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*“DO IT BUT DON’T TELL ME”*

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## Do It But Don't Tell Me

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My purpose in this essay is to identify and, if possible, to make sense of a form of regulation that our legal system seems to have adopted, without fully acknowledging it, in several important areas. This regulatory regime consists of formally forbidding a practice while permitting the practice to continue so long as it is done surreptitiously. Plausible arguments can be made that this is the governing regulatory regime for affirmative action in education; for physician-assisted suicide; for the coercive interrogation of terrorism suspects; for racial profiling by law enforcement officers; for certain forms of police brutality; for the practice of jury nullification; and for other subjects as well.

The puzzle – which has both normative and descriptive aspects – is that this form of regulation seems irrational. One would think that, if we want people to do something in certain circumstances but not others, we would try to specify the circumstances in which the conduct was permitted or prohibited. We might have to specify it imprecisely, with a discretionary standard rather than a clear rule, but we would do the best we can. Then we would provide incentives to try to get people to conform to the rule or standard. But a “do it but don't tell me”

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regime (as I'll call it) does not operate like that. It makes the permissibility of certain conduct turn – de facto or even, in some instances, de jure – on whether the conduct has been successfully concealed. It is not immediately clear why that is a sensible way to regulate conduct, as a normative matter. Also it is not clear why, as a matter of causal explanation, that kind of regulatory regime would be chosen or would evolve.

In part I, I will describe areas in which “do it but don't tell me” regimes seem to govern. I begin with affirmative action, because that is an area in which such a regime has been more or less explicitly adopted, and reaffirmed, by the Supreme Court, and has been in existence for more than a generation. In the other areas I discuss, “do it but don't tell me” regimes have not always been explicitly avowed, but it seems quite clear that they exist in fact. In part II, I will discuss some possible explanations for “do it but don't tell me” that are incomplete but nonetheless helpful. Then in part III, I will suggest some explanations and justifications for this kind of regime that do seem to work.

## I. “Do It But Don't Tell Me” Regimes

### A. Affirmative Action

The constitutional law of affirmative action is an especially useful example of a “do it but don't tell me” regime because such a regime has been adopted by the Supreme Court and defended by some Justices, and it has remained in effect for almost fifty years. The foundation is the opinion of Justice Powell in *Regents of*

*the University of California v. Bakke*.<sup>1</sup> The medical school of the University of California at Davis set aside 16 of 100 places in each entering class for minority students.<sup>2</sup> The Court ruled that the plan was unlawful. Four justices in the majority concluded that the University could not take race into account in admissions; four dissenters would have upheld the University's plan.<sup>3</sup>

In his separate opinion, Justice Powell voted with the majority to invalidate the Davis plan on the ground that it was unconstitutional to set aside a fixed number of places for minority applicants.<sup>4</sup> But, Justice Powell said, it was not unlawful for a university to take race into account and "deem[ it] a 'plus' in a particular applicant's file," as long as the admissions procedure was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."<sup>5</sup> A university had to "treat[ ] each applicant as an individual in the admissions process"; as long as it did so, "an applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color. . . . It would mean only

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<sup>1</sup> 438 U.S. 265 (1978).

<sup>2</sup> Id. at 275 (opinion of Powell, J.)

<sup>3</sup> Id. at 271-72.

<sup>4</sup> Id. at 287-311.

<sup>5</sup> Id. at 317.

that his combined qualifications . . . did not outweigh those of the other applicant.”<sup>6</sup>

As many people have said, it is not clear how this distinction – between setting aside a certain number of places, on the one hand, and using race as a “plus” factor, on the other – can be defended.<sup>7</sup> The use of race as a factor can determine whether an applicant is admitted, just as a quota can. Other things equal, why does it matter whether a non-minority applicant loses out because of one instead of the other? If race, as a factor, is given a weight that allows the admission of sixteen minority candidates who would otherwise be admitted, it is difficult to see how that is different from setting aside sixteen places.

But Justice Powell’s approach must have had something going for it, because it has remained the law of the land since then. It became the standard that universities, government employers, and other institutions used in designing affirmative action plans: they took race into account, and gave a preference to minorities, but did not set overt numerical quotas. In the 1990s, Justice Powell’s approach came under attack in the lower courts;<sup>8</sup> but in 2003, in cases challenging affirmative action in admissions to the University of Michigan,

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<sup>6</sup> Id. at 318.

<sup>7</sup> [citations]

<sup>8</sup> See, e.g., *Hopwood v. Texas*, 236 F. 3d 256 (5th Cir. 2000).

that approach was adopted by a majority of the Supreme Court.<sup>9</sup> In 2007, in cases involving plans to integrate public schools in Louisville and Seattle, Justice Kennedy’s pivotal opinion took essentially the same approach.<sup>10</sup> In 2016, a majority of the Court endorsed the same approach.<sup>11</sup>

What is that approach? It is often described as a matter of avoiding “quotas.” But that is not quite right, as the Michigan cases revealed. In deciding who would be admitted to the undergraduate college, the University of Michigan assigned points for a number of characteristics, including minority status. Applicants who received more than 100 points were generally admitted. Up to 110 points could be awarded for academic performance; up to 40 points for nonacademic achievements; 10 points for being a resident of Michigan. Minority status was worth 20 points.<sup>12</sup> The University of Michigan Law School, by contrast, did not use points; its admissions committee considered applicants individually, on the basis of their entire file, taking minority status into account but without assigning a fixed weight.<sup>13</sup>

If quotas were the problem, the law school’s plan would have been much more troubling: it was flexible enough to allow the admissions committee to use

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<sup>9</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>10</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738, 2788-97 (2007) (Kennedy, J., concurring).

<sup>11</sup> *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016).

<sup>12</sup> *Gratz*, 539 U.S. at 253-57.

<sup>13</sup> *Grutter*, 539 U.S. at 314-16.

a covert quota, and there was some evidence that the law school did just that.<sup>14</sup>

The undergraduate admissions protocol, on the other hand, did not use a quota at all. It assigned the points and let the chips fall where they might. Any manipulation of the point system to reach a quota would have been obvious. Nonetheless, the Court struck down the undergraduate program and upheld the law school's.

