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# 42 U.S.C. 1983--Buying Justice: The Role of Release-Dismissal Agreements in the Criminal Justice System

Brian L. Fielkow

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# 42 U.S.C. § 1983—BUYING JUSTICE: THE ROLE OF RELEASE-DISMISSAL AGREEMENTS IN THE CRIMINAL JUSTICE SYSTEM

**Town of Newton v. Rumery, 107 S. Ct. 1187 (1987)**

## I. INTRODUCTION

In *Town of Newton v. Rumery*,[1] a criminal defendant threatened to bring a civil suit pursuant to 42 U.S.C. § 1983[2] against the city in which he was arrested and the officers who arrested him.[3] The parties subsequently entered into a contract, known as a release-dismissal agreement, whereby the town agreed to drop all criminal charges if the defendant promised not to bring a civil action.[4] The United States Supreme Court held that a criminal defendant in certain cases may waive his right to a section 1983 remedy in exchange for the state's dismissal of the criminal charges.[5]

Most lower courts, including the United States Court of Appeals for the First Circuit in *Rumery*, have adopted a per se rule against release-dismissal agreements.[6] The Supreme Court concluded, to the contrary, that a defendant's choice to enter a release-dismissal agreement often reflects a rational conclusion that the cost of giving up his civil claim is significantly less than the burden of facing prosecution.[7] Because the Court recognized that such agreements benefit both parties, it held that they are not invalid per se as long as the criminal defendant enters into them voluntarily and

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1 107 S. Ct. 1187 (1987).

2 42 U.S.C. § 1983 (1985) states in pertinent 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.

*Id.*

3 Town of Newton v. Rumery, 107 S. Ct. at 1191.

4 *Id.*

5 *Id.* at 1192.

6 *See infra* note 138 and accompanying text.

7 Town of Newton v. Rumery, 107 S. Ct. at 1193.

there exists no evidence of prosecutorial misconduct.[8] Thus, the Court rejected the per se rule against release-dismissal agreements and, instead, instructed the lower courts to review the agreements on a case-by-case basis.[9] The dissent in *Rumery* identified a variety of drawbacks to the agreements but hesitated to support the per se rule against their enforcement.[10]

This Note analyzes the majority's decision, pointing out its strengths and weaknesses. Moreover, this Note argues that release-dismissal agreements should have remained forbidden per se. While such contracts undeniably benefit certain individuals, the ultimate harm that release-dismissal agreements cause outweighs any of the benefits they may produce. This Note examines both precedent and public policy and concludes that release-dismissal agreements serve no legitimate interest.

## II. FACTS

In 1983, a Rockingham County, New Hampshire grand jury indicted David Champy for the aggravated felonious assault of Mary Deary.[11] Respondent Bernard Rumery, a friend of Champy and an acquaintance of Deary, sought information about the charges.[12] He telephoned Deary, who was upset by the call.[13] On March 12, 1983 Deary told David Barrett, the Chief of Police for the Town of Newton, that Rumery was trying to force her to drop the charges against Champy.[14]

On May 11, Rumery again spoke with Deary.[15] Rumery claimed that Deary called him and that she initiated discussion of Champy's ordeal.[16] According to the police record, however, Deary told Chief Barrett that Rumery had threatened her.[17] Rumery allegedly told Deary that if she did not drop the charges, she would "end up like" two women who had recently been murdered in Lowell, Massachusetts.[18] Consequently, Chief Barrett arrested Rumery, charging him

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8 *Id.* at 1195.

9 *Id.* at 1192.

10 *Id.* at 1205 (Stevens, J., dissenting).

11 *Id.* at 1190.

