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SEEKING PRIVACY: EXAMINING A ROLE FOR THE FIDUCIARY IN PROTECTING PERSONAL INFORMATION

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BOOK REVIEW

SEEKING PRIVACY: EXAMINING A ROLE FOR THE FIDUCIARY IN PROTECTING PERSONAL INFORMATION

DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY
IN THE INFORMATION AGE* (2004).

REVIEWED BY MARCEY L. GRIGSBY*

The time will come when we are
well known for our inclinations, our
predilections, our proclivities, and our wants.
We will be classified, profiled, categorized,
and our every click will be watched.¹

I. INTRODUCTION

In 2005, consumers faced unsettling news about the vulnerability of their personal information.² In the span of just a few months, several pillars of corporate America including, among others, Citigroup, Bank of America, UPS, Ameritrade, MCI, and Time Warner, announced they had lost, misplaced, or in some way exposed to theft or unauthorized access the personal information of tens of millions of Americans.³ Perhaps still more disturbing, con-

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1. DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 26 (2004) (quoting Jim Sterne, *WHAT MAKES PEOPLE CLICK: ADVERTISING ON THE WEB* 179 (1997)).

2. See Joseph Nocera, *Data Theft: How to Fix the Mess*, N.Y. TIMES, July 9, 2005, at C1 (reporting that the fear among consumers about the security of their personal information is “palpable” in the wake of announcements of recent data breaches).

3. See M.P. Dunleavy, *Don't Let Data Theft Happen to You*, N.Y. TIMES, July 2, 2005, at C7 (reporting on breaches at Citigroup, Bank of America, ChoicePoint, Inc., and LexisNexis); Jonathan Krim, *Ubiquitous Technology, Bad Practices Drive Up Data Theft*, WASH. POST, June 22, 2005, at D1 (reporting that credit card processing company CardSystems Solutions, Inc., housed 40 million credit card numbers that may have been obtained by hackers); Robert Manor, *Records Lost on 4 Million; UPS Says It Can't Find CitiFinancial Tapes*, CHI. TRIB., June 7, 2005, at C1 (reporting breaches at Bank of America, United Parcel Service, Ameritrade Holding Corp., MCI, Inc., Time Warner,

sumers learned that companies they had never heard of or even knew existed had been collecting and reselling vast amounts of their personal information,⁴ and that one of the largest of these companies, ChoicePoint, Inc., had sold consumer data to identity thieves posing as legitimate customers.⁵ The data that was exposed in these incidents included highly sensitive personal information, such as social security and credit card numbers,⁶ names, ages, credit ratings, the names of account beneficiaries and dependents,⁷ addresses, telephone numbers, online banking user names,⁸ customer account numbers and payment histories,⁹ and a general category of unspecified “confidential data.”¹⁰ The information about these data breaches became public because a California law that was passed in 2003 requires companies to inform the state’s consumers when their personal information has been compromised.¹¹ Without that law, it is possible that these incidents would never have come to light.¹²

In the course of our daily lives, we have become used to providing personal information about ourselves to the companies with

Inc., Citigroup’s CitiFinancial division, as well as data thefts or losses at Polo Ralph Lauren Corp., Boston College, ChoicePoint, and banks, credit bureaus, and universities); Jonathan Peterson, *U.S. Senate Panel Tackles Identity Theft; Members of the Banking Committee Seek New Regulations to Govern Information Brokers*, L.A. TIMES, Mar. 11, 2005, at C1 (reporting that hackers obtained the credit card information of hundreds of thousands of people from shoe retailer DSW, Inc.). Between February 2005 and January 2006, the Privacy Rights Clearinghouse, a consumer advocacy group, reported the occurrence of 114 major data breaches, affecting about 52 million Americans. See Tom Zeller, Jr., *Waking Up to Recurring ID Nightmares*, N.Y. TIMES, Jan. 9, 2006, at C3.

4. See Vera Bergelson, *It’s Personal But Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 381 (2003); Krim, *supra* note 3.

5. See *id.*

6. See *id.* (reporting that nearly 50 million consumer credit card accounts were exposed to security breaches in the first half of 2005).

7. See Manor, *supra* note 3.

8. See Michael Hiltzik, *This Time, Security Breach Is Personal*, L.A. TIMES, June 30, 2005, at C1.

9. See Manor, *supra* note 3.

10. See David Colker, *Low-Tech Methods Used in Data Theft*, L.A. TIMES, Mar. 14, 2005, at C1.

11. See Nocera, *supra* note 2.

12. See *id.* (noting that prior to the California law’s passage, “there were plenty of examples of hacked data,” but that the public simply did not learn about them); Evan Perez, *Identity Theft Puts Pressure on Data Sellers*, WALL ST. J., Feb. 18, 2005, at B1 (reporting that the California law “is the reason why ChoicePoint’s fraud case came to light”).

which we do business.¹³ We give out information about ourselves — including our names, addresses, telephone numbers, social security numbers, credit card information, or our personal preferences — when we make purchases on the Internet or in a store,¹⁴ use ATM cards,¹⁵ pay bills,¹⁶ sign up for frequent-flier or retail rewards programs,¹⁷ obtain driver's licenses,¹⁸ apply for jobs¹⁹ and

13. See Bergelson, *supra* note 4, at 381 (“In the course of our everyday activities, we routinely reveal our names, addresses, and social security numbers as well as our financial decisions, health problems, tastes, habits, political and religious affiliations, sexual orientation, hobbies, and love affairs.”).

14. See, e.g., Macy's, My Account – Register/Create Account, <https://www.macys.com> (last visited Feb. 12, 2006) (listing the benefits of registering with Macy's online, including, among others, the ability to: “shop at over 400 stores nationwide and . . . at macys.com”; view and manage a Macy's credit card account; store billing and shipping information; create and share a “Wish List” with family and friends; and sign up to receive personalized e-mails); Barnes & Noble, Account, <http://www.bn.com> (last visited Feb. 12, 2006) (offering registered users the ability to view their transaction histories going back up to eighteen months; store multiple shipping addresses; store multiple credit card numbers for use in making future purchases; and create and maintain Wish Lists).

15. Details of ATM transactions — including the ATM location and amount withdrawn or deposited — are recorded by banks and appear on account holders' online and paper bank statements. See, e.g., Bank of America, Online Banking Demo, <http://www.bankofamerica.com/onlinebanking/demo2/model/index.cfm> (last visited Feb. 12, 2006).

16. See, e.g., Sprint, Manage Your Account, <http://www.sprintpcs.com> (last visited Mar. 21, 2006) (offering online bill payment to its PCS Wireless customers, including one-time bill payment from customers' checking accounts, which requires customers to enter their bank account numbers and bank routing numbers; also, requiring customers to enter their cell phone numbers to log in to their online accounts).

17. See Delta Air Lines, SkyMiles, <http://www.delta.com/skymiles> (last visited Mar. 21, 2006). Delta Air Lines, like other major airlines, offers a robust rewards program that allows customers to accumulate “miles” for Delta travel. See *id.* Delta's provision of SkyMiles benefits is dependent on the collection and storage of members' personal data, including their travel history, travel preferences, and miles redemption activity. See *id.* Delta also offers a SkyMiles credit card through American Express, a feature typical of airline rewards programs and one that provides the airline with even more access to its members' personal information, including their credit card transactions generally. See *id.* Rewards programs are also common among supermarket chains, drug stores, and other retailers. See, e.g., Albertsons, Save, <http://www.albertsons.com> (last visited Mar. 21, 2006); CVS/Pharmacy, CVS ExtraCare, <http://www.cvs.com/extra-care> (last visited Mar. 21, 2006). Consumers who hold a Gap, Banana Republic, or Old Navy credit card may now earn rewards points for purchases made at any one of the three retailers, which are owned by the same parent company. See The Gap, GapCard, <http://www.gap.com> (last visited Mar. 21, 2006).

18. See, e.g., NY State Department of Motor Vehicles, Proofs of Identity and Date of Birth Required to Apply for a Driver's License, a Learner Permit or a Non-Driver

loans,²⁰ or even move about.²¹ Indeed, nearly everything we do seems to generate data about us.²² The companies that receive this information routinely use it to learn more about us, create new products and services, or send us personalized advertisements. But the information does not always stop there because the companies with whom we have done business do not always keep the information for themselves. They often sell it to companies like ChoicePoint, Inc., or Acxiom Corp., two of a handful of behemoth “data aggregators”²³ or “data brokers”²⁴ that are in the business of collecting, compiling, analyzing, and reselling billions of private records on Americans.²⁵ Although companies have been collecting per-

Photo ID Card, <http://www.nydmv.state.ny.us/idlicense.htm> (last visited Mar. 21, 2006) (listing the personal information required for persons wishing to obtain and renew a New York driver’s license).

19. See Nuala Moran, *Human resources breaks free from its paper chains*, FIN. TIMES, May 7, 2003, at 2 (discussing the growth of Internet-based job applications and recruitment, and the ways in which companies are applying database marketing technologies to recruitment).

20. See, e.g., Access Group, Welcome to Account Access, <http://www.accessgroup.com> (last visited Mar. 21, 2006) (requiring loan customers to enter their social security numbers in order to log in to view account information).

21. See, e.g., Christopher Caldwell, *A Pass on Privacy?*, N.Y. TIMES MAG., July 17, 2005, at 13 (discussing privacy concerns raised by automatic toll-paying devices on the roads); Sewell Chan, *M.T.A. Collects Some ZIP Codes When MetroCard Buyers Use Credit Cards*, N.Y. TIMES, June 16, 2005, at B4 (discussing New York City Transit’s collection of zipcodes from riders who purchase their subway cards at vending machines).

22. Jessica Litman, *Cyberspace and Privacy: A New Legal Paradigm? Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1283 (2000); Joe Burris, *Every move you make; It’s getting harder to cover your tracks as even the most everyday activities – from running a Google search to using the E-Z Pass lane – leave a lengthy digital trail*, BALTIMORE SUN, Feb. 6, 2006, at 1C (“[M]ost people leave a digital trail of personal information behind as they go about their daily life [sic], using an ATM or a grocery savings club card or logging on to their e-mail accounts.”).

23. See Nocera, *supra* note 2.

24. See Chris Jay Hoofnagle, Director, Electronic Privacy Information Center West Coast Office, *After the Breach: How Secure and Accurate is Consumer Information Held By ChoicePoint and Other Data Aggregators?*, Testimony Before the California State Banking, Finance and Insurance Committee, *available at* <http://www.epic.org/privacy/choicepoint/casban3.30.05.html> (last modified Apr. 5, 2005).

