of goods and services. The same presumption might apply when we evaluate the rules for information exchanges in the form of questions showing curiosity and answers meant to satisfy those curiosities. If so, “May Ask, May Tell” is the best default combination of norms. In general, each of us would have the choice to express our interests in information and to decide whether to fulfill the information requests of others, without the threat of legal or social penalty.

Sometimes societal indifference to Q&A choices can be attributed to very low stakes. The state really does not care whether individuals eat with forks or chopsticks in East Asian restaurants; waiters may ask patrons which they prefer but need not, while customers may tell waiters about their preferences but need not. In other examples, the stakes are higher but the magnitude and the direction of the tradeoffs are uncertain, at least to outsiders. Employment reference checks in the private sector are generally May Ask, May Tell. If restaurateurs are eager to learn how a wait-staff applicant performed in a prior job, they may call the previous employer, who may be forthcoming or reticent. Balancing the costs and benefits of such reference checks is quite context-sensitive, implicating thorny issues of employee mobility, employment

---

<sup>44</sup> A question that someone literally must ask does not reveal much about that person, although the actual message received by the audience depends on what they (think they) know.

<sup>45</sup> On reasons for increased responsiveness, see text accompanying note 92, below.

<sup>46</sup> See *supra* text accompanying notes 34-37.

discrimination, wage pressure, and potentially even competition law. Private ordering might be the best we can do. Law's role could be restricted to enforcing voluntary agreements to disclose information and keep secrets.<sup>47</sup>

Often law does look this libertarian, well beyond the famously formal right to remain silent during police interrogations.<sup>48</sup> Indeed a potentially large number of laws restricting asking and telling would draw serious constitutional objections. A legal command to stifle particular honest questions<sup>49</sup> or to stem the flow of truthful information<sup>50</sup> looks much like the kind of content-based regulation that judges condemn.<sup>51</sup> So, too, for commanding that people disclose some category of information<sup>52</sup> or that people ask some category of questions.<sup>53</sup>

True, free speech doctrine is a work in progress and there are strong counter-currents in existing doctrine. For instance, judges shy away from using speech doctrine against contracts.<sup>54</sup> Indeed whole categories of challenges get only modest traction with judges, including public employee claims<sup>55</sup> and business resistance to the disclosure of facts to consumers.<sup>56</sup> In addition, nobody really thinks to raise free speech objections within entire fields of law, such as tort law's duties to warn.<sup>57</sup> We will not examine the First Amendment issues in detail. But it is worth

---

<sup>47</sup> In closely related contexts like criminal history checks for job applicants, jurisdictions sometimes codify their beliefs that some lines of questioning are off limits. *See infra* notes 218-220 and sources cited therein (discussing the dynamics arriving from “ban the box” initiatives).

<sup>48</sup> *See* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). There are complications for a libertarian story in this setting, aside from subtle pressures on relatively unsophisticated arrestees. *Miranda* warnings require law enforcement to inform arrestees of their right to remain silent, *see id.*, so that segment of the interaction is “May Ask, *Must* Tell” (about suspect rights). Furthermore, many police jobs come with an implicit if not formal or judicially enforced duty to investigate crime, *cf.* *Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003) (indicating “a further duty to investigate” before making a probable-cause arrest if “the complaint would lead a reasonable officer to be suspicious”); *Pete’s Towing Co. v. City of Tampa*, 648 F. Supp. 2d 1276, 1287 (M.D. Fla. 2009) (defending police officers against a harassment suit by reference to their duty to investigate), so interrogation itself can be characterized as “*Must* Ask, *May* Tell.”

<sup>49</sup> *Cf.* *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 339 (2010) (mentioning “[t]he right of citizens to inquire”).

<sup>50</sup> *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *Linmark Associates v. Willingboro*, 431 U.S. 85, 94 (1977).

<sup>51</sup> *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010); Eugene Volokh, *Freedom of Speech and Information Privacy*, 52 STAN. L. REV. 1049, 1057-58 (2000) (criticizing information privacy duties beyond contract); *cf.* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability: The Troubling Implications of a Right to Stop People from Speaking About You*, 109 COLUM. L. REV. 1650 (2009) (studying possible free speech objections to legal duties of confidentiality).

<sup>52</sup> *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995) (involving the identity of a political leafleteer); *cf.* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984) (holding that government-required disclosure of trade secrets may constitute a taking).

<sup>53</sup> To our knowledge, must-ask rules have not been subject to free speech litigation.

<sup>54</sup> *See* *Cohen v. Cowles Media*, 501 U.S. 663, 670-71 (1991) (relying on a generally applicable legal duty to keep promises or pay up).

<sup>55</sup> *See* *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

<sup>56</sup> *See* *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651-53 (1985); *American Meat Inst. v. Dep’t of Agr.*, 770 F.3d 1 (D.C. Cir. 2014) (applying *Zauderer* beyond anti-deception efforts to country-of-origin labeling). *But cf.* *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221-22 (D.C. Cir. 2012) (condemning graphic cigarette warnings).

<sup>57</sup> *See, e.g.,* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xii (1993); Robert Post, *Understanding the First Amendment*, 87 WASH. L. REV. 549, 552 (2012) (claiming that “the rule against content

suggesting that constitutional problems might reinforce other normative doubts about departing from May Ask, May Tell. If nothing else, constitutional questions can inhibit the creation of legal norms for asking and telling, such that social norms—including political correctness, patriotism, and politeness—would become the only available mechanism for social control.

May Ask, May Tell might feel equally familiar in our ordinary social lives. A sense of free inquiry and open response is especially familiar to academics like us, who spend a good part of our working lives formulating questions for ourselves and others to answer. But it is easy to overstate people’s freedom to ask and tell without social or emotional penalty. Many people are told or instinctively follow a general rule against talking to strangers, outside of defined scripts. Most people have a very limited face-to-face communication of any kind with strangers and even acquaintances.<sup>58</sup> (Sidewalk preachers aside.) “How are you?” is not actually an attempt to collect information most of the time, nor is “Fine, thanks” expected to be an informative answer. Such polite interactions are safe harbors for interpersonal situations, allowing people to display sociability in an unthreatening way. That said, people do constantly engage in Q&A with acquaintances without much sense of obligation one way or the other, within a number of topics. Generalizations are a bit hazardous here. But probably the closer the personal relationship, and the more impersonal the form of communication, the greater the freedom for individual choice over Q&A without social penalty.

As a rule of thumb, then, our law tends toward May Ask, May Tell, while our social norms often push toward more inhibited combinations. This impression renders it worth considering the reasons why social groups and, at least occasionally, legal institutions might depart from May Ask, May Tell. A complete response would require a full account of ethical, social, and legal norms governing all questions and answers, along with convincing positive and normative theories for the prevailing rules, which cannot be done in an article. Instead we offer illustrative social and legal norms in particular settings. And we suggest clusters of plausible justifications for such regulatory norms, even if we cannot fully explain their development. For building blocks, we take up asking and telling norms separately.

### 3. *Regulating Telling*

Social norms for telling often are clear. If asked and if you know, you are more or less obligated, as a member of the community in good standing, to tell the time of day. For free. True, you won’t be run out of town if you object to others free riding on your investment in discovering the time of day, or if you plead with people to consider the ex ante incentive effects for everyone concerned if you cough up the information without payment. And you might evade social penalties by feigning ignorance with a quick, “Sorry.” But you should feel badly about

---

discrimination is applied in only limited circumstances”); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark*, 1994 SUP. CT. REV. 1, 23-28; see also Helen Norton, *You Can’t Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 728-29 (2003) (defending regulation of employer questions to protect don’t-use norms).

<sup>58</sup> See Elizabeth Dunn & Michael Norton, *Hello, Stranger*, N.Y. TIMES, Apr. 27, 2014, at 6 (Sunday Review) (op-ed). There is local variation in practices. See Peter J. Rentfrow, *Introduction*, in GEOGRAPHICAL PSYCHOLOGY: EXPLORING THE INTERACTION OF ENVIRONMENT AND BEHAVIOR 3 (Peter J. Rentfrow ed. 2014) (“[A] slight nod and smile to a stranger is an acceptable greeting in Austin, Texas, but such behavior would be considered an affront in New York City and possibly perverted in London.”).

that response.<sup>59</sup> Similar observations apply to a social norm in favor of warning people who you know are in the dark, even strangers, about known risks of physical harm. “Watch out” is basically a free service. On the flipside, people operate under a general rule against reporting bad news. If you don’t have anything positive to say, don’t say anything at all—unless you’re a reporter.<sup>60</sup> A softer norm is to avoid distracting or unsettling people with “too much information,” whether personal or not.

We also live with nuances and complexities in telling norms. On the one hand, generally people are supposed to keep their friends’ secrets, to build and maintain trust. On the other hand, there is a general norm in favor of reporting crimes to authorities who can respond effectively (and without blood feuds). So secret-keeping norms and crime-reporting norms may clash. Dramatic examples include codes of silence within subcommunities of certain police departments.<sup>61</sup> Consider also social norms against gossip,<sup>62</sup> and countervailing norms that tend to encourage it.<sup>63</sup> Passing on supposedly true tidbits about people’s so-called private lives is condemned by many, vocally, as degrading the gossipers and perhaps the subject of the gossip, while distracting the listening public from weightier matters.<sup>64</sup> Yet gossip is a kind of currency, too, which can show that the gossipier is “in the know” and therefore a valuable social node. Finally, gossip is widely understood to be a low-cost tool for maintaining social control; the fear of becoming the target for negative gossip prompts individuals in close-knit communities to adhere to social norms.<sup>65</sup> With these complexities, gossip is a somewhat constrained and yet vibrant practice in our society.

We are now touching on legal norms, given that garden-variety tort law includes various duties to warn relative strangers<sup>66</sup> and other positive law may require people to report suspected

---

<sup>59</sup> Note that many must-tell norms are *conditional* on being asked. There is no norm in favor of repeatedly calling out the time of day without being asked. Again, asking a question informs listeners of the questioner’s interests and may avoid wasteful guessing and information overloads. Compare junk mail.

<sup>60</sup> Cf. Adam Waytz et al., *The Lesser Minds Problem*, in *ADVANCES IN UNDERSTANDING HUMANNESS AND DEHUMANIZATION* 49, 53 (Paul G. Bain et al. eds. 2013) (explaining that studies indicate “the tendency for people to keep negative emotions hidden or private,” and a resulting underestimation by observers of the amount of negative emotion experienced by friends and peers).

<sup>61</sup> See, e.g., John Kleinig, *The Blue Wall of Silence: An Ethical Analysis*, 15 *INT’L J. APP. PHIL.* 1, 4-7 (2001) (offering a nuanced account of such codes as an outgrowth of associational bonding and loyalty); Neal Trautman, *Truth About the Code of Silence Revealed*, 49 *LAW & ORDER* 68 (2001) (reporting results of an officer survey); *infra* Part II.E.1.

<sup>62</sup> See McAdams, *supra* note 6, at 2280-81 (presenting many examples of don’t-ask and don’t-tell anti-gossip social norms and their context sensitivity).

<sup>63</sup> See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 57 (1991) (“[P]eople in [Shasta County, California’s] Oak Run area ‘gossip all the time’”).

<sup>64</sup> See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 196 (1890); Nicole Winefield, *Pope in Blistering Critique of Vatican Bureaucrats: Christmas Message Rebukes “Hypocritical” Cardinals, Bishops, and Urges Them to be Joyful*, *ST. LOUIS POST-DISPATCH*, Dec. 23, 2014, at A1 (quoting Pope Francis’s remarks referencing the “terrorism of gossip” that can “kill our colleagues and brothers in cold blood”).

<sup>65</sup> See ELLICKSON, *supra* note 63, at 213-15.

<sup>66</sup> See, e.g., *RESTATEMENT (SECOND) OF TORTS* §§ 341 & 345 (1965) (involving land possessor liability for dangers unknown to those with a privilege to enter); *id.* § 388 (involving chattel dangers known to the supplier).

crimes to government officials.<sup>67</sup> Another well-known example is that agency officials are obligated to hand over certain government records to those who ask for them under the Freedom of Information Act (FOIA).<sup>68</sup> These are “Must Tell” laws. On the flipside, a famous “Don’t Tell” legal norm comes from the system of classified information.<sup>69</sup> A Top Secret stamp indicates that a government official must keep the information within a circle of people sharing similar security clearances,<sup>70</sup> which is a bit like keeping a friend’s confidences. A favorite don’t-tell example for lawyers also involves a principal-agent relationship. Attorneys are usually duty-bound to maintain client confidences, unless the client decides to waive the privilege.<sup>71</sup>

Thus law and social norms both encourage and discourage disclosure. As for explanations and justifications, we have alluded to standard theory on risky information asymmetries, third-party interests, and incentive effects in choosing between disclosure and privacy.<sup>72</sup> These considerations may point in different directions in different settings, which makes for some debatable policy choices but also helps structure inquiry into telling norms.

“Don’t Tell” often reinforces information asymmetries to protect third parties and to generate incentives that support valued relationships. Whether the situation is a friend holding another friend’s confidence or an official holding a state secret, more than one person’s interests are implicated. Law and society might choose sides by requiring secrecy until all those with access to the information consent to further disclosure. Moreover, law’s support for don’t tell may increase the chances of disclosure in the first place, thereby promoting socially beneficial trust relationships.<sup>73</sup> Of course privacy can promote criminal conspiracies and corrupt governments, too, but the double-edged nature of many privacy norms is a reason for careful attention to context. Additionally, a don’t-tell norm might be sensible even if one particular disclosure has no immediate negative effect. With unraveling, one person’s revelation of information may prompt observers to make rational inferences about everyone who tries to remain silent, and in this sense interfere with their choices to reveal or conceal.<sup>74</sup> The felt threat of unraveling may be related to a don’t-*use* norm. If a particular ground for decision is forbidden, forbidding disclosure of information may prevent such decisions.

---

<sup>67</sup> See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1-2 (2014) (reporting that all fifty states require some class of persons to report suspected child abuse to an agency, and that about eighteen states extend this duty to all persons); MASS. GEN. LAWS ANN. ch. 233, § 20B (involving a limitation on psychotherapist-patient privilege for a “threat of imminently dangerous activity by the patient”); cf. Mark Osiel, *Rights to Do Grave Wrongs*, 5 J. LEGAL ANALYSIS 107, 166-67 (2013) (expressing worry about disincentives to seek care when caregivers are legally obligated to report suspected wrongdoing or illness); *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 187-91 (2004) (upholding a state law requiring people to identify themselves upon request by police officers, as applied to a proper investigative stop involving no apparent risk of compelled self-incrimination).

<sup>68</sup> 5 U.S.C. § 552 (2000).

<sup>69</sup> See Exec. Order No. 13,292 (2003); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 937-40 (2006).

<sup>70</sup> See, e.g., 18 U.S.C. § 793.

<sup>71</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.6 (1983).

<sup>72</sup> See *supra* Part I.B.1.

<sup>73</sup> See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (recognizing a psychotherapist-patient evidentiary privilege on the ground that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment”).

<sup>74</sup> See BAIRD *ET AL.*, *supra* note 5, at 91-93; Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).



“Must Tell” norms generally attack information asymmetries to protect the interests of those outside the loop, sometimes despite problematic incentives. Consider duties to warn strangers.<sup>75</sup> Such burdens of disclosure might lack grounding in interpersonal agreements or trust relationships, but other justifications enter the picture. At least with a cheapest-cost-avoider idea in play,<sup>76</sup> there are circumstances in which a quick warning from people who happen to have knowledge will prevent bad outcomes for others, without overloading them with information or intolerably weakening the incentives for discovering hazards. *Miranda* warnings might fit here, as well; the hope is that they help suspects make informed judgments,<sup>77</sup> at little cost to police officers who ought to know about these rights anyway. Even social norms in favor of telling the time when asked have a similar defense. Agency relationships may point toward disclosure, as well, albeit to principals. Agents have and should have various duties to inform their principals, such as when lawyers conduct internal investigations for corporate clients<sup>78</sup> or government officials respond to FOIA requests.<sup>79</sup>

#### 4. Regulating Asking

On the asking side, many social norms are highly contextual but nonetheless common knowledge.<sup>80</sup> Asking how much money someone makes is usually bad form in the U.S., maybe because neither employees nor their employers want to be shown up, except perhaps on Wall Street.<sup>81</sup> In contrast, socially adept adults are more or less required to ask toddlers questions when interacting with caregiving parents, a popular one being “How old are you?” But at some point it becomes inappropriate to ask a woman her age,<sup>82</sup> and perhaps a softer rule applies to men as well. On the other hand, the social norm in favor of asking seems to reappear with respect to anyone who appears to be impressively old.<sup>83</sup> For disabilities, the social norm is against asking a

---

<sup>75</sup> Most jurisdictions are reluctant to impose legal duties in these situations, *see, e.g.*, *Harper v. Herman*, 499 N.W.2d 472, 474-75 (Minn. 1993), though many people feel morally obliged to render assistance and some jurisdictions have created legal duties to rescue a stranger if the act of rescue exposes the rescuer to no risk of harm. *See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 5-15, 22-30 (1993).

<sup>76</sup> *See supra* note 35.

<sup>77</sup> *See Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004) (plurality) (referring to informed choice as an objective of *Miranda*).

<sup>78</sup> *See, e.g.*, *S.E.C. v. Roberts*, 254 F.R.D. 371, 382 (N.D. Cal. 2008); *see generally* Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523, 537-38 (2014) (discussing internal and external investigations).

<sup>79</sup> *See supra* note 68.

<sup>80</sup> *See, for example*, clickbait stories like Jackie Pilossoph, *10 Questions You Should Never Ask Someone You’ve Been Dating for Less than a Year*, Huffington Post.Com, Nov. 16, 2013, [http://www.huffingtonpost.com/jackie-pilossoph/10-questions-you-should-n\\_b\\_4281387.html](http://www.huffingtonpost.com/jackie-pilossoph/10-questions-you-should-n_b_4281387.html); or Kathryn Tuggle, *10 Questions to You Must Never Ask Your Boss*, THE STREET.COM, Nov. 20, 2013, <http://www.thestreet.com/story/12114525/1/10-questions-you-must-never-ask-your-boss.html>.

<sup>81</sup> For suggestions that this norm is fading among social-media saturated Millennials, *see* Jen Doll, *Could Millennials End Salary Secrecy?*, THE WIRE, Apr. 17, 2013, <http://www.thewire.com/business/2013/04/could-millennials-end-salary-secrecy/64317/>.

<sup>82</sup> *See, e.g.*, Susan Sontag, *The Double-Standard of Aging*, in *ON THE CONTRARY: ESSAYS BY MEN AND WOMEN* 99, 99-100 (Martha Rainbolt & Janet Fleetwood eds., 1984) (excepting bureaucrats from the “taboo” and proceeding to critique societal ideals for women that help produce discomfort over such questions).

<sup>83</sup> On television, birthdays of children and exceptionally elderly people are celebrated, but there is no public party for reaching the stage of just plain old.

person about their apparent mental or physical impairments, not to mention any question that sounds like, “What’s wrong with you?” Such questions, especially from strangers, can trigger feelings of insult or intrusion, even though questions about disability are not always unwelcome.<sup>84</sup> In fact, “Do you need help?” sometimes is socially mandatory. Interestingly, when we move from disability to what people consider injury, must-ask norms can appear again—although there might be a risk of unwelcome invasiveness.<sup>85</sup> An example is the friendly question, “How did you break your leg?”<sup>86</sup> In a related vein, we have had the off-putting experience of dining with people who fail to ask us a single question during the meal, and it was hard not to infer narcissism. Depending on the context, then, either asking or not asking can give rise to offense and some kind of social penalty.

Law incorporates various norms for asking questions, too, although not the exact same norms. “Don’t Ask” shows up most famously when police officers must stop questioning suspects in custody after they ask for a lawyer, at least if the officers care about admissibility of suspect statements.<sup>87</sup> Other examples arise from anti-discrimination law in the employment context, although there are fewer formal don’t-ask provisions than you might think.<sup>88</sup> “Must Ask” laws are easiest to find in restricted markets, where only some people are entitled to buy. Sellers of alcohol, tobacco, guns, and prescription drugs are sometimes legally obliged to check buyers’ ages or other characteristics.<sup>89</sup> Additional must-ask duties emerge from contractual and principal-agent relationships. Federal government employees with long-term access to federal facilities must answer a series of questions as part of a background check—and so some current government employee is obligated to ask these questions.<sup>90</sup> Indeed, any agency with an investigative mission includes a must-ask norm for its employees, from Census Bureau

---

<sup>84</sup> See, e.g., <http://storycorps.org/listen/anthony-and-jessica-villarreal/> (recounting experiences of an Afghanistan veteran and burn victim, who thought, “Man, people don’t know how to ask questions. They just want to stare and point.”).