12 *Id.*

13 *Id.* The record does not reveal unambiguously the date or substance of the conversation. *Id.*

14 *Id.*

15 *Id.*

16 *Id.* The substance of this conversation is also disputed. *Id.*

17 *Id.*

18 *Id.*

with tampering with a witness,[19] which is a Class B felony.[20]

Rumery retained criminal defense attorney Stephen Woods, who contacted Brian Graf, the Deputy County Attorney for Rockingham County.[21] Woods told Graf that he should drop the charges because Rumery would certainly win the criminal case and because Rumery intended to bring a civil action against the Town of Newton pursuant to 42 U.S.C. § 1983.[22]

The town's case against Rumery contained certain basic weaknesses. First, the town had no written statement by Deary, sworn or unsworn, that implicated Rumery in any criminal activity.[23] In fact, Deputy County Attorney Graf knew that Deary was unwilling to testify against Rumery.[24] Second, the report on which Chief Barrett based his decision to arrest Rumery was of questionable merit.[25] Specifically, Barrett based his report, in part, on his conversation with Deary's daughter and, in part, on his conversation with Deary when she was in a state of extreme emotional distress.[26] In fact, the dissent in *Rumery* pointed out that "[e]ven the arresting prosecutor who was in charge of the case was surprised to learn that Chief Barrett had arrested respondent on the basis of the information in the police report."[27] Thus, the police arrested Rumery with neither a written statement from Deary nor an adequate police report.

A few days before his hearing to determine probable cause, Rumery entered into a release-dismissal agreement with the prosecutor.[28] Under this agreement, the prosecutor dismissed the criminal charges against Rumery in exchange for Rumery's promise not to sue the Town of Newton, its officials, or Deary for any harm caused by his arrest.[29] All of the parties agreed that one factor in this decision was protecting Deary from the trauma she might suffer

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19 N.H. Rev. Stat. Ann. § 641:5, I(b) (1986) states in pertinent part:

A person is guilty of a Class B Felony if: Believing that an official proceeding . . . or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to . . .

(b) withhold any testimony, information, document or thing.

20 N.H. Rev. Stat. Ann. § 625:9 (III)(a)(2) states in pertinent part that,

Class B felonies are crimes so designated by statute within . . . this code and any crime defined outside this code for which the maximum penalty, exclusive of fine, is imprisonment in excess of one year but not in excess of 7 years.

21 Town of Newton v. Rumery, 107 S. Ct. at 1191.

22 For relevant text of this section, *supra* note 2.

23 Town of Newton v. Rumery, 107 S. Ct. at 1199 (Stevens, J., dissenting).

24 *Id.* at 1191.

25 *Id.* at 1199 (Stevens, J., dissenting).

26 *Id.* (Stevens, J., dissenting).

27 *Id.* (Stevens, J., dissenting).

28 *Id.* at 1191.

29 *Id.*

if she were forced to testify against Rumery.[30]

Although his attorney explained the consequences of the release-dismissal agreement to Rumery before he signed it, Rumery nevertheless filed an action against the Town of Newton under section 1983 in the Federal District Court for the District of New Hampshire in April 1984.[31] He claimed that the town and its officers violated his constitutional rights by falsely arresting him and by imprisoning and defaming him.[32] In turn, the defendants filed a motion to dismiss, using the release-dismissal agreement as an affirmative defense.[33] Rumery then argued that the release-dismissal agreement was unenforceable because it violated public policy.[34]

The district court rejected Rumery's contention, concluding that a "release of claims under section 1983 is valid . . . if it results from a decision that is 'voluntary, deliberate, and informed.' "[35] Moreover, the court recognized that Rumery was knowledgeable and experienced in the business world. His knowledge and experience provided him with the ability rationally to weigh the alternatives and conclude that the release-dismissal agreement was in his best interest.[36] The court, therefore, dismissed Rumery's suit.[37]

The United States Court of Appeals for the First Circuit reversed the holding of the lower court.[38] The court of appeals stated that "[a]lthough we recognize the latitude which prosecutors necessarily must have in determining whether to prosecute criminal charges, a criminal defendant's decision to assert a civil rights claim is not a factor which the prosecutor should consider."[39] Moreover, the court noted that the enforcement of release-dismissal agreements "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."[40] Based on this rationale, the court held that "a covenant not to sue public officials for alleged violations of constitutional rights, negotiated in exchange for a decision not to prosecute the claimant on

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30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* (quoting *petition for cert.* app. at B-6).

