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**OLD SCHOOL GOES ONLINE:
EXPLORING FIDUCIARY OBLIGATIONS OF LOYALTY
AND CARE IN THE DIGITAL PLATFORMS ERA**

By Richard S. Whitt¹

“Study the past if you would define the future.”

-Confucius

As the World Wide Web has become a pervasive feature of life for billions of people, concerns are growing that new legal mechanisms are necessary to govern the activities of online service providers (OSPs). In particular, today’s Web ecosystems are presided over by multisided online platforms, extracting and analyzing personal data in the absence of express obligations to protect and promote their users’ interests. Not surprisingly, over the past twenty years scholars have begun reaching back to “old school” common law doctrines for guidance. One promising legal field entails fiduciary duty-based relationships, which have a robust, globe-spanning history stretching hundreds of years. The latest such approach is the information fiduciaries (IF) model, introduced by academics Jack Balkin and Jonathan Zittrain.

The IF model posits that OSPs should be required to abide by fiduciary duties of care, loyalty, and confidentiality with regard to their end users. A recent draft paper by Lina Khan and David Pozen, however, sees an unsolvable incongruity between a mandated duty of loyalty, and both the corporate law of Delaware, and the financial imperatives of online advertising-based companies such as Facebook. As it turns out, while the IF model’s creators invoke the fiduciary duty

¹ Currently fellow in residence with the Mozilla Foundation, senior fellow with the Georgetown Tech Law and Policy Institute, and president of GLIA Foundation. My thanks to Mike Godwin, distinguished senior fellow at R Street Institute, for his thoughtful critique of an earlier paper draft, and his persuasive take on the relative importance of the fiduciary duty of confidentiality. My appreciation as well to Dr. Todd Kelsey, who supplied his usual trenchant analysis in his role as AI advisor to GLIA Foundation. Finally, Alex Givens and her students in the Georgetown University Law Center’s Spring 2019 Tech Law Scholars Seminar provided their own useful suggestions regarding an initial version of this piece.

of loyalty, in reality their model relies on mandated obligations rooted only in care and confidentiality.

Fortunately, the IF model does not exhaust the richness and depth of fiduciary law doctrine. Another proposed approach is the “digital trustmediary” (DTM), a cornerstone feature of the GLIANet project². The DTM model involves entities providing advanced digital service to their clients, while voluntarily operating under heightened fiduciary duties of loyalty, care, and confidentiality. The opt-in DTM model is positioned as a well-considered alternative to a current Web ecosystem generally lacking in bona fide fiduciary-like relationships. The IF model of mandated care, and the DTM model of voluntary loyalty, present two different but complementary approaches to injecting greater trust and accountability in the Web.

Finally, other tenets of the common law remain available for exploration. Indeed, what could be termed “digital common law” holds the potential to contribute usefully to modern day conversations about the role of digital technologies in society.

² To access the GLIANet project, see GLIANET, www.glia.net (last visited Oct. 1, 2019).

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INTRODUCTION AND SUMMARY

The concept of information fiduciaries has received considerable attention in recent years as one way to impose greater societal obligations on Web-based entities. This paper probes the information fiduciaries concept as a useful entrée into a broader discussion of how to bring longstanding legal institutions into the online digital world.

This Article has five primary objectives. First, it will describe the information fiduciary (IF) model, as laid out by scholars Jack Balkin and Jonathan Zittrain, which was criticized recently by Lina Khan and David Pozen. Second, it will undertake a deeper dive into the basics of the common law of fiduciary obligations, including the twin duties of care and of loyalty. Third, the paper will examine the information fiduciaries model from the standpoint of traditional common law and modern-day commentary.

Fourth, the paper will explore a proposed alternative legal model, the “digital trustmediary” (or DTM), with entrusted entities voluntarily acting under a heightened fiduciary duty of loyalty, and an enabling duty of confidentiality, to their clients. This DTM model will be posited as a viable response to the current Web ecosystem, which is presided over by online platforms extracting and analyzing end user data in the absence of express fiduciary obligations.

The paper concludes by suggesting ways to meld together the two different but complementary IF and DTM fiduciary approaches in the context of Web-based entities. Consistent with this Author’s prior written work on functional openness,³ the overarching intention is to breathe productive new life into old school legal doctrines. In this case, a brief trip down well-worn paths from the past should prove instructive.

I. THE INFORMATION FIDUCIARIES MODEL AND ITS CRITICS

A. Background

Since the dawn of the Web, people have sought to link traditional notions of intermediaries and fiduciary obligations to the digital world. Such proposals have centered on the roles of managing and protecting user data and information.

In 1996, for example, Kenneth Laudon described a scenario where agents that he called “information fiduciaries” would manage

³ Richard Whitt, *Hiding in the Open: How Tech Network Policies Can Inform Openness by Design (and Vice Versa)*, 3 *GEO. L. TECH. REV.* 28, 66-74 (2018).

information deposited by end users.⁴ Three years later, in *Net Worth*, John Hagel and Marc Singer introduced the term “infomediary” to describe a customer agent that extracts monetary value from the customer’s information.⁵ In 2008, on the more defensive front, Neil Richards explained the necessity of subjecting search engines, online bookstores, and other “information fiduciaries” to regulation, including “meaningful requirements of confidentiality.”⁶

In brief, these early camps were divided. Some like Laudon touted the possibility of affirmative, marketplace-based duties between willing parties, while Richards and others proposed government mandates to safeguard user privacy interests.

Beginning in 2015, scholars Jack Balkin and Jonathan Zittrain have developed the concept of an “information fiduciary” (IF)⁷ which would be applied to a category of online service providers (OSPs). Balkin and Zittrain have stated that the IF concept would impose legal duties akin to those found in the traditional common law doctrine of fiduciary obligations.⁸

By mid-2019, support in the United States for regulating OSPs as information fiduciaries had grown appreciably. Other scholars and commentators began expressing their backing to the IF model.⁹ Federal legislation containing OSP fiduciary obligations was

⁴ Kenneth C. Laudon, *Markets and Privacy*, 39 COMM. OF THE ACM 92, 101 (Sept. 1996).

⁵ JOHN HAGEL III & MARC SINGER, *NET WORTH: SHAPING MARKETS WHEN CUSTOMERS MAKE THE RULES* 40-42 (1999).

⁶ Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 436 (Dec. 2008); *see also* NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 168 (2015) (describing information fiduciaries dealing in intellectual data); *see also* DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2006) (suggesting how exploring fiduciary law is a way to deal with data brokers); *see also* Ian Kerr, *The Legal Relationship Between Online Service Providers and Users*, 35 CAN. BUS. L.J. 419 (2001) (concluding that some Internet Service Provider (ISP)-end user interactions display the constitutive elements of a fiduciary relationship).

⁷ The Balkin/Zittrain information fiduciary model will be termed as “IF” throughout this paper to delineate it from earlier instantiations of the more general concept.

⁸ *See infra*.

⁹ *See, e.g.*, ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* 85-88 (2018) (articulating support for the IFs model as an alternative to a “notice-and-choice” regime); MIKE GODWIN, *THE SPLINTERS OF OUR DISCONTENT: HOW TO FIX SOCIAL MEDIA AND DEMOCRACY WITHOUT BREAKING THEM* 29-38 (May 14, 2019) (expressing support for Facebook and other OSPs to adduce to fiduciary law-based standards like information fiduciaries); ROGER MCNAMEE, *ZUCKED* 247, 260 (Feb. 5, 2019) (like doctors and lawyers, companies should act as fiduciaries to protect the interests of consumers); Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 457-58 (2016) (supporting the IFs concept as a way to protect user privacy).

endorsed,¹⁰ and subsequently introduced.¹¹ Launch of a Harvard University-based “Information Fiduciary Consortium” was announced.¹² A recent Federal Communications Commission (FCC) Chairman weighed in favorably on applying common law obligations to online entities.¹³ Even Mark Zuckerberg gave a “thumbs up” to Facebook being treated as a fiduciary.¹⁴

In late February 2019, however, scholars Lina Khan and David Pozen published an initial draft law journal article entitled *A Skeptical View of Information Fiduciaries*.¹⁵ As the name suggests, the authors leveled substantial criticism on the IF concept as a poor legal and practical fit to platform companies like Facebook.

B. *The “Information Fiduciaries” Proposal*

In an April 2016 law journal article, *Information Fiduciaries and the First Amendment*,¹⁶ Balkin first laid out the case for IFs in some detail. He explained that OSPs are in a special position to collect, analyze, use, sell, and distribute their end users’ personal information. In his view, those entities – which include search engines, social networks, Internet Service Providers (ISPs), email providers, and cloud companies – should be induced to take on fiduciary responsibilities.¹⁷

Balkin stressed that “there is no single class of fiduciary duties that applies equally in all situations.”¹⁸ Noting the two basic common

¹⁰ See, e.g., Adam Schwartz & Cindy Cohn, “Information Fiduciaries” Must Protect your Data Privacy, ELECTRONIC FRONTIER FOUNDATION (Oct. 25, 2018), <https://www.eff.org/deeplinks/2018/10/information-fiduciaries-must-protect-your-data-privacy>.

¹¹ In mid-December 2018, U.S. Senator Brian Schatz (D-HI) and fourteen co-signors released Senate Bill 3744, the “Data Care Act of 2018,” which includes express duties of care, loyalty, and confidentiality applied to OSPs regarding their uses of personal data. See Data Care Act of 2018, S. 3744, 115th Cong. (2018); see also Schwartz & Cohn, *supra* note 10.

¹² See Berkman Klein Center, Where’s My Data? Data Transparency, <https://berkmancenter.github.io/datatransparency> (last visited Sept. 21, 2019). The website currently includes a link to an undated document asking companies to join the “Information Fiduciary Consortium,” but no further information appears to be available online.

¹³ Tom Wheeler, The Root of the Matter: Data and Duty, HARVARD KENNEDY SCHOOL, SHORENSTEIN CENTER ON MEDIA, POLITICS, AND PUBLIC POLICY, Nov. 2018, at 10-11 (rules for the new digital economy should include the common law concept of a duty of care).

¹⁴ Josh Constine, Highlights & transcript from Zuckerberg’s 20K-word ethics talk, TECHCRUNCH (Feb. 20, 2019, 3:05 PM), <https://techcrunch.com/2019/02/20/zuckerberg-harvard-zittrain/zuck-interview> [hereinafter Zuckerberg Harvard Interview Transcript].

¹⁵ A subsequent version of the article was posted on May 25, 2019 and provides the basis for this analysis. Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. (forthcoming 2019) (manuscript at 1) (on file with SSRN).

¹⁶ See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183 (Apr. 2016) [hereinafter *Information Fiduciaries*].

¹⁷ *Id.* at 1186.

¹⁸ *Id.* at 1225.

law fiduciary duties of care and of loyalty, Balkin explains that his concept is that OSPs should “act in ways that do not harm the interests of” their end users.¹⁹ OSPs should not betray confidence that they induce, and otherwise “act like con men.”²⁰ By contrast, the traditional duties of loyalty applied to doctors and lawyers “are often quite broad and strong,” and “people do not expect the same degree of concern from online service providers.”²¹ Because the information practices of fiduciaries differ from those involving ordinary strangers, reasonable obligations placed on information fiduciaries would not violate the First Amendment.²²

In a subsequent paper, Balkin again emphasized that digital information fiduciaries “should have fewer obligations than traditional professional fiduciaries like doctor, lawyers, and accountants.”²³ He reasoned that users do not expect comprehensive obligations of care from “special-purpose information fiduciaries” like their ISPs, search engines, and social media.²⁴ He repeated that these entities’ “central obligation is that they cannot act like con artists.”²⁵

In late 2016, Zittrain joined Balkin in penning an article calling for a “grand bargain organized around the idea of fiduciary responsibility.”²⁶ Online companies would agree to take on the obligations of IFs – which the authors explained were primarily not to unfairly discriminate against, or abuse the trust of, their end users. In exchange, Congress could offer special immunities and safe harbors from uncertain legal liabilities. If done correctly, they argued, this trade-off would institute “the duty to use personal data in ways that don’t betray end users and harm them.”²⁷

In a *New York Times* editorial published in April 2018, Zittrain explained IFs in the realm of data sharing scandals at Facebook.²⁸

¹⁹ *Id.* at 1186.

²⁰ *Id.* at 1224.

²¹ *Id.* at 1225-26.

²² See *Information Fiduciaries*, supra note 16, at 1209-1225.

²³ Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1163 (2018) (hereinafter *Free Speech in the Algorithmic Society*).

²⁴ *Id.* at 1162-63.

²⁵ *Id.* at 1163.

²⁶ Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, THE ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/>.

²⁷ *Id.*

²⁸ Jonathan Zittrain, *Mark Zuckerberg Can Still Fix This Mess*, THE NEW YORK TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/opinion/sunday/zuckerberg-facebook-privacy-congress.html>.

Zittrain saw one answer in Facebook accepting societal obligations as an IF, which would demand Facebook to “not betray our interests.”²⁹ As Zittrain explains it:

Mr. Zuckerberg has the power to shake things up. He could bind his company to practices and technologies aimed at a sea change on user privacy and autonomy. Rather than circling the wagons, Facebook can join the cause. If it doesn't, people should disperse to platforms that will.³⁰

Balkin's most recent works invoke the IF model in the context of market challenges with social media.³¹ In these papers he more explicitly claims that the fiduciary duty of loyalty would apply to IFs.³² He argues that this new obligation would “make social media companies internalize the costs they impose on society through surveillance, addiction, and manipulation by giving them new social responsibilities.”³³ What this duty of loyalty means in practice, he emphasizes, depends on the nature of the business, and the reasonable expectations of its users.³⁴ Even so, he repeats the notion from his previous papers that the obligations for these entities would remain more limited than for other types of information fiduciaries. As he puts it succinctly:

Facebook is not your doctor. YouTube is not your accountant or estate manager. We should be careful to tailor the fiduciary obligations to the nature of the business and to the reasonable expectations of consumers. That means that social media

²⁹ *Id.*

³⁰ *Id.* Zuckerberg's March 6, 2019 announcement of a major shift in Facebook's business model, from the “town square” of social media to the “living room” of private communications, is a fascinating pivot point. See Mark Zuckerberg, A Privacy-Focused Vision for Networking, FACEBOOK (Mar. 6, 2019), <https://www.facebook.com/notes/mark-zuckerberg/a-privacy-focused-vision-for-social-networking/10156700570096634/>. Putting aside skepticism about motivations and follow-through, the new model arguably would comport better to a certain scope of fiduciary obligation than the company's existing social media platform.

³¹ See Jack M. Balkin, Free Speech is a Triangle, 118 COLUM. L. REV. 2011 (2018) [hereinafter Free Speech is a Triangle]; see also Jack M. Balkin, The First Amendment in the Second Gilded Age, 66 BUFF. L. REV. 979 (Dec. 1, 2018) [hereinafter Second Gilded Age]; see also Jack M. Balkin, The Three Laws of Robotics in the Age of Big Data, 78 OHIO ST. L.J. 1217 (2017) [hereinafter Three Laws of Robotics]; see also JACK M. BALKIN, FIXING SOCIAL MEDIA'S GRAND BARGAIN (Oct. 15, 2018), https://www.hoover.org/sites/default/files/research/docs/balkin_webready.pdf [hereinafter Fixing Social Media's Grand Bargain].

³² Fixing Social's Media's Grand Bargain, *supra* note 31, at 12-13; Free Speech Is a Triangle, *supra* note 31, at 2048; Second Gilded Age, *supra* note 31, at 1009; Three Laws of Robotics, *supra* note 31, at 1229.

