



February 2014

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Recommended Citation

Erin P. Bartholomy, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331 (1993).
Available at: <http://scholarship.law.nd.edu/ndjlepp/vol7/iss1/10>

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AN ETHICAL ANALYSIS OF THE RELEASE-DISMISSAL AGREEMENT

ERIN P. BARTHOLOMY*

I. INTRODUCTION

A phenomenon exists in the criminal justice world which allows a prosecutor to strike a bargain with a criminal defendant, permitting them both to cut their losses and walk away from a mutually bad situation. On occasions where arrested individuals may have been wronged by public officials in the course of their arrests, prosecutors may legally agree to dismiss defendants' criminal charges in exchange for releases by the defendants of any civil claims arising from the arrests.

The release-dismissal agreement, and variations upon its theme,¹ have been the subject of controversy for several years. Its supporters rely on the obvious efficiency embodied in the situation. Despite this efficiency, such agreements are dangerous, detrimental to the criminal justice system, and against the better interests of society.

This article will examine cases in which the agreements appear and the law which currently allows their existence. It will argue that although the agreements have been allowed by the United States Supreme Court, they are unethical and should be prohibited by the individual state ethics organizations governing the practice of law. Section II presents specific factual situations involving release-dismissal agreements. Section III outlines the historical legal treatment of these agreements as well as their current legal status since the Supreme Court's analysis of the issue. Section IV considers legal ethics and professional responsibility and argues that, according to established norms of our profession, these agreements should not be allowed. Finally, Section V proposes that individual state ethics bodies should, as the Colorado Bar Association has done, promulgate rules prohibiting public prosecutors from entering into release-dismissal agreements.

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1. See *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1980); see also *infra* notes 5-8 and accompanying text.

II. THE SITUATION: CASES IN WHICH THE RELEASE-DISMISSAL AGREEMENT APPEARS

Several instances where release-dismissal agreements have been used will help illustrate the troubling consequences of allowing prosecutors to release alleged criminals in exchange for promises not to file civil complaints. Note that in each instance cited, the beneficiaries of the agreement are the alleged criminal and the allegedly abusive state official.

(1) In 1990, Jose Mendoza, a Salem, Oregon, man who was shot in the face during a drug raid, says he was forced to give up any claim against the state in exchange for the dismissal of criminal charges.² On the advice of his own attorney,³ the 39-year old man, who did not speak English, signed an agreement to release the state of any civil liability for medical bills incurred in treating the wounds to his face. In return for his release of civil liability, the charges against Jose Mendoza, including attempted murder, were dismissed.⁴

(2) Robert Jones filed civil rights claims against the county of Multnomah, Oregon, relating to actions that occurred while he was being held in that county's jail awaiting post-conviction sentencing.⁵ Jones alleged that "[o]n the night of July 3, 1976, he was taken from his cell, stripped, gagged, bound, chained to a wall, hosed with cold water and beaten with a night stick. The incident lasted 3 to 5 hours."⁶ Prison officials then placed Jones in a special segregation facility⁷ and held him there for nineteen days. On July 22, without any prior notice, Jones met with a deputy county counsel and a claims adjuster. At that meeting, Jones accepted \$500 in return for his release of all civil claims arising from the beating of July 3.⁸

2. *Man Says He Was Pressured to Drop Claim with State*, UPI, June 2, 1990.

3. "Portland lawyer Angel Lopez, who represented Mendoza on the civil issue, said he understood his client's feelings. 'What it comes down to is that we were prepared to do what needed to be done to get him out of this criminal problem he was in,' Lopez said. 'I advised him of the probabilities of winning in a civil suit. They don't look too hot.'" *Id.*

4. *Id.*

5. *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1980).

6. *Id.* at 1201.

7. *Id.* at 1202. The "special segregation facility" referred to here is quite similar to solitary confinement. Jones was denied the opportunity to speak to other prisoners or his attorney.

8. *Id.* at 1201. Because the agreement in *Jones* was made after the conviction and did not involve the dismissal of the defendant's charges, it does not present a strict example of a release-dismissal agreement. It is included here as an example of agreements that are made to prevent police brutality claims from being brought by criminal defendants.

(3) Chicago resident Verita Boyd alleged that upon her refusal to acquiesce to a search of her person,⁹ a Chicago police officer pushed her violently against the car she had been in, shoved her against his police car,¹⁰ used abusive language and threatened her. Ms. Boyd was then arrested and incarcerated on charges of disorderly conduct and resisting a police officer. When she appeared for trial, the Assistant State's Attorney of Cook County, Illinois, agreed to dismiss the charges on the condition that Ms. Boyd execute a release from civil liability in favor of the arresting officers and the city. She signed the agreement.¹¹

Examples of alleged police brutality claims abound. The large numbers of arrests the courts have seen which are associated with legitimate complaints of constitutional violations justifies attention to this subject.¹² Under 42 U.S.C. § 1983,¹³ persons deprived of their rights by persons acting under the color of law are entitled to redress from the actors. If their stories are true, each of the criminal defendants described above has meritorious civil rights claims against the arresting

9. *Boyd v. Adams*, 513 F.2d 83 (7th Cir. 1975). Ms. Boyd was a passenger in a car that was stopped and searched when she and a group of people were driving to a high school to pick up the mother of one of the passengers. Before attempting to search Ms. Boyd, the police searched the car and the three other passengers and found nothing incriminating. *Id.* at 83.

10. Ms. Boyd claims that she was pregnant at the time of the incident and that this assault caused her subsequent miscarriage. *Id.* at 85.

11. *Id.*

12. See Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851 n.112 (1988); see also *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985) (paraplegic unconstitutionally arrested in home without warrant on charge of drunk driving, handcuffed, and dragged across the ground to police car); *Stone v. City of Chicago*, 738 F.2d 896, 898 (7th Cir. 1984) (while riding his bicycle, plaintiff was struck by police car; police pushed him to the ground, subjected him and his wife to racial slurs and then kicked him and beat him upon arrival at the hospital); *Garrick v. City & County of Denver*, 652 F.2d 969, 970 (10th Cir. 1981) (plaintiff shot by police officer after being stopped for making an illegal U-turn and having car searched for drugs).

13. 42 U.S.C. § 1983 (1985) states in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

officers and, possibly, against the police departments or the municipalities.¹⁴

While many brutality claims are filed, there are also instances of agreements to release such claims, as illustrated in the previously cited examples. It is not unusual for a state or municipality to dismiss the charges against a criminal defendant in exchange for that individual's promise not to sue the police, the city, or the county for any civil rights violations the arresting individuals might have caused during the arrest.¹⁵ While they may know that they have been wronged or brutalized, defendants, such as Jose Mendoza, often feel that their civil rights claims are futile in light of their current situation. While imprisoned, they feel they have little choice and, realistically, they do have minimal bargaining power. To many, the opportunity to sign a release and walk away from a criminal arrest seems an incredibly lucky break. And the benefits of such agreements are not one-sided; the police escape from their own misdeeds. While judicial economy is preserved by obviating two trials, the net result of such an agreement is a negative one: Suspects are dismissed without trials and officers are relieved from responsibility for constitutional violations. There is no retribution for the victim of the crime, no compensation for the victim of the constitutional deprivation, and, perhaps most importantly, no report to or trial by the public of either alleged wrongdoing.

III. THE LAW

A. *The Historical Controversy:* Dixon v. District of Columbia

Until 1987, when the United States Supreme Court addressed the issue of the enforceability of the release-dismissal agreement,¹⁶ its validity was a matter of long-standing controversy. The question of whether to uphold an agreement to trade the release of civil rights claims for the dismissal of criminal charges had been decided a number of different ways. Some courts held that the agreements were enforceable contracts.¹⁷ Others refused to uphold such agreements and cited a number of factual reasons, including lack of adequate consideration, coercion, and duress.¹⁸ Finally, at least one court has

14. See *infra* part IV(D) for a discussion of the application of § 1983 and the significance of official immunity and municipal liability.