<sup>85</sup> See LESLIE JAMISON, *THE EMPATHY EXAMS* 3 (2014) (flagging the difficulty of properly showing empathy without becoming unduly invasive).

<sup>86</sup> Along with “How are you?,” this question is used to illustrate a lawful inquiry under the ADA in *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examination of Employees Under the Americans With Disabilities Act* (July 27, 2000), reprinted in 2 CHARLES R. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS* appdx. F16 (Feb. 2014 database update).

<sup>87</sup> See *supra* note 28.

<sup>88</sup> See *infra* Part II.A.2. There are analogous restraints on asking in private associations. See *infra* Part II.B.1 (discussing religious confession). After a round of publicity about scouts asking prospective players questions designed to reveal sexual orientation, the NFL adopted a code with the following language:

Coaches, General Managers and others responsible for interviewing and hiring draft-eligible players and free agents must not seek information concerning or make personnel decisions based on a player’s sexual orientation. This includes asking questions during an interview that suggest that the player’s sexual orientation will be a factor in the decision to draft or sign him. Examples:  
*Do you like women or men? How well do you do with the ladies? Do you have a girlfriend?*

Nat’l Football League, *Excellence in Workplace Conduct: Sexual Orientation* 1 (2014).

<sup>89</sup> See *infra* note 173.

<sup>90</sup> See *National Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 752-53 (2011) (discussed in Part II.D.1 below).

canvassers to beat cops.<sup>91</sup> A variety of private sector employees have contractual or other legal obligations to ask questions on behalf of others, including lawyers hired by clients.

Positive and normative theory is not well-established for such asking norms. Asking norms are undoubtedly connected to goals of discouraging or encouraging information flows, as are telling norms, but more is at stake. A good starting point is to wonder why questions from *A* would increase the probability of responsive disclosures by *B*. Questions reveal someone's interest in and comfort with more information on a given topic, but someone else must decide to respond. Several familiar explanations present themselves: (1) *B* might answer *A* out of generosity or *altruism*, perhaps acting as a good citizen by responding to the identified informational need of another person. Generous community-building behavior, including telling time or giving directions, implicates the virtues of voluntary interaction. (2) *B* might answer *A* as part of a *bargain* that society supports, offering information valued by *A* in exchange for something valued by *B*. Answering questions can build credit with the other party, discharge debts, or otherwise fulfill existing contractual or agency duties that are socially desirable. (3) Or *B* might answer *A* because of unwelcome pressure that society condemns, often labelled *coercion*. These scenarios need not fit any attractive model of voluntary interaction, even acknowledging that the boundaries of coercion are contested.<sup>92</sup>

Thus one simple reason for "Don't Ask" is to prevent unwelcome pressure. Following scholarship like Goody's and cases like *Innis*, we know that questions can feel like commands to disclose. Police interrogation and certain employer-employee relations fit here. Equally important, pressured disclosures pose more than one risk. The loss might be to *B*'s autonomy alone, but also could involve the accuracy and reliability of the information received by *A* (consider torture-induced confessions). Furthermore, we might worry about how *A* will *use* the information even if *B*'s response is perfectly accurate. Don't-ask norms can be part of larger efforts to bolster don't-use norms,<sup>93</sup> with coercive questioning being one method of fueling decisions on prohibited grounds. Employment discrimination law is a plausible example here, too (while police interrogation is not). A related concern about involuntary disclosure returns us to unraveling, which is part of the don't-tell story.<sup>94</sup> Once questioning draws attention to a topic, rational inference may prevent anyone from effectively remaining silent, thereby revealing information on which we would rather not have decisions made.

Worrisome questions occur even when no one is browbeaten, however, and often to promote secrecy. Don't-use norms reemerge here. A simple question may increase the probability of voluntary disclosure by those who want to take advantage of the questioner's interests. A prospective employee gaining favor by accurately answering an employer's question about family status or religion, for instance, will not dissipate other people's objections to employers making hiring decisions on those grounds. If these questions can be limited, *B* might not know enough to cater to *A*'s interests.<sup>95</sup> In this respect don't-ask norms functions like don't-

---

<sup>91</sup> See, e.g., *Utah v. Evans*, 556 U.S. 452, 507-08 (2002) (describing compulsory and non-permissible questioning of citizens by census takers).

<sup>92</sup> Finally, *B* might be under pressure from a regulatory legal or social norm, which we are attempting to explain here. For a note on coercion's boundaries, see *supra* note 8.

<sup>93</sup> See BAIRD ET AL., *supra* note 5, at 91-92.

<sup>94</sup> See *supra* note 74.

<sup>95</sup> Cf. BAIRD ET AL., *supra* note 5, at 93 (suggesting that don't-ask laws for employers are pointless if applicants know the employer's preferences and may tell).

tell norms, where an attempt is made to prevent a class of people from revealing their interests. And this helps justify prohibitions on employers asking questions about certain employee characteristics.<sup>96</sup> Perhaps the archaic social norm against asking an adult woman her age is best defended along these lines, as reinforcement for a don't-use norm, if not relief from incentives to prevaricate.

Don't-ask norms do more than support anti-coercion goals and don't-use norms, though. Friendly questions and equally friendly responses can jeopardize trust relationships, even where use of the information is unobjectionable. *B* may have an ongoing contractual, agency, or other trust relationship with a third-party that would be violated by disclosure to *A*. Perhaps questions increase the chances of a breach, and therefore reduce *ex ante* incentives to create these trust relationships. Another concern unrelated to use is that questions can injure the questioner. *A*'s questions can reveal interests, beliefs, or ignorance in ways that insult or offend *B*, or that an audience might take advantage of. Detering questions about disability might be built on assumptions (accurate or not) that the targets of such queries are vulnerable if the topic is opened. Injury could be distinguished as a presumably temporary condition that people usually are strong enough to discuss. Similarly, to the extent a question suggests a problematic norm, we might be better off without this tell. Social norms can be socially harmful, and freedom to question might reinforce a perception, perhaps inaccurate, that a harmful norm prevails. Certain workplace don't-ask norms (religion, family status, sexual orientation, and so on) can be partly defended if not explained by these thoughts.

“Must Ask” norms might seem more difficult to understand, except as friendly reminders to inform oneself or to show interest in other people.<sup>97</sup> Asking little kids their age falls within these parameters. In law, leading examples again suggest support for use norms—this time *must-use* norms that indicate secrets must be exposed to protect other people. Consider restricted markets, in which the government wants commercial transactions limited but not eliminated. Alcohol sellers might want to sell to anybody with cash (no questions asked, as the saying goes), but law is supposed to make them alert to purchaser traits and use that information to discriminate.<sup>98</sup> Third-party protection explanations are likewise plausible in contractual and agency relationships. These relationships can yield a legal duty to serve a principal by posing questions to someone else. Good detectives and diligent census takers return to mind. In addition, a legal duty to investigate may be triggered even if the beneficiaries are not easily classified as principals. One example involves Social Security proceedings conducted by Administrative Law Judges, who have an obligation to investigate the facts and administer the

---

<sup>96</sup> See *infra* Part II.A.2 (collecting prohibited and disfavored questions). Some employers might want law to assure employees that employment decisions will not be based on certain grounds, such as race or religion, and welcome the command or incentive to avoid asking questions about those characteristics.

<sup>97</sup> Sometimes people need encouragement to ask questions when they are too afraid of suggesting their ignorance to others, such as in lecture halls, faculty workshops, and job interviews. But this reason for a must-ask-something rule seems less likely to appear in law.

<sup>98</sup> A must-ask norm could be designed to *prevent* telling revelations about questioner interests. If everyone knows that a group is compelled to ask a question, then asking will not reveal the questioners' independent interests. Perhaps this is a plausible part of the compromise in some restricted product markets, such as firearms, where government-mandated questions might protect the most conscientious sellers from standing out to their most libertarian customers. Another version of the idea involves perceptions of suspicion. Mandatory TSA screening questions at airports, which we discuss in Part III.C., were posed to all air travelers, even people very unlikely to fit any dangerous profile. One possible justification for this over-inclusion is so that those who TSA agents actually suspected of being dangerous are not tipped off.

law correctly even when the party representatives are falling short on their own duties to others.<sup>99</sup>

## II. CURIOUS COMBINATIONS

We now have a sense of why asking and telling are sometimes regulated, although the reasons are diverse. Often the regulatory goal is to encourage or discourage information flows, sometimes with a further goal of influencing either the use of information or instead the strength of relationships based on contract, agency, and trust. In these cases, we might hope or expect that asking and telling norms will point in the same direction—encouraging both asking and telling so that key information will be used, for instance, or discouraging both so that it will not. Sometimes, however, the goal is different. For instance, asking norms may reflect worries about coercive pressure rather than worries about information use or trust relationships per se. Furthermore, agency relationships can generate a variety of asking and telling norms that might be defended, especially if observers cannot know whether disclosure or secrecy is best before a particular conflict arises. In these cases, there is much less reason to hope or expect that asking and telling norms will point in the same direction. And, realistically, some combinations will be ill-considered or the goals confused and compromised by administrative convenience and other factors.

The next step is to draw from the general lessons suggested above and investigate more concretely how asking and telling norms interact. Even less theorizing exists on asking-and-telling combinations than on asking or telling in isolation.<sup>100</sup> And of course people will disagree about the best explanation and the proper norms for many situations. But the clusters of reasons that we have identified provide a rough structure for further inquiry. Moreover, by examining the extreme corner cases where each of the norms is either “Must” or “Don’t,” we get a better picture of how asking and telling norms can and should fit together, sometimes in counterintuitive ways. And, ultimately, we might better understand the scope and justifications for allowing people to ask and/or tell in relative freedom. To show where we are headed, Figure 1 presents a spectrum of examples, with shaded cells denoting combinations that will receive less of our attention. Some of our characterizations might be debated, but each cell can be filled for some set of circumstances.

---

<sup>99</sup> See *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (“Social Security proceedings are inquisitorial rather than adversarial.”); see also *United States v. Romero*, 749 F.3d 900, 906-07 (10th Cir. 2014) (involving police officers’ duty to investigate whether a person has authority to permit entry, if presented with ambiguous facts), citing 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 8.3(g), at 180 (4th ed. 2004).

<sup>100</sup> An exception is the work in linguistics on question-response pairs. See Stenstrom, *supra* note 22, at 306-08 (collecting and summarizing linguistics sources). Another is game theory on Don’t Ask, May Tell, discussed below.

FIGURE 1: SOCIAL AND LEGAL NORMS FOR ASKING AND TELLING

	MUST TELL	MAY TELL	DON'T TELL
MUST ASK	toddler's age employee background checks, income taxes restricted markets ( <i>e.g.</i> , alcohol)	friend's injury police interrogations (as to job duties and formal rights) certain disability accommodations	certain journalist/politician interactions code of silence conflicts civil discovery plus privilege (as to the attorneys)
MAY ASK	STD before intercourse FOIA requests abortion disclosure laws child abuse reporting <i>Brady</i> disclosures	social norms for many settings legal norms for most settings	therapeutic nondisclosure FHA on neighborhood racial demographics non-disclosure agreements
DON'T ASK	marital infidelity employee's disability plus tort duty to warn	acquaintance's disability family status in job interview FHA on homebuyer preferences regarding race or religion employer questioning regarding worker preferences on unionization drive	physical appearance in certain orchestral auditions employment law plus social norms for some protected classes old military policy (partially) inadmissible evidence at trial

*A. Don't Ask, Don't Tell (DADT)*

Start with the extreme combination that should be easiest to rationalize: DADT has an established game theoretic justification, at least if we assume a don't-use rule. Douglas Baird, Robert Gertner, and Randy Picker have considered problems of unraveling when the legal norms are what we would call “Don't Ask, May Tell, Don't Use.”<sup>101</sup> They observed that sometimes formal law prohibits questions about traits—such as a federally-funded school asking about an applicant's marital status—without prohibiting people from offering the very same information.<sup>102</sup> This combination looks senseless in the face of strategic behavior, insofar as anyone who knows they will get an advantage from telling will do so while observers will rationally assume that those who remain silent have the disfavored trait. Under the unraveling scenario, people end up signaling their type regardless of whether they are asked or whether they remain silent. The authors suggest that “[r]ules limiting the transfer of verifiable information

<sup>101</sup> See BAIRD *ET AL.*, *supra* note 5, at 91-93.

<sup>102</sup> See *id.* at 92 (listing, as well, state law restricting questions about religious or political affiliation of applicants for government jobs, and evidentiary rules restricting questions at trial about victim sexual history). The authors treat evidentiary *privileges* as “a form of inquiry limit.” *Id.* In contrast, we treat such privileges as a may-tell norm. It makes a difference to us whether a lawyer is forbidden from asking about a privileged matter, as well as whether another lawyer or a witness has a right not to tell. See *infra* Part II.D.2.

should be two-sided”<sup>103</sup> (DADT, in other words), if there are to be legal rules at all. Stopping the questioning inhibits indications of what is expected to be told, stopping the telling helps prevent unravelling disclosures, and both norms can work together to restrict the flow of information on which decisions should not be made. So does our *law* ever adopt DADT? Does it matter?

### 1. Military Policy

The most famous illustration of DADT in law is the now-repealed policy on gay people serving in the United States military. But the military’s policy was never a model of information control, let alone a commitment against the use of such information.

Shortly after President Clinton took office, he ordered his Secretary of Defense to draft an executive order “ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces.”<sup>104</sup> No such don’t-use rule was ever achieved. Instead the Defense Department adopted a narrow don’t-ask rule: “*Applicants* for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual, or bisexual.”<sup>105</sup> The don’t-tell rule, too, was narrow. Congress warned that “the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to . . . military capability.”<sup>106</sup> In addition to provisions attempting to cement a military policy of separation for certain kinds of homosexual conduct and same-sex marriage,<sup>107</sup> which are close to *must-use* rules, the legislation also imposed a don’t-tell rule. The statute required separation from the armed forces if the member was found to have “stated that he or she is a homosexual or bisexual, or words to that effect,” unless the member demonstrated that he or she did not engage in “homosexual acts.”<sup>108</sup> The statute also announced support for the administration’s don’t-ask rule.<sup>109</sup> The policy was challenged in court on constitutional grounds, including free speech,<sup>110</sup> but the DADT combination survived until the Obama administration.

---

<sup>103</sup> *Id.* at 93.

<sup>104</sup> *Memorandum on Ending Discrimination in the Armed Forces*, 1 PUB. PAPERS OF THE PRESIDENT 23 (Jan. 29, 1993) (ordering a study and consultation, as well).

<sup>105</sup> Dep’t of Defense Directive No. 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction* § E1.2.8.1 (Dec. 21, 1993) (as amended Mar. 4, 1994) (emphasis added).

<sup>106</sup> *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, § 571(a)(1), 107 Stat. 1670 (Nov. 30, 1993) (formerly codified at 10 U.S.C. § 654(a)(15)).

<sup>107</sup> *See id.* (formerly codified at 10 U.S.C. § 654(b)(1), (3)).

<sup>108</sup> *Id.* (formerly codified at 10 U.S.C. § 654(b)(2)). The caveat to the don’t-tell rule was “unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.” *Id.* Subsequently adopted regulations declared that a member’s statement that he or she is a homosexual “creates a rebuttable presumption” of such conduct, attempt, intent, or propensity; and that rebuttal would be considered in light of third-party testimony regarding the member’s past conduct, among other evidence. Dep’t of Defense Instruction No. 1332.40, *Separation Procedures for Regular and Reserve Commissioned Officers* § E2.3.1.2 & 3.1.2.3 (Sept. 16, 1997).

<sup>109</sup> 10 U.S.C. § 571(d)(1) (formerly codified in the note after 10 U.S.C. § 654). This sense-of-Congress clause went on to state, “but the Secretary of Defense may reinstate . . . questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth” in the legislation. *Id.*

<sup>110</sup> *See, e.g., Cook v. Gates*, 528 F.3d 42, 62-65 (1st Cir. 2008) (rejecting free-speech claims against the don’t-tell part of the policy). *Cook* relied heavily on a supposed government purpose and justification of using such speech as *evidence* of homosexual *conduct*, not any bad effects of such speech itself on military operations. *See id.*

If we take as given a *may-use* rule under the old policy, perhaps as a timid bow to political reality,<sup>111</sup> then how bad of a compromise was DADT? Truly effective constraints on asking and telling about service member sexual orientation could deprive military officers of reliable information on which to discriminate. Following the implications of standard game theory, a broad prohibition on any service member or applicant telling anyone about their sexual orientation would prevent unraveling. And a broad prohibition on anyone in the military asking about any service member's or applicant's sexual orientation would reduce the risks of browbeaten responses, not to mention defensive falsehoods.

Whatever the merits of that hypothetical compromise, the actual DADT policy had nothing like the foregoing breadth. The don't-ask rule restricted questioning only at the recruitment and enlistment stages, not afterward. There was apparently no formal restriction on military personnel asking each other about or otherwise investigating sexual orientation—although implementing regulations might channel investigative authority to particular officers.<sup>112</sup> As for the don't-tell rule, it applied only to service member statements about their own sexual orientation, not to one person gossiping about another. Military and civilian informants were left unregulated. Nor did the rule instruct service members who were *not* gay to not tell. Given the other problems, unraveling perhaps should be the last worry about the policy. But it would not be shocking if the old policy encouraged (true and false) advertising of one's heterosexuality.

Several of these shortfalls showed up in *Witt v. Air Force*,<sup>113</sup> which took constitutional objections seriously. The District Court explained that a (civilian) husband sent an email to the Air Force Chief of Staff claiming that Major Margaret Witt had had an affair with his wife. During the subsequent investigation, the Air Force collected information about Witt's relationship with yet another woman, and Witt was later honorably discharged.<sup>114</sup> The actual DADT policy hardly eliminated the ability of third parties to circulate information about gay sex, or the authority of military officers to investigate gay sex. We can say this while ignoring any violations of the formal DADT rules. Perhaps no critical mass of politicians and military leaders wanted the military's practices to change appreciably in the first place.

Thus there were many reasons to hope for the disintegration of the old policy. Most Americans now oppose the underlying idea of excluding people from military service simply because they have homosexual sex, might do so, or marry a same-sex partner—whether or not they tell anyone else.<sup>115</sup> This position indicates a don't-use rule. Plus, given a history of discriminatory military practices, it probably makes sense to add a don't-ask rule regarding sexual orientation, at the very least for those responsible for military recruitment, enlistment, and discipline thereafter. And one might think that a Don't Ask, Don't Use combination is adequately protective such that a Don't Tell rule is not appropriate. This would allow service

---

<sup>111</sup> Compare Yoshino, *supra* note 3, at 542, which recognizes that political power and visibility can be endogenous, and claims that “[t]he state forges a link between gay invisibility and gay powerlessness whenever it participates in closeting homosexuals, making the invisibility of gays mandatory rather than discretionary.”

<sup>112</sup> See BRANDON A. DAVIS, DON'T ASK, DON'T TELL 3 (2010).

<sup>113</sup> 739 F. Supp. 2d 1308, 1312 (W.D. Wa. 2010) (finding facts after a trial on Witt's constitutional claims).

<sup>114</sup> See *id.*

<sup>115</sup> See, e.g., Lucy Madison, *Most Support Gays Serving Openly in Military, Says CBS News Poll*, CBS NEWS, Oct. 4, 2011, <http://www.cbsnews.com/news/most-support-gays-serving-openly-in-military-says-cbs-news-poll/>; Lymari Morales, *In U.S., 67% Support Repealing “Don't Ask, Don't Tell”*, GALLUP POLITICS (Dec. 9, 2010), <http://www.gallup.com/poll/145130/Support-Repealing-Dont-Ask-Dont-Tell.aspx>.



members and applicants to make their own judgments about how much of their sexual orientation to disclose and to whom, without formal law suggesting negative consequences. On the other hand, those supporting Don't Ask, Don't Use might reasonably lean toward a Don't Tell rule, as a way of minimizing the risk of unauthorized discrimination. Perhaps a few people who still want gay people excluded from military service might compromise if a Don't Tell rule is part of the package.<sup>116</sup>

Today's policy has different problems. The military is appropriately sticking with its don't-ask rule at the recruitment and enlistment stages.<sup>117</sup> And it seems that the military is advertising a welcoming attitude toward gay service members.<sup>118</sup> Furthermore, Congress and the President repealed the don't-tell part of the policy,<sup>119</sup> so that a service member's mere announcement that she is gay is no longer grounds for separation. It seems that gay service members can live their lives more openly, if they choose. And perhaps unraveling is unlikely or tolerable if the military really will not discriminate on sexual orientation. Unfortunately, the military's commitment against use is not totally clear. True, the statutory repeal did remove the old references to homosexual conduct and same-sex marriage as requiring separation.<sup>120</sup> But the Uniform Code of Military Justice still includes sodomy ("unnatural carnal copulation") as an offense subject to court martial.<sup>121</sup> Although this sodomy prohibition is not restricted to same-sex contact, it is also not textually limited to, say, nonconsensual or public sex.<sup>122</sup> The Don't Ask, Don't Tell Repeal Act of 2010 was a misnomer. Thankfully, it left in place a don't-ask rule. But without quite switching to a don't use rule, the may-tell rule is less than comforting.