36 *Id.* (citing *petition for cert.* app. at B-4).

37 *Id.*

38 Rumery v. Town of Newton, 778 F.2d 66, 71 (1st Cir. 1985), *rev'd*, 107 S. Ct. 1187 (1987).

39 778 F.2d at 70.

40 *Id.* at 69.

criminal charges, is void as against public policy."[41] The court, therefore, adopted a per se rule against release-dismissal covenants which contain promises not to sue public officials for alleged violations of constitutional rights in exchange for dismissal of criminal charges.[42]

## III. THE SUPREME COURT DECISION

### A. THE MAJORITY OPINION

The United States Supreme Court reversed and remanded for dismissal the holding of the First Circuit. The majority, in an opinion written by Justice Powell,[43] adopted the district court's test of whether a release-dismissal agreement is enforceable. The Court concluded that a criminal defendant may bargain away his right to a civil remedy if his decision is voluntary, not adverse to relevant public interests, and not the result of prosecutorial misconduct.[44]

At the outset, the Court recognized that a contract is unenforceable if the interest in its enforcement is outweighed by any public policy harmed by enforcement.[45] The Court disagreed with the appeals court's conclusion, however, that public policy concerns outweigh any interest in the enforcement of the release-dismissal agreement at hand. The majority declared that "the court [of appeals] overstated the perceived problems and also failed to credit the significant public interests that such agreements can further."[46] Although the Court noted that in certain cases a release-dismissal agreement may infringe upon the rights of the criminal defendant, it held that the "mere possibility" of such harm does not justify a per se rule against such agreements.[47]

The Court went on to reject Rumery's contention that it is unfair to present a criminal defendant with a choice between facing criminal charges and waiving his right to sue under section 1983. The Court pointed out that criminal defendants are often required to make a number of difficult decisions which ultimately result in the waiver of constitutional rights.[48] For instance, the majority recog-

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41 *Id.* at 71.

42 *Id.*

43 Chief Justice Rehnquist, Justice White, Justice Scalia, and Justice O'Connor joined Justice Powell in concluding that the courts must evaluate release-dismissal agreements on a case-by-case basis, that a per se rule against release-dismissal agreements is improper, and that Rumery is bound by his agreement. 107 S. Ct. at 1194-95.

44 *Id.* at 1195.

45 *Id.* at 1192.

46 *Id.*

47 *Id.*

48 *Id.*

nized that plea bargaining does not violate the Constitution even though a guilty plea results in the waiving of significant constitutional rights.[49] The Court also cited *Corbitt v. New Jersey*,[50] in which a statute imposing higher sentences on defendants who went to trial than on those who entered guilty pleas was upheld, as further evidence of the difficult choices that defendants must make. Based on these examples, the majority saw "no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted."[51]

After upholding the general validity of release-dismissal agreements, the Court then discussed how such a contract benefited Rumery. The Court recognized that Rumery's decision to enter into the agreement reflected a highly rational conclusion that the obvious benefits of avoiding criminal prosecutions outweighed the "speculative benefits of prevailing in a civil action."[52] Furthermore, to illustrate the rational and voluntary character of Rumery's decision to enter into the release-dismissal covenant, the Court emphasized the fact that Rumery was a sophisticated businessman who was represented by an experienced criminal lawyer.[53]

A plurality of the Court[54] then focused on the court of appeals' contention that release-dismissal agreements "tempt prosecutors to 'trump up' charges in reaction to a defendant's civil rights claim."[55] The plurality recognized that this issue merited concern, but pointed out that "a *per se* rule of invalidity fails to credit other relevant public interests and improperly assumes prosecutorial misconduct."[56] One such public interest that the plurality recognized was

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[49] *Id.* at 1192 n.3. The majority recognized, however, that its analogy between plea bargains and release-dismissal agreements was imperfect.

