The Relationships Between Speech and Conduct

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INTRODUCTION

The First Amendment right to free speech requires courts to have a working gauge for what "speech" is. Identifying speech is, of course, quite easy in easy cases (political pamphlets and spoken conversations, for example), but at the boundaries, separating protected speech from conduct and other regulable things is difficult to do in a principled way.

Free speech theorists have identified a few well-known First Amendment borderlands — that is, areas where distinguishing between regulations of speech and conduct are sure to be contentious. "Expressive conduct" is one such area. When the government bans the burning of a draft card, the constitutionality of the ban will depend on whether the ban's purpose and effects target the expressive consequences (the anti-war message) or the non-expressive consequences (the fire risks, the smoke, the evasion of draft responsibilities, and the spoliation of government property).[1] Slippage

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[1] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea . . . . This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the

between the expressive and non-expressive aspects is likely to occur, so expressive conduct is fertile ground for hard cases.[2]

Transactional speech is another borderland in free speech law.[3] If a person verbally offers to pay an acquaintance to murder her spouse, or if a shopkeeper posts a sign that reads "We Do Not Serve Gays" in violation of a public accommodations statute, the speech can be used as evidence of an attempt to enter an illegal transaction (in the former[4]) or an attempt to avoid an obligatory transaction (in the latter[5]). Scholars disagree about whether the enforcement of laws in these cases constitutes the regulation of speech, but they do not disagree about the difficulty of the analysis.[6] Cases for which the only

nonspeech element can justify incidental limitations on First Amendment freedoms."). Specifically, government regulation of "noncommunicative conduct" is subject to intermediate scrutiny, while regulation of expression is subject to "a more demanding standard." Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) (citing Texas v. Johnson, 491 U.S. 397, 411-12 (1989)) (internal quotation marks omitted); *see also* Texas v. Johnson, 491 U.S. 397, 411-12 (1989) (burning an American flag as a political protest is protected "expressive conduct").

[2] *See, e.g.*, Hightower v. City & Cnty. of San Francisco, 77 F. Supp. 3d 867, 879 (N.D. Cal. 2014) (upholding in part an ordinance banning public nudity because being naked in public, even to protest the ordinance, was not sufficiently expressive), *appeal filed sub nom.*, Taub v. City & Cnty. of San Francisco.

[3] Jack Balkin calls this "contractual speech." Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 UC DAVIS L. REV. 1183, 1213 (2016) [hereinafter *Information Fiduciaries*].

[4] *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); Rice v. Paladin Enters., Inc., 128 F.3d 233, 249-50 (4th Cir. 1997) (recognizing publisher could be held liable for aiding and abetting a contract killing for which it provided an instruction manual); Norwood v. Soldier of Fortune Magazine, Inc., 651 F. Supp. 1397, 1399-1400, 1403 (W.D. Ark. 1987) (refusing to immunize murder-for-hire advertiser on summary judgment motion). "[*E*]*very* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word." *Rice*, 128 F.3d at 244. Note that this hypothetical differs from incitement and "crime-advocating speech." *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1097-1103, 1107 (2005) (noting "crime-facilitating speech" may be more dangerous than "crime-advocating speech").

[5] *See, e.g.*, Elane Photography, LLC v. Willock, No. CV-2008-06632, 2009 WL 8747805 (D.N.M. Dec. 11, 2009) (holding a photographer liable under public accommodations laws for refusing to photograph a same-sex wedding); *cf.* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting a law firm's argument that its discriminatory denial of associate's consideration for partnership was protected by First Amendment freedom of expression or association).

[6] *Cf.* Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1973-74 (2015) (noting scholarly

evidence used against an offender is speech flirt with the constitutional boundary and raise hard problems.

Although there are a few other broad areas where the interface between speech and conduct are contested and tricky (e.g., intellectual property[7] and indispensable tools of newsgathering[8]), they are not numerous. The ones that do exist share a characteristic: in all of them, we know that their regulation may further some legitimate, non-speech-related goal, or that it may further an illegitimate desire to censor, and that it will be difficult to tell which is happening.