³³ Fixing Social Media's Grand Bargain, *supra* note 31, at 11.

³⁴ Second Gilded Age, *supra* note 31, at 1009.

companies' fiduciary duties will be more limited.³⁵

In his later works, Balkin notes again that, “[a]t base, the [duty] of loyalty mean[s] that digital fiduciaries many not act like con artists” by “creat[ing] an unreasonable risk of harm to their end users.”³⁶

C. The Khan/Pozen Response

As indicated above, the Balkin/Zittrain proposal on IFs has engendered a range of positive responses. Nonetheless, the Khan/Pozen draft paper released online in May 2019 makes no bones about its intention to “disrupt the emerging consensus” of support.³⁷ In fact, Khan and Pozen see the proposed IF model as “moving the conversation backward” on how to regulate digital firms such as Facebook.³⁸

The paper’s initial critique focuses on how the officers and directors of a Delaware corporation already owe a core duty of loyalty to stockholders. The authors claim that this obligation is deeply inconsistent with any similar duty imposed on behalf of end users. Khan and Pozen argue that Facebook would be unable to manage the divided loyalties of its stockholders versus its users, especially since the company ostensibly would own a higher duty of loyalty to its stockholders.³⁹ In other words, “the business model matters.”⁴⁰

The authors also point out that noted legal experts have argued for two different interpretations of the duty of loyalty. The thinner, “prescriptive” account requires that the fiduciary avoid conflicts between self-interest and fulfilment of its duty to the beneficiary.⁴¹ The thicker, “prospective” account requires an affirmative devotion towards the beneficiary.⁴² Khan and Pozen submit that Facebook could pass neither test with regard to its business model and users, and so this fundamental misalignment renders the duty of loyalty implausible.⁴³

³⁵ Fixing Social Media’s Grand Bargain, *supra* note 31, at 12.

³⁶ *Id.* at 13, 14.

³⁷ Khan & Pozen, *supra* note 15 (manuscript at 2).

³⁸ *Id.* (manuscript at 39). The information fiduciaries framework “invites an enervating complacency about issues of structural power and a premature abandonment of more robust visions of public regulation.” *Id.* (manuscript at 5).

³⁹ *Id.* (manuscript at 5-10).

⁴⁰ *Id.* (manuscript at 17).

⁴¹ *Id.* (manuscript at 15).

⁴² *Id.* (manuscript at 15-16).

⁴³ Khan & Pozen, *supra* note 15 (manuscript at 17). The authors point out that Facebook’s business model does not just affect its end users. Advertisers, content producers, nonusers, and other “dependent parties” are affected as well – and yet they are not included within the protections of the fiduciary obligation. *Id.* (manuscript at 17).

The paper notes that a power-based argument for the duty of loyalty depends on two prongs: (1) “the fiduciary possesses professional skills and competencies that the beneficiary lacks”, and (2) using those services requires the disclosure of personal information that the fiduciary could exploit.⁴⁴ Khan and Pozen find that neither prong applies to Facebook: they have no special expertise to run a social media platform, and the users’ exposure is simply “the price that online providers have chosen to set.”⁴⁵

Khan and Pozen also find what they call second-order information asymmetries (where the beneficiary understands the core elements of the relationship, but not the technical details), as well as first-order information asymmetries (where the beneficiary lacks even this core shared understanding).⁴⁶ This “elaborate system of social control” cannot be squared with any meaningful fiduciary duty.⁴⁷

Finally, the authors concede that the information fiduciaries model appears superficially attractive from a theoretical, political, and aesthetic perspective.⁴⁸ Nonetheless, as a government-imposed limitation on protected speech, the IF model still would violate the First Amendment, and leave many problems unaddressed, including the need for pro-competition reforms.⁴⁹ As they conclude, “[w]e can regulate the dominant online platforms as information fiduciaries or we can target their market dominance and business models, but very likely we will not do both.”⁵⁰

II. GETTING GROUNDED IN THE COMMON LAW OF FIDUCIARIES

Recent public policy conversations about regulating OSPs – including the IF model proposal – hinge on adopting and applying the relevant substance of fiduciary obligations. It is surprising, then, that the supporting documents do not dig more deeply into the richness of common law doctrine. This Part will do just that, albeit in an abbreviated way. The premise is that the explanatory roots of fiduciary accountability can provide considerable guidance, as we sort through whether and how such old school duties should apply to the burgeoning new world of Web-based entities and activities.

⁴⁴ *Id.* (manuscript at 18).

⁴⁵ *Id.* (manuscript at 18-19).

⁴⁶ *Id.* (manuscript at 20-21).

⁴⁷ *Id.* (manuscript at 21).

⁴⁸ Khan & Pozen, *supra* note 15 (manuscript at 29-30).

⁴⁹ *Id.* (manuscript at 30-37).

⁵⁰ *Id.* (manuscript at 36).

A. *Complex and Contextual Roots*

The law of fiduciary relationships is a complex one, entwined with centuries of equity, torts, and other common law doctrine. Fiduciary law principles have been applied across a vast array of human endeavors,⁵¹ and most major global cultures.⁵² More recently, elements of this private law regime have been extended by scholars to the public law realm, as articulated in the “fiduciary theory of government” for both citizens’ relationships to their own governments,⁵³ and to human rights vis-à-vis international institutions.⁵⁴ Some scholars even believe the U.S. Constitution itself should be viewed as a fiduciary instrument, premised on power of attorney-like obligations of care, loyalty, and impartiality.⁵⁵

Recently, there has been a renaissance of sorts in the study and application of fiduciary doctrine. As leading fiduciaries law scholar Tamar Frankel has aptly noted, “throughout the centuries the problems that these laws were designed to solve are eternal, etched in human nature, derived from human needs, and built into human activities.”⁵⁶ Over time, fiduciary duty has become a legal category unto itself, embracing a range of different types of entities and relationships.⁵⁷ At its core, however, the law of fiduciaries provides for the assignment of certain moral and legal obligations to people and entities engaged in exchanges of value with each other.

Despite (or perhaps due to) the lengthy history of fiduciaries in common law, some find that “[t]here is considerable uncertainty over the basis, nature, and scope of fiduciary duties as well as their

⁵¹ THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff eds., 2019). Entire book chapters separately cover agency, trust law, corporate law, nonprofits law, banking, pension law, employment law, bankruptcy, family law, legal representation, health care, public affairs, and international law. *Id.* at 23-363.

⁵² Legal systems discussed at length include English common law, canon law, Roman law, classical Islamic law, classical Jewish law, European civil systems, Chinese law, Indian law, and Japanese law. *Id.* at 471-663.

⁵³ See FIDUCIARY GOVERNMENT (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim, & Paul B. Miller eds., 2018).

⁵⁴ See FIDUCIARIES OF HUMANITY (Evan J. Criddle & Evan Fox-Decent eds., 2016).

⁵⁵ See GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

⁵⁶ TAMAR FRANKEL, FIDUCIARY LAW 79 (Dec. 17, 2010).

⁵⁷ Classically, economists see fiduciary law as a response to a principal-agent problem, where one party undertakes imperfectly observable discretionary actions that affect the interests of the principal. Andrew Gold & Paul Miller, Introduction, in PHILOSOPHICAL FOUNDATIONS 8 (Andrew Gold & Paul Miller eds., 2014). Frankel’s view, and that of many other scholars, is that this contracts law-derived perspective unnecessarily narrows the conception of a robust fiduciary relationship.

justification.”⁵⁸ In part, “fiduciary obligation eludes theoretical capture because it arises in diverse types of relationships.”⁵⁹ As a result, the doctrine is uniquely bound to the relevant context.⁶⁰

B. A Basis in Entrusted Power

The crucial linchpin of every fiduciary obligation is what Frankel calls “entrusted power,” affecting the existence, nature, and rules of such relationships.⁶¹ The core concept is that an individual or entity (the “entrustor”) grants access to property, or some other thing of value, to specified fiduciaries, for the purpose of having them undertake tasks that benefit the entrustor.⁶² Or as scholar Paul Miller puts it, a fiduciary relationship is one in which one party exercises discretionary power over the significant practical interests of another.⁶³ In fiduciary relationships, “entrustors are always the vulnerable party.”⁶⁴

To Frankel, “all definitions [of fiduciaries] share three main elements: (1) [the] entrustment of property or power; (2) [the] entrustors’ trust of fiduciaries, and (3) [the] risk to entrustors emanating from the entrustment.”⁶⁵ In particular, fiduciaries offer expert, and usually socially desirable, services, and are granted the property or power to carry out their duties. So, fiduciary relationships often carry a unique blend of the extent of entrustment, degrees of trust, and levels of risk. Likelihood of a failed relationship can come from entrustors failing to protect themselves, markets failing to protect entrustors, or where the costs for fiduciaries to establish their trustworthiness exceeds their benefits from the relationship.⁶⁶

C. Deepening the Queries: Why, What, Who, and How

At this juncture it would be useful to break out fiduciary doctrine into its basic components. These include understanding why there are such duties in the first place, what are the interests at stake, who are the

⁵⁸ Paul B. Miller, *The Fiduciary Relationship*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 63 (Gold & Miller eds., 2014).

⁵⁹ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 *DUKE L.J.* 879, 908 (1988).

⁶⁰ *See id.* at 909.

⁶¹ Frankel, *supra* note 56, at 7.

⁶² *See id.* at 9.

⁶³ Miller, *supra* note 58, at 69 (explaining the definition as part of his “fiduciary powers theory”).

⁶⁴ Frankel, *supra* note 56, at 26.

⁶⁵ *Id.* at 4. That risk in turn depends on the types of services provided, “the nature and magnitude of the entrusted property and power, and the efficient control over the fiduciaries’ ability to abuse the” entrustor. *Id.* at 25.

⁶⁶ *See id.* at 6-9.

players involved, and how are the substantive standards defined and applied.

1. The Why: Trust versus Power

The simplest question is, why does fiduciary law exist in the first place? Frankel's response is straightforward: the duty of loyalty is rooted in asymmetric power relationships between two parties.⁶⁷ Once a relationship has been established, fiduciaries enjoy power over beneficiaries.⁶⁸ Others concur.⁶⁹ Miller observes that power may mean a number of things in different contexts, including "control, authority, strength, or influence," among others.⁷⁰

Not surprisingly, entrusted power rises with the number of entrustors, and the amount of entrusted assets.⁷¹ In turn, the formation of an actual fiduciary relationship involves three related structural properties between the fiduciary and the beneficiary/entrustor: inequality, dependence, and vulnerability.⁷² One basis of the fiduciary's power over the entrustor is the disparity of knowledge, expertise, and experience between the two parties.⁷³ Nonetheless, the source of entrusted power, and conflicting interests, often can be hidden from the beneficiaries.⁷⁴ As a result, the issue of trust emerges over and over again as the pivotal consideration.⁷⁵

For the most part, common law recognizes services that require certain levels of expertise or experience in the fiduciary, that otherwise are lacking in the beneficiary. Prime examples include the medical profession, the legal profession, and certain financial sectors. Entrustment of power or property to those providing these kinds of services triggers the obligation.

⁶⁷ See generally *id.* at 107-109.

⁶⁸ *Id.*

⁶⁹ See generally, Gold & Miller, *supra* note 57.

⁷⁰ Miller, *supra* note 58, at 69-70.

⁷¹ Frankel, *supra* note 56, at 11.

⁷² Miller, *supra* note 58, at 73. D. Gordon Smith believes that where parties rely on legal constraints for protection, "they are not trusting at all, but instead relying on the law of fiduciary duty for protection. Such reliance displaces trust." D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1418 (2002) (emphasis in original).

⁷³ Frankel, *supra* note 56, at 18. Support for Frankel's approach is not universal. Smith claims that her aspiration to develop a universal framework fails to provide the necessary content to the concept of power. Smith, *supra* note 72, at 1426

⁷⁴ Tamar Frankel, *The Rise of Fiduciary Law*, 18-18 B.U. SCH. OF L., PUB. L. RES. PAPER, Aug. 2018, at 6 (hereinafter *The Rise of Fiduciary Law*).

⁷⁵ Frankel, *supra* note 56, at 38; see also *Rise of Fiduciary Law*, *supra* note 74, at 9.

2. The What: Personal and Practical Interests

The entrustment of power means shifting decisional control over something. What is that something? Traditionally, the gravamen of the relationship has been a type of tangible asset, such as a financial instrument or real property. In some legal trusts, however, the healthcare of the entrustor is at issue; in others, the legal status.

Because fiduciary power is relational, the “what” is limited only by what is deemed important to the entrustor. As a result, often the relationship deals with, and profoundly affects, people’s practical interests, even to more intangible matters of personality, welfare, or rights.⁷⁶ D. Gordon Smith posits for example that the gravamen of fiduciary duties is a “critical resource,” which includes tangible property, but of which the most important category is confidential information.⁷⁷

So, the “what” of fiduciary power extends to information derived from the underlying relationship. Brooks points out that “relational knowledge” – special information that fiduciaries acquire about their beneficiaries – is key to the economic logic and the law supporting these relationships.⁷⁸ These entities “[o]ftentimes [have] even more knowledge, in some respects, than beneficiaries possess about themselves,” which includes “knowing their beneficiaries’ personal and otherwise private information”⁷⁹ But the reach is broader than that. As Brooks goes on to explain:

In addition to knowing their beneficiaries’ personal and otherwise private information, fiduciaries normally have or should have superior knowledge concerning the external circumstances to which this information may be put to use in the context of their relationship as well as beyond.⁸⁰

So, entrusted power relationships encompass many forms of tangible and intangible “stuff,” often of a deeply personal nature, subject to a defined range of discretionary decisions and actions.

⁷⁶ Miller, *supra* note 58, at 72-73.

⁷⁷ See Smith, *supra* note 72, at 1441-1444.

⁷⁸ Richard R W Brooks, Knowledge in Fiduciary Relations, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 241 (Gold & Miller, 2014).

⁷⁹ *Id.* at 237-38.

⁸⁰ Richard R W Brooks, Observability and Verifiability: Informing the Information Fiduciary, *U. OF CHI. L. SCH.* 19 (Oct. 9, 2015), https://www.law.uchicago.edu/files/file/brooks_observability_verifiability.pdf [hereinafter *Observability and Verifiability*].

3. The Who: Status and Consent

Another gating question is to whom fiduciary obligations should be applied in the first place. Generally speaking, fiduciary duties either can be imposed (based on an entity's *status*, its specific role vis-à-vis its customers) or assumed (based on the entity's *consent* to take on the enunciated duties).⁸¹

The "status" finding often is based on the answer to the What question: an entity's access to sensitive information about a person, such as health, wealth, and criminal or civil culpability. Such access entails a necessary degree of trust between the parties. So, attorneys and their clients, physicians and their patients, guardians and their wards, clergy and their parishioners, and (some) financial agents and their clients – all can be considered in more "formal" fiduciary relationships.⁸²

By contrast, "consent" status relates to an entity's voluntary undertaking or "holding itself out" to, a specified fiduciary standard. These duties can be laid out in places like professional codes of conduct or industry principles. Scholars, such as Edelman, suggest that all meaningful forms of fiduciary relationships arise in consensual settings, where fiduciaries have voluntarily undertaken their obligations.⁸³ On the other hand, courts tend "to impose fiduciary duties where one party has a continuing authority or power over another, which is" difficult "to monitor and control, and which exposes the entrusting party to" domination, undue influence, or a special vulnerability.⁸⁴

According to one scholar, there are three principal modes of authorizing or requiring a fiduciary relationship: mutual consent of the parties, unilateral undertaking by one party, and legal decree.⁸⁵ The latter can be derived by court decisions, legislative acts, or regulations.