25. See Perez, *supra* note 12; Robert O’Harrow, Jr., *Privacy Eroding, Bit by Byte*, WASH. POST, Oct. 15, 2004, at E01 (naming Acxiom Corp. as “[o]ne of the leading aggregators of personal information”). ChoicePoint describes its business as the “identification, retrieval, storage, analysis and delivery of data.” ChoicePoint, Inc., <http://www.choicepoint.com> (last visited Oct. 13, 2005). ChoicePoint’s customers — to whom it sells this information — include government and law enforcement agencies as well as

sonal information for a long time,²⁶ the growth of the Internet and online commerce, where the exchange of personal information is “part of the price of admission,” has dramatically increased both the volume of personal information available for collection and the rate at which it can be collected.²⁷ This has also increased the possibilities for theft, as the recent data breaches have illustrated. Corporate America, including ChoicePoint, Acxiom, and other information brokers, has cashed in on the growing market for such information, reaping the rewards while consumers pay the price with their privacy.²⁸

The ChoicePoint and other breaches of 2005 have galvanized privacy advocates and consumer groups nationwide.²⁹ Consumers and privacy advocates have expressed alarm not only at the data-theft siege of 2005,³⁰ but at the growth of the consumer data industry generally³¹ and the powerlessness of consumers to control what happens to their personal information.³² Skeptical of self-regulatory solutions because of the amount of money at stake,³³ they are

companies in the marketing, retail, insurance, financial, legal, telecommunications, and nonprofit sectors. *Id.*

26. See O’Harrow, *supra* note 25.

27. *Id.*

28. See Nocera, *supra* note 2 (“Most victims of identity theft have no idea how it happened. Their data is out there in the ether of the Internet or on the computers of companies they’ve never heard of.”). ChoicePoint reported nearly a billion dollars in revenue in its fiscal year ending 2004. See CHOICEPOINT, INC., CHOICEPOINT 2004 ANNUAL REPORT 14, available at <http://library.corporate-ir.net/library/95/952/95293/items/143458/2004annual.pdf>. (last visited Mar. 23, 2006) [hereinafter CHOICEPOINT 2004 ANNUAL REPORT]. Acxiom reported revenue of \$1.223 billion in its 2005 fiscal year, an increase of 21% over the previous year. ACXIOM CORP., ACXIOM ANNUAL REPORT 2005, available at <http://www.acxiom.com/default.aspx?ID=1639&DisplayID=18> (last visited Oct. 13, 2005).

29. See Colker, *supra* note 10 (reporting that the ChoicePoint breach “ignite[ed] a national furor”); Hoofnagle, *supra* note 24.

30. See Krim, *supra* note 3.

31. See O’Harrow, *supra* note 25.

32. See Nocera, *supra* note 2 (reporting that “[t]here is an uneasy sense that people simply do not have control of their own financial information”).

33. See, e.g., Colker, *supra* note 10, at 2 (quoting a privacy advocate as questioning whether these data gathering companies “will really change their attitude without tough new laws and a lot of lawsuits”); Krim, *supra* note 3 (quoting U.S. Senator Dianne Feinstein (D-Cal.) as saying that the CardSystems incident “is a clear sign” that self-regulation is failing”); Perez, *supra* note 12 (quoting the executive director of the Electronic Privacy Information Center (EPIC) as saying that ChoicePoint’s breach “. . . ends the discussion on whether self-regulation works”). ChoicePoint agreed to a \$15 million

seeking legal and federal regulatory changes that will hold data aggregators accountable and force them to better protect the personal information they have collected.³⁴

In *The Digital Person: Technology and Privacy in the Information Age*, Daniel J. Solove, a law professor and leading expert on personal information privacy, provides a detailed examination of the history of the collection and use of personal data by companies in the private sector and a thorough discussion of the disturbing implications such practices raise for personal privacy.³⁵ He proposes that the law recognize a fiduciary relationship between those companies that collect personal information and the individuals whose information they collect.³⁶ Doing so, he argues, would subject these companies to heightened fiduciary obligations and, in turn, greater legal liability when data is lost, exposed to theft, or mishandled.

Part II of this book review summarizes Professor Solove's description of the threat posed by the collection of personal information, the inadequacy of existing law to deal with the threat, and his proposal that the law should hold those companies that collect and use personal information in a fiduciary relationship with the individuals who provide that information. Part III traces the origins of fiduciary law and the analytical framework that governs the recognition of fiduciary relationships. Part IV analyzes Solove's proposal within that framework and concludes that it is unsupported by

settlement with the Federal Trade Commission (FTC) in connection with the 2005 data breaches. Arshad Mohammed, *Record Fine for Data Breach; ChoicePoint Case Spotlights ID Theft*, WASH. POST, Jan. 27, 2006, at D1 (reporting that one-third of the settlement, or \$5 million, was earmarked to reimburse affected consumers). The ChoicePoint fine was the largest ever imposed by the FTC and was hailed by some privacy advocates. *See id.* It amounts, however, to a negligible percentage of ChoicePoint's 2004 revenue. *See CHOICEPOINT 2004 ANNUAL REPORT supra* note 28.

34. *See, e.g.*, Hoofnagle, *supra* note 24 (director of EPIC discussing the ChoicePoint breach and providing a framework for reforming the commercial data broker industry).

35. *See generally* SOLOVE, *supra* note 1. Solove's book was published just two months before the ChoicePoint announcement and is directly relevant to the concerns raised by it. Solove's prescient treatment of the issues confirms his place at the leading edge of the battle for consumer privacy. Solove also addresses threats to personal privacy stemming from access to public records and government access to the information residing in private and public sector databases. *Id.* at 127, 165. Those topics, however, are beyond the scope of this review.

36. *See id.* at 103. "Radical" is Solove's own description for this proposal. *See id.*

fiduciary law and unworkable because it would effectively eliminate the very notion of arm's length dealing between parties to ordinary commercial transactions. Part V concludes that recognizing a fiduciary relationship in this context is not an appropriate solution to the privacy problems posed by the personal information marketplace. We may well remember 2005 as the year of the personal data breach.³⁷ But we are unlikely to remember it as the year when a solution was born.

II. THE GROWING THREAT TO PERSONAL PRIVACY

A. *Digital Dossiers*

The emergence of powerful computer databases and the Internet has allowed the companies with which consumers do business every day, as well as data brokers like ChoicePoint with whom consumers rarely interact directly, to efficiently collect, store, and transfer vast amounts of detailed information about us.³⁸ This information is captured from many sources, including our ATM cards, pre-paid calling cards, frequent shopper cards, credit cards,³⁹ and other publicly available sources.⁴⁰ The Internet has exponentially⁴¹ increased both the supply and demand of personal information⁴² by making it easier and more cost-efficient for companies to collect, buy, and sell personal information.⁴³ It has also made it possible to capture increasingly detailed data about individuals, including information that was not previously available for collection at all, such as demographic⁴⁴ and psychographic data⁴⁵ as well as

37. See Krim, *supra* note 3.

38. See SOLOVE, *supra* note 1, at 18. See also Bergelson, *supra* note 4, at 381 ("The computer revolution has dramatically affected our privacy by making it possible to record, store, and process every scrap of personal information we leave behind.").

39. SOLOVE, *supra* note 1, at 1.

40. See CHOICEPOINT 2004 ANNUAL REPORT, *supra* note 28, at 7.

41. SOLOVE, *supra* note 1, at 16.

42. See *id.* at 22. See also Bergelson, *supra* note 4, at 382 (noting that billions of dollars are generated each year from the sale of mailing lists alone).

43. See Pamela Samuelson, *Cyberspace and Privacy: A New Legal Paradigm? Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1126 (2000).

44. See SOLOVE, *supra* note 1, at 19 (e.g., age, income, race, ethnic background, gender, and location).

45. See *id.* 18 (e.g., opinions, attitudes, beliefs, and lifestyle).

purchasing behavior.⁴⁶ As a result, companies are collecting data that is greater in both volume and level of detail; indeed, they rarely suffer from having “too little data” about us.⁴⁷

This personal information is compiled into detailed electronic records, or “digital dossiers.”⁴⁸ According to Solove, these digital dossiers are full of basic and highly personal information in the form of data about our daily activities: where we are, what we do, what we like, who we are, and what we own.⁴⁹ Data brokers like ChoicePoint analyze this information, develop detailed profiles of us, and then sell the information. The companies that purchase the information use it in two primary ways.

First, the availability of this personal information has revolutionized the ways in which companies market their goods and services to consumers.⁵⁰ Companies use the information in our digital dossiers to decide how they will do business with us, construct predictive models about our future behavior and consumption, and determine what communications we will receive by mail, e-mail, and telephone.⁵¹ Once the information has been collected directly from consumers or purchased from a company like ChoicePoint, it is stored in a database and analyzed to develop in-depth profiles of current or potential customers, including customers’ likes, dislikes, attitudes, hobbies, and habits.⁵² Using these profiles, companies then identify groups, or “segments,” of customers with similar characteristics and assess the types of marketing messages that will resonate with members of each segment.⁵³ Next, companies develop their marketing messages accordingly, creating different messages for the various segments — a practice known in marketing parlance as “targeted” or “database” marketing — resulting in higher response rates and a greater return on their marketing dollars.⁵⁴ Of

46. *See id.*

47. CHOICEPOINT 2004 ANNUAL REPORT, *supra* note 28, at 7.

48. SOLOVE, *supra* note 1, at 1, 3.

49. *See id.* at 1.

50. *Id.* at 18-19 (outlining the innovations that made database-driven marketing “the hottest form of marketing” by 2001).

51. *Id.* at 3-4.

52. *See id.* at 18-19.

53. *Id.*

54. *Id.* at 19. *See also* Press Release, Direct Mktg. Ass’n, DMA CEO Unveils New Association Brand Identity and Reveals Latest Industry Market Numbers At DMA05

course, in order to target their marketing messages, companies must first have information about their customers;⁵⁵ and the success of targeted marketing creates a demand for even more, and more detailed, data on individuals.⁵⁶

The personal information contained in our digital dossiers is also routinely used to make important financial, employment, and other decisions about us.⁵⁷ These records are used to conduct background and credit checks on us — activities that have a very real impact on our lives.⁵⁸ Credit reports, for example, are regularly relied on to evaluate a person's financial health and serve as the basis for decisions that financial and other institutions make about extending credit, setting interest rates on purchases, offering employment, renting a home, issuing licenses,⁵⁹ and setting insurance rates.⁶⁰ Law enforcement officials use the information in government investigations, and still others use the information to commit fraud and identity theft.⁶¹ Perhaps more disturbing is that information about each of us is being swept up and compiled for no particular reason at all, and could be used by some future, unknown entity for purposes of which we cannot now conceive.⁶²

(Oct. 17, 2005), available at <http://www.the-dma.org/cgi/disppressrelease?article=727> (projecting that in 2005, each \$1 investment in direct marketing expenditures will return an average of \$11.49 of incremental revenue across all industries).

55. SOLOVE, *supra* note 1, at 19.

56. *Id.* See also Bergelson, *supra* note 4, at 382 (explaining that “[t]he value of a personal information database depends to a large degree on how precisely it captures a segment of a community with well defined purchasing susceptibilities”). In addition to helping companies communicate more effectively with their customers, thereby increasing the return on their marketing investment, the data can itself be sold to generate additional revenue. See *id.* In the truest sense of the word, then, these companies are profiting from the personal information they collect from individuals.

