Coercive Settlements

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Abstract

Can civil settlements be coercive? Conventional wisdom suggests they generally cannot, as the inherent power dynamic of private law is accepted as inevitable. The media fuels this perception by publishing stories of lucrative bargained-for settlements and ignoring those offered on a take-it-or-leave-it basis by disproportionately powerful defendants. Courts have done the same. Despite the lack of judicial oversight of the settlement process and disadvantaged parties' limited access to legal representation, courts generally refuse to reopen settlement agreements except in cases of fraud or mutual mistake. And although scholars have extensively addressed coercion in plea bargains, they have not paid much attention to their civil, presumably choice-driven, counterparts.

This Article challenges these conventions, arguing that some private settlements—which it labels "high-risk civil settlements"—might be coercive. Using confidential settlements as an example, this Article contends that acquiescence to a defendant's demand for silence in exchange for forgoing a legal claim can reflect coercion when additional factors are present. These factors include position of authority or power, information asymmetry, the context of the dispute, and time pressure. The Article builds on psychological research to show how a plaintiff's voluntariness can be negated by using subtle methods of social influence. Further, this Article draws an analogy between the role of coercion in high-risk civil settlements and in criminal plea bargains. It then leverages this analogy to suggest recommendations for reform. Recognizing the coercive power that stronger parties wield in some private disputes, this Article urges the legal system to step up to assure that civil settlement agreements are in fact mutually desirable deals.

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> [A]ct that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.
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> –Immanuel Kant[1]

Introduction

Sarah[2] was mistreated and eventually fired after sharing the news about her high-risk pregnancy with her bosses.[3] Sensing that she was wronged, she hired a lawyer and filed a claim against her employer,

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1 Immanuel Kant, Groundwork of the Metaphysics of Morals 38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) (emphasis omitted).

2 This is a pseudonym.

3 Anya Meyerowitz, *The Real Impact of NDA Abuse: 'I Struggled with Reading My Emails or Answering the Door. Being Silenced is Choking*,' Glamour (Jan. 14, 2022), https://www.glamourmagazine.co.uk/article/non-disclosure-agreement-abuse [https://perma.cc/E57J-YGXH]. While Sarah's experience happened in the United Kingdom, similar incidents occur domestically. *See Statistics*, Lift Our Voices, https://liftourvoices.org/statistics [https://perma.cc/5MQV-6REN].

starting a chain of legal letters and a cycle of endless stress.[4] This emotional strain was piled on top of an already challenging pregnancy.[5] Eventually, Sarah was offered a settlement conditioned on a nondisclosure agreement ("NDA"), which would prevent her from ever speaking about the underlying events.[6] She took it.[7] "After seven weeks of to'ing and fro'ing, I couldn't do it anymore, my mental health was on the floor. . . . It was explained to me as a confidentiality agreement, meaning I couldn't talk about it. I . . . wanted the whole ordeal to stop, so I signed it."[8] Discussing her decision, Sarah says she did not fully grasp the nature of the agreement: "I didn't understand the repercussions of not speaking about it or how I'd feel being silenced. *Being silenced is choking*."[9]

The news is replete with stories about money-for-silence exchanges. In particular, President Trump's conviction involving his "hush money" deal with adult film star Stormy Daniels has kept NDAs in the public eye.[10] Such high-profile cases create the misconception that NDAs typically represent bargained-for exchanges with lucrative payouts.[11] But, as Sarah's story illustrates, reality is sometimes different. NDAs are often made following conduct like harassment, discrimination, or abuse, which disproportionately affect low income and other vulnerable individuals.[12]

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4 Meyerowitz, *supra* note 3.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* (emphasis added). Sarah also noted, "I wish I'd been told about the ramifications of being silenced, it still feels unfair that I can't tell people—openly—what happened. And that it would have absolutely no bearing on my former boss." *Id.*

10 *See* Aaron Katersky & Peter Charalambous, *Timeline: Manhattan DA's Stormy Daniels Hush Money Case Against Donald Trump*, ABC News (Mar. 4, 2025, 3:20 PM), https://abcnews.go.com/Politics/timeline-manhattan-district-attorney-case-donald-trump/story?id=98389444 [https://perma.cc/JX7Z-WU33]. Importantly, the exchange itself was not the subject of the indictment, as NDAs are not generally illegal. Instead, Trump was found guilty of falsifying business records in connection with the exchange. *Id.*

11 *See* Hiscox, The 2015 Hiscox Guide to Employee Lawsuits 6 (2015), https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf [https://perma.cc/D83X-YBE2]. Some scholars have also articulated this view. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 467, 477 (1991) (arguing against a legal system premised on public disclosure because only a miniscule portion of all litigation concerns the public interest and the vast majority generates no media attention, and instead arguing in favor of private settlement agreements).

12 Low-income individuals—such as those working in the hospitality and accommodation sector and the retail sector—are more likely to experience sexual harassment and other forms of workplace mistreatment. *See* Anne Bolgert, *Lower-Wage Workers Disproportionately Face Sexual Harassment in the Workplace*, Schaefer Halleen LLC (Nov. 12, 2024), https://www.schaeferhalleen.com/lower-wage-workers-disproportionately-face-sexual-harassment/ [https://perma.cc/5WPA-96FF]; Collier Meyerson, *Sexual Assault When You're on the Margins: Can We All Say #MeToo?*, Nation (Oct. 19, 2017), https://www.thenation.com/article/archive/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/ [https://perma.cc/X2XP-PD3Q] (noting that

Moreover, it has been suggested that disadvantaged individuals with little to no bargaining power are prone to signing NDAs,[13] especially those offered on a take-it-or-leave-it basis.[14] Such settlements are anything but mutually desirable deals. This Article argues that some might even be coercive.

Courts and scholars have largely not taken note. Existing doctrine provides that settlement agreements can generally only be invalidated if fraud or a mutual mistake was involved.[15] Likewise, the possible coercion of demanding silence in exchange for monetary compensation has not been addressed to date, notwithstanding the prevalence of nondisclosure clauses and their use by disproportionately powerful defendants.[16] Although the philosophical concept of coercion has been explored in a variety of legal issues, including medical ethics,[17] unconstitutional conditions,[18] duress,[19]

"[p]eople on the margins—women of color, poor women, undocumented women, and trans men and women—are uniquely impacted by sexual assault and harassment" and subjected to sexual misconduct at disproportionately high rates).

13 Some have argued that historically disadvantaged parties are also more likely to sign NDAs. *See* CMTY. LEGAL ASSISTANCE SOC'Y & SHARP WORKPLACES, QUICK FACTS ON NON-DISCLOSURE AGREEMENTS (2022), https://clasbc.net/wp-content/uploads/2022/11/2022-09-22-NDA-Quick-Facts-.pdf [https://perma.cc/7VPZ-9T2C] (noting that seventy-five percent of Black women reported having signed an NDA compared to twenty-eight percent of their White counterparts).

14 As noted below, this Article's analysis might apply to certain contracts of adhesion as well. *See infra* note 26.

15 "If the parties reached agreement on all material terms, then existing precedent 'dictates that only the existence of fraud or mutual mistake can justify reopening an otherwise valid settlement agreement.'" Henley v. Cuyahoga Cnty. Bd. of Mental Retardation & Developmental Disabilities, 141 F. App'x 437, 443 (6th Cir. 2005) (quoting Brown v. County of Genesee, 872 F.2d 169, 174 (6th Cir. 1989)). For cases invalidating settlements on other grounds, see STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 3.39(b) (4th ed. 2023). Rare examples of cases invalidating settlements for duress include *Holler v. Holler*, 612 S.E.2d 469, 476 (S.C. Ct. App. 2005), *Duncan v. Hensley*, 455 S.W.2d 113, 117 (Ark. 1970), and *Service Fire Insurance Co. of New York v. Reed*, 72 So. 2d 197, 198 (Miss. 1954).

16 *See, e.g.*, *NDAs 'Should Not Silence Sexual Harassment Claims,'* BBC (Feb. 10, 2020), https://www.bbc.com/news/business-51438851 [https://perma.cc/HKC5-4QA9]; Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589 [https://perma.cc/VM8F-RDYG].

17 *See, e.g.*, O. O'Neill, *Some Limits of Informed Consent*, 29 J. MED. ETHICS 4, 5 (2003); Joseph Millum, *Consent Under Pressure: The Puzzle of Third Party Coercion*, 17 ETHICAL THEORY & MORAL PRAC. 113, 116 (2014); Eric Chwang, *Against Risk-Benefit Review of Prisoner Research*, 24 BIOETHICS 14, 15–18 (2010) (addressing coercion in consent of prisoners).

18 *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 6 (2001) (suggesting "a new unified theory of unconstitutional conditions . . . that centers on coercion"); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1433 (1989) (mentioning the Supreme Court "has often invoked coercion as the reason to strike down conditions that affect rights to freedom of speech, religion, and association").

19 *See, e.g.*, Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1334 (1989) (discussing duress as an excuse from responsibility).

sexual consent,[20] interrogations,[21] and plea bargains,[22] it has been largely absent from the discussion of civil settlement agreements.[23]

This Article addresses this crucial gap, labeling settlements prone to lack of voluntariness as "high-risk civil settlements" and drawing an analogy between such settlements and criminal plea bargains. Using confidential settlements in harassment, discrimination, or abuse cases as an example, the Article argues that under certain conditions, a settlement imposing silence and the forgoing of a legal claim in exchange for a monetary payout is coercive.[24] Such settlements can reflect coercion when the proposer-defendant is threatening punitive legal consequences—such as a prolonged legal battle or a defamation suit—and preventing the recipient-plaintiff from obtaining a better bargaining position. Defendants can achieve the latter, among other ways, by exploiting information asymmetry regarding the existence of similarly

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20 *See, e.g.*, DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE 165 (2012) ("[C]onsent involves not the granting of a right but just the waiving of it."); Peter Westen, Commentary, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 334 (2004) (remarking that "consent creates a Hohfeldian 'privilege'" to allow otherwise wrongful action); Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 781 (2017) ("All Western jurisdictions have always made it a crime to induce sexual intercourse by threats of death or grievous bodily injury.").

21 *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966); Illinois v. Perkins, 496 U.S. 292, 296–97 (1990). *See generally* Frederick Schauer, *The* Miranda *Warning*, 88 WASH. L. REV. 155 (2013) (discussing the import of *Miranda*); Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (surveying social psychological research on coercion and arguing that such powerful psychological pressures are still at play despite the *Miranda* warning).

22 *See infra* Section II.B.

23 Two noteworthy exceptions are in the context of divorce and custody agreements, *see generally* Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679 (2013), and in the wage and hour context, *see generally* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013). The latter refers specifically to confidentiality in Fair Labor Standards Act ("FLSA") settlements, addressing the power imbalance between employers and employees in this context. *Id.* at 134; *cf.* Madison G. Conkel, Note, *The Lost Approach to FLSA Settlement Agreements: A Freedom-of-Contract Approach*, 55 GA. L. REV. 815, 819–20 (2021) (arguing confidentiality clauses should be permitted as a bargaining chip for employees). Arguments closely linked to coercion in settlements have also been made in the context of absent class members in class actions, *see generally* Maximilian A. Grant, Comment, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239 (1996) (arguing compelled class membership violates the First Amendment), and multidistrict litigation, Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 242 (2023) ("For the MDL's cowboy on the frontier, plaintiffs can often be like proverbial cattle, herded into a forum they did not choose, wrangled by attorneys they did not hire who may assert claims telling only a part of their story, and corralled into a settlement and remedy they may not want.").

24 *See generally* David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFFS. 121 (1981) (offers can coerce); Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC'Y REV. 527 (1979) (same).

situated recipient-plaintiffs and by systematically settling individual claims with a nonnegotiable confidentiality clause.[25]

Although acknowledging that other kinds of civil settlements might also coerce,[26] this Article focuses on the silencing effect of particular settlement agreements due to psychological pressures that may compel weaker parties to settle involuntarily and the emotional burden imposed by enforced silence. In this sense, the Article identifies faults both in the individual bargaining process of high-risk civil settlements and the broader social and economic conditions in which the bargaining occurs.

The Article points out the almost complete lack of judicial oversight over run-of-the-mill civil settlements—apart from limited exceptions[27]—and shows how legal representation, even when it is offered, is scarcely a panacea to an environment ripe for involuntariness. It then suggests several structural factors that courts should consider when deciding whether a high-risk settlement agreement was entered voluntarily—namely, position of authority or power, the context of the dispute, information asymmetry, and time pressure. Importantly, rather than arguing that all settlements of a certain class are per se coercive, this framework intends to help courts identify coercion when it does

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25 Confidentiality of settlements seems to be the default for the defense bar, almost like release of claims. *See* Jennifer Snyder Heis, *Confidentiality of Settlement Agreements*, FOR DEF., Feb. 2007, at 35 ("Confidentiality provisions are routinely included in settlement agreements . . . ."); Lizzie Barmes, *Silencing at Work: Sexual Harassment, Workplace Misconduct and NDAs*, 52 INDUS. L.J. 68, 80–82 (2023) (noting that her interviewees—lawyers and other individuals who are close to employment disputes—emphasized that NDAs are "commonplace"). As Barmes notes,

> This comment from one of my interviews captured this: "I am trying to think of a settlement agreement that I've entered into which doesn't have [an NDA] in the last 25 years, and I can't actually think of any." The assumption that an NDA would be included was described as so strong that some lawyers, although possibly junior, seemed to think this was a legal requirement and another interviewee observed that: "It is just seen as standard. It is not seen as something that individually is negotiated . . . ."

Id. at 81 (alterations in original).

26 This Article aims to provide examples of potentially coercive civil settlement scenarios. Other scenarios involving additional factors might arise, including, for example, certain contracts of adhesion.

27 For example, a court must approve the settlement of class actions certified under Federal Rule of Civil Procedure 23. FED. R. CIV. P. 23(e). Similarly, actions "in which a receiver has been appointed may be dismissed only by court order." FED. R. CIV. P. 66. Furthermore, settlements under the FLSA require court approval, and at least some courts have held that such settlements cannot be subject to a nondisclosure. *See, e.g.*, Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353 (11th Cir. 1982) (requiring that any settlement agreement reached in an FLSA claim be scrutinized by the court for fairness); Brumley v. Camin Cargo Control, Inc., Nos. 08-1798, 10-2461, 09-6128, 2012 WL 1019337, at *7, *9 (D.N.J. Mar. 26, 2012) (rejecting as unfair the confidentiality provision of a settlement agreement). Another example is courts having to approve settlements in the child custody context. *See* WARE, *supra* note 15, § 3.39(b)(4). Of course, most federal cases are classified adjudication and thus in some way judicially monitored. Though the volume of such cases is significant, it is outside the scope of this Article.

occur. By so doing, it seeks to contest the default presumption of settlement voluntariness in high-risk settlements. Finally, the Article offers recommendations for reform, including a civil equivalent to the plea colloquy, albeit a research-informed version that goes beyond the boilerplate language currently used in the criminal context.[28]

Attending to coercion-related challenges to confidential settlements is justified for two main reasons. First, lack of voluntariness of the bargaining process should independently invalidate even a seemingly fair settlement. This might be the case when one has given up a significant right such as their voice as part of the settlement.[29] Second, though not mutually exclusive, centering on coercion accounts for the many jurisdictions that have not otherwise addressed settlement confidentiality, either through the public policy defense or via legislative action.[30] In such jurisdictions, defenses like duress, unconscionability, and undue influence[31] might be the primary grounds available to plaintiffs seeking to invalidate a confidential settlement.

This Article challenges the assumption that settlements of private disputes are necessarily voluntary exchanges, an assumption which has led courts to apply a more exacting standard than conventional contract law when plaintiffs attempt to invalidate settlement agreements.[32] This view, the Article argues, overlooks the complex pressures that can compel settlement regardless of the offer's merits. By shining a light on the discrepancy between contract doctrine and the reality of particular civil settlements, the Article offers several contributions. Theoretically, it applies the concept of coercion to civil settlements that require confidentiality. It also organizes the rich body of literature on coercion in plea bargains, highlighting its key takeaways and using it as analytical leverage to address coercion in the private sphere. Pragmatically, it

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28 For a critique on the current structure of plea colloquies, see Melanie B. Fessinger & Margaret Bull Kovera, *An Offer You Cannot Refuse: Plea Offer Size Affects Innocent but Not Guilty Defendants' Perceptions of Voluntariness*, 47 LAW & HUM. BEHAV. 619, 631 (2023).

29 In a sense, as noted, confidentiality is distinct from other contractual provisions. It thus merits special treatment in the context of assessing voluntariness. *See generally* NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS (2019) (arguing, among other things, that when agreements dramatically constrain our autonomy going forward, the requirements for finding consent and voluntariness should be more stringent).

30 *See generally* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019) (explaining that private settlements can be detrimental to public policy in certain contexts such as sexual assault); Gilat Juli Bachar, *A Duty to Disclose Social Injustice Torts*, 55 ARIZ. ST. L.J. 41, 48–50 (2023) (discussing statutory limits on confidential settlements in some jurisdictions).

31 *See infra* Section III.A.

32 "One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." Asberry v. U.S. Postal Serv., 692 F.2d 1378, 1380 (Fed. Cir. 1982) (quoting Callen v. Pa. R.R. Co., 332 U.S. 625, 630 (1948)).

provides courts with a concrete list of factors to consider when weighing a coercion-based challenge to a settlement agreement, whether grounded in duress, unconscionability, or undue influence arguments. Prescriptively, it offers specific suggestions to address the problem of lack of settlement voluntariness.

The Article proceeds in three parts. Part I discusses the philosophical foundations of the concept of coercion, including its meaning and relationship to the idea of voluntariness. This Part argues that a nuanced understanding of coercion requires taking into account social norms about moral obligations and distributive justice considerations. Part II then surveys and organizes the scholarship regarding coercion in criminal plea bargains. It discusses both the legal doctrine and how psychology can help identify coercive situations, synthesizing key takeaways. Although undoubtedly different, as this Part concludes, criminal pleas and high-risk civil settlements share several characteristics. Thus, plea bargains are a fruitful analogy for unpacking coercion in civil settlements. Part III applies the philosophical, psychological, and legal discussion of coercion, including its bearing on plea bargains, to high-risk civil settlements. Using the example of confidentiality, this Part explains how and when such settlements might be coercive, refuting potential counterarguments. Table 1 then summarizes the coercive elements of plea bargains and high-risk civil settlements alongside suggestions for reform. Finally, the conclusion proposes thoughts for further exploration of this area.