What made the difference, apparently, was that the college used numbers and the law school did not. The college made it clear that minority applicants would have an advantage, and it quantified the advantage. The law school left it all much more murky. In the law school's system, it was even possible – as far as anyone on the outside knew – that no minority applicant got any advantage at all, if that was how the case-by-case review turned out. What all of this suggests is that the lawfulness of an affirmative action program is determined not by whether it uses quotas, but by whether it obscures the degree to which a preference is given.<sup>15</sup>

Justice Kennedy's opinion determining the outcome of the Seattle and Louisville cases, is an even more stark illustration. Seattle and Louisville, in determining who would be admitted to oversubscribed public schools, gave a

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<sup>14</sup> See *id.* at 383-86 (Rehnquist, C.J., dissenting).

<sup>15</sup> Ian Ayres and Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 *Tex. L. Rev.* 517 (2007), interpret the Michigan cases in just this way. They are critical of this approach. See *id.* at 565-82.

mild preference to children who, because of their race, would tend to make the schools more racially heterogeneous. Justice Kennedy concluded that these programs were unconstitutional because they classified individual children on the basis of their race. “Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.”<sup>16</sup> But Justice Kennedy, like Justice Powell, explicitly approved “race-conscious measures that do not rely on differential treatment based on individual classifications.”<sup>17</sup> He explained:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.<sup>18</sup>

The difference between what Justice Kennedy approved and what he disapproved does not really seem to turn on whether individuals are assigned to a certain racial group, though. A school district that draws attendance zones “with a general recognition of the demographics of neighborhoods” or that recruits “in a targeted fashion” is assigning a racial “identity” to individuals. The

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<sup>16</sup> 127 S. Ct. at 2796 (Kennedy, J., concurring).

<sup>17</sup> Id. at 2797.

<sup>18</sup> Id. at 2792.

difference is that the measures Justice Kennedy approved, like the measures approved in *Bakke* and the Michigan cases – but unlike the measures disapproved in each of these cases – are more likely to obscure the degree to which race is being taken into account and might even make it possible for an outsider to believe that race was not taken into account.

This is a “do it but don’t tell me” regime: its governing principle is that affirmative action is acceptable if, but only if, it is done in a way that is not too obvious. There is a resemblance to a more familiar, non-legal instance of “do it but don’t tell me”: the public figure who instructs a subordinate to do something unsavory but who wants to maintain “plausible deniability”<sup>19</sup> – the ability to disavow the subordinate’s actions. If Justice Kennedy were instructing a school district to maintain plausible deniability, his instructions would not look very different. The questions are why that approach has so much appeal as a resolution of the affirmative action issue, and whether it can be justified.

#### B. Other “Do It But Don’t Tell Me” Regimes

If this kind of approach were confined to the affirmative action cases, it might be treated as reflecting just an instinct for a workable compromise on the part of Supreme Court justices who thought the Court should not take more

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<sup>19</sup> The term seems to have been given currency by the report of the special Senate Committee, chaired by Senator Frank Church, that investigated abuses and questionable activities by United States intelligence agencies in the 1960s and 1970s. *Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, United States Senate 11 (Nov. 20, 1975).

clear-cut position either for or against the constitutionality of affirmative action.<sup>20</sup> But there seems to be something more interesting going on as well – some reason why *this* was the compromise that emerged – because essentially this same kind of regime operates in a number of other, quite disparate, areas. In most other areas it is not officially recognized, as it is in the affirmative action cases, and that gives rise to some dissimilarities. But fundamentally the same regime seems to be at work.

### 1. Physician-assisted suicide

In nearly every state, it is a crime for a physician to administer drugs for the purpose of hastening a patient's death, even if the patient requests it. In 1997, the Supreme Court rejected the argument that such laws forbidding assisted suicide in end-of-life situations are unconstitutional.<sup>21</sup> Nonetheless, there seems to be a general understanding that physician-assisted suicide takes place with some frequency,<sup>22</sup> although, for obvious reasons, it is difficult to get reliable data on how often physician-assisted suicide occurs.

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<sup>20</sup> See, e.g., John C. Jeffries, Jr., *Bakke Revisited*, 2003 Sup. Ct. Rev. 1.

<sup>21</sup> *Washington v. Glucksberg*, 521 U.S. 707 (1997).

<sup>22</sup> See, e.g., Diane E. Meier, et al., *A National Survey of Physician-Assisted Suicide and Euthanasia in the United States*, 17 N.E. J. Med. 1193 (1998); *Compassion in Dying v. Washington*, 79 F. 3d 790, 827-28 (9th Cir. 1996) (en banc); Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 Sup. Ct. Rev. 1, 20-21 & nn. 91-92 (citing sources); Asch, *The Role Of Critical Care Nurses In Euthanasia And Physician-Assisted Suicide*, 334 N. Engl. J. Med. 1374, 1379 (1996).

Prosecutions, though, are extremely uncommon, and they seem to be confined to instances in which the doctors make no effort to conceal what they have done. There do not appear to be systematic efforts, even by hospitals – much less by law enforcement officers – to detect cases in which the doctors and the families involved have acted covertly and have not publicized their actions. This is true despite the general recognition that instances of assisted suicide are not rare. These prosecutions would often not be easy to bring, but formally the crime is certainly serious enough to justify a substantial investment of prosecutorial resources. The best description of the current state of affairs seems to be that assisted suicide in end-of-life situations, while illegal, can be done if done surreptitiously, and is in fact done.

At first glance this example might seem to be different from affirmative action, because physician-assisted suicide is formally illegal while affirmative action is not. But in practice the two regimes are more similar than different. Someone giving candid advice to a physician about assisted suicide, and someone giving advice to a school board about affirmative action, would say similar things: you can engage in these practices, but you have to be careful not to make it obvious what you are doing.

Also, in both areas, there is an indistinct, easily-blurred line between what is lawful and what is not. This seems to be characteristic of “do it but don’t tell me” regimes, unsurprisingly: it is easier to be surreptitious if the illegal act can

be made to appear to be a similar, legal one. For example, while physician-assisted suicide is unlawful, palliative care – the administration of pain relief – is generally legal even if the person administering it knows that it will hasten the patient’s death. In fact it may be unconstitutional for a state to outlaw palliative care of this kind.<sup>23</sup> But the difference between palliative care and physician-assisted suicide will sometimes be no more than the subjective intentions of the physician. In addition, a patient who is competent generally has a right to refuse treatment, and the line between honoring a patient’s refusal of treatment and assisting the patient’s suicide again can be unclear, especially if all of those involved have agreed on what the right course of action is.