57. SOLOVE, *supra* note 1, at 21. ChoicePoint describes its business as helping its customers “make sense of large quantities of data” so that they can “extract the valuable knowledge needed to make a decision” about individuals. CHOICEPOINT 2004 ANNUAL REPORT, *supra* note 28, at 9.

58. SOLOVE, *supra* note 1, at 21.

59. *Id.*

60. See CHOICEPOINT 2004 ANNUAL REPORT, *supra* note 28, at 2-3.

61. SOLOVE, *supra* note 1, at 3.

62. Solove observes that “[o]ne company has even been systematically sweeping up all of the data available on the Internet” and storing it away. *Id.* at 26 (citing J.D. Lasica, *The Net NEVER Forgets*, Salon, Nov. 25, 1998, <http://archive.salon.com/21st/feature/1998/11/25feature.html>). Though Solove does not name names in his book, two companies that are well-known for collecting, analyzing, buying, and selling personal

Solove paints a compelling, and often frightening, picture of the confluence of powerful technological and commercial forces that has led to the development and continued growth of a lucrative information-based industry, a veritable “Information Age bazaar,” in which our personal data is routinely rented, bought, and sold.⁶³ The Internet, he says, is “the hub of the personal information market,” in which the companies we know, and others we do not even know exist, trade our personal data — the information that makes up our lives and identities — like so many other commodities.⁶⁴

B. The Power Disparity

Despite the very real impact digital dossiers can have on a person’s life,⁶⁵ individuals have little power, voice, or meaningful participation in the collection, compilation, and use of their personal information.⁶⁶ Solove does not accuse the collectors of having a “diabolical motive or secret plan for domination.”⁶⁷ His concern, rather, is that they treat the information they have collected with bureaucratic, “thoughtless” indifference.⁶⁸ Those who collect and use personal information are generally not accountable to the individuals who provided it and simply do not care about the people whose information they are using for their own profit.⁶⁹ For example, a company can collect a person’s information without contacting or notifying that person, and without that person ever finding out that his or her information has been shared, sold, or exchanged.⁷⁰ Even when that data is lost, stolen, or otherwise com-

data are ChoicePoint and Acxiom. See Eric Dash, *Europe Zips Lips; U.S. Sells Zips*, N.Y. TIMES, Aug. 7, 2005, § 4, at 1.

63. See SOLOVE, *supra* note 1, at 19.

64. *Id.* at 22. See also Bergelson, *supra* note 4, at 382 (explaining that the expansion of the personal information market resulted in the “unprecedented erosion of individual privacy”); Litman, *supra* note 22, at 1285 (suggesting that “[e]ven if one never supplied a single further datum, anyone with access to all the details could assemble a frighteningly precise dossier”)

65. See SOLOVE, *supra* note 1, at 9.

66. See *id.* at 39. See also Litman, *supra* note 22, at 1286 (stating that “actual control [of one’s personal information] seems unattainable”).

67. SOLOVE, *supra* note 1, at 41.

68. *Id.*

69. See *id.* at 102.

70. See *id.*

promised, consumers still may not find out. Only one state, California, currently requires companies that suffer data security breaches to notify their customers.⁷¹ But even this notification comes too late, only *after* a breach has occurred.⁷² Without information about or control over who has their data and how it is being used, stored, and protected — or not protected — consumers are rendered helpless in the face of companies that, functioning like “large bureaucratic organization[s],” exercise control over a vast record of details about their lives, even as they are exposed to harm such as identity theft.⁷³

According to Solove, current privacy law⁷⁴ is ill-equipped to address the unique threats to personal privacy posed by this growing personal data industry.⁷⁵ The law, Solove notes, redresses specific harms done to individuals, such as disclosures of secret information and invasions “into one’s hidden world.”⁷⁶ For a number of reasons, he argues, the privacy problems posed by personal information collection do not fit within this framework.⁷⁷ First, the law is concerned with specific injuries and harms, and isolated, discrete acts.⁷⁸ Yet the ongoing collection and aggregation of personal information is not the result of any specific act of one entity, but of a “systemic” exercise of power through the combination of many

71. See Perez, *supra* note 12. U.S. Senator Dianne Feinstein introduced a bill that would require at the federal level what the California law requires: companies must notify their customers when their personal information has been compromised. *Id.*

72. See Nocera, *supra* note 2.

73. SOLOVE, *supra* note 1, at 9, 41. Solove draws a compelling analogy between the practices of companies that collect personal information and bureaucracies. See *id.* at 39. For a concrete and real-life example of what happens when personal information from one’s dossier falls into the wrong hands, and in which Solove’s analogy of the individual at the mercy of a powerful, bureaucratic entity rings disturbingly true, see Zeller, *supra* note 3 (reporting, among other things, that “data brokers told [an identity theft victim] he could not see his dossier and that it could not be changed anyway”).

74. Solove discusses the various types of law that impact information privacy law in some way, but emphasizes the role of the so-called “privacy torts”: intrusion upon seclusion; public disclosure of private facts; false light; and appropriation. See *id.* at 56, 58-61.

75. See *id.* at 2, 6-7, 9. See also Bergelson, *supra* note 4, at 383 (noting that “[s]cholars from diverse backgrounds . . . point[] out that existing laws are insufficient to protect privacy and fall far behind the developmental trajectory of information technology”).

76. See SOLOVE, *supra* note 1, at 42, 58.

77. See *id.* at 61.

78. See *id.*

small actions — the collection of many single pieces of data — on the part of many actors that, individually, might otherwise appear harmless.⁷⁹ Second, the type of personal information with which he is concerned is not necessarily secret or confidential; it has, in fact, been disclosed (sometimes widely so) such that there is little chance that someone's reputation would be tarnished by the disclosure of the information.⁸⁰ For these reasons, among others, Solove argues that the law does not recognize as "harms" the consequences of the collection and use of personal information.⁸¹

Nevertheless, very real harms exist, Solove argues.⁸² He characterizes the harm to individuals as the power disparity inherent in individuals' relationships with companies that collect their information; a lack of control over how their personal information is used to make decisions about them; and a lack of knowledge about who has their personal information and why it is being collected or used.⁸³ In sum, in order to be effective, privacy, he asserts, must carry with it the ability to "avoid the powerlessness" that occurs when others have control of "such powerful information in one's life without having any say in the process."⁸⁴

C. *From Foe to Friend: Converting Collectors into Fiduciaries*

Solove argues that the relationships individuals have with the companies that collect and use their personal information must be

79. *See id.*

80. *See id.* at 8, 59-61.

81. *Id.* at 9, 42-43. Professor Vera Bergelson observes that, of the four groups of privacy-related causes of action (i.e., false light, intrusion upon seclusion, public disclosure of embarrassing facts, and the appropriation of name or likeness), only the last three "could provide a basis for recovery for an unauthorized acquisition or transfer of personal information," but that all three "have been tested and rejected by courts in that context." Bergelson, *supra* note 4, at 405.

82. *See* SOLOVE, *supra* note 1, at 51. *See also* Steven Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J.L. & TECH. 149, 150 (2001) ("The threat to personal privacy caused by the ever-expanding flow of personal data online is the most significant public policy concern spawned by the Internet.").

83. *See* SOLOVE, *supra* note 1, at 50-51. Arthur R. Miller describes the individual's position vis a vis the information collector as follows: "[w]hen the individual is deprived of control over the information spigot, he in some measure becomes subservient to those people and institutions who are able to gain access to it." Arthur R. Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1108 (1968-1969).

84. SOLOVE, *supra* note 1, at 51.

redefined.⁸⁵ He proposes that the law hold those companies in a fiduciary relationship with the individuals who have given them their information.⁸⁶ As a model for redefining that relationship, he invokes Benjamin N. Cardozo's famous⁸⁷ description of fiduciary obligations in *Meinhard v. Salmon*:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.⁸⁸

In determining whether a fiduciary relationship exists, Solove explains, courts generally look at the following factors: degree of kinship of the parties; disparity in the parties' ages, health, and mental conditions; relative education and business experience of the parties; and the degree to which one party entrusted the handling of business affairs to the other party and "reposed faith and confidence in" that person.⁸⁹ Solove observes that most of these factors address power or knowledge disparities between the parties and concludes, without further analysis, that they "lean in favor of finding a fiduciary relationship between us and the collectors and users of our data."⁹⁰ According to Solove, this last factor — whether one party has entrusted something to another — applies to the relationship at issue here because people "entrust" companies with their personal data.⁹¹ Furthermore, even if this entrustment is

85. *Id.* at 102.

86. *Id.* at 103.

87. *See* *Ne. Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y.2d 158, 162 (1993); Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 549 (1949).

88. SOLOVE, *supra* note 1, at 102-03 (citing *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)).

89. *Id.* at 103 (citing *Pottinger v. Pottinger*, 605 N.E.2d 1130, 1137 (Ill. App. Ct. 1992)).

90. *Id.*

91. *Id.* Solove acknowledges, however, that this proposal is more problematic when applied to third-party companies that obtain our information without having done business with us and often without our consent or knowledge (e.g., Axiom or ChoicePoint), since we have not explicitly or directly entrusted them with anything. *See id.* at 103-04. This review, therefore, does not address his proposal as it relates to the relationship between the consumer and the aggregator or broker, which is one step

not recognized, he asserts that it does not undermine his argument because the other factors appear to “counsel so strongly” for imposing fiduciary obligations on companies that collect and use our personal information.⁹²

Solove acknowledges the “radical” nature of his proposal,⁹³ yet asserts that “the law is flexible and in the past has responded to new situations,” and that it should now respond to the threats posed by the collection of personal data by recognizing a fiduciary relationship in this context.⁹⁴ Redefining the relationship in those terms, he argues, would change the legal obligations that collectors have toward individuals, require them to act with “more care and respect,”⁹⁵ and, as a result, decrease the power disparity.⁹⁶

III. THE LAW OF FIDUCIARY RELATIONSHIPS

A. *Origins and Development of the Fiduciary*⁹⁷

Fiduciary relationships owe their origin and development to an ancient Latin phrase and a group of thirteenth-century Franciscan friars. The *Domesday Book* appeared in England in the year 1086⁹⁸ and listed detailed records of landholders, tenants, and land-ownership disputes.⁹⁹ In it are numerous references to people holding

removed from the consumer; instead, this review analyzes his proposal only with respect to the company that collects information *directly* from the consumer.

92. *Id.* at 104.

93. *Id.* at 103.

94. *See id.* at 103-04.

95. *See id.* at 104.

96. *See id.* at 103-04.

