

The background of the journal cover features a top-down view of a desk. On the left, a pair of black leather brogue shoes is partially visible. In the center, an open notebook with lined pages and a silver pen lies on a light-colored wooden surface. To the right, a black leather bag with a zipper and a black leather watch with a silver face are also visible. A large, semi-transparent white rectangular box is centered over the image, containing the journal's title and ISSN information.

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CONSENT OR COERCION? EXAMINING USER CONSENT VALIDITY IN THE PRESENCE OF DARK PATTERNS

AUTHORED BY - MUDITA SINGH

1. Framing the Illusion: Why “Consent” Needs Re-examination

Legal bases of digital platforms obtain consent with the help of users, which is paradoxical: the interfaces that request it are created to manipulate, lead, and even predetermine the choice of the user. What is perceived as a voluntary agreement can be regarded as an outcome of well-planned decision scenarios that are designed in a manner that would support acceptance instead of rejection. Dark patterns can subsequently be regarded not merely as unethical design practices, but as regular breaches of choice architecture that can predictively reorient user behavior¹. This negates the first assumption of the consent being the expression of free will.

The traditional theory of consent presupposes that the people are under the assumption of acting rationally, are equipped with adequate information and are free to choose. However, the digital places are removing all the three conditions at the same time. The default and frame; the obscure with complexities and overloads and constrain meaningful choices using design friction are done by cognitive bias². Thus, consent is no longer an intent but a manifestation of manipulation as an element of interface design.

This brings up an important doctrinal conflict: in the event that the architecture of choice is manipulative in itself, is consent is still legally valid? The major question of the paper, thus, is to find out what is the point at which design-driven influence turns into coercion. It is claimed that consent that has been obtained under those circumstances is not only flawed, but also legally defective, which requires a recalibration of consent doctrine in order to consider the architectural dominance in the decision-making process.³

¹ Colin M. Gray et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 Proc. ACM Hum.-Comput. Interaction 1 (2019).

² Alessandro Acquisti et al., *Nudges for Privacy and Security: Understanding and Assisting Users' Choices Online*, 7 ACM Computing Surveys 1 (2017).

³ Harry Brignull, *Dark Patterns: Inside the Interfaces Designed to Trick You* (2023).

2. Deconstructing Consent: From Autonomy to Formalism

The concept of consent in legal thought has traditionally rested on the concept of individual autonomy, especially in the field of contract law and data protection regimes. Anything that is not limited by circumstance is not a ground to vitiate free consent, in the doctrine of contract, which includes, but is not limited to, coercion, undue influence, misrepresentation or fraud, and all of which is based on recognizable external force or misrepresentation of information.⁴ Similarly, legal frameworks of data protection establish consent to be freely given, specific, informed, and unambiguous, thereby bringing about autonomy as the normative core of legal processing⁵. It is an assumption that is shared by the two domains, in both cases people are cognitively competent agents, capable of processing information, deliberating in options, and making voluntary decisions, in a fairly neutral space.

However, this model based on autonomy leaves out a significant shift of contemporary digital practice. Formalisation of consent has increasingly been turned into formalities by the checkbox, the click-through deal, the standardised banner, etc., yet this is all a matter of formal compliance, rather than of voluntariness. The mere fact of clicking the I agree button is even thought to be sufficient legal assurance in spite of the circumstances in which such action was produced. This has made the consent doctrine more concerned with the safeguarding of the quality of the decision making, but only demonstrating the existence of an affirmative act⁶. This institutionalization renders consent to a ritual of transaction depriving it of its normativity in autonomy.

The main flaw of this model is that its dogma is insensitive to the behavior and architectural contexts that affect the choices made by users. The systematic effect of cognitive bias such as default effects, framing, and loss aversion on decision-making process is largely ignored in the modern legal systems. Otherwise absent, as well, is any meaningful interaction with interface manipulation or behavioral nudging, despite a long history of empirical research that they do have an effect on user behavior⁷. Neutralizing the decision making environment is not the engineering of consent since it does not cast any questions on the law in case it is a clear expression of consent.

This distance offers structurally permissive space whereby the dark patterns can exist without the doctrinal questions. Since the law considers the presence of the consent to be just formal,

⁴ Restatement (Second) of Contracts §§ 164–177 (Am. L. Inst. 1981).