## 2. Antidiscrimination law

As a structural matter, contemporary antidiscrimination law might look even worse than the military's DADT policy. Take Title VII of the Civil Rights Act of 1964. This historic statute is designed to restrict employment discrimination based on race, color, religion, sex, national origin, and pregnancy.<sup>123</sup> But the statute itself does not expressly prohibit employers from asking

---

<sup>116</sup> See generally David A. Strauss, *Do It But Don't Tell Me* (2009) (unpublished manuscript on file with the authors).

<sup>117</sup> See Dep't of Defense, *Repeal of "Don't Ask, Don't Tell" (DADT): Quick Reference Guide 1* (Sept. 20, 2011) ("Sexual orientation is a personal and private matter. DoD components, including the Services are not authorized to request, collect, or maintain information about the sexual orientation of Service members except when it is an essential part of an otherwise appropriate investigation or other official action.").

<sup>118</sup> See Chuck Hagel, Sec'y of Def., *Remarks at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium* (June 25, 2013) ("Our nation has always benefited from the service of gay and lesbian soldiers, sailors, airmen, and coast guardsmen, and Marines. Now they can serve openly, with full honor, integrity and respect. This makes our military and our nation stronger, much stronger."), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5262>.

<sup>119</sup> See Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515. Section 2(e) of this Act indicates that it does not create a private cause of action.

<sup>120</sup> See 10 U.S.C. §654 (1993), *repealed by* Pub. L. No. 111-321, §2(b), (f)(1), 124 Stat. 3516.

<sup>121</sup> 10 U.S.C. § 925.

<sup>122</sup> Cf. *United States v. Marcum*, 60 M.J. 198, 208 (U.S. Armed Forces Ct. App. 2004) (allowing court martial for sodomy with a subordinate and distinguishing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)); *United States v. Harvey*, 67 M.J. 758, 762-63 (U.S. Air Force Ct. Crim. App. 2009) (allowing court martial of a representative of the military abroad for fellatio with a foreign national, as conduct unbecoming an officer and a gentleman).

<sup>123</sup> See 42 U.S.C. § 2000e-2(a)(1); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

employees or potential employees about any of those subjects.<sup>124</sup> Nor does the statute prohibit employees or potential employees from telling employers about those aspects of themselves. Formally speaking, these major civil rights laws appear to establish “May Ask, May Tell, Don’t Use” regimes. A cagey observer might wonder whether the latter prohibition on information use can be assured while asking and telling remain unregulated. This is the unraveling concern all over again.

Upon closer examination, however, formal law is not so permissive. Federal law does restrict employer questions about disability,<sup>125</sup> and questions about sex and family status may be limited as a condition for receiving federal funding.<sup>126</sup> More broadly, many state laws prohibit employer questions about a number of protected characteristics. Several states, such as California, prohibit employers from asking questions that indicate discrimination or discriminatory intent on various grounds including race, color, sex, disability, age, religion, national origin, marital status, and sexual orientation.<sup>127</sup> Other state laws incorporate specific restrictions on employer questions regarding protected employee characteristics.<sup>128</sup> Also worth noting, a few states have begun to restrict employer requests for social media passwords.<sup>129</sup> But even in these cases, employees and others seem legally free to disclose. The basic pattern in formal antidiscrimination law is to regulate asking only sometimes and telling not at all.

---

<sup>124</sup> See 1 GUIDE TO EMPLOYMENT LAW AND REGULATION § 2:16 (2014 update) [hereinafter EMPLOYMENT LAW].

<sup>125</sup> See *infra* text accompanying notes 156-160; see also 12 C.F.R. § 1002.5 (regulating creditor requests for information, with caveats); 12 C.F.R. § 202.5 (same). The Genetic Information Nondiscrimination Act of 2008, which is supposed to protect employees from adverse employment action, appears to fit a “Don’t Ask, May Tell, Don’t Use” category. See 42 U.S.C. § 2000ff-1(a) (restricting use); *id.* § 2000ff-1(b) (prohibiting employer requests for and purchases of genetic information regarding an employee or employee family member, albeit with several exceptions).

<sup>126</sup> See, e.g., 34 C.F.R. § 106.21(c)(4) (declaring that schools receiving funds from the Department of Education shall not, for example, “make pre-admission inquiry as to the *marital status* of an applicant for admission, including whether such applicant is ‘Miss’ or ‘Mrs.’” and “*may* make pre-admission inquiry as to the *sex* of an applicant for admission, but *only if* such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are *not used* in connection with discrimination prohibited by this part”) (emphasis added); see also 20 U.S.C. § 1682 (granting agency rulemaking authority in this area).

<sup>127</sup> See, e.g., CAL. GOV’T CODE § 12940(d); COLO. REV. STAT. ANN. § 24-34-402(d) (similar but without listing marital status); KAN. STAT. ANN. § 44-1009(3) (similar but without listing age, marital status, or sexual orientation); MICH. COMP. LAWS ANN. § 37.2206(2) (similar but without listing disability or sexual orientation, while adding height and weight); N.Y. EXEC. LAW § 296 (McKinney 2014) (similar but adding military status and “predisposing genetic characteristics”); see also CONN. GEN. STAT. ANN. § 46a-6(a)(9) (covering pregnancy and family responsibilities).

<sup>128</sup> See, e.g., MICH. COMP. LAWS ANN. § 37.2206(2)(a) (prohibiting employer inquiries concerning race, color, sex, religion, national origin, and marital status, plus height and weight); MINN. STAT. §363A.08, subs. 4(1) (similar but limited to pre-employment questions, not listing height and weight, and adding creed, public assistance status, familial status, disability, and sexual orientation); 43 PA. STAT. ANN. § 955(b)(1) (similar but limited to pre-employment questions and not listing, for example, sexual orientation); see also CONN. GEN. STAT. ANN. § 46a-6(a)(11) (prohibiting employer requests for genetic information); VT. STAT. ANN. tit. 21, § 561(b)(1) (regarding job-applicant health coverage). Massachusetts, by agency rule, restricts a variety of employer questions. See 804 CODE MASS. REG. 3.01(8)(g) & 3.02 (presenting a detailed grid of permissible and impermissible employer questions on age, sex, race, disability, criminal records, and many other topics).

<sup>129</sup> See, e.g., CAL. LAB. CODE § 980(b)(1) (enacted by 2012 Cal. Stat. ch. 618); MD. CODE ANN., LAB. & EMPL. § 3-712; NEV. REV. STAT. ANN. § 613.135; ARK. CODE ANN. § 11-2-124.

Of course, formal law does not fully describe the real world of employment practices. However prevalent Don't Ask might be as a formal legal command, many employers seem to get the message that certain questions are inappropriate or even unlawful. And this impression might be important regardless of the enforceability of any don't-use rule. Acknowledging that Title VII does not per se outlaw pre-employment questions concerning race, color, religion, or national origin, the Equal Employment Opportunity Commission nevertheless states that it "regard[s] such inquiries with extreme disfavor . . . . [A]n applicant's race, religion and the like are totally irrelevant to his or her ability or qualifications as a prospective employee, and no useful purpose is served by eliciting such information."<sup>130</sup>

Is that message penetrating? Not to everyone, certainly. But consider the rule-of-thumb advice for hiring procedures from an online resource directed at startup companies.<sup>131</sup> The long list of bad questions is remarkable:

In general, companies should avoid inquiries about protected activities or characteristics, except to keep records required by equal employment opportunity laws. In making inquiries to applicants, the following general rules should always be borne in mind:

- Companies may ask about current address and permanent address. They may not ask whether applicant lives with anyone or whether applicant owns home or rents.
- Companies may ask for name and position of spouse employed by the company or a competitor of the company.
- Companies may not request personal sexual information or requests for sexual conduct.
- Companies cannot ask about marital status; children, dependents, child care arrangements; whether the applicant is pregnant, using birth control, or planning to have children; names of spouse or children; or child support obligations.
- Companies cannot ask about race, ethnicity, lineage, or ancestry. They cannot ask about languages that an applicant can speak, write, read, or understand unless a language other than English is required for the job.
- Companies . . . cannot ask how educational expenses were paid or whether applicant still owes educational loans.
- . . . . [C]ompanies generally may not ask about the number of "sick days" employee used in last job, the number of workdays missed to care for children, or whether the applicant took any leaves of absence from last job.
- Companies may only ask about financial or credit information if it is clearly job-related.
- Companies may ask about the number and kinds of convictions, if companies assure that convictions do not necessarily disqualify applicant. They cannot ask about the number and type of arrests.
- Companies can only ask about applicant's height or weight, if legitimate job qualification.<sup>132</sup>

---

<sup>130</sup> EMPLOYMENT LAW, *supra* note 124, § 2:16 (internal quotation marks omitted); *see also* 29 CFR § 1604.7 (presenting EEOC guidance on pre-employment inquiries related to sex that express discrimination); *King v. Trans World Airlines*, 738 F.2d 255, 258 n.2 (8th Cir. 1984) (*dicta* relying thereon).

<sup>131</sup> *See* ALAN S. GUTTERMAN, THE BUSINESS COUNSELOR'S GUIDE TO ORGANIZATIONAL MANAGEMENT preface (Thompson Reuters/West 2013 update).

<sup>132</sup> *Id.* § 30:34. A longer and more nuanced list was posted by Michigan Tech, *What You Can and What You Can't—Legal/Illegal Interview Questions*, Staff Hiring Process (May 16, 2013), <http://www.mtu.edu/equity/pdfs/whatyoucanandcantasklongversion8-12-04.pdf>. State law and/or conditions on

At least some of these off-limits questions are drawn from EEOC guidance or lower court cases,<sup>133</sup> so the liability fear is not baseless. The list directs employers to the safe side of the street.

Quite a few employers must have the sense that many questions present intolerable risks, whether or not posing those questions is unlawful in a strict sense. Some of these risks are litigation-related. Sometimes questions can be used later in court as evidence of unlawful discrimination, even if law does not outright prohibit the question. In one interchange from the 1980s (easily mistaken for the 1880s), a supervisor reportedly asked a job applicant “how her husband felt about her applying for the job and whether she planned to have additional children.”<sup>134</sup> Despite this plaintiff’s loss on appeal, more-sophisticated and litigation-averse employers will avoid producing such evidence. Perhaps these incentives against employer questioning count as a functional don’t-ask norm.<sup>135</sup>

Employer risks go beyond anticipated lawsuits. Many employers will self-regulate when questions would suggest something disreputable about management’s curiosities and values. Sending those messages can drive down morale and restrict the pool of willing employees. In *E.E.O.C. v. Abercrombie & Fitch Stores*,<sup>136</sup> a case pending before the Supreme Court, the company alleges that its store managers are instructed “not to assume facts about prospective employees” and also “not to ask applicants about their religion.”<sup>137</sup> Although stifling such questions can prevent constructive dialogue about workplace accommodations—in this case, wearing a hijab in a preppy clothing store that has something against employee “caps”<sup>138</sup>—employer questions about religion are problematic for more than one reason. There are litigation as well as other economic risks from a bad signal to prospective employees. Applicants will wonder why a clothing store’s management is interested in religion, and often infer an unwelcoming explanation.<sup>139</sup> We are not under the impression that don’t-ask norms prevail in

---

federal funding might explain such care with questioning, but litigation risk aversion and other moral commitments might be at work. *See also* 30 *Interview Questions You Can’t Ask and 30 Sneaky, Legal Alternatives to Get the Same Info*, HR WORLD.COM, <http://www.hrworld.com/features/30-interview-questions-111507> (last visited Nov. 10, 2014) (providing a provocative list of verboten interview questions, though the “sneaky” alternatives mentioned in the title consist largely of focusing on information pertinent to job performance).

<sup>133</sup> *See, e.g.*, EEOCCM s 2-II, *Cognizable Claims* (2009); 29 C.F.R. § 1600 (2014); *Barnes v. Cochran*, 944 F. Supp. 897, 904-05 (S.D. Fla. 1996) (involving the ADA). The EEOC lacks statutory authority to implement Title VII via rulemaking; its opinions on the correct understanding of Title VII receive variable *Skidmore* deference from courts, which depends on several factors. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991).

<sup>134</sup> *Bruno v. City of Crown Point*, 950 F.2d 355, 364-65 (7th Cir. 1991) (Easterbrook, J., dissenting).

<sup>135</sup> In a similar self-protective vein are DADT norms that arise because of concerns over maintaining an executive’s plausible deniability. White House employees might avoid disclosing envelope-pushing conduct to the President, and a suspicious President may know not to ask hard questions or be barred structurally from doing so, precisely so that the President can be insulated if the conduct later comes to light. *Cf. Aziz Z. Huq, Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 914 (2012).

<sup>136</sup> 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 83 U.S.L.W. 3089 (Oct. 2, 2014).

<sup>137</sup> *Id.* at 1112 (reporting the company’s averments).

<sup>138</sup> *Id.* at 1111; *see id.* at 1116, 1121, 1123, 1134-35, 1143 (granting judgment to an employer partly because the prospective employee did not tell the employer that she wore a hijab for religious reasons, and relying on EEOC warnings against employer questions about religion). There is, unfortunately, nothing per se unlawful about dress codes following “a classic East Coast collegiate style of clothing.” *Id.* at 1111.

<sup>139</sup> Of course, the economic and morale effects are different for businesses attempting to develop niche markets based on religion.

every workplace on every topic implicated by civil rights legislation, or that limited questioning shows no unlawful discrimination. But it would be unrealistic to ignore social norms in trying to understand the effect of civil rights law on employer questions.<sup>140</sup>

The real-life norm on the telling side is likewise far from “may” in some of these settings. A regional social practice of tolerating discussion about one’s religion, for instance, might carry over into the workplace regardless of the use norm in formal law, but only in those regions. Wedding rings and family photos can be found in many, but not all, workplaces. Similarly, it is our impression from having interviewed many candidates for jobs in legal academia that applicants regularly volunteer information about their marital status, especially when it is helpful to their chances (a spouse who already has to relocate to the interviewing employer’s city, for instance). That said, the sensitivity of many people in many workplaces about many of these topics will lean the norms toward “Don’t Ask, Don’t Tell.” Whatever employers might glean from social network postings and third-party databases (ask-*C* options), employees will not always advertise to employers that they are not pregnant, for instance. Returning to religion and disability, job applicants may have more than one reason to not tell. Both religion and disability implicate socially sensitive topics and also provide a basis for legal claims to reasonable accommodations. If they can help it, some number of applicants will not foreground traits that appear to make them more costly employees, especially when job opportunities are scarce. These employee inhibitions conceivably are a crude way of screening out low-value or non-meritorious claims to accommodation against standard operating procedure, and thus a hijab-wearing job applicant might be sending a rather strong message about her religious preferences,<sup>141</sup> but social norms and legal incentives certainly influence the real world of Q&A regardless.

Thus antidiscrimination law might operate quite differently in practice than did the military’s tattered DADT policy. In the employment setting, frequently social norms supplement legal norms against information use. In contrast, a high degree of openness in discussing one’s (hetero)sexuality in the military would have undercut formal protections against investigation and disclosure. A combination of legal and social norms might regulate information flows more sensibly than legal rules alone would. Of course we have not exhausted the analysis and evidence on these matters,<sup>142</sup> but the above discussion helps point a way forward.

### *B. Don’t Ask, Must Tell (DAMT)*

One might imagine situations in which employers, employees, and others freely discuss matters of race, religion, family, and disability with no fear that the resulting circulation of information will be used to make troubling decisions. But people’s trust tends not to stretch that far. In contrast, many personal relationships are meant to rest on at least this much trust. To be sure, trust-based relationships can suggest May Ask, May Tell norms, but sometimes that sort of

---

<sup>140</sup> Affirmative action programs and compliance efforts complicate the analysis. Sometimes employers are authorized by law to collect data on potential or current employees to operate an affirmative action program, or to monitor the organization’s efforts to comply with some other legal obligation.

<sup>141</sup> One of the issues in the case is the likelihood that an applicant is wearing a hijab for *non*-religious reasons. *See id.* at 1118-19.

<sup>142</sup> For instance, genetic information seems to call for special consideration. Wide accessibility to genetic testing might be too recent for any reliable social norms to have developed, and it’s possible that too few employees will obtain such information about themselves for the unraveling dynamic to happen. But a don’t-ask norm might be defended, as it can be in other circumstances, as a way of protecting employees from nominal questions that are more like troubling commands.

freedom would undercut the intended relationship. Although it might seem bizarre compared to DADT, where asking and telling norms both work toward bottling up information, important aspects of personal relationships are supposed to be governed by DAMT, where asking is inhibited while telling is obligatory.

### 1. *Personal relationships*

Consider infidelity. Ideally, a person should not ask his or her spouse or romantic partner, “Are you cheating on me?”—just as a flat accusation is ordinarily inappropriate. But according to mainstream American morality, such partners should disclose an affair if it happens.<sup>143</sup> The question is almost unavoidably accusatory or, at minimum, conveys suspicion in a way that undercuts trust. A question can show suspicion as strongly as any declaration.<sup>144</sup> At the same time, marriage and other personal relationships often depend on a commitment to monogamy, along with a supplemental commitment to disclose conduct that violates such underlying commitments. If the parties to the relationship can trust each other to disclose such misconduct to each other, then they can avoid the discomfiting and even destructive effects of questions that are loaded with suspicion.<sup>145</sup>

In fact, evidence indicates that DAMT might save relationships. When a breach of trust occurs among dating couples, one study shows that the romantic relationship is roughly twice as likely to be repaired if the cheating partner discloses voluntarily rather than waiting to be confronted with questions from the suspicious partner.<sup>146</sup> The voluntary disclosure by the cheating partner contains the disclosure rather than airing it publicly, demonstrates the cheating partner’s remorse and perhaps interest in reconciliation, and evinces limits to the cheater’s

---

<sup>143</sup> Many personal relationships are not mainstream or conventional in the way described in the text. *See* Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004). Some relationships are romantically or sexually more open, and some people within those relationships may prefer Don’t Ask, Don’t Tell or May Ask, May Tell or something else. *See id.* at 327 (quoting Marny Hall, *Turning Down the Jezebel Decibels*, in *THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOGAMY, AND CASUAL SEX* 47, 54-55 (Marcia Munson & Judith P. Stelboun, eds., 1999), describing a couple’s informational logs of their encounters, made available for optional perusal by the other partner).

<sup>144</sup> Although asking suspicious questions might not do much good toward getting the truth, the questions seem to up the stakes for misbehaving partners. Lying or deception would be added to infidelity and nondisclosure. In this sense, these questions indicate a relationship at risk but not yet dissolved. Note that adultery was and still is a fault-based reason for divorce, and is still a crime in approximately half the states. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 5.02 cmt. e (2002) [*hereinafter* FAMILY DISSOLUTION]; *Adultery in New England: Love Free or Die*, *THE ECONOMIST*, Apr. 19, 2014, at 80. A false accusation of adultery might give rise to a defamation per se claim—but surely tort law is no influence on questioning as opposed to outright accusing partners regarding adultery.

<sup>145</sup> While we regard DAMT as the aspirational social norm governing infidelity, *see* Ryan B. Seedall et al., *Disclosing Extra-Dyadic Involvement (EDI): Understanding Attitudes, Subjective Norms, and Perceived Behavioral Control*, 35 CONTEMP. FAM. THER. 745, 754 fig. 1 (2013) (finding very strong beliefs among research subjects in the moral obligation to disclose cheating to a partner); *cf.* Mark H. Butler et al., *Facilitated Disclosure versus Clinical Accommodation of Infidelity: An Early Pivot Point in Couple Therapy*, 35 J. MARITAL & FAM. THERAPY 125, 137-42 (2009) (discussing the morality and consequences of nondisclosure), it could be that nonadherence to this norm is quite prevalent.

<sup>146</sup> *See* Walid A. Afifi et al., *Identity Concerns Following a Severe Relational Transgression: The Role of Discovery Method for the Relational Outcomes of Infidelity*, 18 J. SOCIAL & PERSONAL RELATIONSHIPS 291, 300 (2001) (“[U]nsolicited partner disclosure again produced the least damaging relational results (43.5% dissolution rate following discovery) . . . [D]iscovering the infidelity through solicited information-seeking (86%) or by walking in on the infidelity (83%) . . . were most likely to lead to relationship dissolution.”).

willingness to deceive the partner. All of these factors made forgiveness and continuation of the relationship more likely.<sup>147</sup> To be sure, we do not know how much of this correlation between disclosure mechanisms and relationship survival is causal, we cannot be sure whether relationship survival is a good thing in these contexts, and if the likelihood of eventual detection is low enough, a cheating partner may still elect not to disclose.<sup>148</sup> But voluntary disclosure is both morally justified (because it is something the unaware partner usually would want to know and in the case of a conventional marriage has a right to know) and likely furthers the interests of a cheating partner who hopes for reconciliation.