97. This section draws heavily from F.W. Maitland’s authoritative lectures on Equity, delivered in the early twentieth century. *See* F.W. MAITLAND, EQUITY: A COURSE OF LECTURES ON EQUITY (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 2d ed. 1949) (1909). These lectures may be the single most detailed account of the history and genesis of fiduciary relationships. This section also draws on L.S. Sealy’s seminal work, *Fiduciary Relationships*, which appears to be the first modern attempt to survey fiduciary law and outline a cohesive set of governing principles. *See* L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69.

98. *See* F.W. MAITLAND, DOMESDAY BOOK AND BEYOND 4 (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co. 1970) (1897). The *Domesday Book* was the great land survey commissioned by William the Conqueror to determine the land and resources that comprised England at the time for purposes of taxing the population. *See* MAITLAND, *supra* note 97, at 23-24.

99. *See generally* ROBIN FLEMING, DOMESDAY BOOK AND THE LAW (1998) (reprinting the *Domesday Book*).

land on behalf of others.¹⁰⁰ The word used to express this idea — that a person could undertake to hold land on behalf of another and for the benefit of that other person — was “use.”¹⁰¹ It came from the old Latin phrase *ad opus*, meaning “on his behalf.”¹⁰² For example, if you held land *ad opus* John, it meant that you held the land “to the use of” John, or on John’s behalf.¹⁰³ Although the phrase may have implied, or “pointed to,” a legal relationship in even its earliest usage, there was no law of “uses” as such and the phrase did not confer legal status until a group of Franciscan friars moved to Oxford, England, in the thirteenth century.¹⁰⁴

The friars, who had arrived in Oxford as missionaries, immediately faced a problem: They needed a place to live, but they could not own property, either individually or collectively.¹⁰⁵ Franciscan friars were bound by a vow of poverty that precluded them from accumulating any possessions, property, or wealth.¹⁰⁶ The friars were therefore also not permitted to hold property as a group, unlike monks in other denominations who could own property as a community.¹⁰⁷ Yet the friars nevertheless required a roof over their heads.¹⁰⁸ To solve this problem, a plot of land and a house were conveyed to the village of Oxford “to the use of” the friars.¹⁰⁹ Thus, the community held the land on behalf of the friars — marking what may have been the first time that land was permanently held

100. See Maitland, *supra* note 97, at 23.

101. Maitland, *supra* note 97, at 23-24.

102. Maitland, *supra* note 97, at 24. In Old French, the corresponding phrase was “*al oes, ues*,” which the English referred to as a “use.” *Id.*

103. Maitland, *supra* note 97, at 23-24.

104. See *id.* at 25. The friars arrived in Oxford in 1224. See Edward Hutton, *THE FRANCISCANS IN ENGLAND 1224-1538* 9 (1926); D.E. Sharp, *FRANCISCAN PHILOSOPHY AT OXFORD IN THE THIRTEENTH CENTURY B* (1930).

105. See Maitland, *supra* note 97, at 25. For a narrative recounting the arrival of the Franciscan friars in Oxford, see generally Hutton, *supra* note 104.

106. See Maitland, *supra* note 97, at 25.

107. See *id.*

108. See *id.* See also Hutton, *supra* note 104, at 37-41, for the story of the friars’ first nights in Oxford and their search for accommodations.

109. See Maitland, *supra* note 97, at 25. According to the *History of English Law*, cited by Maitland, the grant stated that the land and house was held by the community of the village of Oxford “*ad opus fratrum*” (“on behalf of the brethren”). *Id.* Hutton’s account of the friars’ arrival and settlement in Oxford confirms this, stating that someone named Richard le Mulliner “gave the ground and the house to the city [of Oxford] for the use of the brethren.” Hutton, *supra* note 104, at 41.

by one group of persons to the use of (*ad opus*), and on behalf of, another group of persons.¹¹⁰

Following this conveyance, the use was widely employed and came to “express a substantially new relationship in connexion [sic] with the holding of land.”¹¹¹ The use was thereafter commonly utilized to pass real property to one’s children,¹¹² as well as to describe agency and bailment relationships.¹¹³ Uses became “extremely popular” in the fifteenth century¹¹⁴ and the Court of Equity began to formally enforce them.¹¹⁵ In doing so, the chancellors treated uses as analogous to estates in land, insofar as the court thought of the use as “a sort of metaphysical entity in which there might be estates very similar to those which could be created in land.”¹¹⁶ The principle underlying enforcement of the use in equity, rather than at law, was simple: “Men ought to fulfil [sic] their promises, their agreements; and they ought to be compelled to do so.”¹¹⁷ Over time, the terms “trust” and “confidence” were also employed to describe these circumstances and the three — use, trust, and confidence — became synonymous.¹¹⁸

By the sixteenth century, England’s Chancery courts exercised jurisdiction over a “great field of substantive law” comprised of such matters, which were brought as causes of action for “breach of confidence.”¹¹⁹ In adjudicating these cases, the chancellors did not fol-

110. See Maitland, *supra* note 97, at 25.

111. *Id.*

112. *Id.* at 26-27, 29-30. Maitland explains that the popularity of the use as a device for leaving property to one’s descendants could be attributed in large part to the fact that the law imposed harsh restrictions on passing property to one’s descendants after death, such as through a will. See *id.* at 26. The use provided an alternative method for passing property to one’s survivors that evaded the legal restrictions. See *id.* at 26.

113. *Id.* at 24.

114. *Id.* at 7.

115. *Id.* at 30.

116. *Id.* at 32.

117. *Id.* at 29.

118. See *id.* at 38 (explaining that “[t]o convey to A upon trust for X, this has precisely the same effect as conveying to A to the use of X”). See also Sealy, *supra* note 97, at 70 (“[M]any of these matters of confidence were naturally called “trusts,” whether there was any strict trust of property or not.”).

119. See Maitland, *supra* note 97, at 7; Sealy, *supra* note 97, at 69. Both Sealy and Maitland recite an old rhyme that identified the three subject matters that first defined the jurisdiction of the Courts of Equity: “These three give place in court of conscience, / Fraud, accident, and breach of confidence.” *Id.* The enforcement of uses by the

low precedent, case law, or other written authority;¹²⁰ instead they relied on a simple vocabulary of descriptive terms such as “trust” and “confidence” and broad, general principles associated with them.¹²¹ One chancellor deciding such a case, for example, reasoned that “if a confidence is reposed, and that confidence is abused, a court of equity shall give relief.”¹²² This approach was adequate, but only for a time.¹²³

Later, starting in the second half of the sixteenth century, the court’s jurisprudence became more settled,¹²⁴ case reporting improved, and the law of equity was recognized as an important branch of law.¹²⁵ As a result of these developments, a standard, more technical approach to this area of the law took hold; concrete rules supplanted broad principles and “precise terms” that were “better suited to the formulation of fixed rules” replaced vague, descriptive phrases.¹²⁶ The word “trust,” once used broadly and synonymously with “use” and “confidence,” attained its modern, technical meaning and usage¹²⁷ in reference to relationships in which a person, the trustee, holds title to the property of another and is held to equitable duties arising from a manifestation to both create such a relationship and deal with the property for the benefit of the other person.¹²⁸ Trusts thereafter have comprised a narrow

Court of Equity coincided with, and in fact contributed to, Equity’s emergence as a court separate and apart from the courts of law. MAITLAND, *supra* note 97, at 6-7.

120. See MAITLAND, *supra* note 97, at 8. Maitland hypothesized about the chancellors’ approach to deciding these cases:

On the whole my notion is that with the idea of a law of nature in their minds [the chancellors] decided cases without much reference to any written authority, now making use of some analogy drawn from the common law, and now some great maxim of jurisprudence which they have borrowed from the canonists or the civilians.

Id. at 8-9.

121. See Sealy, *supra* note 97, at 70.

122. See *id.*

123. See *id.*

124. See MAITLAND, *supra* note 97, at 9.

125. See *id.* at 10-11; Sealy, *supra* note 97, at 70-71.

126. Sealy, *supra* note 97, at 70-71.

127. *Id.*

128. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

subset of the relationships that had previously been collectively labeled as “trust,” “confidence,” or “use.”¹²⁹

Causes of action for breach of confidence continued to arise in a wide variety of contexts.¹³⁰ A person (A) was found to have “reposed confidence” in another (B) by, for example: entrusting property to B to be held and maintained on A’s behalf (a formal “trust”), as well as in those circumstances in which B “undertook to exercise a power, conduct a sale, supervise an estate or business” on behalf of A, or in some way became an agent or employee of A; relying on B’s advice, such as when B was a professional, an expert, or was more knowledgeable on the subject, or because B was a trusted servant, friend, or person of “dominant character” or position who wielded influence on A’s decisions.¹³¹

The courts struggled to distinguish these relationships from the formal trust, at least in definition if not in obligation.¹³² The words of Lord Eldon illustrate the challenge they faced:

129. See MAITLAND, *supra* note 97, at 36 (explaining that “it is absolutely impossible for one to speak of trusts . . . without speaking first of uses. For one would of course like to answer the question — how can a trust be created? — and this unfortunately cannot do without touching the learning of uses”); Sealy, *supra* note 97, at 69-72 (stating that “the whole of our law of trusts” is derived from the branch of Equity dealing with breach of confidence).

130. Sealy, *supra* note 97, at 69.

131. *Id.*

132. Although the respective definitions of fiduciaries and trusts were unclear for some time, the fundamental principle guiding the obligations such persons held toward their beneficiaries was *not* in question: fiduciaries may not profit from their position. *Id.* at 77. In the seminal case articulating this principle, *Keech v. Sandford*, a “trustee” held a lease “for the benefit of” an infant (referring to the infant as the “*cestui que use* [the beneficiary of the use]”). *Keech v. Sandford*, [1726] 25 Eng. Rep. 223 (Ch.). When the landlord refused to renew the lease for the benefit of the infant, the trustee renewed the lease in his own name. *Id.* The court held that:

[the trustee] should rather have let [the lease for the benefit of the infant] run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed

Id. Today, this principle still underlies the obligations of fiduciaries. See Kenneth B. Davis, Jr., *Judiciary Review of Fiduciary Decisionmaking: Some Theoretical Perspectives*, Part I, 80 Nw. U.L. REV. 1, 1 (1985) (“Through the fiduciary device, the law seeks to create a system of compensation and deterrence to protect the principal’s interests against exploitation which results from that divergence.”); Sealy, *supra* note 97, at 77.