⁵ Regulation (EU) 2016/679 (General Data Protection Regulation) art. 4(11).

⁶ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 3–5 (2014).

⁷ Cass R. Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* 21–25 (2016).

manipulative design may not be observed by the law, so long as the requirements of the process are met. The current system then complains on the ground that its very existence is a plea of uncongenial self-preservation where consent is yielded in defence of a legal defence in a decision making process which is fundamentally crippled.

3. Dark Patterns as Architecture of Manipulation

Dark patterns are usually framed through the lens of design as unethical user interface design practices, although this type of definition deemphasizes their structural and legal significance. Dark patterns are themselves considered to be architecture of manipulation, a systematic construction of environment that re-tunes the user choice in predictable ways. They do not matter in individual cases of deception but in the cumulative arrangement of circumstances of choice that is efficacious without its coercion. The result of such reconceptualization is the possibility to substitute descriptive taxonomy with analytical classification with legal implications to put dark patterns within the framework of the broader debate of coercion and autonomy.⁸

A functional classification presents particular mechanisms as per which manipulation occurs. Obstruction patterns form, including roach-motel-shaped patterns, which provide an unequal friction, exit being difficult and entrance being easy. Deceptive framing is a perception manipulation device, which uses linguistic ambiguity and visual hierarchy to direct the user to the preferred option and which has the pretence of being neutral. The forced action conditions reduce the significant decision to a take-it-or-leave-it situation by offering access to services on a bundled-consent basis. Finally, interface interference takes advantage of the default bias by priori selection of interfaces or designing interfaces in a way that allows going against the default to consume disproportionate cognitive resources in the task.⁹ These classifications are not so important as descriptive but how design can be a modality of control.

These mechanisms are based on the underlying logic of behavioral economics. Empirical studies show that people are systematically affected by default effects, loss aversion, and choice overload, which can be exploited strategically by designing interfaces¹⁰. Dark patterns exploit these cognitive biases to manipulate decision making in a way that is not intended and even unnoticeable by the user. Decision environment is thus no longer a neutral environment, it is

⁸ Colin M. Gray et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 Proc. ACM Hum.-Comput. Interaction 1 (2019).

⁹ Harry Brignull, *Dark Patterns: Inside the Interfaces Designed to Trick You* (2023).

¹⁰ Cass R. Sunstein & Richard H. Thaler, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 6–9 (2008).

set up to produce some consequences.

The highly significant fact is that dark patterns do not eliminate choice, but recalculate it, limiting the available options without necessarily involving force. This brings up a legal issue which is at bottom that is, whether coercion contains indirect forms of pressure which restrain autonomy, might manipulation by design (by acting by cognitive and structural constraints) be considered a form of coercion before the law?

4. Coercion Without Force: Expanding the Legal Threshold

The classical legal doctrine views coercion with a limited understanding of coercion that is based on physical force or illegal threats that deny a person the volition of choice. In the law of contract, duress has long been thought to necessitate provable duress, that is, duresses to person, property, or legal right, and thus has placed such a high burden of evidence on the plaintiff.¹¹ This kind of a formulation makes coercion highly inapplicable to the realm of digital space, where manipulation is possible without the threat. Because of this, consent obtained by interface design is usually not subject to the classic definition of coercion, although the autonomy of the user can be in the background significantly undermined.

But this restrictive conception has already been broadened by the developments in doctrine. The principles of undue influence and economic duress acknowledge that coercion can exist that is not based on explicit threats but rather subtle pressures that may take advantage of weakness and power asymmetries.¹² In *Allcard v. Skinner*, the court recognized the fact that domination over will can render consent invalid without the use of overt force,¹³ and although *Williams v. Bayley* records the manner in which the pressure of a situation may destroy voluntariness,¹⁴ Similarly, the economic duress jurisprudence in the case of *Pao On v. Lau Yiu Long* does not reject that may cause constrained options to result in the occurrence of legally cognizable compulsion.¹⁵ It is not force, but the distortion of the volitional capacity by imbalance and dependence which is the guiding principle in all these doctrines¹⁶.

These forces are multiplied and stretched to digital ecosystems. The platforms are typified by high information asymmetry, unilateral control on interface design, and plenty of behavioral data to predict and control user behavior. These components produce situational compulsion

¹¹ Restatement (Second) of Contracts § 175 (Am. L. Inst. 1981).