The distinction between these lawful practices and unlawful physician-assisted suicide is parallel to the distinction between the kinds of “soft” affirmative action that the Supreme Court approves and the more overt kinds that it disapproves. In both areas, there are ways of achieving an objective that sometimes differ only in the degree to which they make it obvious what is actually going on. Affirmative action is lawful as long as it is done “by indirection” (in Justice Kennedy’s words)<sup>24</sup>; and as long as medical care

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<sup>23</sup> In *Washington v. Glucksberg*, *supra*, Justice O’Connor – whose vote was necessary to make a majority – wrote a concurring opinion that hinted that she would have doubts about the constitutionality of a law prohibiting assisted suicide that did not make an exception for palliative care. 521 U.S. at 736-38 (O’Connor, J., concurring).

<sup>24</sup> *Parents Involved*, 127 S. Ct. at 2796.

providers are not overtly engaged in physician-assisted suicide, prosecutors seem to have no interest in ferreting out violations of the law.

Another apparent difference is in the way in which the two practices—affirmative action and physician-assisted suicide—are spoken about. Corporations and college admissions committees that engage in affirmative action, while circumspect in describing what exactly they do, are proud of the outcomes; one hardly sees the same thing with physician-assisted suicide. But this seems to be an artifact not of a difference in the regulatory regimes but of the inherent nature of the subject. The proponents of affirmative action see it as a way of accomplishing something affirmatively good; physician-assisted suicide is just a way of mitigating a terrible situation. In fact, as I will suggest below, the sense that certain acts are painful necessities, not to be celebrated, may be a clue to understanding “do it but don’t tell me” regimes.

## 2. Racial profiling by law enforcement officers

Racial profiling, for these purposes, is the practice in which people are selected for investigation, stop, search, arrest, or prosecution in part because of their race or ethnicity, when the justification for the use of race is that race correlates with an unquestioned indicator of criminal activity. Law enforcement officers, from the top to the bottom of the hierarchy, deny that racial profiling

occurs.<sup>25</sup> Although the statistical story is complicated, it strongly suggests that racial profiling does occur.<sup>26</sup>

In fact it is hard to believe that law enforcement officers would resist the temptation to engage in profiling, given the widespread belief that racial and ethnic characteristics correlate with criminal behavior. But officials also understand that acknowledging the practice, much less defending it, is out of the question. The comments of a now-former superintendent of the New Jersey State Police illustrate the dilemma. After his department was accused of systematic racial profiling, he said: "As far as racial profiling is concerned, that is absolutely not right. It never has been condoned in the State Police and it never will be condoned in the State Police."<sup>27</sup> But then he added:

Today with this drug problem, the drug problem is cocaine or marijuana. It is most likely a minority group that's involved with that. . . . If you're looking at the methamphetamine market, that seems to be controlled by motorcycle gangs, which are basically predominantly white. If you're looking at heroin and stuff like that, your involvement there is more or less Jamaicans.<sup>28</sup>

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<sup>25</sup> See, e.g., Samuel R. Gross and Debra Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413, 1421, 1422 (2002); Jonathan R. Defosse, *Asian Americans, Racial Profiling, and National Security*, 70 Geo. Wash. L. Rev. 181, 203 (2002).

<sup>26</sup> See, e.g., Greg Ridgeway and John MacDonald, *Methods for Assessing Racially Biased Policing*, in *Race, Ethnicity, and Policing: New and Essential Readings* 180 (Stephen K. Rice and Michael D. White, eds.) (NYU Press 2010); Bureau of Justice Statistics, *Contacts Between Police and the Public* (Department of Justice 2005).

<sup>27</sup> Gross and Livingston, *supra* note xx, quoting Kathy Barrett Carter and Rom Marsico, *Whitman Fires Chief of State Police*, *New Jersey Star Ledger* A1 (Mar 1, 1999).

<sup>28</sup> *Id.*

This juxtaposition captures what – judging from the statistics and also common sense – must be the outlook of many law enforcement officers. Given the perceived efficacy of profiling in fighting crime, it makes no sense not to engage in it. But given the consequences of publicly admitting to profiling – the State Police superintendent who made those comments had just been fired because of the accusations against his department – it would end your career to acknowledge doing it. This is again a “do it but don’t tell me” regime.

### 3. Coercive interrogation

Coercive interrogation – the use of force to compel a person to divulge information – was of course been much discussed after the September 11 attacks. In the Bush Administration, the United States government admitted using coercive techniques to obtain information, although it denied that those techniques constituted “torture” within the meaning of the statutes and treaties that banned torture. The Obama Administration explicitly renounced the use of those techniques. At least until it was more or less openly avowed in the Bush Administration, coercive interrogation seemed to be another example of “do it but don’t tell me,” and it may become that again. Governments simply denied that they engaged in coercive interrogation. At the same time, there was an understanding that in extreme cases, interrogators would “do what they had to do.”

As with physician-assisted suicide and affirmative action, this regime was implemented in part by taking advantage of the uncertain boundary between legal and illegal activity. “Torture” was outlawed in the United States, and the official position of the United States government at all times was that it does not engage in torture. The government does not acknowledge that its coercive practices are torture. This is comparable to the distinctions between the kinds of race-conscious action that the Supreme Court permits and the kind it does not, and between the kinds of actions that constitute physician-assisted suicide and those that are legitimate medical care or deference to patients’ wishes. What is lacking in all of these areas – physician-assisted suicide, racial profiling, and (in a slightly different way) affirmative action – is what one would expect to find in a rational regulatory regime: an explicit set of rules or standards that specifies, with whatever degree of precision is possible, when the behavior in question is permissible and when it is not. Instead in each area there is a formal prohibition and an uncompromising public stance, coupled with a practice of excusing surreptitious violations.