4. The How: Care and Loyalty – and Other Obligations

At the core of fiduciary obligation "lies a suite of duties designed to nullify any temptation to sacrifice the interests of the beneficiary."⁸⁶

⁸¹ Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 39-62 (Gold & Miller eds., 2014).

⁸² Smith, *supra* note 72, at 1402, 1441.

⁸³ The Honorable Justice James Edelman, *The Role of Status in the Law of Obligations*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 21 (Gold & Miller eds., 2014).

⁸⁴ Getzler, *supra* note 81, at 43; Smith, *supra* note 72, at 1403-04.

⁸⁵ Miller, *supra* note 58, at 74.

⁸⁶ Getzler, *supra* note 81, at 41.

Precisely how potential fiduciary obligations are carried out typically boil down to two separate sets of duties,⁸⁷ both with roots in ancient concepts:

- ***Duty of care***: The fiduciary satisfies this standard by executing its services with prudence, attention, and proficiency. This standard relates to the quality of the fiduciary's performance of its services. In some circles, this translates as well into not acting in a way that amounts to negligence, by not materially harming the entrustor.
- ***Duty of loyalty***: The fiduciary's obligations relate directly to entrusted power and property, and amount to avowing conflicts of interest, as well as affirmatively promoting the interests of the client.

There is some lively scholarly dispute over how these two sets of duties play out in fiduciary relationships. Most scholars believe, however, that the "duty of loyalty" is the single distinctive obligation at the core of fiduciary relationships.⁸⁸ Indeed, "[a]cross jurisdictions and across theories, there is common ground on a basic conclusion: loyalty is vital in fiduciary relationships."⁸⁹ Indeed, "[w]ithout fiduciary loyalty, the relationships would arguably not be fiduciary at all."⁹⁰ Other experts acknowledge the fundamental divergence, but common fiduciary law foundations, between the two sets of duties.⁹¹

The substance of these two duties is also less than perfectly settled. Nonetheless, the core components, rationale, and trendlines are relatively well established in many jurisdictions.

Fiduciary Care

While duties of care abound in private law, particularly tort law, many commentators highlight a distinctive version in fiduciary law doctrine.⁹² In both versions, the party who exercises a sufficient degree of care is relieved of liability. In tort law, for example, this translates into the avoidance of injurious wrongs, or harm to the other party.⁹³

⁸⁷ Frankel, *supra* note 56, at 106-07.

⁸⁸ Gold & Miller, *supra* note 57, at 1.

⁸⁹ Andrew Gold, The Fiduciary Duty of Loyalty, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 386 (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff eds., 2019).

⁹⁰ *Id.* at 385, 403.

⁹¹ See, e.g., Hanoch Dagan & Sharon Hanes, Managing our Money: The Law of Financial Fiduciaries as a Private Law, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 107-15 (Gold & Miller eds., 2014) (two distinctive duties of loyalty and of care are found in trust law/fiduciary doctrine).

⁹² John C.P. Goldberg, The Fiduciary Duty of Care, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 405, 405 (Criddle, Miller, & Sitkoff eds., 2019).

⁹³ See *id.* at 405-407.

The more unique fiduciary component, however, creates an additional objective standard, one of ordinary care, prudence, and diligence by a party with particular knowledge or skills carrying out its assigned duties.⁹⁴ The rationale is that the fiduciary beneficiary is in a position of vulnerability vis-à-vis the fiduciary. So while the non-fiduciary version of the duty is ordinary care (“harm avoidance”), the fiduciary version adds in the exercise of diligence and skill in one’s conduct (what has been termed “prudent conduct” or “proper performance”).⁹⁵ In some legal circles this also can be seen as a variant on the standard of “gross negligence.”⁹⁶ As a result, a fiduciary duty of care can be breached by an entity’s mis-performance, even absent any injury to the beneficiary.⁹⁷

The content of the duty of care can be highly contextual. For example, the obligation can be quite lax as applied in corporate law (shielded in part by the business judgment rule), while highly stringent in trust law (amounting to a relatively strict standard of prudence).⁹⁸ The substantive difference in standards derives from the divergent interests of the parties.⁹⁹

Fiduciary Loyalty

Fiduciary loyalty clearly constitutes a higher standard than fiduciary care. In comparing the two, Frankel makes clear that the duty of care is “not as weighty and prohibitory.”¹⁰⁰

One can consider this duty [of care] to be weaker than the duty of loyalty. In contrast to the duty of loyalty, which is linked to misappropriation of entrustment, a violation of the duty of care is linked to lack of expertise, inattention, and negligence.¹⁰¹

Like the fiduciary duty of care, the fiduciary duty of loyalty contains its own core element. In this case, as Andrew Gold explains, the “no-conflicts” rule has been deemed proscriptive (a “thou shall

⁹⁴ *Id.* at 408.

⁹⁵ Goldberg, *supra* note 92, at 408 (citing Paul B. Miller, A Theory of Fiduciary Liability, 56 MCGILL L. J. 235, 282 (2011)).

⁹⁶ Goldberg, Fiduciary Duty of Care, at 414-15; Hillary A. Sale, Fiduciary Law, Good Faith, and Publicness, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 763, 765-66 (Criddle, Miller, & Sitkoff eds., 2019).

⁹⁷ Goldberg, *supra* note 92, at 415.

⁹⁸ Dagan & Hannes, *supra* note 91, at 99.

⁹⁹ *Id.*

¹⁰⁰ Frankel, *supra* note 56, at 171.

¹⁰¹ Frankel, *supra* note 56, at 169.

not”). This so-called “thin” version, based in part on the law of trusts, is composed of two elements.

- *Conflicts of interest* (between the pursuit of self-interest, and the fulfillment of a duty to act for the benefit of the beneficiary). The “no profits” rule (fiduciary cannot gain from a conflicted transaction) often is subsumed within this bucket.
- *Conflicts of duty* (between duty, and pursuit of others’ interests). This comes into play in particular when the fiduciary is serving multiple beneficiaries.¹⁰²

In most cases, the duty of loyalty goes beyond its proscriptive foundation. Typically, it is combined with the related fiduciary duty of care (prudent conduct), duty of good faith (faithfulness and devotion to the beneficiary), and duty of disclosure (shares accurate information), to create a prescriptive obligation to act in the best interests of the beneficiary. Again, the rationale is to protect the vulnerable party from opportunistic behavior.¹⁰³ The content of the duty of loyalty “should depend on the potential for opportunism,” or abuse of power; the “duties become more intense as the fiduciary’s power grows.”¹⁰⁴

This “best interests” (sometimes referred to as “thick”¹⁰⁵) notion is key to understanding the unique content of the loyalty obligation.¹⁰⁶ This composite form of loyalty “can be defined as a state of mind and a manner of behavior in which one person identifies with the other person’s interests.”¹⁰⁷ Smith explains further that “the duty of loyalty requires the fiduciary to adjust her behavior on an ongoing basis to avoid self-interested behavior that wrongs the beneficiary.”¹⁰⁸ To some, the duty amounts to advancing practical interests of beneficiaries;¹⁰⁹ to others, adopting “other-regarding preference

¹⁰² Gold, *supra* note 89, at 388.

¹⁰³ *Id.* at 401.

¹⁰⁴ Smith, *supra* note 72, at 1482.

¹⁰⁵ Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 *Wm. & Mary L. Rev.* 513, 557-59 (2015) (hereinafter *Fiduciary Governance*). From a Kantian philosophy perspective, one can discern the possibility of two types of loyalty at play. The “thin” sense of loyalty is a technical, state-enforced obligation, while the “thick” sense of loyalty implies a specific emotional and intellectual orientation of selflessness towards one’s principals. See Irit Samet, *Fiduciary Loyalty as Kantian Virtue*, in *Philosophical Foundations of Fiduciary Law* 139-40 (Gold & Miller eds., 2014).

¹⁰⁶ To Frankel, the two key aspects of loyalty are that the fiduciary acts in the sole (or sometimes “best”) interest of the entrustor, and that there is no conflict of interests with the entrustor.

Frankel, *supra* note 56, at 149-152.

¹⁰⁷ *Id.* at 107.

¹⁰⁸ Smith, *supra* note 72, at 1409.

¹⁰⁹ *Fiduciary Governance*, *supra* note 105, at 556.

functions.”¹¹⁰ In perhaps more quantifiable terms, the duty amounts to “demonstrable partiality.”¹¹¹

So, in brief, the standalone, “thin” fiduciary duty of loyalty can be thought of as the “no conflicts” obligation. The more expansive, composite or “thick” fiduciary duty of loyalty amounts to a “best interests” obligation.

It is worth noting that the “fiduciaries governance theory” has been developed and applied to a variety of situations where there is no obvious designated individual or entity. While the loyalty standard itself largely remains the same, the object of the duty is an abstract, other-regarding purpose.¹¹² In practice, this can include “statements of *common purpose*” for a specific mission.¹¹³ The classic example is the charitable purpose trust,¹¹⁴ but public benefits corporations, non-profits, and even public corporations all can adopt such an object-oriented loyalty duty.¹¹⁵

By way of comparison, then, the general and fiduciary duties of care, as well as the “thin” version of loyalty, present as objective, “reasonable person” standards, and proscriptive (something to be avoided) in nature. By contrast, the “thick” duty of loyalty is a more subjective standard, prescriptive in nature (something to be done), based on what is perceived to be in the beneficiary’s best interest.¹¹⁶ Put in medical terms, getting more exercise is prescriptive; avoiding alcohol is proscriptive.

“Subsidiary” Fiduciary Obligations

Additional fiduciary obligations recognized by courts of equity over many centuries include the duty of candor, duty of good faith, duty not to delegate the services to others, and the duty of confidentiality.¹¹⁷ Typically they are subsumed as “subsidiary” or “implementing”

¹¹⁰ Smith, *Critical Resource Theory*, supra note 72, at 1407 (citation omitted).

¹¹¹ *Fiduciary Governance*, supra note 105, at 547, 562-564.

¹¹² *Id.* at 563.

¹¹³ *Id.* at 553 (emphasis in original).

¹¹⁴ Gold, supra note 102, at 390 n.33.

¹¹⁵ Relatedly, Lawson and Seidman believe that the relevant beneficiaries of the U.S. Constitution as a fiduciary instrument are “We the People ... and our Posterity.” GARY LAWSON & GUY SEIDMAN, *A GREAT POWER OF ATTORNEY* 145-46 (2017).

¹¹⁶ Lionel D. Smith, *Can We Be Obligated to be Selfless*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 146-47 (Gold & Miller, 2014).

¹¹⁷ Frankel, supra note 56, at 106-07, 121-31. Brooks elaborates that duties that should apply while in a relation of trust or confidence include “duties to inquire, to inform, to speak with candor, and other knowledge-based obligations and presumptions.” *Observability and Verifiability*, supra note 80, at 23 n.28.

obligations under either the duty of care or of loyalty.¹¹⁸ However, in some legal quarters the duty of confidentiality has been deemed an important supportive component of the “primary” fiduciary duties.¹¹⁹ As we shall see in the following sections, the duty of confidentiality deserves special status in the digital environment as an “enabling” obligation that strengthens the more well-established fiduciary duties of care and of loyalty.

III. EXAMINING THE INFORMATION FIDUCIARIES MODEL

A. *The Common Law*

The Zittrain/Balkin model for information fiduciaries rests on combining in a specific way the “Why,” the “What,” the “Who,” and the “How” elements of the common law.

First, the rationale for the IF is based on how “Big Data” technology, at the heart of what Balkin calls the “Algorithmic Society,” mediates relationships of power and control between people.¹²⁰ Balkin notes that the issue is not so much the technology, as the government or company using the technology as a means of control over others. The Algorithmic Age then is a struggle over the asymmetries of power, information, and transparency, stemming from the collection, transmission, use, and analysis of data.¹²¹ Information fiduciaries are necessary to help right this imbalance.

Second, the focus of the IF model is an end user’s data or information. As Balkin paraphrases from a Silicon Valley saying, “Big Data is the new oil.”¹²² The model is intended to reach across the different types of data-based services provided by OSPs – namely, ISPs, social media platforms, and search engines. The commonality is access to personal information that has been obtained from end users.

Third, in the United States the information fiduciary obligation would be induced in some fashion by Congress. While consistently speaking of an “obligation” imposed on OSPs, Balkin’s paper regarding IFs and the First Amendment also suggests that government incentives such as tax breaks, safe harbors, or legal immunities could be employed.¹²³ More recently, Balkin and Zittrain have talked about imposing the duty as part of a “grand bargain” between policymakers

¹¹⁸ Robert H. Sitkoff, *Other Fiduciary Duties: Implementing Loyalty and Care*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 419, 419 (Criddle, Miller, & Sitkoff eds., 2019).

¹¹⁹ *See* Smith, *supra* note 72, at 1411-14, 1465-67.

¹²⁰ *Free Speech in the Algorithmic Society*, *supra* note 23, at 1157.

¹²¹ *Id.* at 1157, 1160.

¹²² *Id.* at 1154 (citation omitted).

¹²³ *Information Fiduciaries*, *supra* note 16, at 1229.

and large platform companies.¹²⁴ However, the proposal's aim appears to be the adoption of a legal requirement, imposed on assumedly less-than-willing entities. One can see this as a "status" approach, based on its application to specific entities in specific roles of power over personal data.

Fourth, in substance if not in nomenclature, the IF model encompasses a general duty of care by OSPs. While Balkin explicitly invokes the duty of loyalty in his more recent papers, his reasoning and supporting examples do not in fact correspond to the common law doctrine. This conclusion obviously deserves some unpacking.

1. Duties of loyalty and care

Balkin emphasizes that the IF model's obligation is weaker in some ways than the standard which is imposed on other information fiduciaries, such as physicians and lawyers.¹²⁵ Unlike doctors, OSPs do not hold themselves out as taking care of end users in general, under "comprehensive obligations of care."¹²⁶ Nor should they be required to "look out for the interests of clients and keep them from harming themselves or doing foolish things."¹²⁷ And, an OSP should not have "a positive obligation to stop asking people to reveal more of themselves in social media."¹²⁸ This standard does not sound like a "thick," other-regarding version of the fiduciary duty of loyalty.

In fact, the IF model translates into allowing considerable leeway to existing commercial models. OSPs, for example, should not be required to back away from their current ads-based businesses.¹²⁹ OSPs still would be allowed to use personal data, in ways that would not involve betrayal and harm to users. Balkin even concedes that collecting personal data in order to serve targeted ads "creates a perpetual conflict of interest between end users and social media companies;" rather than ban outright such a conflict, however, "the goal should be to ameliorate or forestall the conflicts of interest."¹³⁰ A

¹²⁴ Balkin & Zittrain, *supra* note 26.

¹²⁵ *See* Information Fiduciaries, *supra* note 16, at 1228.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1229. "'Fiduciary' does not mean 'not for profit.'" *Id.* at 1227. *See also*, Free Speech in the Algorithmic Society, *supra* note, 23, at 1162-63 ("digital information fiduciaries should have fewer obligations than traditional professional fiduciaries like doctors, lawyers, and accountants."). *Id.* at 1163.

¹²⁹ *See* Information Fiduciaries, *supra* note 16, at 1227.

