

Episode 9: Dark Patterns Dark Intentions

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Sara Gras: I'm Sara Gras and this is Episode 9 of Season 2 of Hearsay from the Sidelines, a show about the place where law, sports, and culture intersect brought to you by Culture in Sports and Seton Hall Law School's Gaming, Hospitality, Entertainment and Sports Law program. I wrapped up this season, which focused on the explosive growth of online sports betting, a couple months ago, so I'm presenting this episode, not so much as an epilogue, but as a worthy addition to that body of work.

One of my goals in creating this podcast initially was to integrate podcasting into the traditional world of legal scholarship, and one important aspect of this space is student-run law journals and student-written notes. So it seemed like the right place to create a forum for a student whose note I am supervising this year to talk about his research and his work-in-progress, which is perfectly aligned with the subject of this season.

Sara Gras: Hi, James. So thank you so much for taking time over your winter break to record this epilogue to Season 2 of Hearsay from the Sidelines with me. Just by way of introduction, can you just tell us who you are and why I asked you to sit down with me today?

James Barton Yeah, sure. So I just want to start off by thanking you, Professor, for allowing me to have this platform. Not many law students have the ability to speak about the comment that they're writing for law review, which is the reason why you invited me here today. I'm a 2L at Seton Hall University School of Law and I've just been kind of considering this topic for a bit of time. I'm writing on the use of a manipulative design practices in online sports books and how they entice people to continue betting and the potential for a duty of care to be implemented on these online sports books to mitigate this issue. This kind of arose for me at least, I don't gamble all that much, but I have a ton of friends that do, so seeing them and being around them as they gamble, I I just things started to kind of click

over time like oh this is this is a little bit more tense than even like terrestrial casinos and gambling there. So that's how this idea kind of came to be.

Sara Gras: Yeah, and I really resonated with the proposed topic for your comment because of the podcast and what you are experiencing really reflects sort of what I learned throughout the season interviewing people that work in both the gaming space and the gambling addiction space and treatment space. So it's really interesting that you observed it in your own life first hand amongst your peers and decided that this would be worth writing about. So tell me a little bit more about how you got to this topic of manipulative design and its use in online sports betting.

James Barton Yeah, sure. So I originally wanted to write about this act that I had seen, the Detour Act, which had been it proposed in Congress essentially to kind of like a blanket federal legislation that was going to kind of restrict the use of manipulative design practices. And I couldn't find a lot of of material on that topic. So I kind of pivoted. And again, just being around some friends in law school and, you know, undergraduate at college who were engaging in in online gambling, I just decided to look into that a little bit more and kind of mesh that with my my original topic, which was, well, let me look at these manipulative design practices through this detour act. And I had found that online sports books seemingly use a lot more manipulative design practices than people are maybe willing to give credit for and I was like there might be an idea here and so I just began to explore that a little bit more and and over time reviewing a couple of different articles I found that this was an area that hasn't been very well covered and I think that it that there are some issues here that should be brought to light.

Sara Gras: Yeah. And I thought it was such a good topic because as I did my preliminary research, this was something that I had not really seen discussed, even in the context of restrictions on advertising and marketing within the sports betting space. So you specifically explore the use of dark patterns, dark nudges and other types of manipulative design practices. So can you give some examples of those and maybe how explain a little bit about how they are different?

James Barton Yeah, sure. So these terms I I in my comment, I use dark patterns, dark nudges and sludge. They come from a large interdisciplinary field. So a lot of the times these terms overlap. So dark patterns can look like dark nudges, vice versa. Sludge can look like dark patterns etcetera. But more basically, each of these terms kind of describes a manipulative practice that benefits an online sports book to the detriment of the end user. So, for example, dark patterns are typically described as manipulative tricks in software that get users to complete an action that they otherwise wouldn't. An example of that would be a preset deposit limit that's intentionally higher than a user would be comfortable

depositing. So like if it's set to \$25 when a user is normally only going, going to deposit \$10 and they just aren't aware of this and they automatically deposit the 25.

A dark nudge is a little bit different from dark patterns, though it's kind of a subset of dark patterns. They're design features that exploit behavioral biases to steer users towards choices that are preferable for the online sports, sports books. One example here would be the accumulator bet, and I think they're more colloquially referred to as parlays, where they prey upon the conjunctive fallacy. People overestimate the probability of a chain of events occurring because one of the events in the chain is very easy to to be understood as as occurring or easy to imagine happening. And so that's the way that a dark nudge kind of differs from dark patterns.