Affairs are a fairly narrow illustration, but DAMT probably covers a sizeable chunk of our social lives. Theoretically, you could always ask a spouse, partner, friend, or roommate if they took whatever you cannot find at the moment, but nobody goes that far. At least when the implied accusation is untrue or the suspicion off-base, these questions may provoke resentment, wasteful efforts to appear “beyond reproach” in the first place, or emotional distance and ultimately separation—the opposite of what trust relationships aspire to. In fact, a must-tell norm could boost the inference of accusation from questions about misbehavior. If spouses *A* and *B* both know that misconduct is supposed to be spontaneously disclosed, then spouse *A*’s question about misconduct communicates suspicion about both underlying misconduct and the failure to disclose that misconduct. Believing that we are in a DAMT situation can increase sensitivity and raise stakes, while also helping bind people together.

DAMT also occurs outside of intimate personal relationships, although in less clear forms. One example is Catholic confession. To reconcile with God after the commission of sin, Church members must confess to a priest. But it seems that priests are not in the habit of investigating parishioners or asking them point-blank about sinful behavior outside of the confession context. The sinner must periodically initiate the confession procedure to obtain the sacrament and square up with God, which is optional only in the sense that a baptized person could choose to go without confession and risk damnation.<sup>149</sup> The Catholic Church’s position that the sacrament requires confession to a Church-employed specialist and not a layperson (or directly to God) was one objection that spurred the Reformation.<sup>150</sup> But putting aside that controversy, we can see this sort of DAMT combination in the religious confession practices of non-Catholics as well as the non-religious confessions of many other people.<sup>151</sup> Even if secular, confession to a friend can be an emotional relief and perhaps even a mutual obligation to share secrets. On the other hand, friends should be shy to fish for revelations of misbehavior, unless honestly thought to be in the best interest of their counterpart. The fit with DAMT is not perfect,

---

<sup>147</sup> See *id.* at 295, 301-05.

<sup>148</sup> See *id.* at 305.

<sup>149</sup> See 1983 CODE c.960, CODEX IURIS CANONICI (1983).

<sup>150</sup> See LADISLAS ORSY, *THE EVOLVING CHURCH AND THE SACRAMENT OF PENANCE* (1978) (discussing change from a public confession to reenter the community, available for only some sins, and available only once in a lifetime, to private confessions with a priest repeatedly). Some economists of religion suggest that the practice involves rent seeking or other risks, while others may note that priests are specialists who deliver individualized service and that the practice may have evolved in response to changing demand and circumstances. Compare Robert B. Ekelund, Jr., et al., *An Economic Analysis of the Protestant Reformation*, 110 J. POL. ECON. 646, 653-55 (2002), with Benito Arruñada, *Specialization and Rent Seeking in Moral Enforcement: The Case of Confession*, 48 J. SCI. STUDY OF RELIGION 443, 447-48 (2009).

<sup>151</sup> See Arruñada, *supra* note 150, at 446 (describing confession as a near-universal practice across history).

but these extensions show trust relationships with channels for disclosure of misconduct without prying questions.

However prevalent, DAMT seems fragile. DAMT norms can be skirted or flouted, sometimes with serious consequences. On the asking side, accusatory questions can be replaced with softer inquiries such as, “Hey, where were you last night?”<sup>152</sup> These substitutes erode the don’t-ask category in practice, and may put pressure to be accusatory on the initial target of suspicion—as in, “Why do you ask?” More significantly, the must-tell part of DAMT is much harder to police than the don’t-ask part.<sup>153</sup> The duty to tell is *conditional* on misconduct by *B* that *A*, by hypothesis, does not know about. Whether spouse *A* has posed an accusatory question to spouse *B* will basically always be apparent to spouse *B*, but whether spouse *B* is failing to disclose an affair may not be apparent to spouse *A*. Furthermore, the class of people benefiting from don’t-ask norms might be relatively powerful and have an interest in ignoring the must-tell norms, or falsely advertising their strength.<sup>154</sup> DAMT under those conditions can be a scam to maintain cover for infidelity. The DAMT combination needs a mechanism for incentivizing compliance or matching up people who have internalized these commitments already.<sup>155</sup> Even when DAMT is effectively implemented, a don’t-ask norm may interfere with one person’s communication of honest concern to another, and so DAMT usually comes with costs and important risks.

None of this means that DAMT is irrational or impossible. The combination seems relatively widespread in intimate relationships. Moreover, the fragility of DAMT might help people value the relationship highly when the combination seems to be working, perhaps because success is elusive and failure is emotionally serious. But fragility and high stakes are not strong recommendations for DAMT as a generally applicable combination of norms.

## 2. Workplace regulations

Perhaps because of this fragility, law is different from social norms. DAMT is difficult to identify anywhere in law and, when DAMT legal norms do emerge, they might be a mistake or a regrettable side effect of regulation.

Consider employment law. Employer questions are only occasionally prohibited by law, but the Americans with Disabilities Act is a partial exception.<sup>156</sup> The statute instructs employers to not “make inquiries of an employee as to whether such employee is an individual with a

---

<sup>152</sup> Cf. *supra* text accompanying note 27 (discussing the tear-jerker speech in *Innis*).

<sup>153</sup> Cf. BAIRD *ET AL.*, *supra* note 5, at 95 (suggesting that mandatory disclosure rules might not be effective); DEBORAH M. ANAPOL, *POLYAMORY* 3 (1997) (“Lies, deceit, guilt, unilateral decisions and broken commitments are so commonplace in classic American-style monogamy that responsible nonmonogamy may sound like an oxymoron.”).

<sup>154</sup> Cf. Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2787 (2008) (“Because race and gender intersect to determine an individual’s value in the romantic marketplace, the two partners are unlikely to be similarly situated in terms of their options for leaving the relationship should it become unhappy.”).

<sup>155</sup> Among the possibilities are attempting to signal must-tell commitments (perhaps by disclosing other misconduct that clearly would not have been detected); or adjusting the expected severity of social sanctions depending on whether the misconduct was voluntarily disclosed before detection or suspicion. There seems to be no perfect solution, but we expect people to make efforts to make DAMT work given its apparent value.

<sup>156</sup> See Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 *HOFSTRA LAB. L.J.* 365, 381-86 (1997).



disability or as to the nature or severity of the disability” unless “shown to be job-related and consistent with business necessity.”<sup>157</sup> The statute thus demands a job-related justification for such questions without flatly prohibiting them.<sup>158</sup> Employers can still get into trouble for asking questions, however. In *Roe v. Cheyenne Mountain Conference Resort*,<sup>159</sup> a district court held that an employer could not ask employees to disclose the legal prescription medication that they use, unless the employer could show a relationship to the job and business necessity.<sup>160</sup> Looking slightly beyond formal law, we can see a significant Don’t Ask norm at work. Regulated employers will not always be able to discern the legal difference between asking about a disability as opposed to something else, and between asking an economically justified question as opposed to something else.<sup>161</sup> Again, concerns about litigation risk can prompt employers to avoid questions arguably related to certain employee traits, not to mention social norms in favor of silence.<sup>162</sup>

More difficult is identifying Must Tell rules for employees. Employees rarely have a legal duty to disclose information about traits that employers should not (or will not) ask about.<sup>163</sup> A possible exception involves workplace hazards. There, tort law might overlap with employment discrimination law. Employees with certain disabilities can present increased risks to others if these conditions are not disclosed and adjusted for. An employee with a communicable disease might be perfectly capable of performing many job duties effectively, efficiently, and safely, if precautions are taken to reduce the risk of infection to a given level. Indeed those precautions might be necessary for the employee to comply with ordinary tort duties, including the duty to warn others of known risks.<sup>164</sup> An employer might not take adequate

---

<sup>157</sup> 42 U.S.C. § 12112(d)(4); *see also id.* § 12112(d)(2) (covering job applicants, and clarifying that “a covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions”).

<sup>158</sup> The statute separately allows drug testing. *See id.* § 12112(d)(1) & (2); *see also* EEOC, *Enforcement Guidance: Disability Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)* 21 (July 27, 2000) (question 8) (recognizing circumstances where it is permissible to require employees in positions affecting public safety to report taking medication), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

<sup>159</sup> 920 F. Supp. 1153 (D. Colo. 1996).

<sup>160</sup> *See id.* at 1154-55.

<sup>161</sup> Complicating matters, there is equivocal authority for the proposition that an employer may actually have a duty to investigate the possibility of making accommodations for employees with disabilities, once the disability seems obvious. *See Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) (Calabresi, J.); *see also Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000). *But cf. Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, 1218 (8th Cir. 1999) (indicating that an employee cannot “expect the employer to read [her] mind” about desired and needed accommodations) (internal quotation marks omitted). This would amount to *Must Ask*, *May Tell* for disability law under certain conditions. *See supra* Figure 1.

<sup>162</sup> Some protected traits are transparent to observers, and so employer questions about them seem unnecessary, a legal prohibition bootless if the goal is reinforcing anti-use norms, and employee disclosure irrelevant or gratuitous. Few employers need to ask about an employee’s race to know what it is, in a socially constructed sense. But for more opaque employee traits—such as religion, national origin, sexual orientation, family status, pregnancy, genetic information, and certain types of disability—posing questions might yield new information.

<sup>163</sup> Here we are contrasting legal duties to disclose from legal benefits conditioned on disclosure—for instance, a disabled person might have to inform others to recover in tort, *see Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 744 (Minn. 1997), or to receive employment accommodations, *see Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001), not to mention Social Security disability payments.

<sup>164</sup> *Cf. Doe v. Johnson*, 817 F. Supp. 1382, 1391, 1395-96 (W.D. Mich. 1993) (addressing AIDS and sexual partners); *Franklin v. Butcher*, 129 S.W. 428, 430 (Mo. Ct. App. 1910) (addressing small pox from a stranger to a

precautions unless the disease is disclosed (*e.g.*, requiring safety gloves or masks). At the same time, the employer might be deterred from asking about either employee diseases or employee need for disability-based accommodations because of a perceived litigation risk.

Strictly speaking, even this workplace hazard scenario might not fit the DAMT combination. The must-tell rule is derived from the application of general tort duties, while the don't-ask rule is partially an unintended side effect of litigation risks in discrimination law. So this “example” of DAMT looks more like an unintended consequence than an intelligently designed combination in law. That said, DAMT could have a plausible defense in this workplace context even if it does not arise by design. More than one regulatory goal is in play. The don't-ask rule might serve an anti-coercion mission that justifiably constrains employers, whether or not over-deterrence occurs, while the must-tell rule might represent an exceptional yet justifiable regulation directed at employees to prevent public harm while avoiding employer browbeating. Note that these justifications do not involve building a delicate trust relationship between employers and employees, but perhaps the confluence of rules and incentives with different goals is roughly tolerable.

A similar DAMT candidate stems from *Tarasoff* duties.<sup>165</sup> A majority of states require a therapist to warn others or the authorities if the therapist believes that his or her patient is likely to attack somebody.<sup>166</sup> On the don't ask side, state law might functionally deter potential victims from asking therapists about what their patients are saying in therapy—to the extent that potential victims wonder about such tort law implications. Perhaps the questioner could be sued for inducing breach of confidentiality duties,<sup>167</sup> which might yield a defensible balance of pressures on therapists to respect patient confidences in nearly all situations. That said, we know of no actual case dealing with questions from people fearful of assault. In fact, an element of the inducement claim in Massachusetts is that “defendant did *not* reasonably believe that the physician *could disclose* that information to the defendant without violating the duty of confidentiality.”<sup>168</sup> This seems hard to establish where a person who honestly fears physical attack by a patient asks a therapist about the risk.<sup>169</sup> Logically, there can be no inducement liability for asking about a threat that a therapist must or even may disclose to you. Any residual

---

child); Rebecca Bennett et al., *Ignorance is Bliss? HIV and Moral Duties and Legal Duties to Forewarn*, 26 J. MED. ETHICS 9 (2000); Timothy J. Hasken, Note, *A Duty to Kiss and Tell?*, 95 IOWA L. REV. 985, 987-92 (2010) (discussing case law on duty to warn about infectious diseases, especially STDs).

<sup>165</sup> See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976), *superseded by statute* CAL. CIV. CODE § 43.92.

<sup>166</sup> See National Conference of State Legislatures, *Mental Health Professionals' Duty to Protect/Warn* (Jan. 2013), available at <<http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx>> (visited August 13, 2014). Seventeen states have rules permitting therapists to warn third parties of such dangers. *Id.* We would characterize these jurisdictions as Don't Ask, May Tell.

<sup>167</sup> See *Alberts v. Devine*, 479 N.E.2d 113, 121 (Mass. 1985) (recognizing an inducement claim even without threats or promises of reward, where a minister's superiors asked his psychiatrist about his mental health).

<sup>168</sup> *Id.* at 121 (emphasis added).

<sup>169</sup> *Cf. id.* at 119 n.4 (explaining that “[d]isclosure is permitted only to meet a serious danger to the patient or to others”); *Valente v. Porter, Wright, Morris & Arthur*, 2010 WL 5239186, at \*2 (Ohio App. 8 Dist. Dec. 16, 2010) (stressing that the defendant sought information to defend against a lawsuit, not cash in on new clients).

DAMT combination is more like another side-effect of unavoidable incentives than a plan by judges or legislatures, whatever the merits of the resulting rules.<sup>170</sup>

Why might DAMT be familiar in personal relationships but nearly unknown to formal law? Setting aside workplace hazards and *Tarasoff* duties, which involve odd confluences of different regulatory goals, perhaps formalizing DAMT tends to thwart its more typical trust-based objective. Even people in intimate personal relationships do not necessarily announce DAMT as their rule. It strikes us as unlikely that many spouses, couples, or friends announce to each other that they will not ask about certain transgressions but promise to tell about them if they happen. Announcing the norms easily could communicate a troubling obtuseness about the key attributes of such personal relationships. Similarly, DAMT laws could undermine the trust or reciprocity on which the underlying relationship depends. True, law conceivably can be understood as a distant third-party's announcement that, if people decide to enter into a particular relationship, then DAMT is a norm that might be enforced by others. But perhaps even third-party announcements are excessively formal. In addition, maybe the relationships in need of DAMT depend on a thoroughgoing voluntariness that is crowded out by a legal norm—even if the must-tell part of the combination is difficult for couples to enforce on their own. If the parties to a relationship think that law is part of the reason for following DAMT, the relationship might be poisoned by the confounding third-party pressures. There is no gift if law orders a person to give. Nor is reciprocity likely to be induced if the trust generated is not sourced in that person's emotional commitment, but instead in third-party pressure.<sup>171</sup> We might say that love comes from the heart, not the courts. Court is where divorce happens.<sup>172</sup>

### *C. Must Ask, Must Tell (MAMT)*

Like its polar-opposite, MAMT introduces a good measure of redundancy into the law. DADT regards the disclosure of information as a vice, and MAMT wrings its hands over the possibility of non-disclosure. This concern helps explain why restricted markets, such as guns or alcohol and tobacco, are often governed by a MAMT regime at the point of sale.<sup>173</sup> This legal

---

<sup>170</sup> Another offbeat illustration might come from Massachusetts, where the confluence of two insurance regulations apparently generated a DAMT combination in 2011. The legislature prohibited insurers, including life insurers, from asking applicants about genetic tests. On the other hand, actuarially sound genetic tests were supposed to be disclosed by applicants for life insurance. As far as we know, this combination was not a conscious policy choice. See Turna Ray, *Genetic Bill of Rights in Mass. Seeks to Extend Protections in Life, Auto, Long-Term Care Insurance*, PHARMACOGENOMICS RPTR., Feb. 16, 2011.

<sup>171</sup> See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 76-77 (2003).

<sup>172</sup> One last possibility for DAMT in legal institutions involves government employment. High-level officials might want to select for trustworthy employees who will confess wrongdoing without the trouble of interrogation, which can threaten trust. We can imagine an intelligence agency attempting to operate this way, to the extent that tying the hands of interrogators is especially valuable in attracting and retaining motivated operatives while wrongdoing might be detected anyway using ask-*C* options. Unfortunately, we have not confirmed such an arrangement, which needs an effective selection mechanism, and must ask or may ask norms could easily be better for high-level officials. We thank John Ferejohn for proposing this possibility.

<sup>173</sup> See *supra* text accompanying notes 89 & 98. On firearms sales, see *Abramski v. United States*, 134 S.Ct. 2259, 2263-64 (2014) (noting required submission of data to the National Instant Background Check System). On cigarettes, see 21 C.F.R. § 1140.14(b) (requiring that cigarette retailers verify by photo I.D. that purchasers are at least age eighteen, unless the purchaser is actually over twenty six). On alcohol, see, for example, 235 ILL. COMPILED STAT. 5/6-20 (West 2012); IND. CODE ANN. § 7.1-5-10-23 (West 2011). Even when state law does not require alcohol retailers to check I.D.s, retailers often do so to minimize the risk of legal penalty for violating the

regime applies to countless transactions every day. Of course it is true that many people violate these laws for personal satisfaction and economic gain. In some locations, perhaps standard operating procedure is to flout such laws. But imperfect enforcement does not undercut the straightforward policy defense of MAMT in these settings. Here law tries to push both askers and tellers in the same direction, toward the revelation and use of certain information. That individual preferences and even social norms might conflict with a legal mandate can indicate the need for law to serve societal or third-party interests. Access to addictive drugs and dangerous weapons might fit this profile, whatever policy debates people have at the margins. Another MAMT law affecting millions of people involves the I-9 form to verify eligibility to work in the United States.<sup>174</sup> Again the law here is only partially effective, and people can debate the extent to which immigration law should protect certain labor-market participants from competition with outsiders who employers would otherwise happily hire. But taking this part of immigration law as given, MAMT is no surprise and can be readily defended in light of contrary market incentives.

Yet MAMT's redundancy may be surprising in other contexts. As we shall see, MAMT sometimes is employed where the asking party either already has the pertinent information or can obtain it from a third party, and where there are reasons to be skeptical about the telling party's incentives to answer the questions forthrightly.

### *1. Background checks*

In 2011, the Supreme Court considered the constitutionality of subjecting longtime workers at NASA's Jet Propulsion Laboratory (JPL) to compulsory background checks.<sup>175</sup> JPL employees who refused to comply would face losing their jobs.<sup>176</sup> As part of the background check, the landlords of JPL's workers would be required to fill out Form 42—an Investigative Request for Personal Information.<sup>177</sup> Form 42 digs into a landlord's assessment of a present or former tenant's character. As the Court described the document:

After several preliminary questions about the extent of the reference's associations with the employee, the form asks if the reference has "any reason to question" the employee's "honesty or trustworthiness." It also asks if the reference knows of any "adverse information" concerning the employee's "violations of the law," "financial integrity," "abuse of alcohol and/or drugs,"

---

must-use rule. *See* N.Y. STATE LIQUOR AUTH., HANDBOOK FOR RETAIL LICENSEES 20-21 (2013) (warning retailers about undercover agents and "strongly recommend[ing]" card checks, but acknowledging that state law does not require them). Indeed, even those who come up with plausible-sounding excuses for failing to ask for identification from those seeking access to alcohol are likely to receive an unsympathetic hearing in court. *See, e.g.*, *Lubavitch-Chabad of Illinois, Inc. v. Northwestern Univ.*, 772 F.3d 443, 445 (7th Cir. 2014) (rejecting discrimination argument by an Orthodox rabbi who insisted that demanding identification from students before serving them wine on Jewish holidays would violate the tenets of his religion).

<sup>174</sup> *See* 10E FED. PROC. FORMS § 40:807 (2014); <http://www.uscis.gov/i-9>.

<sup>175</sup> *See* *National Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746 (2011).

<sup>176</sup> *See id.* at 761.

<sup>177</sup> Form 42 initially "ask[s]" respondents to "complete all items on the back of this form," but the fine print of the form suggests that respondents are "required to respond" to a Form 42 that contains a valid OBM number. *See* U.S. Office of Personnel Management, INV Form 42 (Rev. 6/05), *available at* <[http://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=201002-3206-002&icID=33638](http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201002-3206-002&icID=33638)> (visited July 24, 2014). The Office estimates that 1,636,379 Form 42's are sent out every year, resulting in 111,794 hours of paperwork annually. *See* <<http://www.gpo.gov/fdsys/pkg/FR-2014-01-29/html/2014-01874.htm>> (visited July 24, 2014).