15. See generally Kreimer, *supra* note 12.

16. Town of Newton v. Rumery, 480 U.S. 386 (1987).

17. See, e.g., Hoines v. Barney's Club, 620 P.2d 628 (Ca. Sup. Ct. 1980).

18. However, if the agreements were made voluntarily, they would have

held that the release-dismissal agreement is never valid; that it is per se void for public policy reasons.¹⁹

Although the Supreme Court has recently spoken on this subject, opinions about the validity of release-dismissal agreements continue to vary. In its only examination of the issue, the Supreme Court did not manage to attain a majority decision,²⁰ so it is not surprising that feelings about these agreements remain far from settled. Prior to the Court's treatment of the issue, though, strong support lay on the side of refusing to allow such agreements. A leading case, *Dixon v. District of Columbia*,²¹ promotes the position that release-dismissal agreements should never be enforced. *Dixon* set forth the facts and reasoning that led a federal court to refuse to enforce a release-dismissal agreement.²² The *Dixon* court declared the agreements to be void as a matter of public policy and examined what the consequences would be, in terms of the prosecution of the criminal charges, when the defendant breaks an agreement not to sue.²³

In *Dixon v. District of Columbia*, Dixon was stopped by officers for traffic violations.²⁴ At that time he was neither charged nor ticketed. Two days later, when he went to the station to deliver a written complaint regarding the officers' behavior, Dixon entered into a "tacit agreement" with the Corporation Counsel's office.²⁵ The understanding was that Dixon would not proceed further with his complaint and, in exchange, the local government would not prosecute the traffic charges.²⁶

After three months, Dixon decided to file a formal complaint with the District of Columbia Commission's Council on

been enforceable. For the "voluntariness principle," see *Bushnell v. Rossetti*, 750 F.2d 298 (4th Cir. 1984); *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1980).

19. *Rumery v. Town of Newton*, 778 F.2d 66 (1st Cir. 1985).

20. *Town of Newton v. Rumery*, 480 U.S. 386. The decision to enforce the release-dismissal agreement in that case was made by a plurality, with the opinion written by Justice Powell, joined by concurring Justice O'Connor, with four dissenters, led by Justice Stevens.

21. 394 F.2d 966 (D.C. Cir. 1968).

22. *Id.*

23. *Id.*

24. *Id.* at 966. The two violations were failing to obey the instructions given by a police officer and stopping a vehicle in such a manner as to obstruct the orderly flow of traffic. *Id.* n.1.

25. *Id.* at 968. The opinion notes that the police may have been particularly concerned with Dixon's complaint. Because he was a retired detective, and he was black and the two officers were white, Dixon could not easily be accused of raising illegitimate claims of police brutality. *Id.* n.2.

26. *Id.* at 968.

Human Relations. As a result of Dixon's complaint, the case was reopened and he was charged with the two traffic offenses.²⁷ The prosecutor proceeded with the case and the trial court, after granting three continuances in favor of the prosecution, directed findings of not guilty. The government appealed and during a conference with the trial judge ordered by the Court of Appeals, the prosecutor "admitted that the prosecutions were brought because appellant went back on an agreement not to file complaints of misconduct against the police officers who stopped him."²⁸ In their eventual hearing of the case, the Court of Appeals ruled that the prosecution was impermissibly brought and remanded the case with instructions for it to be dismissed.²⁹

The *Dixon* court held that there was a definite necessity to prevent the type of agreement which the government initiated in this case. The Court of Appeals for the District of Columbia Circuit stated that "the courts may not become the 'enforcers' of these odious agreements."³⁰ Further, judges must remove any incentive to enter into the agreements by barring prosecutions brought against defendants who refuse to promise, or later break a promise, not to file complaints against arresting officers.³¹

The court in *Dixon* was concerned with the proliferation of these agreements that would have resulted had it ruled for the government. The court found these agreements to be "odious" for several of the reasons that motivated four Supreme Court justices later to vote against enforcing a similar agreement.³² The court was specifically concerned with the failure to prosecute valid criminal claims as well as the failure to openly and thoroughly air complaints against the police.³³ The

27. *Id.* The Chief of the Law Enforcement division of the Corporation Counsel explained their decision to reopen the case by stating:

We had discussed it back when it originally occurred and, at the time, everybody was happy to forget the whole thing . . . But three months later he comes in and makes a formal complaint. So we said 'If you are going to play ball like that why shouldn't we proceed with our case?'. . . I had no reason to file until he changed back on his understanding of what we had all agreed on . . .

Id.

28. *Id.* at 967.

29. *Id.* at 970.

30. *Id.* at 969.

31. *Id.*

32. See *Town of Newton v. Rumery*, 480 U.S. at 403 (Stevens, J., dissenting).

33. *Dixon*, 394 F.2d at 969.

Dixon court was the first to pronounce the often-quoted fear regarding the "major evil" of these agreements: "[T]hey tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint."³⁴ According to the D.C. Circuit, "The danger of concocted charges is particularly great because complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest."³⁵ Following this reasoning, the *Dixon* holding would invalidate all release-dismissal agreements.

Dixon v. District of Columbia set the groundwork for close to two decades of controversy over the enforceability of the release-dismissal agreement. Federal and state courts all over the country followed the decision,³⁶ many holding the agreements void as against public policy. While the Supreme Court eventually promulgated a different rule, a strong dissent clearly enumerated the problems inherent in the release-dismissal agreement.

B. *Town of Newton v. Rumery: Enforcing the Release-Dismissal Agreement*

The question of the enforceability of the release-dismissal agreement, addressed in *Dixon v. District of Columbia*, was argued and decided before the Supreme Court in *Town of Newton v. Rumery*.³⁷ A plurality headed by Justice Powell, and joined by concurring Justice O'Connor, held that a release-dismissal agreement between a criminal defendant and a prosecutor is not necessarily unenforceable. In its decision to uphold the particular agreement in this situation, the Court refused to find a per se rule of invalidity.

The case arose from the following facts. David Champy, a friend of Bernard Rumery's, was indicted for aggravated felonious sexual assault. After learning of the charges from a local

34. *Id.*

35. *Id.*

36. See Brian L. Fielkow, 42 U.S.C. § 1983—*Buying Justice: The Role of Release-Dismissal Agreements in the Criminal Justice System*, 78 J. Crim. L. 1119 n.138 and accompanying text (1988); see also *Boyd v. Adams*, 513 F.2d 83, 88 (7th Cir. 1975); *Shepard v. Byrd*, 581 F. Supp. 1374, 1386 (N.D. Ga. 1984); *Brothers v. Rosauer's Supermarkets, Inc.*, 545 F. Supp. 1041, 1042 (D. Mont. 1982); *Horne v. Pane*, 514 F. Supp. 551, 552 (S.D.N.Y. 1981); *Williamsen v. Jernberg*, 99 Ill. App. 2d 371, 375 (1968); *Gray v. City of Galesburg*, 247 N.W.2d 338 (Mich. App. 1976); *Kurlander v. Davis*, 427 N.Y.S.2d 376, 381 (N.Y. App. Div. 1980).

37. 480 U.S. 386 (1987).

newspaper, Rumery phoned Mary Deary, an acquaintance of both himself and Champy. Deary was the victim of the assault in question and was expected to testify as the principal witness in the case against Champy. Deary was apparently upset by the substance of the phone call from Rumery and she subsequently contacted the Town of Newton's Chief of Police. Deary told the police that Rumery had attempted to force her to drop the charges against Champy and that Rumery had threatened her if she continued to go ahead with the charges. Rumery was then arrested on charges of tampering with a witness, a class B felony in New Hampshire.

After the arrest, Rumery's attorney reached an agreement with the Deputy County Attorney under which the Prosecutor would dismiss all charges against Rumery if Rumery would agree not to sue the town, its officials, or Deary for any harm³⁸ caused by the arrest. The District Court found that Rumery's attorney presented the agreement to Rumery and explained to him that he would have to forego all civil actions if he accepted the agreement.³⁹ After three days, during which time Rumery was not in custody, he signed the agreement and the charges were dropped.

Ten months later Rumery filed suit,⁴⁰ alleging that the town and its officials had violated his constitutional rights by arresting him, defaming him, and falsely imprisoning him. The Town of Newton moved for dismissal of the civil case with the release-dismissal agreement serving as an affirmative defense. At the trial level, Rumery unsuccessfully argued that the agreement was unenforceable as a violation of public policy. The District Court rejected Rumery's argument and dismissed his civil case, holding that a release of a § 1983 claim may be valid if it results from a voluntary, deliberate and informed decision.⁴¹ The court further found that Rumery's decision resulted from a careful analysis of the situation, and was therefore voluntary; accordingly, they dismissed his suit.⁴²

The Court of Appeals for the First Circuit reversed, adopting a *per se* rule invalidating release-dismissal agreements.⁴³ The First Circuit was concerned with the coercive nature of the agreements as well as their infringement on important public

38. For example, defamation of character or false arrest, which were the bases of Rumery's later § 1983 suit.

39. 480 U.S. at 390.