The Article addresses a dimension yet to be considered in the discussion regarding litigation and settlement confidentiality: Silencing those who have been wronged can also evince their coercion into unwanted settlements. At the same time, the Article opens a broader conversation about the coercive power private parties can wield and its detrimental effects.

I. Philosophical Foundations of Coercion

Unlike "freedom," a word which largely conveys positive normative judgment, "coercion" is widely considered in Western sociopolitical tradition to be a social evil, a word conveying negative meaning.[33] We strive to limit governmental coercion and ensure individual freedom through federal and state constitutional protections.[34] And we use criminal and civil laws to either prohibit coercion—for example, by

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33 *See* Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 Duke L.J. 541 *passim* (analyzing the rhetorical force and characteristics of the words "freedom" and "coercion"); *see also* Alan Wertheimer, Coercion 173–74 (1987) (discussing the moralized approach to coercion in modern jurisprudence).

34 *See, e.g.*, Wertheimer, *supra* note 33, at 127–29 (considering how the Fifth Amendment protects against coerced guilty pleas).

criminalizing extortion—or institute excuses and defenses for those whose actions were coerced by others, such as the defense of duress.[35]

But coercion can sometimes be challenging to identify. Although some scholars have argued that coercion renders an act involuntary,[36] coerced acts are typically viewed as voluntary in both the usual and legal sense.[37] How can a person voluntarily allow another to steal their freedom?[38] One way to settle this apparent paradox is to realize that the coerced person is taking a volitional action—giving a robber their wallet—to escape the threatened action: physical injury. Alan Wertheimer calls this "constrained volition."[39] To better understand this proposition, the concept of coercion prompts a distinction between offers and threats.[40] Typically, threats—which promise to make one worse off than they otherwise would be compared to a baseline[41]—are distinguished from offers, which promise to make one better off in comparison to that baseline.[42] Although most scholars of coercion, including Nozick

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35 Duress can be a defense to a criminal charge, in which an accused person, despite committing a criminal act, avoids punishment due to duress. *See* MODEL PENAL CODE § 2.09 (AM. L. INST. 1962) (duress constitutes an excuse when "a person of reasonable firmness in his situation would have been unable to resist"). It is also a defense in contract law, allowing a party to escape an obligation under a contract. *See* WERTHEIMER, *supra* note 33, at 152–54 (explaining the difference between the criminal and the contract defense of duress). *See generally* John Lawrence Hill, *A Utilitarian Theory of Duress*, 84 IOWA L. REV. 275 (1999) (evaluating several theoretical conceptions of duress).

36 *See, e.g.*, FELIX E. OPPENHEIM, DIMENSIONS OF FREEDOM 15–17 (1961); Michael D. Bayles, *A Concept of Coercion*, *in* COERCION 16, 17 (J. Roland Pennock & John W. Chapman eds., 1972) (comparing what the author calls "occurrent" coercion and "dispositional" coercion, or coercion by physical compulsion and coercion by threat, respectively).

37 This has been the case in criminal law, in which the Model Penal Code excludes from the list of "voluntary acts" reflex movements, bodily movements during unconsciousness, acts performed under hypnosis, and other acts not the product of a conscious determination by the actor. MODEL PENAL CODE § 2.01(1)–(2) (AM. L. INST. 1962). It is also the case in the law of torts. For a discussion of what is considered a volitional act in torts, see W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 34–35 (5th ed. 1984).

38 *See* Hill, *supra* note 35, at 286–87 (arguing that coerced acts are involuntary in that they are "characterized by volitional responses to impossible choices"); Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD 440, 440 (Sidney Morgenbesser et al. eds., 1969) ("If I lure you into an escape-proof room in New York and leave you imprisoned there, I do not coerce you into not going to Chicago though I make you unfree to do so.").

39 WERTHEIMER, *supra* note 33, at 30. Wertheimer also clarifies that "choice" can mean different things and explains what is meant by having "no choice" but to take certain action. *Id.* at 35, 192–201.

40 *But see* Hill, *supra* note 35, at 292–96 (offering a critique on the distinction between threats and offers).

41 Many approaches to coercion use a baseline. Per Nozick, this baseline helps judge whether a coercive arrangement is acceptable. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 177 (1974). That said, there are also nonbaseline approaches to coercion. *See, e.g.*, Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39, 54–57 (2000) (justifying coercion by the undesirability of the options it eliminates).

42 *See* Westen, *supra* note 33, at 571–73; WERTHEIMER, *supra* note 33, at 136; Vinit Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 POL. THEORY 65, 66 (1976) ("Threats worsen your

and Wertheimer, argue that only threats can be coercive,[43] others contend that offers can coerce too.[44] The latter view suggests that when offers—ostensibly improving one's current state—are combined with constraints, they can be coercive.[45] This Article will come back to this distinction in Parts II and III when applying the concept of coercion to both plea bargains and civil settlements.[46]

Coercion also requires that the coercing party has the ability or apparent ability to carry out the proposed harmful action if the coerced party does not comply.[47] According to Westen, coercion is

> a constraint or promise of constraint, Y, that X_1 knowingly brings to bear on X in order that X choose to do something, Z_1, that X would not otherwise do and that X does not wish to be constrained to do, where X knows that X_1 is bringing or promising to bring Y to bear on him for that purpose, and where the constraint renders X's doing Z_1 more eligible to X than it would otherwise be.[48]

Coercion claims build on two related moral duties: the duty not to use another as a means to one's end[49] and the duty not to harm another.[50] But constraining others' freedom can also be part of daily life in ways big and small.[51] To help distinguish coercive from mundane freedom-constraining acts, Nozick—in his theory of voluntary exchange—makes a distinction between "facts of nature" and others' willful acts.[52] For Nozick, if one's actions are limited due to facts of nature—for example, a decision to walk being constrained by the rules

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position compared to what you can expect, whereas (non-coercive) offers do not.").

43 *See* WERTHEIMER, *supra* note 33, at 136; Nozick, *supra* note 38, at 447.

44 *See* Scott Anderson, *Coercion*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2.4 (Edward N. Zalta & Uri Nodelman eds., 2023), https://plato.stanford.edu/Entries/coercion/ [https://perma.cc/4HZX-6VA9] ("While the dominant strand in recent theory has associated coercion with threats, and denied that offers can be used to coerce, this sharp differentiation of these two sorts of proposals has come in for some criticism.").

45 *See* Brunk, *supra* note 24, at 527 (arguing that offers of leniency in the context of a negotiated guilty plea can also be coercive under certain conditions); Zimmerman, *supra* note 24, at 133–34 (arguing that a proposal can actively hinder a coercee's ability to obtain a better situation than what the coercer proposes).

46 *See infra* Parts II–III.

47 *See* Nozick, *supra* note 38, at 441; NOZICK, *supra* note 41, at 115.

48 Westen, *supra* note 33, at 569.

49 *See* KANT, *supra* note 1, at 38.

50 Haksar, *supra* note 42, at 69 ("[F]or a proposal to be coercive, it is necessary that the proposal should involve a wrong to the recipient.").

51 *See* Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1557 (1996) ("People are entitled to assume in the state of nature that their external freedom will be limited only to the extent necessary to harmonize their freedom with that of everyone else in accordance with a universal law . . . .").

52 NOZICK, *supra* note 41, at 262.

of physics—these actions are still voluntary.[53] But if one's options are limited by another, voluntariness hinges on the extent to which that other had a right to act in such a way.[54] Given the relationship between voluntariness and rightful conduct, it is easier to identify coercion when it employs illegal conduct, particularly physical violence. It is harder when the coercion is context dependent, using means that might be considered legal in a different context. As Lindgren explains regarding blackmail, "In blackmail, the heart of the problem is that two separate acts, each of which is a moral and legal right, can combine to make a moral and legal wrong."[55] Although, independently, neither asking someone for money nor telling the police that a crime has been committed are wrong, asking someone for money while threatening to tell the police that a crime has been committed if they do not comply *is* a crime.[56] Nozick reconciles the paradox by focusing on what he calls "productive activities."[57] A productive activity is one in which the proposer makes the recipient better off by engaging in the activity.[58] Thus, blackmail is not a productive activity because it does not make the recipient better off than they would have been without the blackmail.[59]

Importantly, an exchange can be voluntary per Nozick if the proposer compensates the recipient for declining a productive exchange with another.[60] This would be the case where a publisher offers an author payment for writing damaging secrets about a third party, and the third party then pays the author to avoid publishing those secrets.[61] The author selling their silence may "legitimately charge only for what he forgoes by silence," which "does not include the payment he could have received to abstain from revealing his information, though it does include the payments others would make to him to reveal the information."[62] The author therefore cannot demand more payment than necessary to account for the loss of publication.[63] In the negotiation context, Nozick can be read to suggest that "[a]s long as the negotiator proposes to pursue only alternatives that genuinely satisfy her interests,

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53 *Id.*

54 *Id.*; *see also* WERTHEIMER, *supra* note 33, at 217–18 (describing a coercive proposal as one that rescinds or withholds an individual's rights or entitlements).

55 James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670 (1984).

56 *Id.* at 670–71.

57 NOZICK, *supra* note 41, at 84.

58 *Id.*

59 *Id.* at 85. *But see* Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1962 (1993) (arguing that blackmail threatening to disclose criminal activity can provide society with economic benefits by deterring crime).

60 NOZICK, *supra* note 41, at 85–86.

61 *Id.* at 85.

62 *Id.*

63 *Id.*

then the most she can request . . . is to be compensated for forgoing those alternatives."[64] If a party offers to waive something that does not entitle them to compensation, however, that party is not acting within their rights and the exchange is not voluntary, but coercive.[65]

But Nozick's approach to coercion raises questions: Are all proposals that result in a "productive activity" morally acceptable? And are all exchanges lacking alignment between costs and interests morally unacceptable? As Anthony Kronman notes, "defining voluntariness in [Nozick's] way conflicts with deeply entrenched notions of moral responsibility."[66] Extending Nozick's theory to better address moral concerns, Peter Westen distinguishes "threats" that impose "burdens" from "offers" conferring "benefits" along two axes: parties' expectations and society's moral standards.[67] A proposal is coercive if it leaves the recipient "worse off *either* than he otherwise expects to be *or* than he ought to be for refusing to do the proponent's bidding."[68] Social norms regarding legal and moral obligations determine what "ought" to be refused.[69]

Kronman and Westen capture an important aspect of coercion that escapes Nozick and other scholars who focus on liberty and strong notions of private property as defining features of voluntariness. Although common law rules often claim to promote wealth maximization by emphasizing individual liberty and property,[70] society should worry about the possibility of a stronger party exploiting "superior information, intellect, or judgment, in the monopoly he enjoys with regard to a particular resource, or in his possession of a powerful instrument of violence or a gift for deception."[71] As Kronman notes, society should avoid "grant[ing] the possessor of an advantage the exclusive right to exploit it for his own benefit unless those excluded from its ownership are thereby made better off than they would be if no one

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64 Paul F. Kirgis, *Bargaining with Consequences: Leverage and Coercion in Negotiation*, 19 HARV. NEGOT. L. REV. 69, 80 (2014). Kirgis suggests that Wertheimer has "a similar conception in mind with his focus on whether the offeror had a preexisting plan to engage in the conduct proposed; that would suggest that the proposal would satisfy the offeror's interests." *Id.* at 80 n.45 (citing WERTHEIMER, *supra* note 33, at 220).

65 *See* Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 657–58 (1988) (suggesting that such an exchange is coercive blackmail).

66 Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 478 (1980).

67 Westen, *supra* note 33, at 586–87.

68 *Id.* at 587.

69 *See id.* at 586. It should be noted, however, that Westen's work only partially defines the baseline determining a party's expectations.

70 *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 359 (1990) ("It probably is no accident . . . that many common law doctrines assumed their modern form in the nineteenth century, when laissez-faire ideology, which resembles wealth maximization, had a strong hold on the Anglo-American judicial imagination . . . .").

71 Kronman, *supra* note 66, at 480.

were given a greater right to the advantage than anyone else."[72] Seeking to promote overall welfare, Kronman would require that "the welfare of *most people* who are taken advantage of in a particular way be increased by the kind of advantage-taking in question."[73]

Thus, although Nozick and Wertheimer each serve as a crucial starting point for this Article's analysis of coercion, their work is not the be-all and end-all. In this Article's discussion of coercion, Westen contributes the importance of social norms regarding legal and moral obligations for understanding when a recipient is made worse off than they ought to be.[74] Kronman, in turn, contributes the importance of social norms regarding distributive justice in deciding whether certain activities are coercive.[75] Their analyses intimate a more nuanced understanding of coercion that goes beyond existing legal doctrine in the context of settlement.[76] In particular, they acknowledge that threats (or offers)—which are legal in the strict sense—can still exert improper emotional pressure on the recipient and make seemingly available alternatives considerably less attractive.[77] This Article thus adopts a broader definition of coercion: using power to constrain the recipient's situation to impose the proposer's will on the recipient by using either force or conditional proposals, including both threats and offers.[78] As detailed below, this definition differs from the current legal definition of coercion in the context of the defense of duress.[79] And yet, as the

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72 *Id.* at 493.

73 *Id.* at 487.

74 *Supra* notes 67–69 and accompanying text.

75 *Supra* notes 71–73 and accompanying text.

76 *See infra* Section III.A.

77 Kronman, *supra* note 66, at 476–82; Westen, *supra* note 33, at 584–89.

78 This definition builds on Conrad Brunk's work. *See* Brunk, *supra* note 24, at 539–41 (arguing that coercion occurs if the coercer makes a conditional proposal to an offeree that creates a situation that is less preferable than the situation that the offeree has the right to expect). In the plea-bargaining context, the coercer will make accepting a plea more desirable, either by making the alternative—going to trial—less desirable than what it would have been without the coercer's intervention or by making it physically or psychologically impossible for the coercee to refuse the deal. *Id.* at 542–43. As discussed below, a prosecutor might threaten a defendant with seeking the maximum punishment at trial or with prompting other negative consequences for the defendant or others. But the prosecutor could also initially overcharge a defendant and then offer a significant "plea discount." If the latter proposal is combined with other constraints, it might still be coercive. Although most scholars require that the coercer present the coercee with a conditional threat, *see* Nozick, *supra* note 38, at 440–41, some critics have contended that coercion can come from conditional offers that are so impactful that a reasonable person could not refuse them. *See* Brunk, *supra* note 24, at 541–42; *see also* Onora O'Neill, *Which Are the Offers You Can't Refuse?*, *in* VIOLENCE, TERRORISM, AND JUSTICE 170, 170–71 (R.G. Frey & Christopher W. Morris eds., 1991) (pointing out the disagreement between scholars on how to classify coercion). As explained below, the Author joins this latter view.

79 *Infra* Section III.A.

Article claims, the bar for finding duress in the formation of settlement agreements is set too high even by existing standards.[80]

With these philosophical tools in hand, this Article turns to applying them, first to plea bargaining and next to what it calls high-risk civil settlements.

II. Coercion in Plea Bargaining

A. Why Should Private Law Care About Plea Bargaining?

Although criminal and civil settlement dynamics differ considerably, similarities between the two justify extrapolating from plea bargains to certain forms of civil settlements.[81] Indeed, some have argued more generally that plea bargains—as criminal settlements—are directly comparable to civil settlements.[82] In the civil contexts discussed here, much like in plea bargains, less powerful parties might face a lack of alternatives because of the actions of a more powerful counterpart, rendering their acquiescence to the settlement terms involuntary. Although the less powerful party—criminal defendant or civil plaintiff—can ultimately decide whether to accept the settlement offer or proceed to trial, the voluntariness of their decision might be compromised nonetheless.

Furthermore, although the coercive mechanism is clearer in the criminal context, as the defendant cannot simply walk away from a plea negotiation without consequences, there is an element of coercion in enforcing private law too.[83] The state—which provides the institutional infrastructure to enforce private contracts[84]—uses its instruments to allow the power wielded by private parties.

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80 *See infra* Section III.A.

81 In his seminal article, Owen Fiss describes settlements as the equivalent of plea bargains, hinting at the fact that some settlements might be coerced:

> Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1075 (1984).

82 *See* Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. Rev. 1047, 1060 (2021) ("Criminal settlement is the product of optimizing agents engaged in utility-maximizing 'trade.' Each party possesses 'assets' that the other may value, so they bargain with the goal of achieving mutual gains. In the most familiar scenario, prosecutors 'buy' concessions from defendants by promising some benefit (e.g., a lesser charge or a shorter sentencing recommendation), and in turn defendants 'sell' some or all of their procedural rights.").

83 Arguably, the civil defendant cannot just walk away from a settlement negotiation without consequences either, as it is the plaintiff's choice whether to pursue a suit. *See* Ware, *supra* note 15, § 3.5(c).

84 As David Luban notes, "the appeal to a public institution such as the adversary system already bridges the gap between private and public responsibility." David Luban, Lawyers and Justice 173 (1988).

Admittedly, criminal and civil settlement dynamics differ considerably. While a government agent, the prosecutor, initiates and controls the criminal proceeding against an individual defendant, the civil proceeding is started by a private plaintiff who theoretically is on equal footing with a private—individual or entity—defendant.[85] Moreover, in many civil actions, the roles are reversed as the more powerful party is the defendant.[86] The stakes can be much higher too in the criminal setting, in which the risk of incarceration and other criminal sanctions looms large. Relatedly, as Stephen Ware notes,

> while high payments by civil defendants enrich plaintiffs (and typically their lawyers) more than low payments . . . high "payments" by criminal defendants often come in the form of more time behind bars, which does not enrich the prosecuting government and typically burdens [it].[87]

Finally, the market for legal services differs considerably between the two settings. While some prosecutors' offices might struggle with insufficient resources and more cases to pursue than personnel to prosecute them,[88] additional strong civil plaintiffs' cases should attract more lawyers to maximize financial returns.[89]

Despite these differences, in the context discussed here, the coercive dynamics of civil settlement are not unlike those in plea bargains. Importantly, plea bargains are also specifically relevant to settlements conditional upon confidentiality, as silencing can occur in the criminal setting too. As M. Eve Hanan and Alexandra Natapoff explain, defendants are often silenced in the criminal justice system.[90] Although plea bargains typically will not prevent defendants from telling their side of the story retrospectively, they contribute to a broader scheme that

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85 For a discussion of this democratic function of private ordering in the context of tort law, see generally Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 Nw. U. L. Rev. 1765 (2009).

