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PLATFORMS AS TRUSTEES: INFORMATION  
FIDUCIARIES AND THE VALUE OF ANALOGY<sup>†</sup>

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INTRODUCTION

Where public law is absent or fails, the search for a new accountability framework has led to a proliferation of the fiduciary concept beyond its traditional private law boundaries. Indeed, Professor David Pozen speaks of “fiduciary creep.”<sup>1</sup> Pushing back against one emergent fiduciary model, Professors Lina Khan and Pozen offer *A Skeptical View of Information Fiduciaries*.<sup>2</sup> Their thoughtful critique responds to Professor Jack Balkin, who has argued that the law should treat online service providers as “information fiduciaries,” based on an analogy to the fiduciary duties of professionals such as lawyers and doctors.<sup>3</sup> Balkin defines an information fiduciary as “a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship.”<sup>4</sup>

By employing the fiduciary model, Balkin shifts the focus from the content of information to the social relationships between platforms and users.<sup>5</sup> So doing, he suggests, constrains the uses of information that platforms obtain.<sup>6</sup> This approach, Balkin argues, “gives us a way out of the neo-Lochnerian model that binds First Amendment freedoms to contractual freedom.”<sup>7</sup> It also “explain[s] why certain kinds of information are matters of private concern that governments can protect through reasonable regulation.”<sup>8</sup>

Khan and Pozen’s critique is twofold. They suggest that the fiduciary analogy Balkin offers falls short and, moreover, that the overall

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<sup>†</sup> Responding to Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

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<sup>1</sup> David Pozen, *Fiduciary Creep*, BALKINIZATION (Mar. 2, 2020) [https://balkin.blogspot.com/2020/03/fiduciary-creep\\_52.html](https://balkin.blogspot.com/2020/03/fiduciary-creep_52.html) [<https://perma.cc/8FDL-UW7Z>].

<sup>2</sup> Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

<sup>3</sup> Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1225 (2016).

<sup>4</sup> *Id.* at 1209.

<sup>5</sup> *Id.* at 1205.

<sup>6</sup> *See id.* at 1186.

<sup>7</sup> *Id.* at 1205.

<sup>8</sup> *Id.* (emphasis omitted).

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approach of imposing fiduciary duties unhelpfully obfuscates deeper concerns with the platforms' business model and their dominant market position.<sup>9</sup> This Response takes up the first aspect of their critique.

What kind of fiduciaries are information fiduciaries? Distinguishing fiduciary duties enforced through tort law from contractual obligations, Balkin inquires into the origins of fiduciary duties.<sup>10</sup> He contends that fiduciary relationships arose because "doctors, lawyers, and accountants have special relationships of trust and confidence with their clients."<sup>11</sup> But doctors and lawyers are not the only fiduciaries. Indeed, not all professionals are fiduciaries, and not all fiduciaries are professionals. Excavating the basis of the analogy yields an even stronger argument that fiduciary theory supports the concept of information fiduciaries. Khan and Pozen, by contrast, posit that "there are cases where the degree of misalignment renders fiduciary loyalty implausible."<sup>12</sup> To assess the degree of alignment and whether it matters for the analogy, we first must identify which type of fiduciary relationship might be the closest parallel.

This Response reexamines the professional fiduciary analogy and outlines the implications of analogizing information fiduciaries to other traditional fiduciaries. Cautioning against overreliance on professional fiduciaries as the model, I suggest that information fiduciaries in many respects are more usefully analogized to trustees than to professionals. Importantly, as Balkin notes, the analogy depends on the underlying social relationship.<sup>13</sup> Therefore, this Response does not simply advocate shoehorning online service providers into a different existing fiduciary category. Rather, by interrogating the closeness of the fiduciary's fit with the underlying relationship between platforms and users, it concludes that the trustee-beneficiary fiduciary analogy offers productive lessons about the proper obligations to place on social media platforms. Ultimately, analogies are imperfect, and different fiduciary models seek to solve different sets of problems. To find the appropriate new set of duties to impose on platforms, we should not rely on one model alone.