¹³⁰ Fixing Social's Media's Grand Bargain, *supra* note 31, at 12-13.

contrary tack of resolving such conflicts of interest decisively in favor of the end user would be a hallmark of the “thin” duty of loyalty.¹³¹

Balkin does explain that “[t]he nature of their duties depends on the kind of business they present to the public . . . [what] seems like a breach of trust [] depend[s] on the kind of service that entities provide and what we would reasonably consider unexpected or abusive for them to do.”¹³² However, at some point the exceptions swallow up the rule. That would appear to be the case here.

The proscriptive language that Balkin employs also demonstrates a focus on avoiding harms to end user. The IF should not misuse personal information,¹³³ use sensitive information to the user’s disadvantage,¹³⁴ “attempt or threaten to embarrass you,”¹³⁵ manipulate you into voting a certain way,¹³⁶ use data in unexpected ways to disadvantage you,¹³⁷ betray end users or work against their interests,¹³⁸ or otherwise “create an unreasonable risk of harm to their end users.”¹³⁹ At the outset the IF model is intended to “counteract the most egregious examples of bad behavior.”¹⁴⁰ The gravamen of all these scenarios seems to be “harming end users.” Needless to say, avoiding harm is the quintessential core of the general duty of care, and does not correspond to either version of the loyalty obligation.

Does the IF model also include a fiduciary duty of care? Apparently so. Balkin concludes, for example, that Facebook violated the duty of care in the Cambridge Analytica scandal by not taking sufficient care or adequate steps to vet partners, audit and oversee operations, ensure third parties maintained care of the user data, or claw it back.¹⁴¹ That language certainly mirrors the “prudent conduct” core of the fiduciary duty of care.

¹³¹ Second Gilded Age, *supra* note 31, at 1009. One critic believes the IF model “sidestep[s] the conflict of interest issue,” when a data controller has a business interest in the data provided to it by an end user. Sylvie Delacroix & Neil D. Lawrence, Bottom-up data Trusts: disturbing the ‘one size fits all’ approach to data governance, *INTERNATIONAL DATA PRIVACY LAW*, 2019, at 12-13. This observation only buttresses the conclusion that the IF model does not in fact encompass either version of the fiduciary duty of loyalty.

¹³² Information Fiduciaries, *supra* note 16, at 1228, 1229.

¹³³ See Information Fiduciaries, *supra* note 16, at 1223.

¹³⁴ Free Speech in the Algorithmic Society, *supra* note 23 at 1160.

¹³⁵ Information Fiduciaries, *supra* note 16, at 1227.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Free Speech in the Algorithmic Society, *supra* note 23, at 1163.

¹³⁹ Fixing Social Media’s Grand Bargain, *supra* note 31, at 14.

¹⁴⁰ *Id.* at 11.

¹⁴¹ *Id.* at 13-14.

2. Duty of confidentiality

Balkin also invokes the duty of confidentiality as an obligation on equal par with the duties of care and of loyalty. Under the traditional common law treatment discussed above, this duty typically acts as one of a number of secondary, “subsidiary” obligations to the primary fiduciary duties. However, as Mike Godwin points out, given its unique supportive role vis-a-vis other fiduciary obligations, confidentiality merits special -- perhaps even co-equal -- status, vis-à-vis the “primary” duties.¹⁴²

Theorists have noted that although there is considerable overlap, confidential relationships can be distinguished from fiduciary relationships.¹⁴³ Crucially, the concept of keeping confidences rests on the same foundations of entrusted power, private knowledge, and personal relationship that undergird in particular the fiduciary duty of loyalty. Moreover, it is difficult to conceive of a bona fide fiduciary relationship in the absence of a binding confidentiality requirement. Guarding the secrecy of information provided as part of private communications would seem to be a key component to relationships built on both thin and thick forms of fiduciary loyalty.

In key respects, then, confidentiality is a precursor and enhancer to forming a successful fiduciary relationship. As Godwin puts it succinctly, “confidentiality is the real trust-builder.”¹⁴⁴

For now, the salient question here is whether and how the IF model incorporates a duty of confidentiality. Balkin’s repeated rejection of any analogue to doctors and lawyers, which carry with them explicit confidentiality requirements, casts some doubt. At the same time, while the general and fiduciary duties of care can and likely do exist in many cases without an express confidentiality mandate, likely they would be the worse for it.

In his most recent work on the IF model, Balkin ties together an obligation of care (do no harm) with keeping confidences:

The duties of care and confidentiality require fiduciaries to secure customer data and not disclose it to anyone who does not agree to assume similar fiduciary obligations. In other words, fiduciary obligations must run with the data.¹⁴⁵

¹⁴² E-mail from Mike Godwin to author (August 22, 2019) (on file with author) (“Godwin to Whitt Private Communication”).

¹⁴³ See Smith, *supra* note 72, at 1465-67.

¹⁴⁴ Godwin to Whitt Private Communication, *supra* note 142.

¹⁴⁵ Fixing Social Media’s Grand Bargain, *supra* note 31, at 13.

Not disclosing a customer's information to third parties would seem a core attribute to a duty of confidentiality. In this case, ascribing some benefit of the doubt supports acknowledging that the IF model is intended to include an obligation of confidentiality.

Thus, the Zittrain/Balkin approach for information fiduciaries aims at improving power and control asymmetries between Web companies and their users. Some imprecise language aside (or perhaps indicia of a still-evolving standard), the IF model would impose both general and fiduciary duties of care, and a related duty of confidentiality, on a range of online entities regarding their use of their users' personal information.

B. The Khan/Pozen Critique

Khan and Pozen's basic argument is that the duty of loyalty is an ill-fitting remedy to the Facebooks of the world. Much of the challenge, the authors claim, is that anything beyond "do no harm" would clash directly with the overriding corporate imperative to maximize financial value from existing business models.¹⁴⁶ To that extent, the Khan/Pozen analysis casts significant doubt on Congress' ability to mandate a fiduciary duty of loyalty on U.S. corporations.

As we have seen, however, the IF model is based squarely on duties of care, not of loyalty. Attributing a mandated fiduciary duty of loyalty is an understandable misreading, given Balkin's invocation of that standard in his later papers.¹⁴⁷ However, as highlighted above, Balkin and Zittrain appear to want no part of an actual fiduciary loyalty standard. So, the Khan/Pozen paper essentially is doing battle with an empty suit.

Noting some of the internal inconsistencies in the actual duty involved, the Khan/Pozen paper suggests one reading that would "cabin any fiduciary duties afforded to users so that they do not seriously threaten firm value," or the structure of the Delaware corporate fiduciary law.¹⁴⁸ Otherwise:

For if the concept of digital information fiduciaries does *not* require online platforms to place their users' interests above all other interests, it is unclear what work the concept is supposed to be doing. More than that, it is unclear how this is

¹⁴⁶ Khan & Pozen, *supra* note 15 (manuscript at 21).

¹⁴⁷ Fixing Social's Media's Grand Bargain, *supra* note 31, at 12-13; Free Speech Is a Triangle, *supra* note 31, at 2048; Second Gilded Age, *supra* note 31, at 1009; Three Laws of Robotics, *supra* note 31, at 1228-29.

¹⁴⁸ Khan & Pozen, *supra* note 15 (manuscript at 12).

a fiduciary approach in any meaningful sense.¹⁴⁹

The cogent response to those questions is that the actual concept behind the IF model is to protect users from various harms and imprudent conduct, under general and fiduciary duties of care. Those duties do have some weight, and likely would prohibit more conduct than Federal law currently permits. If such mandates were imposed by Congress, for example, a corporation expressly maximizing shareholder value by deliberately harming its users would amount to a plain violation of the general duty of care. Similarly, a corporation performing its various responsibilities in an imprudent and irresponsible manner would amount to a violation of the fiduciary duty of care. It is difficult to imagine that Facebook shareholders, or officials with the State of Delaware, would have reasonable grounds to take serious issue with either obligation.¹⁵⁰

Thus, the IF model should survive legal scrutiny – so long as it sticks to the general and fiduciary duty of care obligations. Further, the Khan/Pozen critique leaves open the probability that a true duty of loyalty can coexist with the business imperatives of entities willingly entering the market under such conditions.

C. *Zuckerberg Claims the Fiduciary Mantle*

As indicated earlier, Mark Zuckerberg has weighed in to suggest general support for the Balkin/Zittrain proposal.¹⁵¹ Moreover, he believes Facebook already is serving as a fiduciary to its end users.

Zuckerberg has stated that “our own self image of ourselves and what we’re doing is that we’re acting as fiduciaries and trying to build the best services for people.”¹⁵² And later, “[o]ur self image is largely acting as – in this kind of fiduciary relationship”¹⁵³ Apparently, as he describes it, the equation amounts to people choosing to use Facebook, and Facebook then building services it believes are best for them.

¹⁴⁹ *Id.* (emphasis in original).

¹⁵⁰ Khan and Pozen argue as well that a social media company like Facebook does not possess necessary attributes of loyalty, namely (1) access to a user’s most personal data, and (2) services of expertise. *Id.* (manuscript at 18-20). These arguments seem inapt. To the extent the authors are attempting to undermine application of the supposed duty of loyalty underpinning the IF model, the attempt is unnecessary. Nor, frankly, is the argument all that convincing on its merits. Facebook plainly has ready access to a trove of personal user data, and also possesses singular expertise to utilize that data in myriad ways.

¹⁵¹ See Zuckerberg Harvard Interview Transcript, *supra* note 14.

¹⁵² *Id.*

¹⁵³ *Id.*

It is unfortunate that the precise nature and scope of the supposed fiduciary obligation – whether Facebook is exercising a duty of care or a duty of loyalty – is not brought up in the interview. Nonetheless, if Zuckerberg believes that Facebook already is acting as a fiduciary to its end users, even at the lower fiduciary duty of care level, the evidence suggests otherwise:

- *Lack of notice*: Facebook has never expressed before this concept or defined its substance. As a result, its users have no ability to even understand, let alone negotiate or contest, the existence of an actual fiduciary relationship with the company.
- *Lack of legitimate consent*: Facebook users have never given their express approval to become clients in a fiduciary relationship with the company.
- *Lack of substance*: Facebook’s recent marketplace actions do not appear consistent with a fiduciary, even at the lowest level duty of care.
- *Lack of accountability*: Facebook users have no direct recourse for possible violations of their fiduciary obligations.

D. Choosing Our Words Well

While the sheer expanse and depth of common law areas like fiduciary doctrine can be challenging, one upside is that its flexible nature can accommodate developing societal concerns. Indeed, Frankel points out that the common law is a relatively open-ended instrument for “allowing the acceptance of new fiduciaries into the field.”¹⁵⁴ As a result, nearly any problem rooted in power relationships between people can be deemed a fiduciary problem.¹⁵⁵ That would extend, it seems, to the dynamism of the World Wide Web in the early 21st Century.

On the other hand, it is particularly crucial to have that public conversation now, rooted in the actual rationale of the equity and common law concepts of being a fiduciary. While the obligations in practice remain fraught around the edges, the core fiduciary duties of care and of loyalty should not be confused. As Zuckerberg’s recent statements only highlight, employing our legal language and concepts without sufficient precision can be problematic. Otherwise, there is a credible threat that as the terms enter into more common parlance among stakeholders, they will become misunderstood before having the opportunity to shed much-needed light.

¹⁵⁴ Frankel, *supra* note 56, at 183.

¹⁵⁵ *Id.* at 78.

In short, then, we should avoid, in the words of one scholar, “a sense of *fiduciary* so open as to be empty.”¹⁵⁶ A nuanced understanding of the nomenclature, purpose, and application of fiduciary law doctrine can only better inform the larger public debate.

IV. OPTING INTO A DEEPER LOYALTY: DIGITAL TRUSTMEDIARIES

This Part proposes a new type of fiduciary, the digital trustmediary (or “DTM”), with scope, participants, and obligations intended to have particular relevance to the Web platforms era. Parts V and VI then will propose joining together the IF and DTM models in a common governance framework.

The conjoined meaning embedded in the name should help explain its three key components.

- The term “digital” is meant to connote that the scope – the “What” -- of its obligation runs broader and deeper than just an end user’s personal data or information. Indeed, potentially it would include all types of interactions in digital (meaning modern-day) environments, including those normally thought of as part of supportive human relationships.
- The term “trust” is meant to invoke the relational essence of the fiduciary relationship – the “How” -- which is rooted in both proscriptive and prescriptive loyalty. The trust involves two particular kinds of fiduciary relationship – loyalty and confidentiality -- and the human trait of trustworthiness that the model seeks to embrace.
- Finally, the term “intermediary” refers to the voluntary mediating role – the “Who” – that the entity plays, providing an active virtual interface between the user (who is now a client) and its digital experiences.

The remainder of this Part will explore these considerations in more depth.

A. *The “Why” – Challenging Unbalanced Platform Markets*

The context for this proposal is important to understanding its potential relevance.

My previous *Hiding in the Open* paper unpacked and examined the openness paradigm, as applied to a variety of natural and human-

¹⁵⁶ Daniel Yeager, *Fiduciary-isms: A Study of Academic Influence on the Expansion of the Law*, 65 *DRAKE L. REV.* 179, 184 (2017) (emphasis in original).

made systems, networks, and platforms.¹⁵⁷ There, I also described the rise of networked emergent technology (NET) platforms. The paper attributes the NET platforms' incredible success to a combination of three interrelated factors: *Web inputs* (user data and content), *Net effects* (positive externalities, network effects, feedback loops, economies of scale), and *Platform dynamics* (the connectivity/communication function that bridges disparate sets of users).¹⁵⁸

From a functional standpoint, these platforms combine various Internet overlays (Web portals, mobile applications, computational systems) and underlays (networks, clouds, personal devices, sensing devices). These elements are mixed with considerable amounts of data, derived from users' fixed and mobile online activities, and various "offline" activities (collected via environmental mechanisms: the Internet of Things, augmented reality, and robotics), as well as information inferred by machine learning algorithms.¹⁵⁹

Some of the largest multisided platforms have woven together all these powerful elements into highly lucrative, multidimensional ecosystems.¹⁶⁰ They are premised on what Google's Chief Economist, Hal Varian, has called in straightforward fashion the practice of "data extract[ing] and analy[zing]."¹⁶¹

The concern is that these multidimensional ecosystems in essence are driving distinctly unbalanced platforms. The end user on one end of the platform has become, in Varian's telling, the object of data extraction and analysis. The true subjects operate on the other ends of the platform: the data brokers and analyzers, including purveyors of advertising technologies ("adtech") and marketing technologies ("martech").¹⁶² While the end users do receive benefits, often in the form of "free" goods and services, they are paying through the extraction and analysis of their personal information, and its subsequent exposure to data brokers and others.

¹⁵⁷ Whitt, *supra* note 3, at 31-66.

¹⁵⁸ *Id.* at 66-70.

¹⁵⁹ *Id.* at 69.

¹⁶⁰ Shoshana Zuboff has labelled this a "behavioral futures market." Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* 93-96 (Jan. 15, 2019).

¹⁶¹ *Id.* at 64. Tim O'Reilly calls this equation the "Wall Street algorithm," of using pervasive data surveillance to maximize user engagement, and platform company profits. *See generally* TIM O'REILLY, *WTF?: WHAT'S THE FUTURE AND WHY IT'S UP TO US* (Oct. 10, 2017).

¹⁶² Zuboff, *supra* note 160, at 94.