> The former are subject to judicial oversight. Moreover, when the State enters a plea bargain with a criminal defendant, it receives immediate and tangible benefits. . . . The benefits the State may realize in particular cases from release-dismissal agreements may not be as tangible, but they are not insignificant.

[50] *Id.* at 1192. In Corbitt v. New Jersey, 439 U.S. 212, 218-19 (1978), the Court held that

> not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas.

[51] Town of Newton v. Rumery, 107 S. Ct. at 1192.

[52] *Id.* at 1193.

[53] *Id.*

[54] Justice O'Connor did not join in this part of the opinion. *See infra* notes 55-63 and accompanying text for a discussion of Justice O'Connor's opinion in *Rumery*.

[55] Town of Newton v. Rumery, 107 S. Ct. at 1193 (plurality opinion)(quoting Rumery v. Town of Newton, 778 F.2d at 70).

[56] *Id.* at 1193 (plurality opinion). The Court noted that disciplinary rules are already in effect against prosecutors who act improperly. *Id.* at 1193 n.4. Specifically, the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(A) (1980) provides that "[a]

the burden on the courts of frivolous section 1983 claims.[57] The plurality stated that "[m]any [section 1983 claims] are marginal and some are frivolous."[58] This belief led the plurality to announce that "[t]o the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims, they further this important public interest."[59]

The plurality then criticized the circuit court for assuming that prosecutors will trump up charges in response to a defendant's section 1983 claim by reiterating the principle that courts must defer to prosecutorial decisions about whom to prosecute.[60] Specifically, the plurality recognized the complex factors that enter into a prosecutor's decision, including the strength and importance of a case, tangibles and intangibles specific to the case and, finally, the best method of allocating the scarce resources of the criminal justice system.[61] Based on the policy of deference to prosecutorial decisions and the complex factors on which those decisions are based, the Court refused to assume that prosecutors act maliciously when a section 1983 claim arises.[62] Therefore, the Court refused to recognize a per se rule against release-dismissal agreements simply out of a fear of malicious motives.

Rather, guided by the belief that many release-dismissal agreements contain a net social benefit,[63] the Court chose to analyze the validity of release-dismissal agreements on a case-by-case basis. The Court upheld as valid release-dismissal contracts involving the waiver of the constitutional right to a civil remedy so long as they are voluntary, not adverse to public interests and not the result of prosecutorial misconduct.[64]

### B. JUSTICE O'CONNOR'S CONCURRING OPINION

Justice O'Connor agreed with the majority that Rumery's release-dismissal agreement should be enforced. She wrote separately

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lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

57 Town of Newton v. Rumery, 107 S. Ct at 1194 (plurality opinion).

58 *Id.* (plurality opinion).

59 *Id.* (plurality opinion).

60 *Id.* (plurality opinion). (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)) ". . .[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute . . . generally rests entirely in his discretion.").

61 *Id.* at 1194. (plurality opinion).

62 *Id.* (plurality opinion).

63 *Id.* at 1195 (plurality opinion). Justice O'Connor rejoined the plurality at this point.

64 *Id.*

to emphasize, however, that the party relying on the covenant as an affirmative defense to a section 1983 claim must establish that the civil plaintiff entered into it voluntarily and without prosecutorial misconduct.[65] Thus, Justice O'Connor declined to join the plurality in assuming that Rumery entered into the agreement voluntarily and that the prosecutor did not act maliciously. Instead, she would have reversed the holding of the First Circuit because the evidence established that Rumery acted voluntarily and that the prosecution did not act maliciously.[66]

Justice O'Connor agreed that a case-by-case analysis of release-dismissal agreements is proper.[67] Under the appropriate circumstances, she asserted that such agreements spare "the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution."[68] On the other hand, Justice O'Connor was also aware of the perils of release-dismissal agreements. She feared that the agreements may tempt prosecutors to bring groundless criminal charges in order to deter meritorious section 1983 suits.[69] Conversely, Justice O'Connor argued that the agreements may cause a prosecutor to drop a valid criminal case in order to foreclose a governmental body's exposure to civil liability.[70] She added that, on the whole, "[b]y introducing extraneous considerations [such as release-dismissal agreements] into the criminal process, the legitimacy of that process may be undermined."[71]

Justice O'Connor further stated that "[t]he central problem with the release-dismissal agreement is that public criminal justice interests are explicitly traded against the private financial interest of individuals involved in the arrest and prosecution."[72] She finally contended that the process of negotiating release-dismissal agreements should take place under judicial supervision in order to prevent allegations of prosecutorial misconduct.[73]

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65 *Id.* at 1195-96 (O'Connor, J., concurring).