“mental or emotional stability,” “general behavior or conduct,” or “other matters.” If “yes” is checked for any of these categories, the form calls for an explanation in the space below. That space is available for providing “additional information” (“derogatory” or “favorable”) that may bear on “suitability for government employment or a security clearance.”<sup>178</sup>

The Ninth Circuit found the open-ended questions on Form 42 (“any reason to question?”) particularly troubling.<sup>179</sup> That court ruled that the open-ended question was likely unconstitutional, observing that Form 42 “invites the recipient to reveal *any* negative information of which he or she is aware. It is difficult to see how the vague solicitation of derogatory information concerning the applicant’s ‘general behavior or conduct’ could be narrowly tailored to meet *any* legitimate need.”<sup>180</sup>

The Supreme Court was unimpressed. The alternative to asking landlords whether they knew anything negative about tenants that might affect their fitness for federal positions was to produce a much longer form that would “catalog all the reasons why a person might not be suitable for a particular job.”<sup>181</sup> That could be an obnoxious and time-consuming burden if the landlords were conscientious about responding. “[R]eferences do not have all day.”<sup>182</sup>

On the telling side, the government mandate here addresses two kinds of respondents who may prefer to remain silent without special legal pressure. The first type is positively disposed towards the subject of the inquiry and would prefer not to disclose something that might cause the subject to lose a job opportunity. But faced with even a remote prospect of a penalty for failure to answer a question truthfully, the landlord will disclose adverse information to the government.<sup>183</sup> The second type is negatively or neutrally disposed towards the subject and would prefer to disclose the adverse information to the government in the abstract, but fears defamation or other liability if the applicant finds out that the landlord contributed to the applicant losing a job opportunity. Compulsion should prompt the risk-averse landlord to respond, and the compulsory nature of the landlord’s response could make a court considering a subsequent defamation suit less sympathetic to the plaintiff.<sup>184</sup> In both instances, Must Tell likely produces more pertinent information than May Tell. Moreover, the nature of the government’s form alerts landlords to a must-tell obligation about which they might otherwise be unaware.

## 2. Taxes

The personal income tax regime is perhaps the most familiar MAMT regime to many Americans. The Internal Revenue Service (IRS) provides each taxpayer with a form (typically

---

<sup>178</sup> *Id.*

<sup>179</sup> *Nelson v. National Aeronautics & Space Admin.*, 530 F.3d 865, 881 (9th Cir. 2008).

<sup>180</sup> *Id.*

<sup>181</sup> *Nelson*, 131 S. Ct. at 761.

<sup>182</sup> *Id.*

<sup>183</sup> With respect to this sort of landlord, Form 42’s open ended questions are in one sense less effective than the alternative of a great many very specific questions. A landlord who knows something troublesome about a tenant that isn’t explicitly addressed on form 42 (say, the job seeker is an extremely careless driver or an atrocious writer) is unlikely to be penalized in the face of ambiguity over whether a particular fact provides “any reason to question” an applicant’s fitness for a job.

<sup>184</sup> *Cf. Noyes v. Moccia*, 1999 WL 814376, at \*9 (D.N.H. June 24, 1999) (“In addition, Defendant Moccia’s allegedly defamatory statements were not unsolicited, but were made in response to the USPS’s approved request for information.”).

1040 or 1040-EZ) containing a long list of questions that the taxpayer must answer truthfully, under penalty of perjury.<sup>185</sup> Each taxpayer must answer the same basic questions, though taxpayers with substantial investment incomes, foreign earnings, or unusual credits and deductions may need to fill out supplemental forms and schedules.

Strikingly, because it collects tax information from third parties like employers, banks, and brokerages, IRS already has much of the most important information that a taxpayer will provide on the applicable 1040. This redundancy has sparked reformers to call for replacement of the current, high-transaction costs MAMT regime with one where the government automatically calculates each taxpayer's liability (or refund) each year and sends her a bill (or check).<sup>186</sup> Notwithstanding the substantial time savings for taxpayers that such plans may entail,<sup>187</sup> these proposals for reform have not been implemented. What gives?

Our first answer is that the government might impose "Must Ask" on itself to guard against an agency problem. The poorly incentivized government official performing a background check might be tempted to cut corners, and Forms 42 and SF-85 limit the agent's ability to carelessly wing it. Similarly, Form 1040 effectively forces the government's agents to ask questions about taxable events that occur quite irregularly but that, in the aggregate, may make a meaningful contribution to tax revenues. Once government decides to ask for information, "Must Tell" can facilitate automated authentication. MAMT may be useful in flagging for further review mismatches between the responses given and the responses expected. Similarly, discrepancies between tax information reported by employers and information reported by employees can be noticed algorithmically.<sup>188</sup> In a world where the IRS has limited resources, focusing on these discrepancies is a sensible strategy to detect mistakes and cheating.

Less obviously, when the government requests personal information from individuals, rather than obtaining the same information from third parties, it can prompt self examination by the individual. Perhaps a world without mandatory background checks is one in which too many applicants fail to self-screen, by not asking themselves the hard questions about whether they can be trusted with state secrets. Maybe for every Edward Snowden<sup>189</sup> there are dozens of unknown federal job applicants who realize upon answering background check questions that they ought not be trusted with a public sector position and withdraw from consideration. Similarly, we expect that some taxpayers who prepare their own returns are surprised in April when in response to a governmental query they write down particular numbers on their 1040 forms. Somewhat dated studies of income tax awareness indicate that Americans surveyed a few months after filing their taxes were typically 14–19% off in estimating the taxes they recently

---

<sup>185</sup> See, e.g., *United States v. McBride*, 908 F. Supp.2d 1186, 1206 (D. Utah 2012).

<sup>186</sup> See Joseph Bankman, *Using Technology to Simplify Individual Tax Filing*, 61 NAT'L TAX J. 773 (2008) (proposing tax data retrieval from IRS and optional automatic tax returns); see also Randall Stross, *Why Can't the I.R.S. Help Fill in the Blanks?*, N.Y. TIMES, Jan. 23, 2010.

<sup>187</sup> At the turn of the millennium, 125.9 million American individual income taxpayers devoted an estimated 3.21 billion hours to complying with the income tax. See John L. Guyton et al., *Estimating the Compliance Cost of the U.S. Individual Income Tax*, 56 NAT'L TAX J. 673, 682 (2003).

<sup>188</sup> See Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 DUKE J. COMP. & INT'L L. 503, 558 (2011).

<sup>189</sup> Keep in mind that there is only one Edward Snowden. Or maybe two, if you consider Bradley Manning to be another Edward Snowden.

paid,<sup>190</sup> with a slight tendency to underestimate their tax bills.<sup>191</sup> If people are bad at estimating their tax liability when they have already calculated their taxes, they might be particularly inept at assessing such liability if they had never calculated their taxes. Insofar as Americans do the work of calculating their own income and taxes due, it might make them more aware of the burdens of citizenship, better informed voters, or even feel a sense of civic duty that alters their perception of the burden.<sup>192</sup> People may also be imperfect at assessing their own income,<sup>193</sup> so discerning their Adjusted Gross Incomes every year may prompt individual taxpayers to take actions that better reflect their values (*e.g.*, “I should donate more to charity” or “I need to get out of this dead-end job” or “Why didn’t I save more money this year?”).

The above are public-spirited justifications for MAMT. But, as with DADT and DAMT, there are more troubling explanations for this combination. With respect to income tax filing, supporters of small government might believe that “the process is the punishment,” to borrow a phrase. Filling out a 1040 is, for millions of people, worse than a waste of time. It is an occasion for frustration and even outrage at the federal government’s greed. Advocates who want a night-watchman-style small state might believe that individuals will not feel such frustration and outrage if the government lightens the paperwork burden. Tax preparers form an important interest group too, and they may resist efforts to streamline the government’s questioning.

#### *D. Must Ask, Don’t Tell (MADT)*

“If any of you can show just cause why they may not lawfully be married, speak now; or else for ever hold your peace” is a request that has been made at countless traditional Christian wedding ceremonies for generations.<sup>194</sup> Although the quoted language might be rarely employed these days, it still figures prominently in films, with directors apparently unable to resist the ostensibly hilarious contrast between what the guests or filmgoers are thinking (skeletons in the closet, a doomed relationship) and external appearances (a match made in heaven, till death do they part). Or sometimes the guests in the film do not hold their peace, and a doomed nuptial is avoided.<sup>195</sup> Audiences respond well to these scenes because they know that, in fact, it would be deeply inappropriate to voice objections at somebody else’s wedding regardless of the literal meaning of a minister’s invitation. The social norm against telling at these ceremonies, in front

---

<sup>190</sup> See Norbert Lloyd Enrick, *A Pilot Study of Income Tax Consciousness*, 16 NAT’L TAX J. 169, 170 (1963).

<sup>191</sup> See *id.* A more recent literature review on tax perceptions is Martin Fochmann et al., *Tax Perception: An Empirical Survey*, ARQUS-DISKUSSIONBEITRÄGE ZUR QUANTITATIVEN STEUERLEHRE, No. 99 (2010).

<sup>192</sup> Some of these arguments are considered in LAWRENCE ZELENAK, *LEARNING TO LOVE FORM 1040* (2013).

<sup>193</sup> See generally Marcel Das & Arthur van Soest, *Expected and Realized Income Changes: Evidence from the Dutch Socio-Economic Panel*, 32 J. ECON. BEHAV. & ORG. 137, 146-51 (1997) (suggesting that demographic groups of Dutch respondents varied in their tendencies to overestimate or underestimate their current year income, but that underestimation was more common in total).

<sup>194</sup> THE EPISCOPAL CHURCH, *THE BOOK OF COMMON PRAYER* 424 (Gregory M. Howe ed., Church Publishing Incorporated 2007) (1549), [http://www.episcopalchurch.org/sites/default/files/downloads/book\\_of\\_common\\_prayer.pdf](http://www.episcopalchurch.org/sites/default/files/downloads/book_of_common_prayer.pdf) (visited August 25, 2014).

<sup>195</sup> *The Graduate* is the most famous movie scene of this sort. Other depictions include *Four Weddings and a Funeral* and *Made of Honor* (earnestly following the formula) and *Wayne’s World 2*, *The Lonely Guy*, *Harold & Kumar Escape from Guantanamo Bay*, and *What About Bob??* (parodying the *Graduate* formula). For a comprehensive listing, see <http://tvtropes.org/pmwiki/pmwiki.php/Main/SpeakNowOrForeverHoldYourPeace>.

of everybody assembled, is strong enough to make one doubt that the ceremonial words should be understood as anything like an honest request for information. The entrenched MADT norm functions in a manner somewhat similar to a penalty default;<sup>196</sup> it incentivizes those with material information to bring it to the bride and groom's attention long before the wedding day. Either way, there are recurring situations in which some people feel encouraged to ask while other people are discouraged from answering.

### *1. Meet the Press and Codes of Silence*

Whereas the wedding version of MADT promotes answering the key question earlier, its journalistic equivalent underscores the desirability of answering later. When politicians who are thinking of running for President appear for interviews on news programs, viewers are again subjected to an odd form of MADT. The interviewer inevitably asks the politician whether he or she will run, and the prospective candidate usually offers a coy non-response.<sup>197</sup> Journalists may even preface this line of questioning in a manner that underscores its obligatory nature, as when John Patterson said to Senator Obama, "I'm pretty sure I know the answer, but I have to ask, because everyone has to ask this question now: Are you flat out ruling out a run in 2008?"<sup>198</sup> The goal of journalists here seems to be creating artificial drama.<sup>199</sup> The question is usually asked at a time when declaring one's candidacy is politically inopportune. It is not as though candidates who have decided to run for a higher office ever forget to announce their candidacy.

Sometimes, however, the candidate actually says that they are indeed running, jolting viewers who were expecting to encounter the Sunday morning punditry's peculiar form of kabuki. But this tends to occur with severe underdogs, especially those who have run and lost before.<sup>200</sup> For these candidates, a Q&A session on a national television program is about as much attention as they are ever going to get. As a result, the candidate who actually announces his candidacy for the Presidency on *Good Morning America* or *Meet the Press*, is likely to be giving a concession speech on the night of the New Hampshire primaries.

---

<sup>196</sup> See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 1, 91 (1989).

<sup>197</sup> See, e.g., Meet the Press Transcript, Feb. 18, 2007, available at 2007 WLNR 3242832 (Chuck Hagel refusing to answer Tim Russert's questions about whether he will seek the Republican nomination for President in 2008); Meet the Press Transcript, Feb. 11, 2007, available at 2007 WLNR 2723485 (recounting various exchanges between Tim Russert and Barack Obama about whether the latter would run for President, with initially definitive answers being replaced by non-responses as the presidential primaries drew nearer); ABC News Special Report Transcript, Dec. 10, 2010, available at 2010 WLNR 24493409 (Sarah Palin refusing to answer Barbara Walter's question about whether she will seek the Presidency in 2012). This routine is a specific example of a more general relationship between politicians and the professional news media, part of which involves apparently adversarial Q&A.

<sup>198</sup> John Patterson, *What's Changed for Obama in Last 2 Years*, CHI. DAILY HERALD, July 27, 2006, at 7, available at 2006 WL 24379014. To this query, the future President responded, "I was asked the day after the election to the Senate, when I was running for president. I said at that time I was not running for president. Nothing has changed my mind." *Id.*

<sup>199</sup> Judicial confirmation hearings in the Senate sometimes follow the same formula, with Senators asking questions they know the nominees will not answer about how the nominees would rule in particular cases.

<sup>200</sup> See, e.g., Good Morning America Transcript, May 13, 2011, available at 2011 WLNR 9594998 (in which Ron Paul responds to George Stephanopoulos that he will in fact seek the Presidency in 2012); Meet the Press Transcript, February 24, 2008, available at 2008 WLNR 3637693 (in which Ralph Nader responds to Tim Russert that he will be running for President again).



As these twin examples suggest, Must Ask, Don't Tell is a strange combination that we should not expect or want in many locations. MADT suggests a malfunction in our social systems, in which a group of questioners are obligated to demand information that a group of respondents are obligated to withhold. A number of interactive situations produce MADT combinations that are more or less tragic, even if fairly stable over time. Think about codes of silence among police officers who are committed to impeding misconduct investigations by internal affairs and others up the chain of command.<sup>201</sup> And think about "don't snitch" campaigns among those in the game of organized crime, as well as ordinary citizens who are committed to impeding criminal investigations by police officers.<sup>202</sup> In these settings of outright conflict, competing subgroups have developed competing sets of norms. To see the MADT combination, an observer must open her frame of reference to aggregate two different lines of social, moral, and legal authorities. Code of silence of situations are not far from spy versus spy international intrigue, which is unavoidable to a degree but hardly comforting. Nor are they terribly far from the relationship between investigative journalists seeking classified information and government officials sometimes resisting and sometimes disclosing.

As we have seen, U.S. law does not often embrace Don't Ask, Must Tell, either. But in that case, our best explanation involves law's difficulty in building the delicate trust relationships on which DAMT is often based. With MADT, law might be all too effective in signaling the absence of trust and the acceptability of open conflict. Of course, any market economy of significant scale will encompass significant differences in values, worldviews, and strategies. Some conflict and competition is unavoidable, and they can be a source of growth and innovation if regulated intelligently. This does not mean law ought to loudly endorse questions calling for information that should not be disclosed, but it does suggest that law and social norms will tolerate MADT in some situations. So we might look for MADT combinations where adversarial relationships are tolerated and where asymmetries in information and wit are accepted. Which brings us to lawyering.

## 2. *Civil Discovery*

Discovery in the United States sometimes entails voluminous requests for information and voluminous responses to those requests. In complex cases, where millions of (electronic) documents might change hands, lawyers frequently make mistakes, improperly producing attorney work product or privileged communications when those documents should have been withheld in accord with the client's interest. In some jurisdictions it is fair to characterize law's attitude toward the civil discovery of privileged documents in high-stakes cases as MADT.<sup>203</sup> Not all discovery rules have this character, obviously. Federal Rule of Civil Procedure 26(a)(1) creates a limited norm of "must tell even if not asked": parties are supposed to disclose automatically to each other certain information that is helpful, not harmful, to the disclosing

---

<sup>201</sup> See Jerome Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RES. 7 (2002).

<sup>202</sup> See ALEXANDRA NATAPOFF, SNITCHING 121-38 (2009) (asserting that don't-snitch norms originated with people actively involved in the drug trade and became a complaint from citizens and affected neighborhoods who objected to informants staying on the streets, but acknowledging more widespread campaigns).

<sup>203</sup> See Paula Schaefer, *Technology's Triple Threat to the Attorney-Client Privilege*, 2013 J. PROFESSIONAL LAW. 171, 178-80 (2013). In run-of-the-mill, lower stakes cases handled by solo practitioners and small firms, "may ask, don't tell" and "may ask, may tell" are more likely to prevail.

party's case.<sup>204</sup> More important, judicial personnel help manage civil discovery under a general rule that parties *must* answer each other's relevant questions. The discovery rules are, however, adversarial in key respects. Along with rules of professional responsibility and lawyers' economic incentives, if not the social-sanctioned backed norms of our profession, the civil discovery system often encourages adversarial MAMT behavior.<sup>205</sup>

From the perspective of the lawyer seeking discovery in a high-stakes case, "Must Ask" is the order of the day. As an agent of the client,<sup>206</sup> the attorney is ethically obligated to seek relevant documents that may help the client construct a case or learn information relevant to the causes of action, defenses, and damages at issue.<sup>207</sup> Lawyers are not charged with taking any measures to limit the scope of discovery in a manner that will reduce the risk of privileged documents improperly changing hands.<sup>208</sup> Rather, the responsibility for preventing leaks of privileged information is squarely on the shoulders of opposing counsel. Thus, from the perspective of the lawyer responding to a discovery request, "Don't Tell" is the imperative for privileged information and attorney work-product—unless the interests of their principal would be served by disclosure, of course, in which case the lawyer-agent should recommend not invoking it. Crudely speaking, each side fights for its own interest.

Of course lawyers do not always fulfill these roles. Interestingly, legal authorities deviate with respect to what ought to happen when a lawyer seeking discovery asks, opposing counsel improperly tells, and documents that should have been part of a privilege log instead find their way into the hands of opposing counsel. Under ABA Model Rule 4.4(b), an attorney who receives information that the attorney knows or reasonably should know to be privileged or work product has a duty to inform the disclosing party of this fact.<sup>209</sup> The improperly disclosing party may then seek a remedy under Federal Rule of Civil Procedure 26(b)(5)(B), which may require the return or destruction of inadvertently disclosed privileged or work product information.<sup>210</sup> But disagreement and ambiguity abound. Rule 4.4(b) has not been adopted by some jurisdictions.<sup>211</sup> Even where it applies, determining whether information was inadvertently sent may be a judgment call, one made by the receiving attorney against the background of her duty

---

<sup>204</sup> See FED. R. CIV. P. 26(a)(1)(A)(i)-(ii) (referring to certain items that a party "may use to support its claims or defenses, unless the use would be solely for impeachment"); see also *id.* 26(e)(1) (requiring updates). The rule is useless insofar as parties already have incentives to disclose helpful evidence to impress their adversaries and obtain a favorable settlement.

<sup>205</sup> Another partial exception is the duty to consider cost to the other side when formulating discovery requests. See FED. R. CIV. P. 26(g)(1)(B)(iii); see also *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 334-38 (E.D. Pa. 2012) (collecting cases imposing cost sharing on requesting parties).

<sup>206</sup> See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40-48, 76 (1989) (explaining competing conceptions of the proper lawyer role, though concluding that the officer-of-the-court conception is a small part of the enforced norms of professional conduct).

<sup>207</sup> See LEGAL ETHICS, LAW. DESK BK. PROF. RESP. § 1.2-3 (2013-2014 ed.).

<sup>208</sup> Lawyers might limit the scope of their discovery questions so as to mitigate the fees they will have to charge clients for reviewing the documents produced, or to comply with their Rule 26(g) duties. Privileged documents from the other side, though, are likely to be juicy enough so that it will almost inevitably be worth the client's time to review them once they have been produced.

<sup>209</sup> "Must Ask, Don't Tell, Must Tell"! The resulting 27-box matrix appears in an appendix. (Not really.)

<sup>210</sup> For a helpful discussion, see Nathan M. Crystal, *Inadvertent Production of Privileged Information in Discovery in Federal Court: The Need for Well-Drafted Clawback Agreements*, 64 S.C. L. REV. 581, 600-04 (2013).

<sup>211</sup> See Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 206-07 (2010).

to help her client.<sup>212</sup> There is then the related issue of whether the privilege has been waived for purposes of trial, and the federal rule is about equally gauzy. In federal proceedings, the improper disclosure of attorney-client privileged communications or work product does not constitute a waiver if “(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.”<sup>213</sup> Under this approach, the sloppy or passive lawyer who has unwittingly supplied his adversary with privileged communications has lost the privilege for his client and is potentially liable for malpractice, but the test for any of these elements is far from self-executing.