86 *See, e.g.*, Katersky & Charalambous, *supra* note 10.

87 Ware, *supra* note 15, § 3.5(g).

88 *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2555 (2004); *see also* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/W4P2-PLVL] (noting that prosecutors are "often overworked and understaffed").

89 *See* Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?*, 91 Marq. L. Rev. 145, 158 (2007) (observing that, while civil litigators "work to maximize financial returns," "[p]rosecutors have an incentive to maximize their conviction rate and, therefore, are more likely to only go to trial with sure winners").

90 *See* M. Eve Hanan, *Talking Back in Court*, 96 Wash. L. Rev. 493, 495 (2021) (discussing how defendants rarely "talk back" in court in the sense of challenging authority); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1456 (2005) (arguing that defendant silencing has contributed to the declining adversarial nature of the criminal justice system).

permits defendants to be seen but not heard.[91] This is another sense in which the comparison between plea bargains and confidential civil settlements is useful.

Thus, notwithstanding the qualifications, acknowledging the structural similarities between plea bargains and some civil settlements elucidates coercion in civil settlements.[92] This Part of the Article discusses coercion in plea bargains. Next, in Part III, the Article uses this discussion as analytical leverage to highlight the coercive nature of some civil settlements.

B. Plea Bargains and Voluntariness

Guilty pleas lead to the vast majority of criminal convictions in the United States yearly.[93] For guilty pleas to be valid, however, courts must ensure that defendants entered them "knowingly, intelligently, and voluntarily."[94] Rule 11 of the Federal Rules of Criminal Procedure states that pleas can only be accepted if they were made voluntarily and

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91 Indeed, one of the big benefits of plea bargaining from the state's perspective is that it prevents defendants from telling their side of the story. For instance, after Breonna Taylor was killed, the state offered her ex-boyfriend a favorable plea deal if he would (falsely) claim that she was involved in his drug conspiracy. *See* Vanessa Romo, *Prosecutors' Plea Deal Required Drug Suspect to Name Breonna Taylor a 'Co-Defendant*,' NPR (Sept. 2, 2020, 2:33 AM), https://www.npr.org/2020/09/02/908625259/prosecutors-plea-offer-alleged-breonna-taylor-was-part-of-organized-crime-syndic [https://perma.cc/V579-V7FP]. Further, there are many examples of *Alford* pleas being used to prevent defendants from suing the state in later civil litigation. *See* Thea Johnson, *Lying at Plea Bargaining*, 38 Ga. St. U. L. Rev. 673, 698–99, 699 n.101 (2022) (discussing examples of such pleas, including the famous "West Memphis Three" case). Those *Alford* pleas are essentially good deals that force the defendant not to speak about their experience by preventing disclosures in civil litigation.

92 In fact, one of the most discussed psychological theories in criminal plea bargaining was borrowed from the literature on civil settlements. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2464–65 (2004) (describing the prevalence of Mnookin and Kornhauser's divorce-settlement model in criminal plea bargain literature). *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979) (considering the psychology of settlements in civil divorce proceedings).

93 *See* Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023, 5:00 AM), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/RC78-6WDZ] ("98% of criminal cases in the federal courts end with a plea bargain . . . ."). The National Registry of Exonerations reported that between 1989 and 2021, 2,970 innocent individuals had been exonerated of crimes they did not commit. The Nat'l Registry of Exonerations, 2021 Annual Report 5 (2022). Of these exonerees, twenty-two percent entered a guilty plea. *Id.* at 9. False confessions and coerced plea bargains likely account for some of these wrongful convictions.

94 Stano v. Dugger, 921 F.2d 1125, 1161 (11th Cir. 1991); *see also* Brady v. United States, 397 U.S. 742, 758 (1970) (endorsing the reliability of guilty pleas attained voluntarily, intelligently, and with advice of counsel). Courts have generally treated the terms understandingly, knowingly, and intelligently as "synonymous and interchangeable in the guilty-plea context, making no meaningful effort to attribute discrete and disparate meanings to them." United States v. Dominguez, 998 F.3d 1094, 1102 n.5 (10th Cir. 2021).

"did not result from force, threats, or promises (other than promises in a plea agreement)."[95] But this standard fails to clarify the concept of voluntariness. Similarly, the Supreme Court's definition of voluntariness has been dubbed "vague and imprecise,"[96] rendering the doctrine unclear.[97]

Importantly, although there are competing views regarding the relationship between voluntariness and coercion,[98] the legal system has tended to treat them as each other's antithesis. For example, regarding confessions, the Supreme Court in *Colorado v. Connelly*[99] held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'" and maintained that "the voluntariness

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95 FED. R. CRIM. P. 11(b)(2). The *Brady* standard requires that the

> plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).

Brady, 397 U.S. at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

96 Hollida Wakefield & Ralph Underwager, *Coerced or Nonvoluntary Confessions*, 16 BEHAV. SCIS. & L. 423, 436 (1998).

97 It is important to distinguish between confessions and guilty pleas in this context. A confession can sometimes result in an acquittal at trial, as a suspect who confesses might still choose to exercise their right to a trial. *See* Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1425–26 (2016) (contrasting plea bargains and confessions). A defendant might even retract their confession prior to the beginning of trial. *See* Gisli H. Gudjonsson & James A.C. MacKeith, *Retracted Confessions: Legal, Psychological and Psychiatric Aspects*, 28 MED. SCI. & L. 187, 187 (1988). In contrast, when a guilty plea is accepted, it leads to a conviction. *See* Garrett, *supra*, at 1418. Furthermore, although prosecutors have specific authority to offer leniency in sentences and charges as part of a plea deal, police cannot legally promise leniency at trial. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922 (2004) (explaining that when a defendant confesses, prosecutors tend to be less lenient); Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS 49, 52, 61 (G. Daniel Lassiter & Christian A. Meissner eds., 2010). However, confessions also share similarities with plea bargains: Primarily, state representatives exercise power and use other social influence factors to secure admissions from individuals. *Id.* at 59. Furthermore, both confessions and plea bargains present similar risk factors to certain suspects and defendants. *Compare* Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010) (describing demographic and social factors that make a defendant more likely to confess to a crime), *with* Allison D. Redlich, Stephanos Bibas, Vanessa A. Edkins & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339 (2017) (describing demographic and social factors that contribute to plea bargains).

98 *Compare* Brunk, *supra* note 24, at 527 (arguing that coercion is essentially equivalent to involuntariness from a legal standpoint), *with* Michael Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133, 133 (1984) (arguing that the two concepts are distinct and that coercion is insufficient to make an act involuntary).

99 479 U.S. 157 (1986).

determination . . . is designed to determine the presence of police coercion."[100] Similarly, with respect to plea bargains, the United States District Court for the Eastern District of New York took for granted that coercion rendered a plea agreement involuntary, asking instead what degree of coercion was needed to reject a plea as involuntary.[101] To determine the voluntariness of pleas, courts evaluate the oral plea colloquy, which consists of judges asking defendants a series of questions to assess the extent to which they understand and desire the plea.[102] Among other issues, the questions address whether any threats or promises were made in exchange for the plea.[103]

Despite this procedural safeguard, research has found a high rate of exonerations involving false guilty pleas.[104] As a result, scholars have begun to identify factors that might negate voluntariness and contribute to false pleas, such as prosecutorial overcharging and deals constrained by time pressures.[105] What does overcharging mean in the context of plea bargaining? Prosecutors might take the term to mean falsely accusing the defendant of a crime they did not commit merely to induce the plea.[106] However, overcharging as used here refers

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100 *Id.* at 167–68.

101 United States v. Speed Joyeros, S.A., 204 F. Supp. 2d 412, 424. (E.D.N.Y. 2002) ("'[V]oluntary' can not be defined by freedom from 'coercion,' rather than by acknowledging appropriate levels of coercion.").

102 *See* Boykin v. Alabama, 395 U.S. 238, 243–44 (1969). Courts have said that the true inquiry in each plea colloquy is whether coercion has made the plea unconstitutional. *See* Stano v. Dugger, 921 F.2d 1125, 1142 (11th Cir. 1991); United States v. Martinez, 486 F.2d 15, 21 (5th Cir. 1973) ("[T]he question whether a guilty plea is voluntarily entered is determined, not by whether there are external forces inducing a defendant to plead guilty—for such forces will invariably exist—but instead by a determination as to whether these forces are constitutionally acceptable.").

103 *Boykin*, 395 U.S. at 242–43; *Stano*, 921 F.2d at 1162 n.6; *see also* Allison D. Redlich & Catherine L. Bonventre, *Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 LAW & HUM. BEHAV. 162, 164 (2015) (showing that jurisdictions significantly vary in the actual questions they ask as part of the oral plea colloquy).

104 *See* Samantha Luna, *Defining Coercion: An Application in Interrogation and Plea Negotiation Contexts*, 28 PSYCH., PUB. POL'Y, & L. 240, 241 (2022) ("As of August 2021, . . . false guilty pleas were present in about 20% [of all known exonerations], with 2.7% of exonerations involving both a false confession and false guilty plea.").

105 *See* Redlich et al., *supra* note 97, at 339 (examining various factors affecting the extent to which pleas are made "knowingly, intelligently, voluntarily, and with a factual basis of guilt"); Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH., PUB. POL'Y, & L. 250, 250 (2016) (finding that "substantial discounts were offered to participants in exchange for their guilty pleas" and that participants were given "very short time periods in which to make their decisions").

106 *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85 (1968). Interestingly, as Thea Johnson shows, the parties might at times mutually agree to a

to a much more common practice: "[w]hen the only reason for filing a charge is to induce a plea of guilty to some other charge . . . ."[107] The flip side of overcharging would be to apply exceeding leniency—or "plea discounts"—to those who agree to plead guilty.[108]

Merely examining the plea colloquy could thus fail to identify involuntariness when such means of influence as overcharging and plea discounts were used in the plea-bargaining process.[109] Defendants might fail to acknowledge that their plea was entered involuntarily, and judges might do the same.[110] As one district court has noted, many plea bargains would likely be invalidated if courts applied a strict voluntariness rule to assessing them.[111]

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fictional plea—that is, the defendant pleading guilty to a charge based on fabricated facts. *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 858 (2019).

107 Alschuler, *supra* note 106, at 86 (adding that "even when prosecutors have other, purely tactical reasons for multiplying the number of accusations[] defense attorneys view the practice as 'overcharging' despite the sufficiency of the prosecutor's evidence" (citation omitted)). For a psychological perspective, see generally Stephanie A. Cardenas, *Charged Up and Anchored Down: A Test of Two Pathways to Judgmental and Decisional Anchoring Biases in Plea Negotiations*, 29 PSYCH., PUB. POL'Y, & L. 435 (2023).

108 This is also referred to as "the trial penalty." *See* Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 256 (2019).

109 *See* Samuel M. Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*, 6 VAL. U. L. REV. 111, 119–20 (1972); United States v. Speed Joyeros, S.A., 204 F. Supp. 2d 412, 417–18 (E.D.N.Y. 2002). Indeed, although judges have absolute discretion in rejecting or accepting a guilty plea, *see* United States v. Bundy, 392 F.3d 641, 647 (4th Cir. 2004) (providing that a district judge is free to withhold consent from a conditional plea "for any reason or no reason at all"); United States v. Bell, 966 F.2d 914, 916 (5th Cir. 1992) (providing that a court is "free to reject a conditional plea for any reason or no reason at all"); *In re* Gallaher, 548 F.3d 713, 716–17 (9th Cir. 2008) ("Rule 11(a)(2) does not place any per se restrictions on how a court may exercise its discretion."); United States v. Davis, 900 F.2d 1524, 1527 (10th Cir. 1990) (stating that a district court "has absolute discretion with regard to accepting or rejecting the conditional plea" and "can refuse to accept a conditional plea for any reason or for no reason"), instances of coercion sufficient to invalidate a plea are rare, *see* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMPAR. L. 199, 212–13 (2006) (discussing general lack of involvement by judges in plea bargaining). Such rare instances of invalidated pleas due to coercion include threats to prosecute a baseless case against a defendant, *see* Waley v. Johnston, 316 U.S. 101, 101, 104 (1942) (stating that a plea induced by federal agents' threats to turn over false information to state prosecutor would render the plea invalid), and occasionally threats against third parties, *see* Martin v. Kemp, 760 F.2d 1244, 1246–48 (11th Cir. 1985) (finding that a threat to prosecute defendant's wife meant that the voluntariness of defendant's guilty plea was not sufficiently developed in the state court hearings).

110 For a recent comprehensive review of the research on coercion in plea bargains, see generally Lucian E. Dervan, Vanessa A. Edkins & Thea Johnson, *Victims of Coercive Plea Bargaining: Defendants Who Give False Testimony for False Pleas*, 72 AM. U. L. REV. 1919 (2023).

111 *Speed Joyeros*, 204 F. Supp. 2d at 423.

C. The Scholarly Debate on Coercion in Plea Bargaining

As scholars have observed, coercion has implications across various legal doctrines,[112] including contracts,[113] negotiation,[114] medical ethics,[115] unconstitutional conditions,[116] duress,[117] and sexual consent.[118] Specifically, coercion has been studied for years in plea bargains, with scholars debating the extent to which such exchanges are inherently coercive.[119]

Notably, scholars disagree on whether employing subtle influence tactics such as overcharging amounts to coercion.[120] Scholars who claim that overcharging can be coercive have argued that a fundamentally fair plea requires three factors: voluntariness,[121] "informed choice and an

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112 *See* Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 720 (2005) (applying the concept of coercion across legal doctrines); Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 46 (2002) (arguing that legal doctrines require two distinct types of coercion); WERTHEIMER, *supra* note 33, at xi (offering a theory of coercion across legal doctrines).

113 *See, e.g.*, WERTHEIMER, *supra* note 33, at 23–28 (surveying duress cases in contracts); Bar-Gill & Ben-Shahar, *supra* note 112, at 753 ("It is beyond dispute that an improper threat can create duress and justify the rescission of the contract . . . ."); Stephen A. Smith, *Contracting Under Pressure: A Theory of Duress*, 56 CAMBRIDGE L.J. 343, 343 (1997) (observing that in contract law, "courts are regularly required to consider how far the scope of duress should extend"); Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L.J. 175, 176 (1997) ("A bargain entered into under duress is not enforceable.").

114 *See, e.g.*, Kirgis, *supra* note 64, at 75 (relying on a theory of coercion to identify positive and negative negotiation leverage).

115 *See supra* note 17.

116 *See supra* note 18.

117 *See, e.g.*, Dressler, *supra* note 19, at 1334.

118 *See supra* note 20.

119 *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1298 (1975) ("When our consciences cause us to deny the coercive character of the system that we have created, we magnify its injustice as we delude ourselves."); Bar-Gill & Ben-Shahar, *supra* note 112, at 763 ("Plea bargains are a unique species of contract that raises frequent concerns of coercion."); Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1127 (2016) (arguing that whether a plea bargain is coercive should be determined based on a proportionality baseline); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13 (1978) ("Plea bargaining, like torture, is coercive.").

120 *Compare* Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 704–07 (1980) (arguing that high sentencing can result in coercive plea agreements), *with* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 311 (1983) (rejecting the argument that pleas can be coercive).

121 Included in the idea of voluntariness is how the outcome affects other people. *See* Jolly & Prescott, *supra* note 82, at 1092 ("[O]utcome-modification agreements can go beyond a defendant and directly affect third parties, which occurs only because the defendant has an interest in these parties. For instance, hardball prosecutors may threaten to investigate and indict a defendant's friends, family members, or co-conspirators unless the defendant relinquishes some or all of their procedural rights. Under such circumstances, defendants might feel compelled to settle to protect their network from the costs of such attention or to save themselves from any reputational effects." (footnote omitted)).

opportunity for reasoned deliberation," and an absence of governmental misconduct.[122] If any of these elements are missing, the plea should be considered wrongfully coercive and thus impermissible.[123]

To assess the coercive nature of pleas, scholars tend to focus on what is known as a "sentencing differential" whereby the state imposes "one sentence if there is a plea, and a higher sentence if the defendant stands trial and is convicted."[124] Arguments regarding coercive plea bargains can be divided into two broad views: "(1) differential sentences that 'coerce' confessions, and (2) differential sentences that 'unduly burden' constitutional rights."[125]

Starting with the first view, that differential sentences can coerce confessions, scholars like Steven Nemerson argue that ethical values should make enhancing "the maximum proportionate sentence to coerce cooperation . . . impermissible."[126] In other words, "If a plea induced by fundamentally unfair or unethical conduct or promises is constitutionally infirm, then a plea resulting from threats of disproportionately severe punishment upon conviction after trial is also invalid."[127] Nemerson thus believes it to be morally impermissible to use a "retributive principle" "to impose a greater sentence on a defendant than that justified by his individual culpability for the purpose of coercing cooperation by the defendant or others, except in the most compelling cases of social need."[128] But how large should the differential be to render a plea coercive? According to Albert Alschuler, the size of the differential does not matter and any differential is problematic because "[i]f we are 'lenient' toward [defendants who plead guilty], we are by precisely the same token 'more severe' toward [those who

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122 *See* Nemerson, *supra* note 120, at 704–07.

123 *Id.*

124 Easterbrook, *supra* note 120, at 311.

125 Nemerson, *supra* note 120, at 701. The arguments based on morality alone are intertwined with these views, but as Nemerson points out, "it is generally inadequate in a legal brief to cite [morality texts] as controlling or even persuasive precedent on the validity of a judicially imposed sentence of incarceration." *Id.*

126 *Id.* at 707.

127 *Id.* at 706–07.