Which by contrast, sludge is a friction that makes a good decision harder. So an example of that in the online sportsbook context would be navigating through like a labyrinth of windows to get to a cancellation or a withdrawal screen, or maybe even burying essential terms of an accumulator bet or another type of bet in a really dense and lengthy agreement filled with legalese. That's kind of how these terms differ and where some of them may overlap.

Sara Gras: Yeah. And you see these even in all types of online spaces, right? We haven't had a lot of time to gather data on how online sports betting has or will impact the prevalence of gambling harms. So how are you drawing the conclusion, or how do you think one can draw the conclusion that these types of manipulative design practices are effective and as a result of being effective, potentially dangerous?

James Barton Yeah, I so the, I guess PASPA, which is the the act that had restricted sports gambling federally in the United States, has it's it's only been repealed now. I think it's been 7 years. We're going on 8 years now. So there's not been a lot of time where we've we've had an ability to research gambling harm, specifically in the online sports book context. So in in that respect, in my comment at least, I tried to draw a parallel between online sports books and electronic gambling machines, which online sports books over time, we've seen that they've kind of mimicked this electronic gambling machines, the tactics that they employ to try and draw users in and to make them gamble more. Traditionally, sports gambling was limited by slow paced games, whereas electronic gambling machines could allow better place wages consistently and frequently. And so I guess going back to this, online sports books could not increase the speed at which a game, an NFL game, finishes. It's going to be the three hours that it is.

But what an online sports book could do to try and increase the frequency with which a person bets to mimic an electronic gambling machine is they could offer things such as

micro bets or in play betting, which allows a user to place bets on teams as odds fluctuate throughout a game. When the home team begins to win or lose, a bettor can then bet on them or hedge their bets by betting on another team. Or they can bet on in-game happenings or or micro bets where they can bet on the the first basket to be scored. Or you know whether a certain player will score X amount of points or have X amount of rebounds. And so this increases betting frequency, which makes it look more like an electronic gambling machine which we have a tons of research on, and it shows that electronic gambling machines, which use very frequent bets and frequent betting payouts, lead to higher rates of problem gambling over time and actually lead people to get into more addictive patterns of gambling.

I think that it's also important to note that accessibility of online sports books through mobile devices and obviously that's the way that you access an online sports book is only increasing the amount that people are able to play and where electronic gambling machines located at terrestrial casinos were limited by the operating hours of the casino. We now see that the 24/7 gambling on mobile apps has allowed individuals to gamble at any time of the day, so long as there is a game being broadcast, which with modern technology allows a person in the United States at 3:00 AM to watch a game that's occurring in a European basketball league in the morning, or vice versa.

Sara Gras: Right. And the sheer number of sports that exist and that are now available as you know, vehicles to wager on is just again, as you mentioned, exponentially increasing every day. Given that sports betting has been online, sports betting has been legal in other parts of the world much longer than it has been in the US, has the use of manipulative design practices, you know, been limited or banned in other countries? Or are there other contexts or industries in which the United States has already addressed the use of these practices?

James Barton Yes. So at least in the UK and in Europe there are or there have been some some steps taken to try and limit and reduce the use of of dark patterns because dark patterns being embedded into online sports books are probably just as recent I guess as the, the introduction of online sports gambling in the US, it seems like the problem isn't that much different in the UK than it is or in other European countries than it is in the United States. So I think it's more about looking to other industries in the US where these dark patterns have actually been regulated a little bit more. States such as California have amended their Consumer Privacy Act to ban companies obtaining information through dark patterns. And then I I know that at least ten other states have followed California's lead and adopted similar language in their privacy statutes which is just more of an

encompassing overall ban on dark patterns and not necessarily a specific industry that it's that it's targeted towards.

In addition, the Federal Trade Commission has classified dark patterns as an unfair design practice under Section 5 of their Operating Act. And in two recent cases, the FTC actually brought suit against companies for violating Section 5 of its act, one of which was in, I believe it was 2022 against Epic Games Fortnite, which was resolved in 2023. Epic Games was essentially using patterns to trick players into making unintended in-game purchases, which was targeted towards children through its popular game Fortnite. And they made purchases without parental consent through the use of dark patterns. And so the FTC sued and they subsequently were able to settle for \$45,000,000 in that case. More recently, there was a settlement this year or this past year where the FTC sued Amazon. Amazon knowingly misled millions of consumers into enrolling people into Amazon Prime through the use of confusing and deceptive user interfaces and they created a difficult process for then canceling the subscriptions once users found out that they had they'd been duped into enrolling in Amazon Prime and that settlement was for \$2.5 billion.

So I think we're starting to see that there's as as dark patterns and other manipulative design practices start to come more to light that regulators both at the state and federal level are starting to crack down on on their uses and and this is more less of an industry specific kind of action and in more of a widespread, a widespread addressing of this issue.

