

DON'T ASK, MUST TELL—AND OTHER COMBINATIONS

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The U.S. military's defunct Don't Ask, Don't Tell policy has been studied and debated for decades. Surprisingly, the question 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 the gathering and disclosure of information—asking and telling. While there is a large legal 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, we give accounts of why law gravitates toward particular combinations of asking and telling rules in various domains, and we offer some normative evaluation of these extreme strategies. We emphasize 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 the old practices of direct question-and-answer less significant if not obsolete. Finally, the typology we offer in this paper reveals new pathways for institutional and doctrinal reform, drawing on comparative evidence and conceptual work to facilitate policy brainstorming.

[Note to readers: This article is not like what you are used to reading in this colloquium. Nor is it exactly like what I am used to writing. The topic should be engaging, however, and is subject to several theoretical perspectives. I appreciate your patience and thoughtfulness. –A.M.S.]

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INTRODUCTION

Life is filled with norms for 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 norms work and interact, nor into what their content should be.

In this article, we examine several intriguing combinations of norms for asking and telling. Don't Ask, Don't Tell (*DADT*) already has drawn repeated attention from legal scholars because of the now-abandoned policy regarding gay people serving in the military.¹ 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 apparently redundant Must Ask, Must Tell (*MAMT*), and the often regrettably adversarial Must Ask, Don't Tell (*MADT*). As far as we know, no one has examined these combinations together, either positively or normatively. Yet each of these extreme combinations occupies a pocket of existing law.

Many of the lessons that we offer below are localized, grounded in investigations of particular combinations of asking and telling norms. These combinations are interesting and important enough on their own, we think, but we also want to suggest broader lessons. On that score, we try to extend and integrate strands of work in law and economics and law and social norms. The notion that asking and telling norms are best understood when taken together appeared no later than 1994, in *Game Theory and the Law*.² 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 norms in addition to legal norms. The real-world set of asking and telling norms changes when social norms are added to legal norms, and so might one's evaluation of those norms.³ If nothing else, this article facilitates

¹ 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 E. 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).

² DOUGLAS BAIRD, ROBERT GERTNER & RANDAL PICKER, *GAME THEORY AND THE LAW* 91-93 (1994) (discussed below at text accompanying notes 89-91). 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).

³ 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

integrated thinking on the actual and proper assortment of rules for acquiring and disclosing information. We hope our typology 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.

Our article proceeds as follows. Part I 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 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?⁴ 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 norms. Sometimes law and social norms regulate how people use information once they get it, as distinguished from how people collect information in the first place. For example, law might prohibit hiring decisions based on certain characteristics, such as race, whether or not law regulates asking and telling about race. Our immediate concern is not use norms, but often use norms must be considered to understand asking and telling norms. In other situations, however, asking and telling norms are justified quite apart from any use rule. One of our goals is to consider when asking and telling norms are part of a larger regulatory mission involving the use of information, and when such norms stand on their own. Seeing this difference in justification for Q&A norms has important implications for our future in a world of rapidly expanding ask-*C* options.

Before going forward, three caveats are in order. First, our analysis references distinctions between may, must, and don’t that can be controversial. Readers will differ on whether, for instance, loss of face or litigation incentives or grant conditions are enough to locate a norm beyond “may.”⁵ Personally, we are curious about even modest influences on behavior, regardless. And the categorization problems are not at all special to Q&A norms. Our framework should provide insight wherever one draws lines around contested concepts such as coercion and free choice. Second, we cannot cover every possible Q&A norm for two-party interactions. There might be a good article to be written on “Don’t Ask Twice,”⁶ “May Ask Thrice,”⁷ 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.

⁴ 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.

⁵ 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*, 5 J. LEGAL ANALYSIS 61, 81-83, 92-97 (2013).

⁶ 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.

even “Must Ask Thrice,”⁸ but ours will not be it. Nor will we explore variations like “May Lie” or “Must Lie,” since those have been examined fruitfully elsewhere.⁹ We generally presume truthful telling and non-deceptive silences.¹⁰ Third, 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 one-shot interactions to repeat play.¹¹ Norms also can shift depending on whether the asker or teller moves first.¹² 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*.¹³ 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.”¹⁴ 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,¹⁵ and might have arisen

⁷ 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?”).

⁸ “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.

⁹ 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).

¹⁰ *But cf. infra* Part II.E (examining codes of silence and evidentiary privilege assertions).

¹¹ See Talley, *supra* note 3, at 1958-61 (applying game theory to contend that disclosure laws and social norms may complement each other in repeat play situations, even with an error-prone judiciary).

¹² Cf. J. Money, *Why Are You Asking About My Salary Again?*, MSN MONEY, Nov. 10, 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>.

¹³ See, e.g., McAdams, *supra* note 3, at 2280-81 (canvassing gossip norms, which can depend on why and to whom communications are made).

¹⁴ 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).

¹⁵ 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.”).

earlier in human history.¹⁶ 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.

Our interest is 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).¹⁸ 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.¹⁹ For the same reason, we are not studying rhetorical questions or self-questioning.²⁰ 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,” “answering,” 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.²¹ 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, depending on the circumstances.²² In a related vein, a nominal question might be understood by listeners partly as a command, depending on the parties' perceived roles.²³ We

¹⁶ 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).

¹⁸ 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).

¹⁹ 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 AND QUESTIONING 304, 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.

²⁰ *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.”).

²¹ 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”).

²² See *infra* text accompanying notes 44-47.

²³ 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

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,” “questioning,” 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 or 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.²⁴

A functional perspective like ours can make categorization difficult, of course. *Rhode Island v. Innis*²⁵ is a famous illustration. In police custody, “interrogation” is supposed to stop if the detainee clearly asks for a lawyer’s help.²⁶ Innis was arrested for armed robbery and he asked 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.²⁷ 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,²⁸ but they were unwilling to classify the officers’ speech as interrogation via appeal to conscience.²⁹ Two of the dissenters basically agreed with the majority’s test but were “utterly at a loss” to understand the majority’s conclusion.³⁰ 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.³¹ 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 won’t 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

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, 202 (2002) (“[L]aw enforcement officers . . . may pose questions . . . provided they do not induce cooperation by coercive means.”).

²⁴ 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).

²⁵ 446 U.S. 291 (1980).

²⁶ *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.

²⁷ *Innis*, 446 U.S. at 294-95.

²⁸ *Id.* at 300-01; *see id.* at 301.

²⁹ *See id.* at 302-03.

³⁰ *Id.* at 305 (Marshall, J., dissenting); *see also id.* at 311-12 (Stevens, J., dissenting) (offering a different functional test).

³¹ *See United States v. Hubbell*, 530 U.S. 27, 34-35 (2000).

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,³² 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.³³ Factors like these are familiar in analyzing tort and 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.³⁴ Alternatively, *B*'s disclosure 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 norms.³⁵ Of course our goal here is not to resolve when disclosure is better than privacy and vice versa. Nonetheless, the disclosure literature suggests a challenge for those interested in questions: One might wonder whether getting society's telling norms right kills the significance of asking norms. 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.

Existing theory on asking is indeed more limited, especially in relation to telling norms. But 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, which we referenced above.³⁶ Scholars also have studied how often people ask different types of questions and how people tend to respond to differently formulated questions,³⁷ partly to

³² STEWART BRAND, *THE MEDIA LAB* 202 (1989).

³³ 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 9, 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) (regarding manufacturer ability to discover product defects).

³⁴ 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).

³⁵ See *infra* Part II.B.2.