40. Under 42 U.S.C. § 1983.

41. 480 U.S. at 391.

42. *Rumery v. Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985).

43. *Id.*

interests. In holding that such agreements are never enforceable, the court stated:

It is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights.⁴⁴

The United States Supreme Court granted the town's petition for a writ of certiorari,⁴⁵ and in the plurality opinion, Justice Powell⁴⁶ stated the issue: "The question in this case is whether a court properly may enforce an agreement in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges."⁴⁷

Justice Powell began his opinion by stating that the source of the relevant legal authority is the common law principle that a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.⁴⁸ He placed the issue and the Court's position in perspective by stating:

The Court of Appeals concluded that the public interests related to release-dismissal agreements justified a per se rule of invalidity. We think the court overstated the perceived problems and also failed to credit the significant public interests that such agreements can further. Most importantly, the Court of Appeals did not consider the wide variety of factual situations that can result in release-dismissal agreements. Thus, although we agree that in some cases these agreements may infringe important interest of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a per se rule.⁴⁹

Justice Powell's plurality opinion systematically rejected the Court of Appeals' two arguments. He began by responding

44. *Id.*

45. *Town of Newton v. Rumery*, 475 U.S. 1118 (1986).

46. Justice Powell was joined by Chief Justice Rehnquist, Justice White and Justice Scalia. Justice O'Connor concurred in the decision and parts of the opinion.

47. *Rumery*, 480 U.S. at 389.

48. *Id.* at 392 n.2 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981)).

49. *Id.*

to the argument that these agreements are "inherently coercive."⁵⁰ While the Court agreed that some release-dismissal agreements "may not be the product of an informed and voluntary decision,"⁵¹ it concluded that the possibility of an involuntary decision does not justify invalidating all release-dismissal agreements.⁵²

The Court based its rejection of the theory of inherent coerciveness on two grounds. First, in other contexts criminal defendants are required "to make difficult choices that effectively waive constitutional rights."⁵³ Second, in many cases the defendant's decision to enter into the agreement reflects "a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action."⁵⁴ Based on the fact that the defendant was a sophisticated businessman, that he was not in jail at the time of the agreement, and that he was represented by an experienced criminal lawyer, the plurality concluded that Rumery's decision was such a rational judgment.⁵⁵

Because, as the Court found, Rumery's decision to enter into the agreement was voluntary, "the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid."⁵⁶ In accordance with these findings, the Court held that the mere possibility of coercion in the making of these agreements is insufficient to justify a per se invalidation of release-dismissal agreements.⁵⁷

The second argument justifying the First Circuit's holding was the significant public interests that invalidating release-dismissal agreements would serve.⁵⁸ Specifically, the Appellate Court sought to protect the public interest in revealing police misconduct and in preventing prosecutors from the temptation to "trump up charges."⁵⁹ The Supreme Court challenged

50. *Id.* at 393 ("It is unfair to present a criminal defendant with a choice between facing criminal charges and waiving his right to sue under § 1983.").

51. *Id.* ("The risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious.").

52. *Id.*

53. *Id.* ("[I]t is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted.").

54. *Id.* at 394.

55. *Id.*

56. *Id.*

57. *Id.*

58. 778 F.2d at 69.

59. *Id.*

these two bases of public interest and found the public interest in enforcing and allowing the agreements to be more significant. Noting that not all § 1983 suits are meritorious, the plurality found that "[t]o the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims," they further an important public interest.⁶⁰ Additionally, the Court attacked per se invalidation of the agreements because such action "assumes that prosecutors will seize the opportunity for wrongdoing."⁶¹ Citing their own rule that courts normally must defer to prosecutorial decisions as to whom to prosecute,⁶² and noting that judicial deference to prosecutorial discretion has long been recognized, the Court felt properly reluctant to assume prosecutorial misconduct will necessarily arise from the availability of release-dismissal agreements. Concluding that, "because release-dismissal agreements may further legitimate prosecutorial and public interests," the Court rejected the view promulgated by the lower court that all such agreements are per se invalid.⁶³

After determining that release-dismissal agreements are not inherently coercive and that they can serve legitimate public interests, the Court further held that the specific agreement in *Rumery's* case should be enforced because it was entered into voluntarily.⁶⁴ Reversing the holding of the Court of Appeals, the Supreme Court held that "this agreement was voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interests."⁶⁵ Implicit in the Supreme Court's decision was a new rule that if a release-dismissal agreement were made voluntarily and if the public interests would be benefitted by the agreement, it should be enforced.⁶⁶

60. *Town of Newton v. Rumery*, 480 U.S. at 396:

No one suggests that all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. Counsel may be retained by the official, as well as the governmental entity. Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties. In some cases litigation will extend over a period of years. This diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest.

61. *Id.*

62. *Id.*

63. *Id.* at 397.

64. *Id.* at 398.

65. *Id.*

66. *Id.* The public benefits that derived from this particular agreement

For practical purposes, the Court stated that a "voluntariness" standard would now govern issues of enforceability of release-dismissal agreements.

Justice O'Connor concurred in the Court's opinion to disapprove the Court of Appeals broad holding that release-dismissal agreements are void as against public policy under all circumstances.⁶⁷ In her concurrence, Justice O'Connor further agreed that the enforceability of these contracts should be decided on a case-by-case approach which "appropriately balances the important interests on both sides of the question of the enforceability of these agreements."⁶⁸ Justice O'Connor agreed with the plurality that Bernard Rumery's covenant not to sue was enforceable.⁶⁹

The concurrence set out the specific factors that should be considered in the decision to enforce the agreement and emphasized that the party seeking to enforce the agreement bears the burden of proving that it was entered into voluntarily and that it was not an abuse of the criminal process. Justice O'Connor's analysis resembled the District Court's ruling and basically restated that court's voluntariness test. Relevant factors include: the experience of the criminal defendant, the circumstances of the release, the availability of counsel, and the nature of the criminal charge.⁷⁰ Also significant, but not necessary, is whether the agreement was executed under judicial supervision.

According to the concurrence, release-dismissal agreements are respectable because much § 1983 litigation is meritless and "the inconvenience and distraction of public officials caused by such suits is not inconsiderable."⁷¹ Justice O'Connor also believed that the agreements may actually serve "bona fide criminal justice goals" and she cited protection of Mary Deary as such a legitimate goal.⁷² The agreement served criminal justice, according to Justice O'Connor, by sparing

included the facts that the agreement served judicial economy in that it foreclosed both a criminal and a civil trial and that it spared Mary Deary from "the public scrutiny and embarrassment she would have endured if she had had to testify in either of those cases." *Id.*

67. *Id.* at 399.

68. *Id.* (O'Connor, J., concurring).

69. *Id.*

70. *Id.* at 401. Justice O'Connor stated that the greater the charge, the less likely that the agreement will be voluntary and the greater the coercive effect. *Id.*

71. *Id.*

72. *Id.* at 399, 403. This was an important point for Justice O'Connor; she felt strongly that protection of the complaining witness is a large

Deary the rigors of testifying in two cases in which she was the complaining, principal, and only witness. Justice O'Connor further grounded her praise of the release-dismissal agreement on its cost-efficiency to the local community who should be spared the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecuting.⁷³

Justice O'Connor departed from the plurality in that she extensively examined the dangers involved in the release-dismissal agreement. She concurred with the possibility of temptation for the prosecutor to file "trumped up charges" in an attempt to exonerate a tortious police officer.⁷⁴ Justice O'Connor also mentioned the converse, and equally significant, "temptation" accompanying these bargains — the problem of dropping meritorious criminal charges for the purpose of protecting the municipality from civil claims.⁷⁵ The concurrence was further concerned about introducing extraneous civil concerns into the criminal justice process and stated that the central problem with the agreement was "that public criminal justice interests are explicitly traded against the private financial interest of the individuals involved in the arrest and prosecution."⁷⁶ Even with these significant harms poised precariously over the integrity of the criminal justice system, Justice O'Connor stated that "[n]evertheless, the dangers of the release-dismissal agreement do not preclude its enforcement in all cases."⁷⁷

C. *The Dissenting Opinion*

Between the extremes of the *Dixon* court and the *Rumery* plurality, the *Rumery* dissent took a moderate position on the issue of the validity of the release-dismissal agreement. Led by Justice Stevens, the dissenters sided neither with those who argue for the per se rule against enforceability nor with the plurality who found merit in those agreements that were not defectively negotiated. After considering the issue, the *Rumery*

incentive to enter into a release-dismissal agreement and the existence of this incentive will enhance the agreement's enforceability.