This kind of regime seems to resemble, but is in fact crucially different from, a so-called “outlaw and forgive” regime.<sup>29</sup> Under “outlaw and forgive,” coercive interrogation remains flatly illegal. An individual who engages in coercive interrogation should admit and explain his actions and then either

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<sup>29</sup> So named, but not endorsed, in Eric A. Posner and Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 Mich. L. Rev. 672, 694 (2006).

invoke the defense of necessity, or ask to be excused by the exercise of prosecutorial discretion or by a pardon. This approach has many advocates.<sup>30</sup> It is also somewhat similar to the resolution of the famous cannibalism case, *Queen v. Dudley and Stephens*,<sup>31</sup> and to a system of “acoustic separation.” In a system of “acoustic separation,” the rules that govern officials’ exercise of their power to punish are not known to the individuals whose conduct is being regulated.<sup>32</sup> The individuals are told that their acts are forbidden, and they act at their own risk; after the fact, though, officials (acting according to norms not publicly known) might decide not to punish them.

“Outlaw and forgive,” acoustic separation, and similar approaches are different in two respects from “do it but don’t tell me.” First, in those other examples, the violation is not surreptitious; it is acknowledged and the person who engages in it seeks to justify his action according to some (possibly not fully articulated) norms. Instances of physician-assisted suicide and racial profiling are not made public and forgiven; they are concealed, so a pardon or the exercise of prosecutorial discretion seldom becomes necessary. When affirmative action is done too transparently, as with the programs that the Supreme Court struck

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<sup>30</sup> See, e.g., Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 Minn. L. Rev. 1481 (2004); Henry Shue, *Torture*, in Sanford Levinson, ed., *Torture: A Collection* 47, 58 (2004); Jean Bethke Elshtain, *Reflections on the Problem of “Dirty Hands,”* in *id.*, at 77, 82-84.

<sup>31</sup> 14 Q.B.D 273 (1884).

<sup>32</sup> See Meir Dan-Cohen, *Decision Rules And Conduct Rules: On Acoustic Separation Criminal Law*, in *Harmful Thoughts: Essays on Law, Self, and Morality* 37 (2002).

down, it is simply unconstitutional. There is no question of after-the-fact forgiveness.

Second, and more important, unlike “do it but don’t tell me,” an “outlaw and forgive” type of regime is not a particularly puzzling form of regulation. It conforms to the rational model of deciding what kinds of conduct should be allowed and aligning incentives accordingly. There is an explicit prohibition; that is the “outlaw” part, or the public rule. But the person who seeks “forgiveness” – in the form of a pardon, or a favorable exercise of prosecutorial discretion, or a necessity defense – is also invoking some set of norms or principles. The idea behind this regime is not that “forgiveness” is granted randomly or whimsically. It might be that the norms determining when a person will be forgiven cannot easily be embodied a rule, or even in a discretionary standard; those norms might have to emerge over time from a series of decisions.

The distinctive feature of an “outlaw and forgive” system is that it puts the risk of misapprehending the norms of forgiveness on the actor. In that way it is in tension with familiar notions that individuals should have advance notice of what kind of conduct will get them punished. But there can be good reasons for putting actors at risk in those ways, if that produces the right level of deterrence. The model of regulation is still the familiar one: conduct is either allowed or forbidden, according to certain norms, and the incentives are arranged

accordingly. That is not, at least not obviously, what is going on in a “do it but don’t tell me” regime.

#### 4. “Rough justice” and police brutality

Coercive interrogation is sometimes compared with routine police enforcement tactics, such as the use of deadly force. Sometimes the purpose of the comparison is to argue that coercive interrogation should be regulated in the same way – by explicit rules or before-the-fact judicial authorization, for example. But the more illuminating comparison might be with law enforcement tactics that do not conform to the established rules governing police conduct.

There is good evidence that there exists an underbelly of law enforcement behavior that is regulated – as, I’ve argued, coercive interrogation actually is – by a “do it but don’t tell me” regime. Law enforcement officers, on the streets and in prisons, are allowed some latitude to engage in questionable or unlawful conduct in order to maintain order. The unlawful conduct might include stops and frisks conducted without reasonable suspicion, pretextual arrests (which are not necessarily a violation of the Fourth Amendment but may violate other rules or policies), or even acts of brutality.

This conduct is tolerated in the sense that, as with the other examples, rooting it out is not a high priority. Also, there is some reason to think that courts

systematically avert their eyes from such conduct.<sup>33</sup> But it is not openly avowed or made public; if it were, the officers who engaged in the conduct would be subject to discipline, civil lawsuits, and possibly criminal punishment. The same puzzle exists. If some degree of order-maintenance policing that exceeds the currently recognized limits on police conduct is acceptable, why not determine what is acceptable and set up an explicit structure of incentives to achieve it? Or, if it is not acceptable, then it should be systematically prevented or punished. It is not an answer to say that the situations in question are too complex to be governed by rules, because they do not have to be governed by rules. A discretionary standard would suffice, as it does for many kinds of police conduct that are explicitly regulated. But instead we seem to have settled on a “do it but don’t tell me” regime.

#### 5. Jury nullification

Jury nullification – a jury’s acquittal of a defendant whom it believes to be guilty of the charges – is a time-honored and celebrated tradition. The power of the jury to nullify is routinely offered as a defense of the jury system – indeed, as one of the most important virtues of the jury system. But juries are not told that they have the right to nullify.<sup>34</sup> Defendants are not entitled to an instruction

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<sup>33</sup> See, e.g., Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *Buff. L. Rev.* 1275 (1999).

<sup>34</sup> In Indiana, Georgia, and Maryland, juries are told that they are the judges of the law, as well as the facts. But they are not explicitly told they may nullify, and pattern jury

telling jurors that they may nullify. Prospective jurors who say that they might nullify can be challenged for cause. Defense counsel may not urge the jury to nullify; doing so would be grounds for a mistrial and potentially for discipline. In most jurisdictions, if a judge learns during trial or during the jury's deliberations that a juror is contemplating nullification, the judge may interrupt the proceedings to question the juror and, if appropriate, dismiss the juror.