The thesis here is that this asymmetric treatment of stakeholders in the NET platforms ecosystem is not well serving the legitimate interests of many of its end users.¹⁶³ As put elsewhere:

One missing ingredient today appears to be basic human trust, an assurance that online interactions are founded on consent, accountability, and [transparency]. With new technologies of data control now coming online--the Internet of Things, cloud computing, A.I. and machine learning, augmented reality, biometrics and more—that existing trust and accountability deficit likely will get appreciably worse.¹⁶⁴

Why then should the hoary common law of fiduciaries law be relevant here? Because, if one believes the troubling narrative sketched out above, the situation is ripe for a market intervention, based on fostering trustworthy and accountable relationships. If we are to retain an “open” Web, trust is vital. In turn, an “open” Web requires human agency, institutional accountability, and overall relational support – all of which are lacking in the current Web environment.¹⁶⁵

More to the point, the core elements of a fiduciary relationship are in play:

- *First*, there is entrusted power. Online platforms and other OSPs have access to, and exercise discretionary power over, the significant practical interests (personal data, sensitive information, user-generated content, etc.) of the platform end users.
- *Second*, the source of power in this instance is uniquely opaque. Who is doing what with my data typically is hidden from view or written ambiguously in privacy policies, with Web services rendered by complex algorithmic systems, under often-obscure terms of service.
- *Third*, there is considerable skill and expertise involved in collecting, moving, storing, handling, analyzing, and otherwise utilizing personal data and information.
- *Fourth*, there exists at least some modicum of trust, or otherwise users would not utilize various platforms’ services. Potential distrust often is overridden by the zero price services provided, and/or a lack of knowledge about the tradeoffs.
- *Finally*, there is considerable risk of harm to users emanating from the entrustment, and their considerable reliance on OSPs.

¹⁶³ Whitt, *supra* note 3, at 74-75.

¹⁶⁴ *Id.* at 74.

¹⁶⁵ See GLIANET, www.glianet.com (last visited Oct. 1, 2019).

Should these elements not be found to constitute a bona fide fiduciary relationship between an OSP and its end users, at minimum a torts-like general duty of care (“do no harm”) can offer some protections. Should some more limited form of relationship be established, the fiduciary duty of care of prudent conduct could be found to apply as well. Regardless, either one or both of those duties of care could be mandated by law, in ways consistent with corporate law and the U.S. Constitution.

What then about the “thick” and “thin” versions of the fiduciary duty of loyalty? If compelled by law, such a duty may be unconstitutional, as the Khan/Pozen analysis demonstrates (and, if nothing else, the duty would be politically challenging to enact into law in the first place). Plus, as Frankel observes, forced loyalty is not true loyalty at all.

Another option suggested here is to create a new Web ecosystem, based on entities voluntarily operating under the composite (thick) fiduciary duty of loyalty. This would include both forms of care, and both forms of loyalty, as well as an enabling duty of confidentiality.

An enlarged role for government in the OSPs world seems inevitable. In the meantime, however – and ideally in concert – there is a role for the rest of us as well, in creating a new Web ecosystem, centered on more balanced digital platforms, governed by healthier incentive structures.¹⁶⁶ If the community is indeed the critical asset of any multisided platform,¹⁶⁷ the objective is to substantially improve the experience of its stakeholders.

The digital trustmediary model, presented below, is one such proposed approach. One which “could pose worthy market alternatives to the more intrusive ‘Ads+Data World’ commercial model still underpinning many online platforms.”¹⁶⁸

B. Creating More True Fiduciary Relationships

The “Why” analysis, provided above, does not differ appreciably from Balkin and other commentators. The DTM model does however rest on different responses to the “What” and “Who” and “How” queries.¹⁶⁹

¹⁶⁶ Whitt, *supra* note 3, at 74.

¹⁶⁷ *Id.* at 67.

¹⁶⁸ *Id.* at 74.

¹⁶⁹ For additional and updated information on the concept of the digital trustmediary, and its role in the GLIANet platforms ecosystem, *see* GLIANET, *supra* note 165. *See also* Richard Whitt, GLIANet: A White Paper (February 2019 draft) (on file with author); Whitt, *supra* note 3, at 74.

The DTM model incorporates three core principles, with important relevance derived from fiduciary law. First, the relationship between client and agent is a broad one, taking on all aspects of modern digital life. Second, the relationship would be entirely voluntary, opted into willingly by both sides. Third, the relationship would entail a duty of loyalty, owed by the DTM to the now-entrustor/client. So, the relational element of the traditional fiduciary relationship is preserved, along with the notion of addressing entrusted power. The DTM model is intended to be a case of digital platforms done right.

1. What: A Digital Life Support System

In line with the “Why” of actively promoting the client’s interests, the DTM model entails providing robust support to clients. This support can take place at one or more different levels.

The vision is broader than merely protecting against data-related harms. The model also encompasses an individual creating and building a relationship with a digital trustmediary that actively promotes that individual’s interests.¹⁷⁰ One example is the extraction and analysis of personal data, which today is accomplished more or less surreptitiously. In a trusted and accountable relationship, raw data about myself can become relevant information, and even more relevant knowledge. With the assistance of a DTM, that knowledge then can be shared with others as part of a mutual, consensual exchange of value.

There are several possible layers of functions, under attendant fiduciary duties, that the DTM can perform for its clients. These can be thought of as three separate tiers to protect, enhance, and promote, or “PEP.” Optimally, through positive experiences at lower tiers, the

¹⁷⁰ Doc Searls’ longstanding work in furtherance of Vendor Relationship Management (VRM), including Customer Commons, is a guiding light in my conception of the DTM’s role in fashioning its clients’ “digital life support systems.” See, e.g., SEARLS, <https://www.searls.com> (last visited Oct. 1, 2019) (Searls’ main website); Neil Davey, Doc Searls: VRM and the new tools of engagement, MYCUSTOMER (Jan. 25, 2010), <https://www.mycustomer.com/selling/crm/doc-searls-vm-and-the-new-tools-of-engagement> (an early VRM posting); CUSTOMER COMMONS, <https://www.customercommons.org> (last visited Oct. 1, 2019) (Customer Commons main website). Yet another paradigm-shifting Searls conception is the so-called fourth party, which is intended to represent the customer’s interests. See Doc Searls, VPM and the Four Party System, PROJECT VRM (Apr. 12, 2019), <https://blogs.harvard.edu/vrm/2009/04/12/vrm-and-the-four-party-system/>. A useful analogy is the typical modern-day real estate transaction. The seller is deemed the first party, and the buyer the second party. Both the listing agent and the showing agent are third parties supporting the seller, even though they do not always appear that way to the unsuspecting buyer. Only in more recent times has the “buyer’s agent” appeared on the scene. In Searls’ parlance, that agent is the fourth party representing the buyer’s interests. Amidst the myriad of countless Web interactions and transactions, the DTM would occupy that fourth party role, in perpetual virtual orbit around its clients.

client would opt to have the DTM take on further functions on her behalf. A virtuous cycle of trust would serve both sides well.

Level One: Protect

At a basic Level One, the DTM can provide fundamental client protection. This could range from taking on mundane but still-important online tasks for clients, such as managing passwords, updating software, patching security holes, and establishing privacy settings. The DTM also could shoulder more daunting cognitive burdens to promote the client's interests, such as analyzing and providing guidance concerning the terms of service (ToS) of websites and applications. On the duty side of the equation, this protection role matches up well with a general duty of care.

Level Two: Enhance

At a more advanced Level Two, the DTM could act as a filtering conduit, through which flows selectively all of the client's interactions with the World Wide Web. The function could include the full protection and preservation of my data lifestream. This particular role could include establishing a virtual zone of trust and accountability to protect the individual from unwanted outside intrusions. In essence, the DTM would help present my enhanced human self to the digital world. This obligation is approximated by a "thin" duty of loyalty.

Level Three: Promote

Finally, at Level Three, the DTM could employ still more advanced and emerging technology tools to fully protect, enhance, and promote the client's interests. This could include virtual avatars, personal cloudlets, sovereign identity layers, portable connectivity, modular devices, and preserved content.¹⁷¹ The "thick" duty of loyalty seems most apt here.

One example of a Level Three-type function is the concept of an individual digital agent, sometimes called a "Personal AI."¹⁷² A DTM could arm its client with on-device computational software that could interact directly with so-called "Institutional AIs," such as Amazon's Alexa and Google's Assistant. This Personal AI could perform a bevy of functions, including effectively protecting the client from unwanted digital surveillance, as well as promoting the client's own intentions in the online environment.¹⁷³

¹⁷¹ See GLIANET, supra note 165.

¹⁷² Throughout this paper, "AI" is abbreviated for "Artificial Intelligence."

¹⁷³ This author's recent series of articles makes the case for Personal AIs. Richard Whitt, Democratize AI (Part I), Medium (June 3, 2019), <https://medium.com/swlh/democratize-ai-part->

2. Who: Opting In

In this new dynamic, the Web user can enter into a legally-binding, arm's-length agreement with a trusted entity. Upon becoming part of this new commercial arrangement, this entity can be referred to as a digital trustmediary. As a client, I would agree to compensate this DTM in some manner for the services and technologies it provides to me, my family, and/or my various communities of interest. And in return, this entity pledges to fully represent my unique interests, to both the online and offline worlds.

Because this model would be opted into voluntarily by both sides, it mirrors a “consent” approach from the fiduciary law tradition. As Frankel notes, “[f]iduciary services are best rendered voluntarily.”¹⁷⁴ Compelling an unwilling party to undertake such a relationship, on the other hand, can actually endanger the recipients and their interests.¹⁷⁵

In the first instance, the user would select one or more entities to become a digital trustmediary. Theoretically, at least, there would be a plethora of viable candidates. For example, leading companies in the tech space could capitalize on their existing trustworthiness with their customers. But others could vie for that relationship as well, including any entity with whom one has established trust. These options might entail for example a favorite television or radio broadcaster, or news organization, or retailer, or broadband provider. This may also include a local bank, library, church, university, food co-op, coffee shop, political party, or a governmental body. Or, an entity not yet born, including so-called distributed autonomous organizations (DOAs) based on blockchain platforms. The point is to begin with the core trust relationship, rather than the technology.

3. How: Loyalty in Confidence to the Client

As part of voluntarily taking on the role of a trusted intermediary, the DTM also would embrace the existence of a true fiduciary relationship. This opt-in decision would recognize the obvious fiduciary elements highlighted by Frankel and others,¹⁷⁶ as well as elevate the “ancillary” duty of confidentiality to a role of overall enablement and enhancement.

i-ade3cc7f727d; Richard Whitt, *Democratize AI: The Personal AI (Part II)*, Medium (June 18, 2019), <https://towardsdatascience.com/democratize-ai-part-2-the-personal-ai-bedf819ace44>; Richard Whitt, *Democratizing AI (Part 3): Action plans for creating Personal AIs*, Medium (July 1, 2019), <https://medium.com/@whitt/democratizing-ai-part-3-efb8da5d956a>.

¹⁷⁴ *The Rise of Fiduciary Law*, supra note 74, at 3.

¹⁷⁵ *Id.* at 4.

¹⁷⁶ See supra Part II.

In particular, under fiduciary duties of loyalty, the DTM and the client would have an actual understanding, freely agreed to by both sides. The client would receive all the tangible benefits of accountability and trust that a mutually beneficial services arrangement bestows. As a result, if the client is satisfied with the relationship, the trust level rises, and she then can be more willing to further engage with the DTM. In some cases, this could include an openness to share more of her personal information lifestream. That openness, in turn, creates more personal, social, and economic value, for both the client (relevant Web connections) and the DTM (relevant services).

If it means anything, the supportive duty of confidentiality requires keeping information away from prying eyes.¹⁷⁷ Because the DTM is rooted in a right relationship between client and agent, all the key elements of that relationship have been established in confidence, even before the individual has taken on that client status. What the client shares, and what the agent comes to learn (which may not be the same thing) would be subject to a confidentiality obligation. In real terms, this furthers the interests of both parties; as the client reveals more in confidence, the agent can better serve her interests. This feeds back into the openness dynamic engendered by loyalty – and the trust cycle reinforces.¹⁷⁸

Of course, human beings make mistakes, and can act with selfish intent. With the DTM, if the client is dissatisfied with something, she would have some recourse. As in any ordinary business relationship, there would be some form of accountability. Broken trust leaves the client the ability to pursue various options – reputational, market, and/or legal – to put things right. One scholar has suggested for example that the FTC could exercise its Section 5 authority to find that inducement of misplaced trust is a “deceptive business practice.”¹⁷⁹ As will be discussed in Part VI *infra*, a professional accreditation or self-certification regime is one governance avenue worth exploring for implementing this model.

¹⁷⁷ See RICHARDS, *supra* note 6, at 147-50 (describes a long legal tradition of confidentiality in the common law, and as an essential element of intellectual privacy).

¹⁷⁸ Glial cells, those human brain-based networks that protect, enhance, and promote healthy neural function, have become a touchstone metaphor for the author’s GLIANet Project. See *generally* GLIANET, *supra* note 165. Mike Godwin helpfully has pointed out the conceptual link as well between the important role of confidentiality in fiduciary relationships, and the supportive role of glial cells in the human brain. Godwin to Whitt Private Communication, *supra* note 142.

¹⁷⁹ WALDMAN, *supra* note 9 at 89. Of course, that same approach could be applied “where platforms leverage their design[s] to induce trust and then act against their members’ interests.” *Id.*

V. OLD SCHOOL GOES ONLINE

This next section presents a provisional dive into whether and how these different sets of fiduciary duties, as instantiated in the IF and DTM models, can fit together in the online context. The intention is to apply these duties to a number of tangible real-world examples, in a way that provides useful guidance.

A. *A Range of Duties*

As we have seen from our discussion of fiduciary law in Part II, the common law suggests four basic types of obligations that could be applied to entities and their online activities. I would parse them out in the following way:

- A general (tort-like) duty of care: “do no harm.”
- A fiduciary (negligence-like) duty of care: “prudent conduct.”
- A “thin,” proscriptive duty of loyalty: “no conflicts of interests or duties.”
- A “thick,” prescriptive fiduciary duty of loyalty: “promote best interests.”

These four sets of duties appear to constitute a continuum. They range from the less to the more contextual, and from the purely transactional of a minor traffic accident to the fully relational of a committed relationship.

A fifth obligation, an enabling duty of confidentiality, also should be recognized. In some ways, keeping confidences is the connective tissue that binds together the other duties.¹⁸⁰ At the same time, this particular obligation is contextual, based on the underlying duty being supported. In essence, the duty of confidentiality is like a ratchet, with varying degrees of protection – “thinness” or “thickness” – dependent on the nature and scope of the underlying fiduciary obligations.¹⁸¹

For example, when added to the general duty of care, the duty of confidentiality is relatively limited – essentially, do not reveal things about me that would harm me in a tort-like manner. When added to the fiduciary duty of care, the obligation entails taking reasonable steps not to reveal information disclosed in confidence. Both of these somewhat narrow, “thin” interpretations make sense, as the duty of care tends to be more transactional than relational.

¹⁸⁰ Godwin to Whitt Private Communication, *supra* note 142.

¹⁸¹ Other “ancillary” duties, such as good faith and candor, similarly can be defined more expansively, or more constrictively, depending on whether they are attaching/supporting the thick or thin version of the fiduciary duties of care and of loyalty.

Only when supplementing the duty of loyalty does the duty of confidentiality reach its full enabling power. The relational aspect of the client-agent bond is made plain in the injunction that all such confidences must be fully honored. This means not revealing the substance or even existence of such confidences to outside third parties not bound by the fiduciary relationship. One can view this incarnation of the obligation as a “thicker” version, in parallel with the “thick” form of fiduciary loyalty.