In his new article, *Information Fiduciaries*,[9] Jack Balkin has quietly added another speech-conduct borderland to the list. I do not mean to suggest that the article is demure; like all of Balkin's work, this article has a lot of verve. It convincingly argues that existing or prospective laws imposing confidentiality and other speech-related restrictions on Internet firms should be able to withstand First Amendment scrutiny (if they are designed well enough) because they protect consumers in fiduciary relationships. His article makes an important contribution to the growing literature on professional speech,[10] and it offers privacy scholars a credible path through the constitutional landscape. But the article also makes a less obvious contribution to debate on the boundaries of free speech. It argues that some regulations of speech — perhaps quite a lot of it, even — is best understood as the government management of relationships between the speakers and key interested

disagreement about the scope of the commercial speech doctrine). *Compare* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783-84, 1805-07 (2004) (arguing that these and many other examples of regulated speech are not generally thought to be covered by the First Amendment), *with* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 68-69 (2014) (contesting this descriptive claim), *and* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2195-97 (2015) (presenting evidence that until the New Deal, the First Amendment offered "broad but shallow" coverage to all direct regulations of speech).

[7] *See, e.g.*, Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008) (personal data); Rothman, *supra* note 6 (commercial speech); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000) (intellectual property).

[8] *See, e.g.*, Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1052-54 (2015) (describing the scholarly debates on this point); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1128-29 (1999) (arguing that the right to gather news is constitutionally protected).

[9] Balkin, *Information Fiduciaries*, *supra* note 3, at 1186.

[10] *See, e.g.*, ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 43-53 (2012); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016).

parties.[11] And, like other boundary zones of free speech, challenges to these types of regulations will require analysts and courts to take great care before concluding that they absolutely are, or absolutely are not, burdens on protected speech.

In this essay, I will begin to roll out the implications of Balkin's relational approach to free speech. Part I will show that the management of relationships can explain puzzles in free speech case law that go well beyond fiduciaries, and it may provide helpful guidance in future free speech controversies. Part II argues that even when the relationship approach to free speech is embraced, its implications are somewhat limited in the context of Internet services. As Balkin's article itself concedes in its later parts, the theory probably cannot justify the numerous and strong confidentiality laws that privacy scholars (and even Balkin himself) seem to want.[12] For this reason, I expect *Information Fiduciaries* to have a more profound influence on free speech law in general than it does on privacy law specifically.

I. RELATIONSHIPS AS A BORDERLAND IN FREE SPEECH THEORY

I have characterized Balkin's relational theory of speech as one that identifies the boundary between speech and conduct. This is not exactly how Balkin characterizes it. For specific application to information fiduciaries, he argues that relationships help courts determine the strength of First Amendment protections even when they are clearly working under the general umbrella of speech.[13] Balkin argues that relationships help sort public discourse from nonpublic speech.[14] Public speech receives full protection, and its restrictions trigger strict scrutiny review. Nonpublic speech, by contrast, sometimes receives reduced protection[15] (although courts are inconsistent on this score[16]). Balkin uses relationships to make sense

[11] Balkin, *Information Fiduciaries*, *supra* note 3, at 1209-20.

[12] *Id.* at 1225-26.

[13] *Id.* at 1214-15.

[14] *Id.* at 1215-17.

[15] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985); *see also* Snyder v. Phelps, 562 U.S. 443, 451-52 (2011) (discussing the fine line between public and private speech).

[16] *See, e.g.*, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226-27 (2015) (declaring that all laws regulating speech based on content, subject matter, or message must undergo strict scrutiny review); *Snyder*, 562 U.S. at 452 (acknowledging that the line between speech of public and private concern is "not well defined" (citation omitted) (internal quotation marks omitted)); Clay Calvert, *Public Concern and*

of this distinction. "[W]hat falls within public discourse and what falls outside of it does not depend on the content of the speech. Rather, it depends on a characterization of social relationships."[17] When the law seeks to protect one participant in a relationship out of concern for relative inexperience or vulnerability, or to encourage relationships of trust, the government arguably has more leeway even if it does so using speech restrictions.[18] Good faith efforts along these lines will trigger First Amendment scrutiny but should apply it with less force.