128 *Id.* at 698–99. But "the state may impose less than the proportional penalty on an offender if the overall consequences of such leniency . . . would be better than those that would likely result from imposition of the maximum deserved sentence." *Id.* at 698–99. The caveat is that "any harmful consequences of such leniency (e.g., decreased general deterrence) do not outweigh the good gained." *Id.* at 699. To determine an appropriate lower limit for a sentence, Nemerson suggests a "utilitarian principle," which would support eliminating plea bargains based on the result. *Id. But see* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 671–79 (1981) (taking issue with Nemerson's position that the utilitarian "sacrifice of one governmental objective—that of insuring adequate punishment for offenders—can be justified to accomplish another—that of reducing government expenditures").

plead not guilty]."[129] The state is thus punishing a person because, for the nonpleading defendant, "the act of putting the noose around their own necks is simply too difficult,"[130] and "[f]ar from promoting his sense of personal dignity, it may confirm his sense of bewilderment and unfair imposition."[131]

Pivoting to the second argument, that "differential sentences . . . 'unduly burden' constitutional rights,"[132] Alschuler asserts that "in the absence of a legitimate reason, the government may not burden the exercise of constitutional rights at all."[133] Alschuler takes issue with the very balancing of the constitutional right to trial and counsels against economic pressures of government.[134] Taking this argument a step further, John H. Langbein compares a confession received after torturing a person to a negotiated plea for less prison time,[135] concluding that both prompt the victim "to bear false witness against himself in order to escape further [punishment]."[136] If "there is no way of knowing whether a particular guilty plea was given because the accused believed he was guilty, or because of the promised concession," Langbein sees no moral difference other than degree of coercion between the two tactics for extracting confessions.[137]

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129 Alschuler, *supra* note 128, at 659 (second and third alterations in original) (quoting Scott v. United States, 419 F.2d 264, 278 (D.C. Cir. 1969)). The very choice between a plea and a trial is thus unjust for Alschuler, as "[o]ne mark of a just legal system is that it minimizes the effect of tactical choices upon the outcome of its processes." *Id.* at 657. In an unjust legal system, therefore, "one [of two virtually identical defendants will] receive a more severe sentence than the other only because he has exercised his right to trial." *Id.* at 658.

130 *Id.* at 666.

131 *Id.* at 668–69.

132 Nemerson, *supra* note 120, at 701.

133 Alschuler, *supra* note 128, at 695. Thus, "[t]he legitimacy of the government's purpose must always be evaluated in terms of the objectives of the Constitution itself." *Id.* at 695 n.115. As a result, utilitarian arguments regarding government benefits or administrability cannot justify coercive pleas that involve "the sacrifice of penological purposes (or of important constitutional values)." *Id.* at 672; *see also* Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 LAW & CONTEMP. PROBS. 83, 100–02 (2017) (discussing how plea bargaining relies on well-funded, accurate defense counsel, so the inadequate public defender system requires greater state funding).

134 Alschuler, *supra* note 128, at 677 ("If the framers of the Constitution were not fools, they knew that trials would cost money. They apparently decided that the price was worth paying. Under our Constitution, it is simply impermissible to balance the virtues of trial against the economic costs . . . [because the framers] surely did not overlook the fact that the sixth amendment would have an impact on government treasuries." (footnote omitted)).

135 Langbein, *supra* note 119, at 12–13.

136 *Id.* at 15.

137 *Id.* at 16 (quoting People v. Byrd, 162 N.W.2d 777, 787 (Mich. Ct. App. 1968) (Levin, J., concurring)). Langbein adds an authority-usurping function to the analysis, noting that "plea bargaining . . . requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause." *Id.* at 18. Unlike the constitutionally mandated fair trial, which requires "the prosecutor to make the charging decision, the judge and especially the jury to

Structural elements can also play a role in coercive plea bargains. A key example is information asymmetry.[138] To explain this asymmetry, Stephanos Bibas compares basic consumer protections to those offered to a defendant and shows that the market for bargaining is biased against "unsophisticated laymen facing repeat-player prosecutors."[139] This asymmetry, combined with the pressure "to make hurried decisions based on advice by lawyers whom they may not yet have come to trust" and who are "often overburdened . . . and may have incentives to plead cases out quickly," creates conditions ripe for coercion.[140] Similarly, Ion Meyn highlights structural elements used to limit formal discovery and overburdened public defenders ill-equipped to handle the discovery as crucial factors affecting the plea bargaining process.[141]

In contrast, some have argued that plea bargains are not inherently coercive unless accompanied by physical or extreme emotional threats, which are already prohibited.[142] As for the sentencing differential, Frank Easterbrook argues that attempts to set a specific limit to the differential run counter to defendants' and prosecutors' autonomy and disincentivize the most efficient way of settling cases.[143] For Easterbrook, the mere act of buying and selling certain rights for certain results is not itself coercive:

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adjudicate, and the judge to set the sentence[, p]lea bargaining merges these accusatory, determinative, and sanctional phases of the procedure in the hands of the prosecutor." *Id.*; *see also* Griffin, *supra* note 133, at 100–02 ("Plea bargaining . . . compromis[es] the professional roles and norms of both prosecutors and judges."). For Langbein, this is directly analogous to "the European inquisitorial procedure," which "concentrated in the investigating magistrate the powers of accusation, investigation, torture, and condemnation." Langbein, *supra* note 119, at 18.

138 *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1153–59 (2011) (arguing that the current plea bargain system is unjust and in need of reform because it pits unsophisticated laymen against repeat-player prosecutors, leading to information imbalance); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 Brook. L. Rev. 1091, 1091–92 (2014) (noting information asymmetry in criminal discovery).

139 Bibas, *supra* note 138, at 1153.

140 *Id.* at 1153–55. Bibas adds that for unsophisticated defendants, "[i]t is astonishing that a $100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment." *Id.* at 1153.

141 *See* Meyn, *supra* note 138, at 1129–33.

142 *See* Josh Bowers, *Two Rights to Counsel*, 70 Wash. & Lee L. Rev. 1133, 1147–48 (2013) (noting that plea bargains cannot be "cheekily equated" to torture, because "actual or threatened physical harm" and "mental coercion overbearing the will of the defendant" are already prohibited (quoting Brady v. United States, 397 U.S. 742, 750 (1970))); *see also* Easterbrook, *supra* note 120, at 311–12 (arguing that sentencing differentials that naturally result from the bargaining process are not coercive).

143 Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1977–78 (1992) ("Formally, the [criminal sentencing] guidelines limit the discount for 'acceptance of responsibility' to two levels, or roughly fifteen percent of the sentence. This discount, significantly less than the historical reduction, could have discouraged pleas. . . . [This is] the opposite of the effect the guidelines' authors sought to achieve.").

> If plea bargains are honest compromises among the parties, in which defendants who might be acquitted surrender that possibility in exchange for a lower sentence, then there will be a sentence differential that is indistinguishable from the coercive threat of which the critics complain.[144]

Even if coercion were present, it would be difficult to identify, because in a world where plea bargains exist, it is impossible to know what a sentence would be in their absence.[145] Further, differences in posttrial and postplea sentences are expected, because "the right to take the case to trial is a valuable entitlement . . . [which the prosecutor] will pay handsomely for."[146] Per Easterbrook, therefore, to base coerciveness only on differential size ignores other factors that create sentencing differentials, such as the likelihood of acquittal.[147] It also fails to account for inequalities rampant at trial, in which "[i]nformation and reputation effects create economies of scale in defense[,] . . . [e]yewitnesses are often unreliable (but believable) witnesses[, and e]vidence may not come to light."[148]

In contesting the claim that plea bargains are coercive, Robert E. Scott and William J. Stuntz use the framework of duress in contract law: "[C]ontract law has resolutely rejected the buyer's duress argument [in cases where the standard going-rate and the actual price are drastically different] on the sensible ground that the seller's actions did not produce the constraint on the buyer's choices . . . ."[149] Thus, the fact that the defendant has "few and unpalatable choices" does not make the plea agreement involuntary as long as the prosecutor did not manipulate

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144 Easterbrook, *supra* note 120, at 311 (using an example in which a defendant facing twenty years believes he has a fifty percent chance of conviction and arguing that if his discount rate is ten percent, any offer of less than 5.82 years of incarceration would be an objectively attractive offer). Per Easterbrook, "only if circumstances cause him to accept a higher sentence or if the risk of the twenty-year sentence would not exist but for the existence of plea bargaining" then the plea bargains can be isolated as coercive itself. *Id.*

145 *Id.*

146 Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1921 (1992). Easterbrook looks at the issues from a law and economics perspective, whereas Scott and Stuntz form a contract-based discussion, but their findings are similar. *See* Easterbrook, *supra* note 143, at 1969 ("Dean Scott and Professor Stuntz provide an impressive defense of plea bargaining based on autonomy and efficiency—the best defense in the literature. They add proposals for reform along contractual lines. The editors must have thought that Professor Schulhofer and I would supply contrasting points of view in reply, as if law reviews should aspire to the format of television commentary. Our reactions must be a disappointment, for we agree on everything that Scott and Stuntz themselves view as novel about their article." (footnote omitted)).

147 Easterbrook, *supra* note 120, at 312.

148 *Id.* at 310, 316–17.

149 Scott & Stuntz, *supra* note 146, at 1920.

posttrial sentences.[150] Scott and Stuntz also reject an unconscionability challenge to plea bargains, highlighting prosecutors' incentives to bargain with defendants and defendants' power to force prosecutors to try them.[151] This incentive makes plea bargains different from most unconscionable contracts, as "it is in [the prosecutor's] interests to bargain for a deal with each defendant" and generally "the absence of such individualized bargaining in other settings . . . supports claims of unconscionability on the basis of unequal bargaining power."[152]

A final strand of work assessing coercion in plea bargaining focuses on notice, which Josh Bowers claims is consistent with how courts interpret plea voluntariness.[153] Bowers notes that the Supreme Court has held that if the defendant is "fully aware of the likely consequences" when pleading guilty, it is "not unfair to expect him to live with those consequences."[154] This rationale fits with Bowers's claim that plea bargaining and guilty plea procedure care "comparatively more about autonomy and fairness, and comparatively less about the perceived settled question of technical guilt accuracy."[155] Thus, if a charge is supported by probable cause, "there is no impermissible coercion."[156]

An important component largely missing from this theoretical and doctrinal discussion is the psychology of coercion. Understanding the psychological factors that contribute to an individual's experience of being pushed into acquiescence can narrow the divide between legal definitions and the coerced individual's reality. It can also aid in discerning subtler forms of coercion than those traditionally recognized by the legal system.

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150 *See id.* at 1920–21. For Scott and Stuntz, then, "An offer that exploits those circumstances [in which a defendant has few, bad options] is nevertheless value enhancing, and enforcement is appropriate. More choices are better, even—perhaps especially—if one has few to begin with." *Id.* at 1920.

151 *Id.* at 1921–24.

152 *Id.* at 1924.

153 Bowers, *supra* note 142, at 1147–48 (noting that courts have not protected any other aspect of plea bargaining besides notice, as "actual or threatened physical harm" and "mental coercion overbearing the will of the defendant" are already prohibited (quoting Brady v. United States, 397 U.S. 742, 750 (1970))).

154 *Id.* at 1148–49 (quoting Mabry v. Johnson, 467 U.S. 504, 511 (1984)).

155 *Id.* at 1149–50.

156 *Id.* at 1151 (noting that "[f]or the Court, it matters terrifically that prosecutors apply pressure with the law, not with their hands"). Bowers asserts that

> [u]ltimately, then, there exists a complicated interplay between plea-bargaining and coercion—narrowly, between plea-bargaining and draconian substantive criminal codes. By compelling the defense attorney to bargain hard around unfair code law (and to exercise 'considerable persuasion' in her dealings with both the State and her client), the Court has facilitated the substantive circumvention of law in the name of procedural fairness.

Id. at 1166.

D. Psychological Coercion

Psychological coercion is often discussed in the context of plea bargaining and criminal confessions, but this literature is useful for understanding the psychological mechanisms contributing to coercion in other settings, including civil settlements. As reviewed in Part I, some philosophers have expanded their definitions of coercion over the last several decades to include subdued forms of coercion.[157] However, legal doctrine has yet to catch up[158] by addressing the subtle forms of coercion that psychological research shows can influence voluntary decision-making.[159]

These subtle methods of coercion fall into two main categories. The first category is authority and power, and the second is social influences.[160]

With regard to *authority*, psychological studies have shown that more often than not, people obey instructions from others who they view as authority figures.[161] For example, in Stanley Milgram's famous experiment from 1963, more than half of the participants obeyed the experimenter's instructions and issued what they thought were potentially harmful shocks to a person in another room complaining of pain and pleading with them to stop.[162] Later studies have produced similar results, showing that deference to perceived authority can have a significant impact on a person's decision-making process.[163]

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157 *See supra* Part I.

158 Indeed, cases discussing forced confessions only address situations in which coercion is obvious. *See* Hopt v. Utah, 110 U.S. 574, 585 (1884) ("[A] voluntary confession of guilt is among the most effectual proofs in the law, . . . [b]ut the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."). These cases typically include explicit threats or promises. *See, e.g.*, *id.*; Brown v. Mississippi, 297 U.S. 278, 281–82 (1936); *cf.* Bordenkircher v. Hayes, 434 U.S. 357, 358–59, 364–65 (1978) (holding that a prosecutor did not violate the due process rights of a criminal defendant during plea bargaining by telling the defendant that the prosecutor would return to the grand jury and seek an indictment on a charge carrying a mandatory sentence of life imprisonment if the defendant pleaded not guilty).

159 *See* Luna, *supra* note 104, at 242 (reviewing conceptions of coercion across law, philosophy, and psychology to propose an updated legal definition of coercion).

160 *Id.* at 245, 250.

161 *Id.* at 245.

162 Stanley Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psych. 371, 374, 376 (1963).

163 *See, e.g.*, Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity, and Compliance*, *in* 2 The Handbook of Social Psychology 151, 170–71 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L.J. 1962, 1962, 2001–04

Another notable element of Milgram's study was how little pressure the experimenter put on the subjects to keep allegedly shocking the other individual.[164] In another study, researchers similarly found that very little pressure was needed before participants would confess to something that they did not do.[165] These researchers told participants to perform a computer task and instructed them not to press the "ALT" key, which would crash the computer.[166] The computer would then crash on its own, and the experimenter would ask the participant to sign a written confession that said "I hit the 'ALT' key and caused the program to crash. Data were lost."[167] A total of sixty-nine percent of participants signed the false confession despite being innocent, and the experimenter applied no pressure other than simply asking them to sign the confession.[168]

Researchers have attempted to explain why people so often comply with authority even when they do not wish to do so.[169] One potential reason is that authority figures are perceived as people with high levels of knowledge and experience in a particular area.[170] Furthermore, people often comply with requests by authority figures because real-world decision-making has to be "fast, automatic, and unconscious."[171] A related factor that contributes to psychological coercion is *power*.[172] Similar to authority, power has to do with real or perceived control over rewards and punishments, which is the case for prosecutors and interrogators.[173] People in positions of power can exert similar influence on individuals who are subordinate to or otherwise weaker than them.

(2019) (reporting survey results and noting that "decision makers judging the voluntariness of consent consistently underestimate the pressure to comply with intrusive requests").

164 *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 175–77. According to the study, simply saying things like "you must go on" was enough for participants to continue their supposed torture of the person in the other room. *Id.* However, some have cast doubt on the study's method and findings. *See* Gina Perry, *Deception and Illusion in Milgram's Accounts of the Obedience Experiments*, THEORETICAL & APPLIED ETHICS, Winter 2013, at 79 (arguing that the experimenters in Milgram's study were far more involved in badgering participants than originally reported).

165 Nadler, *supra* note 164, at 178–79. *See generally* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCH. SCI. 125 (1996) (describing the method and results of the study).

166 Kassin & Kiechel, *supra* note 165, at 126.

167 *Id.*

168 *Id.* at 126–27.

169 *See, e.g.*, Nadler, *supra* note 164, at 174–75.

170 *Id.* at 173.

171 *Id.* at 174.

172 Luna, *supra* note 104, at 245.

173 *See id.* There are five types of power: legitimate, reward, coercive, referent, and expert. *Id.* Legitimate power comes from one's perception of the person in power as having a right to influence. *Id.* Reward power comes from the perceived ability to control benefits, whereas coercive power is derived from the perceived ability to control punishments. *Id.* Referent power originates

Authority and power operate via perception, not necessarily objective reality.[174] An example of this comes from a psychological study in which experimenters showed participants a confession tape from different camera angles.[175] The participants who were shown the tape from the perspective of the interrogator were more likely to say that the confession was voluntary.[176] The participants who were shown the tape from the perspective of the accused, however, were more likely to say that the confession seemed coerced.[177] This suggests that coercion induced by authority and power is created by the subjective perception of the person being coerced, and people outside the situation may struggle to recognize this experience.[178] Further, when people perceive another as someone in an authority position or possessing power, it changes the way that their actions and language are perceived.[179] When someone with perceived authority and power gives a direction, people are more likely to understand the directive as an order, not a suggestion.[180]

The second category of factors that contribute to psychological coercion is *social influences*.[181] There are three main social theories that help explain coercive aspects of settlement agreements: reciprocity, scarcity, and social validation.[182] First, reciprocity "involves the exchange of benefits for like benefits."[183] A person acts reciprocally when they "reward kind actions and punish unkind ones."[184] This behavioral phenomenon helps explain the desire to give a gift to a person after receiving a gift from that person.[185] Studies have shown that reciprocity

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in someone identifying with the person in power. *Id.* Finally, expert power is attained from the perception that the person in power is knowledgeable. *Id.* Prosecutors and interrogators arguably hold all five of these types of power, which can have a significant impact on the decision-making process of the accused. *Id.* at 249.

174 *Id.* at 245.

175 Nadler, *supra* note 164, at 170; *see also* G. Daniel Lassiter, Andrew L. Geers, Patrick J. Munhall, Ian M. Handley & Melissa J. Beers, *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 Advances Experimental Soc. Psych. 189, 241–46 (2001) (discussing and analyzing the results of the study).

176 Nadler, *supra* note 164, at 170.

177 *Id.*

178 *See id.* at 169–72.

179 *See id.* at 188–90.

180 *See id.* Whereas if a friend were to give the same directive, it would more likely be perceived as a suggestion or request. *See* Jennifer L. Vollbrecht, Michael E. Roloff & Gaylen D. Paulson, *Coercive Potential and Face-Sensitivity: The Effects of Authority and Directives in Social Confrontation*, 8 Int'l J. Conflict Mgmt. 235, 236 (1997).

181 *See* Luna, *supra* note 104, at 250–51.

182 *See id.*; Nadler, *supra* note 164, at 179–85.