Working in combination, then, the rules provide cause for parties to include privileged and work product information within the ambit of their discovery requests. At minimum the rules offer no reason to take care that the other side’s privileged material stays secret. While most responding parties will invoke the privilege, some will fail to do so as a result of bad legal judgment or improper protocols, and this possibility is a pay-off for inclusive discovery requests that offer no friendly reminders about privilege risks.<sup>214</sup> There is always hope that a key privileged communication will slip through and be available as evidence at trial, thereby favorably changing the settlement dynamics. To be sure, some parties have tried to mitigate the risks of these sorts of mistakes through clawback agreements entered into at the beginning of discovery, but even these clawback agreements often given rise to thorny new legal disputes.<sup>215</sup>

We might wonder why law imposes minor burdens on the party seeking discovery only at the time it receives a document that it knows or should know to be privileged. Why not impose obligations on parties seeking discovery to frame their requests for documents to mitigate the risk of an inadvertent disclosure? A good initial response rests on information asymmetries: The party responding to discovery is the only party that sees all the pertinent documents, and so is in the best position to prevent these errors. At the time its discovery requests are formulated, the asking party is essentially flying blind. That said, while the lawyer producing the discovery is almost always going to be the cheapest-cost avoider, it does not necessarily follow that *all* of the burdens of avoiding the accident ought to fall on her. Beyond that, the failure of the states to coalesce around a unified solution to this costly problem reflects a clash of conflicting values. States want to clamp down on a kind of litigation gamesmanship that raises costs and contributes to acrimony, but at the end of the day judges also prefer having access to information that promotes accurate factfinding, and they may benefit from the existence of doctrines that penalize careless lawyering too.

---

<sup>212</sup> See *id.* at 603; see also Schaefer, *supra* note 203, at 179-80 (asserting that, even in states with a notification duty, there are “numerous cases in which the sending attorney first learned of the disclosure not through notice from opposing counsel, but at a deposition where the mistake was revealed for the first time”; and that receiving attorneys might think that disclosure can be so terribly careless as to be beyond “inadvertence”).

<sup>213</sup> FED. R. EVID. 502(b). Not all states follow the federal approach in state court litigation. See Leroy J. Tornquist & Christine R. Olson, *Why Oregon Should Adopt an Equivalent to Federal Rule of Evidence 502*, 46 WILLAMETTE L. REV. 539, 565-68 (2010).

<sup>214</sup> Contrast the footer on every email you receive from any lawyer on any topic, plus the long list of consumer protection disclosure requirements. See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW* (2014).

<sup>215</sup> For discussion, see Crystal, *supra* note 210, at 603-23.

### *E. Partially Permissive Rules*

As we noted in Part I.B.1 (May Ask, May Tell), purely permissive norms often fit the intuition that the individuals with questions and answers have a better sense of the trade-offs involved than government or the community. On the other hand, Part II.A (Don't Ask, Don't Tell) and Part II.C (Must Ask, Must Tell) offered reasons for Q&A rules to point in the same direction sometimes, either inhibiting or encouraging information flows beyond what unregulated parties might produce on their own. The least intuitive combinations discussed in Part II.B (Don't Ask, Must Tell) and Part II.D (Must Ask, Don't Tell) also occupy interesting locations in our legal and social life, but those spaces are sometimes small, sometimes difficult to defend, and sometimes unstable. This leaves one last set of combinations that deserves comment: “partially permissive rules.”

Q&A rules sometimes show a targeted regulatory interest, combining a one-sided permissive rule with a must or don't rule. As Figure 1 illustrated, each form of partially permissive rule exists in American law and society. The minor puzzle is why legal and social norms would not tilt all the way toward preventing or requiring both asking and telling, when total permissiveness is denied. Our analysis above suggests explanations in these spaces, too: Permissive norms often show confidence in the judgment of a questioner or respondent, but such confidence need not extend to every party involved. Partially permissive rules might be defended based on asymmetric regulatory risks and opportunities.<sup>216</sup> Here we will simplify the analysis of this complicated subject by focusing on legal rules and plausible explanations.

“Don't Ask, May Tell” examples often are linked to one-sided worries about the vulnerability of respondents to questioner power. Suspect *B* might have a right to remain silent in a custodial environment free from prying questions from officer *A*, but *B* need not continue to exercise that right. As well, employers cannot lawfully ask employees whether they support unionization; the query is perceived as one likely to intimidate workers.<sup>217</sup> Yet preventing employees from expressing union preferences would impede unionization deliberations by inhibiting worker-to-employer communication and worker-to-worker persuasion. Similar judgments probably are at work when antidiscrimination law regulates employer questions about religion, disability, criminal history, or other traits without regulating employee disclosures about those traits.<sup>218</sup> Such one-sided regulation will sometimes misfire via unraveling, as we have discussed,<sup>219</sup> or via statistical discrimination.<sup>220</sup>

---

<sup>216</sup> This thought can be connected to regulated markets more generally, as Daryl Levinson has helpfully suggested to us. Sometimes participants in the same market for goods and services are regulated differently with respect to related behavior. Rules of professional responsibility might prohibit lawyers from chasing ambulances, but injured people are free to chase lawyers. The cheapest cost avoider might effectively shoulder greater responsibility to prevent injuries than other people with whom she interacts, and not only by issuing warnings. Some of our commentary here might generalize, and lessons might be drawn from other markets. Given our focus in this Article, however, we leave those extensions to another day.

<sup>217</sup> See *Venture Indus., Inc. v. Int'l Union*, 330 N.L.R.B. 1133, 1138 (2000).

<sup>218</sup> See, e.g., Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893 (2014).

<sup>219</sup> See *supra* Part II.A.2.

<sup>220</sup> See, e.g., LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 142-46 (2011); Sonja B. Starr, *Do Ban the Box Laws Reduce Employment Barriers for Black Men?* available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2470395](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470395)> (unpublished April 2014 draft, noting preliminary findings).

“May Ask, Must Tell” also can arise from one-sided worries about power—this time the power of potential respondents. Sometimes a tip-off is the duty to tell being conditioned on getting a question. Under FOIA, person *A* gets to decide whether to be interested in certain government operations, while government agency *B* has a legal obligation to respond with certain categories of records upon request.<sup>221</sup> We can think of government as an agent of the people to account for the may and the must norms. Furthermore, the people’s diverse interests are not readily known before questions are posed, which also helps explain why telling is conditioned on asking.<sup>222</sup> Mandatory reporting statutes for suspected child abuse represent a distinct concern, by the way. Teachers, clergy, health care professionals, and child advocates have legal obligations to report suspected abuse to the state,<sup>223</sup> but the state generally does not ask mandatory reporters whether they have learned of any suspected abuse.<sup>224</sup> Perhaps we can trust the state to assess whether such queries require too much paperwork or will prompt mandatory reporters to hound children with questions, which could damage trust relationships between mandatory reporters and children.<sup>225</sup>

Other combinations may reflect concerns about asymmetric information and administrative convenience, yielding regulation of *A* or *B* but not both. “May Ask, Don’t Tell” pops up when home buyers are permitted to ask their real estate agents about the racial composition of a neighborhood, but the Fair Housing Act’s anti-steering rules at least arguably prohibit the real estate agent from answering such a question.<sup>226</sup> Somewhat similarly, home buyers are permitted to tell real estate agents about their desire to be proximate to a particular

---

<sup>221</sup> See *supra* note 68.

<sup>222</sup> Revealingly, the government’s duty to tell extends only to existing records otherwise within the scope of the statute. See 5 U.S.C. § 552 (2009); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975); *Samaha*, *supra* note 69, at 971-72 (highlighting limits on FOIA). There is no generally applicable statutory obligation to respond to questions that agency employees could answer with ease, let alone to use the kind of records covered by FOIA. The statute is a compromise, not a full implementation of a principal-agent model.

<sup>223</sup> See, e.g., 42 U.S.C. § 13031 (2014); CAL. PENAL CODE § 11166 (West 2014); MICH. COMP. LAWS ANN. § 722.623 (West 2009); MONT. CODE ANN. § 41-3-201 (West 2013); N.M. STAT. ANN. § 32A-4-3 (West 2014); 23 PA. CONS. STAT. ANN. § 6311 (West 2014); TEX. FAM. CODE ANN. § 261.101 (West 2013). In each instance, the mandated reporter’s duty is limited to reporting based on reasonable cause, and not extended to a duty to investigate. See also ILL. DEP’T OF CHILDREN & FAMILY SERVS., MANUAL FOR MANDATED REPORTERS (2014), [http://www.state.il.us/dcf/docs/CFS\\_1050-21\\_Mandated\\_Reporter\\_Manual.pdf](http://www.state.il.us/dcf/docs/CFS_1050-21_Mandated_Reporter_Manual.pdf).

<sup>224</sup> The statutory frameworks establishing mandatory reporting regimes generally contain no provisions requiring law enforcement officers to survey those subject to mandatory reporting requirements about whether they have any information that would give rise to a duty to report. Governmental duties under such statutes are typically limited to training mandatory reporters about their legal investigations and properly investigating an allegation once it is brought to the state’s attention. See, e.g. CAL. PENAL CODE § 1164 et seq. & § 11174.1(c).

<sup>225</sup> Compare our discussion in Part II.A.1 of the harm that suspicious questions about infidelity can do to a romantic relationship.

<sup>226</sup> See 42 U.S.C. § 3604 (2009). Compare *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 n.11 (E.D. Mich. 1975) (suggesting in dicta that responding to such questions is unlawful), *aff’d* 547 F.2d 1168 (6th Cir. 1977), with *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530-31 (7th Cir. 1990) (suggesting in dicta that responding to such questions is lawful if the conversation is initiated by the client). For the U.S. Department of Housing and Urban Development’s application of § 3604(a) to racial steering, see 24 C.F.R. § 100.70(a). The legal issue remains highly controversial, see Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1643-46 (2007), but real estate agents’ practice is evidently to resist answering such questions based on concerns about legal liability. See Teke Wiggin, *Steering 2.0? Data May Undermine Fair Housing Laws*, INMAN SELECT, April 29, 2014, available at <[www.inman.com/2014/04/29/steering-2-0-data-may-undermine-fair-housing-laws/](http://www.inman.com/2014/04/29/steering-2-0-data-may-undermine-fair-housing-laws/)> (visited Dec. 26, 2014).

faith's church or temple, but real estate agents should not broach the issue.<sup>227</sup> Here the law, on one reading, seeks to undermine voluntary racial and religious segregation by inhibiting information flows, and regulating the conduct of real estate agents will be much cheaper and more effective than regulating the conduct of unorganized and less-sophisticated customers. Information asymmetries concerning a contractual nondisclosure obligation can also yield May Ask, Don't Tell. Here the questioner is ignorant about the would-be-teller's contractual obligation, so putting the responsibility for avoiding the disclosure on the shoulders of the party that has assumed the obligation is both economically sensible and morally appealing.

Finally, partially permissive rules can have paternalistic justifications, when people believe *A* or *B* should be made to help *B* or *A*. Thus May Ask, Don't Tell norms can protect the questioner from information he only thinks he wants to hear. Legal immunity can arise for physicians who withhold information from patients for therapeutic reasons.<sup>228</sup> Social norms may dictate diversionary tactics when friends ask each other whether a haircut is appealing or whether an unreturnable outfit makes them look fat. Perhaps the aforementioned sexist norm against asking an adult woman her age had a similar origin: women would be tempted to lie in response to the question.<sup>229</sup>

On the other hand, "Must Ask, May Tell" can encourage *B* to consider using information that society values, and yet leave the ultimate decision to her. An example is police-offered *Miranda* warnings coupled with a question about the arrestee's understanding.<sup>230</sup> This is a nudge from *A* that might highlight *B*'s options. Similarly, "May Ask, Must Tell" can be a strategy to ensure that *A* receives information that she personally does not want. Here, telling duties will not be conditioned on anyone asking. Several states have enacted laws to compel abortion providers to disclose information<sup>231</sup> and, more recently, to display ultrasound images to women seeking abortions.<sup>232</sup> While North Carolina requires the patient to sign a form indicating whether she "has availed herself of the opportunity to view the image" of the fetus,<sup>233</sup> the act should not "be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description."<sup>234</sup> The law thus shies away from a *Clockwork Orange*-style "May Ask, Must Tell, Must Listen" regime, though

---

<sup>227</sup> See 24 C.F.R. § 100.70(a); 24 C.F.R. § 100.500.

<sup>228</sup> See *Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir. 1972); Stewart A. Laidlaw et al., *Genetic Testing and Human Subjects in Research*, 24 WHITTIER L. REV. 429, 462 (2002); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 945 n.184 (1994) (discussing a privilege for therapeutic nondisclosure in the United Kingdom).

<sup>229</sup> Concern for respondents was a rationale for prohibiting sworn trial testimony from criminal defendants in early American history. See *Nix v. Whiteside*, 475 U.S. 157, 164 (1986). Several reasons have been given, such as the presumably low reliability of the information and avoiding temptation to perjury and sin. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2645 & n.77, 2661-62 (1996). Obviously this regime fell apart.

<sup>230</sup> Whether informal pressures will lead a suspect to ignore or waive these rights is another important issue.

<sup>231</sup> See, e.g., *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 883 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.); ARK. CODE ANN. § 20-16-1303(d) (regarding mandatory disclosures by doctors about fetal heartbeat and the probability of carrying to term); see also *Edwards v. Beck*, 8 F. Supp. 3d 1099, 1101 (E.D. Ark. 2014) (upholding the Arkansas disclosure requirements).

<sup>232</sup> See Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2415-21 (2014).

<sup>233</sup> N.C. GEN. STAT. ANN. § 90.21-85(a)(2)-(5).

<sup>234</sup> *Id.* § 90.21-85(b).

it does require the abortion provider to display and describe the fetus’s anatomy even if the patient is plugging her ears and wearing a blindfold.<sup>235</sup>

Such must-tell duties result from an unusual combination of factors. A concern for third party harms (to fetuses) is an obvious ground for defense. Indeed North Carolina legislators presumably would prefer to prohibit most abortions but are barred by constitutional doctrine from doing so.<sup>236</sup> Hence they arrive at their second-best solution of mandating disclosure of information and images designed to dissuade women from obtaining abortions, which also might be characterized as informed consent. At the same time, paternalistic explanations also play a part. At minimum, the state wants the citizenry to reflect on the moral significance of their decision.<sup>237</sup> More insidiously, the state might feel that women are particularly susceptible to emotional manipulation, and that confronting an image of a fetus is particularly likely to pull at the heart strings of women.<sup>238</sup> In any case, the Fourth Circuit recently invalidated the Must Tell portion of North Carolina’s regime on First Amendment grounds,<sup>239</sup> moving the state toward “May Ask, May Tell”—where we began.

### III. THEMES, TRENDS, AND IMPLICATIONS

By now, we hope that readers are convinced that legal and social norms in a complex society with diverse relationships should generate every possible combination of asking and telling norms, though some combinations will appear more frequently and last longer than others, depending on the circumstances. In this Part, we provide more structure to our analysis by suggesting further themes for the patterns we see. One basis for sorting Q&A norms is whether or not they are meant to control subsequent use of the queried information. Sometimes use concerns are the best explanation and justification for regulating Q&A, sometimes not. We then show how current technological developments upset some of the traditional strategies for regulating asking and telling. Though the world we have described so far has been mostly binary, with *A* and *B* deciding whether to exchange information, we will suggest how the existence of multiple repositories for information both complicates the analysis and offers new opportunities for policymakers concerned about the quantum and quality of information flows.

#### *A. Use Rules*

In attempting to organize and rationalize a large number of examples, we might suggest a number of themes. For instance, we have indicated that many norms for asking and telling are defensible in terms of third (or second) party interests, and some on paternalistic concerns.

---

<sup>235</sup> See *Stuart v. Loomis*, 992 F. Supp. 2d 585, 602-03 (M.D.N.C. 2014). The law permits abortion providers to make blindfolds and noise-cancelling headphones available to patients who do not wish to hear the physician’s disclosures, though it does not require that they do so. See *id.* at 590.

<sup>236</sup> See, e.g., *Casey*, 505 U.S. at 876 (joint opinion) (endorsing an undue burden test).

<sup>237</sup> See *id.* at 605; *Stuart v. Camnitz*, \_\_\_ F.3d \_\_\_, 2014 WL 7237744 (4th Cir. Dec. 22, 2014), at \*4 (“The state freely admits that the purpose and anticipated effect of the Display of Real-Time View Requirement is to convince women seeking abortions to change their minds or reassess their decisions.”).

<sup>238</sup> See Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. Rev. 351, 396-97 (2008) (suggesting this objective and that such an ultrasound requirement is “less an appeal to reason than an attempt to overpower it”).

<sup>239</sup> See *Stuart*, 2014 WL 7237744, at \*10-13. *But see* *Texas Med. Providers Performing Abortion Services v. Lakey*, 667 F.3d 570, 577-80 (5th Cir. 2012) (upholding similar regulations against a First Amendment challenge).

Likewise, we might try to understand combinations of Q&A rules by assuming optimistically that social and legal norms tend to be efficient or welfare-maximizing. Alternatively, one could assume that social and legal norms cater to the interests of the powerful and the mainstream. Each of these ideas is useful in developing provisional positive and normative theories for any legal or social rule, including those governing the pushing and pulling of information. A more targeted principle for sorting our examples involves the relationship between information disclosure and information use. This relationship might prove critical to understanding which combination of Q&A norms is plausibly best and perhaps why a legal and social system adopts particular norms.

Two of our extreme asking-and-telling combinations are readily defended by use concerns, even if in part. DADT becomes a plausible combination of silencing norms when the goal is to prevent the information in question from influencing decisions. Employment discrimination laws in conjunction with various social norms reinforce commitments to prevent adverse decisions based on protected traits; and the U.S. military's abandoned and severely compromised DADT policy was an indication that policy makers had not coalesced around a don't use norm. By the same token, MAMT becomes plausible when the goal is instead to ensure that decisions are based on the information in question. The most common examples involve restricted products and labor markets, in which economic incentives would produce more deals than policymakers will tolerate; and we analyzed interesting illustrations involving background checks and income taxes. One might be tempted to generalize that any combination involving a "Must" or "Don't" indicates concern about information use.

Many more justifications for regulating Q&A are apparent in our analysis, however, to say nothing of the constellation of forces responsible for establishing these norms as a positive matter. Go no further than personal and contractual duties of confidentiality. The resulting don't-tell obligations may not have anything to do with norms against others using the confidential information, as opposed to encouraging reliance on agreements and generating safe spaces for honest discussion, for instance. So, too, for don't-ask rules. Most people do not want law enforcement to use every available technology and interrogation technique to identify law-breaking, but this position on police inquiries does not suggest that the incriminating information itself should be off-limits in a criminal trial if gathered in an acceptable manner. Questions can be perfectly appropriate in terms of subject matter yet objectionably overbearing or coercive, whether in police custody or employment settings. Gentle questioning might even be a way of ensuring reliable answers. In addition, we have observed that direct questions can threaten trust relationships or simply hurt feelings, regardless of whether the information should be used in a subsequent decision. Recall our discussions of child abuse reporting<sup>240</sup> and *Tarasoff* duties,<sup>241</sup> for example. Moreover, norms governing asking or telling come with a variety of costs, including information losses and possible information overloads. No one can hope to deploy a single variable, use or otherwise, to fully explain or justify the range of combinations that we have examined.

In this spirit of subtlety, return now to our other two corner combinations: use norms are not persuasive explanations or defenses for either DAMT or MADT. MADT in the form of a code of silence is the product of warring authorities, essentially ruling out the possibility of a unified use norm to explain or justify the combination. Civil discovery clashes similarly result

---

<sup>240</sup> See *supra* text accompanying note 223.

<sup>241</sup> See *supra* text accompanying note 165.



from competing obligations to competing principals, and suggest basically nothing about what the finders of fact should do with the underlying information. As for DAMT, conventional norms for infidelity reflect a nuanced view that, while adultery is unethical or immoral for the couple, questioning the loyalty of one's spouse without hard proof is also problematic. After a spouse learns of a partner's infidelity, acting on this information (including judging the partner harshly, demanding honest apologies, separating, and filing for divorce) is appropriate according to mainstream values. One cannot easily derive the use rule from the asking and telling rules, which point in opposite directions. On the one hand, the current shift toward finessing the DAMT norm by asking third parties whether one's spouse is faithful—searching web browser history or credit card bills, secretly pursuing emails and text messages on a partner's smart phone, and so on—easily could be unstable, an artifact of an era where technology for detecting snooping have not caught up with snooping tools in the mass consumer marketplace.<sup>242</sup> On the other hand, when A asks C instead of B, A at least avoids the risk of personal insult and trust-defying accusation, while sometimes relieving C of a felt inhibition about bearing bad news.