[T]here is a vast difference between things to which we give the same denomination, I mean trusts. You have a trust expressed; you have a trust implied; you have relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a *cestui que trust* [trust beneficiary]; and yet you cannot deny, that to some intents and some purposes one is a *cestui que trust* and the other a trustee.¹³³

Lord Eldon's conclusion was consistent with what would become the generally accepted view: the relationship at issue, though once called a "trust" and resembling a trust, was merely similar to a trust, but was nevertheless not a trust.¹³⁴ What, then, of the other relationships that had also been labeled "trusts," but which were not quite trusts, and now had no name?¹³⁵

B. *The Framework for Analyzing Fiduciary Relationships*

In time, the word "fiduciary" was adopted to describe those relationships of "confidence" that "fell short of the now strictly-defined trust."¹³⁶ That word, however, was no more than a label for those relationships that were trust-like, were once called trusts, but which were not, strictly speaking, "trusts." One definition articulated around the time of its adoption was that "every remedy which can be sought against a fiduciary is one which might be sought against a trustee on the same grounds."¹³⁷ Yet this merely describes what a trust and fiduciary have in common; it does not, as Sealy

133. Sealy, *supra* note 97, at 71 (citing *Cholmondeley v. Clinton* [1821] 4 Bli. 1, 96)).

134. See Sealy, *supra* note 97, at 71.

135. See *id.* According to early case reports, there was a great deal of uncertainty at the time as to whether those relationships could still be called "trusts." *Id.*

136. See *id.* at 71-72. Prior to the adoption of the term "fiduciary," such relationships were referred to as quasi-trusts and constructive trusts, reflecting their trust-like or nearly-trust nature. See MAITLAND, *supra* note 97, at 80; Sealy, *supra* note 97, at 71. The word "fiduciary" is derived from the Latin words "fides," meaning "faith," and "fiducia," meaning "trust." GARY WATT, TRUSTS AND EQUITY 323 n.2 (2003).

137. Sealy, *supra* note 97, at 72-73 (quoting *Re West of England and South Wales District Bank, ex p. Dale & Co.* [1879] 11 Ch. D. 772, 778).

pointed out, help us recognize whether any given relationship is fiduciary in nature.¹³⁸

“Fiduciary” is still used, to some extent, in an indefinite sense,¹³⁹ at least to the degree that the word “fiduciary” does not define a single class of relationships governed by a fixed set of rules.¹⁴⁰ In its most basic sense, a fiduciary is defined as “a person who undertakes to act in the interest of another person,”¹⁴¹ and does so willingly in the context of certain pre-defined relationships.¹⁴² Relationships recognized as fiduciary,¹⁴³ in addition to the trustee-trustor relationship,¹⁴⁴ include those between guardian and ward,¹⁴⁵ agent and principal,¹⁴⁶ attorney and client,¹⁴⁷ corporate directors¹⁴⁸ or officers and the corporation’s shareholders, as well as between business partners,¹⁴⁹ physicians and their patients,¹⁵⁰ and, in some cases, between controlling and minority shareholders of a

138. See *id.* at 73. *Id.* at 72 (stating that most authorities of the day were similarly unhelpful.).

139. See *id.* at 73.

140. *Id.*

141. Scott, *supra* note 87, at 540.

142. See *supra* note 137 and accompanying text. The fiduciary must in some way willingly accept this role. See Eileen Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 905 nn.29-30 (“The potential for fiduciary liability arises only with an individual’s choice to bind herself to the obligation.”). For purposes of tort liability, a fiduciary relationship exists “between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” RESTATEMENT (SECOND) OF TORTS § 874 cmt. a (1979).

143. For a list of relationships recognized as fiduciary, see Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 306-07 (1999); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 795 (1983); Scott, *supra* note 89, at 541.

144. See RESTATEMENT (SECOND) OF TRUSTS § 2.

145. See, e.g., *In re Swiecicki*, 477 N.E.2d 488 (Ill. 1985).

146. See RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (“An agent is a fiduciary with respect to matters within the scope of his agency.”).

147. See, e.g., *In re Holland*, 97 N.Y.S. 202, 202 (3d Dep’t 1906).

148. See, e.g., *De Bardeleben v. Bessemer Land & Improvement Co.*, 37 So. 511, 515 (Ala. 1903) (“Directors . . . of a corporation . . . are subject to the rules which apply generally to persons standing in fiduciary relations.”); *Lyons v. Webster*, 73 So. 339 (Ala. 1916) (finding that the relationship of promoters and directors of a corporation to the corporation was of a fiduciary nature).

149. See e.g., *Meinhard*, 249 N.Y. 458 (Cardozo, C.J.).

150. See, e.g., *Hammonds v. Aetna Casualty & Surety Co.*, 237 F. Supp. 96, 102 (D. Ohio 1965).

corporation.¹⁵¹ Legal scholars have identified four basic situations in which fiduciary relationships generally arise.¹⁵² Professor Eileen Scallen describes them as follows:¹⁵³ (1) a status relationship in which one person has legal title and/or control over the property of another; (2) a reliance relationship in which one party reposes trust and confidence in, or relies on, the other; (3) an entrustment relationship in which one party has conferred power on another party, thereby requiring the entrusted party to exercise discretion over the entrusting party's financial or other well-being; and (4) an assumption-of-duty relationship in which a person undertakes to act in the interest of another.¹⁵⁴

The analysis courts use to determine whether a fiduciary relationship exists between two parties is deeply grounded in analogical reasoning,¹⁵⁵ an approach that is perhaps a legacy of the fiduciary's roots in Courts of Equity.¹⁵⁶ Courts asked to find a fiduciary rela-

151. See, e.g., *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 120 A. 486, 491 (Del. Ch. 1923) (stating that "in a proper case," the law will recognize majority stockholders of a company as fiduciaries to minority stockholders, and citing supporting cases).

152. Sealy, *supra* note 97, at 74 (observing that "the authorities seem to suggest that there are four categories of fiduciary relationship"). These categories often overlap such that a single relationship may fall into one or more of the categories. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879; Sealy, *supra* note 97, at 79-81. For example, Sealy points out that a guardian-ward relationship may fall into all four categories, that an attorney-client relationship could be located in three, and that agents "will always" be placed in the entrustment category, but sometimes also in the status category. Sealy, *supra* note 97, at 79-80.

153. Scallen's categorization is the most helpful and incorporates theories asserted by other scholars in the area. See Scallen, *supra* note 142, at 914 n.70. Sealy, too, recognizes four categories of fiduciary relationships, but does so without Scallen's descriptive labels. See Sealy, *supra* note 97, at 74, 76-78 (referring to the four types of fiduciary relationships as Category I, II, III, and IV).

154. See Scallen, *supra* note 142, at 914. The categories, it should be noted, are imperfect and have shortcomings, as both Scallen and Sealy point out. *Id.*; Sealy, *supra* note 97, at 79-81. For purposes of this review, however, it is sufficient to simply identify these basic categories as a way to locate Solove's collector-provider relationship within the universe of fiduciary relationships generally. Others have the task of providing the much-needed clarity and cohesion. See, e.g., Frankel, *supra* note 143, at 797 (advocating for the recognition of fiduciaries as a group and the treatment of the law that governs them as "a distinct body of policies, principles, and rules").

155. See DeMott, *supra* note 152, at 891 (observing that the law governing fiduciary obligations illustrates, more so than other areas of the law, "the power of analogy in legal argumentation").

156. See Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 1 (1975).

tionship in a new context will first identify a relationship that the law already recognizes as having fiduciary status.¹⁵⁷ Using that relationship as a model for analyzing the relationship at issue,¹⁵⁸ the courts will next evaluate whether the instant relationship is sufficiently like the model relationship to support recognizing it as fiduciary.¹⁵⁹ The law of fiduciary relations is, above all, “situation-specific” and drawing analogies to existing relationships must be “the starting point for any further analysis.”¹⁶⁰ Only upon finding that a fiduciary relationship exists will courts impose fiduciary obligations on the parties, again extending by analogy the obligations

157. DeMott, *supra* note 152, at 891. DeMott also explains that “[c]ourts considering whether to impose a fiduciary constraint in a novel context rely heavily on comparisons to more conventional contexts in which the constraint does apply,” and that this comparison is “an inevitable aspect of fiduciary analysis.” DeMott, *supra* note 152, at 879. It should be noted that the categorization of fiduciary relationships noted above is solely the work of legal academics and scholars. Courts do not engage in this exercise and the categories play no role in the judicial analysis of relationships that are purported to be fiduciary in nature.

158. Some scholars refer to the model relationship as a “prototype” or “paradigm” relationship. See, e.g., Frankel, *supra* note 143, at 804 (“prototype”); DeMott, *supra* note 152, at 879 (“paradigm”).

159. See, e.g., *Swiecicki*, 477 N.E.2d, 490 (finding that “[t]he relationship between guardian and ward is equivalent to that between a trustee and a beneficiary . . . [t]hus, in the instant case, the defendant as guardian had the duty to manage the ward’s property with the same degree of vigilance, diligence and prudence as a reasonable man would use in managing his own property”) (citations omitted); See *Ne. Gen. Corp.*, 82 N.Y.2d at 162-63 (finding that the function of an investment advisor was not sufficiently like that of a broker, who has fiduciary duties, to support finding a fiduciary relationship between the advisor and advisee); Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 68 (2004) (noting that courts, when defining the standards for fiduciary duties in the context of limited liability companies, draw analogies to partnership and corporate law).

160. See DeMott, *supra* note 152, at 879. While this case-by-case approach may be adequate for resolving individual disputes, it “has not . . . been appropriate for the elucidation of the broader problems of policy which underlie the whole fiduciary concept.” Weinrib, *supra* note 156, at 1 (criticizing the approach as “piecemeal”). Thus, this area of the law still lacks uniformity, cohesion, and clarity. See *id.*; Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 286 (1989) (observing that judicial and academic conclusions relating to fiduciary status “have been tentative,” and that the law in this area “remains obscure”); Frankel, *supra* note 143, at 795-96 (observing that examining fiduciary relationships as a whole is complicated by “the fact that the various types of fiduciaries have evolved over the centuries”); Sealy, *supra* note 97, at 69 (noting that what had previously been written about fiduciary relationships “is not usually very full or precise”).

associated with the model relationship to the newly recognized relationship.¹⁶¹

IV. THE FIDUCIARY SOLUTION: WHY “RADICAL” ISN’T RIGHT

Solove’s proposal that collectors of personal information should be held to act with “the punctilio of an honor the most sensitive” as to the information they collect and the providers of that information¹⁶² may seem an appealing antidote to the significant privacy threats posed by the collection and aggregation of personal data.¹⁶³ And Solove is no doubt right about the need for a solution, as the data breaches of the past year clearly demonstrate.¹⁶⁴ Yet a careful review of his argument reveals that it fails to justify the imposition of fiduciary status on such relationships for three reasons. First, Solove’s argument is inconsistent with the way courts analyze relationships to determine whether they are fiduciary in nature. Second, his proposal would convert nearly every buyer-seller transaction into a fiduciary relationship, effectively eviscerating the well-established boundary between arm’s length business transactions

161. See Frankel, *supra* note 143, at 804. Also important to note is that the party seeking relief on the grounds that a fiduciary relationship existed has the burden of pleading and proving its existence by clear and convincing evidence. See, e.g., *Pottinger v. Pottinger*, 605 N.E.2d 1130 (Ill. App. Ct. 1992).

