

MANIPULATIVE DESIGN: DEFINING AREAS OF FOCUS FOR CONSUMER PRIVACY

FILTER 

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In consumer privacy, the phrase “dark patterns” is everywhere. Emerging from a wide range of technical and academic literature, it now appears in at least two US privacy laws: the [California Privacy Rights Act](#) and the [Colorado Privacy Act](#) (which, if signed by the Governor, will come into effect in 2025).

Under both laws, companies will be prohibited from using “dark patterns,” or “**user interface[s] designed or manipulated with the substantial effect of subverting or**

impairing user autonomy, decision-making, or choice,” to obtain user consent in certain situations—for example, for the collection of sensitive data.

When organizations give individuals choices, some forms of manipulation have long been barred by consumer protection laws, with the Federal Trade Commission and state Attorneys General prohibiting companies from deceiving or coercing consumers into taking actions they did not intend or striking bargains they did not want. But consumer protection law does not typically prohibit organizations from persuading consumers to make a particular choice. And it is often unclear where the lines fall between cajoling, persuading, pressuring, nagging, annoying, or bullying consumers. The California and Colorado laws seek to do more than merely bar deceptive practices; they prohibit design that “subverts or impairs user autonomy.”

What does it mean to subvert user autonomy, if a design does not already run afoul of traditional consumer protections law? Just as in the [physical world](#), the design of digital platforms and services always influences behavior — what to pay attention to, what to read and in what order, how much time to spend, what to buy, and so on. To [paraphrase Harry Brignull](#) (credited with coining the term), not everything “annoying” can be a dark pattern. Some examples of dark patterns are both clear and harmful, such as a design that tricks users into making recurring payments, or a service that offers a “free trial” and then makes it difficult or impossible to cancel. In other cases, the presence of “nudging” may be clear, but harms may be less clear, such as in beta-testing what color shades are most effective at encouraging sales. Still others fall in a legal grey area: for example, is it ever appropriate for a company to repeatedly “nag” users to make a choice that benefits the company, with little or no accompanying benefit to the user?

In Fall 2021, Future of Privacy Forum will host a series of workshops with technical, academic, and legal experts to help define clear areas of focus for consumer privacy, and guidance for policymakers and legislators. These workshops will feature experts on manipulative design in at least three contexts of consumer privacy: (1) Youth & Education; (2) Online Advertising and US Law; and (3) GDPR and European Law.

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AS LAWMAKERS ADDRESS THIS ISSUE, WE IDENTIFY AT LEAST FOUR DISTINCT AREAS OF CONCERN:

- **Designs that cause concrete physical or financial harms to individuals.** In some cases, design choices are implicated in concrete physical or financial harms. This might

include, for example, a design that tricks users into making [recurring payments](#), or makes unsubscribing from a free trial or other paid service [difficult or impossible](#), leading to unwanted charges.

- **Designs that impact individual autonomy or dignity (but do not necessarily cause concrete physical or financial harm).** In many cases, we observe concerns over autonomy and dignity, even where the use of data would not necessarily cause harm. For the same reasons that there is wide agreement that so-called [subliminal messaging](#) in advertising is wrong (as well as [illegal](#)), there is a growing awareness that disrespect for user autonomy in consumer privacy is objectionable on its face. As a result, in cases where the law requires consent, such as in the European Union for placement of information onto a user's device, the law ought to provide a remedy for individuals who have been subject to a violation of that consent.
- **Designs that persuade, nag, or strongly push users towards a particular outcome, even where it may be possible for users to decline.** In many cases, the design of a digital platform or service clearly pushes users towards a particular outcome, even if it is possible (if burdensome) for users to make a different choice. In such cases, we observe a wide spectrum of tactics that may be evaluated differently depending on the viewer and the context. Repeated requests may be considered “nagging” or “persuasion”; one person’s “clever marketing,” taken too far, becomes another person’s “guilt-shaming” or “confirm-shaming.” Ultimately, our preference for defaults (“opt in” versus “opt out”), and within those defaults, our level of tolerance for “nudging,” may be driven by the social benefits or values attached to the choice itself.
- **Designs that exploit biases, vulnerabilities, or heuristics in ways that implicate broader societal harms or values.** Finally, we observe that the collection and use of personal information does not always solely impact individual decision-making. Often, the design of online platforms can influence groups in ways that impact societal values, such as the [values of privacy](#), avoidance of “tech addiction,” free speech, the availability of data from or about marginalized groups, or the proliferation of unfair price discrimination or other [market manipulation](#). Understanding how design choices may influence society, even if individuals are minimally impacted, may require examining the issues differently.

This week at the first edition of the annual [Dublin Privacy Symposium](#), FPF will join other experts to discuss principles for transparency and trust. The design of user interfaces for digital products and services pervades modern life and directly impacts the choices people make with respect to sharing their personal information.

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