³⁶ See *supra* notes 14-20

³⁷ See, e.g., Heritage, *supra* note 24, at 1433-44 (studying news interviews for different reactions to negative framing at the beginning compared to the end of interviewer statements).

understand norms of politeness.³⁸ Survey researchers, for instance, have developed strategies for getting reliable answers to “sensitive questions.”³⁹ Much of this research is foundational descriptive work without necessarily offering positive or normative lessons. For example, anthropologist Esther Goody helped unsettle the partition between asking and ordering. People may have difficulty asking purely information-seeking questions to people of a different social status, given the audience’s tendency to perceive nominal questions as bundled with a command or an inappropriate challenge to their status.⁴⁰ Such findings suggest that designing effective norms for asking and telling can be tricky, whether or not Goody’s ethnographic study generalizes perfectly.⁴¹

Even these modest beginnings are enough to indicate distinctive functions for voluntary questions. Questions indicate the questioner’s interests and thus tend to increase the probability of a responsive disclosure.⁴² This is obvious and yet crucial. Social and legal systems cannot, in fact, accurately identify all and only the true informational interests of diverse groups of people operating in circumstances that differ in innumerable ways. When freely chosen, questions are always telling, and in a special sense: They indicate the questioner’s interest in additional information, alerting audiences to curiosities that might otherwise be ignored. Informational questions thus enable listeners to provide thoughtful answers, or considered silences, and to avoid wasteful guessing about the questioner’s interests. Merely permitting disclosure is an awfully hit-or-miss way to achieve informed, targeted, and voluntary communicative exchanges. And requiring disclosure under prescribed conditions cannot possibly identify every instance in which information should be exchanged, even putting aside inevitable enforcement problems.

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 swaps in a world—the real world—where everybody knows something and nobody knows everything.

2. Q&A unbound

At this early stage and bracketing the disclosure rules referenced above, 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

³⁸ See, e.g., Penelope Brown & Stephen Levinson, *Universals in Language Usage: Politeness Phenomena*, in QUESTIONS AND POLITENESS, *supra* note 23, at 56, 60 (modeling and studying “patterns of message construction, or ‘ways of putting things,’” as a tool to describe social relationships).

³⁹ 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).

⁴⁰ See Goody, *supra* note 23, 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. 92, 99 (1991).

⁴¹ See Goody, *supra* note 23, at 20 (presenting her study of a Ghanaian community as a beginning for understanding connections between asking and commanding).

⁴² On good and bad reasons for increased response rates, see text accompanying notes 89-91.

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 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.

Often law does look this libertarian, well beyond the famously formal “right to remain silent” during police interrogations.⁴³ Indeed a potentially large number of laws restricting asking and telling would draw serious constitutional objections. A legal command to stifle particular honest questions⁴⁴ or to stem the flow of truthful information⁴⁵ looks much like the kind of content-based regulation that judges loudly condemn.⁴⁶ So, too, for commanding that people disclose some category of information⁴⁷ or that people ask some category of questions.⁴⁸

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.⁴⁹ Indeed whole categories of challenges get only modest sympathy from judges, including public employee claims⁵⁰ and business resistance to the disclosure of facts to consumers.⁵¹ In addition,

⁴³ 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, 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 duty to investigate crime, so interrogation itself can be characterized as *Must* Ask, May Tell.

⁴⁴ Cf. *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 339 (2010) (mentioning “[t]he right of citizens to inquire”).

⁴⁵ 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).

⁴⁶ 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*, 109 COLUM. L. REV. 1650 (2009) (studying possible free speech objections to legal duties of confidentiality).

⁴⁷ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995) (involving identity and political leaflets); cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984) (holding that government-required disclosure of trade secrets may constitute a taking).

⁴⁸ To our knowledge, must-ask norms have not been subject to free speech litigation.

⁴⁹ 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).

⁵⁰ See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

nobody really thinks to raise free speech objections within entire fields of law, such as tort law’s duties to warn.⁵² We won’t examine the First Amendment issues in detail. But it is worth 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 are guarded in face-to-face communication of all kinds with strangers and even acquaintances.⁵³ Sidewalk preaching is an outsider practice. “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. With increasing access to communications technology that allows countless erstwhile strangers to engage in brief and often anonymous contact, it has become hard to believe that the old norms for face-to-face interaction retain a similar power outside of that context. 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 norms, which cannot be done in an article. Instead we can offer illustrative social and legal norms in particular settings. And we can 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.

⁵¹ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *American Meat Inst. v. Dep’t of Agr.*, 2014 WL 3732697, at *1 (D.C. Cir. July 29, 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).

⁵² 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 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*, 11 WM. & MARY BILL RTS. J. 727, 728-29 (2003) (defending regulation of employer questions to protect don’t-use norms).

⁵³ See Elizabeth Dunn & Michael Norton, *Hello, Stranger*, N.Y. TIMES, Apr. 27, 2014, at 6 (Sunday Review) (op-ed).

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 that response.⁵⁴ 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.⁵⁵ 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.⁵⁶ Consider also social norms against gossip,⁵⁷ and countervailing norms that tend to encourage it.⁵⁸ 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.⁵⁹ Yet gossip is a kind of currency, too, which can show that the gossip 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.⁶⁰ With these complexities, gossip is somewhat constrained and yet a vibrant practice in our society.

⁵⁴ Note the usefulness of making many must-tell norms *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.

⁵⁵ 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).

⁵⁶ 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.

⁵⁷ See McAdams, *supra* note 3, at 2280-81 (presenting many examples of don't-ask and don't-tell anti-gossip social norms and their context sensitivity).

⁵⁸ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 57 (1991) ("[P]eople in [Shasta County, California's] Oak Run area 'gossip all the time'").

⁵⁹ See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 196 (1890).

⁶⁰ See ELLICKSON, *supra* note 63, at 213-15.

We are now touching on legal norms, given that garden-variety tort law includes various duties to warn relative strangers⁶¹ and other positive law may require people to report crimes to government officials.⁶² 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).⁶³ These are “Must Tell” laws. On the flipside, a famous “Don’t Tell” legal norm comes from the system of classified information.⁶⁴ A Top Secret stamp indicates that a government official must keep the information within a circle of people sharing similar security clearances, 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.⁶⁵

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.⁶⁶ 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 information insiders consent to 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.⁶⁷ 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 else, and in this sense interfere with their choices to reveal or

⁶¹ 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).

⁶² 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 (2004) (upholding an application of a state law requiring criminal suspects to identify themselves upon request by police officers).

⁶³ 5 U.S.C. § 552 (2000).

⁶⁴ 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).

⁶⁵ See MODEL RULES OF PROF’L CONDUCT R. 1.6 (1983).

⁶⁶ See *supra* Part I.B.1.

⁶⁷ 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”).

conceal.⁶⁸ 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.

"Must Tell" norms generally attack information asymmetries to protect the interests of those outside the loop, sometimes despite problematic incentives. Consider social and legal duties to warn strangers. 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,⁶⁹ 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 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 or government officials respond to FOIA requests.

4. *Regulating asking*

On the asking side, many social norms are highly contextual but nonetheless common knowledge.⁷⁰ 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.⁷¹ In contrast, socially adept adults are more or less required to ask toddlers questions, a popular one being "How old are you?" But at some point it becomes inappropriate to ask a woman her age, 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.⁷² For disability, the social norm is against asking a 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.⁷³ In fact, "Do you need help?" sometimes is socially mandatory. Interestingly, when we move from disability to what people consider

⁶⁸ See BAIRD *ET AL.*, *supra* note 2, at 91-93; Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

⁶⁹ See *supra* note 33.