¹² Ewan McKendrick, *Contract Law: Text, Cases, and Materials* 377–82 (9th ed. 2020).

¹³ *Allcard v. Skinner*, (1887) 36 Ch. D. 145 (C.A.).

¹⁴ *Williams v. Bayley*, (1866) L.R. 1 H.L. 200.

¹⁵ *Pao On v. Lau Yiu Long*, [1980] A.C. 614 (P.C.).

¹⁶ Mindy Chen-Wishart, *Contract Law* 431–35 (6th ed. 2018).

(e.g., friction in opt-outs or bundled consent), and cognitive pressure, and take advantage of biases such as default effects and loss aversion, and with the support of dark patterns¹⁷. The fact that there are no immediate threats is not a reason to cease the fact that there are no coercions and that can be considered as the change in the brash pressure to the subtle one.

This paper takes the notion of an architectural coercion further to describe this phenomenon: the notion of coercion integrated into the architecture of spaces of decision making, but not isolated instances of coercion. Architectural coercion seems to be continuous unlike traditional coercion which is periodic and visible and influences the decisions of individuals by limiting meaningful decisions. It renders design a site of coercion in which the consent is manufactured through the circumstances of organized power.

It is in opposition to this that law should cease to be act-centric but should instead take the manipulated environments as coercive situations. In the absence of such change in the doctrine, the consent doctrine would fall under the archaic postulations whereby structurally coerced decisions would be permitted to perpetuate formal legalism in autonomy despite substantive debilitation of autonomy.

5. The Collapse of “Informed” and “Freely Given” Consent

The doctrine that consent must be informed assumes that users are able to access, process and meaningfully interpret the information on which decisions are made. In practice, though, privacy disclosures are overly long, are too legalistic, and are structurally opaque, making them practically inaccessible to everyday users. Empirical evidence has shown that these notices are hardly read and understood even more rarely, which compromises the informational predicate of consent¹⁸. This deficiency, in the digital realm is superimposed at a greater scale in the form of the dark patterns which actively manipulates the attention itself by distraction, visual disorientation and interface clutters and, therefore, displaces the attention elsewhere than material terms. The result is not half knowledge and nothingness, where the consensus is officially well informed but filled to a large extent with empty content.

Even that the consent must be given freely does not apply to the current platform architectures. The digital services will tend to be provided in the form of take-it-or-leave-it and neither option of either one is a realistic choice. Even though there is nominal choice, in most cases it is

¹⁷ Cass R. Sunstein & Richard H. Thaler, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 6–9 (2008).

¹⁸ Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & Pol’y for Info. Soc’y 543 (2008).

framed with spaces of design which are framed with emotional framing, urges or friction asymmetries to provoke the outcome. These processes are not coercive in a more traditional sense, but instigates a systematic compulsion through cognitive and behavioural prompting, and depreciation of the world of meaningful refusal¹⁹. Voluntariness is not then killed, but is choke-strangled.

Most importantly, the mentioned gaps are not the byproducts of the design inefficacy. Instead, they are made into systematically engineered systems of influence where both the lack of transparency and resistance are not incidental but beneficial attributes of user interfaces. The reason why the informational crowding and the smaller space of choice inevitably leads to the consent to be uninformed in content, and unfree in form.

In this regard, the doctrine of validity of consent cannot be fulfilled by the consent elicitation in the context of the influence of dark patterns. It is not informed and not in any way voluntary and an act of structural disintegration of consent as a valid act of legal autonomy in decision making.²⁰

6. Regulatory Fragmentation and Its Limits

Modern law in response to manipulative digital practices is spread out across various regulatory frameworks, with a prominent role in data protection and consumer protection law. Legality is mostly operationalized using disclosure-based compliance, which is the framework of data protection, especially the consent system, where specificity, disclosure, and affirmative action are used as proxies to autonomy.²¹ In contrast, consumer protection regimes are aimed at banning deceptive trade practices, dealing with misleading representations, omissions or unfair commercial practices.²² Although both frameworks are related to vulnerability of users, there is a difference in one of the frameworks, namely informational transparency, and the other one, which is deception in the market.

This dichotomous arrangement causes an essential breakdown of regulation. The law of the protection of data presupposes that the harm is the result of informational asymmetry, and as such tries to mitigate the same, by increasing the disclosure requirements. Consumer law on the other hand assumes that harm is suffered due to the misrepresentation and thus it deals with either direct or indirect misrepresentation or unfairness in commercial communication without

¹⁹ Cass R. Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* 21–25 (2016).