183 Luna, *supra* note 104, at 250.

184 Armin Falk & Urs Fischbacher, *A Theory of Reciprocity*, 54 Games & Econ. Behav. 293, 293 (2006).

185 *See id.*

theory "is a powerful determinant of human behavior."[186] In plea deals, if a prosecutor originally overcharges a defendant and then offers concessions in exchange for a guilty plea, this could influence the defendant to reciprocate.[187]

Second, scarcity explains that people tend to value things that are rare and likely to become unavailable if they wait.[188] Psychologists describe the state of scarcity as "having less than you feel you need."[189] Researchers have found that scarcity causes a mental state that reduces cognitive and executive functioning and thus negatively impacts individuals' decision-making skills.[190] In plea negotiations, if a prosecutor offers a defendant a plea deal with a time limit to accept—sometimes called "an exploding plea"[191]—the time limit increases the likelihood that the defendant will take the deal as compared to if the deal had no time limit.[192] Additionally, the defendant may experience decreased complex decision-making abilities during this time due to pressure induced by scarcity.[193] Scholarly work studying how long it takes a defendant to plead guilty after being offered a deal has supported this theory.[194]

Third, social validation elucidates how people tend to make decisions based on the actions of people around them.[195] When in a novel situation, a person may rely on the actions of those either currently or previously in similar situations to decide how to act.[196] Various psychological studies have shown that people are extremely influenced by the decisions and actions of those around them.[197] Although this phenomenon is less relevant to an individual settlement or plea, social cues might be gathered from how others have previously behaved in

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186 *Id.* at 294.

187 *See* Luna, *supra* note 104, at 250. Reciprocity is also applicable to civil negotiations and transactions, as people more often agree to something when they feel compelled to participate in a quid pro quo. *See* Cialdini & Trost, *supra* note 163, at 175–76.

188 *See* Luna, *supra* note 104, at 250; Robert B. Cialdini, Influence: Science and Practice 203–04 (4th ed. 2001).

189 Sendhil Mullainathan & Eldar Shafir, Scarcity: Why Having Too Little Means so Much 4 (2013) (emphasis omitted).

190 *See* Long Huang, Xiaojuan Li, Fuming Xu & Fuhong Li, *Consequences of Scarcity: The Impact of Perceived Scarcity on Executive Functioning and Its Neural Basis*, Frontiers Neuroscience, June 13, 2023, at 1, 1–2, https://www.frontiersin.org/journals/neuroscience/articles/10.3389/fnins.2023.1158544 [https://perma.cc/S8Q5-GLXN].

191 *See* Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 Washburn L.J. 513, 551 (2012).

192 *See* Luna, *supra* note 104, at 250.

193 *See* Huang et al., *supra* note 190, at 2.

194 *See, e.g.*, Rapping, *supra* note 191, at 550–51.

195 Nadler, *supra* note 164, at 179–81.

196 *See id.*

197 *See, e.g.*, Solomon E. Asch, *Opinions and Social Pressure*, Sci. Am., Nov. 1955, at 31, 32–33.

a similar situation. Conformity can thus be induced by pointing to the acts of similarly situated persons.

These factors combined can have a powerful impact on an individual's decision-making process.[198] Although the legal system has attempted to account for coercion in plea deals, it has done so only in a narrow subset of scenarios.[199] Further, subtle forms of psychological coercion are still present in a variety of situations, including civil settlements. Considering psychological factors that contribute to a sense of involuntariness can offer a more nuanced understanding of coercion in both criminal and civil settlements. The analysis in Part III integrates these notions into a legal account of coercive settlements. But before proceeding to Part III, it is useful to take stock of the main takeaways from the plea bargaining analysis.

E. Takeaways from Plea Bargaining to Civil Settlement Coercion

This analysis of coercion in plea bargaining helps gauge the extent to which some civil settlements—particularly those that silence the plaintiff—are coercive too. Several takeaways from this analysis are especially useful. *First*, sentencing differentials have the potential to be coercive. By creating a large disparity between the possibly devastating consequences of trial and the considerably more lenient treatment proposed in exchange for a guilty plea, prosecutors can generate conditions that hardly allow a defendant to decline the plea.[200] Offers of leniency, in addition to threats of harsh treatment, can play a coercive role if the prosecutor imposes additional constraints on the defendant that lead them to take action.[201] As the next Part shows, civil defendants can similarly leverage a differential between trial and settlement. *Second*, structural and psychological elements are important. Factors such as lack of sufficient information, pressure to make decisions quickly, and overburdened

198 Furthermore, in line with the theory on procedural justice, studies have found that when an individual has a voice during the decision-making process, their decisions are more often perceived as voluntary. *See* Melanie B. Fessinger & Margaret Bull Kovera, *From Whose Perspective? Differences Between Actors and Observers in Determining the Voluntariness of Guilty Pleas*, 46 LAW & HUM. BEHAV. 353, 353 (2022) (finding that "[d]efendants and judges both determine whether a guilty plea is made voluntarily" and "[t]hese decision-makers are likely to perceive the plea decision-making process differently given their differing perspectives"); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) (arguing that a person's sense of procedural justice is important to whether they accept the results of the procedure).

199 *See supra* Section II.B.

200 *See supra* notes 104–08, 126–31 and accompanying text.

201 *See generally* Brunk, *supra* note 24 (arguing that many factors commonly present in the plea-bargaining process may make a negotiated guilty plea involuntary and that offers of leniency can also be coercive under certain conditions).

public defenders can further weaken defendants' voluntariness.[202] Part III elucidates that these elements are present in the civil context too. For example, information asymmetry favors civil defendants who know of the existence of other potential plaintiffs; plaintiffs face time constraints to settle; and even when plaintiffs are represented, their own lawyers might pressure them to settle as well. *Third*, context matters. Although plea deals are not inherently coercive,[203] considerable institutional factors contribute to their coercive effect in many instances.[204] A nuanced analysis of these factors is necessary to determine whether a settlement is truly voluntary. As explained in Part III, in the civil context, the conditions of the settlement process should be understood against the backdrop of the broader societal and economic structure to identify scenarios susceptible to coercion.[205] But courts have been reluctant to take such a nuanced approach. As noted, although the Supreme Court invalidates plea bargains obtained through force, threats, or promises,[206] many scholars argue that this approach is overly narrow.[207] This Article contends that this is the case for civil settlements too.[208]

III. COERCIVE SETTLEMENTS

The foregoing discussion regarding coercion in plea bargaining raises the possibility that some civil settlements might be coercive too. This Part shows this is the case, dubbing civil settlements prone to coercion "high-risk civil settlements" and focusing on one class of

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202 *See supra* notes 138–41, 190–94 and accompanying text.

203 For a recent example of a plea bargain that the Author does not find coercive, see Eileen Sullivan & Danielle Kaye, *Boeing Agrees to Plead Guilty to Felony in Deal with Justice Department*, N.Y. TIMES (July 8, 2024), https://www.nytimes.com/2024/07/08/business/boeing-justice-department-plea-deal.html [https://perma.cc/DQ8J-2QMM].

204 *See supra* notes 138–41, 161–73 and accompanying text.

205 *See infra* Section III.B. This argument is aligned with a line of thinking in contract law arguing that in certain contexts, contracts are subject to the extracontractual norms formed by political and associative values: norms like due process and control over one's life and its prospects. *See* Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 845–46 (2012).

206 *See* FED. R. CRIM. P. 11(b)(2); Waley v. Johnston, 316 U.S. 101, 104 (1942); *see also* Martin v. Kemp, 760 F.2d 1244, 1246–48 (11th Cir. 1985) (providing that when the government induces a plea by threatening to prosecute a third party, such a plea is invalid only if the government lacked good faith of probable cause that the third party committed a crime).

207 *See, e.g.*, Nemerson, *supra* note 120, at 701–13 (arguing that factors other than force, threats, or promises can coerce the defendant into confessing and pleading guilty).

208 That said, one might argue that the systemic value of plea bargains is more significant than civil settlements' systemic value. Pleas allow for maintaining the gap between the severe sentences on the books and the actual lower sentences in action. *See* Easterbrook, *supra* note 120, at 309, 311–12. Such systemic benefits are not as prominent in the civil context, except perhaps in eviction cases. *See* Nicole Summers, *Settlements of Adhesion*, 93 U. CHI. L. REV. (forthcoming 2026) (on file with author).

such settlements as an example. Specifically, this Part argues that when a defendant conditions a settlement on confidentiality, the resulting settlement might be coercive if additional factors are present, including power imbalance, lack of information, and time pressure.

Importantly, the argument advanced here pertains only to a specific subset of contracts rather than to the law of contract more generally. As explained in Section III.A, courts tend to shy away from intervening in settlements, effectively setting a higher bar for settlement invalidation compared to other contracts. This Part pushes back against this approach as applied to high-risk settlements. It argues that consideration should be given to the broader social and economic context of the settlement and to subtler forms of power and social influence—not unlike those commonly used in the plea-bargaining process—which might amount to coercion.

This Article focuses on certain confidential settlements as an example of high-risk settlements not only because of their contemporary importance but also because of the special nature of silence as a contractual term. As Nancy Kim has argued, for agreements that dramatically constrain one's autonomy going forward, the law should observe stricter requirements for consent and voluntariness.[209] A settlement nondisclosure, this Part argues, merits special treatment given concerns about the psychological forces that could lead weaker parties to involuntarily enter such agreements and the emotional strain silence can impose.[210]

The analysis below first discusses the doctrine on coercion in settlement agreements, showing that courts rarely invalidate settlements due to coercion. Then, this Part proposes a list of factors contributing to high-risk civil settlements, which warrant closer examination by courts for indications of coercion. It also addresses both the procedural context and the structural factors that can give rise to such coercive settlements and deals with potential counterarguments. Finally, it suggests a path forward.

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209 KIM, *supra* note 29, at 218 (proposing that courts should examine "the context in which the manifestation of consent was made, rather than the mere fact that it was made" and arguing "that both the robustness of consent conditions *and* the consent-seeker's responsibility for ensuring valid consent should increase commensurately with the threat to the consenter's autonomy presented by the proposed activity"). In contrast, some have argued that relational contracts are inherently about constraining future states of action, particularly when one is concerned about counterparty risk. *See* Hanoch Dagan & Tamar Kricheli-Katz, *Long-Term Contractual Commitments and Our Future Selves*, 48 LAW & SOC. INQUIRY 517, 517 (2023) (finding that "people's intuitive tendencies to make long-term commitments align with those that underlie liberal contract law, which is careful about enforcing contracts that constrain the self-determination of contractors' future selves").

210 *See supra* Section II.D. Though for other reasons, the concern articulated in this Article is similar to concerns about a tendency to take fewer self-protective measures in ongoing contract relationships. *See generally* David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395 (2013) (finding evidence for this phenomenon by comparing precautions in ongoing contract relationships with those in initial negotiations).

A. Duress, Unconscionability, and Undue Influence in Civil Settlement: Existing Doctrine

This Section surveys standard doctrine and argues that although it is unlikely to find coercion in high-risk civil settlements, a more expansive look at typical coercion-based contract defenses allows for such a finding.

In contract law, coercion generally relates to two main doctrines: duress and unconscionability—each of which allows courts to ignore an agreement due, in part, to abusive bargaining methods.[211] An additional relevant doctrine is undue influence, which protects weaker parties from overreaching and often involves a stronger party exploiting the other side's reduced capacity.[212] Undue influence's boundaries, however, are currently even more limited than those of duress and unconscionability.[213] Indeed, generally speaking, "Courts rarely overturn contracts on the basis of these doctrines explicitly employing inequality of bargaining power as an element."[214]

In the past, duress was a valid defense only when actual serious physical harm was used to coerce an agreement.[215] It was not until the late nineteenth century that economic duress was first acknowledged.[216] Per Justice Holmes,

> If a party obtains a contract by creating a motive from which the other party ought to be free, and which, in fact, is, and is known to be, sufficient to produce the result, it does not matter that the motive would not have prevailed with a differently constituted person, whether the motive be a fraudulently created belief or an unlawfully created fear.[217]

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211 *See* RESTATEMENT (SECOND) OF CONTS. §§ 175, 208 (AM. L. INST. 1981). *See generally* John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 240 (1942) (discussing duress); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing unconscionability).

212 *See* RESTATEMENT (SECOND) OF CONTS. § 177 (AM. L. INST. 1981).

213 *See generally* Hila Keren, *The Unbearable Narrowness of Undue Influence*, *in* RESEARCH HANDBOOK ON THE PHILOSOPHY OF CONTRACT LAW 415 (Mindy Chen-Wishart & Prince Saprai eds., 2025) (discussing how undue influence's narrowness renders it unable to protect vulnerable individuals from manipulative contracts). Because this Article focuses on standard arm's-length transactions in which undue influence is rarely applied, it dedicates more attention to duress and unconscionability. That said, it recognizes the potential to expand the use of undue influence in the context discussed here.

214 Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005). For empirical support of this assertion, see Danielle Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L.J. 1661, 1672–73 (2015).

215 JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.2 (6th ed. 2009).

216 *See* Silsbee v. Webber, 50 N.E. 555, 556 (Mass. 1898).

217 *Id.*

According to the Restatement (Second) of Contracts, outside of physical coercion, duress occurs when "a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative."[218] When the standard for duress is met, an otherwise enforceable contract is voidable.[219] This standard typically requires that the party asserting the defense prove that, as a result of the other party's improper threat, the "circumstances permitted no other alternative" but—seemingly—to assent to the contract.[220]

Wertheimer frames duress as generally requiring two independent and necessary elements: a "wrongful" proposal (the "proposal prong") and an unreasonable constraining of a party's choices (the "choice prong").[221] Under the proposal prong, because legitimate actions by others can constrain a person's choices, only wrongful proposals will allow a person to escape the consequences of volitional acts.[222] The choice prong demands that "[a recipient] has 'no reasonable choice' or 'no acceptable alternative' but to succumb to [the] proposal."[223] Likewise, Judge Posner reaches this conclusion through the causation element embedded in the duress framework. To Posner, causation does not exist unless the stronger party creates distress for the weaker party.[224]

As argued in the next Section, Wertheimer's framework and Posner's approach are overly narrow in the context of the agreements

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218 RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981). The exact way courts define duress varies from state to state. *Compare* Brown v. Cain Chem., Inc., 837 S.W.2d 239, 244 (Tex. App. 1992) (explaining that in Texas, duress has an illegal act requirement that is not present in other states), *with* Martinez-Gonzalez v. Elkhorn Packing Co., 25 F.4th 613, 620 (9th Cir. 2022) (explaining that in California, duress has no illegal act requirement).

219 RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981).

220 Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1329 (Fed. Cir. 2003) (quoting Dureiko v. United States, 209 F.3d 1345, 1358 (Fed. Cir. 2000)).

221 WERTHEIMER, *supra* note 33, at 30. Wertheimer analyzes parallel language from the Restatement (First) of Contracts. To him, duress involves a two-prong analysis that focuses on the voluntariness of the recipient's choices and the moral legitimacy of the proposal. *Id.* As Hila Keren notes, Wertheimer can be read to emphasize "wrongness and unfairness" over "freedom and voluntariness" in the doctrine of duress. *See* Keren, *supra* note 23, at 721 n.254 (quoting WERTHEIMER, *supra* note 33, at 53).

222 WERTHEIMER, *supra* note 33, at 30; *see also* Dalzell, *supra* note 211, at 240 ("[T]o constitute duress, the following elements are both essential and sufficient: (1) the transaction must be induced by a wrongful threat, (2) for which the law offers no adequate remedy, that is, no remedy which (by practical laymen's standards, not those of the common-law nor even of equity) is really sufficient to compensate for the wrong suffered if the threat should be carried out.").

223 WERTHEIMER, *supra* note 33, at 30. Wertheimer relies on a comparison to an old contract case in which a gunman demanded "[y]our money or your life" from a victim. *Id.* at 126–27. Per Wertheimer, "The gunman's proposal is wrong (in part) because [the gunman] has created the victim's coercive choice situation. We evaluate the victim's choices by comparing them with his choices *prior* to the gunman's proposal." *Id.* at 135. The gunman is asking their victim to forgo a legal right: either a legal right to money or a legal right to life, which makes the proposal wrongful. *Id.* at 136.

224 *See* Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928–29 (7th Cir. 1983).

discussed here. First, they fail to account for threats—or offers—that, although legal in the strict sense, still exert improper emotional pressure on the recipient. Second, they do not consider the possibility of making seemingly available alternatives like litigation considerably less attractive.

Turning specifically to settlements, courts rarely invalidate such agreements due to duress.[225] Courts have held that "[a]n agreement is not void because a party settled for less than [the party] later believes the law provides."[226] Additionally, a plaintiff cannot prove a duress claim by simply stating that they were under economic duress to settle because they needed the money.[227] In order to prevail on an economic duress argument, a plaintiff must prove that the duress was caused by the actions of the other party.[228] Further, the plaintiff must prove that they had no other reasonable option,[229] and litigation is usually considered an alternative option for disputants in such situations.[230] Finally, an attorney's presence at the signing of the settlement agreement generally creates a presumption that entering the agreement was voluntary.[231] Thus, the bar for proving an economic duress argument is high.[232]

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225 *See, e.g.*, Ballard v. Phila. Sch. Dist., 273 F. App'x 184, 187 (3d Cir. 2008). One reason for this approach may be courts seeking to incentivize settlements to promote judicial economy.

226 *Id.* at 188. For the general jurisprudence on economic duress, see, for example, Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533, 535 (N.Y. 1971); Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102–03 (9th Cir. 1902).

227 *See* Dobson v. Portrait Homes, Inc., 117 P.3d 1200, 1206 (Wyo. 2005). Economic difficulties can affect defendants in plea negotiations too, particularly if inability to post bail led to their pretrial detention. *See* Roxy W. Davis, *Homelessness and Pretrial Detention Predict Unfavorable Outcomes in the Plea Bargaining Process*, 46 LAW & HUM. BEHAV. 201, 209–10 (2022) (finding that homeless defendants were more likely to be held in pretrial detention, plead guilty, and serve longer sentences compared to housed defendants).

228 *Dobson*, 117 P.3d at 1206. See also Judge Posner's approach in *Selmer*, 704 F.2d at 928–29, for an application of this principle.

229 *Dobson*, 117 P.3d at 1206. As further discussed below, cases often fail to consider that costs and other barriers can prevent litigation from serving as a reasonable alternative.

230 *Id.* There are exceptions, though. For example, in a case of spousal abuse, a court was willing to find duress during divorce negotiations because the abused spouse may have been in a fragile mental state. *See* Lewis v. Lewis, 234 A.3d 706, 718–19 (Pa. Super. Ct. 2020). There are also public policy exceptions, which can be used as an alternative to meeting the high standard of a duress argument in the settlement context. *See generally* Hoffman & Lampmann, *supra* note 30 (explaining that private settlements can be detrimental to public policy in certain contexts such as sexual assault).