162. If collectors are recognized as being in fiduciary relationships with the providers, the collectors would be required to satisfy some set of fiduciary obligations. It is not at all clear, however, what those obligations would be. Just as there is no one-size-fits-all definition of what constitutes a fiduciary relationship, there is also no single set of fiduciary obligations that are uniformly conferred upon all fiduciaries. See Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C.L. REV. 595, 595 (1997) (“The restraints on the fiduciary’s self-benefiting behavior that attend the finding of the fiduciary relationship are not the same in each category or indeed in all contexts within any category. The same is true for sanctions imposed for violating such fiduciary obligations.”); Scott, *supra* note 78, at 541 (noting that “[s]ome fiduciary relationships are undoubtedly more intense than others” and that “all . . . fiduciaries . . . are subject to the fiduciary principle of loyalty, although not to the same extent”). An important principle underpinning the recognition of fiduciary obligations is that a person found to be a fiduciary “incurs duties designed to put detail into the idea of ‘serve the interests of another.’” SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 145 (2d ed. 2003). We could therefore only make a general prediction that the collectors of information would to some degree be required to serve the privacy interests of individuals.

163. Fiduciary principles teach a lesson of loyalty that is otherwise lacking in the “workaday mundane marketplace” and all too absent from the personal information marketplace. See *Ne. Gen. Corp.*, 82 N.Y.2d at 162 (quoting *Meinhard*, 249 N.Y. at 464).

164. See *supra* notes 2-37 and accompanying text.

and fiduciary relations. Lastly, his claim that fiduciary law is flexible enough to apply to this situation is unfounded.

A. *Fiduciary Analysis Gone Awry*

Solove's argument ignores the traditional analytical framework outlined above or, at least, applies a somewhat backward version of it. First he identifies the obligations he wishes to impose on the collectors of personal information, and then he argues that the collector-provider relationship is sufficiently like already-recognized fiduciary relationships to warrant similar status.¹⁶⁵ He begins his argument by asserting that companies that collect personal information should be held to the fiduciary obligations so forcefully described by Cardozo in *Meinhard v. Salmon*.¹⁶⁶ To quote *Meinhard*, however, is to merely restate well-established principles about the obligations that result once a fiduciary relationship is found to exist; doing so does not articulate analytical principles by which the law recognizes a fiduciary relationship between two parties.¹⁶⁷ Indeed, scholars have cautioned that the mere statement that someone is in a fiduciary relationship with another means nothing more than that some aspects of the relationship may resemble that of a fiduciary;¹⁶⁸ such a statement does not itself compel the conclusion that fiduciary principles or duties should be applied.¹⁶⁹ Rather, the nature of the relationship must be such that it "justifies the interference."¹⁷⁰ Solove's argument, therefore, begs the question: Is the relationship at issue here — between individuals and the companies that collect personal information from them — of a fiduciary nature such that it gives rise to the fiduciary obligations he wants to

165. See SOLOVE, *supra* note 1, at 102-03.

166. *Id.* at 102-03 (citing *Meinhard*, 249 N.Y. 458).

167. See *Claude Neon Lights, Inc. v. Fed. Elec. Co.*, 236 N.Y.S. 692, 698 (N.Y. Sup. Ct. 1929).

168. See Sealy, *supra* note 97, at 73 ("[T]he mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like.").

169. See Sealy, *supra* note 97, at 73.

170. *Id.* (quoting *Coomber v. Coomber*, 1 Ch. 723, 728 (1911) (Moulton, L.J.)). Sealy notes that L.J. Moulton cautioned against "the danger of trusting to verbal formulae." *Id.* See also *Ne. Gen. Corp.*, 82 N.Y.2d at 163 (stating that whether a fiduciary duty exists is not determined by "nomenclature," but by the "services agreed to under the contract between the parties").

impose? A comparison of the collector-provider relationship to the relationships Solove employs in his argument reveals that it is not.

1. *Meinhard v. Salmon*

The *Meinhard* case involved the relationship between two business partners, Walter Salmon and Morton Meinhard, who had entered into a joint venture to develop and manage a piece of prime New York City real estate.¹⁷¹ They went into business together to convert the Hotel Bristol, located at 42nd Street and 5th Avenue, into shops and offices.¹⁷² Under the terms of their agreement, Meinhard was to pay half of the costs for reconstructing, managing, and operating the property, and Salmon was to pay Meinhard a percentage of the net profits generated.¹⁷³ The lease for the property, however, was in Salmon's name only.¹⁷⁴ In addition, the agreement conferred sole power on Salmon for the leasing, management, and operation of the building, and provided that any losses would be shared equally by the parties.¹⁷⁵ Near the end of the lease, Salmon surreptitiously entered into a new long-term lease with the property owner, covering not only the original tract, but five additional tracts, including one that adjoined the Hotel Bristol lot.¹⁷⁶ These lease terms called for the existing buildings, including the Bristol, to be torn down and replaced by a new.¹⁷⁷ Meinhard was not aware of these building negotiations or the executed lease; he only learned of it after the lease had been signed,¹⁷⁸ whereupon he sued Salmon for breach of a fiduciary duty.¹⁷⁹

Cardozo, then Chief Judge of the New York Court of Appeals, determined that as "coadventurers" Salmon and Meinhard were

171. 249 N.Y. at 461-62. For further discussion of the *Meinhard* case, see also Scott, *supra* note 87, at 548-49.

172. 249 N.Y. at 461-62.

173. *Id.* at 462. The agreement called for Salmon to pay Meinhard 40% of the profits for the first five years of the lease and 50% of the profits thereafter. *Id.*

174. *Id.* at 461.

175. *Id.* at 462.

176. *Id.* at 462-63.

177. *Id.* at 463.

178. *Id.*

179. *Id.*

analogous to “copartners”¹⁸⁰ and, therefore, subject to the fiduciary obligations imposed upon partners and trustees,¹⁸¹ including a duty of the “finest loyalty.”¹⁸² The aspects of Salmon’s relationship with Meinhard that set it apart from those of the “workaday world”¹⁸³ that the two were business partners in a joint venture, were together through “fair weather or foul” and “for better or worse,”¹⁸⁴ and that Salmon was the managing agent of the venture.¹⁸⁵ In that capacity, the court noted, Salmon had exclusive authority to operate the business, as well as the power to abscond with the assets of the venture.¹⁸⁶

A New York court interpreting *Meinhard* just one year after it was decided held that a party seeking to apply the principles articulated in *Meinhard* must first show that an agreement between the two parties was, in fact, a “joint adventure.”¹⁸⁷ The court further cautioned that, even upon finding a joint adventure, the fiduciary obligations articulated in *Meinhard* do not arise automatically since the duties of the parties to a joint adventure are likely to be limited by the terms of the agreement.¹⁸⁸ This approach is consistent with how courts today generally decide whether a fiduciary relationship exists,¹⁸⁹ and further highlights the problems with Solove’s out-of-order analysis.

The relationship Solove wishes to recognize as fiduciary in nature is, even on its face, far different from the one described in *Meinhard*, which he sets forth as his model relationship. In *Meinhard*, the men were business partners, which means that they were

180. *Id.* Cardozo also refers to Salmon and Meinhard as “joint adventurers,” but without defining the term. *Id.* In an earlier case, *Jones v. Walker*, the court defined a joint adventure as “a limited partnership, not limited in a statutory sense as to liability but as to scope and duration, and, under our law, joint adventures and partnerships are governed by the same rules.” 101 N.Y.S. 22 (N.Y. App. Term 1906).

181. 249 N.Y. at 464. This relationship would appear to fall into Scallen’s “entrustment” category. *See* note 142 and accompanying text.

182. *Meinhard*, 249 N.Y. at 463-64.

183. *Id.* at 464.

184. *Id.* at 462.

185. *Id.* at 468. Cardozo noted that Salmon was “much more than a coadventurer. He was a managing coadventurer.” *Id.*

186. *Id.* at 466.

187. *See Claude Neon Lights*, 236 N.Y.S. at 697 (applying *Meinhard*, 249 N.Y. 458).

188. *See id.* at 697-98.

189. *See* text accompanying notes 157-61.

“carry[ing] on as co-owners a business for profit.”¹⁹⁰ In contrast, the parties in the relationship with which Solove is concerned are not co-owners in a business and do not seek profits together; far from it. They have not entered into a partnership arrangement of any kind, or a relationship that remotely resembles one. As buyer and seller, they are merely parties to an ordinary commercial transaction. Even when an individual has actively established a relationship with a company, the relationship is not much more than that of strangers, as Solove himself acknowledges.¹⁹¹ This relationship, therefore, fails to satisfy even a threshold requirement for finding a fiduciary status under *Meinhard*.¹⁹²

2. *Pottinger v. Pottinger*¹⁹³

Solove’s reliance on an Illinois case involving an elderly woman whose relatives defrauded her does not save his argument. In that case, Ida Werner, 93, had entered into an installment contract with Mr. and Mrs. Pottinger, Werner’s nephew and his wife, whereby they purchased Werner’s farm and agreed to pay taxes on the property while Werner retained a life estate interest in one of the property’s residences.¹⁹⁴ Werner later brought suit against the Pottingers, claiming that they breached their fiduciary duties to her when they took her money and wrote themselves checks that were drawn on her account.¹⁹⁵

In evaluating whether a fiduciary relationship existed between Werner and the Pottingers, the court stated that a fiduciary relationship may arise “where trust and confidence, by reason of friendship, agency and experience, are reposed by one person in another so the latter gains influence and superiority over the former” and proceeded to articulate the factors Solove applies to the collector-provider information: degree of kinship of the parties; disparity in the parties’ ages, health, and mental conditions; relative education and business experience of the parties; and the degree to which

190. RESTATEMENT (SECOND) OF AGENCY § 14A.

191. See SOLOVE, *supra* note 1, at 102.

192. See *Ne. Gen. Corp.*, 82 N.Y.2d at 162 (stating that parties to a commercial transaction will not be held to fiduciary duties).

193. 605 N.E.2d 1130, *cited in* SOLOVE, *supra* note 1, at 103.

194. *Id.* at 1133.

195. *Id.* at 1133-34, 1136.

one party entrusted the handling of business affairs to the other party and “reposed faith and confidence in” that person.¹⁹⁶ Upon applying these factors, however, the court held that *no* fiduciary relationship arose between Werner and the Pottingers.¹⁹⁷ The court found no evidence that Werner had reposed faith and confidence in the Pottingers “to the extent that she entrusted the handling of her business affairs to them.”¹⁹⁸ Mrs. Pottinger did chores around the house for Werner and Mr. Pottinger performed maintenance at her house.¹⁹⁹ The parties’ blood relationship and the Pottingers’ performance of these duties for Werner was not sufficient to give rise to a fiduciary relationship.²⁰⁰ The court further noted that “one person’s assistance of another in business affairs” also does not establish a fiduciary relationship.²⁰¹

Even assuming *arguendo* that the Werner-Pottinger relationship satisfied the elements pertaining to differences in the parties’ relative age, health, mental condition, education, and business experience — which, as Solove asserts, suggest power disparities between the parties²⁰² — the court nevertheless found that the entrustment element was missing.²⁰³ For purposes of finding a fiduciary relationship in the collector-provider relationship, therefore, *Pottinger* teaches that the entrustment element must be satisfied, and that it must be satisfied with more than the mere handling of another’s business or personal affairs. The collector-provider relationship falls significantly short of this standard. A person who makes a purchase and in doing so provides the seller with personal information needed to execute the transaction — such as a credit card number or mailing address — does not, in any conception of that

196. *Id.* at 1138. See also SOLOVE, *supra* note 1, at 103.