²⁰ European Data Protection Board, *Guidelines 05/2020 on Consent under Regulation 2016/679* (2020).

²¹ Regulation (EU) 2016/679 (General Data Protection Regulation) art. 5–7.

²² Federal Trade Commission Act, 15 U.S.C. § 45 (2022).

considering the direction of the misrepresentation. Nonetheless, both of the frameworks lack structural capability to deal with manipulation in the interface architecture where power is exercised without falsely asserting or real deficiency of information.

The resulting gap is conceptually intriguing: the absence of a common legal system of values that would have the power to imagine the manipulative pattern as the coercion of form and not the single and only malpractice. Dark patterns capitalize on this very gulf, by existing in those areas where disclosure technically exists, and disbelief cannot be directly proved. This means that the regulatory review is more of a non-in-depth version of compliance i.e. it was disclosed or the statements were misleading and not the design of the decision environment.

Therefore, the current rule is restricted to the indications of manipulation- including acts or omissions of misleading- and not to the structural circumstances of manipulation in architecture design. This symptomatic solution does not allow law to combat the actual issue of imposed autonomy in the online domains. The non-existence of a doctrinal convergence between the regimes means that manipulative design is in the regulatory blind spot and is not subject to legal limitations, but poses a challenge to meaningful consent in a cumulative manner.²³

7. Toward a Substantive Consent Doctrine

The doctrinal insufficiency revealed by dark patterns requires a transition to a substantive doctrine of consent based on autonomy, rather than formal consent models that depend on the checkbox compliance and disclosure ritual. The consent law, as it exists today, ratifies the procedural expression and not evaluative integrity, thus allowing manipulation to function below the standard of legal inquiry. Instead of assessing the presence of affirmative act, a substantive framework should evaluate whether consent is a genuinely autonomous decision-making condition, not just because an affirmative act is present.²⁴

This will be a shift whereby the platforms will come up with a design neutrality requirement where the platforms will design interfaces in a way that does not favor the user preference. This does not imply that there are no mechanisms of influence but it does indicate that there are no asymmetric steering mechanisms that can be foreseen to influence the outcome of the decisions in a biased manner. Add to this is the ban on manipulative choice architecture which would make interface designs that would manipulate cognitive biasing or blocking escape or containing coercive default criminal.

²³ Woodrow Hartzog, *Privacy's Blueprint: The Battle to Control the Design of New Technologies* 112–15 (2018).

²⁴ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 3–7 (2014).

This framework entails a burden-shifting strategy to ensure that it occurs. Instead of making a user demonstrate that the manipulation took place, the platforms should be able to demonstrate that the consent was not obtained in a structurally coercive manner. It transforms the pre-existing asymmetry of evidence into the digital consent regimes and the legal vetting procedure into the facts of the information control.

This re-construction of the doctrine is the so called Autonomy Integrity Test, in which we are given: Would a reasonable user have chosen the same given no manipulation of the design? This test restates the emphasis on the content of the expression of approval of the healthiness of the environment of the decision itself. It involves counterfactual examination into law where the courts have been capable to establish that consent is an act of actual volition or any type of coerced compliance²⁵.

8. Conclusion: Reclaiming Consent from Design Control

As this paper has shown, the contemporary doctrine of consent is becoming more of a defense of platforms which masks structurally engineered manipulation under procedural compliance. The dark patterns say more about the design: the leadership in the interface design translates to leadership in the user choice, and, by extension, autonomy is supplanted by engineered compliance. Under these circumstances, consent cannot be an expression of free will any longer but a pre-determined outcome of the manipulated decision-making rooms. Even in such cases when substantive autonomy is absent, legal validation will be maintained, which will indicate a growing lack of compatibility between formal and normative legitimacy²⁶. Until the doctrinal frameworks can transform to question the architecture of choice itself, consent will remain somewhere in a dual state, both legally sound and normatively empty, eroding its position in the framework of both the contract and the data protection regimes.²⁷

²⁵ Cass R. Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* 54–58 (2016).

²⁶ Cass R. Sunstein, *The Ethics of Influence: Government in the Age of Behavioral Science* 54–58 (2016).

²⁷ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 3–7 (2014).