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

67 *Id.* at 1196 (O'Connor, J., concurring).

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

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

70 *Id.* (O'Connor, J., concurring). *cf.* Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 610, 620 P.2d 628, 633, 170 Cal. Rptr. 42, 46 (1980) "On no occasion has a prosecutor—motivated by what he reasonably deemed to be in the interest of justice been held to have compounded a crime by promising to dismiss a charge in consideration of an accused's release of civil liabilities or stipulation of probable cause.").

71 Town of Newton v. Rumery, 107 S. Ct. at 1196 (O'Connor, J., concurring).

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

73 *Id.* (O'Connor, J., concurring). Justice O'Connor recognized that there is a high degree of judicial supervision in plea bargains. For instance, "[b]efore accepting a plea

Notwithstanding her criticism of release-dismissal agreements, Justice O'Connor maintained that an individual analysis of each case is the best method to determine the enforceability of the agreement.[74] She joined with the four plurality Justices in *Rumery*, noting that, because the charge against Rumery was a lesser felony, the covenant spared Deary further suffering and that Rumery made a voluntary and informed decision.[75]

Given her belief in the enforceability of Rumery's covenant, Justice O'Connor stated that she would have shifted the burden to the town only to prove that the agreement was voluntary and that there was no prosecutorial misconduct.[76] She criticized the plurality for presuming at the outset that the agreement was voluntary and that prosecutorial misconduct was absent.[77] Thus, although Justice O'Connor identified a number of areas where release-dismissal agreements could produce more harm than good, she still supported a case-by-case approach to determine their validity. For all practical purposes, then, Justice O'Connor only disagreed with the plurality as to whom should bear the burden of proving the agreement's validity. In the case at hand, her disagreement with the plurality effectively made no difference.

### C. THE DISSENTING OPINION

The dissenting opinion, authored by Justice Stevens and joined by Justice Brennan, Justice Marshall, and Justice Blackmun, stated that the majority failed to recognize the complexity underlying the decision to enforce the release-dismissal agreements. Although the dissent sharply criticized the majority, in the end, it also hesitated to adopt an absolute rule against all release-dismissal agreements.[78] Instead, the dissent went only so far as to advocate a strong presumption against the validity of release-dismissal agreements.[79]

The dissent also pointed out that an intelligent and informed but completely innocent person could be forced to choose between either a threatened indictment and trial or his right to a section 1983 remedy against governmental bodies and their officers.[80] This

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pursuant to a plea agreement, the court shall advise the parties whether it approves the agreement and will dispose of the case in accordance therewith." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.5(4) (1975).

74 Town of Newton v. Rumery, 107 S. Ct. at 1197 (O'Connor, J., concurring).

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

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

77 *Id.*

78 *Id.* at 1205 (Stevens, J., dissenting).

79 *Id.* (Stevens, J., dissenting).

80 *Id.* at 1198 (Stevens, J., dissenting).

point led the dissent to argue that it would be very difficult for a defendant to enter voluntarily into a release-dismissal agreement.[81] The dissenting justices illustrated their point by discussing the dilemma that Rumery faced when he decided to enter into a release-dismissal agreement.[82] Such a dilemma arose when Chief Barrett arrested Rumery even though Deary refused to produce a written statement implicating him.[83] Although Rumery's attorney knew that these facts weakened the prosecutor's case, he nevertheless advised Rumery to enter into the release-dismissal agreement because, even if Rumery were completely innocent, an acquittal would not be guaranteed.[84]