197. *Pottinger*, 605 N.E.2d at 1138.

198. *Id.* Several years after signing the installment contract, but before the lawsuit arose, Werner executed a power of attorney naming Mrs. Pottinger as her attorney. *Id.* at 1133. The defendants conceded that a fiduciary relationship arose upon execution of the power of attorney by operation of law. *Id.* at 1138. Therefore, the court here was addressing the question of whether a fiduciary relationship existed between the parties *prior* to the power of attorney. *Id.* at 1137.

199. *Id.* at 1138.

200. *Id.*

201. *Id.*

202. SOLOVE, *supra* note 1, at 103.

203. See *Pottinger*, 605 N.E.2d at 1138.

encounter, entrust the seller with the buyer's personal or business affairs.

B. The Arm's Length Limits of Fiduciary Relations

It is well established that the relationship between a buyer and a seller is not a fiduciary or trust-based relationship.²⁰⁴ Rather, a buyer and seller are parties to an arm's length transaction in which each seeks for itself the best advantage to be derived from the transaction²⁰⁵ and acts only for its own benefit, not for the benefit of the other.²⁰⁶ For this reason, an arm's length business transaction does not give rise to a fiduciary relationship.²⁰⁷ A fiduciary relationship arises between such parties only "when, by their concerted action, they willingly and knowingly act for one another in a manner to impose mutual trust and confidence."²⁰⁸ These two types of relations — arm's length and fiduciary — therefore cannot co-exist in the same relationship, by virtue of their very natures: a fiduciary is, by definition, not dealing at arm's length with the beneficiary, and parties who transact at arm's length will not be subject to fiduciary duties.²⁰⁹ This principle, inherent in fiduciary doctrine since the

204. See *Nifty Foods Corp. v. Great Atl. & Pac. Tea*, 614 F.2d 832, 838 (2d Cir. 1980) (holding that "[t]he relationship of a buyer to his supplier . . . does not constitute a fiduciary or other special relationship of trust"); *Claude Neon Lights, Inc.*, 236 N.Y.S. at 696 (holding that a company has no fiduciary relationship to another when the relationship of the parties is that of buyer and seller, not joint adventurer).

205. *Sachs v. Cluett Peabody & Co., Inc.*, 39 N.Y.S.2d 853, 856 (1st Dep't 1943).

206. See *id.*; *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 179 (S.D. Fla. 1991) (holding that "in an arms length transaction . . . there is no duty imposed on either party to act for the benefit or protection of the other party").

207. See *Sachs*, 39 N.Y.S.2d at 856 (noting that "[p]arties dealing at arm's length, each seeking for himself the best advantage to be derived from a transaction, are not in confidential [or fiduciary] relationship").

208. *Paul v. Smith*, 380 P.2d 421, 426 (Kan. 1963). See also *Lanz*, 764 F. Supp. at 179 (stating that "the fact that one party places trust or confidence in the other does not create a confidential relationship in the absence of some recognition, acceptance or undertaking of the duties of a fiduciary on the part of the other party" and citing cases); *Meinhard*, 249 N.Y. at 462.

209. See *WATT*, *supra* note 136, at 325 (observing that parties dealing at arm's length may be bound by an implied duty of good faith toward each other, but "will rarely be subject to an implied fiduciary duty to put the interests of the other party first"); *Scott*, *supra* note 87, at 541 ("The relationship between the parties [who are in a fiduciary relationship] is very different from that between parties dealing with each other at arm's length.").

friars arrived in Oxford in 1224,²¹⁰ acts as a limit on the recognition and enforcement of fiduciary relationships.

In *Northeast General Corp. v. Wellington Advertising, Inc.*, the New York Court of Appeals, sixty-five years after its landmark decision in *Meinhard*, criticized those who would apply *Meinhard's* principles in a way that would encroach upon arm's length transactions.²¹¹ Indeed, the court defined the limits of fiduciary relationships in direct reference to arm's length transactions, holding that when a party to an ordinary commercial transaction is not functioning as an agent, partner, or "coventurer," the recognition of a fiduciary duty "extends too far":²¹²

Probing our precedents and equitable principles unearths no supportable justification for such a judicial interposition, however highly motivated and idealistic. Indeed, responding to this fine instinct would inappropriately propel the courts into reformation of service agreements between commercially knowledgeable parties in this and perhaps countless other situations and transactions as well.²¹³

The court did not, however, find that such parties are without any protection at all.²¹⁴ It found that they may themselves create a relationship of "higher trust" when the court will not do it for them.²¹⁵ And if they choose *not* to take on greater obligations for the other party's benefit, they must rely on the customs and practices of the marketplace²¹⁶ — of which, the court noted, there is nothing "inherently objectionable."²¹⁷

210. See discussion *supra* Part III.A-B.

211. 82 N.Y.2d 158 (addressing whether an investment advisor, or "finder," stood in a fiduciary relationship with a company for whom the finder had agreed to identify an acquirer).

212. *Id.* at 162 (citing H. Jefferson Powell, "Cardozo's Foot": *The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7 (1993)).

213. *Id.*

214. *Id.*

215. *Id.* ("[C]ourts should not ordinarily transport [the parties to a commonplace commercial transaction] to the higher realm of relationship and fashion the stricter duty for them.").

216. See *id.* at 160.

217. *Id.* (citing Benjamin N. Cardozo, *The Nature of the Judicial Process*, reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 152 (Margaret E. Hall ed., 1947)).

The relationships with which Solove is concerned are classic arm's length transactions.²¹⁸ And the fact that such a transaction involves the exchange of personal information should not convert the relationship from one of parties dealing at arm's length into a fiduciary relationship that requires the seller to place the buyer's interests above its own. First, as noted above, the law has never recognized personal information as giving rise to a fiduciary relationship.²¹⁹ Historically, fiduciary relationships involved the exercise of power over another's property, money, business or legal affairs, or ownership interests.²²⁰ The law does not recognize personal information as property or as something in which an individual has an ownership interest.²²¹

Second, even assuming that personal information could serve as the basis for a fiduciary relationship, the buyer has not — by merely handing over personal information as part of a purchase — “entrusted” anything to the seller in the way that this term is used in fiduciary law. “Entrustment” relationships exist when a person has “conferred power on another party” to act on that person's behalf, “thereby requiring the entrusted party to exercise discretion over the entrusting party's financial or other well-being.”²²² The buyer

218. The relationship which is the subject of Solove's proposal exists between a company as seller and one of its customers as a buyer of some good or service offered by the company. This discussion assumes that the provision of personal information is the only basis on which this relationship might be deemed fiduciary, and that there is no other independent aspect of the relationship that would otherwise create a fiduciary relationship. See SOLOVE, *supra* note 1, at 102-04.

219. See Flannigan, *supra* note 160, at 285. See generally Sealy, *supra* note 97.

220. See Sealy, *supra* note 97, at 69.

221. See Samuelson, *supra* note 43, at 1131-32. Professor Samuelson explains that “[i]t may seem natural for individuals to assume that they do or should own data about themselves” because the law protects individuals against misuse or disclosure of their personal data. *Id.* at 1130-31. Nevertheless, that protection “has not historically been grounded on a perception that people have property rights in personal data as such.” *Id.* In American law, such information traditionally “cannot be owned by any person.” *Id.* at 1131. Individuals therefore have no legal right, for example, to prohibit companies from “marketing their personal data to other firms based on information that the individuals disclosed on a product warranty card sent to manufacturers of that product.” *Id.* at 1131-32. Professor Jessica Litman argues that a property-based model is not only inadequate to protect our personal information, but could create more problems than it would solve: “The market in personal data is the problem. Market solutions based on a property rights model won't cure it; they'll only legitimize it.” Litman, *supra* note 22, at 1301.

222. See *supra* text accompanying note 154.

has not conferred such power on the seller because the seller does not hold the information on behalf of the buyer for the purpose of using the information to represent the buyer's interests in any way. Instead, the personal information — such as a credit card number or other payment information, name, address, etc. — is necessary for the seller to be able to complete the transaction because, without this information, the buyer would, for example, not be able to provide the seller with consideration for the bargain, or the seller might have no way to deliver the goods. For a relationship to be deemed fiduciary, however, more is required; one party must undertake *to act in the interests of another*.²²³ By receiving information that is necessary or incidental to the completion of an ordinary commercial transaction, the seller has not undertaken to act on behalf of or in the interests of the buyer. This exchange of personal information is therefore insufficient to create a fiduciary relationship between the two parties.

Third, there are many circumstances in which personal information is provided not because it is necessary to complete the transaction, but for other reasons, such as when consumers hand over their e-mail addresses or information about their product preferences. In these cases, consumers typically receive something in return from the collector, such as personalized information about products and services that match their interests, whether delivered via a website, e-mail, mail, or otherwise. Here, the provision of information is part of a voluntary bargain and individuals assume some risk in giving it up.²²⁴

223. See Scott, *supra* note 87, at 540.

224. Professor Litman explains that consumers are on notice to these information collection practices:

Sometime in the past dozen or so years, most of us became gradually aware of the fact that businesses were collecting information about us to use in marketing products to us. That check cashing card we'd applied for at the supermarket in order to write checks for groceries gave the supermarket the ability to track our purchases; when supermarkets began accepting credit cards, that gave them the same ability. The sweater we ordered from a catalog arrived in the mail along with umpteen new glossy catalogs for people who wear sweaters. That cooking magazine we subscribed to seemed to show up along with a score of apparently independent special offers for folks interested in cooking.

Litman, *supra* note 22, at 1285.

Solove's proposal raises other practical, if not theoretical, questions. If a buyer-seller relationship were deemed fiduciary simply because personal information is exchanged, what class of commercial relations would *not* be subject to fiduciary status and obligations? Solove does not offer any limiting principles that would achieve his goal of protecting personal information without undermining the law's long-established approach of non-interference in such relations. Instead, his proposal effectively eviscerates the very notion of arm's length dealing and renders limitless the reach of fiduciary relations. This is what makes his solution unworkable and, in Solove's own words, so "radical."²²⁵

C. Dispelling the Illusion of Flexibility

Solove acknowledges the challenge of finding a fiduciary relationship between collectors and providers of personal information, yet asserts — without supporting authority — that the law is flexible in responding to new situations and should be flexible in recognizing a fiduciary relationship here.²²⁶ He finds this flexibility in *Swerhun v. General Motors Corp.*, in which the court stated that courts "have carefully refrained from defining instances of fiduciary relationships in such a manner that other and perhaps new cases might be excluded."²²⁷ The *Swerhun* court's full statement reads:

It is settled by an overwhelming weight of authority that the principle [of fiduciary relations] extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal . . . It has been said that [a fiduciary relationship] exists, and that relief is granted, in which influence has been acquired and abused—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those infor-

225. SOLOVE, *supra* note 1, at 103.

226. *Id.* at 104 (citing no authority).