All of this is put into service for Balkin's definition and justification of information fiduciaries. By highlighting the importance of relationship management, Balkin finds a coherent way to justify burdens on speech that would clearly violate the First Amendment outside the context of special relationships.[19] But the relational approach has much broader application. It has relevance not only for professional speech and the special relationships recognized in tort law, but also in a range of non-special relationships. And it has relevance not only for laws that burden speech of *some* sort (either public or purely private), but also for laws that burden something teetering on the edge of conduct. Let me illustrate with two examples.

First, consider what happens when Abe catches Bob in an act of infidelity. Bob has a very strong preference for Abe not to inform Bob's spouse, and Abe knows it. If Bob approaches Abe and offers $10,000 not to disclose his secret, Abe can accept the deal and enter into a Non-Disclosure Agreement. However, if Abe approaches Bob and offers the same deal with the same terms, Abe can be prosecuted for blackmail, and the First Amendment apparently does nothing to intervene.[20] This seeming paradox should be explained (to the extent it is worth explaining at all) using the relational theory.[21] The law

Outrageous Speech: Testing the Inconstant Boundaries of IIED and the First Amendment Three Years After Snyder v. Phelps, 17 U. PA. J. CONST. L. 437, 474 (2014) (finding that with one exception, all courts reviewing IIED decisions since *Snyder* have concluded that the media defendants were engaged in speech of public concern even when the content was only loosely connected to public debate).

[17] Balkin, *Information Fiduciaries*, *supra* note 3, at 1214.

[18] *Id.* at 1214-17 ("The law characterizes the social function of speech in these relationships as importantly different from the expression and circulation of opinions in the public sphere.").

[19] *Cf.* Balkin, *Information Fiduciaries*, *supra* note 3, at 1217 ("[T]he law does not treat speech in professional or other fiduciary relationships as part of public discourse; instead, it treats speech within these relationships as part of ordinary social and economic activity that is subject to reasonable regulation.").

[20] *See generally* Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1663-64 (1993).

[21] *See id.* at 1689-91 (arguing that the best way to explain the blackmail paradox is

appears to regard Bob as the vulnerable party, and his weak status makes very similar speech have vastly different meaning when it comes from him than when it comes from Abe. When Abe approaches Bob with the offer, Bob is likely to understand this as just the first in a series of demands. Coming from Abe, the speech is an inherent threat of repeated extortions. There are problems, of course, with even this account of black mail. First, it is not clear why the law could not solve the paradox by permitting Abe's *first* offer of non-disclosure and criminally penalizing him for extortion only if he returns for more. Also, the most vulnerable party may be Bob's unsuspecting spouse, not Bob. Nevertheless, the peculiar power imbalance within social relationships gives the best account for why courts treat the law of blackmail as a constitutional regulation of *conduct* rather than a questionable regulation of speech.

For a second example of the power of relationships, consider what happens when Abe tells Bob "this plant is edible!" under a mistaken belief that the plant is safe and non-toxic. Bob subsequently eats the plant and suffers injuries. Can Abe be penalized for his encouragement? The answer is better explained by relationships than by anything else. If Abe and Bob were standing in Abe's backyard when Abe made the statement, then the law may impose something like a negligence standard on Abe's encouragement even though it consisted of speech alone.[22] Abe's special access to his own land may make his statements more credible and more likely to induce Bob's experiment. But if Abe and Bob are hiking in public lands, a negligence standard is likely to run afoul of the First Amendment.[23] Abe may not have any more information than Bob about the native plant life, so Bob has little reason to place great faith on the opinion of a peer. Bob should have known he was assuming some risk when he

by recognizing that society considers blackmailers to be exploiting an "oppressive relationship").