⁷⁰ See, for example, clickbait stories like Jackie Pilosof, *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-pilosof/10-questions-you-should-n_b_4281387.html; or Kathryn Tuggle, *10 Questions to 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>

⁷¹ For suggestions that this norm is fading among social-media saturated Millennials, see Jenn Doll, *Could Millennials End Salary Secrecy?*, THE WIRE, Apr. 17, 2013, <http://www.thewire.com/business/2013/04/could-millennials-end-salary-secrecy/64317/>.

⁷² 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.

⁷³ 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.").

injury, must-ask norms can appear again, as in, “How did you break your leg?”⁷⁴ 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.⁷⁵ Other examples arise from anti-discrimination law in the employment context, although there are fewer formal don’t-ask provisions than you might think.⁷⁶ “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.⁷⁷ Additional must-ask duties emerge from contractual and principal-agent relationships. Every federal government employee must answer a series of questions as part of a background check—and so some current government employee is obligated to ask these questions.⁷⁹ Indeed any agency with an investigative mission includes a must-ask norm for its employees, from Census Bureau canvassers to beat cops. 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 disclosures, as are telling norms, but more is at stake. A starting point is to wonder why questions from *A* could increase the probability of responsive disclosures by *B*.⁸⁰ Several realistic explanations present themselves. One possibility is that *B* is being generous or altruistic in responding to *A*, perhaps acting as a good citizen in a place where people try to “pay it forward.” Any of this behavior will usually implicate the virtues of voluntary interaction. Another possibility is that *B* is effectively bargaining with *A*, offering information valued by *A* as a market-like commodity; a related possibility is that *B* feels that she owes *A*, perhaps because of an existing contractual or agency relationship. But *B* might also experience other kinds of

⁷⁴ 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).

⁷⁵ See *supra* note 26.

⁷⁶ 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).

⁷⁷ See *infra* note 198.

⁷⁹ See *National Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 752-53 (2011) (discussed in Part II.D.1 below).

⁸⁰ See *supra* note 43.

unwelcome pressure, sometimes labelled coercion, which need not fit any attractive model of voluntary interaction.⁸¹

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. Our 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 tortured disclosures). 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,⁸² 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.⁸³ Once a topic is foregrounded through questioning, 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. That a prospective employee might gain 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 questions can be limited, *B* might not know enough to cater to *A*’s interests.⁸⁴ In this respect don’t-ask norms functions like don’t-tell norms, where an attempt is made to prevent a class of people from revealing their interests. Questions can be telling, after all. And this helps justify prohibitions on employers asking questions about certain employee characteristics.⁸⁵ 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 if otherwise use of the information of 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

⁸¹ Finally, *B* might be under pressure from a regulatory legal or social norm, which we are attempting to explain here.

⁸² See BAIRD *ET AL.*, *supra* note 2, at 91-92.

⁸³ See *supra* note 74.

⁸⁴ Cf. BAIRD *ET AL.*, *supra* note 2, at 93 (suggesting that don’t-ask laws for employers are pointless if applicants know the employer’s preferences and may tell).

⁸⁵ 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.

opened. Injury could be distinguished as a passing state 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 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 show interest in topics that we do want raised. Asking little kids their age falls within these rationales of protecting questioners and provoking thought by respondents. 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. Think about restricted markets, in which 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.⁸⁶ 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 law correctly even when adversaries are falling short on their own duties to others.⁸⁷

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 won't. 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 speaking, some

⁸⁶ 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 reason for this over-inclusion is so that those who TSA agents actually suspected of being dangerous are not tipped off.

⁸⁷ 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 (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).

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.⁸⁸ 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.

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 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 some 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

⁸⁸ An exception is the work in linguistics on question-response pairs. See Stenstrom, *supra* note 19, at 306-08 (collecting and summarizing linguistics sources). Another is game theory on Don't Ask, May Tell, discussed below.

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. In 1994, Douglas Baird, Robert Gertner, and Randy Picker considered problems of unraveling when the legal norms are Don't Ask, May Tell, Don't Use.⁸⁹ 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.⁹⁰ 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 should be two-sided”⁹¹ (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 supposed to be 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.”⁹² 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.”⁹³ 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.”⁹⁴ In addition to provisions attempting to cement a military policy of separation for certain kinds of homosexual conduct and same-sex marriage,⁹⁵ 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

⁸⁹ See BAIRD *ET AL.*, *supra* note 2, at 91-93.

⁹⁰ 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.

⁹¹ *Id.* at 93.

⁹² *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).

⁹³ 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, 1993) (emphasis added).

⁹⁴ 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)).

⁹⁵ See *id.* (formerly codified at 10 U.S.C. § 654(b)(1), (3)).

“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.”⁹⁶ The statute also announced support for the administration’s don’t-ask rule.⁹⁷ The policy was challenged in court on constitutional grounds, including free speech,⁹⁸ but the DADT combination survived until the Obama administration.

If we take as given a *may-use* rule under the old policy, perhaps as a timid bow to political reality,⁹⁹ 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 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.¹⁰⁰ 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 (true and false) advertising of one’s heterosexuality was a military phenomenon that was encouraged by the old policy.

Several of these shortfalls showed up in *Witt v. Air Force*,¹⁰¹ which gave some traction to constitutional objections. 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

⁹⁶ *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).

⁹⁷ 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.*

⁹⁸ *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.*

⁹⁹ Compare Yoshino, *supra* note 1, 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.”

¹⁰⁰ *See* BRANDON A. DAVIS, *DON’T ASK, DON’T TELL* 3 (2010).

¹⁰¹ 739 F. Supp. 1308, 1312 (W.D. Wa. 2010) (finding facts after a trial on Witt’s constitutional claims).

relationship with yet another woman, and Witt was later honorably discharged.¹⁰² 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.¹⁰³ 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 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 unraveling and 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.¹⁰⁴

Today's policy certainly is different but it has different problems. The military is appropriately sticking with its don't-ask rule at the recruitment and enlistment stages.¹⁰⁵ And it seems that the military is advertising a welcoming attitude toward gay service members.¹⁰⁶ Furthermore, Congress and the President repealed the don't-tell part of the policy,¹⁰⁷ 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 we might dismiss unraveling fears to the extent that the military is now clearly against discrimination on the basis of 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

¹⁰² See *id.*

¹⁰³ See, e.g., Lucy Madison, *Most Support Gays Serving Openly in Military*, 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>.

¹⁰⁴ See generally David A. Strauss, *Do It But Don't Tell Me* (2009) (unpublished manuscript on file with the authors).

¹⁰⁵ See Dep't of Defense, *Repeal of "Don't Ask, Don't Tell" (DADT): Quick Reference Guide 1* (Dec. 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.").

¹⁰⁶ 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 benefitted 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>.

¹⁰⁷ 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.

same-sex marriage as requiring separation.¹⁰⁸ But the Uniform Code of Military Justice still includes sodomy (“unnatural carnal copulation”) as an offense subject to court martial.¹⁰⁹ Although this sodomy prohibition is not restricted to same-sex contact, it is also not textually limited to, say, nonconsensual or public sex.¹¹⁰ 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

Contemporary antidiscrimination law might now look even worse than the military’s DADT failure. 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.¹¹¹ But the statute does not, in fact, expressly prohibit employers from asking employees or potential employees about any of those subjects.¹¹² 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.

All told, formal law is not so permissive, however. Federal law does restrict employer questions about disability,¹¹³ and questions about sex and family status may be limited as a condition for receiving federal funding.¹¹⁴ 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

¹⁰⁸ See 10 U.S.C. §654 (1993), *repealed by* Pub. L. No. 111-321, §2(b), (f)(1), (1)(A), 124 Stat. 3516.

¹⁰⁹ 10 U.S.C. § 925.

¹¹⁰ *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).

¹¹¹ 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)).