Nullification is, then, both celebrated and put off limits. But not entirely off limits: once a trial is over, jurors cannot be questioned to determine if they nullified, and they certainly cannot be punished for nullification. This is partly because of a general reluctance to examine jury deliberations, but only partly. Jurors can be questioned if there are allegations of fraud (if, for example, a juror lied about his or her relationship to a party), or corruption, or intimidation, or certain kinds of bias. Nullification is not treated like that. Other features of the criminal justice system are also designed in part to make it possible for jurors to nullify: for example, criminal juries usually render general verdicts of guilty or not guilty, rather than answering specific interrogatories, and the Double Jeopardy Clause is interpreted to forbid government appeals of acquittals altogether.<sup>35</sup>

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instructions in Georgia and Maryland at least tell jurors that they have to follow the judge's instructions on the law. No other states go even as far as those three; nor does the federal government.

<sup>35</sup> I am indebted to George Fisher for discussion of these points.

All of this suggests another “do it but don’t tell me” regime. Juries may nullify; we do not try nearly as hard as we might to prevent them from doing so, and we celebrate the tradition that allows them to do so. But the practice is formally disapproved. A juror who intends to nullify had better do so stealthily. If she makes her intentions known, she will be excused. If a jury does nullify, though, its action is accepted and even protected. The same puzzle exists here as with other instances of “do it but don’t tell me.” If nullification is an acceptable and sometimes valuable practice, why not figure out a formulation, however vague, that would give jurors some guidance about when they should nullify, and tell them?

#### 6. Issues in transition: contraception, abortion, and gay rights

“Do it but don’t tell me” regimes also seem to function as way-stations, when the dominant public opinion on a subject is in the process of changing. When some kind of conduct is still unlawful but a substantial portion of society believes it should not be, the equilibrium might be a “do it but don’t tell me” regime. There is nothing inevitable about this; there might also be widespread (if often reluctant) obedience, or alternatively open defiance that treats the law as a dead letter. But sometimes a “do it but don’t tell me” regime emerges instead.

This seems to have been the case with contraception, abortion, and gay sex before they were legalized. *Griswold v. Connecticut*<sup>36</sup> struck down a

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<sup>36</sup> 381 U.S. 479 (1965).

Connecticut statute that forbade the use of contraceptives, even by a married couple; a concurring opinion commented that the statute was not generally enforced.<sup>37</sup> In an earlier case, *Poe v. Ullman*,<sup>38</sup> the Court had refused to decide whether the statute was constitutional, concluding that the case was not justiciable because the statute was not enforced. But while the authorities did not seek out married couples to prosecute for using contraceptives, the statute was enforced against birth control clinics that openly violated it.<sup>39</sup> Private use was essentially ignored; visible conduct was penalized.

Before *Roe v. Wade*, while there were prosecutions of doctors who performed abortions, abortions were available in many urban areas, particularly in the 1960s. Even before then, many hospitals interpreted even narrow exceptions in laws forbidding abortions – such as provisions that allowed abortions to protect the life of the mother – quite liberally and performed abortions in a variety of circumstances.<sup>40</sup> While there were, periodically, efforts to seek out abortion providers, by and large doctors could escape prosecution if

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<sup>37</sup> *Id.* at 506 (White, J., concurring in the judgment) (referring to the “total nonenforcement . . . and apparent nonenforcibility” of the statute against married couples)

<sup>38</sup> 367 U.S. 497 (1960).

<sup>39</sup> See, e.g., David J. Garrow, *Liberty & Sexuality* chs. 1-3 (Macmillan 1994); Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 Iowa L. Rev. 915 (1990)

<sup>40</sup> See, e.g., Garrow, *supra* note xx, at 277-85.

they were cautious.<sup>41</sup> Similarly, laws forbidding gay sex were not aggressively enforced in the years before *Lawrence v. Texas*, although there were occasional prosecutions of individuals who made themselves conspicuous.<sup>42</sup> All of these were, to some degree at least, “do it but don’t tell me” regimes: conduct that was formally forbidden was permitted, with little effort to seek out offenders unless they made themselves highly visible. This point should not be overstated: there were sometimes systematic efforts to detect violations, and even when they were not, the formal illegality seriously affected many people, especially women seeking abortions. But the regimes in place seem to have been roughly comparable to that governing physician-assisted suicide today.

## II. Incomplete Explanations

Some explanations for “do it but don’t tell me” seem straightforward. A regime that essentially confines itself to visible, public violations of the law might just be a more efficient or otherwise superior use of enforcement resources. A “do it but don’t tell me” regime might be seen as serving expressive values: it enables a community to express its general disapproval of, say, racial profiling or coercive interrogation, while still gaining the practical advantages of allowing those practices to take place. Related, a “do it but don’t tell me” regime might be a particularly good way for a community to express ambivalence about a

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<sup>41</sup> *See id.* [more needed].

<sup>42</sup> [citations]

practice. But while all of these explanations shed some light on the puzzle, none of them solves it.

#### A. Enforcement Costs

For familiar reasons, a simple concern with enforcement costs might lead to a regime that, *de facto*, permits conduct as long as it is engaged in covertly. The costs of detecting and then proving surreptitious conduct are obviously likely to be greater. That is especially true if the costs include not just the costs to enforcement agencies but the invasion of individuals' privacy, as with the enforcement of the Connecticut statute forbidding contraceptive use even by married couples. At the same time, punishing open defiance of the law is likely to provide greater deterrence, other things equal, and failing to punish open defiance is more likely to undermine deterrence. So there are straightforward reasons why a rational law enforcement strategy might overlook covert violations while punishing conspicuous violations, even if the ideal state of affairs would be one in which there was no law violation at all.

The concern with enforcement costs—or, more precisely, the balance of costs and benefits—is also the principal explanation for another example of “do it but don’t tell me”: the underenforcement of laws forbidding minor crimes. At first glance, minor offenses might seem to provide a particularly clear example of conduct that is formally illegal but nonetheless accepted so long as it is done covertly. The most obvious examples are offenses that have no identifiable victim

and do not seem terribly wrong as a moral matter – minor traffic offenses, for example, or the possession of small amounts of certain illegal recreational drugs. People can get away with doing these things as long as they do not do them openly. Violations of the immigration laws and infringements of intellectual property rights may also fall in this category, although those may present more complicated issues.