73. *Id.* at 400. However, the Class B felony for which *Rumery* was charged with the possibility of up to seven years in prison (N.H. Rev. Stat. Ann. § 641:5(I)(b) (1986)) does not seem to fall into the category of a "minor crime" that supports Justice O'Connor's reasoning.

74. *Id.*

75. *Id.*

76. *Id.* at 401.

77. *Id.*

dissent concluded that while they were hesitant to adopt an absolute rule invalidating the agreements, the enactment of § 1983 mandates a strong presumption against the agreements.⁷⁸ Because the strong presumption against enforcing the agreements may be overcome only by facts and policies that were not present in the *Rumery* case, Justices Stevens, Brennan, Marshall and Blackmun voted not to uphold the specific agreement in that case.⁷⁹

To support their differing conclusion, the dissent offered several lines of reasoning. First, Justice Stevens argued that even though *Rumery's* decision to enter into the agreement was deliberate, informed, and voluntary, that fact does not address two important objections to its enforcement: The agreement is inherently coercive and the bargain exacts a price unrelated to the defendant's own conduct.⁸⁰

The *Rumery* dissent contended that defendants should not be faced with the dilemma of choosing between trial (and possible conviction) and surrendering their civil rights claims. The dissent condemned that situation by stating:

Even an intelligent and informed, but completely innocent, person accused of crime should not be required to choose between a threatened indictment and trial, with their attendant publicity and the omnipresent possibility of wrongful conviction, and surrendering the right to a civil remedy against individuals who have violated his or her constitutional rights.⁸¹

Justice Stevens noted that *Rumery's* choice to sign the agreement was made with advice of counsel and after three days of reflection. Consequently, he agreed with the plurality in their determination that it was a voluntary and intelligent decision.⁸² Yet, while the dissent conceded that this contract was voluntary, it found no reason to conclude the agreement was enforceable simply because it was voluntarily entered into. Comparing this bargain to a promise to pay a patrol officer twenty dollars for not issuing a speeding ticket, Justice Stevens submitted that "the deliberate and rational character of

78. *Id.* at 418 (Stevens, J., dissenting).

79. *Id.*

80. *Id.* at 411. The dissent's first argument is summarized by Justice Stevens' statement that "[t]he prosecutor's offer to drop charges if the defendant accedes to the agreement is inherently coercive; moreover, the agreement exacts a price unrelated to the character of the defendant's own conduct." *Id.*

81. *Id.* at 405.

82. *Id.* at 408.

[Rumery's] decision is not a sufficient reason for concluding that the agreement is enforceable."⁸³ There may be nothing irrational about agreeing to bribe a police officer, yet no court would enforce such a contract. The same should be the case, argued the dissent, with the bargain formed between the Town of Newton's prosecutor and Rumery.

After stating that the release-dismissal agreement is inherently coercive, even if rationally negotiated, the dissent emphasized the further unfairness of this bargain because of the lack of mutuality of advantage between the prosecutor and the defendant.⁸⁴ According to Justice Stevens, this case involves the functional equivalent of a citizen's paying money, represented by waiving the possibility of damages in a civil claim, for the dismissal of a charge that the prosecution has not proven.⁸⁵ The extension of this logic leads to the conclusion that the mutuality of advantage will only grow more disparate in proportion to the certainty of the innocence of the defendant and the wrongfulness of the police officer's actions. Justice Stevens based that conclusion on his theory that prosecutors' strongest interests in entering into these agreements exist when they realize that defendants are innocent and wrongly accused.⁸⁶ Ironically, that is precisely the situation in which the criminal charges should be dropped regardless of the extenuating circumstances.⁸⁷ Such an easy exoneration as the bargain presented here should not be an option for the municipality and the tortious actors.

The plurality and the concurrence both stated that some § 1983 claims are meritless or even frivolous.⁸⁸ However, even if that assumption is true, Justice Stevens argued, those claims, as well as the criminal charges suffering from the same criti-

83. *Id.*

84. *Id.* at 410.

85. Stevens examined the lack of evidence against Rumery and cited specifically the facts that the complaining witness was unwilling to testify at trial, that there was no written statement on which to base the arrest and that Rumery was never indicted. *Id.* at 405.

86. Stevens repeatedly reminds us that the defendant is innocent as a matter of law. *Id.* at 404, 409. "Not only is such a person presumptively innocent as a matter of law; as a factual matter the prosecutor's interest in obtaining a covenant not to sue will be strongest in those cases in which he realizes that the defendant was innocent and was wrongfully accused." *Id.* at 409. The reader is asked to construe the masculine gender used in this and all other extracts in the generic sense, to include women as well as men.

87. "The State is spared the necessity of going to trial, but its willingness to drop the charge completely indicates that it might not have proceeded with the prosecution in any event." *Id.* at 410.

88. *Id.* at 411.

cisms, must be tested by the adversary process.⁸⁹ Justice Stevens stressed that regardless of the value or merit of a particular § 1983 claim, the defendant who relinquishes that claim in exchange for criminal exoneration is paying a price unrelated to his possible criminal behavior.⁹⁰ For example, a defendant's giving up a claim against the police that is worth \$1000 is functionally equivalent to his paying \$1000 to the police department's retirement benefit fund.⁹¹

Supporters of the release-dismissal agreement cite the efficiency argument as a major basis for allowing these procedures.⁹² Justice Stevens pointed out, though, that the Court's decision in this case defeats its own goal by creating the necessity of examining the merits of each agreement to determine its enforceability. At the same time, the efficiency argument is particularly weak in that, while proposing judicial economy, it encourages inattention to potential conflicts of interest.⁹³

In addition to its argument that Rumery's agreement is defective due to its coercive nature and unfair price, the dissent argues that these agreements are presumptively invalid because they force the prosecutor in such cases improperly to represent three potentially conflicting interests: in this case, the interests of the state, the police, and the complaining witness. The primary duty of the prosecutor is to represent the sovereign's interest in the effective enforcement of the criminal law.⁹⁴ Viewing this issue from the standpoint of that duty, Justice Stevens declared that the release-dismissal agreement in this case was both unnecessary and unjustified, "for both the prosecutor and the State of New Hampshire enjoy absolute immunity from common-law and § 1983 liability arising out of a prosecutor's decision to initiate criminal proceedings."⁹⁵ Because Rumery's agreement gave the state and the prosecutor no additional pro-

89. *Id.* Supporters of the release-dismissal agreement analogize it to plea bargaining as an efficient and acceptable means of resolving cases without litigation. The plea bargain analogy is faulty, though, because in that situation the defendant admits guilt, while in the release-dismissal situation the defendant must be presumed to be innocent. *Id.* at 409.

90. "Whatever the true value of a § 1983 claim may be, a defendant who is required to give up such a claim in exchange for a dismissal of a criminal charge is being forced to pay a price that is unrelated to his possible wrongdoing as reflected in that charge." *Id.* at 411.

91. *Id.*

92. *Id.* at 395-96.

93. *Id.* at 414 (Stevens, J., dissenting).

94. *Id.* at 412; see also *Berger v. United States*, 295 U.S. 78, 88 (1935).

95. *Rumery*, 480 U.S. at 412 (Stevens, J., dissenting); see also *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

tection, the contract was irrelevant in terms of the prosecutor's primary duty.

The main function and duty of prosecutors may likely be clouded by allowing other interests to influence their judgment. Justice Stevens cited the prosecutor's ethical obligation to exercise independent judgment and to avoid potentially conflicting interests.⁹⁶ Prosecutors who involve the state in release-dismissal agreements extend, and often neglect, their duty to represent the state. The public is entitled to a decision of whether to prosecute that is made independently of outside concerns. By seeking to protect law enforcement officials from civil liability, prosecutors impair their ability to serve that public interest.

The plurality mentioned and the concurrence emphasized the interest of protecting Mary Deary as an acceptable rationale for entering into and enforcing the Rumery agreement. They cited Deary's emotional distress, her unwillingness to testify against Rumery, and the necessity of her testimony in the sexual assault case as reasons supporting the release-dismissal agreement.⁹⁷ Justices Powell and O'Connor are only half right.