Sara Gras: So obviously then those state statutes and regulatory mechanisms could be utilized against perhaps online gaming operators, just at kind of setting a precedent for these types of practices to be challenged. But have you observed or in or have you come across anything in your research that suggests, like an appetite or a desire to specifically address this in the gaming online, online sports betting or online gaming industry? And you know, if so, are there any concerns about kind of some potential complications with trying to limit this type of, I think, what some might see as legitimate corporate speech or action writes potentially an unconstitutional limitation.

James Barton Yeah, absolutely. So in my comment, I came across some what I found was potentially startling in that states are receiving tax revenue from these online sports books and online sports books, they have an incentive to to obviously raise as much money as possible through the use of these manipulative design practices, which again in turn benefits the states through the amount of of taxable income that these these organizations make. So the state kind of has an incentive to allow these online sports books to continue to utilize manipulative design practices to raise revenue. And as we've seen since the repeal of a PASPA, there have been some major or the online sports book industry has been a major driver of tax revenue for the states that have allowed it to be legalized in their state.

So therein lies a big problem, I think, just because of this symbiotic nature of the state regulation and the online sportsbook industry itself.

And that isn't even addressing, as you've brought up in your question this potential issue with regulating dark patterns and how that might actually be a constitutional issue, a constitutional challenge. I think that there is potentially some, some role that constitutional concerns play in limiting at least federal legislative action. Without getting too into the weeds on this issue, the level of scrutiny that courts will apply in evaluating laws that regulate expressive commercial conduct versus expressive non-commercial conduct will vary. And so federal laws that regulate dark patterns more broadly are likely to be struck down as over-inclusive. So I think regulators maybe with respect to those that have tried to pass acts such as the Detour Act, which has stalled in Congress, I think maybe they're realizing that this term dark patterns is an over encompassing term that might actually be used as a way for some of these online sports books or other industry leaders to kind of challenge the vagueness of the laws that they pass as being too over inclusive. And so maybe these regulators need to reevaluate exactly how they're going to attack these manipulative design practices, maybe by identifying more specific design practices and then outlawing those and allowing to continue.

Sara Gras: So I think those are really, really great insights and you did a really good job in your comment in the most recent draft of your comment that I read in highlighting. And this is something that I, you know, found throughout the podcast season, highlighting the tension between sports books being valuable business entities for individual jurisdictions and the role of the states in regulating them right without over-regulating them to the point of non-viability, right. I think that that's such an important thing to remember that just, just because states have laws or precedent does not necessarily mean they're going to always apply them to certain businesses and industries that, you know, benefit broader state interests. So I think that's really important that you've picked up on that, OK.

So. I think this would be, I think, a good point to pivot to talk about the solution or sort of the idea that you propose as an alternative for sort-of waiting for legislative action or for regulatory bodies to take action. So tell me a little bit about that idea that you're kind of suggesting in your comment.

James Barton Yeah, sure. So I think that because of this, as you've described, a tension between the state and state regulations and the online sports gambling industry, if the state isn't going to be the one to protect the consumer who are who are vulnerable, especially those who have exhibited issues of problem gambling and who can't, who are compulsive and cannot stop themselves. I think that the courts should step in to kind of, kind of bridge this gap that's been created and we've seen this before. This is not really a

new or revolutionary idea that I'm proposing. I'm just, I'm just arguing that the duty of care that we see in some other contexts, products liability or dram shop liability should just be kind of mutated to fit this specific need that we have with online sports books.

Sara Gras: Yeah. So let's talk a little bit more about that, because those are not, um, legal concepts that I really described at all in this season of the podcast, so let's back up just a tiny bit, right? And tell me, and this is something that you go into in the comment about the sort of history of claimants using tort law, right, which is private civil actions to shift some liability for harms experienced by consumers as a result of gambling, shifting some of that harm liability to the gaming operators themselves, you have some nice descriptive discussion of that. You can go into detail if you want to, but also maybe just kind of tell me whether that has been a successful strategy. Has tort law presented individual litigants with like an effective vehicle for seeking damages?

James Barton Sure. And I think the short answer to that is no. Unfortunately, plaintiffs since at least the late aughts have tried to argue for imposing a duty of care on terrestrial casinos specifically. And the argument that they usually put forth is that these casinos should know of the foreseeable harms, both economic and personal, that are posed by the gambling tactics that entice consumers to come in, and especially those that have already exhibited symptoms or essentially symptoms of problem gambling, especially when many of these casinos already track the gambling habits of their consumers. But courts across the country, and most recently the Third Circuit, have declined to recognize this duty as viable, and they often reason that the comprehensive state regulatory schemes that already govern are just exactly that, that they're comprehensive and they cover everything that they need to. And it places the responsibility on the patrons to self-exclude. And therein lies most of the problem that people who are already exhibiting issues of problem gambling and who are compelled to gamble themselves are likely not able to then take that step to exclude themselves from the thing that that is pushing them to gamble.