¹¹² See 1 GUIDE TO EMPLOYMENT LAW AND REGULATION § 2:16 (2014 update) [hereinafter EMPLOYMENT LAW].

¹¹³ See *infra* text accompanying notes 178-182; 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).

¹¹⁴ 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).

sexual orientation.¹¹⁵ Other state laws incorporate specific restrictions on employer questions regarding protected employee characteristics.¹¹⁶ Also worth noting, a few states have begun to restrict employer requests for social media passwords.¹¹⁷ 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.

Of course, formal law does not fully describe the real world of employment practices. However rare Don't Ask might be as a formal legal norm, many employers seem to get the message that many 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.”¹¹⁸

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.¹¹⁹ 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.

¹¹⁵ 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 (similar but without listing age, marital status, or sexual orientation); MICH. COMP. LAWS ANN. § 37.2206(1)(c) (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).

¹¹⁶ See, e.g., MICH. COMP. LAWS ANN. § 37.2206(1)(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).

¹¹⁷ 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.

¹¹⁸ EMPLOYMENT LAW, *supra* note 144, § 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).

¹¹⁹ See ALAN S. GUTTERMAN, THE BUSINESS COUNSELOR'S GUIDE TO ORGANIZATION MANAGEMENT preface (Thompson Reuters/West 2013 update).

- 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.¹²⁰

At least some of these off-limits questions are drawn from EEOC guidance or lower court cases,¹²¹ so the liability fear is not baseless. The list directs employers to the safe side of the street. In a similar but more provocative vein, *HR World* published an online article in 2007 entitled *30 Interview Questions You Can’t Ask and 30 Sneaky, Legal Alternatives to Get the Same Info*.¹²² Actually, many of the listed questions are not characterized as unlawful by the article, but rather “embarrassing” or offensive to potential employees and/or potential evidence in a discrimination suit.¹²³ And many of the “sneaky” alternatives are suggestions that employers concentrate their questions on practical concerns about job performance and avoid generalizations based on crude classifications, such as employee age, gender, religion, nationality, disability, and so on.¹²⁴

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

¹²⁰ *Id.* § 30:34. A longer and more nuanced list was posted by Michigan Tech, *Legal and 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 federal funding might explain such care with questioning, but litigation risk aversion and other moral commitments might be at work.

¹²¹ *See, e.g.*, EEOCCM s 2-II, *Cognizable Claims* (2009); 29 C.F.R. § 1600 (2014); *Barnes v. Cochran*, 944 F. Supp. 897 (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 American Oil Co.*, 499 U.S. 244, 257 (1991).

¹²² <http://www.hrworld.com/features/30-interview-questions-111507>.

¹²³ *Id.*

¹²⁴ *See, e.g., id.* (“You may want to know about religious practices to find out about weekend work schedules, but it’s imperative that you refrain from asking directly about a candidate’s beliefs. Instead, just ask directly when they’re able to work, and there will be no confusion.”).

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.”¹²⁵ 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.¹²⁶

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*,¹²⁷ 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.”¹²⁸ Although stifling such questions can prevent constructive dialogue about workplace accommodations—in this case, wearing a hijab in a preppy clothing store that has a thing against employee “caps”¹²⁹—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.¹³⁰ We are not under the impression that don’t-ask norms prevail in 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.¹³¹

The real-life norm on the telling side is likewise far from “may” in some of these settings. A regional social practice of tolerating questions 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

¹²⁵ *Bruno v. City of Crown Point*, 950 F.2d 355, 365 (7th Cir. 1991) (Easterbrook, J., dissenting).

¹²⁶ 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).

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

¹²⁸ *Id.* at 1112 (reporting the company’s averments).

¹²⁹ *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.

¹³⁰ Of course, the economic and morale effects are different for businesses attempting to develop niche markets based on religion.

¹³¹ 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. To take another example from legal academic hiring, the FAR form, which permits a would-be law professor to get a one-page application in front of every Association of American Law Schools member institution that is interested in hiring faculty during a given year, asks applicants to disclose their race. This is done to help schools interested in enhancing the racial diversity of their faculties accomplish that goal. Nevertheless, several years ago one of us was chairing our law school’s faculty hiring committee, and was instructed by an attorney in the university’s general counsel’s office not to look at the FAR box disclosing a candidate’s race. The instruction, during a training session for faculty hiring chairs, prompted a lengthy discussion.

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 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, Don't Use." 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, but they influence the real world of Q&A regardless.

Thus antidiscrimination law might operate quite differently in practice than did the U.S. 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 produce roughly rational regulation of information flows where only legal norms would fail. Of course we have not exhausted the analysis and evidence on these matters,¹³³ 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 commercial transactions and elsewhere. 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 freedom would undercut the intended relationship. So although it might seem bizarre compared to DADT, important aspects of personal relationships are supposed to be governed by DAMT.

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 notions of morality, such partners should disclose an affair if it happens.¹³⁴ The question is almost unavoidably accusatory or, at minimum, conveys suspicion in

¹³³ 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.

¹³⁴ 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 47, 55-55 (1999),

a way that undercuts trust. A question can show suspicion as strongly as any declaration.¹³⁵ 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.¹³⁶

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.¹³⁷ The voluntary disclosure by the cheating spouse contains the disclosure rather than airing it publicly, demonstrates the cheating spouse's remorse and perhaps interest in reconciliation, and evinces limits to the cheater's willingness to deceive the partner. All of these factors made forgiveness and continuation of the relationship more likely.¹³⁸ To be sure, we do not know how much of this correlation between disclosure mechanisms and relationship survival is causal, we can't 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 the infidelity.¹³⁹ 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 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

describing a couple's informational logs of their encounters, made available for optional perusal by the other partner).

¹³⁵ 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] (“[A]dultery . . . is still treated as ‘fault’ by many states that otherwise determine alimony by no-fault rules.”); *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. Aside from outlier states, adultery itself is no longer a potential basis for tort recovery against anyone. *See* FAMILY DISSOLUTION, *supra*, at 1 2 IV.

¹³⁶ While we regard DAMT as the aspirational social norm governing infidelity, *cf.* Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1911 & n.21 (2000) (discussing research on the widespread disapproval of marital infidelity), it could well be that nonadherence to this norm is more prevalent than adherence. Our claim is merely that most people in the United States would regard themselves as morally obliged to inform their spouse about an affair.

¹³⁷ *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.”).

¹³⁸ *See id.* at 295, 301-05.

¹³⁹ *See id.* at 305.

efforts to appear good beyond all doubt 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 or suspicion 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² Even if entirely secular, confession to a friend can be an emotional relief, and perhaps even a kind of mutual obligation to share secrets. On the other hand, friends should be shy to troll for revelations of misbehavior, unless honestly thought to be in the best interest of the counterpart. The fit with DAMT is not perfect, but these extensions show trust relationships with channels for disclosure of misconduct without prying questions.

However prevalent, DAMT seems brittle. 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?” or, “Have you seen my keys?”¹⁴⁴ 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.¹⁴⁵ The duty to tell is *conditional* on misconduct by B that A, by hypothesis, doesn’t know about. Whether Spouse A has posed an

¹⁴⁰ See 1983 CODE c.960, CODEX IURIS CANONICI (1983).

¹⁴¹ 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 et al., *An Economic Analysis of the Protestant Reformation*, 110 J. POL. ECON. 646, 653-54 (2002) (describing the Church’s requirement of auricular confession as one of many rent-seeking doctrinal practices), with Benito Arruñada, *Specialization and Rent Seeking in Moral Enforcement: The Case of Confession*, 48 J. SCI. STUDY OF RELIGION 443, 447-48 (2009) (arguing that specialization benefits, rather than rent-seeking, drove the change to auricular confession).