231 *See, e.g.*, Ortiz-Quinones v. Cook County, 744 F. App'x 962, 964 (7th Cir. 2018).

232 *See* Alexander v. Standard Oil Co., 423 N.E.2d 578, 582 (Ill. App. Ct. 1981) (holding that there must be unlawful or morally wrongful pressure to show economic duress). That said, in many jurisdictions, the requirement that the pressure be "unlawful" no longer exists. As noted, according to the Restatement, the threat does not have to be illegal. RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981).

Although in the context of civil rights claims the standard is relaxed,[233] it remains difficult to show that a settlement entered after the filing of a civil rights action was not entered voluntarily.[234]

This Article is aware of only two cases in which a party argued that a confidentiality provision of a settlement agreement should be invalidated due to duress. In *Igani v. Summit Physical Therapy*,[235] the defendant filed a motion to enforce a settlement agreement reached during mediation for claims of harassment and retaliation.[236] The plaintiff disputed the mutual confidentiality terms reflected in the settlement agreement,[237] arguing that the mediation settlement was signed under duress because "his own attorney recommended settlement and the mediator 'did not remain neutral'" during negotiations.[238] The

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233 Cases arising under civil rights statutes have their own voluntariness requirement for waiver or release of claims. Under this requirement, an employee's consent to settle an action under Title VII must be knowing and voluntary or else any waiver of claims is ineffective. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974). To assess the validity of the settlement, courts must evaluate both state contract law and the "knowing and voluntary" nature of the employee's entry into the settlement. *See, e.g.*, Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 65 F.3d 562, 568, 570 (7th Cir. 1995) (analyzing the validity of a settlement on both state law contract grounds and "knowing and voluntary" grounds). One standard adopted by some of the circuits looks to the "totality of the circumstances" in evaluating whether a settlement was made voluntarily and knowingly. *See* Coventry v. U.S. Steel Corp., 856 F.2d 514, 523–24 (3d Cir. 1988). In evaluating the "totality of the circumstances," the Third Circuit considered:

> 1) the plaintiff's education and business experience, 2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 523 (quoting Equal Emp. Opportunity Comm'n v. Am. Express Publ'g Corp., 681 F. Supp. 216, 219 (S.D.N.Y. 1988)). Courts also consider whether the employer encourages or discourages the employee to consult an attorney and whether the attorney actually had the opportunity to do so. *See* Cirillo v. Arco Chem. Co., 862 F.2d 448, 454 (3d Cir. 1988). New Jersey has also adopted this test in evaluating waivers of claims under the New Jersey Law Against Discrimination. *See* Swarts v. Sherwin-Williams Co., 581 A.2d 1328, 1332 (N.J. Super. Ct. App. Div. 1990).

234 For a rare civil rights case in which a settlement was invalidated on appeal for lack of voluntariness, see Taylor v. Krakora, No. A-0294-20, 2022 WL 2760851, at *5–7, *9 (N.J. Super. Ct. App. Div. July 15, 2022) (invalidating a settlement because the plaintiff presented evidence of cruel, retaliatory acts by defendants). Although the issue of waiver voluntariness can come up both prior to and after the filing of a complaint or a civil action, it more commonly arises prefiling. *See* Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. Pa. J. Lab. & Emp. L. 73, 74 n.4 (2005) (explaining differences between prefiling and postfiling waivers). On the contrast between predispute and postdispute consent, see also Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 Harv. J. on Legis. 711, 727–35 (2016).

235 No. 18-cv-155, 2019 WL 13299291 (E.D. Tenn. Dec. 20, 2019).

236 *Id.* at *1.

237 *Id.* at *4.

238 *Id.* at *6.

court found that even though the plaintiff's attorney may have urged settlement, this did not create coercion or duress, and a mediator's suggestions that the plaintiff was unlikely to win at trial did not "divest [plaintiff] of his own independent will."[239] Additionally, in 2018 in the Middle District of Georgia,[240] a plaintiff brought a breach of contract claim against the defendant for allegedly violating the confidentiality provision of their settlement agreement.[241] The defendant argued that the plaintiff's complaint must be dismissed because the confidentiality provision was induced through duress.[242] The court rejected the duress argument as premature, reasoning that it could not assess the merits of a duress argument without more facts.[243] Courts thus have not yet fully considered the possibility that consent to settlement nondisclosure can, under certain circumstances, reflect duress.

Unlike duress, unconscionability emerged in equity as a catchall protection from oppressive bargaining or agreements.[244] Later on, the doctrine was codified in the Uniform Commercial Code[245] and in the law of contracts more generally.[246] Although both duress and unconscionability protect weaker parties from stronger parties' overreaching, there are important differences between the doctrines. For example, duress is tested by the improper threat and the state of mind induced in the victim—one of a lack of choice[247]—while unconscionability addresses the parties' relationship and the extent to which the substance of the

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239 *Id.* The court upheld the settlement agreement and enforced the confidentiality clause. *Id.* at *7.

240 [Redacted] v. [Redacted], 326 F. Supp. 3d 1349 (M.D. Ga. 2018).

241 *Id.* at 1350–51.

242 *Id.* at 1353.

243 *Id.* at 1355. The court ultimately held that the confidentiality provision was enforceable because it did not prohibit disclosure in civil discovery or ongoing criminal investigation, and thus it did not violate Georgia public policy. *Id.* at 1354–56.

244 *See* Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948) ("That equity does not enforce unconscionable bargains is too well established to require elaborate citation.").

245 Uniform Commercial Code ("UCC") section 2-302 provides,

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (Am. L. Inst. & Unif. L. Comm'n 1977). *See generally* Leff, *supra* note 211 (considering the history, implications, and criticisms of the unconscionability clause of the UCC). According to the comment to UCC section 2-302, "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302(1) cmt. (Am. L. Inst. & Unif. L. Comm'n 1977). For a critique of this section, see Leff, *supra* note 211, at 487.

246 Restatement (Second) of Conts. § 208 (Am. L. Inst. 1981).

247 *See id.* § 175.

bargain is reasonable.[248] Of the two doctrines, Wertheimer contended that only duress requires coercion.[249] Per Wertheimer, unlike duress, unconscionability includes situations in which neither party generated the lack of alternatives but one party exploited the lack of alternatives against the other.[250]

In contrast, Paul Kirgis suggests a different division of labor between duress and unconscionability in cases of coercion. Analyzing coercion in negotiation, Kirgis defines leverage as "power rooted in consequences"[251] and explains that "[w]hen a negotiator has sufficient power to compel a counterparty to accept a set of unfavorable terms, the use of leverage may cross a line into inappropriate or illegal coercion."[252] Of course, power in negotiation is not in and of itself a negative thing.[253] Negotiating parties regularly use advantages like information, charisma, and better alternatives to get their way—that is, as leverage.[254] Drawing on Richard Shell's distinction between "positive" and "negative" leverage,[255] however, Kirgis distinguishes an offer to satisfy the other side's interests from a threat to impose costs on them if they do not accept a term or set of terms.[256] Only the latter carries coercive force:[257]

> Abuses of negative leverage ought to be understood as grounds for contract unenforceability under the principle of duress, while abuses of positive leverage should be understood as grounds for contract unenforceability under the principle of unconscionability.[258]

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248 *See* Hume v. United States, 132 U.S. 406, 411 (1889) (defining an unconscionable contract as one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other" (quoting Earl of Chesterfield v. Janssen (1750) 28 Eng. Rep. 82, 100; 2 Ves. Sen. 125, 156)).

249 WERTHEIMER, *supra* note 33, at 40.

250 *Id.* at 39–40.

251 Kirgis, *supra* note 64, at 73.

252 *Id.* at 69.

253 Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCIENTIST 149, 150 (1983) (explaining that a party with negotiation power can obtain a more favorable outcome for themselves).

254 Kirgis explains that "a party has leverage when it has the ability to influence another party through the threat of or the imposition of consequences on that party." Kirgis, *supra* note 64, at 73. This notion is closely tied to coercion, as a party's power to impose consequences on a counterparty might allow the party to coerce the counterparty into an agreement. *Id.*

255 G. RICHARD SHELL, BARGAINING FOR ADVANTAGE 101–02 (2d ed. 2006).

256 Kirgis, *supra* note 64, at 74.

257 *Id.* at 75. Kirgis argues that courts should more consistently apply the doctrines of duress and unconscionability when it comes to negotiation leverage. *Id.*

258 *Id.* Kirgis focuses specifically on arm's-length transactions in which a weaker party wishes to invalidate a contract based on one of these doctrines. *Id.* at 75–76. As noted in *Viacom International Inc. v. Icahn*,

> In a "hard-bargaining" scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for

Finally, the doctrine of undue influence is another important tool for addressing coercive settlements. In one famous case involving settlement, *Odorizzi v. Bloomfield School District*,[259] the court, reciting California statutory law, stated that undue influence denotes "taking an unfair advantage of another's weakness of mind; or . . . taking a grossly oppressive and unfair advantage of another's necessities or distress."[260] Undue influence thus involves someone in a dominant position placing excessive pressure on and taking advantage of someone in a servient position when the latter is vulnerable and susceptible to such pressure.[261] Although courts tend to shy away from this doctrine, some scholars have pushed back against its narrowness, suggesting it should apply when people are manipulated into agreeing to a harmful contract.[262] This Article argues that the undue influence doctrine can also offer significant force in the context at hand.

As explained in the next Section, although courts rarely apply contract defenses such as duress, unconscionability, and undue influence to settlement agreements, the reality of settlement negotiations should encourage a more flexible approach.[263] Courts should apply a broader understanding of these defenses, one that acknowledges subtler forms of coercion and considers the negotiation's context, when a stronger party overpowers a weaker party through "power rooted in consequences."[264] As for the distinction among the three doctrines, a coercion-based challenge may be grounded in one or multiple doctrines depending on the circumstances.[265]

B. Coercion in High-Risk Civil Settlements

The settlement-related doctrine discussed in the preceding Section assumes that, barring extreme circumstances, civil settlement is by definition voluntary.[266] Indeed, courts presume that civil litigants can always

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> transferring property to the defendant, but in an extortion scenario the alleged victim has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.

747 F. Supp. 205, 213 (S.D.N.Y. 1990). Even though the subject matters vary, the logic of this distinction and parts of Kirgis's analysis apply to this Article's discussion of settlement negotiations.

259 54 Cal. Rptr. 533 (Cal. Ct. App. 1966).

260 *Id.* at 539 (alteration in original) (quoting CAL. CIV. CODE § 1575 (West 2025)).

261 *Id.* at 540.

262 *See* Keren, *supra* note 213, at 21.

263 *See infra* Section III.B.

264 Kirgis, *supra* note 64, at 73.

265 *See generally* Keren, *supra* note 213 (arguing for an expansion of the undue influence doctrine to include a wider variety of circumstances in which manipulation leads to accepting a harmful deal).

266 *See, e.g.*, Asberry v. U.S. Postal Serv., 692 F.2d 1378, 1380–81 (Fed. Cir. 1982) ("Those who employ the judicial appellate process to attack a settlement through which controversy has been sent to rest bear a properly heavy burden.").

choose to litigate if they are unhappy with a settlement offer and—if they do not litigate—their decision to settle must be voluntary.[267] This view overly simplifies settlements and ignores many factors that can make plaintiffs feel compelled to accept settlement deals whether deemed objectively good or bad.[268] These situations are characterized, as detailed below, by unequal bargaining power, limited information, and the use of various social influence tactics.

This Section applies the coercion framework to civil settlement and shows how such settlements can become coercive in certain scenarios. Importantly, this Section does not claim that the scenarios discussed here are the *only* situations in which coercion in civil settlement can occur or that the list of factors is exhaustive. Rather, it points to common scenarios that tend to deny a civil party their voluntariness in entering a settlement. These scenarios are examples of what this Article calls "high-risk civil settlements." Future work might help identify other scenarios that are similarly at risk of negating settlement voluntariness.

1. Procedural Context

Two preliminary notes about the infrastructure of civil settlement procedure are in order. First, run-of-the-mill civil settlements *lack judicial oversight*. Judges are typically not involved in approving or executing such settlements,[269] which can allow coercion to go completely unobserved.[270] Judges take part in executing a civil settlement only if the parties specifically invite them to do so.[271] Unlike their criminal

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267 *See* Dobson v. Portrait Homes, Inc., 117 P.3d 1200, 1205–06 (Wyo. 2005) (stating that a plaintiff "bears the burden of proving that . . . [he] perform[ed] some act under circumstances which deprive[d] him of the exercise of free will" (quoting Kendrick v. Barker, 15 P.3d 734, 741 (Wyo. 2001))).

268 In other words, a variety of reasons may cause plaintiffs to feel compelled to accept settlement deals that they otherwise do not want to accept, be it because the deal is bad, the plaintiff does not want to cooperate, or there exists some other interest.

269 *See* Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 Mo. L. Rev. 211, 229 (2021) ("In most circumstances, courts dismiss cases upon the agreed request of the parties. The agreement is not filed and only put before the court in the event of a breach as part of a contract action." (footnote omitted)). As a result, settlement agreements are typically not public records. *See, e.g.*, Pansy v. Borough of Stroudsburg, 23 F.3d 772, 781 (3d Cir. 1994) (holding that a settlement agreement was not a public record because it was not filed with the court).

270 This is not the case in the context of multidistrict litigation, which is significant in rate but outside the scope of this Article. *See* Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to MDL Settlement*, 89 UMKC L. Rev. 971, 972–73 (2021).

271 Parties may ask the court to enter their settlement as a judgment, making it a court record. *See, e.g.*, Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344–45 (3d Cir. 1986). If the parties wish to keep the agreement from becoming public, they might seek a court order sealing their filed settlement. *See* Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 Notre Dame L. Rev. 283, 394 (1999) ("Litigants presumably do not file their agreement unless they want the court to take some action

counterparts, in which judges are at least formally required to assess the voluntariness of the plea through the plea colloquy,[272] civil settlements generally do not mandate judicial review for assuring the parties' voluntary assent.[273] In fact, review of civil settlements is virtually nonexistent even when the law requires it, as judges have the incentive to dismiss settled cases quickly to trim their overloaded dockets.[274] This incentive is also evident in the presettlement stage, in which judges often exert pressure on parties to settle.[275]

Second, *legal representation* is often unavailable or insufficient. Unlike defendants in the criminal context,[276] plaintiffs may not have counsel in civil settlement negotiations and thus receive no legal advice about the negative implications of the settlement or their alternatives.[277] But even when a plaintiff is represented, it does not guarantee that their settlement is voluntary. Although the presence of lawyers ameliorates the risk of undue pressure to settle,[278] principal-agent problems loom

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concerning it—either by issuing a confidentiality order incorporating its terms or, at the very least, a dismissal order retaining jurisdiction to enforce the accord.").

272 *See supra* notes 102–03 and accompanying text. This is not to say that the colloquy is a meaningful check on plea bargain voluntariness. Coercion can and does occur despite this procedural check. *See supra* notes 104–11 and accompanying text.

273 *See* Doré, *supra* note 271, at 297. There are some exceptions. *See supra* note 27.

274 *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73, 85 (2017) (describing settlement as a mechanism for judges to control their dockets). This is the case even when it comes to sealing court records as part of a settlement. Research shows that when a joint protective order is sought by the parties, most federal judges never reject the request. *See* Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 100 (2024).

275 *See* Deason, *supra* note 274, at 109–13 ("The potential for coercion is elevated many fold when the arm twisting, or even less forceful encouragement, comes from a judge who will have decisional power over the case if it does not settle."); AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 130 (2009), https://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf [https://perma.cc/X4RT-2U3B] (finding that twenty-three percent of plaintiffs' lawyers and forty percent of defense lawyers surveyed agreed that judges inappropriately pressure parties to settle); Stephen G. Crane, *Judge Settlements Versus Mediated Settlements*, DISP. RESOL. MAG., Spring 2011, at 20, 22 (noting that "the environment is inherently coercive" when a settlement conference is conducted by the judge who will have power over the case at trial).

276 For criminal defendants, the right to counsel is constitutionally guaranteed, at least when it comes to serious crimes. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); Wheat v. United States, 486 U.S. 153, 158 (1988) (citing *Gideon* to hold that "the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime").

277 The U.S. Constitution grants no categorical right to counsel in civil cases, *see* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981), and challenges faced by civil pro se litigants have been well-documented, *see generally* Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157 (1972) (discussing issues pro se litigants encounter throughout the litigation process). This can affect settlement negotiation as well.

278 As noted, courts have held that the presence of an attorney at the signing of the settlement agreement generally creates a presumption that entering the agreement was voluntary. *See supra* note 231 and accompanying text. Courts have even held that an attorney pushing their

large in settlement negotiations.[279] This is especially true in the personal injury context, in which contingency fees are often the norm.[280] In such cases, a plaintiff's lawyer is incentivized to have the plaintiff settle quickly and cheaply[281] and might pressure their client to accept a suboptimal settlement offer. In this sense, civil settlements are similar to plea bargains, in which defense lawyers' incentive structure discourages them from taking cases to trial and encourages them to prefer quick pleas.[282] In both contexts, quick settlements or pleas are often better for all lawyers involved.[283]

Although these procedural characteristics of civil settlement do not directly lead to coercion, they contribute to a system in which it can easily occur without being detected or challenged. The absence of a judicial check coupled with the limitations of legal representation and perverse incentives of the lawyers involved give rise to an environment that can allow for coercive settlements. But what specific factors might lead to coercive civil settlements?

2. Applying the Coercion Framework to Confidential Settlements

The analysis of factors contributing to coercion in civil settlement starts with Wertheimer's two-prong test for coercion.[284] Given the limitations of this test for identifying coercion in the scenarios in question,

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client to settle does not constitute coercion or duress. *See* Words v. United Parcel Serv., No. 92-3059, 1992 WL 25217, at *3 (10th Cir. Sept. 16, 1992); *see also id.* at *2 (collecting cases). In such cases, courts have found that the proper course of action is for the plaintiff to assert a claim against their attorney. *See id.*

279 *See* Dalzell, *supra* note 211, at 271.

280 *See* Eric Helland & Seth A. Seabury, *Contingent-Fee Contracts in Litigation: A Survey and Assessment*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 383, 387 (Jennifer Arlen ed., 2013). That said, litigation funding might change this calculus, given the rise in rapidly changing settlement dynamics in the context of personal injury law. *See generally* Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563 (2021) (discussing litigation finance and its effects on parties to a dispute).