Sara Gras: Right. Or people who might not be or might not maybe be at a point in their lives where they even recognize the signs that they are experiencing harms. I mean, I think about that a lot in terms of younger people, college students who maybe don't have as great of an awareness that they're maybe straying off a path of what is considered healthy and normal because they don't have a frame of reference for that.

James Barton Yeah, and this is more anecdotal, but I've heard many people that I've been friends with who have just kind of said, and it may be in college or otherwise, you know, I'll stop when I'm older. Like this is kind of like a temporary thing, not recognizing that it's actually setting the foundation for a lifelong addiction, one that isn't talked about enough for us to even understand that they're forming.

Sara Gras: Yeah, yeah, I think that's all wrapped up in all of this, so, so as you said, there has not been a lot of success experienced in in these civil claims against gaming operators for, you know, liability for harm to individuals. Now you make, I think, a really strong argument, and I absolutely agree that courts should impose this duty of care on online sports books, even where they have been reluctant to do so on like land-based casinos, so I think in order to understand that argument, you need to go just into a little bit more description of what the duty of care is and in what instances it is typically held to be owed to a consumer.

James Barton Sure, yes. So typically the common law duty of care traditionally applies to areas where there's a risk of physical harm and not really economic harm. And so that kind of leaves online sports books free to use these manipulative design practices or tactics to exploit consumers, because there really is no risk of physical harm there. It's just more of an economic harm. And maybe the risk of physical harm is kind of a downstream consequence that could eventually occur. So my proposal is to create a narrowly tailored duty of care that covers foreseeable economic harm, which would presumably compel sports books to curb their manipulative design practices.

And so to make this duty of care a little bit more workable and understandable, I tried to break it down into three subsidiary obligations, essentially the first of which requires a duty of prudence, I call it, which is actually, I take it from some other different scholars works who are much smarter than I am. So I don't want to say that I'm the one who's claiming to create this duty of prudence, but in this context, it would require sports books to avoid inherently addictive or manipulative design, product designs and to implement frictions that would be necessary to slow harmful betting behavior. A second subsidiary obligation would be a duty of candor, which would be to require clear and plain language disclosure of material terms without dark patterns kind of, you know, obscuring the terms and making them more difficult for the average consumer to understand. And then finally, there would be a duty to monitor, which would require sports books to track betting behavior and then intervene as risk escalates, which is actually surprisingly through my research, I found that many of the regulatory schemes that states have implemented currently require online sports books to monitor the bets that are that are occurring on their websites. And so they have this technology and this ability to implement a duty to monitor they have it there and and ready to go essentially so.

Sara Gras: Yeah, and they use it to their advantage, right? They use it to flag potentially, potentially manipulative gambling behaviors, right? Manipulation of the betting, I guess environment. It's how so many, I don't want to call...I guess they are scandals. I know so many gambling scandals have sort of been discovered is through the collection and the

analysis of data at a really, really like granular and high, I guess AI-enabled and like facilitated level that they can see, you know, like red flags pop up immediately when people are, you know, all of a sudden betting big sums of money on someone like Jontay Porter, who nobody has ever really bet anywhere close to those sums of money before. You know, all of these red flags go up and it's immediately obvious that this is something is wrong here. So you're absolutely right, that same data, it doesn't even require new systems, that exact those exact same systems of data can 100% be utilized to detect out of bounds or, you know, irregular consumer behaviors. So I think yes that's 100% one of the easiest steps for sportsbook operators to take. Yeah, that's fantastic.

So to me, it seems like there are not a lot of barriers to, to doing this. And I in fact, I think you know the National Council on Problem Gambling, NCPG, in sort of their guidelines to operators basically suggests that a lot of these things be implemented. Again, it's not necessarily required by, you know, the various regulatory bodies that oversee gambling in the different states-obviously some states have more stringent regulations than others, but no estate is, you know, following all of those guidelines. Given that this information is readily available, is unlikely to incur new costs, perhaps to operators, why do you think courts wouldn't want to implement such a duty of care?