But for two reasons, the concern with enforcement costs and benefits is not a satisfactory explanation of the other examples of “do it but don’t tell me.” (That is why the underenforcement of minor criminal laws, which can be easily explained in those terms, is a less interesting example.) First, in the other examples, the ratio of the benefits of enforcement to the costs is much higher. Enforcing the laws against physician-assisted suicide would be very costly, in both material and non-material terms, but formally the crime is a very serious one. Ordinarily the criminal justice system will unhesitatingly incur costs, including serious costs to private relationships, to enforce laws as important as the laws against physician-assisted suicide nominally are. The enforcement costs associated with other instances of “do it but don’t tell me” are not especially great, and the benefits, again, are substantial, at least if one takes the relevant prohibitions – against coercive interrogation, racial profiling, and police brutality – at face value.

Second, in the case of minor crimes, the ideal state of affairs would be one in which no such crimes were committed; the only problem is that that state of affairs cannot be attained without excessive enforcement costs. In the other examples, complete compliance is not the ideal state of affairs. That is just the point: if we have a “do it but don’t tell me” regime, instead of a vigorously enforced prohibition, it is because we want physician-assisted suicide, coercive interrogation, racial profiling, jury nullification, and so on, to occur to some limited degree. In those situations, enforcement costs are only a minor part of the explanation.

#### B. Ambivalence and Hypocrisy

At first glance, hypocrisy might seem to be an obvious explanation for “do it but don’t tell me” regimes. Whoever decides on such a regime – the Supreme Court, or some other group of political actors, or society at large – seems to want to talk one way and act another. We will gain the benefits of coercive interrogation, affirmative action, or racial profiling while posing as opponents of those practices. It’s like the famous line of the Claude Rains character in *Casablanca*, who announces that he is “shocked, shocked” that gambling is going on in the establishment and then is handed his winnings.

This account may be correct, but it seems incomplete. In some of these areas at least, the sentiments of the people who embrace a “do it but don’t tell me” approach seem ambivalent rather than hypocritical. Many people are torn

between conflicting impulses about physician-assisted suicide and coercive interrogation; a similar ambivalence characterizes a some people's attitudes toward affirmative action.<sup>43</sup> These are not instances of garden-variety hypocrisy, in which people act out of self-interest in a way that violates their professed moral views. Rather, these seem to be situations in which both courses of action – permitting physician-assisted suicide or totally prohibiting it; prohibiting coercive interrogation even when it might save lives or permitting it – seem to violate some moral obligation.<sup>44</sup> One resolution may be better than another, but both involve a serious loss.

The existence of moral conflict, and ambivalence, may help explain, as a descriptive matter, why “do it but don't tell me” regimes have evolved in certain areas. A “do it but don't tell me” regime obscures from view the situations that create the moral conflict. That regime creates a relatively comfortable situation in which the official norm is an appealing one, but at the same time people can feel secure in the belief that cases in which that norm will produce unacceptable results will be dealt with appropriately. The moral conflict is mitigated because the reassuring official norm – no coercive interrogation, no racial profiling, no

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<sup>43</sup> See Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907 (1983).

<sup>44</sup> See the account in Bernard Williams, “Conflicts of Values,” in *Moral Luck* 71, 73-75 (Cambridge 1981); see also Martha C. Nussbaum, *The Fragility of Goodness*.

physician-assisted suicide – is salient, while the troubling counter-examples are not.

This kind of resolution – essentially averting one’s eyes from the aspects of a situation that make it morally difficult – is similar to the common unwillingness to quantify the worth of a human life, in situations in which the question is whether to risk lives in exchange for some socially beneficial activity. There are celebrated instances in which firms that explicitly calculated the risk that their products would endanger lives, then quantified that risk and weighed it against the benefits, were penalized, even though the only alternative was a cruder and more impressionistic version of the same cost-benefit calculation.<sup>45</sup>

This kind of reluctance to confront the existence of a difficult choice obviously can be criticized as irrational, but it is not entirely clear that the reluctance is a bad thing. It could be that this attitude reflects a valuable character trait, while a ready willingness to engage in explicit tradeoffs in such troubling situations reflects a less admirable character. I will return to this possibility below. But in any event, the arguably irrational desire to avert one’s eyes from an unsettling clash of values does seem to explain the attractiveness of a “do it but don’t tell me” regime.

While the existence of moral conflict might help explain why a “do it but don’t tell me” regime is adopted (or survives once it adventitiously comes into

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<sup>45</sup> [E.g. Gary Schwartz on the Ford Pinto litigation]

being), it does not really *justify* such a regime. Ambivalence could be resolved by adopting a regulatory regime of the usual kind, one that specified the right course of action through a rule or a standard. In each of these instances, after all, someone has to make a decision and act on it: someone has to decide whether this is a case in which physician-assisted suicide, or racial profiling, or coercive interrogation is warranted. A regulatory regime could try to specify, to the extent possible, what the right outcome should be, using discretionary criteria or even case-by-case development if necessary. Regulations deal with many subjects that are characterized (at least sometimes) by moral ambivalence, including the imposition of criminal punishment itself. Ambivalence in the face of serious moral conflict does not, by itself, seem to justify a “do it but don’t tell me” regime.

#### D. Expressive and symbolic values

Another straightforward and plausible explanation for the “do it but don’t tell me” regime is that it serves expressive values in a way that a conventional regulatory regime would not. The idea is that it is important for a society to express its values by outlawing certain conduct. We formally forbid physician-assisted suicide and coercive interrogation because doing so expresses our respect for human life and human dignity. Then, having secured that symbolic good, we allow covert exceptions in order to protect other values.

One problem with this explanation can be seen by asking: what exactly is the symbolic statement that the society is making? The statement “We do not permit physician-assisted suicide in any circumstances” is untrue. We do permit it, as long as it is done covertly, and we permit it because sometimes it is the right thing to do. (At least that would be the view of those who endorse the “do it but don’t tell me” regime instead of insisting on rigorous enforcement.) Why should a society announce that it stands for a view that it does not think is morally correct? By hypothesis, the correct view is that physician-assisted suicide should be forbidden generally but permitted in certain circumstances. Why not make *that* statement? And that statement can be made outright, in a conventional regulatory regime, not a “do it but don’t tell me” regime.