[22] *See* RESTATEMENT (SECOND) OF TORTS § 311 cmt. b (1965) (Negligent misrepresentation involving risk of physical harm "finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends"); *see, e.g.*, Holt v. Kolker, 57 A.2d 287 (Md. 1948) (upholding tenant's judgment against her landlord for negligent misrepresentation about the safety of a porch, but not the plumber who performed work on it whose statements were "casual expressions of opinion").

[23] *Cf.* Brandt v. Weather Channel, Inc., 42 F. Supp. 2d 1344, 1346 (S.D. Fla. 1999) (holding a weather channel not liable for failing to report bad weather, allegedly causing a fisherman's death), *aff'd*, 204 F.3d 1123 (11th Cir. 1999) (unpublished table decision). *See generally* Cardozo v. True, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977) (holding a retailer not liable for a cookbook that failed to describe a poisonous ingredient, in part on First Amendment principles).

decided to adopt Abe's assessment as his own. Case law has not developed a land-owner-visitor exception to the First Amendment, but it does not have to. This is just one instantiation of the legal management of relationships.

One may be tempted to think that the outcome here has more to do with Abe's relationship to the *land* than to Abe's relationship to Bob, but this is not so. Suppose that Abe owned the land on which the toxic plant grew, but this time, rather than hearing Abe say that "this plant is edible!" in person, Bob saw Abe make the statement on a broadcast television program on the topic of native foods. If Bob later ate the plant while visiting Abe's land, even as an invited guest, Bob will not be able to sue Abe for his earlier statement made on television.[24] This is because Abe's relationship to Bob when he made the statement was importantly different. Abe was engaged in public discourse — in "democratic culture," to use a Balkinism[25] — and so the First Amendment requires Bob and other listeners to understand that. Public discourse, when it can be identified, always expects listeners to understand that every statement has an implied "I think that . . . ." at the beginning of every sentence, and to be on notice that they are fending for themselves when they make their own choices. The same implied "I think that . . . ." attaches to statements made by doctors, lawyers, and other professionals when they are speaking outside the scope of formal engagement with a client.[26]

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[24] *See, e.g.*, Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1037 (9th Cir. 1991) (holding that the First Amendment immunized publishers of a book about mushrooms with incorrect information about a deadly species of mushroom (footnotes omitted)); Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580, 583 (Ga. 1981) (immunizing television program that suggested child viewers try a science experiment); Smith v. Linn, 563 A.2d 123 (Pa. Super. Ct. 1989) (immunizing the publishers of a diet book with dangerous recommendations).

[25] Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676027; Balkin, *Information Fiduciaries*, *supra* note 3, at 1212.

[26] *See, e.g.*, Gorran v. Atkins Nutritionals, Inc., 464 F. Supp. 2d 315, 327-28 (S.D.N.Y. 2006) (immunizing Dr. Atkins' estate and company from potentially dangerous diet recommendations); *see also* Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2856-59 (2014) (discussing *Hunter v. Virginia State Bar, ex rel. Third Dist. Comm.*, 744 S.E.2d 611 (Va. 2013), and arguing that the First Amendment should protect certain legal information to expand public access to such information). What "formal engagement" means is a notoriously difficult problem in professional responsibilities, and speech is often used as evidence of the start and end of professional relationships. But whatever it means, speech outside "formal engagement" is treated as peer speech even when the speaker does have more knowledge relative to the listener. *See, e.g.*, Nolan v. Foreman, 665 F.2d 738, 739 n.3 (5th Cir. 1982) (Under Texas law, "[t]he

Balkin's relational approach to free speech is a powerful descriptive tool. It does a pretty good job guiding an observer through the odd turns First Amendment law makes based on subtle differences of fact. However, Balkin does not and cannot say that the government has unconstrained freedom to restrict speech in the interest of protecting relationships.[27] Like the other free speech borderlands, the relational theory poses an ever-present risk that the government could exploit its constitutional leeway. The state could justify nearly every restriction of speech by reference to the management of some relationship or another.