## I. THE PROFESSIONAL FIDUCIARY ANALOGY

In developing the theory of information fiduciaries, Balkin explains: "[P]rofessionals like doctors and lawyers have fiduciary obligations that give them special duties with respect to personal information that they obtain in the course of their relationships with their clients. Therefore, we can give them a special name. We can call them *information fiduciaries*."<sup>14</sup> Khan and Pozen characterize the professional fiduciary

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<sup>9</sup> Khan & Pozen, *supra* note 2, at 519.

<sup>10</sup> Balkin, *supra* note 3, at 1206–07.

<sup>11</sup> *Id.* at 1207.

<sup>12</sup> Khan & Pozen, *supra* note 2, at 515.

<sup>13</sup> Balkin, *supra* note 3, at 1225.

<sup>14</sup> *Id.* at 1208.

analogy as follows: “Just as the law imposes special duties of care, confidentiality, and loyalty on doctors, lawyers, accountants, and estate managers vis-à-vis their patients and clients, so too should it impose such duties on Facebook, Google, Microsoft, Twitter, and Uber vis-à-vis their end users . . . .”<sup>15</sup> Though this analogy’s rhetorical force is undeniable, it may not reflect the underlying relationship in a sufficiently precise manner.

Professionals have fiduciary duties to their clients or patients that stem from the asymmetry of knowledge between them.<sup>16</sup> The client or patient seeks the professional’s advice precisely because of this asymmetry: the professional has knowledge that the client needs to make important decisions but lacks.<sup>17</sup> To obtain professional advice, the client or patient entrusts the professional with information. To account for the vulnerable position occupied by the client or patient in this relationship, the fiduciary duties imposed on doctors, lawyers, and other professionals are the twin duties of loyalty and care.<sup>18</sup> The decisional autonomy of the individual client or patient, with whom the ultimate decision rests, is at the core of this relationship.<sup>19</sup>

Professionals and platforms differ in many important ways. Most crucially perhaps, doctors and lawyers are bound to their professional knowledge community in the advice they give.<sup>20</sup> Though Khan and Pozen adopt this view and correctly note the “thicker relationships of care,”<sup>21</sup> they may overestimate the degree to which professional fiduciaries are able to resolve divided loyalties via informed disclosure and prioritizing the interests of clients and patients.<sup>22</sup> By contrast, the speech on platforms is not connected to a body of knowledge. There is no advice-giving relationship between platforms and their users. The information the professional fiduciary obtains is typically tailored to ensuring the individual client or patient receives the best advice in order to make important decisions.<sup>23</sup> The information entrusted to platforms, however, does not serve any such function.<sup>24</sup> Yet, whereas Khan and Pozen conclude that platforms thus do not require “the kind of expertise that has helped justify fiduciary relationships in the past,”<sup>25</sup> I conclude

<sup>15</sup> Khan & Pozen, *supra* note 2, at 500.

<sup>16</sup> Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1271 (2016).

<sup>17</sup> Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, 698 (2017).

<sup>18</sup> TAMAR FRANKEL, FIDUCIARY LAW 106 (2011).

<sup>19</sup> Haupt, *supra* note 16, at 1243.

<sup>20</sup> Khan & Pozen, *supra* note 2, at 507; Haupt, *supra* note 16, at 1241–42, 1248–51, 1253–54.

<sup>21</sup> Khan & Pozen, *supra* note 2, at 507.

<sup>22</sup> Medical professionals in particular are often intractably caught between institutional constraints and their patients’ interests. See, e.g., Claudia E. Haupt, *Professional Ethics, Personal Conscience, and Public Expectations*, 27 J. CLINICAL ETHICS 233, 236 (2016).

<sup>23</sup> Haupt, *supra* note 16, at 1271.

<sup>24</sup> Khan & Pozen, *supra* note 2, at 517–19.