Notwithstanding those difficulties, I think this justification cannot be dismissed out of hand. A “do it but don’t tell me” regime – in which the official public posture is that some practice is strictly forbidden – does convey a different message from a regime in which there are explicit exceptions to the prohibition, even assuming the scope of the exceptions is identical in the two cases. I do not think that the idea of expressing society’s values quite explains this, though. I will return to this issue below as well.

### III. Availability in the Public and Private Domains

“Do it but don’t tell me” seems to be too complex a phenomenon to be explained, or justified, in any simple way. Still, it is possible to give some

accounts that unify the various areas in which that kind of regime operates.

There are at least three ways in which “do it but don’t tell me” regimes might be both justified and explained. The first is that such a regime shields people from the awareness of unpleasant facts. The second is that it makes it less likely that people will engage in conduct that they might otherwise be too likely to do. The third is that it reduces the political salience of an issue and therefore enables a small group to exert greater control.

#### A. Unpleasant information

A “do it but don’t tell me” regime makes it possible for people to avoid thinking about things they would rather not think about – that is why such regimes seem to emerge in situations of intense moral conflict. If physician-assisted suicide, or coercive interrogation, or “rough justice” by law enforcement agents were regulated in a conventional fashion, there would be general public knowledge and discussion of the circumstances in which those kinds of unappealing conduct occurred. If, to put it in crude terms, being confronted with that kind of unpleasant information causes disutility, then there is a reason to shield people from it. On this point, a “do it but don’t tell me” regulatory regime resembles something from a non-legal setting: a jealous spouse’s wish not to know about his or her partner’s infidelity.<sup>46</sup>

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<sup>46</sup> Less crudely:

Othello: I swear 'tis better to be much abused

This desire to be shielded from unpleasant information is rational if by that one simply means that people have chosen not to encounter something that will give them disutility. That is why the desire to avoid unpleasant information—to avert one’s eyes—might both explain and justify the existence of this kind of regime: perhaps it is enough to say that, other things equal, avoiding disutility is an acceptable goal.

But it is not rational in the sense that a “do it but don’t tell me” regime does not shield people from the *knowledge* that something unappealing is going on. It makes it more difficult for people to know how often physician-assisted suicide or coercive interrogation is taking place, but a rational individual will know that those things are occurring. Such an individual might over- or underestimate the frequency of these events, depending upon what kind of fragmentary information is accessible. What a “do it but don’t tell me” regime does is to enable people not to think about what they know. This does seem to be an important function that such a regime serves, and—depending upon whether shielding people from unpleasant truths is a legitimate objective—it may be a justification as well.

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Than but to know’t a little.

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He that is robb’d, not wanting what is stol’n,  
Let him not know’t, and he’s not robb’d at all

William Shakespeare, *Othello*, Act III, scene iii, ll. 337-38, 343-44.

The use of “do it but don’t tell me” regimes for affirmative action – and perhaps for racial profiling – can be explained in this way as well, although the unwanted information is of a different kind. A familiar concern about affirmative action is that it will stigmatize the beneficiaries by causing them to be viewed as unworthy of what they have apparently achieved. A regime that obscures the degree or even existence of race-conscious action can counteract this effect. In theory, of course, it could make it worse: it could cause observers to overestimate the contribution of affirmative action to minority groups’ achievements. But if we assume that people pay less attention to something when they are not reminded about it, the “do it but don’t tell me” regime should have the opposite effect. By muting the visible evidence of race-conscious decisionmaking, it should cause observers to discount the likelihood that a particular individual owes his accomplishments to affirmative action.

In the case of racial profiling, the concern is different but related: the overt use of a profile might be seen as branding a certain racial group as inherently prone to criminal conduct. Indeed, a concern with that kind of branding or stigmatizing effect seems to underlie the prohibition against racial statistical discrimination that is a fixed point of the antidiscrimination laws generally. This kind of stigmatizing effect is mitigated if racial profiling is overtly disavowed. By contrast, the open avowal of racial profiling may promote the kind of stigmatizing generalizations that antidiscrimination laws try to deter.

## B. Influencing Decisions

### 1. Limiting available options

Sometimes we do not want people consciously considering a certain option, even though we are prepared to allow them to choose that option in extreme circumstances. We do not want the option to be available to them, but if they choose it despite its unavailability, we will accept that choice. We do not want coercive interrogation, assisted suicide, racial profiling, or unlawful physical force to be consciously considered as options by the relevant decision-makers (interrogators, doctors, family members, police officers) unless the situation is so extreme that the option is, in effect, forced upon them.

Formal illegality, on this account, takes the option off the table. If the circumstances are so dire that the people involved nonetheless consider it, then—but only then—it should be considered. Jury nullification is another example: it is an option, but not a readily available one; instead, it is a last resort for cases in which a conviction would be so unjust that nullification is the only acceptable outcome. Affirmative action fits less easily into this mold, but it is possible that for some members of the Supreme Court, and other influential figures, affirmative action presents a similar (although less dramatic) situation: it, too, should be kept as a last resort, to be used only when necessary.

Of course this explanation depends on a series of psychological conjectures, intertwined with moral assumptions. One conjecture is that

declaring an option formally illegal will keep it off the table. That may not be true, especially if, in fact, that option may be exercised covertly. The further assumption is that the option will become psychologically available only in circumstances that make it morally right to exercise that option (or, again, that we are more likely to get morally right outcomes this way than under any alternative regime). Alternatively, keeping an option formally illegal may affect the outcome of a group decision: the members of the decisionmaking group who are reluctant to engage in the formally illegal conduct will be in a stronger position if it remains formally illegal than if the possibility of engaging in it is overtly debatable.

These conjectures do not seem totally implausible, though. Many of the situations governed by “do it but don’t tell me” rules call for people to make decisions in situations of, potentially, great emotional stress. In addition, the formally illegal option may be the easy way out, in the sense that it enables the people making the decision to externalize a burden that they might otherwise have to bear themselves. An interrogator will face a terrible predicament if he suspects, but is not sure, that the person he is questioning has information that, if uncovered, will save many lives. Juries may be reluctant to impose harsh punishment on the defendant who is before them, when the consequences of refusing to do so – generally, less deterrence of future crimes – are speculative and fall on unidentified others. Physicians and, especially, families who are

caring for seriously ill patients might see euthanasia as the least burdensome course. In these circumstances, it would not be surprising if people seized on an option that was explicitly made available to them even if it was not the right choice. Inculcating an ethos in which certain options are simply not considered or discussed, because they are illegal, may be an effective way to keep that option from being invoked too easily. But then, precisely because these situations are so fraught, declaring that option illegal does not mean it would never be considered. In some extreme cases people may be willing to entertain the option despite its illegality. A “do it but don’t tell me” regime might be justified if this is the best state of affairs.