One telltale sign of exploitation are attempts by the state to define a protected relationship based on the content of speech or expressive activities rather than the conduct of the two parties.[28] After all, the First Amendment would have to intervene if the state tried to restrict political speech by defining a "political fiduciary" as any person who holds himself out to have special skill and knowledge in public policy and offers to serve the best interests of his audience or constituency. Likewise, the state could not protect relationships based on private, one-on-one conversations in which one of the participants urges the other to join a labor union or to avoid contributing to a war.[29] When the state has a legitimate, non-speech-related reason to manage a relationship, it will typically manage many non-speech aspects of the relationship as well. Doctors give verbal advice that may be subject to regulation, but they also provide direct physical interventions — procedures and drugs. The law is just as concerned (if not more concerned) about these aspects of the doctor-patient relationship as it is about the potentially dangerous speech of doctors.[30] Likewise,

fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention"); *In re* Bernstein, 707 A.2d 371, 375 (D.C. 1998) ("Whether an attorney-client relationship [exists] is to be determined by the fact finder based on the circumstances of each case."). *See generally* Baron v. City of L.A., 469 P.2d 353, 357 (Cal. 1970) (en banc) (defining the practice of law to include "legal advice").

[27] *See* Balkin, *Information Fiduciaries*, *supra* note 3, at 1228-29.

[28] *See* Balkin, *Information Fiduciaries*, *supra* note 3, at 1205 ("My central point is that certain kinds of information constitute matters of private concern not because of their *content*, but because of the *social relationships* that produce them."). *See generally* Snyder v. Phelps, 562 U.S. 443, 461 (2011) (Breyer, J., concurring) (arguing that the ends of a hypothetical assault — garnering attention for a public issue — do not justify the means).

[29] *Cf.* City of Ladue v. Gilleo, 512 U.S. 43, 58-59 (1994) (invalidating an ordinance that prevented a homeowner from displaying an anti-Persian Gulf War sign on her lawn); Thomas v. Collins, 323 U.S. 516, 532 (1945) (noting that labor unions enjoy the First Amendment freedoms of speech and association).

[30] *See* RESTATEMENT (SECOND) OF TORTS § 874 reporter's note (1979) (noting that a

landowners have many legal obligations to their guests that have nothing to do with speech. The state has shown consistent interest in encouraging these relationships and imposing duties on at least one of the participants. Legal impositions on the speech of co-workers, pamphleteers, friends, and conversationalists would lack this sort of evidence that the state has a reason to manage the relationships for reasons that are independent from speech.

Scholars and, eventually, judges will have to develop other sub-theories about the types of relationships that warrant preservation through speech-restricting law, and the types of speech burdens that are appropriate for those purposes.[31] Balkin has begun to do some of this work in the context of fiduciary relationships, and a close reading of the second act of *Information Fiduciaries* reveals that the concept of professional relationships offers only a partial remedy for privacy advocates' First Amendment troubles.

The next Part shows that Balkin's proposal for the regulation of information fiduciaries' speech by its own terms would not apply to a large swath of data-collectors. And any expansion of Balkin's proposal to accomplish more privacy goals could cause unsettling distortions of free speech protection unless the expansions are justified on some other grounds.

II. THE LIMITS OF RELATIONSHIPS AS A BASIS FOR PRIVACY LAW

A careless reader of *Information Fiduciaries* could come away thinking that the government can impose many more duties of confidentiality than it currently does without significant First Amendment interference. Parts of the Article encourage this reading by presenting the fiduciary relationship as a solution to generic privacy problems[32] and by suggesting that any service provider who handles personal information might be characterized as a fiduciary:

doctor's disclosure of a patient's confidential information is also a breach of fiduciary duty, just as is applying an incorrect medical procedure). *See generally* Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163 (2000) (describing shifting medical malpractice standards).

[31] *See, e.g.*, Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 807 (1983) (attributing the increase in the number of fiduciary relationships to the modern society's social structure).

[32] *E.g.*, Balkin, *Information Fiduciaries*, *supra* note 3, at 1186 (proposing "to show how protections of personal privacy in the digital age can co-exist with rights to collect, analyze, and distribute information that are protected under the First Amendment").