<sup>25</sup> *Id.* at 517.

that they do not have the kind of expertise that justifies *professional* fiduciary relationships. But in addition to professional relationships, fiduciary duties attach in other contexts. Those contexts might be better suited to analogize information fiduciaries. Thus, by rejecting the analogy to professionals, Khan and Pozen may be giving up on fiduciaries too quickly.

## II. THE TRUSTEE-BENEFICIARY ANALOGY

Another traditional fiduciary relationship is the trustee-beneficiary relationship. The trustee assumes a fiduciary responsibility for managing the trust assets and carrying out the purposes of the trust.<sup>26</sup> A trustee has a fiduciary duty to act in the best interests of both current and future beneficiaries of the trust. The trustee must prudently manage trust assets in alignment with investment objectives. The trust assets must be used and distributed for the purposes described in the trust.<sup>27</sup> Moreover, the trustee must account for and report on trust assets to beneficiaries and file accounting reports.<sup>28</sup> To fulfill a trustee's duties, specific knowledge of estate planning and tax and trust law are necessary. As a fiduciary, the trustee must avoid conflicts of interest and any self-dealing and remain loyal to the beneficiaries.

But to what extent are trustees also *information* fiduciaries? The flow of information and, perhaps more importantly, expert knowledge is at the core of professional relationships. Whereas trustees are typically managers of property, this relationship, too, involves a considerable flow of information. First, the trust document outlines the parameters of the relationship. The trustee then owes informational duties both to the beneficiaries and — by way of tax filings, for instance — to the state. And while there is not generally the same form of individualized advice-giving based on a knowledge community's insights as in a professional relationship, the trustee's investment function does add a dimension of expertise.<sup>29</sup> In short, the social relationship underlying the trustee-beneficiary model is sufficiently information based to mirror the information-based relationship between online service providers and their users.

Just like professional advice is speech, so too can the advice and accounting requirements of a trustee be understood as speech since they involve disclosure of relevant information about the trust assets. But professional advice and accounting are different in the sense that the trustee does not provide expert knowledge akin to a professional's. At

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<sup>26</sup> FRANKEL, *supra* note 18, at 121–23.

<sup>27</sup> Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 41, 46 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

<sup>28</sup> FRANKEL, *supra* note 18, at 130.

<sup>29</sup> Sitkoff, *supra* note 27, at 48.

the same time, the accounting that is required from the trustee is hardly vulnerable to First Amendment challenges. While accounting is not knowledge based in the sense of professional advice, it must be accurate and comprehensive.<sup>30</sup> There is no First Amendment defense against inaccurate or incomprehensive accounting by the trustee.

Though the trustee-beneficiary analogy may be a closer match than the professional fiduciary analogy, it too is imperfect. The trustee takes legal ownership of property — the assets held in trust — while the beneficiaries retain equitable ownership.<sup>31</sup> But “[t]he classification of a person as a fiduciary limits the fiduciary’s use of entrusted power. If the beneficial ownership does not ‘belong’ to the fiduciary, the fiduciary can deal with the property only according to the terms of the delegation of power and for the entrustor’s benefit.”<sup>32</sup> Thus, fiduciary duties mitigate the trusting party’s vulnerable position. While the analogy is imperfect with respect to property ownership, the trustee-beneficiary relationship can be viewed in different ways that make the analogy useful to better understand the platform-user relationship.

In contrast to the professional-client or doctor-patient relationship, the trustee-beneficiary relationship arguably places less emphasis on individuals and their sensitive information. The fiduciary duties protect from more generalized harm to a group of individuals, the beneficiaries, than an individualized harm to one specific client or patient. In this sense, the relationship is not as much about placing trust in one particular person as it is about the trustworthiness of the type of relationship circumscribed by the institution of the trust. This situation mirrors the concerns about platform misuse of information that are less about sensitive information of an individual (though that certainly is a concern, too) and more about the systematic manipulation of users.<sup>33</sup> Replacing the professional analogy with the trustee-beneficiary analogy thus shifts the focus from protecting the trust placed in an individual for the benefit of another individual to ensuring the trustworthiness of an industry.