281 For an extreme example of the effects contingency fees can generate, see Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 805 (2011) (arguing that high-volume personal injury firms produce large numbers of settlements, making them akin to a no-fault mechanism).

282 *See* WARE, *supra* note 15, § 3.5(g) ("Relatedly, lawyers representing defendants in many criminal cases are paid in ways that discourage them from taking cases to trial.").

283 In the criminal context, prosecutors are incentivized to secure convictions using as few resources as possible. In this sense, their incentives can be aligned with those of some defense lawyers. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1122–23 (2008) ("For all involved, the best pleas are quick pleas. And quick pleas are most efficiently reached at low market prices, because—although prosecutors may abandon sentence maximization—defendants always remain sentence minimizers.").

284 *See supra* notes 221–23 and accompanying text.

this Section next builds on Zimmerman's account of coercive offers.[285] Finally, it considers counterarguments and several structural elements that characterize the scenarios at issue and contribute to a coercive environment.

The scenarios this Section refers to involve a demand for confidentiality as a condition for settlement of a civil action for assault, harassment, or discrimination. The defendant might be an employer, a public or religious entity, or an educational institution, and the plaintiff might be an employee, a citizen, a congregant, or a student. In these scenarios, a significant power imbalance between the parties may allow the settlement to move forward despite one party's lack of free choice. And given the silencing effect of confidentiality agreements, these scenarios might involve multiple victims, with information asymmetry and lack of coordination between victims leading to claims settled on an individual basis.

Why confidential settlements? As noted, a settlement nondisclosure merits special treatment given concerns about the psychological forces that could lead weaker parties to concede valuable rights.[286] Unlike courts' common tendency to set a high bar for disturbing settlement agreements,[287] the settlement context should be carefully scrutinized for attempts to take advantage of a party's eagerness to move on from the stress of a legal dispute and give up a valuable right—their own voice—in the process. Importantly, the focus here is on the bargaining process rather than the fairness of the resulting settlement. Although, in some cases, the settlement reached between the parties might seem objectively fair, it can still be the result of a coercive process.

Sexual assault exemplifies the risks that such settlements entail. As Leah Lipton explains, settlement negotiations of sexual assault cases involve a complex history of trauma and abuse,[288] as the wrongdoer has traumatized the victim.[289] The parties might also go into the details surrounding the victim's trauma during negotiations, and the defendant might attack, belittle, and attempt to discredit the victim.[290] Additionally, victims may lose the ability to work and have to pay for intensive therapy and treatment.[291] This puts victims in a financial situation that may pressure them into entering a settlement agreement containing an

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285 *See* Zimmerman, *supra* note 24.

286 *See supra* Section II.D; *supra* note 210 and accompanying text.

287 *See supra* Section III.A.

288 *See* Leah Lipton, *Cutting Out Her Tongue: The Impact of Silencing Trauma Through a Nondisclosure Agreement*, 55 CONTEMP. PSYCHOANALYSIS 373, 376 (2019).

289 *See id.* at 376–79 (discussing an NDA between a victim of sexual assault and the assailant and arguing that, because of the parties' history, there cannot be a fair, rational agreement between the parties).

290 *Id.* at 377–78.

291 *Id.* at 377.

NDA just so that they can pay their expenses.[292] Sarah's story[293] demonstrates how such situations might lead to denying one's sense of free choice. But is this coercion in the legal sense?

Under the proposal prong of Wertheimer's framework, to be wrongful, the settlement proposal needs to deprive the other side of value without providing them with a benefit, thus making the recipient worse off than they ought to be.[294] As for the choice prong, the question is whether the threatened party had a reasonable alternative to the settlement.[295] If the threatened party agreed to a set of terms that is worse than the point at which they should have walked away from the settlement negotiation, their will was overborne—that is, they were coerced into the agreement.[296] Applying the proposal prong of Wertheimer's framework to the context at hand, a demand for silence as a condition of settlement might make the recipient worse off than the recipient ought to be. As part of the settlement, the proposer seeks to have the recipient forgo a significant right: the ability to discuss their traumatic experience.[297] This voice—when used, for example, to seek mental health assistance—might be vital for the recipient's healing from trauma.[298] At the same time, because of the recipient's diminished bar-

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292 *Id.* For more on the importance of financial hardship when it comes to settlement of sexual misconduct claims, see Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 33 (2022).

293 *See supra* notes 2–9 and accompanying text.

294 Wertheimer describes a wrongful proposal as one that creates a dilemma for the recipient. *See* WERTHEIMER, *supra* note 33, at 40. This depiction suggests that the recipient must be worse off following the proposal than they were prior to the proposal or else it would not be a dilemma. As Kirgis notes, "to be deprived of 'property' by 'wrongful means' is to be pressured into an agreement that concedes value that the threatened party could not have been required to concede in the absence of the threatening proposal." Kirgis, *supra* note 64, at 108.

295 *See* WERTHEIMER, *supra* note 33, at 36; P.S. Atiyah, *Economic Duress and the "Overborne Will,"* 98 LAW Q. REV. 197, 201 (1982).

296 *See* Joseph M. Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403, 407 (1978) (arguing that to assess extortion in litigation, courts should consider whether the settlement is worse than the expected value of litigation).

297 NDAs tend to be drafted very broadly to encompass any type of disclosure, including to mental health professionals. *See* William M. Sage, Jospeh S. Jablonski & Eric J. Thomas, *Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System*, 175 JAMA INTERNAL MED. 1030, 1134 (2015).

298 Lipton, *supra* note 288, at 374; Leanh Nguyen, *The Ethics of Trauma: Re-Traumatization in Society's Approach to the Traumatized Subject*, 61 INT'L J. GRP. PSYCHOTHERAPY 26, 33 (2011) (explaining that failing to talk about trauma can keep a victim in the traumatic space and make it harder for them to heal). By the same token, disclosing trauma to others can have positive effects. *See, e.g.*, Melanie A. Greenberg & Arthur A. Stone, *Emotional Disclosure About Traumas and Its Relation to Health: Effects of Previous Disclosure and Trauma Severity*, 63 J. PERSONALITY & SOC. PSYCH. 75 (1992) (showing that, beyond the positive psychological effects that trauma disclosure can have on victims, talking about trauma can improve physical health as well, and victims who disclosed serious traumas reported fewer physical symptoms in the months following the disclosure).

gaining power,[299] the amount of money offered in exchange for silence and forgoing a legal claim might not adequately represent the value of the recipient's voice. The recipient may also forgo their right to an appropriate remedy for the wrong they suffered. They might do so to relieve themselves of the stress of legal battle, but they lose valuable rights in the process. Whether the resulting settlement is judged as good or bad from an objective perspective, the recipient simply might not want the settlement. The standard for settlement voluntariness should be strict here given the significant constraint imposed on the recipient's autonomy.[300]

In some scenarios, the choice prong of Wertheimer's coercion framework may be satisfied too. The defendant might turn the trial alternative—hailed by courts as always available to litigants[301]—into something significantly less attractive for the plaintiff. As Kirgis notes, "The distinction between positive and negative leverage is the distinction between the ability to satisfy the other party's interests and the ability to impose costs on the other party in retaliation for the other party pursuing its [best alternative to a negotiated agreement]."[302] In this context, the proposer might threaten to "punish" the recipient by imposing significant costs should they choose trial over settlement. Similar to a prosecutor threatening to seek the maximum punishment at trial,[303] a proposer-defendant might threaten to bury the recipient-plaintiff in motion practice and endless discovery that will prolong the litigation and impose both financial and emotional costs.[304] Here too, a better bargaining position and more resources can allow the defendant to credibly make this threat. Furthermore, a proposer-defendant might threaten to disparage the plaintiff or even bring a defamation claim against them if they do not agree to an NDA.[305]

One might counter that because the proposer-defendant generally has a right to demand confidentiality as a condition for settlement[306] as well as a right to threaten not to settle if the recipient-plaintiff does not accept the terms, such a settlement is not in fact coercive.[307] The recipient

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299 *See supra* notes 288–92 and accompanying text.

300 *See* Kim, *supra* note 29, at 218 (arguing that when the agreement significantly threatens the consenter's autonomy, the robustness of consent conditions must be greater).

301 *See, e.g.*, Dobson v. Portrait Homes, Inc., 117 P.3d 1200, 1206 (Wyo. 2005).

302 Kirgis, *supra* note 64, at 90.

303 *See supra* notes 105–08 and accompanying text.

304 *See generally* Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. Rev. 1652 (2013) (discussing various measures aimed at addressing the costs and time involved in civil litigation on the federal level).

305 *See, e.g.*, Lipton, *supra* note 288, at 378.

306 This assumes that NDAs have not been banned in the jurisdiction. See Bachar, *supra* note 30, at 48–50, for a review of statutes limiting or banning settlement confidentiality.

307 A version of this argument was made by Stephen Ware regarding employees' mandatory arbitration agreements. Ware discusses situations in which an "employer refuses to hire a job

might face an unpleasant situation, but the proposer should not be at fault for taking advantage of the recipient's unfavorable state. Both alternatives—either forgoing one's right to a legal remedy or pursuing the legal action at trial—might be bad for the recipient, and the proposer may well be exploiting the plaintiff's vulnerability.[308] But this is still not coercion.[309]

In response to this counterargument, the Article takes the position that Wertheimer's two-prong test is too narrow. Instead, the Article proposes a broader understanding of coercion that highlights the fundamental rights at stake and considers the downstream effects of coercion. Arguing that offers can coerce, David Zimmerman contends that a proposer might actively hinder the recipient of the offer from obtaining a better situation for themselves than what the proposer puts forward.[310] For Zimmerman, the appropriate baseline to judge a settlement proposal should consider whether the proposal prevented the recipient from achieving a better state.[311] Zimmerman uses an example of a person stranded on an island who receives an employment offer for a small amount that will allow them to survive.[312] This proposal is an offer rather than a threat; it will improve on the recipient's state prior to the proposal. However, if the proposer prevents the recipient from leaving the island—for example, by not allowing them to build a boat—this

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applicant unless that applicant signs an arbitration agreement," as well as scenarios in which "an at-will employee who has been employed for some time but has not signed an arbitration agreement" and the employer threatens to fire them unless they sign it. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 122 (1996) (footnote omitted) ("In neither of these cases is there 'traditional' duress because in both cases the employer has a right to take the threatened action. That is, the employer has a right to refrain from hiring and a right to fire an at-will employee. Or, to put it another way, in neither case does the employee have a right to be free of the threatened act." (footnote omitted)).

308 Kirgis gives the following example: "[A] person in urgent need of medical care but with no insurance and very little cash appears at a private hospital. The hospital refuses to provide care unless the person can demonstrate an ability to pay a reasonable fee." Kirgis, *supra* note 64, at 81. He argues that although many people would view a refusal to treat that person in need as morally problematic, Nozick would likely say this is a voluntary, noncoercive exchange, as "[t]he exchange the hospital proposes is productive in Nozick's terms—it would leave the person better off than if the hospital had never existed." *Id.*

309 *Id.* Kim Ferzan argues that this would be exploitation: taking advantage of someone who is already below the baseline rather than changing the baseline. *See* Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 961 (2018) ("Coercion is related to, but distinct from, exploitation. Whereas coercion is a threat to bring someone below a moralized baseline, exploitation is unfairly taking advantage of the fact that someone is already below a baseline."); *see also* Berman, *supra* note 112, at 85 ("Exploitation . . . connotes taking unfair advantage of a person's vulnerability.").

310 *See* Zimmerman, *supra* note 24, at 133. According to Zimmerman, the correct baseline to use to assess the proposal is what the recipient would encounter had it not been for the proposer intervening. *See id.*

311 *See id.*

312 *Id.*

offer is coercive.[313] The reason is that the correct baseline to assess the proposal would be the situation the person would encounter had it not been for the employer-proposer's interference. In Zimmerman's example, the recipient might have been able to build a boat and leave the island.[314] As such, the baseline offered by Zimmerman is normative rather than merely descriptive, baking in some assumptions about the impropriety of enhancing an already unequal bargaining dynamic.

A settlement process should be considered coercive if it prevented the recipient from achieving a better bargaining position that would have allowed them to "leav[e] the island"—that is, to achieve a satisfactory settlement for the wrong they suffered.[315] Put this way, the coercion can also be understood as causing the bargaining differential in the first place.[316] By systematically settling claims with a nonnegotiable confidentiality demand, defendants prevent plaintiffs from coordinating to obtain a better bargaining position.[317]

Several potential counterarguments should be addressed. *First*, one might worry about the parties' freedom of contract in agreeing to the settlement[318] and, relatedly, the risk of paternalism arising from failing to uphold the autonomous choices of more vulnerable parties.[319] In response, this Article posits that a particularly large differential in bargaining power could prevent the weaker party from entering a

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313 *See id.* at 133–34.

314 *Id.*

315 Anderson, *supra* note 44, § 2.4. Some have suggested that Zimmerman's argument could be reconfigured to say "that offers made from a position of superior bargaining strength are very likely to be exploitative; and that sometimes coercion is used to create or maintain one's bargaining advantages." *Id.*

316 *Id.*

317 For an argument suggesting that victims should disclose their wrongdoing to advance solidarity and promote coordination, see generally Bachar, *supra* note 30. In Hohfeldian terms, this might be thought of as a change in legal relationship from power (held by the plaintiff) and liability (held by the defendant) to immunity (provided to the defendant via settlement) and disability (imposed on the plaintiff via settlement), except the disability is so much more crippling when the settlement was coerced. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 30 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 710 (1917).

318 *Compare* David Campbell, *Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting*, *in* Feminist Perspectives on Contract Law 161, 165, 172 (Linda Mulcahy & Sally Wheeler eds., 2005) (arguing that if authors "do not place a pre-eminent value on autonomy, feminists cannot really respect the law of contract, for a law of contract that does not turn on autonomy and choice becomes something like a law of planned, paternalistic exchanges, that is, not contract at all"), *with* Gillian K. Hadfield, *The Dilemma of Choice: A Feminist Perspective on* The Limits of Freedom of Contract, 33 Osgoode Hall L.J. 337, 341 (1995) (offering to cabin the scope of choice in contract law).

319 For more on this concern, see generally Hadfield, *supra* note 318.

subjectively desirable settlement agreement.[320] Respecting the parties' freedom of contract is unwarranted in such scenarios, as it serves to enforce a deal that the weaker party did not voluntarily enter. That said, coercion should not be so broad as to deny parties'—even vulnerable parties'—autonomy. This Article's framework seeks to identify coercion when it occurs; it is not meant to create an assumption that settlements are involuntary. As long as this framework is narrowly applied to adequate cases of "high-risk settlement," it should not reduce settlement finality nor the expected value of settlement.[321]

Second, one could argue that confidentiality agreements are valuable to plaintiffs. Some plaintiffs value confidentiality themselves. Other plaintiffs can use confidentiality agreements to increase their bargaining power and extract large payouts from defendants.[322] Although this may hold true in certain cases, it does not apply to the scenarios examined here. Here, plaintiffs have limited if any bargaining power, and the settlement agreement including the confidentiality clause is offered on a take-it-or-leave-it basis. Thus, silence is a nonnegotiable term. Further, in these scenarios, plaintiffs' ability to have voice about the harm they suffered carries considerable value for them.[323]

Third, some might contend that the plaintiff could be falsely accusing the defendant of wrongdoing to gain settlement money for nuisance value. Such cases might exist.[324] But here too, in the cases discussed in this Article, the plaintiff is truthful about the harm they suffered, and the defendant has at least preliminarily substantiated the allegations against it.

Finally, some of the scenarios discussed in this Article might also give rise to public policy or statutory challenges depending on

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320 For a different version of this argument, see Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1131 (2016) (arguing that the unconscionability doctrine should be understood as "a party who engages in exploitative behavior may lose her moral standing to complain" when the other party violates a contractual obligation, thus avoiding paternalism-based critiques of the doctrine).

321 Some might also argue that lowering the threshold for contract defenses would incentivize plaintiffs to attempt to invalidate settlement agreements. Although this remains an empirical question, it is unclear whether there will be an uptick in such attempts given the high costs of litigation.

322 For discussion of this argument in the context of restricting NDAs, see Bachar, *supra* note 292, at 10–14; Hoffman & Lampmann, *supra* note 30, at 182–84.

323 *See supra* note 298.

324 However, concerns about false complaints might be overstated, at least in the context of sexual wrongdoing. *See, e.g.*, Katie Heaney, *Almost No One Is Falsely Accused of Rape*, N.Y. MAG.: THE CUT (Oct. 5, 2018), https://www.thecut.com/article/false-rape-accusations.html [https://perma.cc/3KF8-RYD8] (explaining that, because only eight to ten percent of rapes are reported and about five percent of reports may be unsubstantiated, false accusations account for around one-half percent of reported and unreported rapes).

the jurisdiction.[325] However, this Article focuses on coercion-related challenges to highlight the element of individual choice in settlement agreements and the extent to which a nondisclosure clause might in some instances reflect a lack of voluntariness.

Because structural elements are an inseparable part of the coercive environment discussed here, the next Section turns to unpacking these factors.

3. Structural Factors Contributing to Coercive Settlements

This Section identifies several structural and procedural factors that contribute to coercive settlements. It draws on the legal, philosophical, and psychological discussion regarding coercion in plea bargains to show how some of the characteristics of these exchanges are applicable to high-risk civil settlements as well.

Importantly, although courts might classify some of the structural elements discussed below as considerations for a procedural unconscionability challenge to a settlement agreement, courts should also consider these elements as potentially contributing to duress or undue influence. As discussed, courts rarely vacate settlements due to these defenses.[326] For a successful unconscionability challenge, the court typically must find that the resulting deal is unfair.[327] In instances in which courts do not view the settlement terms as unfair, considering the structural factors that negate one's voluntariness in entering a settlement can be vital to mounting a successful coercion-based challenge.[328]

First, a *position of power or authority* can influence whether a settlement is coercive. Somewhat like prosecutors as compared to defendants in the criminal context, defendants in civil litigation might hold positions of authority or disproportionate power compared to the plaintiff.[329] This is the case, for example, in a civil action brought for police brutality or workplace sexual harassment. Such positionality is crucial for observing nuanced forms of coercion, particularly if the plaintiff is not represented by counsel.[330] As discussed, psychological studies have shown that people are more likely to obey instructions from others who they perceive as authority figures partly because such figures have more knowledge and experience in a particular area, and most everyday decision-making

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325 On the use of the public policy defense in the context of confidential settlements, see generally Hoffman & Lampmann, *supra* note 30. As for statutes barring sexual misconduct-related confidential settlements in some jurisdictions, see Bachar, *supra* note 30, at 48–50.