> An information fiduciary is [someone] 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. People and organizations that have fiduciary duties arising from the use and exchange of information are information fiduciaries whether or not they also do other things on the client's behalf . . . .[33]

In Part VI, Balkin explicitly states that fiduciary duties can arise any time a consumer reveals sensitive information to a service-provider. "[B]ecause we trust them with sensitive information, certain types of online service providers take on fiduciary responsibilities."[34] Earlier work by Neil Richards and Daniel Solove used a similar if-trust-then-fiduciary sort of reasoning to argue that existing duties of confidentiality can and should be expanded.[35] Balkin therefore has some optimism that fiduciary duties might justify speech restrictions not only on core communications service providers (ISPs and email providers) but Netflix, Kayak, and OkCupid as well.[36]

But any attempt to harness the power of fiduciary relationships in order to achieve broad privacy policy runs into an unavoidable problem: it violates the cardinal rule of content-neutrality. Balkin's "central point is that certain kinds of information constitute matters of private concern not because of their *content*, but because of the *social relationships* that produce them."[37] If the regulated social relationship is defined by assessing the sensitivity of the information that is exchanged, then the social relationship merely serves as a stalking horse for speech.

Given this problem, it is not surprising that Balkin's concrete formulation of an information fiduciary is rather narrow — too narrow, it seems to me — to contain Netflix, Amazon, and most other web services. According to Balkin, a company will not become an information fiduciary unless it takes active steps to induce trust; specifically, to

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[33] *Id.* at 1209 (footnote omitted).

[34] *Id.* at 1221; *see also id.* at 1222 ("Online service providers have lots of information about us . . . .").

[35] *See* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 174, 181-82 (2007) (describing as somewhat superior the value of the English trust-based conception of confidentiality); *see also* Richards, *supra* note 7, at 421-25 (2008) ("Without a meaningful expectation of confidentiality . . . we would have fewer ideas, and those that we did have might be unlikely to be shared.").

[36] Balkin, *Information Fiduciaries*, *supra* note 3, at 1221-22.

[37] *Id.* at 1205.

reassure consumers that it will not disclose or misuse personal information.[38] And even then, a company will still only be a fiduciary if these assurances of trust are consistent with social norms; that is, with the actual and reasonable beliefs of consumers.[39] Most popular services collecting potentially sensitive data fall outside this definition. Netflix and Amazon attained their market power by studying and repurposing user data.[40] The disclosure of personal information is the *raison d'etre* for Facebook and OkCupid, and the latter makes transparent, unapologetic use of personal data to generate research reports. Even email providers and search engines could make non-spurious arguments that they fall outside this definition (though the case for fiduciary treatment of these seems far stronger since, like doctors and lawyers, they perform critical services for which candid, trusting relationships may have positive externalities on the rest of society).

Balkin's *Information Fiduciaries* therefore comes only part of the way to meeting demand for privacy regulations. This is a feature, not a bug. By hinging on active inducements, carried out by the putative fiduciary, Balkin's definition of an information fiduciary can avoid peeking into the content of speech to define a special relationship.[41] The fiduciary responsibilities are taken on by the firm's conduct in advance — before any sensitive (or non-sensitive) information has been collected. Thus, Balkin's definition is more likely to withstand a free speech challenge than the broader if-trust-then-fiduciary conception. Since consonance with the First Amendment was a primary objective of this project, Balkin was wise to adopt constraints on the definition of information fiduciary.

Readers who would prefer broad duties of confidentiality (and other forms of loyalty) to accomplish privacy goals may see the First Amendment's strong preference for content-neutral speech regulations as a pointless exercise in formalism, but this is not so. If the state could identify and regulate a fiduciary relationship any time one

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[38] *Id.* at 1223-24.

[39] *Id.* Social norms may be informed by how critical the services are to ordinary life; Balkin emphasizes the *need* for services in his justification for fiduciary duties. *See id.* at 1222.