Given these parameters, the general duty of care should play out well in nearly any online situation, including where there is no preexisting contact or interactions between the parties. Even a limited form of confidentiality should apply in such contexts. By contrast, the three fiduciary duties should apply only where there is a preexisting “entrusted” relationship of power, expertise, reliance, and risk.¹⁸² Thought of in another way, the duty of care creates an additional degree of accountability in existing institutions, while the duty of loyalty creates an additional degree of individual agency for new clients.

How then do these duties play out in OSP practices and behaviors with regard to Web users? Largely it depends on the roles and functions involved. Under a “form follows function” model the author has employed elsewhere,¹⁸³ a proposed test for fiduciary status would be based on the form of the relationship between two parties, and the specific functions to be provided.

1. Medical Health Duties

In functional terms, the physician-patient dynamic contains crucial elements to form a fiduciary relationship. These include: (1) an asymmetric power balance, based on the patient’s vulnerability; (2) acquiring and utilizing sensitive health information about the patient; (3) utilizing professional expertise to carry out specific tasks; and (4) the patient’s reliance on such expertise. From these factors flows the composite or “thick” fiduciary duty of loyalty, plus a “thick” form of confidentiality, culminating in the fiduciary command to act in the patient’s best interests.

¹⁸² One complication is that modern day legislators have adopted the term “fiduciary duties” – often referred to as “statutory duties” – which may or may not reach to actual equity-based fiduciary obligation standards. Edelman, *supra* note 83, at 21, 23. The “prudent conduct” fiduciary duty of care is one such category where legislation would presume or assign what is called a fiduciary relationship.

¹⁸³ Whitt, *supra* note 3, at 74-78. *See also* Kiel Brennan-Marquez, Fourth Amendment Fiduciaries, 84 *FORDHAM L. REV.* 611, 652 (endorsing a “functionalist approach” to assigning and delineating fiduciary duties).

One useful way to think about differences between the duties is to compare them with a parallel in the medical field: the Hippocratic Oath. Basic principle of “first do no harm” (or, *primum non nocere* in Latin), have been associated for centuries with Hippocrates the Greek physician. Interestingly, the text passed down to us from ancient Greece uses a different formulation: “to abstain from doing harm,” also known as “nonmaleficence.”¹⁸⁴ But the basic point is the same: physicians should endeavor above all not to harm their patients. That is a distinctly tort-like obligation, like the general duty of care.

As it turns out, however, remaining portions of the Hippocratic Oath text provide detail about affirmative duties for physicians to attend to the sick. In other words, doctors should actually and deliberately help their patients. In a related medical text of that time (*Epidemics, Book One*), physicians are told essentially to accomplish two things: to do no harm, and to do good.¹⁸⁵ The “golden axiom of Chomel” similarly breaks down medical obligations into two sets of rules. The “first law” is not to do harm, while the “second law” is to do good.¹⁸⁶

As a rough dichotomy, then, doing no harm correlates to the general duty of care, while doing good essentially is the fiduciary duty of loyalty. No harm could be considered a “negative” duty of restraint; doing good is an “affirmative” duty of action. Keeping private the confidentiality information revealed or gleaned about the client helps bind the duties closer together.

2. “Digital Health” Duties

To the extent that such care/loyalty distinctions from the medical world are illuminating, how would they be applied to the world of online data practices? As we have seen in parsing Balkin’s IF model:

- The general duty of care amounts to protecting against harm. In the digital environment, this would translate into: don’t deliberately leave my personal data unsecured, don’t sell my personal data to third parties you know likely will use it against me.
- The higher fiduciary duty of care amounts to acting in a prudent manner in protecting my personal data, and my online

¹⁸⁴ Rancich AM & Gelpi RJ, Analysis of the ethical principles in medical oaths used by medical schools of Argentina in relation to the Hippocratic Oath, *MEDICINA BUENO AIRES*, 1998, <https://www.ncbi.nlm.nih.gov/pubmed/9706247>.

¹⁸⁵ Hippocrates, Of the Epidemics, THE INTERNET CLASSICS ARCHIVE, <http://classics.mit.edu/Hippocrates/epidemics.1.i.html> (last visited Oct. 1, 2019).

¹⁸⁶ Auguste Francois Chomel, REVOLVY, <https://www.revolv.com/page/Auguste-Fran%C3%A7ois-Chomel> (last visited Oct. 1, 2019).

content. This would translate into: don't be sloppy in securing my data on your server, don't leave your server farms understaffed by poorly-trained employees.

- The enabling “thin,” proscriptive version of confidentiality bolsters the care duties. This means, in essence: do not be imprudent or unreasonable in allowing third parties to gain unauthorized access to my private information, which they would then use to my detriment.

The fiduciary duty of loyalty would demand more.

- The thin proscriptive version tells the fiduciary: do not have any conflicts between your digital interests and my own, or between different sets of clients. Do not sell my personal data to the highest bidder. Do not program your AI to spy on me and acquire my data.
- The thick prescriptive version sets the highest standard: actually promote my interests. Do inform me about online risks. Do keep my data in a super-safe location (*i.e.*, not a vulnerable server farm). Do filter out harmful or unwanted content from my online feeds. Do arm me with technology tools to protect my interests. Do present me with advertising and marketing options tailored to my particular wants or needs – or, no ads at all.¹⁸⁷
- The enabling “thick,” prescriptive version of confidentiality provides additional protections to the client. Do affirmatively keep away from third parties all my information – from personal data, to private confidences, to inferred wants and needs – absent an explicit assent on my part.

So, in terms of interacting with user data, the duty of care would cover protecting the user against harm arising from the fiduciary's conduct, including third parties seeking to gain unauthorized access to the data. The duty of loyalty, by contrast, would cover protecting and promoting the user's interests, and her personal information, over the fiduciary's own interests.

¹⁸⁷ Seen in this light, Google's longstanding “don't be evil” mantra (since removed from its main website) sets a fairly low bar. If companies merely can avoid becoming the equivalent of the Darth Vader of the Web, apparently that would be sufficient to meet the general (non-fiduciary) duty of care standard. In hindsight this fact should not be surprising, as Google (to my knowledge) never has claimed to be in a fiduciary relationship with its users. As a corporate slogan, “do be good” or “helping you do better” would approximate the higher standards of conduct expected from a fiduciary relationship based on care and loyalty.

B. *Voluntary Loyalty Surpasses Grudging Care*

The IF model's "duty of care" promises to some degree to "lift all boats" (all OSPs) to a minimal standard of non-harmful and prudent conduct. The DTM model's duty of loyalty standard by contrast (to maintain the analogy) seeks to "rebuild the levees," by raising up the interests of one side of the existing online platforms: the end users. When introduced into some real-world scenarios, each approach shows its advantages, and its challenges.

1. Comparative Upside

The DTM model does provide some notable benefits.

First, per the Khan/Pozen paper, the conflict of duties between users and stockholders they claim Facebook experiences would be problematic under a mandated duty of loyalty regime. This conflict derives from the fact that Facebook's business model is already well-established. Assumedly the company's stockholders support Facebook's ongoing market activities and data practices, which do not (obviously) involve a fiduciary duty of loyalty to its users.

The same would not be the case, however, were an entity to take on its fiduciary obligations for the first time, and willingly, with full understanding and support from its stockholders. After all, the doctors, lawyers, accountants, and others cited in the Khan/Pozen paper, voluntarily joined their respective professions with already established codes of conduct and ethics. So, the DTM model survives intact that line of argument. Indeed, creating an "expectation of confidentiality" should give would-be clients a greater degree of trust to pursue fiduciary relationships with would-be DTMs.¹⁸⁸

Second, the DTM model effectively sidesteps Balkin's animating concerns about potential First Amendment or Fourth Amendment challenges from enlisting unwilling participants to become IFs.¹⁸⁹ Once an entity of its own accord steps into the DTM role, the constitutional issues should diminish.

While Balkin's papers focus on the First Amendment implications of the information fiduciaries model, the Fourth Amendment angle is worth highlighting briefly. Under the "third party doctrine," individuals typically lack protected Fourth Amendment interests in records that are possessed, owned, and controlled, by a third party.¹⁹⁰ With the United States Supreme Court's recent *Carpenter v. United*

¹⁸⁸ Godwin to Whitt Private Communication, supra note 142.

¹⁸⁹ Information Fiduciaries, supra note 16, at 1209-1220.

¹⁹⁰ *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979).

States decision,¹⁹¹ the underpinnings of that doctrine have been called into question.¹⁹²

Balkin states that “we should have a reasonable expectation of privacy for purposes of the Fourth Amendment” when we share information with information fiduciaries.¹⁹³ In his view, then, the third party doctrine should not apply. However, because the IFs model is premised on a combination of general and fiduciary duties of care, and thin confidentiality, courts may be less likely to take IFs out of the third-party doctrine category.

By introducing DTMs into the mix, however, the notion that individuals have a reduced expectation of privacy in information willingly shared with third parties is less likely to hold sway. In fact, if a client agrees to share information with a DTM acting as a professional fiduciary, bound by loyalty and confidentiality obligations, that client should have a heightened, not a reduced, expectation of privacy.¹⁹⁴ Future Fourth Amendment-related jurisprudence could well acknowledge that special constitutional status for DTM-like entities.

Third, the DTM model provides an effective means of compliance with new government-imposed data protection mandates, such as the EU’s General Data Protection Regulation (GDPR).¹⁹⁵ Because the DTM need not actually own, control, or even possess its client’s data, applicability of the data controller and data processor requirements under the GDPR is questionable. Regardless, DTMs should be able to meet, if not exceed, their GDPR obligations.

The GDPR is a notable achievement in furthering the cause of increased protection of European citizens’ personal data. That said, one can argue that the rules are a well-meaning but suboptimal fit for the growing complexities of the online era. Two observations are worth noting briefly here.

¹⁹¹ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁹² Mike Godwin, What’s Next for the Reasonable Expectation of Privacy?, SLATE (June 27, 2018, 3:28 PM), <https://slate.com/technology/2018/06/after-the-supreme-courts-carpenter-ruling-where-is-the-reasonable-expectation-of-privacy-heading.html>.

¹⁹³ Information Fiduciaries, *supra* note 16, at 1231.

¹⁹⁴ See Kiel Brennan-Marquee, Fourth Amendment Fiduciaries, 84 FORDHAM L. REV. 611, 654-55 (2015). (When A shares information with B to obtain a socially valuable service, B should be treated as an “information fiduciary,” so that B’s interactions with law enforcement are treated as a Fourth Amendment search.). See also Mike Godwin, It’s Time to Reframe Our Relationship with Facebook, in THE SPLINTERS OF OUR DISCONTENT: HOW TO FIX SOCIAL MEDIA AND DEMOCRACY WITHOUT BREAKING THEM 34 (Zenger Press, May 14, 2019) (fiduciary status could bolster a company’s standing to resist government attempts to seize user data).

¹⁹⁵ EU GDPR.ORG, <https://eugdpr.org/> (last visited Oct. 1, 2019).

First, the GDPR regime essentially accepts as given the current Web ecosystem, and the “transactional paradigm” of reducing human beings to conduits of static data points. Per the dominant theology of Silicon Valley, information about people is perceived to be a resource – much like oil – to be extracted and controlled and processed and, ultimately, monetized. Whatever its merits, such a perspective seems to crowd out other, more humanistic conceptions of personal data.¹⁹⁶

Further, by relying on extensive transparency measures, repeated consent notifications, and ex post compliance regimes, the GDPR puts the onus on the end user constantly to represent her best interests. “Consent fatigue” is bound to set in. Higher per-transaction costs and cognitive overload will be a major, if not debilitating, challenge to the GDPR construct.¹⁹⁷ Many users in exasperation will simply resort to clicking through a growing raft of “notice and consent” messages – and in the process, potentially eroding actual real-world protections.¹⁹⁸ As one scholar puts it, “there are reasons to doubt the invincibility of consent.”¹⁹⁹

In contrast to that transaction-focused approach, the DTM model is relational. This means that many consent-seeking, accountability-establishing, and trust-building elements would be presented up front to potential clients, vis more human-friendly mechanisms. In essence, the relationship can buttress otherwise shaky foundations of the consensual.

Interestingly, several scholars have proposed that privacy be viewed more aptly through the lens of human trust, including fiduciary

¹⁹⁶ One such alternate perspective is the so-called “lifestream”, conceived by the Author as an ever-evolving flow of individual and collective information rooted in human identity, relationship, and experience. The pecuniary value of such flows is considered secondary to its value as a way to unlock human potential. See GLIANet, *supra* note 165.

¹⁹⁷ This drawback is all the more problematic in the Internet of Things (IoT) environment, where notice and the ability to register (lack of) consent seem all the more daunting.

¹⁹⁸ See A critical reflection on #GDPR, TANTE (Apr. 3, 2018), <https://tante.cc/2018/04/03/a-critical-reflection-on-gdpr/>. See also Larry Downes, GDPR and the End of the Internet’s Grand Bargain, HARVARD BUSINESS REVIEW (Apr. 9, 2018), <https://hbr.org/2018/04/gdpr-and-the-end-of-the-internets-grand-bargain>.

¹⁹⁹ NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 2 (Apr. 4, 2019). See also WALDMAN, *supra* note 9, at 83-85 (for many practical reasons, “notice-and-consent doesn’t work.”).

obligations.²⁰⁰ “Put simply, privacy matters because it enables trust.”²⁰¹

Finally, and perhaps most importantly, the DTM model potentially disrupts and disperses incumbent economic power via market activities. More traditional “behavioral” regulation can have the unfortunate tendency to accept and lock in such power via regulatory compliance regimes.²⁰² Concerns over an incumbent’s “regulatory lock-in advantage” have been raised as well regarding Europe’s GDPR.²⁰³ That same premise seemingly could extend as well to other regulatory regimes involving OSPs, and in particular large online platform companies.²⁰⁴

2. Inevitable Tradeoffs

By the same token, the DTM model – with its broader scope, heightened duties, and opt-in status – translates into new types and greater degrees of responsibilities. These inevitable tradeoffs warrant closer examination.

First, the DTM model encompasses not just personal data, but all human interactions with the open Web and other ubiquitous digital platforms, both online and increasingly offline. This expansive purview obviously would require from the DTM more technical know-how than would be the case in a purely data-focused regime.

Second, the DTM model rests on a base of positive incentives and motivations, due to its reliance on voluntary, opt-in relationships between willing parties. This approach is consistent with the

²⁰⁰ See HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 199 (2009) (the lens of contextual integrity helps us conceive of privacy within “spheres of trust,” and Web companies operating in information caretaker or fiduciary roles). See also WALDMAN, *supra* note 9, at 85-88 (privacy-as-trust recognizes that data collectors are being entrusted with user information, which should require fiduciary obligations). See also Richards, *supra* note 6 (a new professional class of information fiduciaries should be required as a means of protecting our intellectual data).

²⁰¹ Richards & Hartzog, *supra* note 9, at 447.

²⁰² Cory Doctorow, *Regulating Big Tech makes them stronger, so they need competition instead*, *THE ECONOMIST* (June 6, 2019), <https://www.economist.com/open-future/2019/06/06/regulating-big-tech-makes-them-stronger-so-they-need-competition-instead>; Larry Downes, *How More Regulation for U.S. Tech Could Backfire*, *HARVARD BUSINESS REVIEW* (Feb. 09, 2018), <https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire>.