96. *Rumery*, 480 U.S. at 413 (Stevens, J., dissenting) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983) [hereinafter MODEL CODE]); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1992) [hereinafter MODEL RULES]; MODEL CODE DR 7-103 ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."); MODEL CODE EC 7-14 ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.").

97. *Rumery*, 480 U.S. at 415. The Court stated "Mary Deary did not want to testify against Mr. Rumery." *Id.* at 390. The Court further noted:

[I]n this case the prosecutor had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities. The agreement foreclosed both the civil and criminal trials concerning Rumery, in which Deary would have been a key witness. She therefore was spared the public scrutiny and embarrassment she would have endured if she had had to testify in either of those cases. Both the prosecutor and the defense attorney testified in the District Court that this was a significant consideration in the prosecutor's decision.

Id. at 398. Finally, the Court noted:

Mary Deary's emotional distress, her unwillingness to testify against Rumery, presumably in later civil as well as criminal proceedings, and the necessity of her testimony in the pending sexual assault case against David Champy all support the prosecutor's judgment that the charges against Rumery should be dropped if further injury to Deary, and therefore to the Champy case, could thereby be avoided.

Id. at 403 (O'Connor, J., concurring). The dissent also discussed several

While the "dismissal" portion of the agreement was justified under these facts, the support for the "release" half of the bargain was shaky at best. Lack of evidence, represented in this case in the form of a reluctant witness, justified dropping the charges against the defendant. However, while a weak case justifies dropping charges, it does not justify exonerating the police who may have acted wrongfully.

As Justice Stevens wrote, "there is no reason to fashion a rule that either requires or permits a prosecutor always to defer to the interests of a witness."⁹⁸ Rather, it is often the case that prosecutors are not able to pursue the interest of protecting victims while still fulfilling their law enforcement duty to the sovereign.⁹⁹ Where the two interests conflict, the duty of the prosecutor toward just law enforcement must take precedence over both protecting a fragile witness and ensuring success in another case.¹⁰⁰ Neither the interest in sparing Deary the suffering of testifying at Rumery's trial nor the necessity of her testimony at Champy's trial justified foreclosing a victim of wrongful police behavior from pursuing his constitutional rights.

In its third argument, the dissent stated that the relevant public interests upon which the plurality based their votes did not outweigh the public interest embodied and reflected in the very existence of § 1983. The "relevant public interests" to which the plurality and Justice O'Connor refer are three.¹⁰¹ First, because not all § 1983 suits are meritorious, enforcing release-dismissal agreements is correct because they protect officials from the burdens of defending unjust claims. Second, traditional judicial deference to the prosecutor's choice of whom to prosecute calls for allowing these agreements. Third, the interest in protecting Mary Deary and witnesses like her support allowing the agreements.¹⁰²

The dissent believed that the merits of open civil litigation and remedy to the person harmed strongly outweighed the

times Dreary's unwillingness to testify against Rumery and her emotional distress. *See id.* at 406 n.5, 410 n.11, 416 n.19 (Stevens, J., dissenting).

98. *Id.* at 415 (Stevens, J., dissenting).

99. "There will be cases in which the prosecutor has a plain duty to obtain critical testimony despite the desire of the witness to remain anonymous or to avoid a courtroom confrontation with an offender." *Id.*

100. "It would plainly be unwise for the Court to hold that a release-dismissal agreement is enforceable simply because it affords protection to a potential witness." *Id.*

101. *Id.* at 398.

102. *Id.*

interest in avoiding the expense and inconvenience of litigation.¹⁰³ As for the Court's protection of the second "relevant public interest," judicial deference to prosecutorial discretion is significant, but again, while that argument supports the dismissal of criminal charges, it does not support the release of civil claims. Finally, the impropriety of promoting the interest of a witness at the expense of the law enforcement duty cannot be supported.

In response to the Court's statement of the relevant public interests supporting their holding, the dissent examined the interests embodied in § 1983.¹⁰⁴ The policies supporting the statute are the federal interests in providing a remedy for civil violations caused by law officers as well as the desire to have these claims resolved publicly. If these interests could be so easily defeated by an agreement, the purpose and strength of § 1983 would be significantly weakened. The plurality's reasoning seemed to be based on the unspoken premise that the burden of litigation on society is so heavy as to outweigh the benefits provided by § 1983. If the facts are to be assessed that way, said Justice Stevens, the statute and its purposes should not be circumvented, but rather the statute should be repealed.¹⁰⁵ Until Congress takes that action, though, the courts must respect their decision to "attach greater importance to the benefits associated with access to a federal remedy than to the burdens of defending these cases."¹⁰⁶

IV. PROFESSIONAL RESPONSIBILITY

The *Rumery* dissenters attempted to prevent the enforcement of that particular release-dismissal agreement. While their opinion stressed that there should be a strong presumption against enforcing the agreements, even the dissenters on the Court were reluctant to create a per se rule which would eliminate the agreement altogether.¹⁰⁷ After *Rumery*, we must conclude that to rid our society of these instruments, the legal profession itself must adopt the attitude that lawyers should not enter into these "odious agreements," and that the courts should not enforce them.

While *Dixon's* holding and Stevens' dissent represent the more professional and rational approach to the issue, they do

103. *Id.* at 419 (Stevens, J., dissenting).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 418.

not carry the legal authority to require courts to follow their directive. Although the Supreme Court achieved only a plurality in favor of enforcement, it is doubtful that it will speak on this issue again soon. Some states may wait for that day, and the practice of trading civil rights for non-judicial acquittal will continue, but individual states may act now through a number of means. Alternatively, they may enact legislation which outlaws the agreements. An even more effective course, however, and the one in the spirit of *Dixon*, would be for states' professional ethics bodies to forbid prosecutors from ever utilizing the tool of the release-dismissal agreement.

In their discussion of the issue, the *Rumery* courts, both at the appellate and Supreme Court levels, concentrated primarily on the rights of the defendant and the interests of the public.¹⁰⁸ The Justices correctly examined the possibility of coercion inherent in the agreements and balanced the relevant public interests that would both be served and harmed by allowing them to exist. The dissent concentrated on the competing interests the prosecutor inconsistently served,¹⁰⁹ and Justice O'Connor mentioned in detail the "dangers" lurking behind the agreements.¹¹⁰ None of the opinions stated, though, that these agreements were ethically wrong. No one questioned whether utilizing these agreements is unprofessional. No one explored the possibility that American Bar Association standards themselves might implicitly reject these agreements as "unethical" or, at the very least "unprofessional." The following section argues that, for several reasons, prosecutors should not enter into release-dismissal agreements because the practice that is legal in the eyes of the Supreme Court is unethical according to our own professional norms.

A. "Systematic Inequality"

As the plurality in *Rumery* admitted, even criminal defendants who believe their defenses are meritorious are often intimidated by "the risk, publicity, and expense of a criminal trial."¹¹¹ It is unlikely, though, that the arrestee's threat of a civil suit is as intimidating to the prosecutor as is the prosecutor's threat of indictment and trial. This fact supports *Rumery's* claim that release-dismissal agreements are "inherently coercive," and as such should not be allowed. The inher-

108. See discussion *supra* notes 58-63 and accompanying text.

109. See *supra* notes 93-100 and accompanying text.

110. See *supra* notes 74-77 and accompanying text.

111. *Rumery*, 480 U.S. at 393.

ent coerciveness stems from the unequal positions of the prosecutor and the defendant, and this systematic inequality of bargaining power renders the agreement suspect.¹¹²

The *Rumery* plurality stated that the defendant's intimidation and unequal position *vis-a-vis* the prosecutor do not justify invalidating release-dismissal agreements because the inequality of position between prosecutor and defendant is regularly tolerated in plea bargains.¹¹³ The prosecutorial threat which produces a plea arrangement may seem similar to that which produces a release-dismissal agreement, but as Justice Stevens reminds us, there are important distinctions between the two situations.¹¹⁴ Plea bargains are public, judicially supervised, and involve an admission of guilt. Release-dismissal agreements are private and made outside of judicial scrutiny, and, perhaps most importantly, defendants who give up their civil rights claims to avoid prosecution are presumed to be innocent. Further, as Justice Stevens stated, the "mutuality of advantage" that supports plea bargaining is not present in release-dismissal agreements.¹¹⁵

Where in a plea bargain the terms of the bargain are related to the strength of each side's case, a release-dismissal agreement "exact[s] a price unrelated to the character of the defendant's own conduct."¹¹⁶ The nature and strength of the two claims are unrelated; a civil rights claim has no bearing on the defendant's guilt or innocence. Verita Boyd's dismissal of police brutality charges was in exchange for a dismissal of a disorderly conduct and resisting arrest charge.¹¹⁷ Miller Dixon was stopped for obscure traffic violations — failing to obey the instructions given by a police officer and stopping a vehicle in such a manner as to obstruct the orderly flow of traffic — which were only prosecuted as a vindictive response to his own civil complaint.¹¹⁸ These examples illustrate what Justice Stevens must have meant when he stated that the defendant who releases his civil claim in exchange for dismissal of a criminal

112. See PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS* 429 (1988).

113. *Rumery*, 480 U.S. at 393.