The requirement that the action be covert is integral to this account. If violations of the formal rule become public, the possibility of violating the rule becomes more available. In fact, as I suggested earlier, once violations become public – as in an “outlaw and forgive” regime – there are likely to be norms, however informal, that govern when those violations will be punished and when they will not be. Then the option becomes fully available and subject to rational calculations. If the idea behind the “do it but don’t tell me” regime is to deal with the morally wrong ways that people will act when they can bring an option too readily to mind, then the advantages of that regime will be lost once violations stop being surreptitious.

There is a further dimension to this problem, again suggested by the appeal of averting one's eyes from difficult moral conflicts and also related to the expressive function of "do it but don't tell me" regimes. It may be that we do not want people to be in the habit of calculating whether they should engage in some desperate action of the kind that a "do it but don't tell me" regime formally forbids. We want decisions to be made by the kind of people who recoil from that prospect, because that is a sign of better character. For that reason, it may not be a bad thing if people resist quantifying or even considering the cost, in human lives, of engaging in beneficial activity, even though it generally is irrational to try to make a decision without doing those things: if they found it easy to make those trade-offs, we would find them much less appealing (and maybe less morally worthy) people. Similarly, we may not want to breed a corps of intelligence agents, police officers, or doctors who routinely contemplate the pros and cons of acts that are, out of context, unspeakable. We want them to engage in those kinds of acts only when they cannot do otherwise. A "do it but don't tell me" regime might accomplish that objective – only "might," because, among other things, it could be that those kinds of decisions become matters of routine nonetheless.

## 2. Cascade effects

A related justification for a "do it but don't tell me" regime is one version of the "expressive" justification. It is that such a regime may prevent a certain

kind of harmful cascade, or even promote a beneficial cascade.<sup>47</sup> The kinds of conduct regulated by such a regime are often best controlled not by official sanctions but by social norms, for example because the conduct is difficult to detect and may not be susceptible to litigation or professional discipline. People's willingness to adhere to social norms depends in part on their perception of how widely those norms are observed by others.<sup>48</sup> If the breach of a norm is widespread enough, it loses its effectiveness as a norm; the conduct it condemns stops seeming so bad.

In a "do it but don't tell me" regime, the formal, acknowledged norm is that the conduct is absolutely forbidden. Such a regime suppresses information about how often the norm is breached. Especially given the availability bias, this should cause individuals to underestimate the extent to which the norm is actually breached. In that way, the social sanctions against violating the norm will remain intact longer. This seems like a plausible dynamic in the case of physicians and police officers, with respect to both racial profiling and rough justice. It may operate with jurors, who would otherwise be too willing to nullify. It seems less realistic for, say, college admissions officers, but it may very well be the kind of thing that the Supreme Court justices had in mind: that if race-conscious action becomes too overt, it will also become too routine. In fact the

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<sup>47</sup> I am especially indebted to Richard McAdams for discussion of this point.

<sup>48</sup> [citations]

opinions frequently refer to the supposed need to keep race-conscious action from becoming too much the norm.

### C. Demobilizing interest groups

The final explanation for “do it but don’t tell me” regimes is potentially less benign. It may be that the function of such a regime is to deny interest groups a salient issue or set of events around which they might mobilize. On this account, “do it but don’t tell me” is a way of taking a decision out of the political process and effectively delegating it to a group of insiders, who – unlike members of the public – are consciously aware of the complete set of options. Physicians know very well that assisted suicide is an option, as long as it is kept covert; the same is true of interrogators, if in fact a “do it but don’t tell me” regime governs there, and of police officers in street-level rough justice. Affirmative action plans are implemented by, for example, university administrators who certainly know the whole story.

On this account, a “do it but don’t tell me” regime, by suppressing information about how widespread a practice is, prevents interest groups from mobilizing to interfere with the elites. If citizens generally knew how often physician-assisted suicide was practiced, or just how much of a preference affirmative action plans give to minorities, or, perhaps, how often coercive interrogation, profiling, or rough justice tactics were used, there might be a reaction that would limit the freedom of action of the doctors, interrogators,

administrators, or police officers who do those things. But it is more difficult to rally support among members of the public without visible events, and a “do it but don’t tell me” regime obscures the events that might serve that function.

This may explain why that kind of regime is attractive when a society is in transition. If there are deep divisions in society on, say, the moral acceptability of abortion, a “do it but don’t tell me” regime allows people who believe abortion is acceptable to have or facilitate abortions without giving their opponents something visible to rally against. This explanation may also account for the attractiveness – to the Supreme Court and, for that matter, to the entities engaged in affirmative action – of a “do it but don’t tell me” regime in that area. To the extent the concern is that affirmative action is a divisive issue that will pit racial or ethnic groups against each other, an approach that minimizes the visibility of race-conscious decisions is both appealing and justifiable. The same may be true of racial profiling.

This use of “do it but don’t tell me” might be pathological, if it ensures that a small group will be able to make decisions that should be made democratically by society at large. But it is not necessarily pathological. Perhaps if the practices in question were made fully public, members of the public would overreact. That could be simply because of the salience of aspects of those decisions that no one likes to be reminded about, as, perhaps, in the case of explicit tradeoffs between human life and other goods. Or the political

overreaction might happen because interest groups, if given a high-profile target, will be able mobilize excessive power and distort the democratic process. “Do it but don’t tell me” may be a way to enable good practices, free from unjustified interest group actions that capitalize on the salient, focal-point nature of the practices in this way.

For all of these reasons, the persistence of “do it but don’t tell me” regimes is not so surprising. They may be a sensible way of dealing with certain kinds of decisions and of averting certain harms. They may also have the effect of giving power to insider groups and insulating them, for better or worse, from larger social and political pressures. Whether that is on balance good or bad is another question, and one that probably has no single answer.