¹⁴² See Arruñada, *supra* note 172, at 446 (describing confession as a near-universal practice across history).

¹⁴⁴ Cf. *supra* text accompanying note 25 (discussing the tear-jerker speech in *Innis*).

¹⁴⁵ Cf. BAIRD ET AL., *supra* note 2, 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.”).

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.¹⁴⁶ DAMT under those conditions can be a scam by one side in a relationship to maintain cover for infidelity. Regardless, maintaining 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 especially valuable to people, and perhaps 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. *Clashing workplace regulations*

Perhaps because of this fragility, law is different. DAMT is very difficult to identify in law and, when law does produce DAMT, it seems to be a mistake or a regrettable side effect of regulation.

Employment law offers one mild hope for identifying DAMT in legal norms. As we have mentioned, employment law only occasionally prohibits employers from asking questions, but the Americans with Disabilities Act is a partial exception.¹⁴⁷ The statute instructs employers to not "make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability" unless "shown to be job-related and consistent with business necessity."¹⁴⁸ The statute thus demands a job-related justification for such questions without flatly prohibiting them.¹⁴⁹ Employers can still get into trouble for asking questions, however. In *Roe v. Cheyenne Mountain Conference Resort*,¹⁵⁰ to take one example, a district court held that an employer could not ask employees to disclose the legal prescription medication that they use, unless the employer can show a relationship to the job and business necessity.¹⁵¹ Looking slightly beyond formal law, we can see a significant Don't Ask norm at work in the disability context. Regulated employers will not always be able to discern the fine legal difference between asking about a disability as opposed to something else, and between

¹⁴⁶ Cf. Russell 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.").

¹⁴⁷ See Stephen Befort, *Pre-Employment Screening*, 14 *HOFSTRA LAB. L.J.* 365, 381-86 (1997).

¹⁴⁸ 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").

¹⁴⁹ The statute separately allows drug testing. See *id.* § 12112(d)(1) & (2); see also EEOC, *Enforcement Guidance: Disability Related Inquiries and Medical Examinations* 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>.

¹⁵⁰ 920 F. Supp. 1153 (D. Colo. 1996).

¹⁵¹ See *id.* at 1154.

asking an economically justified question as opposed to something else.¹⁵² 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. Functionally, well-formed employers are likely to steer clear of many questions touching on employee disability.¹⁵³

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.¹⁵⁴ Employees tend to be in the *may* tell category regarding race, sex, religion, disability, marital status, pregnancy, and so on.¹⁵⁵ A possible exception involves workplace hazards and the overlap of tort law with employment discrimination law. Employees with certain disabilities and diseases 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. Those precautions might be necessary for the employee to comply with ordinary tort duties, including the duty to warn others of known risks.¹⁵⁶ An employer might not take adequate precautions unless the disease is disclosed (*e.g.*, 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 liability risk.

Strictly speaking, even this workplace hazard scenario might not fit the DAMT combination, which is revealing. The must-tell norm is derived from the application of general tort duties, while the don't-ask norm is at least partially an unintended side effect of litigation risks in discrimination law.¹⁵⁷ So this “example” of DAMT looks more like an unintended consequence than an intelligently designed combination in law.

¹⁵² 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.

¹⁵³ 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.

¹⁵⁴ 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 receive employment accommodations, *see* *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001), not to mention Social Security disability payments.

¹⁵⁵ We have not assessed unraveling and its associated opportunities for disclosure as a must-tell norm, but there may be room for debate here.

¹⁵⁶ *Cf.* *Doe v. Johnson*, 817 F. Supp. 1382, 1391, 1395-96 (W.D. Mich. 1993) (AIDS and sexual partners); *Franklin v. Butcher*, 129 S.W. 428, 430 (Mo. Ct. App. 1910) (small pox from a stranger to a child); 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).

¹⁵⁷ 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

One last DAMT candidate stems from *Tarasoff* duties.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶¹ That said, we know of no actual case dealing with questions from people fearful of assault. Indeed 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.”¹⁶³ This seems hard to establish where a person who honestly fears physical attack by a patient asks a therapist about the risk.¹⁶⁴ Formally, there is no inducement liability for asking about a threat that a therapist must or even may disclose to you. Any residual DAMT combination is more like another side-effect of unavoidable incentives than a plan by judges or legislatures.

Why might DAMT be familiar in personal relationships but nearly unknown to formal law? Perhaps formalizing DAMT tends to thwart its achievement, especially if the combination is meant to be an outgrowth of trust or love. Even people within personal relationships do not necessarily announce DAMT as their goal. 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 seems weird. Doing so might communicate a troubling obtuseness about the key attributes of such personal relationships. Similarly, legal norms designed to achieve DAMT 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 set of relationships, then DAMT is the norm and it 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 brand of 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 know that law is even part of the reason for following DAMT, the relationship might be “poisoned” by the presence of 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

choice but rather an unforeseen consequence of new regulation. *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.

¹⁵⁸ *See* *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976), *superseded by statute* CAL. CIV. CODE § 43.92.

¹⁵⁹ *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.

¹⁶¹ *See* *Alberts v. Devine*, 479 N.E.2d 113, 121 (Mass. 1985) (recognizing an inducement claim without threats or promises of reward, where a minister's superiors asked his psychiatrist about his mental health); *cf.* *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 519-21 (Ohio 1999) (following *Alberts* where a law firm contracted with a hospital to identify patients eligible for SSI benefits by examining hospital registration forms).

¹⁶³ *Alberts*, 479 N.E.2d at 121 (emphasis added).

¹⁶⁴ *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) (indicating *Biddle* was distinguishable because the defendant sought information to defend against a lawsuit, not cash in on new clients).

sourced in that person’s emotional commitment alone, but instead in third-party pressure.¹⁶⁵ We might say that love comes from the heart, not the courts. Court is where divorce happens.¹⁶⁶

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 that the non-disclosure of critical information might lead to disastrous consequences. 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.¹⁶⁷ Another example affecting millions of people is the I-9 form to verify eligibility to work in the United States, which may protect certain labor-market participants from competition with certain outsiders who employers would otherwise happily hire.¹⁶⁸ Yet the redundancy may be initially surprising in other contexts. As we shall see, MAMT sometimes is employed in settings 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 confronted a question involving the constitutionality of subjecting longtime workers at NASA’s Jet Propulsion Laboratory (JPL) to compulsory background checks.¹⁶⁹ JPL employees who refused to comply would face losing their jobs.¹⁷⁰ As part of the background check process, the landlords of JPL’s workers would be required to fill out Form 42—an Investigative Request for Personal Information.¹⁷¹ 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

¹⁶⁵ On *reciprocity*, couples don’t want each other to engage in misconduct and then tell each other about it; they don’t want the misconduct in the first place.

¹⁶⁶ Law regarding marriage complicates this suggestion, given precommitment theories that mix constraints with increased freedom on the other side of the commitment.

¹⁶⁷ 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 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).

¹⁶⁸ See 10E FED. PROC. FORMS § 40:807 (2014); <http://www.uscis.gov/i-9>.

¹⁶⁹ See *National Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746 (2011).

¹⁷⁰ *Id.*

¹⁷¹ 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> (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).

reference knows of any “adverse information” concerning the employee’s “violations of the law,” “financial integrity,” “abuse of alcohol and/or drugs,” “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.”¹⁷²

Some JPL employees found the open-ended questions on Form 42 (“any reason to question?”) particularly obnoxious. The Ninth Circuit ruled that the open-ended question was likely unconstitutional, worrying 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.”¹⁷³

The Supreme Court was unimpressed. The Court’s basis for upholding Form 42’s constitutionality was pragmatic. 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.”¹⁷⁴ That could be an obnoxious and time-consuming burden if the landlords were conscientious about responding. “[R]eferences do not have all day.”¹⁷⁵

On the telling side, the government mandate here addresses two kinds of respondents who may prefer to remain silent. 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.¹⁷⁶ 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.¹⁷⁷ In both instances, the duty to disclose likely produces more pertinent information for the government than a landlord option to disclose (must ask, may tell) would. Moreover, the nature of the government’s form alerts landlords to a must-tell obligation about which they might otherwise be unaware.

