

Vast Scale Undue Influence

Author : Hila Keren

Date : May 20, 2022

Jamie Luguri & Lior Strahilevitz, [*Shining a Light on Dark Patterns*](#), 13 **J. Legal Analysis** 43 (2021).

Each time we browse the web, we are steered into making dubious contracts. A common [example](#) is digital platforms' pressure that users click to 'ACCEPT ALL COOKIES.' Web designers not only make the 'accept' button the most eye-catching option, they often enhance the effect by having it block what users really want to view. Additionally, the disfavored behavior of rejecting some cookies is intentionally made to frustrate, frequently requiring users to navigate through several screens and choose between deliberately confusing alternatives. When users surrender to this design, they consent to sell their information to innumerable entities without reward—manipulated into donating their private data to sophisticated strangers.

In *Shining a Light on Dark Patterns*, Jamie Luguri and Lior Strahilevitz do a remarkable job explaining and demonstrating the problem and starting the search for solutions. Their important article contributes to a growing body of literature that discusses the fast-spreading phenomenon of using big data and advanced technologies to prey on human biases and maneuver the decision-making of countless people. As the authors specify, the behavior is based on "altering online choice architecture in ways that are designed to thwart users' preferences for objectionable ends." (P. 52.) Their article presents a long list of recognized methods used to manipulate customers, offering examples that would be too familiar to apps and digital platforms users. And, yes, these examples include the method of convincing people to choose the firm-friendly option of accepting all cookies, calling it "interface interference."

Scholars have used various terminologies to capture those vast scale manipulations. While Luguri and Strahilevitz use the term dark patterns, others have referred to [digital](#) or [online](#) manipulations and [deception by design](#). Regardless of title choices, researchers seem to agree that the problem is significant and urgent, perhaps "[the most alarming](#) problem confronting us today." *Shining Light on Dark Patterns* considerably substantiates this claim.

The article reports two large-scale experiments that provide evidence that efforts to manipulate the masses actually work. Here is how the authors summarize their main finding: "Our bottom line is that *dark patterns are strikingly effective in getting consumers to do what they would not do when confronted with more neutral user interfaces.*" (P. 46, emphasis by the authors.) The experiments also offer two more nuanced but as meaningful results. First, they show (somewhat counterintuitively) that the most effective manipulations are the subtler ones, while the power of more aggressive interventions tends to be countered by a backlash. Second, they illuminate a distributive effect, demonstrating that less educated Americans are more likely to be swayed by dark patterns than their more educated counterparts.

Turning from experiments to the law, the authors discuss ways to regulate dark patterns. Their rich analysis leads them to argue that "[t]he contract doctrine of undue influence provides the most promising existing framework for efforts to curtail dark patterns." (P. 94.) This is a valuable idea that deserves closer attention. As the authors point out, the relevancy of the doctrine comes from its focus on unfair persuasions that impair the exercise of judgment by influenced parties. On this point, they compellingly argue that since their experiments show an intentional and impactful interference in

people's decision-making, the doctrine of undue influence can and should be used in the digital context.

However, the article alludes to the limitation arising from the doctrine's conventional narrowness. In particular, it refers to the doctrine's demand for a special relationship between influencers and the people they exploit. The authors' general response to this challenge is based on their observation that "some courts construe the relationship language broadly." (P. 94.) The problem is, of course, that there are not too many cases that prove this point. Accordingly, Luguri and Strahilevitz ultimately concede that handling dark patterns with conventional undue influence tools "would amount to *an extension of the doctrine*." (P. 96, emphasis added.) Nonetheless, they state that such an extension would be desirable in light of the darkness they describe and "consistent with the purpose of the doctrine." (P. 96.)

The article's call to use the doctrine of undue influence against digital manipulations is invaluable. Indeed, the doctrine relies on a triangle of dominance, vulnerability, and a harmful contract, and this triangle can be found in various contractual scenarios, old and new alike. The problem is that the doctrine has long been applied too narrowly, preventing many from seeing how it can be utilized to address new realities. As the article suggests, part of the challenge comes from the conventional insistence that the parties will have a particularly close relationship, such as in the cases enumerated in the Restatement (Second) of Contracts, which include, for example, "parent and child, husband and wife, clergyman and parishioner, and physician and patient." By contrast, dark patterns operate between strangers. Moreover, compared to the classical stories of undue influence, they are distinct in their "newness, scale, and effectiveness of techniques." (Pp. 45-6.)

Those notable differences, however, should support rather than undermine the authors' claims regarding undue influence. The doctrine's *past* focus on relationships that reside at the margin of the market should not prevent us from using it to handle contemporary and emerging issues that occur at the heart of the marketplace.

It should be further noted that another obstacle to applying undue influence to novel and vast forms of manipulation is the doctrine's traditional focus on the most extreme cases of vulnerability. For example, common law scholars [describe](#) claimants of undue influence as "impaired in their judgmental capacity" due to "*their morbid dependence on another*." However brazen, this description reflects the more general belief that only the pathologically vulnerable should be awarded relief under the doctrine. At the same time, it strongly suggests that ordinary users of contracts are *not* vulnerable and thus should be able to resist manipulations without legal help.

Yet, this view is misleading. In reality, as the vulnerability theory reminds us, [we are all vulnerable](#) due to our embodied humanity. And, counter to the neoliberal myth, people's survival and thriving always entail dependency on others and susceptibility to influence. Indeed, firms and web designers are fully aware and ready to profit from the moderate vulnerabilities shared by ordinary people. As the authors explain, "[Dark patterns] typically prompt users to rely on System 1 decision-making rather than more deliberate System 2 processes, exploiting cognitive biases like framing effects, the sunk cost fallacy, and anchoring." (P. 44.) In fact, recent literature [demonstrates](#) that digital manipulations can trick even Google software engineers.

New technologies make it easier to detect and exploit vulnerabilities in a *systematic* way that reaches *everyone* and is—as Luguri and Strahilevitz show—uniquely effective. This problem is presently acute and undoubtedly will further intensify. While concrete rules may help, we must also utilize existing flexible standards such as the one offered by the doctrine of undue influence to timely respond to emergent variations of manipulations. In the face of obstacles rooted in the doctrine's conventional application, works like *Shining Light of Dark Patterns* justify a call for its modernization so that law can

meet rising challenges to contracts' voluntary nature.

Cite as: Hila Keren, *Vast Scale Undue Influence*, JOTWELL (May 20, 2022) (reviewing Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 **J. Legal Analysis** 43 (2021)), <https://contracts.jotwell.com/vast-scale-undue-influence/>.