[40] *See, e.g.*, Roberto Baldwin, *Netflix Gambles on Big Data to Become the HBO of Streaming*, WIRED (Nov. 29, 2012, 6:30 AM), http://www.wired.com/2012/11/netflix-data-gamble/ (noting that Netflix "is counting on data mining and algorithms to provide an edge"); Marcus Wohlsen, *Amazon's Next Big Business Is Selling You*, WIRED (Oct. 16, 2012, 11:00 AM), http://www.wired.com/2012/10/amazon-next-advertising-giant/.

[41] Of course these "active inducements" may consist of speech alone. This is just the sort of problem that requires more work at the boundary of speech and conduct.

person trusted another person or firm, the results would trouble even the most hardcore privacy advocate.

First, the scope of a fiduciary could be massive. Spouses, friends, and coworkers trust each other, and often have something other than perfectly balanced power between them. Journalists sometimes inspire trust in their sources, yet the public often benefits when that trust is betrayed. Any time anybody with special training or education is talking to a layperson, the listener is "potentially uninformed, vulnerable, and dependent."[42] And yet, imposing duties of care, loyalty, and confidentiality in speech directed to or about the potentially vulnerable party would reduce candor, impoverish debate, and surely harm the intended beneficiaries in the long run. These concerns are not academic. Any lawyer who has been approached by desperate friends or family experiencing out-of-state legal difficulties (which is to say, any lawyer) can attest to the reluctance and anxiety caused by prohibitions on the "unauthorized practice of law."

Moreover, the if-trust-then-fiduciary approach to special relationships will have the effect of increasing trust and of coercing participants to align their interests. This is all to the good when the government has reasons, independent of preexisting trust, to force parties to merge their interests and rely on one another. But such relationships ought to be exceptional against a backdrop of healthy skepticism, arms-length negotiation, and social norms. The law may better serve consumers by encouraging skepticism rather than trust in garden-variety Internet firms.

Finally, the government has a range of options for inducing relationships of trust *without* direct regulations of speech. The state could create a certification program in which companies opt into various promises (backed by regulatory enforcement) in exchange for marketing themselves as "certified."[43] Or the state could use its own speech to endorse trust-worthy firms or to cast doubt on privacy-invasive ones.[44] Each of these would influence the choices that companies make about their personal data policies without using legal prohibitions.

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[42] *See* Balkin, *Information Fiduciaries*, *supra* note 3, at 1215.

[43] *See, e.g.*, U.S. DEP'T OF AGRIC., WHAT IS ORGANIC CERTIFICATION? (2012), *available at* http://www.ams.usda.gov/sites/default/files/media/What%20is%20Organic%20Certification.pdf (providing information about the Department's organic seal program).

[44] For an example of using government speech to cast doubt on organizations, see *Charity Scams*, FED. TRADE COMMISSION, https://www.consumer.ftc.gov/features/feature-0011-charity-scams (last visited Jan. 30, 2016) (providing a means to search for charities in Better Business Bureau and IRS databases).

For these reasons, Balkin's assessment of cloud service providers, email providers, and Internet service providers as information fiduciaries is quite compelling based on the critical services they provide. But the application of fiduciary duties to online retailers is not. To be clear, there are reasons quite apart from special relationships to protect privacy, and these reasons can potentially withstand First Amendment scrutiny.[45] But privacy laws can rely on the concept of relationships only to the extent there is credible evidence the relationships truly are "special."

CONCLUSION

Jack Balkin's *Information Fiduciaries* has opened a vast, uncharted terrain of free speech theory by highlighting the importance of relationships. Regulations of speech that have the purpose and effect of managing important social relationships may deserve a special place, with more regulatory latitude, even as free speech rights expand. However, as the application to information fiduciaries demonstrates, free speech scholars have a lot of work ahead before we know with any precision how much latitude is consistent with First Amendment objectives.

[45] *See, e.g.*, Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 209-10, 231-32 (2012) (arguing that an expansion of the intrusion tort could protect data privacy without running afoul of the First Amendment); Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 802-03 (2006) (arguing that bolstering the right to receive information protects privacy interests); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423-36 (2000) (suggesting that adopting a theory of individual autonomy offers a strong constitutional basis for protecting privacy).