¹⁷² *Id.*

¹⁷³ *Nelson v. National Aeronautics & Space Admin.*, 530 F.3d 865, 881 (9th Cir. 2008).

¹⁷⁴ *Id.* at 761.

¹⁷⁵ *Id.*

¹⁷⁶ 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.

¹⁷⁷ *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.”).

2. Taxes

The personal income tax regime is perhaps the most familiar MAMT regime to many Americans. The Internal Revenue Service provides each taxpayer with a form (typically 1040 or 1040-EZ) containing a long list of questions that the taxpayer must answer truthfully, under penalty of perjury. 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, the Internal Revenue Service 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 the 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).¹⁷⁸ Notwithstanding the substantial time savings for taxpayers that such plans may entail,¹⁷⁹ these proposals for reform have not been implemented. What gives?

The first straightforward 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 (usually a retired FBI agent, based on our experiences) might be tempted to cut corners, and Forms 42 and SF-85 limit the agent's ability to wing it in ways that might cause an important fact to fall through the cracks. Similarly, Form 1040 (especially the long form) 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 the government's 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.¹⁸⁰ In a world where the IRS has limited resources, focusing on these discrepancies is a sensible strategy. Such discrepancies are likely to reveal mistakes or cheating by the employee (or, occasionally, by an employer).

Less obviously, when the government requests personal information from individuals, rather than obtaining the same information from third parties, it can prompt the individual to confront both the query and her response to it. Perhaps a world without mandatory background checks is one on which people who are unsuitable for sensitive positions within the government get hired nevertheless and fail to ask themselves the right hard questions about whether they can be trusted with state secrets. Maybe for every Edward Snowden¹⁸¹ there are dozens of unknown

¹⁷⁸ See Joseph Bankman, *Using Technology to Simplify Individual Tax Filing*, 61 NAT'L TAX J. 773, 773-89 (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, at 4.

¹⁷⁹ 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).

¹⁸⁰ 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).

¹⁸¹ Keep in mind that there is only one Edward Snowden. Or maybe two, if you consider Bradley Manning to be another Edward Snowden.

federal job applicants who realize upon answering background check questions that they ought not to 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 paid,¹⁸² with a slight tendency to underestimate their tax bills.¹⁸³ If people are bad at estimating their tax liability when they have already calculated their taxes, they might be particularly inept at calculating such liability if they had never calculated their taxes. If 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.¹⁸⁴ People may also be imperfect at assessing their own income,¹⁸⁵ 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?”). To mandate the asking and answering of a question is to promote the salience of the answer given, and this heightened salience may induce people to bring their behavior in line with their aspirations.

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, if not at one’s atrophying math skills. Advocates who want a night-watchman-style small state might believe that individuals won’t 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)

1. Meet the Press and codes of silence

“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.¹⁸⁶ Although the quoted language might be rarely employed

¹⁸² See Norbert Lloyd Enrick, *A Pilot Study of Income Tax Consciousness*, 16 NAT’L TAX J. 169, 170 (1963).

¹⁸³ 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).

¹⁸⁴ Some of these arguments are considered in LAWRENCE ZELENAK, *LEARNING TO LOVE FORM 1040* (2013).

¹⁸⁵ 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, 146-52 (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).

¹⁸⁶ 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 (visited August 25, 2014).

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.¹⁸⁷ What makes these scenes shocking or amusing is that audiences know that, in fact, it would be deeply inappropriate to voice objections at somebody else's wedding regardless of the meaning of a minister's invitation. The social norm against telling at these ceremonies, in front 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 really functions in a manner somewhat similar to a penalty default;¹⁸⁸ it incentivizes those with material information to bring it to the bride and groom's attention long before the wedding day.

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.¹⁸⁹ Journalists may even preface this line of questioning in a manner that underscores its compulsory 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?"¹⁹⁰ 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.¹⁹¹ The sort of 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. Judicial confirmation hearings in the Senate sometimes follow the same

¹⁸⁷ *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>.

¹⁸⁸ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 1, 91 (1989).

¹⁸⁹ 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.

¹⁹⁰ 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.*

¹⁹¹ 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).

formula, with Senators asking questions they know the nominees won't answer about how the nominees would rule in particular cases.

As these twin examples suggest, Must Ask, Don't Tell is indeed a strange combination that we should not expect or want to appear in many locations. The combination suggests a malfunction somewhere in our social systems, actually, in which a group of questioners are obligated to demand information that a group of respondents are obligated to withhold. As it happens, a number of interactive situations produce MADT combinations that are more or less tragic. 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 in police department hierarchies.¹⁹² 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 beat officers and detectives.¹⁹³ In these settings of outright conflict, competing subgroups have developed competing sets of adversarial norms. To see the MADT combination in these examples, an observer must open her frame of reference to aggregate two different lines of social, moral, and legal authorities. Thus code of silence of situations are not far from spy versus spy international intrigue, which is familiar and unavoidable to a degree but hardly comforting. Nor are they terribly far from the age-old relationship between investigative journalists seeking classified information and government officials sometimes relisting and sometimes disclosing.

As a general rule, then, we might not want a unified legal authority in a well-functioning society to embrace MADT. Doing so indicates serious conflicts that such rules might exacerbate. 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 practical inability to build the delicate trust relationships on which DAMT is often based in our social lives. With MADT, law might be all too effective in signaling if 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. The resulting conflict in competition is unavoidable, and it 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 will tolerate MADT in some situations, perhaps many situations as a practical matter. So we might look for MADT combinations in law where adversarial relationships are tolerated, where asymmetries in information and wit are accepted, and where competition is most sharp. Which brings us to lawyering.

2. *Civil discovery*

Discovery in the United States sometimes entails voluminous requests for information and responses to those requests. In complex cases, where tens of thousands or even millions of (electronic) documents might change hands, lawyers frequently make mistakes, improperly producing attorney work product or lawyer-client 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-

¹⁹² See Jerome Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. & RES. 7 (2002).

¹⁹³ 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).

stakes cases as MADT.¹⁹⁴ An exception is Federal Rule of Civil Procedure 26(a)(1), which 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 party’s case.¹⁹⁵ More important, a discovery regime managed by judicial personnel under a general rule that parties *must* answer each other’s relevant questions is not fully “adversarial” in any strict sense. The discovery rules are, however, adversarial in key respects and they do facilitate competitive behavior.¹⁹⁶

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,¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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 waiving the privilege. 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.²⁰⁰ 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.²⁰¹

¹⁹⁴ 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.

¹⁹⁵ 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.

¹⁹⁶ 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).

¹⁹⁷ 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).

¹⁹⁸ See LEGAL ETHICS, LAW. DESK BK. PROF. RESP. § 1.2-3 (2013-2014 ed.).

¹⁹⁹ 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.

²⁰⁰ Must Ask, Don’t Tell, Must Tell! The resulting 27-box matrix appears in an appendix. (Not really.)

²⁰¹ 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).