114. *Id.* at 409 (Stevens, J., dissenting).

115. *Id.*

116. *Id.* at 411.

117. See *supra* notes 9-11 and accompanying text.

118. *Dixon v. District of Columbia*, 394 F.2d 966, 966 n.1 (D.C. Cir. 1968).

charge is "forced to pay a price that is unrelated to the possible wrongdoing as reflected in that charge."¹¹⁹

The systematic inequality of the agreement supports an argument that the government's objective in obtaining the agreement is not legitimate. As Justice Stevens pointed out, the prosecutors' strongest interest in entering into these agreements exist when the defendant is both innocent and deprived of constitutional rights.¹²⁰ Unlike settling a criminal case with a plea bargain, the prosecutor is admitting the defendant's innocence by dropping the charges. The cases which present the prosecutor with the strongest incentives to make this agreement are those in which the defendant is most deserving of relief.¹²¹ Such a benefit, which the prosecutor receives from the defendant's willingness to forego a civil rights claim, is not one for which the prosecutor should legitimately be allowed to bargain. It is rather less than admirable to allow the superior position of the prosecutor to deprive an individual of vindication of constitutional claims. The release-dismissal agreement is invalid, then, both because of the inequality between the two parties and because the government is pursuing an interest that does not deserve merit.¹²²

B. *Existing Codes of Legal Ethics*

Admittedly, the American Bar Association does not explicitly disallow the release-dismissal agreement. There is precious little, short of the obvious, which the current standards governing the practice of law explicitly forbids. It seems, though,

119. *Rumery*, 480 U.S. at 411 (Stevens, J., dissenting).

120. See *supra* notes 86-87 and accompanying text.

121. This is especially true if the *Dixon* court was correct in its assertion that the these agreements encourage prosecutors to "trump up charges" in order to protect police from their own misconduct. Imagine, for example, a case where a person is arrested without probable cause, is innocent and is physically brutalized during the course of the arrest. That person would have a strong civil rights case; simultaneously, the prosecutor who is seeking to protect the police would have the strongest incentive to enter into a release-dismissal agreement. While such a situation presents the obvious conclusion that the prosecutor should simply drop the charges regardless of the defendant's possible suit against the police, it is possible that the prosecutor could threaten to prosecute and then use the agreement as a mechanism to protect the police and the municipality. This was the position advanced by the *Dixon* court. See also Kreimer, *supra* note 12, at 865, whose empirical study showed that "rather than constituting a means by which impartial prosecutors screen out frivolous civil rights actions, these situations appear to represent a method for municipal attorneys to routinely eliminate section 1983 claims against their clients." *Id.*

122. Low & JEFFRIES, *supra* note 112, at 430.

that anyone arguing for a per se rule against enforcement of release-dismissal agreements could and should present the argument that it is wrong, by ethical and professional standards, to be a party to such an agreement.

The ABA Model Code of Professional Responsibility¹²³ reminds us that lawyers are "guardians of the law" and bear the consequent obligation "to maintain the highest standards of professional conduct."¹²⁴ This proposed law of ethics purports to guide lawyers toward what is right and wrong, or at least toward what is acceptable and unacceptable, professional and unprofessional. In terms of this "guide," to act unprofessionally is tantamount to acting unethically, and to be deserving of official sanctions.¹²⁵

The Code, in its guidance function, sets forth "ethical considerations" for lawyers. It is there, if anywhere, where a lawyer will find standards of professionalism. These considerations are merely considerations; the Preamble to the Code refers to them as "aspirational in character" but certainly not mandatory.¹²⁶ The ABA did create Disciplinary Rules which are mandatory and which state the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."¹²⁷ Those very rudimentary rules do not shed much light on the problem at hand.

Within the current Model Code of Professional Responsibility, there is neither an Ethical Consideration nor a Disciplinary Rule which forbids a public prosecutor from entering into an agreement with a criminal defendant to dismiss charges in exchange for a civil release. Prosecutors will not find such an obligation within the current Model Rules of Professional Responsibility, either. However, we may deduce unethical or at least unprofessional conduct that should be forbidden by the

123. This article concentrates more on the ABA standards as outlined in the Code of Professional Responsibility than on the Model Rules of Professional Responsibility because the Model Rules fail, in large part, to address the issues presented herein. While the Code is now considered obsolete in many jurisdictions, as it has been superseded by the Model Rules, it is cited for its value as a traditional guide for professional responsibility.

124. MODEL CODE, *supra* note 96, pmbl.

125. *Id.*

126. *Id.*

127. *Id.*; see also AMERICAN BAR ASS'N, STANDARDS RELATING TO CRIMINAL JUSTICE Standard 3-1.1(e) (1982) [hereinafter CRIMINAL JUSTICE STANDARDS]: "As used in this chapter, the term 'unprofessional conduct' denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility in each jurisdiction."

Code and the Rules through analogies drawn and arguments based on the aspirations and minimum standards that we do have.

Because the Code itself is largely silent on the special duties of prosecutors, it may be assumed that they are to be held to the same ethical standards as other lawyers, with the state acting as the "client."¹²⁸ According to Canon 5, "a lawyer should exercise independent professional judgment on behalf of a client."¹²⁹ The Ethical Considerations within that Canon state that "the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."¹³⁰ Further, "the obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment."¹³¹ The Model Rules of Professional Conduct reiterate the mandate that lawyers should not limit their representation of clients by responsibilities to third parties.¹³²

As Justice Stevens stated in the *Rumery* dissent, a prosecutor is practically unable to serve the competing interests involved in the release-dismissal practice and still fulfill the duties required by these ethical mandates.¹³³ When the interest in protecting the police thwarts the interest of serving the people, as is often the case when a defendant accused of a violent crime is freed without investigation or trial, the prosecutor fails in her ethical obligation by facilitating, rather than disregarding, the desires of a third party. The Model Rules, which are the relevant authority in most jurisdictions, also forbid conflicts of interest which involve the prosecutor's serving the interests of a third party rather than the interests of the client.¹³⁴ Releasing a defendant in order to protect individual officers or a municipality, rather than pursuing a criminal case in service to the state, is the type of situation which both the Code and the Rules forbid.

The Code and the Model Rules state that "the responsibility of a public prosecutor differs from that of the usual advo-

128. *But see* MODEL CODE, *supra* note 96, Canon 7, and text accompanying note 98.

129. *Id.* Canon 5.

130. *Id.* EC 5-1.

131. *Id.* EC 5-21.

132. MODEL RULES, *supra* note 96, Rule 1.7.

133. *Town of Newton v. Rumery*, 480 U.S. 386, 415 (Stevens, J., dissenting).

134. MODEL RULES, *supra* note 96, Rule 1.7(b).

cate; his duty is to seek justice, not merely to convict."¹³⁵ This "special duty" springs from the fact that the prosecutor represents the sovereign and it includes the employment of "restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute."¹³⁶ The prosecutor bears the duty to see justice done; that duty includes attempting to convict suspected criminals or, in the alternative, to dismiss unjust charges. It is not the proper duty of the prosecutor, however, to protect the police from their own misconduct,¹³⁷ nor is it the prosecutor's proper duty to spare witnesses like Mary Deary from the discomfort of testifying. It is quite likely that engaging in behavior which tends to those ends will only compromise the prosecutor's original duty of law enforcement.