It is possible that Balkin did in fact include the trustee model in his theory of information fiduciaries from the outset. He notes: “Fiduciaries often perform professional services or else manage money or property for their principals, beneficiaries, or clients.”<sup>34</sup> The reference to “manag[ing] money or property” for “beneficiaries” suggests such a broad understanding of information fiduciaries. But this broader view

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<sup>30</sup> FRANKEL, *supra* note 18, at 130 (“Accounting must be systematic, periodic, and comprehensive, including accounting at the termination of the relationship.”).

<sup>31</sup> Sitkoff, *supra* note 27, at 42.

<sup>32</sup> FRANKEL, *supra* note 18, at 244 n.5.

<sup>33</sup> See Balkin, *supra* note 3, at 1233.

<sup>34</sup> *Id.* at 1207.

may have been lost in the debate.<sup>35</sup> A misplaced emphasis that creates a narrow focus on professional fiduciaries, for the reasons discussed throughout this Response, would undermine the basis of Balkin's proposal. I suggest that the distinction among these fiduciaries does matter with respect to the fit of the analogy.

### III. THE VALUE OF FIDUCIARY ANALOGIES

Analogizing information fiduciaries to trustees rather than to professionals has a number of consequences that respond to both Balkin's concerns about platforms and the doubts Khan and Pozen raise about the professional fiduciary analogy. Importantly, the advantages that Balkin identifies with respect to the First Amendment<sup>36</sup> still hold if information fiduciaries are more like trustees than like professionals.

There may be further advantages to the trustee analogy that render it an affirmatively more productive model. For one, the trustee may not fully delegate fiduciary services to others.<sup>37</sup> Moreover, the trustee-beneficiary analogy can potentially deal with unidentified beneficiaries: "[I]n contrast to shareholders, not all beneficiaries can be identified, because beneficiaries can include unborn children, who are unable to give their consent directly."<sup>38</sup> The analogy is useful to apply, for example, to Facebook's use of data belonging to individuals who are not themselves users of Facebook. If the terms of the trust do not provide otherwise, the trustee has to be impartial among beneficiaries.<sup>39</sup> And there are parallels to be explored between the terms of the trust and the terms of service. In both, the parameters of the interaction between entrusting and trusted parties can be delineated. But regardless of the terms, "a trustee must always act in good faith and in the interests of the beneficiaries."<sup>40</sup> Finally, the trustee's accounting duties vis-à-vis the state might introduce an element of transparency that is typically absent in the professional context.

Assuming that the trustee-beneficiary is the closest fiduciary match to information fiduciaries, it is important to remember the analogy's premise: it is based on the nature of the social relationship. This means that if the social relationship is that of professional and client or doctor

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<sup>35</sup> Professors Balkin and Jonathan Zittrain themselves have occasionally emphasized professional fiduciaries. See, e.g., 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> [<https://perma.cc/3F9C-RNDS>].

<sup>36</sup> See Balkin, *supra* note 3, at 1210 (noting that a fiduciary's speech may be regulated without violating the First Amendment).

<sup>37</sup> FRANKEL, *supra* note 18, at 130–31.

<sup>38</sup> *Id.* at 151.

<sup>39</sup> Sitkoff, *supra* note 27, at 52.

<sup>40</sup> *Id.* at 41.

and patient, the traditional professional set of fiduciary duties applies. As Balkin explains, “[n]ot all information fiduciaries are the same . . . ; the duties they take on depend on the nature of their business and the reasonable expectations of the public.”<sup>41</sup> So when a platform performs the services of ordinary professionals, the traditional fiduciary duties of professionals apply. Consequently, I have suggested elsewhere that these duties must be maintained irrespective of the advice giver, such as when patient medical advice is given by algorithms rather than by doctors.<sup>42</sup> If the platform is a professional service platform, moreover, professional duties apply.<sup>43</sup> Similarly, a professional relationship may exist on other platforms — if, for example, a therapy app entered into a relationship with Facebook to provide mental health services for platform users.<sup>44</sup> In that case, the traditional professional fiduciary duties applicable to therapists should apply to that relationship regardless of the platform. This point might be obscured by analogizing the fiduciary duties of platforms to those of professionals.<sup>45</sup>