This last point indicates a payoff for the nuances surrounding use norms. Regardless of how the considerations net out for suspected infidelity and other situations, the rapid expansion of ask-C opportunities is an occasion to stop and think hard: Exactly why do and should we have any given combination of asking and telling norms? Use norms plainly cannot explain everything. But knowing whether use norms are important allows us to make progress in evaluating contemporary asking-and-telling norms. The contemporary academic literature on disclosure seems focused on the benefits from proper use of disclosed information and the likelihood of nonuse or misuse, although scholars worry about the costs of disclosure as well.<sup>243</sup> Use considerations do matter often, but they provide little help in comprehending some combinations of asking and telling rules. One also needs to consider power dynamics, expectations in trust relationships, subtle forms of discrimination, agency problems, and the pathologies of factional warfare. Understanding the relationship between asking and telling is more complicated than understanding telling in isolation.

### B. Beyond Q&A

We are writing at an odd moment. In 2015, the United States and, to a lesser degree, other industrialized countries seem to be embracing Big Data—the combination of gigantic data sets with analytics designed to reveal patterns that might predict future behavior. Feeding the developing algorithms is a stream of information supplied via voluntary web postings, commercial transactions, and high-tech surveillance in public places and work spaces that was unimaginable a generation ago.<sup>244</sup> The United States is in the midst of a “Reputation Revolution,” where it is becoming easier for firms, governments, and ordinary people to learn a great many facts about any citizen without ever asking that person a direct question.<sup>245</sup> As a result, maybe the traditional form of asking and telling is becoming passé. What are the

---

<sup>242</sup> The potential elimination of this longstanding asymmetry is a theme developed in DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998).

<sup>243</sup> See, e.g., BEN-SHAHAR & SCHNEIDER, *supra* note 214, at 43-93, 104-06, 169-82.

<sup>244</sup> See Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 *WAKE FOREST L. REV.* 393, 397-403 (2014); Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 *WASH. L. REV.* 35, 38-42 (2014).

<sup>245</sup> See STRAHILEVITZ, *supra* note 220, at 127-33.

implications for social norms and legal regimes when *A* can ask *C* (or watch *B* instead of asking *B*) and get the same or better information more easily than ever before?

Suppose two potential student roommates, Alan and Bob, are trying to assess each other's compatibility. It is likely that they will have a conversation with one another, in person or virtually. But it is equally likely that they will Google each other, examine each other's Facebook pages and Twitter feeds, interrogate mutual acquaintances, and generally obtain more information from third parties than they will acquire directly from each other. Things would have been different a decade ago, and maybe they will be different a decade from now. But for the time being, this reliance on third parties is widespread and significant. To some degree, reliance on third parties may render social norms or laws that limit asking or telling obsolete. Observers are sometimes in the habit of concluding that new technology tends to make a regulation ineffective, perhaps especially when the traditional rules were legally questionable anyway.

An automatic shift to “May Ask *C*, *C* May Tell” would be too quick, however. Even if the old rules for *A* and *B* will no longer inhibit information flows, the old reasons for those rules might still apply. Alan's asking Bob's friends about Bob's sexuality, academic aptitude, or neatness may be no less gauche than Alan asking Bob these questions directly. And while formal law likely has little effect on the sorts of disclosures that Bob's friends would make to Alan, social norms might fill the gap. Moreover, relevant provisions like the Fair Credit Reporting Act,<sup>246</sup> privacy tort law,<sup>247</sup> or the Electronic Communications Privacy Act<sup>248</sup> will substantially affect which facts about Bob Apple, Verizon, or Bank of America is willing to share with Alan. If the old norms that regulated Q&A between Alan and Bob were based on use concerns, those concerns easily can carry forward to ask *C* situations, albeit with updated and imperfect regulatory tools. On the other hand, if the old norms were only based on, say, protecting people like Bob from getting their feelings hurt when they face direct questions about hygiene—and protecting people like Alan from inadvertently insulting others—then there might be no reason for controlling ask-*C* efforts, whether high or low tech.

A very different response to ask *C* opportunities is to move toward use rules. Society might let information flow freely but constrain Alan's ability to use it. As Scott Peppet explains, these “Don't Use” rules arise in a number of contexts. To borrow one example he provides, the Genetic Information Nondiscrimination Act (GINA) was enacted by Congress in 2008 to prevent the use of genetic information by insurers.<sup>249</sup> Preventing an orchestra from determining the gender of someone auditioning to join it and preventing the orchestra from making the performer's gender relevant to its decision about which musician to select are alternative mechanisms to achieve the same ends. Which mechanism is better depends on various factors, but where the commitment to stamp out a vice (like gender discrimination in classical music) is strong enough, it may be prudent to combine both strategies.<sup>250</sup> As we saw above,<sup>251</sup> civil discovery rules similarly work together to govern both the circumstances under which information should be exchanged (privileged or work product) and the appropriate uses when a

---

<sup>246</sup> 15 U.S.C. § 1681 et seq.

<sup>247</sup> See, e.g., Restatement (Second) of Torts § 652.

<sup>248</sup> 18 U.S.C. §§ 2510-2522.

<sup>249</sup> See Peppet, *supra* note 5, at 1200 (citing Pub. L. No. 110-233, §§ 101 et seq., 122 Stat. 881, 883-904).

<sup>250</sup> Cf. STRAHILEVITZ, *supra* note 220, at 159 (“[W]e can achieve more with four tools than we can with three”).

<sup>251</sup> See *supra* Part II.D.2.

privileged document is accidentally disclosed (admissible or inadmissible). The connection between legal restrictions on obtaining information and restrictions on using the information obtained was noted long ago.<sup>252</sup>

Of course, the trade-offs between Q&A norms and use norms are changing. Many people take for granted that determining whether a decision maker has accessed information is usually easier than determining whether she has used that information to make a decision. Access and receipt often can be proven objectively, but decisionmaking may be opaque enough to leave an external observer relying on the decision maker's statements about what was in her head plus the observer's own hunches about the decision maker's credibility. These generalizations now deserve challenge, however. As more economic activity moves online and finds its way into datasets, the same Big Databases that are used to identify behavioral patterns and generate predictions can also be used to track anomalies in hiring, termination, promotion, evaluations, and the like. The secretly racist boss or police officer can be revealed—algorithmically—provided the system knows the races of those subject to his discretion and can compare him with unbiased decision makers who interact with similar populations.<sup>253</sup> For most of our history, the collection of information has been more transparent than its use. This made restricting collection the most practical route available for legal or social reformers concerned with privacy, power, or other interests. But as collection (via third parties or surveillance) has become less transparent, use has become more so, at least in some contexts. This dynamic, combined with American exceptionalism where free speech is concerned, suggests that use restrictions will take on increased importance to support old commitments under new circumstances.

There will even be instances in which people will value nondisclosure so much that even seemingly airtight combinations of “DADTDU”<sup>254</sup> will be deemed inadequate. This situation describes the law in at least fourteen states with respect to trade secrets.<sup>255</sup> In its famous 1995 opinion in *PepsiCo, Inc. v. Redmond*, the Seventh Circuit considered claims against William Redmond, a former Pepsi manager. He had defected to the Quaker Oats Company (which owned Gatorade, Snapple, and other beverages) while he still possessed trade secret knowledge about PepsiCo's pricing and marketing plans.<sup>256</sup> Embracing the doctrine of “inevitable disclosure,” the court held that Redmond should be enjoined from working for Quaker until the inside knowledge he had about Pepsi's pricing and marketing strategies for the coming year became stale.<sup>257</sup> The injunction would survive notwithstanding Redmond's agreeing to disclose none of Pepsi's secrets to Quaker and Quaker's promises not to use any of Redmond's confidential information.<sup>258</sup> As the court put it, “PepsiCo finds itself in the position of a coach, one of whose

---

<sup>252</sup> See, e.g., Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions under the Fourth Amendment*, 74 TEX. L. REV. 49, 51 (1995) (arguing that “the reasonableness of a seizure extends to the uses that law enforcement authorities make of property and information even after a lawful seizure”); see also BAIRD ET AL., *supra* note 5, at 91-93.

<sup>253</sup> See Lior Jacob Strahilevitz, “How's My Driving?” for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1734 (2006).

<sup>254</sup> “Don't Ask, Don't Tell, Don't Use.”

<sup>255</sup> See Barry L. Cohen, *The Current Status of the Inevitable Disclosure Doctrine*, 3 No. 2 LANDSLIDE, at 40, 43 (Nov./Dec. 2010) (“Seven states have rejected outright the use of the inevitable disclosure doctrine. Fourteen states have applied the inevitable disclosure doctrine on at least one occasion.”).

<sup>256</sup> 54 F.3d 1262 (7th Cir. 1995).

<sup>257</sup> *Id.* at 1272.

<sup>258</sup> See *id.* at 1270.

players has left, playbook in hand, to join the opposing team before the big game.”<sup>259</sup> The court said it was inevitable that Redmond would use Pepsi’s confidential information in his capacity as a manager for a company in direct competition with Pepsi, and in light of this inevitability the only solution was to prevent him from working there.<sup>260</sup>

It is initially hard to imagine other instances in which confidentiality is treated as sufficiently important to justify not only restrictions on asking, restrictions on telling, and restrictions on using, but also restrictions on the establishment of relationships themselves. Yet the trade secrets example is not unique. Law firms routinely are required to turn away lucrative work because of conflicts of interest that could arise with respect to the firm’s existing clients. A well-enforced DADT rule presumably would build in sufficient precautions to prevent inappropriate knowledge spillovers from affecting the work that lawyers do. But law instead prohibits the work from flowing to the conflicted firm in the absence of the affected party’s consent.<sup>261</sup> Or take security clearances. For people with high-level clearances, telling is forbidden, as are uses outside of one’s capacity as a government employee. For those deemed non-trustworthy, a variant of *PepsiCo* is implemented: applicants will not be permitted to work for the agency at all if their trustworthiness cannot be established *ex ante*.<sup>262</sup>

Finally, there are similar implications for “*Must Ask*” norms. Increasing opportunities for ask-*C* solutions can increase the plausibility of duties to gather information from third parties, when a must-ask or must-tell norm is based on a desire to ensure that the information is used in decision-making. Direct Q&A is often encumbered by reliability problems associated with self-reporting in any event. Querying third parties and databases sometimes is a more reliable information-gathering strategy, and it is becoming faster and cheaper every year. Consider what the IRS does when a known income earner fails to file a tax return. The agency does not always give up. Drawing on information already gathered in federal government data banks, the IRS may effectively fill out a tax return for the non-filer and then pursue collection remedies.<sup>263</sup> We can imagine a similar practice of investigation becoming a social or legal duty of employers and sellers in restricted markets, or maybe the duty of their government regulators, where the politics are conducive and where efficient screening can be done by accessing databases. State law causes of action for negligent hiring already create such duties in some jurisdictions.<sup>264</sup> As with

---

<sup>259</sup> *Id.*

<sup>260</sup> *See id.* at 1271.

<sup>261</sup> *See, e.g.,* Roy D. Mercer, LLC v. Reynolds, 292 P.3d 466, 475-76 (N.M. 2012); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1286-87 (Pa. 1992).

<sup>262</sup> This realm of American law notably puts no restrictions on journalists’ ability to ask questions about matters that are classified, and First Amendment doctrine limits the ability of the government to sanction the publication of information that is disclosed in violation of a “Don’t Tell” duty. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989); *Pentagon Papers*, National Archives, <http://www.archives.gov/research/pentagon-papers/> (last visited June 28, 2014). Don’t Associate rules might be a predictable substitute when Don’t Ask and Don’t Tell are hobbled, legally or technologically. Classified information leaked by Edward Snowden, who was a government contractor apparently unaffected by any culture of government loyalty among long-term officials, indicates the importance and imperfections of *ex ante* screening. But Big Data will help here, too.

<sup>263</sup> This practice shows up in litigated cases in which (non)taxpayers continue to resist tax assessments. *See, e.g.,* United States v. Silkman, 220 F.3d 935 (8th Cir. 2000) (holding taxpayer liable for substitute return determined by the IRS when taxpayer failed to file a return and disclose relevant information).

<sup>264</sup> *See, e.g.,* Underberg v. Southern Alarm, Inc., 643 S.E.2d 374, 376-78 (Ga. App. 2007) (subjecting an alarm company to potential liability where it failed to conduct a background check on an independent contractor who kidnapped the plaintiff, a client of the company).

don't-ask norms, however, must-ask and must-tell norms are not always built on commitments regarding the use of information. So, again, perhaps no change in practices will be warranted if the reason for mandating questions is, for instance, to convey respect for another person's judgment without demanding that it be exercised in a particular direction.

### C. Reform

The norms we introduce in this Article are sticky, but they can change over time. Christian wedding officiants no longer crowdsource the question of whether nuptials should proceed, as we noted above.<sup>265</sup> The new norm is DAMT, at least where there is a close enough relationship between the party possessing explosive information and either member of the couple. This shift makes sense, given the infrequency with which anyone attending a wedding accepted the officiant's invitation to speak against the union's wisdom. Shifting the conversation initiation duty to the party with the information likely has the further effect of promoting early disclosure, so that a doomed wedding could be called off, ideally before the wedding invitations are sent, thereby keeping a lid on the gossip-worthy turn of events and saving nuptial-related expenditures. The increased availability of ask-C options might also have empowered brides and grooms to do due diligence on each other, thereby reducing the probability that skeletons will be hiding in the closets of his or her intended.<sup>266</sup> On balance, the norms appear to have changed for the better.

The law of Q&A changes, too, in major and minor ways. Over a number of years our criminal trial system shifted hard from "Don't Ask, Don't Tell," which prohibited criminal defendants from testifying, to "May Ask, May Tell," which left the matter to the defendant's option.<sup>267</sup> Our first extreme example in this Article—the U.S. military's limited DADT policy—also crumbled as use norms shifted and turned into something like "Don't Ask, May Tell." Don't-tell rules for gays in the military have gone the way of must-tell rules governing Communist Party membership,<sup>268</sup> largely in response to changing popular attitudes about morality and the seriousness of perceived threats to social stability. In a pro-regulatory direction, consider the developing restrictions on employer questions to support anti-discrimination goals. And, to add a recent illustration, consider Transportation Security Administration (TSA) airport screening. TSA used to require that every boarding passenger be asked whether "anyone unknown to you has asked you to carry an item onto this flight" and whether "any of the items you are traveling with [have] been out of your immediate control since the time you packed them."<sup>269</sup> The questions were implemented after the bombing of Pan Am flight 103 and two near misses where terrorists had apparently deceived their girlfriends into carrying explosives hidden

---

<sup>265</sup> See *supra* text accompanying note 194.

<sup>266</sup> See *Phillips v. Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002) (holding that a suspicious mother did not have a right under the Fair Credit Reporting Act to obtain credit information about her daughter's fiancé, but reserving the question of whether the daughter might have done so without violating the statute based on the possibility that a marriage is a "consumer transaction" under section 1681b(a)(3) of the statute), *abrogated on other grounds by Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

<sup>267</sup> See *supra* note 229 and accompanying text.

<sup>268</sup> See *Barenblatt v. United States*, 360 U.S. 109 (1959) (upholding a contempt conviction based on Barenblatt's refusal to answer a congressional committee's questions about whether he is a member of the Communist Party).

<sup>269</sup> Tom McCann, *2 Questions No Longer Part of Airport Routine*, CHI. TRIB., Aug. 30, 2002, at 1.

in their suitcases onto planes.<sup>270</sup> The questions were eliminated in 2002, after inefficiency complaints built up and evidence of terrorism prevention failed to materialize.<sup>271</sup> Air travelers no longer get reminders of such residual risks via repetitious questioning,<sup>272</sup> but TSA insisted that it would continue to raise awareness through automated announcements in airports.<sup>273</sup> It does not appear that airline employees ever exercise discretion to ask such questions today. Perhaps the concern is that letting employees ask the question of some customers would reveal an unsavory form of racial profiling, such that asking everyone and asking no one are the most palatable possibilities.<sup>274</sup>

Our framework for analyzing Q&A norms should be illuminating in several ways, one of them being intelligent and critical evaluation of existing policy well beyond a TSA choice to announce instead of ask. Before concluding, we will sketch a few other instances in which reasonable people may conclude that society could do better by altering particular asking and telling rules.

One straightforward suggestion involves employment discrimination law. We have seen that the don't-use norms in antidiscrimination laws are not always backed up by legal restrictions on asking, let alone telling.<sup>275</sup> Although our sense is that there is relatively little unraveling in employment markets with respect to issues like planned pregnancies that may require a job applicant to take parental leave, the behavior may be sufficiently troubling to warrant a DADT legal rule. Particularly in small companies with generous parental leave policies, extended leaves can impose real short-term costs on a firm and on co-workers. If a job seeker credibly articulates a lack of interest in becoming a parent any time soon, a boss may have a hard time giving this information no weight, even though giving it any weight would constitute unlawful discrimination.<sup>276</sup> For the same reason that some orchestras have musicians audition behind screens that prevent those evaluating the music from learning the performer's race, gender, or age, a firm might demonstrate its commitment to gender equality in hiring by prohibiting applicants from saying anything about their parenting plans. Law can reinforce such commitments, and it can help deter employers from exploiting burgeoning ask-C options. Such extensions of law would follow ongoing concern about certain topics being foregrounded in the employment context, importantly motivated by don't-use norms.

A very different recommendation would liberalize Q&A in the workplace and rely more heavily on don't-use norms. As we mentioned above, employer ability to work around don't ask norms is increasing along with observers' ability to identify possible instances of discriminatory decisions. Big Data and pervasive surveillance can be and is directed at many targets, some of

---

<sup>270</sup> *See id.*

<sup>271</sup> *See* Marcella Bombardieri, *Baggage Questions Unanswered: Check-In Mantra Worked, Some Say*, BOSTON GLOBE, Sep. 2, 2002, at B1.

<sup>272</sup> *See id.* (raising this concern).

<sup>273</sup> *See* McCann, *supra* note 269.

<sup>274</sup> For further discussion, see *infra* note 283.

<sup>275</sup> *See supra* Part II.B.2.

<sup>276</sup> Housing discrimination is similar but trickier. A very strong commitment to ending residential racial segregation might justify supplementing "Don't Tell" anti-steering rules with "Don't Ask" restrictions for home-buyers. But informing home buyers of their "Don't Ask" obligations could backfire by stimulating their interest in the forbidden fruit of neighborhood demographic information, which they can obtain lawfully via the Internet and other ask-C portals. *See* Wiggin, *supra* note 226.

them relatively powerful. If the enforcement of don't-use norms in employment becomes reliable enough, then important good can be accomplished by opening up lines of questions and responses on heretofore legally sensitive subjects. Regulating Q&A certainly can be useful, but, as we observed at the outset, that strategy entails information losses. Questions can be the simplest way to avoid mutual misunderstanding about each other's abilities, values, and other traits, without depending on guesswork or third-party estimations. Co-workers might be more satisfied with their jobs when they feel free to discuss a variety of topics at the water cooler, and they might better understand how to adjust standard operating procedures so that the firm flourishes economically. This openness might be an unintended side effect of some courts tinkering with a must-ask norm in ADA cases,<sup>277</sup> contrary to the suggestion in *Abercrombie* that such questions are off limits until the employee raises the issue.<sup>278</sup> An employer might have a duty to ask if the employer suspects that an employee might benefit from an accommodation. A clear legal duty would dampen litigation risk from initiating productive conversations, as well as any bad signal that an employee might see in discretionary questioning about disability or religion. Compelled questions can have these effects.

Next, recall our discussion of the prevalence of MADT in civil discovery and its decision to impose few duties on the party seeking discovery to reduce the probability that privileged information will be erroneously produced.<sup>279</sup> At a macro-level, the American legal system's comfort with an unusual MADT regime in this setting reflects the generally adversarial character of the litigation system that we have built, tempered by modest efforts to preserve a degree of gentility and efficiency. Given what we wrote earlier about high-stakes discovery, the following subversive question now seems natural: Does litigation have to be that way? Can we imagine a system closer to trust-based DAMT than adversarial MADT? After all, the design of our litigation system has never been set in stone and always has been a mixture of adversarial, inquisitorial, managerial, and other models.<sup>280</sup> Consider one alternative. At the outset of litigation, the lawyer for party *A* would stand up and say, "Here are the strong points of our case and here are all the reasons why my own client's case is weak and the other side should win." The lawyer for party *B* would then stand up and do likewise. Having heard a candid assessment of the strengths and weaknesses of each party's case, the lawyers could then presumably hammer out a settlement reflecting the relative positions of each party. If the rules are effective, asking becomes a pointless waste of client money. Perfect telling obviates the need to ask. It sounds dreamy,<sup>281</sup> but there is an obvious problem of incentives. Lawyers will be rewarded when their clients achieve good results, and if there is no one auditing the veracity of a lawyer's confessions

---

<sup>277</sup> See *supra* note 161.