227. *Id.* at 103 (citing *Swerhun v. Gen. Motors Corp.*, 812 F. Supp. 1218 (M.D. Fla. 1993)).

mal relations which exist whenever one [person] trusts in and relies upon another. The only question is, Does such a relation in fact exist?²²⁸

At most, *Swerhun* appears only on its face to state a flexible standard for finding fiduciary relationships. Any suggestion that it provides a basis for recognizing a new category, however, is misguided and the result of a superficial reading of the case and a misunderstanding of fiduciary law. A close reading of the above quote undermines Solove's argument. The court is merely stating that it will not fail to recognize a relationship as fiduciary when the facts show that a fiduciary relationship actually exists and when the relationship at issue is one of the traditional fiduciary relationships.²²⁹ The court's language does not suggest, as Solove would suggest, that *any* relationship may be recognized as fiduciary. Quite the opposite. The court makes clear that the facts must support finding a fiduciary relationship, reminding us where the heart of the matter lies when it states that "[t]he only question is, Does such a relation in fact exist?"²³⁰ Furthermore, the court also makes clear that the relationship at issue must be one of the traditional types of fiduciary relationships in order to be deemed fiduciary. The court defines a fiduciary relationship as one in which "there is confidence reposed"²³¹ and goes on to use the word "confidence" three times, as well as "trusts" and a form of "relies."²³² As we have seen in the origins and development of fiduciary law,²³³ these are descriptors for an already recognized set of fiduciary relations. They not only describe Scallen's "reliance" category,²³⁴ but the very *first* fiduciary relationship recognized by the law, one in which "confidence is reposed."²³⁵ The court is not breaking new ground; it is merely following the well-trodden path of five hundred years of fiduciary law.²³⁶

228. *Swerhun*, 812 F. Supp. at 1222-23 (internal citations omitted).

229. *See id.*

230. *Id.* at 1223. The court's approach is consistent with the analytical approach explained in Part III.B.

231. *Swerhun*, 812 F. Supp. at 1222.

232. *Id.* at 1222-23.

233. *See supra* text accompanying notes 97-135.

234. *See* Scallen, *supra* note 142.

235. *See supra* note 137 and accompanying text.

236. *See supra* note 119 and accompanying text.

The court's statement that "the relation and duties . . . need not be legal," but may instead be "moral, social, domestic, or merely personal"²³⁷ merely refers to the fact that a fiduciary duty need not arise out of a contract-based relationship, and is consistent with the categories of fiduciary relationships outlined above.²³⁸ The reference to a "moral" source of fiduciary relationships cannot be taken as an invitation to expand the doctrine to this context. Professor Deborah A. DeMott observes that courts routinely employ words of moral obligation when discussing fiduciary relationships and obligations,²³⁹ explaining that:

[i]n establishing that the imposition of fiduciary obligation in a particular situation conforms to moral intuition, courts may be responding to the situation-specific quality of the obligation. They may also be responding to the stringency of the standards for assessing a fiduciary's behavior, as well as to the high social value placed on trust.²⁴⁰

There are still two further considerations that caution against such a broad and sweeping interpretation. First, courts themselves have simply not interpreted or applied *Swerhun's* language as broadly as Solove suggests. *Swerhun* has only been cited by two cases and neither provides support for the argument that courts would, or should, embrace Solove's expansive view of fiduciary relationships. In *Amoco Oil Co. v. Gomez*, the district court cited *Swerhun* for no more than the requirement that the party seeking to establish a fiduciary relationship must provide "substantial evidence" of such a relationship.²⁴¹ In *Estate of Ayres v. Beaver*, the district court never even reached the issue of whether a fiduciary relationship existed because it concluded that it lacked subject matter jurisdiction to hear the claim.²⁴² The court only noted that that there was

237. *Swerhun*, 812 F. Supp. at 1223.

238. *See supra* Part III.A-B.

239. *See* DeMott, *supra* note 152, at 891. Examples of courts employing moral language in reference to fiduciary relations or obligations can be found in *Guth v. Loft, Inc.*, 5 A.2d 503, 281 (Del. 1939), and, of course, *Meinhard*, 249 N.Y. at 464, and its many progeny.

240. DeMott, *supra* note 152, at 891-92.

241. 125 F. Supp.2d 492, 510 (S.D. Fla. 2000).

242. 48 F. Supp.2d 1335, 1341 (M.D. Fla. 1999).

“a possibility” that the plaintiff could prove a cause of action based on a breach of fiduciary duty.²⁴³

Second, *Swerhun*'s application is greatly limited by the authorities on which it relies. A review of the three cases the *Swerhun* court cites as support for its seemingly broad language reveals that the relationships recognized as fiduciary in those cases do not represent departures from the traditional conceptions of fiduciary relationships. Indeed, the relationships fall squarely within the traditional categories of fiduciary relationships;²⁴⁴ two of the cases address joint venture relationships and the third addresses a relationship in which a bank “exercised absolute *de facto* control” over its depositors' corporate enterprise.²⁴⁵ In the leading case, *Quinn v. Phipps*, the court found a relationship of trust and confidence between a real estate broker and the principal on whose behalf the broker was to make and negotiate an offer to purchase a piece of land from a third party.²⁴⁶ The real estate broker, the court reasoned, invited the confidence of the plaintiff.²⁴⁷ Just as Justice Cardozo emphasized the special relationship between the co-adventurers in *Meinhard*, the court in *Quinn* emphasized the heightened professional responsibilities attending real estate brokers because they are “the medium through which annually many millions of dollars in earnings and savings are secured or invested.”²⁴⁸ Furthermore, *Quinn* is weak authority for applying *Swerhun* as broadly as Solove advocates. None of the cases following *Quinn* have recognized fiduciary relationships outside of the traditional categories.²⁴⁹

243. *Id.* at 1341.

244. *See* Scallen, *supra* note 142, at 914, and Sealy, *supra* note 97, at 74.

245. *See* *Garner v. Pearson*, 545 F. Supp. 549, 557 (M.D. Fla. 1982) (finding that the defendants, who were shareholders of a bank, were in a fiduciary relationship with the bank and its depositors because the defendants exercised dominion over the entire corporate enterprise at all relevant times, and citing *Quinn v. Phipps*); *Quinn v. Phipps*, 113 So. 419 (Fla. 1927); *Browning v. Peyton*, 918 F.2d 1516 (11th Cir. 1990) (finding issues of fact as to whether a fiduciary relationship existed between parties to an alleged joint venture).

246. *Quinn*, 113 So. 419.

247. *Id.* at 422-23.

248. *See id.* at 425.

249. *See, e.g.*, *Lockhart v. Mundon Hill Farms, Inc.*, 150 So. 233 (Fla. 1933) (involving constructive trust of real property); *Tillman v. Pitt Cole Co.*, 82 So. 2d 672 (Fla. 1955) (involving constructive trust of real property); *Cannova v. Carran*, 92 So. 2d 614, 620 (Fla. 1957) (addressing, *inter alia*, existence of a joint adventure). Additionally,

Thus, *Swerhun*'s reference to "moral, social, domestic, or merely personal" relationships as sources of fiduciary status merely points to those relationships that courts already recognize as fiduciary. It does not, as Solove suggests, create new categories, nor does it authorize a blank check with which courts may recognize new fiduciary relationships or expand the doctrine of fiduciary law.

The traditional approach to recognizing fiduciary relationships is, admittedly, not without critics.²⁵⁰ Tamar Frankel and Robert Flannigan have suggested that the role of fiduciary relations in society, as well as fiduciary law generally, is growing in importance and that this may in turn spark changes in the way courts recognize fiduciary relations.²⁵¹ Frankel asserts that "fiduciary law is becoming more important as it responds to basic changes in our society" and that lawmaking bodies "increasingly draw on fiduciary law to answer problems caused by . . . social changes."²⁵² At the same time, he argues, the current analogical approach to fiduciary law is "unsatisfactory because the analogies frequently do not result in appropriate rules."²⁵³ Flannigan observes that throughout the British Commonwealth, interest in fiduciary obligations is growing and is "forcing the courts to begin to grapple with some very fundamental issues in the area."²⁵⁴ Such predictions about the prospects for change in this area of the law may very well prove true some day. For now, however, the recognition of fiduciary relationships is still solidly anchored in analogy-based reasoning and a new analytical framework has yet to emerge.²⁵⁵ For these reasons, Solove's assertion that fiduciary law is flexible enough to recognize new fiduciary relationships is unsupported or, at least, premature.

Quinn is generally not followed outside of Florida. Shepard's Reports reveals only 219 citing references for *Quinn*, of which all but sixty-four were Florida cases. This is compared to over 1,600 citing references for *Meinhard* throughout jurisdictions nationwide. *Meinhard*, decided the year after *Quinn*, is the leading case on fiduciary relationships and obligations within corporate law and has been followed much more widely than *Quinn*. See, e.g., J.A.C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 11 n.2 (1987).

250. See Frankel, *supra* note 143, at 797.

251. See *id.*; Flannigan, *supra* note 160, at 285-86.

252. Frankel, *supra* note 143, at 797.

253. *Id.*

254. Flannigan, *supra* note 160, at 285-86.

255. See DeMott, *supra* note 152, at 891 (noting that although this approach may be "unsatisfying," it is pervasive, persistent, and an inevitable part of the analysis).

V. CONCLUSION

Recent data breaches have highlighted the disturbing privacy problems resulting from the burgeoning personal information marketplace and the lack of protections available to safeguard our personal information. In response to these developments, Solove is right to argue that the customs of the marketplace alone are not adequate to protect our personal information privacy, and that something more is needed. But that "something more" cannot be the recognition of a fiduciary relationship between companies that collect personal information and the individuals who provide the information. Applying fiduciary law to the collector-provider relationship here would find no fiduciary at all. Furthermore, the imposition of fiduciary status in this context would convert nearly every buyer-seller transaction into a fiduciary relationship, thereby eliminating the very concept of arm's length dealing.

This is not to say that companies that collect personal information should be free of any obligations regarding the protection of that information, or that those companies should have no duty whatsoever to the individuals who provide their personal information in the course of a transaction. It is simply to acknowledge, as Solove fails to do, that the theoretical existence of a fiduciary relationship cannot be considered apart from the practical implications of its enforcement.²⁵⁶

256. See Davis, *supra* note 123, at 3.