The dissenting justices thus viewed Rumery's decision as "voluntary, deliberate and informed."[85] In their view, Rumery rationally weighed the benefits and burdens of the agreement and concluded that it was in his best interest to sign.[86] The dissent pointed out that, although this decision met the majority's test, the test was an insufficient basis on which to enforce the agreement.[87] Taking the majority's test to the extreme, the dissent said: "There is nothing irrational about an agreement to bribe a police officer, to enter into a wagering arrangement . . . or to threaten to indict an innocent man in order to induce him to surrender something of value."[88] In short, the dissent maintained that it was improper to determine the enforceability of a release-dismissal agreement on the basis of the voluntariness of the criminal defendant's decision-making process.[89]

The dissent further argued that release-dismissal agreements fail to serve society's interest in punishing wrongdoers.[90] To prove this contention, the dissent compared and contrasted plea bargains and release-dismissal agreements. Justice Stevens argued that a plea bargain strikes "a delicate balance of individual and social ad-

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81 *Id.* at 1200 (Stevens, J., dissenting).

82 *Id.* (Stevens, J., dissenting).

83 *Id.* at 1199 (Stevens, J., dissenting).

84 *Id.* at 1200 (Stevens, J., dissenting). Attorney Woods testified " '[n]ow whereas Mr. Rumery had a great deal of confidence in the criminal justice system, I had less confidence, not so much in the criminal justice system but in the trial system; that I recognized that, you know, no lawyer is going to guarantee a result regardless of the guilt or innocence of their client.' " *Id.* at 1200 n.8 (Stevens, J., dissenting)(quoting Record at 56).

85 *Id.* at 1200 (Stevens, J., dissenting).

86 *Id.* (Stevens, J., dissenting).

87 *Id.* (Stevens, J., dissenting).

88 *Id.* (Stevens, J., dissenting).

89 *Id.* (Stevens, J., dissenting).

90 *Id.* at 1201 (Stevens, J., dissenting).

vantage"[91] because it represents a practical compromise between parties, taking into account the burdens of litigation, the probable outcome, and society's interest in imposing punishment on an admittedly guilty person.[92] The dissent asserted further that the advantages of plea bargaining covenants do not exist in release-dismissal agreements.[93] By entering into a release-dismissal agreement, the dissent admitted that the state is spared the burden of litigating both the criminal and civil suits.[94] The dissent pointed out, however, that the prosecution's willingness to drop the charge would indicate that the case might have been unworthy of pursuing in the first place.[95] For instance, in *Rumery*, the prosecution knew that Deary was unwilling to testify against Rumery. This factor could have created great difficulty for the prosecution when it tried to build its case. Hence, the dissent concluded that the release-dismissal agreement afforded the state the advantages of not having to litigate a potentially costly civil suit and of dropping a potentially weak criminal case.[96] This scenario, according to the dissenting justices, failed to strike the balance of individual and social advantage found in plea bargains.[97]

The dissent also pointed out that release-dismissal agreements fail to serve the legitimate social interest in the punishment of wrongdoers.[98] Unlike plea bargains, the dissent noted that the agreements simply resolve the question of section 1983 liability.[99] This point led the dissent to discuss the disproportionate exchange that occurs in the typical release-dismissal agreement. Justice Stevens stated that "a defendant who is required to give up [a section 1983] 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."[100]

The dissent then shifted its focus to the role of the prosecutor in release-dismissal agreements. Justice Stevens argued that, by allowing the prosecutor to take part in the agreement, the plurality wrongly permitted him to represent interests not related to his offi-

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91 *Id.* (Stevens, J., dissenting).
92 *Id.* (Stevens, J., dissenting)
93 *Id.* (Stevens, J., dissenting)
94 *Id.* (Stevens, J., dissenting).
95 *Id.* (Stevens, J., dissenting)
96 *Id.* (Stevens, J., dissenting).
97 *Id.* (Stevens, J., dissenting).
98 *Id.* (Stevens, J., dissenting).
99 *Id.* (Stevens, J., dissenting).
100 *Id.* at 1202 (Stevens, J., dissenting).