²⁰³ Doctorow, *supra* note 202.

²⁰⁴ This reputed incumbency advantage for the large platform companies also speaks to the Khan/Pozen concern that a single-minded focus on fiduciary obligations will minimize or even negate the desire to pursue competition law-based remedies. Khan & Pozen, *supra* note 15 (manuscript at 5, 27-29).

observation that “forced loyalty may not be loyalty as such.”²⁰⁵ However, that very voluntariness also means that, absent obvious incentives, entities are free to decide whether to become DTMs.

Third, the DTM model provides a duty of loyalty, which better protects and promotes the interests of entrusting clients through newly active agents with real “skin in the game.”²⁰⁶ Again, this heightened standard would involve more responsibility and accountability for the DTM.

So, given the considerably broader scope and substance of the fiduciary obligations – with greater client support, technology know-how, and legal compliance costs/risks – one challenge may be in attracting sufficient number of entities willing to take on the mantle of a digital trustmediary.

This concern is borne out by a 2004 thesis paper which explored various reasons for the failure of the infomediaries model earlier in this century.²⁰⁷ The author identified a number of new uncertainties for businesses looking into become such infomediaries, including the need to develop new online business models, pursue network-based lock-in effects, determine the value in intangible information assets, better understand their customers, and generate high levels of trust.²⁰⁸ Fifteen years later, many of these same uncertainties appear to be relevant considerations for building a healthy online ecosystem.²⁰⁹

Some of those concerns could be overcome, however, from establishing attractive incentives for an entity to decide to opt into a DTM model. By leveraging existing trustworthiness with its clients, for example, the DTM can in theory gain (purely consensual) access to a client’s most valuable personal data and information, doubly protected

²⁰⁵ Gold, *supra* note 89, at 393 (citation omitted). *See also* Frankel, *The Rise of Fiduciary Law*, at 3 (“[f]iduciary services are best rendered voluntarily.”).

²⁰⁶ *See generally* NASSIM NICHOLAS TALEB, *SKIN IN THE GAME: HIDDEN ASYMMETRIES IN DAILY LIFE* (Feb. 27, 2018).

²⁰⁷ Bethany L. Leickly, *Intermediaries in Information Economies*, YUMPU (Apr. 30, 2004), <https://www.yumpu.com/en/document/read/11549048/intermediaries-in-information-economies-communication-culture-> (a Master of Arts in Communication, Culture and Technology thesis, Georgetown University). A Thesis Submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University in partial fulfillment of the requirements for the degree of Master of Arts in Communication, Culture, and Technology.

²⁰⁸ *Id.* at 49-50. The author lays out seven rules for infomediary success: provide value for both businesses and consumers, promote trust in online transactions, become experts in specialized areas, respect information privacy, achieve critical mass, gain first-mover advantage, and take advantage of information as a commodity. *Id.* at 61.

²⁰⁹ An even earlier market analysis – perhaps the first of its kind – details the economics of network-based information intermediaries, as “trustworthy information processing third parties,” mediating between information seekers and sources. *See* FRANK ROSE, *THE ECONOMICS, CONCEPT, AND DESIGN OF INFORMATION INTERMEDIARIES* (1998).

by an enabling duty of confidentiality. The DTM model frees up opportunities to utilize new business models, such as quality advertising/marketing/branding arrangements, client intent-casting, monthly subscriptions, per-transaction fees, and tokenized data access.

Other advantages could accrue. Incumbents with existing customers or subscribers can use the DTM model to create more “stickiness” in those relationships. Technology-savvy entities can leverage the cutting-edge tech tools, like Personal AIs, as a way to attract early adopters and others. More social-minded entities can perceive the DTM loyalty obligations as another way to serve the higher goals of the organization. As a result, a raft of governance models (b-corps, platform cooperatives, blockchain foundations, etc.) can be explored. And, if nothing else, the fear of being left behind in the digital economy may propel some entities to consider the DTM model as a way of gaining new market relevance.²¹⁰

The other major concern is that, on the end user side of the DTM platform, there would be an insufficient number of willing clients. The Leickly study observes that consumers too face new uncertainties in the growing e-commerce space, including information overload (difficulty in differentiating between trustworthy and opportunistic businesses), information asymmetry (inability to process relevant information), technology weariness (prevalence of malfunctions, failures, and hacks), and the moral hazard of reduced privacy online.²¹¹ Again, these concerns seem near-universal in the modern online world. In particular, the opacity of the existing information asymmetries and platform imbalances may not be readily discernible to the average Web user. Surmounting these uncertainties will be crucial in order for an actual DTMs-based ecosystem to take hold and succeed.

At bottom, then, the two visions have countervailing challenges. A world of IFs may include too many of the unwilling, while a world of DTMs may contain too few of the willing. This tension need not be resolved decisively in one direction or the other. Instead, as we will see in Part VI, the two models can be accommodated to the benefit of the participants in both regimes.

²¹⁰ As explained above, in the age of GDPR, and future international, national, and/or state data protection and privacy regimes, one should not overlook the legal and regulatory compliance advantages that would accompany adoption of the DTM model.

²¹¹ Leickly, *supra* note 206, at 49-50.

C. A Cautionary Note: Zuckerberg and the Spectre of Competition

In his February 2019 interview at Harvard, Mark Zuckerberg draws a fascinating, if overlooked, contrast between people who would be greatly empowered by the ability to choose their Web-based intermediary, and the role of large platform companies:

If you have a fully distributed system, it dramatically empowers individuals on the one hand, but it really raises the stakes and it gets to your questions around, well, what are the boundaries on consent and how people can really actually effectively know that they're giving consent to an institution? In some ways it's a lot easier to regulate and hold accountable large companies like Facebook or Google, because they're more visible, they're more transparent than the long tail of services that people would choose to then go interact with directly.²¹²

Zuckerberg seems to believe that an assertion of serving his users' interests should trump market interventions to give people additional options. In fact, he all but invites government regulation. Per the incumbent lock-in concerns mentioned previously, that policy prescription might well end up maintaining Facebook's current market position with users. An alternative is to open up the market to "the long tail" of entities that people willingly and expressly want to select to "dramatically empower" them. The DTM model is one approach to bridge the accountability gap that Zuckerberg raises as an obstacle to achieving that promising scenario.

One option consistent with the Khan/Pozen critique is to affirmatively prohibit OSPs – or at least those exhibiting non-fiduciary practices – from taking on an affirmative duty to loyalty under their current business models and corporate obligations. Their paper demonstrates that the tension between the fiduciary duty of loyalty, and the online platforms' existing financial incentives and corporate priorities, may be too deep to resolve without fundamental reforms.²¹³ The exact duties of a fiduciary relationship between two parties depends first on the actual function to be provided. This "form follows function" approach would be violated by an entity, such as Facebook, that assumes the mantle of trust, without providing the necessary loyalty regarding their entrusted power over purported entrustors.

²¹² Zuckerberg Harvard Interview Transcript, supra note 14.

²¹³ Khan & Pozen, supra note 15 (manuscript at 10-17).

Unless and until that functional “failure” were to be corrected, the duty of loyalty should not apply.

VI. A WAY FORWARD: THE “WHICH/WHERE/WHEN” OF IMPLEMENTATION

A. *Two Complementary Tiers*

Adopting a multi-tiered approach containing both the IF and DTM models has some support in fiduciary law doctrine. As Richard Brooks puts it, “a fully developed model of the concept of an information fiduciary would incorporate both the affirmative and negative duties suggested by Laudon and Richards.”²¹⁴

The structural pluralism school also provides some useful guidance. Ideally, law should protect our core interests, while at the same time, allowing latitude for people to engage in autonomous behaviors. To Dagan and Hannes:

People should be able to choose from these institutions in line with their own conceptions of the good and the means necessary for its realization given their particular needs and circumstances. . . . This fundamental commitment to self-authorship . . . accommodate[s] heterogeneity. . . . [T]o the extent possible, private law should attempt to overcome problems of information asymmetry and cognitive biases by prescribing sticky defaults rather than by curtailing choice through mandatory rules.²¹⁵

This observation suggests that a two-tiered fiduciary approach is a doable way to protect the downside user risks, while enabling the upside mutual benefits. In fact, each duty can in important ways reinforce the other; for example, by building online human agency on top of institutional accountability. While an imposed duty of care facilitates higher degrees of accountability by existing OSPs, a voluntary duty of loyalty supplies individuals with new agency as empowered clients. As we also have seen, in the common law, the fiduciary duties of care and loyalty interact with and bolster one another by promoting best interests through their composite bundle of “thick” duties. After all, sheer “loyalty” in the absence of any sense of “care” does not necessarily guarantee the moral quality of the actions that are informed by it.²¹⁶ Nor does loyalty have much meaning where

²¹⁴ Brooks, *supra* note 78, at 240.

²¹⁵ Dagan & Hannes, *supra* note 91, at 115.

²¹⁶ Irit Samet, *supra* note 105, at 128.

private information and confidences routinely are revealed to unaffiliated third parties.

So, a mandated duty of care plus “thin” duty of confidentiality could apply to those OSPs involved generally in personal user data, while a voluntary duty of loyalty plus “thick” duty of confidentiality could be adopted for those entities opting into direct, accountable relationships with clients. Among other advantages, combining the IF and DTM models in two separate tiers would provide the basis for parties to explore and adopt a graduated set of obligations.

Getzler observes that fiduciary law can serve as a protective, relatively stringent “penalty default rule,” with parties able to negotiate downward from there.²¹⁷ The suggestion here, however, would go the other way: to adopt the “default rule” of a duty of care, and then allow parties to negotiate upward to a higher duty of loyalty while supporting confidentiality. This would accommodate, among other things, the legal and political challenges of gaining adoption of a loyalty standard, per the Khan/Pozen analysis.

B. Implementing the IF Model

In the United States, Federal legislation appears to be a leading implementation option for the IF model. A notable example came about in December 2018, when U.S. Senator Brian Schatz, along with fourteen co-sponsors, introduced Senate Bill 3744, the “Data Care Act of 2018.”²¹⁸ Section 3 of the bill lays out the specific duties of OSPs with regard to personal data. Three sets of obligations are enunciated.

- *Duty of care*: The OSP must reasonably secure data from unauthorized access and provide prompt notice of data breach.
- *Duty of loyalty*: The OSP may not use data in any way that would benefit the OSP to the detriment of the user, would result in reasonably foreseeable and material physical or financial harm; or would be unexpected and highly offensive to the user.
- *Duty of confidentiality*: The OSP may not disclose or sell individual identifying data except as consistent with the duties of care and loyalty.

S.3744 specifies that the Federal Trade Commission (FTC) is the relevant regulatory agency to oversee its implementation. The FTC may exempt certain categories of providers, services, and data,

²¹⁷ Getzler, *supra* note 81, at 61.

²¹⁸ The Data Care Act of 2018, *supra* note 11 (introduced December 12, 2018).

including conducting a cost/benefit analysis. State attorney general (AGs) also could become involved, via civil actions against OSPs.

The proposed Data Care Act seeks to grapple head-on with applying various fiduciary-based duties to OSPs. To that end, it is a laudable contribution to the conversation, and potentially a useful vehicle to bring to life the IF model. In one respect, however, the legislation should be modified to avoid conflating the OSPs' duty standards.

As indicated above, the bill's duty of care provision essentially mirrors the general (tort-like) and fiduciary duties of care. Reflecting the way that Balkin has articulated the IF model, however, the bill then appropriates the duty of loyalty mantle for what amounts to an additional set of duty of care obligations. For example, the duty of loyalty provision mistakenly encompasses carrying out existing services while merely avoiding harm. Further, the bill's duty of confidentiality lacks explicit content, instead tying a non-disclosure requirement to carrying out the other two duties. To maintain a doctrinally consistent approach, the bill text should clarify that its requirements amount to the more limited reach of "do no harm" and "prudent conduct" duty of care obligations, and a "thin" version of confidentiality, and does not entail as well a fiduciary duty of loyalty.²¹⁹

That said, the proposed Data Care Act is a good start in the United States. That or similar Federal legislation could become the vehicle for adopting general and fiduciary duties of care, applicable to the broad range of OSPs and their data-related activities. As discussed above, such legislation could include functional openness provisions as well, which would help pave the way for a robust alternative market of digital trustmediaries.

As it turns out, such bi-partisan legislation was just introduced. Senate Bill 26581, the ACCESS ("Augmenting Compatibility and Competition by Enabling Service Switching") Act, was introduced on October 22, 2019 by U.S. Senators Mark Warner (D-VA), Josh Hawley (R-MO), and Richard Blumenthal. (D-CT).²²⁰ The bill combines several functional openness provisions, with recognition of "custodial" third parties operating on behalf of users under specified care-like duties. The bill's sponsors recognize that empowering digital intermediaries with "portability, interoperability, and delegatability. . .

²¹⁹ As observed above, mandating by law a relational fiduciary duty of loyalty would be impractical, likely running afoul of constitutional, political, and commercial pushbacks.

²²⁰ Press Release, Mark R. Warner, Senators Introduce Bipartisan Bill to Encourage Competition on Social Media (Oct. 22, 2019), <https://www.warner.senate.gov/public/index.cfm/2019/10/senators-introduce-bipartisan-bill-to-encourage-competition-in-social-media>.

will help put consumers in the driver's seat when it comes to how and where they use social media."²²¹

Specifically, the ACCESS Act would require large platform companies to operate interfaces allowing users to access and port their data, as well as interfaces facilitating interoperability with third parties.²²² The legislation further allows users to delegate management of their online interactions to "custodial third party agents."²²³ Those agents in turn would abide by specified duties, including reasonably safeguarding user data, and not accessing such data in ways that would harm the user.²²⁴

C. Implementing the DTM Model

1. Accountability: Codes and Certifications

A noteworthy advantage of the DTM model is that it need not be adopted via prescriptive legislation, managed through challenging political processes.²²⁵ Instead, interested entities and individuals can begin now to establish DTM relationships, as anchors to a more trustworthy and accountable Web ecosystem.

These DTM relationships can be bolstered by a number of overarching institutional accountability measures.²²⁶ Among other benefits, the existence of such accountability and compliance mechanisms can help reduce entrustors' risks.²²⁷ For example, entities on their own can adopt and implement best practices, codes of practice or conduct, or self-certification regimes. Similarly, groups of such entities could coordinate via industry associations, certification bodies, and/or multi-lateral stakeholder coalitions.

2. Accountability: Professional Status

Another interesting path to consider is creating an entirely new profession for digital agents. Much like a physician or an attorney, the

²²¹ *Id.*

²²² See S. 26581, 116th Cong. §§ 2, 3 (2019), <https://www.scribd.com/document/431507473/GOE19968>.

²²³ *Id.* at § 5.

²²⁴ *Id.* While the accompanying press release specifies that the bill includes "a strong duty of care" for third party custodians, the actual text does not invoke by name any particular standard.

²²⁵ That said, the DTM model also could be recognized in some fashion by the U. S. Congress, and/or state legislatures, as a viable common law-style option.

²²⁶ Richard Whitt, Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy, 61 FEDERAL COMMUNICATIONS LAW JOURNAL 483, 521-526 (2009) (selecting appropriate institutional approach for particular policy situations) (hereinafter Adaptive Policymaking); Whitt, *supra* note 3, at 74-78.

