Biography

David Pozen is a Professor of Law at Columbia Law School. He teaches and writes about constitutional law, information law, and nonprofit law, among other topics. For the 2017-2018 academic year, Pozen was the inaugural visiting scholar at the Knight First Amendment Institute at Columbia University. From 2010 to 2012, Pozen served as special advisor to Harold Hongju Koh at the Department of State. Previously, Pozen was a law clerk for Justice John Paul Stevens on the U.S. Supreme Court and for Judge Merrick B. Garland on the U.S. Court of Appeals for the District of Columbia Circuit, and a special assistant to Senator Edward M. Kennedy on the Senate Judiciary Committee. Pozen’s scholarship has been discussed in the New Yorker, New York Times, Washington Post, Harper’s, Politico, Salon, Time, American Scholar, and numerous other publications.

Abstract

The concept of “information fiduciaries” has surged to the forefront of debates on social media regulation. Developed by Professor Jack Balkin, the concept is meant to rebalance the relationship between ordinary individuals and the digital companies that accumulate, analyze, and sell their personal data for profit. Just as the law imposes special duties of care, confidentiality, and loyalty on doctors, lawyers, and accountants vis-à-vis their patients and clients, Balkin argues, so too should it impose special duties on companies such as Facebook, Google, Microsoft, and Twitter vis-à-vis their end users. Over the past several years, this argument has garnered remarkably broad support and essentially zero critical pushback.

This paper, co-authored with Lina Khan, seeks to disrupt the emerging consensus by identifying a number of lurking complications in the theory of information fiduciaries as well as a number of reasons to doubt the theory’s capacity to resolve them satisfactorily. Although we agree with Balkin that certain online platforms should be regulated more vigorously, we question whether the concept of information fiduciaries is an adequate or apt response to the problems of information asymmetry and abuse that he stresses, much less to more fundamental problems associated with outsized market power and practices of pervasive surveillance. We also call attention to the potential costs of adopting an information fiduciaries framework—a framework that, we fear, invites an enervating complacency toward social media companies’ core business models and a premature abandonment of more robust visions of public regulation.