cial duties.[101] Specifically, the dissent identified three interests that the prosecutor in *Rumery* represented. First, Justice Stevens noted that the prosecutor represented the State of New Hampshire's interest in the enforcement of its criminal laws.[102] Second, the dissent asserted that the prosecutor represented the interests of the Town of Newton and its officers in connection with their possible section 1983 liability.[103] Finally, the dissent stated that the prosecutor claimed to represent the interests of Deary, a reluctant, emotionally distressed witness who the prosecutor sought to shield from further harm.[104]

The dissent argued that the prosecutor should have only represented the first of these three interests.[105] His primary duty was to represent the State of New Hampshire in its case against Rumery. Justice Stevens noted that the prosecutor and the state enjoy immunity to any section 1983 claim arising out of the prosecutor's decision to initiate criminal proceedings.[106] As a result, the dissent concluded that the release-dismissal agreement was completely unnecessary to protect the interest of the state.[107] Justice Stevens asserted that the prosecutor must have seen an advantage to the release-dismissal agreement in the way it would benefit either the Town of Newton or Deary.

The prosecutor's decision to protect the town was improper, according to the dissent. Justice Stevens argued that a severe conflict exists between this goal and Prosecutor Graf's duty to enforce the law. The dissent noted that "[t]he public is entitled to have the prosecutor's decision to go forward with a criminal case, or to dismiss it, made independently of his concerns about the potential damages liability of the police department."[108] Moreover, the dissent feared that the possibility that a criminal defendant will execute a release-dismissal agreement might encourage a prosecutor unnecessarily to bring or continue a prosecution that is not supported by probable cause.[109]

Similarly, the dissent maintained that it was improper for the prosecutor to consider Deary's interests in deciding whether to

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101 *Id.* (Stevens, J., dissenting).
102 *Id.* (Stevens, J., dissenting).
103 *Id.* (Stevens, J., dissenting).
104 *Id.* at 1203 (Stevens, J., dissenting).
105 *Id.* at 1202 (Stevens, J.,dissenting).
106 *Id.* (Stevens J., dissenting).
107 *Id.* at 1202 (Stevens, J., dissenting).
108 *Id.* (Stevens, J., dissenting).
109 *Id.* at 1203 (Stevens, J.,dissenting).

enter into the release-dismissal agreement.[110] The dissent maintained that an inherent conflict of interest exists between a prosecutor and a reluctant witness. In certain cases, a prosecutor must obtain crucial testimony "despite the desire of the witness to remain anonymous or to avoid a courtroom confrontation with an offender."[111] Therefore, "[i]t would plainly be unwise for the court [to enforce] a release-dismissal agreement . . . simply because it affords protection to a potential witness."[112] In sum, the dissenting justices believed that release-dismissal agreements should never be executed for the benefit of a witness.

Even though the dissent discussed no advantages to the release-dismissal agreement, it concluded that it was "hesitant to adopt an absolute rule invalidating all such agreements."[113] However, the dissent argued that it is unlikely that the administrative cost to the state of determining the validity of the agreements through litigation will be outweighed by any benefits that they will produce.[114] Justice Stevens further pointed out that the "very existence of [section 1983] identifies the important federal interests in providing a remedy for the violation of constitutional rights."[115] According to the dissent, this important federal interest almost always outweighs any interests the State has in enforcing release-dismissal agreements.[116] These contentions ultimately led the dissent to advocate a strong presumption against the enforcement of release-dismissal agreements.[117]

## IV. ANALYSIS

### A. APPARENT CONFLICT AMONG LOWER COURTS

At first glance, it appears that the lower courts were in conflict over the validity of pre-conviction release-dismissal agreements in which a criminal defendant bargains away his right to a civil remedy. A closer look reveals, however, that the lower courts overwhelmingly adopted a per se rule against pre-conviction release-dismissal agreements such as that at issue in *Rumery*.