326 *See supra* notes 214, 225–34, 262 and accompanying text.

327 Kirgis, *supra* note 64, at 121–22. This is known as "substantive unconscionability." *Id.*

328 *See supra* notes 214, 225–34, 262 and accompanying text (noting the difficulty caused by the individuality of contract defenses).

329 *See supra* Section II.A.

330 *See supra* note 277.

is done quickly.[331] Similarly, power plays a significant role in contributing to psychological coercion because of real or perceived control over rewards and punishments.[332] As Nadler observes, not only do people tend to comply with those in positions of authority,[333] but they also tend to follow other people's actions.[334] Furthermore, the language of the proposer and their perceived authority in the eyes of the recipient can significantly impact voluntariness or lack thereof.[335]

The proposer's power can result not only from their role or position but also from societal and financial inequities. As Anderson notes, "there are many offers that one cannot reasonably refuse, possibly reflecting great imbalances in power or prior historical injustices between the bargaining parties."[336] In the context of confidential settlements of claims arising from sexual wrongdoing, data show that vulnerable groups are not only more likely to experience sexual harassment and other forms of mistreatment but are also more likely to sign NDAs concealing the mistreatment.[337] This veil of silence in turn serves to sustain the societal power imbalance.

Such power imbalances affect settlement negotiation dynamics and the extent to which the resulting settlement is voluntary. When a plaintiff lacks bargaining power and an authority figure or disproportionately powerful counterpart offers settlement terms on a take-it-or-leave-it basis,[338] the conditions are ripe for coercion. Furthermore, as noted, entrenched power dynamics can prevent weaker plaintiffs from gaining improved bargaining power and negotiating a better deal.

Second, and relatedly, the *context of the dispute* matters. The difficult, normative question of what parties are entitled to offer or withhold from one another as part of a settlement is best answered in a context-specific, fact-sensitive way. The cases discussed here—pertaining to discrimination, harassment, and assault—are merely examples. Such disputes are characterized not only by power imbalance but also by an emotional component that is generally absent from purely transactional

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331 *See supra* notes 161–71.

332 *See supra* notes 172–73. Stephen Galoob and Erin Sheley have addressed how coercive power and control in an abusive relationship should affect the criminal law: "A defendant should be entitled to a coercion-based defense when the coercer has usurped the target's decisional authority—that is, when the coercer has usurped . . . control over the target's decision about what to do." Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. Crim. L. & Criminology 265, 314 (2022).

333 Nadler, *supra* note 164, at 173–79.

334 *Id.* at 179–85.

335 *Id.* at 187–90.

336 Anderson, *supra* note 44, § 2.4; *see also* Berman, *supra* note 18, at 1–4 (considering when conditional offers by the federal government coerce the states).

337 *See supra* note 13 and accompanying text.

338 Ware, *supra* note 307, at 118–19 (discussing this issue in the context of employment arbitration agreements).

contexts like business-to-business disputes. That said, coercive settlements can certainly occur elsewhere, including in the consumer and divorce contexts.[339] When designating civil disputes as "high-risk" for the purposes of identifying coercion, courts should carefully consider the context of the dispute and the extent to which it might give rise to an environment in which one party coerces the other into settling.

The third factor is *information asymmetry*. As Bibas notes regarding plea bargains, the market for bargaining is biased against "unsophisticated laymen facing repeat-player prosecutors."[340] Similarly, information asymmetries abound in high-risk civil settlements, especially when the plaintiff is not represented. The plaintiff in a sexual harassment case may not know whether their experience is part of a larger pattern of sexual wrongdoing perpetrated by the wrongdoer.[341] In contrast, the wrongdoer and likely the employer have more information about the existence of other victims.[342] Defendants can exploit this information advantage, denying plaintiffs the possibility of sharing their experience with other victims to coordinate their legal strategy.[343] As a result, defendants can pressure plaintiffs into individual settlements that inadequately compensate them while demanding their silence.[344] In the context of a workplace sexual harassment claim, an employer might tell an individual employee that it will be the employee's word against the employer's, and a jury may well believe the employer. At the same time, the employer might be aware of several other victims whose words resemble the individual employee. Such information asymmetry can help employers pressure employees into unwanted settlements.

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339 The latter example is interesting because of the lack of a clear alternative; if someone wants a divorce—or if their spouse is the one who filed for divorce—their options are limited.

340 Bibas, *supra* note 138, at 1153.

341 *See* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 322 (2018).

342 *Id.* As Levmore and Fagan note, this can negatively affect the victim's ability to "extract a high settlement" as well as lead to insufficient deterrence. *Id.*

343 *Id.* This information gap has mental health implications too. Research has found that when victims disclose their trauma to people who have experienced similar traumas themselves, the benefits of disclosure are even greater. *See* Kathleen de Boer, Chelsea Arnold, Jessica L. Mackelprang, Danielle Williamson, David Eckel & Maja Nedeljkovic, *Outcomes from a Pilot Study to Evaluate Phase 1 of a Two-Phase Approach to Treat Women with Complex Trauma Histories*, 58 AUSTRALIAN PSYCH. 346, 347 (2023). Researchers found that victims of trauma reported improved symptoms after undergoing group treatment in which they could share, validate, and normalize their experiences. *See id.* at 353–54. Victims of trauma tend to find comfort in speaking to others who had similar experiences. *See* Juan Forero, *From Shared Experience, an Offer of Comfort: A Support Group Helps to Repair Lives Shattered by Plane Crashes*, N.Y. TIMES (Nov. 13, 1999), https://timesmachine.nytimes.com/timesmachine/1999/11/13/issue.html [https://perma.cc/LW8N-DHGP].

344 Levmore & Fagan, *supra* note 341, at 322 (noting that "it is the pattern potential that makes the information valuable to others and costly to the settling party").

A fourth factor concerns *time pressure*. As discussed, the psychological literature has found that the scarcity principle, which makes time-limited offers seem more valuable, plays a key role in coercion.[345] In particular, time-limited plea bargains have been found to have a coercive effect on defendants who are rushed to make hurried decisions.[346] By setting a short time limit on a settlement offer, the proposer can pressure the recipient to make a quick decision that does not adequately consider the long-term consequences. Thinking back to Sarah's story, her emotional turmoil after acquiescing to settle her claim confidentially might have resulted, at least in part, from pressure to make a decision in a hurried fashion.[347]

Importantly, these structural factors should be considered against the backdrop of the aforementioned procedural characteristics involving the limits of judicial review and legal representation.[348] Many of these coercion-inducing conditions can be exacerbated by a lack of legal representation. In particular, without the advice of legal counsel, a recipient will struggle to assess their chances of success at trial or the credibility of a proposer's threat to drown them in legal motions or file a defamation suit.[349] That said, even when a plaintiff *is* represented, lawyers are often incentivized to pressure plaintiffs into unwanted settlements.[350] This issue ties into a recipient's lack of resources and the financial and emotional costs associated with going to trial. Although

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345 *See supra* notes 187–94 and accompanying text; *see also* IRVING L. JANIS & LEON MANN, DECISION MAKING 59 (1977) (discussing the role played by imminence in decision-making processes and noting that the quality of the process depends on whether there was "sufficient time to make a careful search for and evaluation of information and advice" (emphasis omitted)); RICHARD S. LAZARUS & SUSAN FOLKMAN, STRESS, APPRAISAL, AND COPING 93 (1984) (discussing how the quality of decision-making largely depends on whether the decision-maker has enough time to consider the decision). As Keren notes, time pressure should be taken as a factor in understanding the victim's vulnerability and as enhancing the wrongfulness of the stronger party if that party imposed the time pressure. Keren, *supra* note 23, at 730–31.

346 *See* Luna, *supra* note 104, at 250 ("To some, having to make what is often a life-altering decision in such as brief amount of time is unduly coercive."); Bibas, *supra* note 138, at 1153–54 (discussing how defense lawyers can pressure their clients into accepting a plea bargain); *see also* Zottoli et al., *supra* note 105, at 252, 255 (discussing a study of ninety-seven youths and adults in alternative-to-incarceration programs that found that most youths and a sizeable minority of adults had less than a day to decide whether to accept a plea bargain).

347 *See supra* notes 2–9 and accompanying text. Not only does time pressure affect voluntariness, but making such important decisions quickly may also increase the chances of experiencing regret and paying an emotional toll in the aftermath.

348 *See supra* Section II.B.

349 *See generally* Zeigler & Hermann, *supra* note 277 (describing the difficulties that unrepresented litigants face throughout the litigation process).

350 *See* Gilat Juli Bachar, *Money for Justice: Plaintiffs' Lawyers and Social Justice Tort Litigation*, 41 CARDOZO L. REV. 2617, 2654–55 (2020) (discussing plaintiffs' lawyers' practice of pushing for settlement even when it is inadequate); Engstrom, *supra* note 281, at 839–41.

financial hardship is not in and of itself grounds for duress,[351] it should be factored in as a constraint that might force unwanted settlements onto plaintiffs. Furthermore, because judges typically do not oversee civil settlements,[352] there is no check—not even a limited one—on the extent to which a settlement was entered voluntarily.[353] This lack of oversight can allow coercion to occur and remain unnoticed.

Table 1 summarizes elements that can lead to coercion in high-risk civil settlements compared to plea bargains.

TABLE 1: COERCIVE ELEMENTS IN PLEA BARGAINS AND HIGH-RISK CIVIL SETTLEMENTS

Element	Plea Bargains[354]	High-Risk Civil Settlements (Confidential Settlements as an Example)
Conditional Threats	Seeking maximum punishment	Stating intention to prolong litigation proceedings or sue plaintiff, imposing financial and emotional costs
Conditional Offers	Overcharging / offering leniency in exchange for guilty plea	Offering money in exchange for silence and forgoing legal claim
Authority / Power	Authority	Authority / disproportionate power
Structural Elements / Constraints	Information asymmetry Time pressure Defense lawyers' and prosecutors' perverse incentives Costs associated with trial	Information asymmetry Time-pressure Lack of legal representation / plaintiff's lawyers' perverse incentives Costs associated with trial Lack of judicial oversight Context of dispute

C. A Path Forward: Settlement Intervention

The foregoing discussion has identified a gap between how courts treat settlement voluntariness and the reality that some settlements are reached in potentially coercive environments. The prior Sections suggested that existing doctrine fails to recognize moral considerations, distributive-justice issues, and psychological factors that can help to identify such environments. The remaining question is how the legal system can close this gap. This Article ends by putting forward two proposals aimed at reducing coercion in high-risk civil settlements.

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351 Asberry v. U.S. Postal Serv., 692 F.2d 1378, 1381 (Fed. Cir. 1982) (noting that financial difficulties are insufficient to establish economic duress).

352 *See supra* notes 269–71 and accompanying text. This is unlike the plea colloquy in the criminal context. *See supra* notes 102–03 and accompanying text.

353 *See* Fiss, *supra* note 81, at 1077–79.

354 This part of the table draws on Luna, *supra* note 104, at 249.

The first suggestion builds on existing contract defenses and is backward looking. Courts should be more open to considering coercion-based challenges to high-risk settlement agreements. These challenges should include duress, unconscionability, and undue influence, depending on the circumstances of the case. Duress should be used when a party can show that the settlement was entered involuntarily regardless of the extent to which the settlement is viewed as good or bad.[355] For unconscionability, structural factors creating an unfair, one-sided process will typically need to be shown in addition to an unfair settlement.[356] Undue influence should be applied when a party takes advantage of a counterparty's vulnerability and susceptibility to persuasion beyond the narrow context of special relationships.[357]

The laissez-faire approach courts have adopted with respect to civil settlement[358] undoubtedly offers significant benefits to the legal system, such as helping judges quickly and efficiently dismiss attempts to invalidate settlement agreements and enhancing certainty.[359] But the current approach lets cases that *do* require intervention slip through the cracks, inadequately protecting settlement voluntariness. Instead, courts should adopt an understanding of contract defenses such as duress, unconscionability, and undue influence that accounts for subtler forms of coercion, such as those discussed here, and the structural elements that can enhance it. Courts should also be cognizant of the context of the dispute to assess the extent to which the case before them is prone to allowing coercive power to be wielded by one party against another. Because settlements happen in the "shadow of the law,"[360] courts producing contract doctrine that more rigorously defends voluntariness would in turn affect bargaining conditions in subsequent cases.[361]

The second suggestion is forward looking, or preemptive, and will involve a more significant procedural change. This Article suggests adding a civil settlement colloquy in cases designated as high-risk. This process would intend for judges to inquire whether the settlement was reached "knowingly, intelligently, and voluntarily."[362] However, adopting

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355 *See supra* Section III.A.

356 *See supra* Section III.A.

357 *See* Keren, *supra* note 213, at 11 (making the case for expanding the confines of the doctrine).

358 *Id.*

359 *See supra* note 274.

360 *See* Mnookin & Kornhauser, *supra* note 92, at 968.

361 Once a court finds that a settlement was coercive, a separate question regards the appropriate remedy. Specifically, to what extent should the remedy be declaring the settlement void as opposed to allowing other remedies that will keep the settlement in place? Oren Bar-Gill and Omri Ben-Shahar argue that sometimes the coerced party is better off with an enforced than a nonenforced contract. *See* Bar-Gill & Ben-Shahar, *supra* note 112, at 718. Answering this question in the context of the scenarios discussed in this Article is best left for future work.

362 Stano v. Dugger, 921 F.2d 1125, 1161 (11th Cir. 1991); *see supra* Section II.A.

critiques of the plea colloquy,[363] its civil counterpart should go beyond using boilerplate language to ask whether the settlement is clear and voluntary. Instead, courts should pursue a more meaningful inquiry in cases designated as high-risk to assess settlement voluntariness. This inquiry could include, for example, the amount of time allowed to consider the settlement and the extent to which the plaintiff understands the settlement's implications.[364] Further, a mechanism will need to be put in place to determine which cases are "high-risk." It also remains to be determined whether the mechanism may simply be subject-matter driven or may consider additional circumstances. Adding this stage to the case dismissal process might serve as a check on nefarious defendants—at least in cases in which the risk of coercion is greater.[365] And a civil settlement colloquy can also caution courts against pressuring parties to settle in such cases.[366] As shown by certain employment and collective settlements, courts can take a more active part in the settlement process.[367] Although the colloquy is hardly a panacea,[368] it steps in the right direction of acknowledging that the risk of coercion exists in some private law settings too.

CONCLUSION

Research shows that people tend to overestimate the voluntariness of other people's actions and underestimate the effect that situational factors had on their behavior and decisions.[369] Courts are no exception to this tendency—as the doctrine on plea bargaining reflects—but this

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363 *See generally* Fessinger & Kovera, *supra* note 28 (considering various factors, such as offer size, that pressure innocent defendants to plead guilty despite the plea colloquy).

364 As noted, such a standard has been adopted in the Title VII context as one indication of whether a waiver of claims was done knowingly and voluntarily. *See supra* note 233.

365 Although the colloquy will not be helpful in cases of prefiling settlement, the shadow of common law contract doctrine on coercion-based defenses will affect the bargaining process.

366 *See supra* note 275 and accompanying text.

367 *See supra* note 27.

368 *See* David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1233 (critiquing courts' failure to combat secrecy and practice restrictions in class actions).

369 Nadler, *supra* note 164, at 169 ("As a general matter, people are strongly inclined toward explaining another person's behavior in terms of internal causes (their intentions and dispositions), while ignoring aspects of the situation that could account for the person's actions. For this reason, behavior that looks voluntary from the outside can feel constrained by the situation from the perspective of the actor." (footnote omitted)). This human tendency is sometimes referred to as the "fundamental attribution error." *See* Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCH. 485, 491 (1977) (finding that in a study involving subjects randomly assigned as either a contestant with a challenging task or a quizmaster with an easy task, observers rated the quizmasters as smarter than the contestants despite the obvious differential in task difficulty); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCH. BULL. 21, 25 (1995) (observing that situational factors affecting the actor's behavior can be "invisible" from the perspective of the observer).

bias has been largely overlooked with respect to civil settlement. Not only does the legal system often take a laissez-faire approach when it comes to settlement approval and case dismissal, but courts are also reluctant to invalidate settlement agreements, generally assuming they represent a mutually desirable deal. Although this approach may serve judicial economy[370] and is generally appropriate when parties are on equal footing, the scenarios discussed here caution against applying this approach without exception.

This Article argued that subtle forms of coercion apply to certain civil settlements and focused on one particular kind: those in which recipients are offered money in exchange for their silence and forgoing their legal claims. To support this argument, the Article adopted a broader definition of coercion that considers methods of social pressure and structural factors that can lead recipients to involuntarily accept a settlement offer. It also suggested small and big ways in which the legal system can better address these situations.

Although this Article focused on a particular kind of settlement, it hopes to begin a larger conversation about civil settlements more generally. For example, in some civil settlements, the roles are reversed and the poor, marginalized, or otherwise disproportionately weak are the defendants. This is the case in debt collection and eviction cases, in which coercion might occur when defendants agree to economic terms they cannot comply with. Further research could help identify coercive settlements in such settings. Finally, alongside contemplating ways to expand existing contract doctrines where appropriate, scholars should also continue to develop strategies that address collective concerns.[371] The first step is to acknowledge that private action is vital in the fight to achieve social change—in the fight to ensure that no individual is ever merely a means.

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370 Arthur Miller famously made this point in support of confidential settlements. *See* Miller, *supra* note 11, at 441.

371 *See generally* Bachar, *supra* note 30 (arguing that it is in victims' interest—and the public interest—to create a culture of solidarity and disclosure); Benjamin C. Zipursky & Zahra Takhshid, *Consumer Protection and the Illusory Promise of the Unconscionability Defense*, 103 TEX. L. REV. 847, 865 (2025) (noting that "when one just focuses on each individual consumer and their bargain with AT&T Mobile (as opposed to the collective question of all similarly situated consumers), the contract was arguably quite favorable to the individual plaintiff"). Another example in which a collective strategy matters relates to class action waivers. In this context, Keren argues that courts' blind enforcement of such waivers should be replaced with treating them as coerced, unconscionable, and in violation of public policy. *See* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 583 (2020).