A critic might argue that the trustee analogy necessarily means accepting the idea of data as property. But it does not require any particular theory of data as property to see how the trustee-beneficiary analogy can instead correspond to the data collector’s control over the user’s information, which could include metadata, the time spent on a platform, or the date and time of logging on.<sup>46</sup> The trustee’s property-management function becomes the platform’s information-management function. Shifting from property to control, or governance, reveals a potentially even more compelling advantage of the trustee model. The platform’s power over users, then, is no longer akin to the trustee’s management of property but to dominance over those governed by the trustee, perhaps best exemplified by the trustee’s decisions over competing beneficiary interests. The relationship between platforms and users occurs in a new environment that demands fiduciary duties similar to existing fiduciary models. A focus on the governance aspect<sup>47</sup> rather than the property aspect of the trustee-beneficiary relationship makes this analogy useful.

<sup>41</sup> Balkin, *supra* note 3, at 1186.

<sup>42</sup> See Claudia E. Haupt, *Artificial Professional Advice*, 18 YALE J. HEALTH POL’Y L. & ETHICS, 21 YALE J.L. & TECH. 55, 59–60 (2019) (joint symposium issue).

<sup>43</sup> See Claudia E. Haupt, *Governing A.I.’s Professional Advice*, 64 MCGILL L.J. (forthcoming) (manuscript at 11), <https://ssrn.com/abstract=3523328> [<https://perma.cc/E67Q-TJ77>].

<sup>44</sup> See Christina Farr, *Talkspace CEO Says He’s Pulling Out of Six-Figure Deal with Facebook, Won’t Support a Platform that Incites “Racism, Violence and Lies,”* CNBC (June 1, 2020, 2:57 PM), <https://www.cnn.com/2020/06/01/talkspace-pulls-out-of-deal-with-facebook-over-violent-trump-posts.html> [<https://perma.cc/ZF2Y-8ECE>].

<sup>45</sup> Haupt, *supra* note 43, at 11.

<sup>46</sup> Arguing that the trustee-beneficiary analogy is the closest match also does not require taking a position on data trusts.

<sup>47</sup> See, e.g., Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1602 (2018).

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The professional analogy has some useful features; the trustee analogy, as I have argued, potentially has more. Both also have features that do not accurately reflect the platform-user relationship, such as the professional's advice-giving function and connection to a knowledge community or the trustee's holding of property. This is due to the fact that they were created for different social interactions. Here, the analogies find their limits. But these mismatched features should be disregarded in fashioning a new regulatory framework. The value of the analogy is to create, from existing legal components, a framework that is responsive to the particular concerns of this new kind of social interaction between platforms and users.

#### CONCLUSION

Khan and Pozen argue that “[b]y glossing over these points of disanalogy with doctors and lawyers, Balkin’s proposal risks obscuring the contingent and constructed character of the power imbalances that exist between ordinary individuals and the major online providers.”<sup>48</sup> The power disparities between providers and users, they assert, “stem both from the business model these firms employ and from the market dominance they enjoy.”<sup>49</sup> With respect to Khan and Pozen’s critique, this Response does not answer whether we should impose fiduciary duties in the first place. But I suggest that Khan and Pozen move perhaps too quickly from dismissing the professional fiduciaries analogy to abandoning the fiduciary model altogether. Although the social relationship between platforms and users is distinctive and existing fiduciary models do not provide a perfect fit, considering other fiduciary relationships may provide a firmer basis to the information-fiduciaries model. The trustee-beneficiary relationship provides a closer analogy that better reflects the interests we want in information fiduciaries.

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<sup>48</sup> Khan & Pozen, *supra* note 2, at 519.

<sup>49</sup> *Id.*