²²⁷ Frankel, *supra* note 56, at 31.

digital fiduciary agent would hold itself out as the member of a professional guild of experts. As one example, Jerry Kang and others have suggested that “personal data guardians” play an intermediary role in the information ecosystem, complete with “a professional identity of expertise and service.”²²⁸ The core of this new profession would be to act as a client’s trustworthy confidante, zealous advocate, and wise counsellor.²²⁹ In other words, this profession could be founded on a digital trustmediary’s thick fiduciary duty of loyalty and enabling confidentiality obligation.

Treating the DTM as its own profession, complete with enforceable codes of conduct, also can qualify for special treatment under the U.S. Constitution. Godwin has argued that a statutory and/or professional framework of fiduciary obligations should offer a DTM-like entity a similar special legal status as a doctor or a physician. In turn, that entity should have legal standing to defend its clients’ Fourth Amendment rights against government seizures of personal information, and its clients’ First Amendment rights of speech and privacy.²³⁰ To the extent this analysis proves correct, a professional DTM becomes all the more attractive to would-be clients.

Balkin has argued that OSPs should not abide by higher fiduciary obligations because consumers do not expect from them such doctor-like duties. While that may well be true in this particular moment (and it is unclear that user expectations should be a deciding factor regardless), that need not be the case going forward. Social norms and values and expectations change and continue to evolve over time. Establishing a new digital agency profession, complete with a full panoply of fiduciary duties, can materially elevate those societal perspectives.

3. Inducements: Public Policy Elements

One also can imagine parallel implementation efforts across a myriad of public policy and market systems. For example, the IF duty of care/thin confidentiality model can become the ground floor obligation for certain Web-based entities, perhaps pursued as part of Federal data protection and privacy legislation in Congress. At the same time, the DTM duty of loyalty/thick confidentiality model can become a key inducement presented to entities vying for actual clients.

²²⁸ Jerry Kang, Katie Shilton, Deborah Estrin, Jeff Burke, & Mark Hansen, *Self-Surveillance Privacy*, 97 IOWA L. REV. 809, 828 (2012).

²²⁹ *Id.* at 828-29. *See also* Godwin, *supra* note 194, at 34-35 (suggests forming professional associations of personal information trustees).

²³⁰ *Id.*

Nonetheless, some OSPs, and large platform companies in particular, may well resist having DTMs enter the Web marketplace. Such resistance could extend to refusing to engage in meaningful commercial transactions or provide functional access to necessary platform inputs. In those instances, some policy assistance may be required. This could include a mix of tailored market inputs and incentives.

Previously the author has described how “functional openness,” born out of regulatory policies developed at the FCC, has facilitated new communications and information services markets by “opening up” underlying platform resources.²³¹ Via nondiscriminatory software-based interfaces, such regulated business inputs (RBIs) can include new rights to interconnection, interoperability, and data portability, under fair, reasonable, and nondiscriminatory (FRAND) conditions.²³² The ACCESS Act legislation discussed above incorporates several of these functional openness measures, albeit as part of a voluntary duty of care-type regime. Other functional, structural, behavioral, procedural, and informational safeguards, to protect both consumers and competition, may be useful as well.²³³

VII. LOOKING AHEAD: DIGITAL COMMON LAW?

Of course, the information fiduciaries debate is not occurring in a vacuum. Even as we examine the prospects of applying specified duties of care and of loyalty to certain OSP practices, there are larger conversations yet to be had. This academic-seeming discussion should not overlook the percolating market and technology activities that already are reshaping portions of the digital landscape. Nor should we neglect possible ways of stringing together disparate legal elements into a coherent whole – namely, a digital common law.

A. *A Bigger Canvas*

Many emerging forms of human/technology mediation call for greater coherence in our legal and policy thinking. For example, potential governance models include the “data trust,” a group of collective stewards of shared data, under a legal trust arrangement, forming an ecosystem with differing business models and terms.²³⁴

²³¹ Whitt, *supra* note 3, at 75.

²³² Whitt, *supra* note 3, at 73-76. *See also* U.S. Senator Mark Warner, Potential Policy Proposals for Regulation of Social Media and Technology Firms (July 30, 2018), discussed at Whitt, *supra* note 3, at 72-73.

²³³ Whitt, *supra* note 3, at 76.

²³⁴ PINSENT MASONS, QUEEN MARY UNIVERSITY, & BPE SOLICITORS, DATA TRUSTS: LEGAL

Related models include the “civic trust,”²³⁵ as well as the “civic data trust” being championed by Alphabet’s Sidewalk Labs.²³⁶ Others have been investigating as well the concept of a “data co-op.”²³⁷

In terms of novel data-centric business models, examples include the “PIMs” (personal information managers) in the United Kingdom,²³⁸ and Jaron Lanier’s “MIDs” (mediators of individual data).²³⁹ Another approach is utilizing so-called “reverse meters,” where businesses compensate users with data/attention credits.²⁴⁰

Privacy-enhancing technology implementations also abound. These include Sir Tim Berners-Lee’s SOLID PODs (personal online data stores),²⁴¹ Holochain’s distributed computing platform,²⁴² digi.me’s personal data manager,²⁴³ and countless others. Ongoing businesses should not be ignored, such as DuckDuckGo (search engines),²⁴⁴ Firefox and Brave (Web browsers),²⁴⁵ Signal (text app),²⁴⁶ Mycroft (personal voice AI agent),²⁴⁷ and more.

The heterogeneity of these approaches is staggering. And yet, the commonality is that all these disparate businesses and technologies are crafting novel forms of privacy and autonomy-enhancing mediation practices between end users and the Web. Can we consider the utility of organizing, and even coordinating, all this burgeoning activity,

AND GOVERNANCE CONSIDERATIONS (Apr. 2019) (explores real-world application of data trust concept); Jack Hardinges, What is a data trust?, ODI (July 10, 2018), <https://theodi.org/article/what-is-a-data-trust/> (Open Data Institute touts digital trust model); Delacroix & Lawrence, supra note 131, at 9-10 (same).

²³⁵ Sean McDonald & Keith Porcaro, The Civic Trust, MEDIUM (Aug. 4, 2015), <https://medium.com/@McDapper/the-civic-trust-e674f9aeab43>.

²³⁶ Sean McDonald, Toronto, Civic Data, and Trust, MEDIUM (Oct. 17, 2018), <https://medium.com/@McDapper/toronto-civic-data-and-trust-ee7ab928fb68>.

²³⁷ Katrina Ligett & Kobbi Nissim, Ground Rules and Goals for Data Co-ops (May 24, 2019) (unpublished manuscript) (on file with the author).

²³⁸ Allen Loayza, Personal information management systems: A new era for individual privacy?, IAPP (Mar. 21, 2019), <https://iapp.org/news/a/personal-information-management-systems-a-new-era-for-individual-privacy/>.

²³⁹ Jaron Lanier & E. Glen Weyl, A Blueprint for a Better Digital Society, HARVARD BUSINESS REVIEW, Sept. 26, 2018.

²⁴⁰ Richard Reisman, Reverse the Biz Model! – Undo the Faustian Bargain for Ads and Data, MEDIUM (Dec. 3, 2018). *See also* Richard Reisman and Marco Bertini, A novel architecture to monetize digital offerings, JOURNAL OF REVENUE AND PRICE MANAGEMENT, Feb. 28, 2018 (describes Fairpay reverse meter technology).

²⁴¹ SOLID, <https://solid.inrupt.com/> (last visited Oct. 3, 2019).

²⁴² HOLOCHAIN, <https://holochain.org/> (last visited Oct. 3, 2019).

²⁴³ DIGI.ME, <https://digi.me/> (last visited Oct. 3, 2019).

²⁴⁴ DUCKDUCKGO, <https://duckduckgo.com/> (last visited Oct. 3, 2019).

²⁴⁵ MOZILLA, <https://www.mozilla.org/en-US/firefox/> (last visited Oct 3, 2019); BRAVE, <https://brave.com/> (last visited Oct. 3, 2019).

²⁴⁶ SIGNAL, <https://signal.org/> (last visited Oct. 3, 2019).

²⁴⁷ MYCROFT AI, <https://mycroft.ai/> (last visited Oct. 3, 2019).

under a single legal roof? In short, can we develop what amounts to a digital common law?

B. A Bigger Framing

A parting thought is to explore, in the United States and elsewhere, the potential for a grand synthesis of public policy, legal, and regulatory elements.²⁴⁸ Beginning with the fiduciary duties of care and of loyalty, one suggestion is to come up with what would amount to a digital common law. This would be a way of defining and applying more nuanced, effective versions of traditional common law principles, for all forms of digital activities.²⁴⁹

Already one can perceive viable use cases. As one example, a shortcoming shared by both the IF and DTM models is that the fiduciary protections extend only to those entities' "first party" users or clients. It is unclear how best to protect clients from unwanted "third parties," such as data brokers, who somehow have gained non-consensual access to personal information.²⁵⁰ To help remedy that scenario, one author suggests extending the IF model to cover the sale and storage of data.²⁵¹ Balkin himself proposes another approach, which is adopting a new concept he calls "algorithmic nuisance," borrowed from tort law.²⁵²

Other uses of tort law are possible. William Prosser first established the "privacy torts" of disclosure, false light, appropriation, and intrusion – a category recently expanded on by Richards as "information torts."²⁵³

An additional possibility is to use the general theory of misappropriation to cover the exploitation of personal data in one's possession (akin to a "data insider trading" prohibition). The larger

²⁴⁸ None of the following suggestions is intended to supplant or minimize the need for more structurally-based remedies for market concentration concerns – namely, a nation's competition and antitrust laws.

²⁴⁹ This article's focus has been on scenarios involving the treatment of an individual's personal data and information. Fiduciary obligations could be considered as well for the players involved in producing and posting user-generated content (UGC) to online platforms, as well as those who subsequently interact with such content. The context would differ, of course, but the desirability of being able to treat certain individuals and collectives of users as agents in a fiduciary relationship would be similar.

²⁵⁰ Delacroix & Lawrence, *supra* note 131, at 13.

²⁵¹ Theodore Rostow, What Happens When an Acquaintance Buys Your Data: A New Privacy Harm in the Age of Data Brokers, 34 *YALE J. ON REG.* 667, 699-700 (2017).

²⁵² Three Laws of Robotics, *supra* note 31, at 1232-1241.

²⁵³ RICHARDS, *INTELLECTUAL PRIVACY*, at 156-157. Those information torts are publicity, trespass, confidences, defamation, and intentional infliction of emotional distress. *Id.* at 157-159.

point is that the depth and richness of the traditional common law could be useful in filling in various gaps in existing laws and regulations.

An intriguing path was suggested in the Supreme Court's recent *Carpenter* decision.²⁵⁴ There, in a dissenting opinion, Justice Gorsuch recommends exploring the use of the "positive" or common law of bailments – where third parties temporarily hold personal property on one's behalf – as an alternative basis for Fourth Amendment jurisprudence. In particular, he notes how bailment law could be modified to suit the digital age, a perspective this author previously has articulated for broadband access platforms.²⁵⁵ As Justice Gorsuch puts it, "[j]ust because you entrust your data – in some cases, your modern-day papers and effects – to a third party may not mean you lose all Fourth Amendment interest in its contents."²⁵⁶ He suggests that even in the absence of a formal agreement between the data owner and its possessor, the possessor may be a "constructive bailee" under an involuntary bailment.²⁵⁷

A blend of common law doctrines could be useful to consider here. As bailment has its common law roots in the protection of private property, perhaps it could be appropriated for an individual's information instantiated as digital bits "at flight or at rest" – namely, in data streams that course through telecommunications networks and reside on cloud servers. By contrast, fiduciary law runs with the person, and her confidences, and so could provide a useful analogue for information/knowledge provided in more relational contexts. Regardless, Justice Gorsuch's reach for constitutional guidance from the common law is a novel, and potentially constructive, way to map some old school rules to scenarios involving emerging digital technologies.

A clear advantage in devising a digital common law is that the groundwork has existed, in some cases, for many hundreds of years. Likely piece parts already have been proposed, or simply are waiting to be rediscovered. Without offering here a critique, a few such options could include:

- General duty of care, based on negligence standards;²⁵⁸

²⁵⁴ See *Carpenter*, 138 S. Ct. at 2206-2223.

²⁵⁵ Richard Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 *COMMLAW CONSPECTUS* 417, 494-495, 504-505 (2009) (hereinafter *Evolving Broadband Policy*).

²⁵⁶ *Carpenter*, 138 S. Ct. at 2269 (Gorsuch, J., dissenting).

²⁵⁷ *Id.* at 2270.

²⁵⁸ Wheeler, *supra* note 13, at 10-12. Wheeler's article states that it is based on the IF model, which in turn is premised on the fiduciary duty of care. *Id.* at 12 n.1. The text of Wheeler's article reveals however a tort-like general standard of care.

- Statutory duty of care for websites posting “user-generated content;”²⁵⁹
- “Duty to deal”²⁶⁰ (applicable to platform company “bottlenecks”);
- “Functional openness” requirements (wholesale market inputs); and
- Bailment obligation (data carriage and storage).²⁶¹

In the United States, these and other learnings could be adopted and applied by existing agencies, such as the FTC, the FCC, and the National Institute of Standards and Technology (NIST). While each agency has its own charter and processes for addressing the technology issues within its purview, reliance on elements of common law doctrine should not be too great a conceptual or procedural stretch. As Justice Gorsuch’s analysis also shows, judicial bodies too can look to traditional common law as a prism for resolving complex digital issues.

CONCLUSION: DIGITAL LOYALTY THROUGH THICK AND THIN

The debate over information fiduciaries highlights an important truth: the future needs the past. Common law does indeed have useful things to contribute to modern day concerns about the role of digital technologies in our society. As Brooks puts it, the application of fiduciary principles “will continue to grow and acquire salience,” as policymakers and others “borrow doctrine from fiduciary law to regulate the possession and sharing of knowledge in our increasingly information-dense world.”²⁶² The Balkin/Zittrain “information fiduciaries” proposal is a worthy contribution to the challenges of dealing with the entrusted relational power of various data-based online entities.

At its best, “[f]iduciary law is attuned to human nature.”²⁶³ An important societal conversation now is underway over whether and how online service providers and multisided online platforms should abide by fiduciary obligations as they provide their services to us. The jury of public opinion remains out on those questions.

²⁵⁹ See, e.g., HM GOVERNMENT, ONLINE HARMS WHITE PAPER 62 (Apr. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf (consultation closed); Lorna Woods & William Perrin, Internet Harms Reduction: a Proposal, CARNEGIE UK TRUST (Jan. 30, 2019), <https://www.carnegieuktrust.org.uk/blog/internet-harm-reduction-a-proposal/> (applying statutory duty of care to user content hosted by third party platforms).

²⁶⁰ Wheeler, *supra* note 13, at 14-22.

²⁶¹ Evolving Broadband Policy, *supra* note 249, at 494-495, 504-505.

²⁶² Brooks, *supra* note 78, at 241.

²⁶³ Frankel, *supra* note 56, at 78.

The perspective here is to embrace some lessons from human experience, and clear away growing doctrinal confusion, without necessarily adopting a slovenly obeisance to the past. Hopefully interested stakeholders – from businesspeople to technologists to policymakers – can incorporate useful takeaways into their future plans, while the rest of us can begin elevating our collective expectations of what it means to be a digital participant in the 21st Century.

We need not wait however to begin making real progress to protect and promote the interests of Web users. Those users deserve options that embrace standards of care, loyalty, and confidentiality, which treat them like actual clients. The digital trustmediaries model in particular can usher in a more balanced and healthy platforms dynamic, bringing together willing participants bound by mutual benefit and – yes – trust.