James Barton Yeah, well, I think all of the things that you just pointed out, it seemed glaringly obvious to me, especially after my research. I really, it almost takes a lot for me to kind of think about why wouldn't we implement a system that that tries to or at least a stopgap remedy to try and to try and mitigate the harm to allow then the legislature to reconsider and then maybe potentially pass regulation that would obviate the need for a duty of care. And I think maybe three things come to mind.

I think that it's, there's a concern with adequately defining this duty of care, which I tried to do a decent job of in in my comment to try and work through some of the concerns that would be posed by opponents to implementing this duty of care. I think the second is maybe then overcoming the presumption of the sufficiency of the current regulatory framework. And again, we've already pointed to a couple of different reasons why the current regulatory framework doesn't work in in the consumer's favor. But again, there could always be pushed back there. And I think third there's a stigma surrounding those with gambling issues, almost in the same way that that anybody with an addiction is kind of stigmatized, that it's their problem. The onus is on them to get over it. And obviously I think you know as a society we're starting to move past some of those issues, but they certainly still remain and I think the courts specifically kind of hold on to that antiquated viewpoint and like to point to that as maybe a reason why we shouldn't provide those individuals with

more protection because they've chosen to engage in this practice, not that they can't stop engaging in this practice.

Sara Gras: Yeah, that's a really good insight. I think that you're absolutely correct that just because courts can doesn't mean they want to, right, maybe create or carve out sort of a new duty or an obligation where they feel that doing so would excuse or enable behavior that's I guess in the perception of some, right, socially undesirable.

James Barton Absolutely.

Sara Gras: Yeah, so if this were to maybe take hold in, you know, a few jurisdictions, let's say a court in New Jersey finds an online sports book operator civilly liable for consumer harm as a result of the use of deceptive marketing practices. Do you foresee, or could you anticipate the potential for this to maybe open the floodgates and lead to litigation against other types of retailers or online businesses? Is it possible that that might be another barrier to convincing courts, this would be a valid kind of basis for a cause of action.

James Barton Yeah, I well, I think it is possible that this could, this could lead to maybe a domino effect in other industries that utilize manipulative design practices. I think maybe the one thing that separates or differentiates the online sports book industry is the potential for or the misuse of this in almost leading to again that those foreseeable economic harms, you know, in some other industries. I don't know that those harms are available or at least we don't have research to show that those harms are more prevalent, but that's certainly always a concern. But I think maybe, maybe, you know, weighing the weighing the concerns of those commercial operators against the concerns of the individuals, I think that the individual concerns outweigh the commercial concerns and here if we impose that duty, we should expect to see online sports books at least start to curtail their use of manipulative design practices or incur civil penalties through either civil liability or again, if we have regulators who step up and eventually pass regulations, then the state can hold them accountable.

Sara Gras: Yeah, I think that is a really good point that there isn't the same type of potential for economic harm in many other industries other than maybe financial products, you know, thinking about prediction markets as being sort of close cousin of online sports betting would be like the only one where that seems maybe like a similar argument could be made, but I think that's also a really good point. Well, I guess.

James Barton: Ha ha.

Sara Gras: Those are all the questions that I had. Is there anything else that you have sort of thought about over, you know, now that exams have ended and you've been thinking

about your piece that you have wanted to maybe add to the discussion or to the piece that didn't kind of make it into the most recent draft that I read?

James Barton: Yeah, I think it maybe is that that concern, I would like to address a little bit more of what opponents of my duty of care or this argument that that many people have made that I'm just putting on paper, what opponents to that would say specifically in that you know this would open the the flood gates of litigation. Because I really do, I understand that that is a viable concern and it's a concern with with any type of duty or imposition of legal liability in nearly every industry. So I would like to address that and kind of shore up that that part of the argument because I think that's something that a lot of people are holding on to, especially maybe courts or legislators who are trying to push back against this.

Sara Gras: Awesome. Well, I really appreciate that your time. And again, I really look forward to seeing your final piece. I have big hopes for its publication future and I definitely look forward to talking with you about this more.

James Barton: Yes, likewise. Thank you so much for having me on, Professor. This was this was amazing.

Sara Gras: Great. Thank you.

Hearsay from the Sidelines is a collaboration of Seton Hall Law School and Culture in Sports; research and writing by Sara Gras with the help of my amazing research assistants, Emily Raedisch and Lauren Vuolo; music by my son, Robert; produced by Sara Gras and Dr. Jeremy Piasecki, Executive Director of Culture in Sports. Links to all available academic and primary legal sources, media, music, transcription, and other materials mentioned in this episode are available on the Hearsay from the Sidelines show page, hearsayfromthesidelines.com. And if you like this show, check out cultureinsports.com where you'll find more articles, shows, webinars, summits, and courses for sports leaders of all levels.