But disagreement and ambiguity abound. Rule 4.4(b) has not been adopted by some jurisdictions. 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 to help her client.²⁰² 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.”²⁰³ Under this approach, the sloppy or passive lawyer who has unwittingly supplied his adversary with privileged communications has waived the privilege 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 throughout the litigation. While most responsive 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.²⁰⁴ 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.²⁰⁵

Structurally speaking, we might wonder why the legal regime 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 in such a way so as to mitigate the risk of an inadvertent disclosure? At a micro-level, it appears the answer is that because the party responding to discovery is the only party that sees all the pertinent documents, it is in the best position to prevent these errors. At the time it is formulating its discovery requests, the opposing party is essentially flying blind. That said, while the lawyer producing the discovery is almost always going to be the least-cost avoider, it does not necessarily follow that *all* of the burdens of avoiding the accident ought to fall on her. Hence the move among many sophisticated litigants to clawback agreements.

²⁰² See *id.* at 603; see also Schaefer, *supra* note 224, at 179 (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”).

²⁰³ 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).

²⁰⁴ 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).

²⁰⁵ For discussion, see Crystal, *supra* note 231, at 603-23.

E. Partially Permissive Rules

Finally, we offer thoughts on relatively permissive combinations. As we noted in Part I.B.1, purely permissive norms—May Ask, May Tell—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. In some instances, however, the law might endorse a sufficiently targeted interest in disclosure or nondisclosure to combine a one-sided permissive rule with a must or don't rule. We will refer to these combinations as “partially permissive rules.” As Figure 1 illustrates, each form of partially permissive rule exists in the American legal system. The puzzle is why legal and social norms would not tilt all the way toward preventing or requiring asking and telling. Our analysis above indicates explanations: Permissive norms often show confidence in the judgment of a questioner or respondent, while must and don't norms often show lack of confidence. Partially permissive rules thus might be defended based on power imbalances or asymmetric regulatory risks.

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.²⁰⁷ 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, or other traits without regulating employee disclosures about those traits. Such one-sided regulation can misfire via unraveling, as we have discussed, but not always.²⁰⁸

May Ask, Must Tell also can arise from one-sided concerns 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, individual *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. 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.²⁰⁹ (Mandatory reporting statutes for suspected child abuse represent a distinct concern. Teachers, clergy, health care professionals, and child advocates have legal obligations to report suspected abuse to the state,²¹⁰ but the state generally does not ask mandatory reporters whether

²⁰⁷ See *Venture Industries, Inc. v. International Union*, 330 N.L.R.B. 1133, 1138 (2000).

²⁰⁸ See *supra* Part II.A.2.

²⁰⁹ 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 70, at 971-72 (highlighting limits on FOIA). There is no statutory obligation to respond to questions that agency employees could answer with ease, let alone record their activities in the kind of records covered by FOIA. The statute is a compromise, not a full implementation of a principal-agent model.

²¹⁰ 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 (2012), http://www.state.il.us/dcf/docs/CFS_1050-21_Mandated_Reporter_Manual.pdf.

they have learned of any suspected abuse. 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.²¹¹)

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 prohibit the real estate agent from answering such a question.²¹⁴ Somewhat similarly, home buyers are permitted to tell real estate agents about their desire to be proximate to a particular faith's church or temple, but real estate agents should not broach the issue.²¹⁵ Here the law seeks to undermine voluntary racial and religious segregation by inhibiting information flows, and law enforcers recognize that 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.²¹⁶ 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.²¹⁷

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.²¹⁸ 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

²¹¹ Compare our discussion in Part I.B.1 of the harm that suspicious questions about infidelity can do to a romantic relationship.

²¹⁴ See 42 U.S.C. § 3604 (2009). 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).

²¹⁵ See 24 C.F.R. § 100.70(a); 24 C.F.R. § 100.500.

²¹⁶ See Stewart A. Laidlaw et al., *Genetic Testing and Human Subjects in Research*, 24 WHITTIER L. REV. 454, 462 (2002); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 946 n.184 (1994) (discussing a privilege for therapeutic nondisclosure).

²¹⁷ 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 wanting to avoid temptation to perjure one's self and therefore sin on the stand. Obviously this legal regime fell apart. See generally AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 107-08 (2012).

²¹⁸ In social norms, this combination can arise to communicate concern without pressure to discuss. Although *B* might have sound emotional or privacy-related reasons for not wanting to talk about an apparent injury, *A* usually will be thought callous if she is a friend who fails to inquire about the broken leg or the black eye.

be conditioned on anyone asking. Several states have enacted laws to compel abortion providers to disclose information²¹⁹ and, more recently, to display ultrasound images to women seeking abortions.²²⁰ 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,²²² 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.”²²³ The law thus shies away from a *Clockwork Orange*-style “may ask, must tell, must listen” regime, though 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.²²⁴

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. 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 may also play a part. The state wants the citizenry to see the moral light and reflect.²²⁵ 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.²²⁶ In any case, a federal district court recently invalidated North Carolina’s regime on First Amendment grounds,²²⁷ moving the state toward May Ask, May Tell—where we began.

III. THEMES, TRENDS, AND IMPLICATIONS

We have introduced a novel framework for understanding the asking and answering of questions. 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 surely will appear more frequently than others. In this Part, we attempt to provide more structure to our preceding analysis by suggesting further themes for the patterns we see. One helpful 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

²¹⁹ 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 fetal heartbeat and probability of carrying to term); see also *Edwards v. Beck*, 2014 WL 1245267, at *7 (E.D. Ark. Mar. 14, 2014) (upholding the Arkansas requirements).

²²⁰ See Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2414-21 (2014).

²²² N.C. GEN. STAT. ANN. § 90.21-85(a)(2)-(5).

²²³ *Id.* § 90.21-85(b).

²²⁴ See *Stuart v. Loomis*, 992 F. Supp. 2d 585, 602 (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.

²²⁵ See *id.* at 605.

²²⁶ 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”).

²²⁷ See *Stuart*, 992 F. Supp. 2d at 610.

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 Norms

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, some by paternalistic concerns. 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, at least 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 don't ask, don't tell policy was an indication that policy makers had not consolidated behind 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 norms. 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 or should not be used in a subsequent decision. Recall our discussions of child abuse reporting and *Tarasoff* duties, 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 extreme combinations: use norms are not persuasive explanations or defenses for either DAMT or MADT. MADT in the form of code of silence is the product of warring authorities, essentially a ruling out the possibility of a unified use norm to explain or justify the combination. Civil discovery clashes similarly result 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. 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. 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 particular 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.

B. Beyond Q&A

We are writing at an odd moment. In 2014, 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.²²⁸ The United States is in the midst of a “Reputation Revolution,” where it is becoming comparatively easy for firms, governments, and ordinary people to learn a great many facts about any member of the public or public official without ever asking that person a direct question.²²⁹ As a result, maybe the traditional form of asking and telling is becoming passé. What are the implications when *A* can easily ask *C* (or watch *B* instead of asking *B*) and get the same or better information?²³⁰

²²⁸ 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).

²²⁹ LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 127-133 (2011).

²³⁰ Obviously the ask-*C* approach is not new. What is new is the proliferation of data collections and the precipitous decline in the cost of accessing them.

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 get 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, privacy tort law, or the Electronic Communications Privacy Act will substantially affect which facts about Alan 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.²³¹ 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.²³² As we saw above,²³³ 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 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.²³⁴

²³¹ See Peppet, *supra* note 2, at 1200 (citing Pub. L. No. 110-233, §§ 101 et seq., 122 Stat. 881, 883-904).

²³² Cf. STRAHILEVITZ, *supra* note 237, at 159.

²³³ See *supra* Part II.D.1.

²³⁴ See, e.g., Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions under the Fourth Amendment*, 74 TEX. L. REV. 49 (1995); see also BAIRD ET AL., *supra* note 2, at 91-93.