The ABA has also promulgated Standards Relating to the Administration of Criminal Justice,¹³⁸ and it is there that we would expect to find an explicit rejection of the practice of release-dismissal agreements. While that is not the case, we again see that the proper function of the prosecutor is to seek justice, not merely to convict.¹³⁹ These standards further resemble the Code as tailored to public service, rather than private service, in their mandate of avoiding conflict of interest with respect to official duties.¹⁴⁰ These standards may not clearly and unequivocally answer our question, but they certainly support the conviction that, based at least on duty and conflict of interest principles, the prosecutor should not compromise her position by engaging in release-dismissal bargains.

Courts have begun to consider release-dismissal agreements in light of the ethical standards described above. For example, in 1989, the Court of Appeals of New York considered release-dismissal agreements in light of the Supreme

135. MODEL CODE, *supra* note 96, EC 7-13; MODEL RULES, *supra* note 96, Rule 3.8.

136. MODEL CODE, *supra* note 96, EC 7-13.

137. The Court stated in *Rumery*:

It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case.

Rumery, 480 U.S. at 414 n.17 (quoting *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir. 1970)).

138. CRIMINAL JUSTICE STANDARDS, *supra* note 127.

139. *Id.* Standard 3-1.1(c).

140. *Id.* Standard 3-1.2.

Court's ruling in *Rumery*. In *Cowles v. Brownell*,¹⁴¹ basing much of its reasoning on ethical considerations, the court held that "the integrity of the criminal justice system mandates that an agreement made in the circumstances presented not be enforced by the courts."¹⁴² The case arose when Cowles sued an arresting officer for malicious prosecution, false arrest, assault and battery. The officer moved for summary judgment, based on the ground that the plaintiff had previously released all claims against the officer. The court refused to dismiss the suit, finding that the prosecutor's conditional dismissal of the criminal charges upon the relinquishment of Cowles' civil claims was unrelated to the merits of the People's case, and, consequently, there remained unresolved factual allegations regarding Cowles' conduct. There were equally unresolved allegations against the District Attorney's office, which stood "accused of routinely demanding such waivers in order to protect a police officer whose misdeeds it knows."¹⁴³

As did the *Rumery* dissent, the majority in the New York case refused to enforce a specific release-dismissal agreement but did not promulgate a per se rule invalidating the agreements.¹⁴⁴ Although the result may not be exactly what critics of the agreements are seeking, the *Cowles* case is significant in that it examines the ethical considerations and professional responsibilities that the prosecutor compromised in that case.

The New York court, like Justice Stevens in *Rumery*, was extremely concerned with the conflicts of interest to which prosecutors expose themselves in release-dismissal situations.¹⁴⁵ According to the court, protecting the police from civil liability is not the duty of the prosecutor. Rather, prosecutors bear the obligation to represent the People, and to fulfill that obligation, they must exercise independent judgment in deciding whether or not to prosecute.¹⁴⁶ The court found that this obligation to the people "cannot be fulfilled when the prosecutor undertakes also to represent a police officer for reasons divorced from any criminal justice concern. To enforce a release-dismissal agreement under these circumstances is simply to encourage violation of the prosecutor's obligation."¹⁴⁷

141. 538 N.E.2d 325 (N.Y. 1989).

142. *Id.* at 327.

143. *Id.* at 326.

144. *Id.* at 327.

145. *Id.*

146. *Id.*

147. *Id.*

The New York court also considered the prosecutor's ethical obligation to avoid even the appearance of professional impropriety.¹⁴⁸ That obligation includes the fact that "a lawyer should promote public confidence in our system and in the legal profession."¹⁴⁹ This duty springs from the fact that on occasion the conduct of a lawyer may appear to the lay person to be unethical. The New York court decided not to enforce the release-dismissal agreement in this case because it was concerned about both the conflict of interest inherent in the situation and the appearance of impropriety that would stem from publicly allowing such a bargain.¹⁵⁰

The principal concern in these cases, and an argument relied upon by the *Rumery* plurality, is whether or not the agreements advance public interest. In no way is that interest furthered by the agreement exemplified in the *Cowles* case.¹⁵¹ Instead of furthering any public benefit, these agreements eliminate both the public's ability to seek justice against a possible criminal wrongdoer and the public's right to assess the possible constitutional violation of one of its officials. In terms of ethical obligations, if the criminal behavior truly occurred, and could have been proven beyond a reasonable doubt, the prosecutor owed a duty to the state to pursue prosecution. Conversely, if the charges were false, or the case unprovable, the prosecutor was ethically obligated to dismiss the charges at no price to the defendant. In either situation requiring a release of civil rights for the dismissal is unethical.¹⁵²

148. *Id.* (citing MODEL CODE, *supra* note 96, Canon 9); see also MODEL RULES, *supra* note 96, Rule 3.1 (regarding Meritorious Claims and Contentions) & Rule 3.8 (regarding the Special Duties of Prosecutors).

149. MODEL CODE, *supra* note 96, Canon 9.

150. "The record in this case demonstrates that the practice of requiring the release of civil claims in exchange for dismissal of charges simply to insulate a municipality or its employees from liability can engender at least an appearance of impropriety or conflict of interest." *Cowles*, 538 N.E.2d at 326-27.

151. "Insofar as the integrity of the criminal justice system was concerned — the paramount interest here — on this record there was no benefit, only a loss." *Id.* at 327.

152. The *Cowles* court stated that:

Assuming plaintiff to have been guilty of the criminal charges leveled against him (as the prosecutor maintains), the People's interest in seeing a wrongdoer punished has not been vindicated. Assuming him to have been innocent (as he maintains), or the case against him to have been unprovable, the prosecutor was under an ethical obligation to drop the charges without exacting any price for doing so.

Id.

As well as requiring unethical conduct on the part of the prosecutor, these agreements leave unanswered questions about officers' conduct. That fact further supports the conclusion that the minimal public interest served by these agreements do not overcome the dangers they pose. Rather, as the New York court held, "the agreement may be viewed as undermining the legitimate interests of the criminal justice system solely to protect against the possibility of civil liability."¹⁵³

C. *The Purposes of § 1983*

The *Rumery* plurality cited three "relevant public interests" supporting their holding: avoidance of the expense and inconvenience of litigation, judicial deference to prosecutorial discretion, and protection of the victim of the crime.¹⁵⁴ The holding reached by the *Rumery* plurality suggests that these interests are so important to society that they outweigh the interests promoted by § 1983.¹⁵⁵ As Justice Stevens reminded us though, we should be disconcerted by the fact that the benefits, goals and purposes of § 1983 may so easily be circumvented by an agreement. One need only examine the goals of the statute to conclude that Congress must not have intended such a result.

An award of damages against a public official for the misuse of government power promotes two obvious objectives: compensation to victims and deterrence from further misconduct. The Supreme Court has identified compensation of the victims of official misconduct as "the basic purpose of a § 1983 damages award."¹⁵⁶ This "basic purpose" is obviously defeated by the release-dismissal agreement. While a dismissed arrestee may now avoid the threat of prosecution, that person still carries the injuries of the official misconduct and, if the injuries are physical, the medical costs related to the incident.

The second objective of a § 1983 damages award, deterrence of future misconduct, is achieved when "[a]n award of damages against one official conveys to others a threat of similar treatment if they too misbehave."¹⁵⁷ This purpose is similarly defeated by releasing the officer without a public recognition of the injury inflicted. The wholly private nature of

153. *Id.*

154. See *supra* notes 58-65, 101-02 and accompanying text.

155. See *supra* notes 104-106 and accompanying text.

156. *Carey v. Phipps*, 435 U.S. 247, 254 (1978).

157. *Low & Jeffries*, *supra* note 112, at 42.

these agreements — unlike plea bargains or civil settlements, they are not judicially supervised not publicly recorded — not only evades the deterrence purpose of § 1983 but actually undermines it by possibly encouraging officials to misbehave.¹⁵⁸ However, such a suspicion that police will actually take advantage of these agreements' existence in order to intentionally brutalize arrestees is not necessary to prove the point that the agreements undermine the deterrent aspect of § 1983. The statute was intended to discourage misconduct. By rendering it impotent by denying its use, the effect of these agreements is to encourage disregard or indifference to an arrestee's constitutional rights.