<sup>278</sup> See *E.E.O.C. v. Abercrombie & Fitch Stores*, 731 F.3d 1106, 1134-35 (10th Cir. 2013) (involving religion), *cert. granted*, 83 U.S.L.W. 3089 (Oct. 2, 2014); *supra* note 136.

<sup>279</sup> See *supra* Part II.E.2.

<sup>280</sup> See, e.g., Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2004) (arguing that the problems of today's largely adversarial system could be resolved by emphasizing our quasi-inquisitorial equity tradition); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (claiming that, in practice, the American litigation system is more akin to a non-adversarial administrative system of justice than an adversarial model).

<sup>281</sup> Perhaps some plea bargaining negotiations between prosecutors and public defenders who see each other every day can be characterized by this level of candor and professionalism.

about his client’s strengths and weaknesses, then there will be an overwhelming temptation to shade the truth in a manner that makes the client’s case look stronger than it is.

And yet in the highly adversarial context of criminal discovery, the *Brady* doctrine requires prosecutors to hand over exculpatory or impeachment evidence to defense counsel.<sup>282</sup> The failure to do so may result in an acquittal. What seems unrealistic on the civil side is constitutionally compulsory on one side of the criminal context, where the prosecutor has immense power over the accused as well as public responsibilities.<sup>283</sup> The duty to avoid asking questions that unduly risk prompting mistaken disclosures by the other side in civil litigation might be less radical than the government’s must-tell duty to disclose information adverse to its prospects for conviction. Consider then the following modest reform: Litigation in which the government is seeking substantial civil penalties against firms or individuals should be structured so that the state has *Brady*-style must tell obligations.<sup>284</sup> More ambitiously, we can imagine a sufficiently robust auditing mechanism that could make DAMT work for all civil discovery. Suppose that in one of every twenty cases, an inspector general assessed the veracity of a lawyer’s representations about his client’s case. This auditor would be entitled to see everything that the lawyer saw and to second guess every characterization. Penalties for shading the truth could be as severe as necessary. Conceivably this would be an improvement over the status quo, although the proposal admittedly is not clearly compatible with the interests of those invested in the existing system.

To canvass another domain for possible reform, one might worry that while the Freedom of Information Act does an adequate job of ensuring the transparency of shallow government secrets, the program breaks down when it comes to deep secrets—the unknown unknowns of state conduct.<sup>285</sup> For this reason, commentators have proposed second-order disclosure requirements, whereby the executive must disclose information to Congress or the public in

---

<sup>282</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963); cf. 18 U.S.C. § 3500 (restricting defendant access to witness statements to the government before and after they testify).

<sup>283</sup> In the *Brady* context, one commentator recently suggested going further. In Jason Kreag’s view, *Brady*’s structure (which we characterize as “May Ask, Must Tell”) is inadequate to protect the rights of criminal defendants; prosecutors too often ignore their disclosure obligations. See Jason Kreag, *The Brady Colloquy*, 67 STAN. L. REV. ONLINE 47 (2014). Although he does not use this terminology, Kreag winds up proposing something close to a MAMT regime to govern *Brady*—courts would as a matter of course ask a series of questions to prosecutors in open court to ensure that they had complied with their *Brady* obligations. See *id.* at 49-57. In his discussion of the costs and benefits of his proposal, Kreag hints at one of the broader themes that we have explored herein. Compare *id.* at 56 (“[S]ome prosecutors might be insulted by having to answer these or similar questions from the court, believing that the questions themselves amount to an accusation.”), with text accompanying notes 144-154 (discussing the same dynamics in the context of personal relationships) and text accompanying note 225 (discussing those dynamics in the context of relationships between children and adult authority figures). It is hard to make sense of the hurt feelings concern in a MAMT context, however. If spouses were legally obligated to ask their partners whether they had been faithful during the previous week, and everybody complied with the law, no rational person would hold a grudge about the question being posed. Indeed, the avoidance of suspicious “singling out” presents an important argument for compulsory asking regimes. See *supra* text accompanying note 274.

<sup>284</sup> See Justin Goetz, Note, *Holding Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure*, 95 MINN. L. REV. 1424, 1428-45 (2011). On the phenomenon of corporate civil liability, see Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014); A *Mammoth Guilt Trip: Corporate America is Finding it Ever Harder to Stay on the Right Side of the Law*, ECONOMIST, Aug. 30, 2014.

<sup>285</sup> See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 121 (1996); Samaha, *supra* note 69, at 920 n.41, 948.



order to ensure that critical programs' existence is not kept secret from people who have oversight responsibilities but lack the creativity to anticipate that such programs have been implemented.<sup>286</sup> The effect of these executive disclosure requirements, which have been implemented in a few domains,<sup>287</sup> is to help ensure that the government's telling is not made contingent on anyone's asking.

Finally, in exploring reform options, the universe is not limited to policies that already combine asking and telling regulations. Rather, readers might identify any information flow problem that concerns them and then ask how different combinations of asking and telling rules might address it. There are countless such problems in society, but let us use gender pay disparities for illustration. One significant contributor to the problem of pay disparity is that men are more likely than women to initiate negotiations regarding raises.<sup>288</sup> Valuable recent scholarship proposes using disclosure strategies to counteract the pay gap.<sup>289</sup> But some research suggests that men generally ask to make more than their peers are making and women systematically ask to make the same salary as peers.<sup>290</sup> Disclosure will not counteract that dynamic; other mechanisms could. Perhaps pursuant to a consent decree, a firm found liable for pay discrimination might implement a gender-sensitive regime of existing salary transparency: DAMT for female employees and DADT for male workers. Thus, during annual performance reviews women (but not men) would hear what their peers are earning, and all parties would be prohibited from asking about salary information to ameliorate the disparities that stem from men's disproportionate tendency to solicit salary information as a precursor to salary negotiations. The evidence suggests that, once armed with information about peer salaries, women would seek pay that brings them closely into line with what male peers are earning.<sup>291</sup> Such a regime might achieve the same egalitarian results as an alternative remedy, such as ongoing judicial monitoring of male and female salaries, at a much lower cost, given the difficulty courts and other outside monitors have in determining whether any particular employees of a firm deserve the same pay.

Readers may disagree that these reforms would be desirable, which is fine. Our goal here is not to promote any particular set of changes. Rather, by highlighting the relationship between asking and telling, we want to encourage readers to identify their own examples of policies and norms that are currently situated in questionable boxes. Structured thinking about asking and telling in conjunction can open up a host of controversial and interesting possibilities.

---

<sup>286</sup> See, e.g., David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 326-33 (2010).

<sup>287</sup> See *id.*

<sup>288</sup> See Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Field Experiment*, NBER Working Paper 18511 (Nov. 2012).

<sup>289</sup> See, e.g., Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951 (2011); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011).

<sup>290</sup> Lisa A. Barron, *Ask and You Shall Receive? Gender Differences in Negotiations' Beliefs About Requests for a Higher Salary*, 56 HUMAN RELATIONS 635, 643-44 (2003).

<sup>291</sup> Cf. Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 PSYCH. WOMEN Q. 65, 72-73 (2001) (reviewing social science evidence suggesting that, when women discover they are underpaid compared to peers, they promptly began requesting higher salaries).

## CONCLUSION

There has been virtually no legal scholarship on the dynamic relationship between asking and telling rules, which are two building blocks for human relationships. We are interested in moving beyond monologues. We want to understand *conversations* involving asking and telling, and the various constraints that legal and social systems place on them. A skeptic might wonder whether combining the study of asking and telling rules yields insights that looking at them in isolation would not. This Article shows that the answer is yes. Questions are a special device for information collection embedded within an interactive social practice involving the exchange of information. Lawyers of all people should understand that the process of information revelation is no less important than the consequences of information revelation. Regulating the process of asking and telling influences the substantive outcomes of conversations. Perhaps more surprisingly, such regulation can change the preferences and relationships of the conversation participants. Moreover, regulation of Q&A may be driven by goals apart from the proper use of information. So getting the disclosure rules exactly right, which is not really possible, is only part of the challenge. In any event, if we look only at the regulation of telling or the regulation of asking, we will walk away with an insufficiently rich understanding of what makes our legal and social systems tick.

In investigating a large array of domains for asking and telling, we have stressed that sound evaluation must account for both social norms and legal rules. When put together, we can make sense of some extraordinary combinations of asking and telling rules—and we can more precisely criticize some other combinations. But because asking and telling rules are only sometimes related to use rules, even this much is not enough. And because opportunities for people to work around existing asking and telling rules are rapidly expanding with new technology and analytics, we will have to rethink some old rules. Getting a good picture of these moving parts is a difficult task, but an exciting one, too. We are encouraged that the answers to the questions we pose are multi-faceted. The world is a complicated place, probably more so as technology and rules shift. Mono-causal explanations and uni-dimensional justifications for broad social phenomena rarely withstand scrutiny. In this initial effort, we have attempted to identify major questions that other scholars will feel inspired—or even compelled—to answer.

Readers with comments should address them to:

Professor Lior Strahilevitz  
lior@uchicago.edu

Chicago Working Papers in Law and Economics  
(Second Series)

For a listing of papers 1–600 please go to Working Papers at  
<http://www.law.uchicago.edu/Lawecon/index.html>

601. David A. Weisbach, Should Environmental Taxes Be Precautionary? June 2012
602. Saul Levmore, Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law, June 2012
603. David S. Evans, Excessive Litigation by Business Users of Free Platform Services, June 2012
604. Ariel Porat, Mistake under the Common European Sales Law, June 2012
605. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Dynamics of Contract Evolution, June 2012
606. Eric A. Posner and David Weisbach, International Paretianism: A Defense, July 2012
607. Eric A. Posner, The Institutional Structure of Immigration Law, July 2012
608. Lior Jacob Strahilevitz, Absolute Preferences *and* Relative Preferences in Property Law, July 2012
609. Eric A. Posner and Alan O. Sykes, International Law and the Limits of Macroeconomic Cooperation, July 2012
610. M. Todd Henderson and Frederick Tung, Reverse Regulatory Arbitrage: An Auction Approach to Regulatory Assignments, August 2012
611. Joseph Isenbergh, Cliff Schmitt, August 2012
612. James Melton and Tom Ginsburg, Does De Jure Judicial Independence Really Matter?, September 2014
613. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
614. Gary Becker, François Ewald, and Bernard Harcourt, “Becker on Ewald on Foucault on Becker” American Neoliberalism and Michel Foucault’s 1979 *Birth of Biopolitics* Lectures, October 2012
615. William H. J. Hubbard, Another Look at the Eurobarometer Surveys, October 2012
616. Lee Anne Fennell, Resource Access Costs, October 2012
617. Ariel Porat, Negligence Liability for Non-Negligent Behavior, November 2012
618. William A. Birdthistle and M. Todd Henderson, Becoming the Fifth Branch, November 2012
619. David S. Evans and Elisa V. Mariscal, The Role of Keyword Advertising in Competition among Rival Brands, November 2012
620. Rosa M. Abrantes-Metz and David S. Evans, Replacing the LIBOR with a Transparent and Reliable Index of interbank Borrowing: Comments on the Wheatley Review of LIBOR Initial Discussion Paper, November 2012
621. Reid Thompson and David Weisbach, Attributes of Ownership, November 2012
622. Eric A. Posner, Balance-of-Powers Arguments and the Structural Constitution, November 2012
623. David S. Evans and Richard Schmalensee, The Antitrust Analysis of Multi-Sided Platform Businesses, December 2012
624. James Melton, Zachary Elkins, Tom Ginsburg, and Kalev Leetaru, On the Interpretability of Law: Lessons from the Decoding of National Constitutions, December 2012
625. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
626. David S. Evans, Economics of Vertical Restraints for Multi-Sided Platforms, January 2013
627. David S. Evans, Attention to Rivalry among Online Platforms and Its Implications for Antitrust Analysis, January 2013
628. Omri Ben-Shahar, Arbitration and Access to Justice: Economic Analysis, January 2013
629. M. Todd Henderson, Can Lawyers Stay in the Driver’s Seat?, January 2013
630. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Altruism Exchanges and the Kidney Shortage, January 2013
631. Randal C. Picker, Access and the Public Domain, February 2013
632. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
633. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
634. Ariel Porat and Lior Strahilevitz, Personalizing Default Rules and Disclosure with Big Data, February 2013
635. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
636. Oren Bar-Gill and Omri Ben-Shahar, No Contract? March 2013
637. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
638. M. Todd Henderson, Self-Regulation for the Mortgage Industry, March 2013
639. Lisa Bernstein, Merchant Law in a Modern Economy, April 2013
640. Omri Ben-Shahar, Regulation through Boilerplate: An Apologia, April 2013

641. Anthony J. Casey and Andres Sawicki, Copyright in Teams, May 2013
642. William H. J. Hubbard, An Empirical Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
643. Eric A. Posner and E. Glen Weyl, Quadratic Vote Buying as Efficient Corporate Governance, May 2013
644. Dhammika Dharmapala, Nuno Garoupa, and Richard H. McAdams, Punitive Police? Agency Costs, Law Enforcement, and Criminal Procedure, June 2013
645. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
646. Stephen M. Bainbridge and M. Todd Henderson, Boards-R-Us: Reconceptualizing Corporate Boards, July 2013
647. Mary Anne Case, Is There a Lingua Franca for the American Legal Academy? July 2013
648. Bernard Harcourt, Beccaria's *On Crimes and Punishments*: A Mirror of the History of the Foundations of Modern Criminal Law, July 2013
649. Christopher Buccafusco and Jonathan S. Masur, Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law, July 2013
650. Rosalind Dixon & Tom Ginsburg, The South African Constitutional Court and Socio-economic Rights as "Insurance Swaps", August 2013
651. Maciej H. Kotowski, David A. Weisbach, and Richard J. Zeckhauser, Audits as Signals, August 2013
652. Elisabeth J. Moyer, Michael D. Woolley, Michael J. Glotter, and David A. Weisbach, Climate Impacts on Economic Growth as Drivers of Uncertainty in the Social Cost of Carbon, August 2013
653. Eric A. Posner and E. Glen Weyl, A Solution to the Collective Action Problem in Corporate Reorganization, September 2013
654. Gary Becker, François Ewald, and Bernard Harcourt, "Becker and Foucault on Crime and Punishment"—A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, September 2013
655. Edward R. Morrison, Arpit Gupta, Lenora M. Olson, Lawrence J. Cook, and Heather Keenan, Health and Financial Fragility: Evidence from Automobile Crashes and Consumer Bankruptcy, October 2013
656. Evidentiary Privileges in International Arbitration, Richard M. Mosk and Tom Ginsburg, October 2013
657. Voting Squared: Quadratic Voting in Democratic Politics, Eric A. Posner and E. Glen Weyl, October 2013
658. The Impact of the U.S. Debit Card Interchange Fee Regulation on Consumer Welfare: An Event Study Analysis, David S. Evans, Howard Chang, and Steven Joyce, October 2013
659. Lee Anne Fennell, Just Enough, October 2013
660. Benefit-Cost Paradigms in Financial Regulation, Eric A. Posner and E. Glen Weyl, April 2014
661. Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing, Crystal S. Yang, October 2013
662. Have Inter-Judge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker, Crystal S. Yang, March 2014
663. William H. J. Hubbard, A Theory of Pleading, Litigation, and Settlement, November 2013
664. Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples": The Global Origins of Constitutional Preambles, April 2014
665. Lee Anne Fennell and Eduardo M. Peñalver, Exactions Creep, December 2013
666. Lee Anne Fennell, Forcings, December 2013
667. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, A Winner's Curse?: Promotions from the Lower Federal Courts, December 2013
668. Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, Beyond Presidentialism and Parliamentarism, December 2013
669. Lisa Bernstein, Trade Usage in the Courts: The Flawed Conceptual and Evidentiary Basis of Article 2's Incorporation Strategy, November 2013
670. Roger Allan Ford, Patent Invalidity versus Noninfringement, December 2013
671. M. Todd Henderson and William H.J. Hubbard, Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior, January 2014
672. Lisa Bernstein, Copying and Context: Tying as a Solution to the Lack of Intellectual Property Protection of Contract Terms, January 2014

673. Eric A. Posner and Alan O. Sykes, Voting Rules in International Organizations, January 2014
674. Tom Ginsburg and Thomas J. Miles, The Teaching/Research Tradeoff in Law: Data from the Right Tail, February 2014
675. Ariel Porat and Eric Posner, Offsetting Benefits, February 2014
676. Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, February 2014
677. Matthew B. Kugler, The Perceived Intrusiveness of Searching Electronic Devices at the Border: An Empirical Study, February 2014
678. David S. Evans, Vanessa Yanhua Zhang, and Xinzhu Zhang, Assessing Unfair Pricing under China's Anti-Monopoly Law for Innovation-Intensive Industries, March 2014
679. Jonathan S. Masur and Lisa Larrimore Ouellette, Deference Mistakes, March 2014
680. Omri Ben-Shahar and Carl E. Schneider, The Futility of Cost Benefit Analysis in Financial Disclosure Regulation, March 2014
681. Yun-chien Chang and Lee Anne Fennell, Partition and Revelation, April 2014
682. Tom Ginsburg and James Melton, Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty, May 2014
683. Eric A. Posner and E. Glen Weyl, Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms, May 2014
684. Adam B. Badawi and Anthony J. Casey, The Fannie and Freddie Bailouts Through the Corporate Lens, March 2014
685. David S. Evans, Economic Aspects of Bitcoin and Other Decentralized Public-Ledger Currency Platforms, April 2014
686. Preston M. Torbert, A Study of the Risks of Contract Ambiguity, May 2014
687. Adam S. Chilton, The Laws of War and Public Opinion: An Experimental Study, May 2014
688. Robert Cooter and Ariel Porat, Disgorgement for Accidents, May 2014
689. David Weisbach, Distributionally-Weighted Cost Benefit Analysis: Welfare Economics Meets Organizational Design, June 2014
690. Robert Cooter and Ariel Porat, Lapses of Attention in Medical Malpractice and Road Accidents, June 2014
691. William H. J. Hubbard, Nuisance Suits, June 2014
692. Saul Levmore & Ariel Porat, Credible Threats, July 2014
693. Douglas G. Baird, One-and-a-Half Badges of Fraud, August 2014
694. Adam Chilton and Mila Versteeg, Do Constitutional Rights Make a Difference? August 2014
695. Maria Bigoni, Stefania Bortolotti, Francesco Parisi, and Ariel Porat, Unbundling Efficient Breach, August 2014
696. Adam S. Chilton and Eric A. Posner, An Empirical Study of Political Bias in Legal Scholarship, August 2014
697. David A. Weisbach, The Use of Neutralities in International Tax Policy, August 2014
698. Eric A. Posner, How Do Bank Regulators Determine Capital Adequacy Requirements? September 2014
699. Saul Levmore, Inequality in the Twenty-First Century, August 2014
700. Adam S. Chilton, Reconsidering the Motivations of the United States? Bilateral Investment Treaty Program, July 2014
701. Dhammika Dharmapala and Vikramaditya S. Khanna, The Costs and Benefits of Mandatory Securities Regulation: Evidence from Market Reactions to the JOBS Act of 2012, August 2014
702. Dhammika Dharmapala, What Do We Know About Base Erosion and Profit Shifting? A Review of the Empirical Literature, September 2014
703. Dhammika Dharmapala, Base Erosion and Profit Shifting: A Simple Conceptual Framework, September 2014
704. Lee Anne Fennell and Richard H. McAdams, Fairness in Law and Economics: Introduction, October 2014
705. Thomas J. Miles and Adam B. Cox, Does Immigration Enforcement Reduce Crime? Evidence from 'Secure Communities', October 2014
706. Ariel Porat and Omri Yadlin, Valuable Lies, October 2014
707. John Bronsteen, Christopher Buccafusco and Jonathan S. Masur, Well-Being and Public Policy, November 2014
708. David S. Evans, The Antitrust Analysis of Rules and Standards for Software Platforms, November 2014

709. E. Glen Weyl and Alexander White, Let the Best 'One' Win: Policy Lessons from the New Economics of Platforms, December 2014
710. Lee Anne Fennell, Agglomerama, December 2014
711. Anthony J. Casey and Aziz Z. Huq, The Article III Problem in Bankruptcy, December 2014
712. Adam S. Chilton and Mila Versteeg, The Inefficacy of Constitutional Torture Prohibitions, December 2014
713. Lee Anne Fennell and Richard H. McAdams, The Distributive Deficit in Law and Economics, January 2015
714. Omri Ben-Shahar and Kyle D. Logue, Under the Weather: Government Insurance and the Regulation of Climate Risks, January 2015
715. Adam M. Samaha and Lior Jacob Strahilevitz, Don't Ask, Must Tell—and Other Combinations, January 2015