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 unbiased decision makers who interact with similar populations.²³⁵ 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”²³⁶ will be deemed inadequate. This situation describes the law in at least fourteen states with respect to trade secrets.²³⁷ 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.²³⁸ 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.²³⁹ 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.²⁴⁰ As the court put it, “PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game.”²⁴¹ 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.²⁴²

²³⁵ See Lior Jacob Strahilevitz, “How's My Driving?” for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1734 (2006).

²³⁶ Don't Ask, Don't Tell, Don't Use.

²³⁷ Barry L. Cooper, *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.”).

²³⁸ 54 F.3d 1262 (7th Cir. 1995).

²³⁹ *Id.* at 1272.

²⁴⁰ *Id.* at 1270.

²⁴¹ *Id.*

²⁴² *Id.* at 1271.

On first thought, it is 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.²⁴³ 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 here as well: applicants will not be permitted to work for the agency at all if their trustworthiness cannot be established *ex ante*.²⁴⁴

Finally, it is worth mentioning logically 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.²⁴⁵ 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 effective screening can be done cheaply and perhaps more accurately by accessing databases and where the politics are conducive. State law causes of action for negligent hiring already create such duties in some jurisdictions.²⁴⁶ As with 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 to, for instance, convey respect for another person's judgment without demanding that it be exercised in a particular direction.

²⁴³ See, e.g., *Mercer 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).

²⁴⁴ 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 analytics will help here, too.

²⁴⁵ 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).

²⁴⁶ 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).

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. 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 duty to the party with the information likely had 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. 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.²⁴⁷ 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,” prohibiting criminal defendants from testifying, to “May Ask, May Tell” at the defendant’s option.²⁴⁸ 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,²⁴⁹ 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. Perhaps not known for nimble security adjustments, 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.”²⁵⁰ The questions were implemented after the bombing of Pan Am flight 103 and near misses where terrorists had convinced their girlfriends to carry explosives hidden in their suitcases onto planes.²⁵¹ The questions were eliminated in 2002, after inefficiency complaints built up and evidence of terrorism prevention failed to materialize.²⁵² Air travelers no longer get reminders of such residual risks via repetitious questioning,²⁵³ but TSA insisted that it would

²⁴⁷ 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. v. Burr*, 551 U.S. 47 (2007).

²⁴⁸ See *supra* note 115.

²⁴⁹ 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).

²⁵⁰ Tom McCann, *2 Questions No Longer Part of Airport Routine*, CHI. TRIB., Aug. 30, 2002, at 1.

²⁵¹ See *id.*

²⁵² See Marcella Bombardieri, *Baggage Questions Unanswered: Check-In Mantra Worked, Some Say*, BOSTON GLOBE, Sep. 2, 2002, at B1.

²⁵³ See *id.* (raising this concern).

continue to raise awareness through automated announcements in airports.²⁵⁴ 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.²⁵⁵

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 the asking and telling rules for a particular setting.

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.²⁵⁶ 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.²⁵⁷ 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 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

²⁵⁴ See McCann, *supra* note 258, at 1.

²⁵⁵ For further discussion, see *infra* note 271.

²⁵⁶ See *supra* Part II.B.2.

²⁵⁷ 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.

they might better understand how to adjust standard operating procedure 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,²⁵⁸ contrary to the suggestion in *Abercrombie* that such questions are off limits until the employee raises the issue.²⁵⁹ 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 limit the probability that privileged information will be erroneously produced.²⁶⁰ 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.²⁶¹ 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,²⁶² 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 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.²⁶³ 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

²⁵⁸ See *supra* note 183.

²⁵⁹ 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 127.

²⁶⁰ See *supra* Part II.E.2.

²⁶¹ 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 (1997) (claiming that, in practice, the American litigation system is more akin to a non-adversarial administrative system of justice than an adversarial model).

²⁶² 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.

²⁶³ 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).

immense power over the accused as well as public responsibilities.²⁶⁴ 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.²⁶⁵ 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.

In addition, 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.²⁶⁶ For this reason, commentators have proposed second-order disclosure requirements, whereby the executive must disclose information to Congress or the public in order to ensure that critical programs’ existence isn’t kept secret from people who have oversight responsibilities but lack the creativity to anticipate that such programs have been implemented.²⁶⁷ The effect of these executive disclosure requirements, which have been implemented in a few domains,²⁶⁸ is to help ensure that the government’s telling is not made contingent on anyone’s asking.

²⁶⁴ 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 and courts let them get away with it. 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 57 (“[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 166-177 (discussing the same dynamics in the context of personal relationships) and text accompanying note 104 (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 263.

²⁶⁵ See Justin Goetz, *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.

²⁶⁶ See AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 121 (1996); Samaha, *supra* note 70, at 920 n.41, 948.

²⁶⁷ See, e.g., David E. Pozen, *Deep Secrecy*, 68 STAN. L. REV. 257, 326-33 (2010).

²⁶⁸ See *id.*

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.²⁶⁹ Valuable recent scholarship proposes using disclosure strategies to counteract the pay gap.²⁷⁰ 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.²⁷¹ 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 result because men are more likely to solicit salary information as a precursor to salary negotiations. Once provided with this information about peer salaries, the evidence suggests that women would seek pay that brings them closely into line with what male peers are earning.²⁷² 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.

CONCLUSION

There is significant scholarship on information disclosure, and there is a more fragmented literature on questioning. But there is virtually no legal scholarship on the dynamic relationship between the two. 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 through rules that mandate or forbid. A skeptic might wonder whether combining the study of asking and telling rules yields insights that looking at them in isolation would not. The analysis in this Article necessitates an affirmative answer. Legal systems do not find their way into particular combinations of asking and telling rules entirely by accident. Although questions are telling, practical differences between requesting information and

²⁶⁹ See Andreas Leibbrandt & John A. List, *Do Women Avoid Salary Negotiations? Evidence from a Large Scale Natural Experiment*, NBER Working Paper 18511 (Nov. 2012).

²⁷⁰ 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).

²⁷¹ 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).

²⁷² Cf. Mary E. Wade, *Women and Salary Negotiation: The Costs of Self-Advocacy*, 25 PSYCH. WOMEN Q. 65, 72-73 (2001).

providing it cannot be erased. There are important attributes that Must Ask, Must Tell policies share that Must Ask, May Tell, and Must Ask, Don't Tell policies lack. By the same token, Must Ask, Don't Tell and Don't Ask, Don't Tell are motivated by a different set of considerations. Hence 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. None of this suggests that society is at its Pareto frontier where asking and telling are concerned. On the contrary, we point to places where we think altering the existing rules and norms may be justified. But we can do so more confidently because we have begun to give conversations the sustained scrutiny that they deserve.

Scholarship entails trade-offs, of course, involving which topics to consider deeply and which broadly. We chose to dig into the phenomena of asking and telling, while demonstrating the staggering array of legal domains from which lessons might be drawn and to which our new toolkit might contribute. In so doing, we stressed that a sound evaluation must account for both social and legal norms. When these norms and their sources are put together, we can make sense of some extraordinary combinations of asking and telling norms—and we can more precisely and deeply criticize some other combinations. But because asking and telling norms are only sometimes related to use norms, even this much is not enough. Furthermore, since opportunities for people to work around existing asking and telling norms are rapidly expanding with technology and big data analytics, we will have to rethink or even revamp a constellation of legal and social norms that is still under-analyzed. Getting a good picture of these moving parts is a difficult task but, we think, 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 norms shift; mono-causal explanations and uni-dimensional justifications for broad social phenomena rarely withstand careful scrutiny. In this initial effort, we aspire to identify major questions that scholars will feel compelled to answer.