Additionally, perhaps the most important goal furthered by § 1983 litigation is that § 1983 damage awards "are one way of affirming legal rights and thus of educating the moral sentiments of the community."¹⁵⁹ The damage awards themselves are often nominal. Indeed, in many cases the bankruptcy of municipalities renders them judgment-proof, and individual police officers generally have no "deep pockets." As a result, money is not the motivation to pursue a § 1983 claim. Rather, the importance of litigating claims under the statute is to publicly air official misconduct, which publicity may help to further the goals of compensation and deterrence of future wrongs. The "cover-up" nature of the release-dismissal agreement is perhaps its most invidious characteristic. It is probable that most members of the public would prefer to have criminals prosecuted, if there is probable cause of their guilt enough to indict them, rather than be released for a reason unrelated to their arrest. Presumably, most people probably do not wish their public officials to engage in constitutional violations and then be protected from suit by local prosecutors.

158. See *supra* notes 44, 59, 120-121, and accompanying text. It has been theorized that prosecutors may consciously use the agreements to protect police from their misconduct, but it may be unnecessarily cynical to assume that police will purposely engage in unconstitutional practices if these agreements continue to exist. While some officers may rationally choose to violate individuals' rights, it seems that most cases of misbehavior arise out of anger or ignorance. Although the release-dismissal option may not send a specific signal to officers that their misconduct is acceptable, the elimination of § 1983 claims may eventually lead to the same result. So while the continued existence of these agreements may not affirmatively encourage misbehavior, the lack of punishment for these incidents implies that civil rights are not worth respect because no one is ever punished for violating them.

159. Low & JEFFRIES, *supra* note 112, at 42.

D. *The Application of § 1983*

The *Rumery* plurality and concurrence relied heavily on concerns for judicial economy to support their approval of the release-dismissal agreement in that case. Justices Powell and O'Connor each cited a concern to avoid "frivolous" and unfairly burdensome lawsuits against municipalities and officers as a compelling rationale to allow individuals to bargain away civil rights claims.¹⁶⁰ An examination of the technical aspects surrounding § 1983 litigation demonstrates, however, that that very concern has been provided for by judicial interpretation of the statute which has greatly narrowed its application. Specifically, the qualified immunities granted to individual officers make it difficult for a plaintiff to pursue an action, and the situations in which a municipality will ever be found liable are very limited. In short, it is extremely difficult for a plaintiff to get past a motion to dismiss, even if that plaintiff has a case which seems meritorious. A study of official immunity and municipal liability in relation to § 1983 cases will show that Justices Powell and O'Connor's concerns about frivolous lawsuits are unfounded, and that for a prosecutor to enter into a release-dismissal agreement to support that rationale is both unnecessary and immoral.

1. Official Immunity

The common law traditionally recognizes the necessity of permitting government officials to perform their official functions free from the threat of suits for personal liability.¹⁶¹ This official executive immunity stems from two interdependent rationales: first, "the injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and, second, "the danger that the threat of such liability would deter [that officer's] willingness to execute his office with the decisiveness and the judgment required by the public good."¹⁶² Police officers, accordingly, enjoy "qualified immunity" from liability from damages under § 1983.¹⁶³

It is presumed that a police officer who commits a constitutional deprivation is immune from suit. The rule is that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their con-

160. See *supra* notes 60, 71 and accompanying text.

161. *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974).

162. *Id.* at 240.

163. *Id.*

duct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁶⁴ This qualified immunity is defeated, then, when the officer who committed the deprivation knew or reasonably should have known that he was violating some clearly established constitutional standard.¹⁶⁵ The significance of the existence of this objective rule of qualified immunity is that the first step in any § 1983 case will be to determine this threshold question, and until that question is resolved discovery will not be allowed.¹⁶⁶

The practical consequence of qualified immunity is that many § 1983 cases will not survive long enough to even reach the discovery stage of a lawsuit. The immunity defense is usually pleaded as the defendant-officer's first response to the complaint, in the form of a motion to dismiss. For example, the officer will plead that there was no clearly established constitutional or statutory rule which governed the particular situation, or that the state of the law on that particular situation was unclear. Further, if there was such a clearly established rule, officers may plead that they were reasonable in not knowing about it. Consequently, unless there was not such a rule of law about which an officer should have known, the court will dismiss the case at the initial stage.

The rule of qualified immunity has obvious implications in the release-dismissal debate. Thanks to the tough standard that § 1983 plaintiffs must surmount just to proceed beyond a motion to dismiss, Justices Powell and O'Connor need not be concerned about officers being overburdened with frivolous complaints. Unless the act the officer performed was clearly illegal, that officer is immune from suit.

2. Municipal Liability

Because individual officers may be immune from suit or be practically judgment proof, § 1983 plaintiffs may wish to sue the deeper pocket of the municipality, as was the case in *Rumery*. As a rule, a municipality may be held liable for the constitutional deprivations performed by its officers. The Supreme Court has held that “[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief.”¹⁶⁷ That liability is limited, however, in that

164. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

165. *Id.*

166. *Id.*

167. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

"the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."¹⁶⁸ The local government's liability may not be based only on injuries inflicted by its employees, though; municipalities may not be held liable merely under the doctrine of respondeat superior. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."¹⁶⁹

Unless a municipality employs a policy or custom of depriving individuals of their constitutional rights, it will not be liable for the wrongful acts of its officers. The implications of this rule of municipal liability appear in the example of the Rodney King beating incident of March, 1991, and the pending federal civil suit arising from that incident. Even though the physical evidence in that case lends strong sympathetic support for holding the Los Angeles Police Department liable for King's physical injuries, it seems that proving the municipality's liability will be the "major stumbling block" in the § 1983 damages action.¹⁷⁰ Because municipal liability cannot be established under a vicarious liability theory, King will be required to prove that the officers were acting according to an official policy or custom of the L.A. Police Department.¹⁷¹ As noted earlier, the individual officers are not the "deep pockets" that civil plaintiffs are seeking. One law professor noted that without municipal liability "you've won the battle but lost the war."¹⁷²

The law shows that a release-dismissal agreement will only be necessary, then, to protect a municipality who as a matter of policy employs unconstitutional practices. One is only left to wonder why, then, these prosecutors who are servants of the people, members of communities, and officers of the court want to support such practices by allowing them to continue.

168. *Id.*

169. *Id.*

170. Stephanie B. Goldberg, *Federal Lawsuits for Rodney King Raise New Issues*, A.B.A. J., July 1992, at 76.

171. A showing that the department was deliberately indifferent to the training and conduct of its officers may establish the "policy or custom" necessary to prove liability. See *Canton v. Harris*, 489 U.S. 378 (1989).

172. Goldberg, *supra* note 170 (quoting Peter L. Davis, Touro College, Jacob D. Fuchsberg Law Center, New York, N.Y.).

V. PROPOSED SOLUTION

The U.S. Supreme Court has held that the release-dismissal agreement may be enforced, if it is negotiated under the proper circumstances. While the Court gives permission to enter into these agreements, that judicial statement is no mandate for prosecutors to continue this practice, or for ethics associations to permit it.

As a largely self-governing profession, lawyers take pride in their ability to regulate themselves through such bodies as the ABA and state bar associations. The preamble to the Model Rules states that "the legal profession's relative autonomy carries with it special responsibilities of self-government."¹⁷³ Further, "the profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."¹⁷⁴ These statements would support any action states may take, through their own bar associations, to discourage the practice of entering into release-dismissal agreements.

In 1982, the Colorado Bar Association declared that "it is improper for a public prosecutor to require that a defendant, as a condition of charging or sentencing concessions, release governmental agencies or their agents from actual or potential civil claims which arise from the same transactions as the criminal episode."¹⁷⁵ The Colorado Bar based its opinion on the ABA's statement that "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."¹⁷⁶ If courts are currently unable to interpret the concepts that it is unprofessional to represent conflicting interests¹⁷⁷ and that the primary duty of a public prosecutor is not merely to convict, but to see that justice is done,¹⁷⁸ as expressions disallowing the practice of dismissing charges for the release of civil claims, then individual states should follow Colorado's example and expressly prohibit the use of these agreements.

173. MODEL RULES, *supra* note 96, pmbl.

174. *Id.*

175. Colorado Bar Ass'n., Ethics Opinion No. 62 (Nov. 20, 1982) (regarding duties of a public prosecutor), *reprinted in* 12 COLO. LAW. 455 (1983).

176. CRIMINAL JUSTICE STANDARDS, *supra* note 127, Standard 3-1.1(c); MODEL CODE, *supra* note 96, EC 7-13.

177. MODEL CODE, *supra* note 96, Canon 5.

178. *Id.* EC 7-13.