The majority of the *Rumery* Court mistakenly cited two lower court decisions that apparently had applied the voluntariness test to

110 *Id.* at 1202 (Stevens, J., dissenting).
111 *Id.* (Stevens, J., dissenting).
112 *Id.* at 1204 (Stevens, J., dissenting).
113 *Id.* at 1205 (Stevens, J. dissenting).
114 *Id.* at 1205 n.22 (Stevens, J., dissenting).
115 *Id.* at 1205 (Stevens, J., dissenting).
116 *Id.* at 1205-1206 (Stevens, J., dissenting).
117 *Id.* at 1205 (Stevens, J., dissenting).

conclude that release-dismissal agreements are enforceable on a case-by-case basis.[118] The majority's reliance on these cases is inappropriate. In *Jones v. Taber*,[119] a convicted criminal was in jail awaiting sentencing.[120] The employees of the jail bound, gagged, stripped, and beat the convict.[121] Weeks later and without notice, officials of the county took the convict to a meeting with the county's deputy counsel.[122] The convict accepted $500 in exchange for a release of all claims that he might bring against the county or its officers.[123] The Court of Appeals for the Ninth Circuit remanded the lower court's approval of this agreement for a determination of whether the release was "voluntary, deliberate and informed."[124]

Although the *Rumery* majority cited *Jones* to bolster its conclusion that release-dismissal agreements should be upheld if they were executed voluntarily, the standard of review in *Jones* actually has no bearing on the facts of *Rumery*. The *Jones* case merely involved an offer of cash in exchange for the release of civil claims. Because this transaction is a basic tort settlement, the *Jones* court did not discuss whether voluntariness is necessary for the valid exchange of a criminal suit for a civil suit. Therefore, the *Rumery* majority's application of *Jones* was improper because *Jones* does not actually deal with pre-conviction release-dismissal agreements.

The majority also cited *Bushnell v. Rossetti*,[125] a case in which an attorney was convicted of disorderly conduct and resisting arrest. After the trial court found the attorney guilty, he agreed to dismiss his section 1983 claim against the municipality in exchange for its recommendation of probation.[126] The *Bushnell* court agreed with the decisions that upheld the per se abolition of pre-conviction release-dismissal agreements.[127] However, the court in *Bushnell* found "no comparable public policy concerns in relation to releases given in exchange for post-conviction sentencing recommendations."[128] As a result, the Court of Appeals for the Fourth Circuit affirmed the holding of the lower court because the convicted attorney entered into the agreement voluntarily after his conviction.[129] As is apparent

118 *Id.* at 1195 n.10.
119 648 F.2d 1201 (9th Cir. 1981).
120 *Id.* at 1202.
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 1203.
125 750 F.2d 298 (4th Cir. 1984).
126 *Id.* at 299.
127 *Id.* at 301.
128 *Id.*
129 *Id.* at 302.

from the facts, *Bushnell*, unlike *Rumery*, does not deal with a pre-conviction release-dismissal agreement.

The cases on which the Court of Appeals for the First Circuit in *Rumery* relied to declare a per se abolition of pre-conviction release-dismissal agreements were more applicable to the facts of *Rumery*. The seminal case, *Dixon v. District of Columbia*,[130] involved a "tacit agreement" whereby the appellant promised not to proceed with his section 1983 claim if the District did not prosecute his outstanding traffic violations.[131] When Dixon violated the covenant and pursued his civil claim, the prosecutor re-opened the criminal case.[132] The prosecutor implicitly admitted that re-opening the case in retaliation for Dixon's violation of the covenant was an abuse of his discretion.[133] Notwithstanding its finding of abuse of discretion in this case, the *Dixon* court denounced all release-dismissal agreements as "odious" and against the public interest.[134]

The Court of Appeals for the Ninth Circuit in *MacDonald v. Musick*[135] similarly upheld the per se abolition of release-dismissal agreements. The court announced that "[i]t is no part of the proper duty of the 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."[136] The First Circuit in *Rumery v. Town of Newton* found these cases on point and thus followed the weight of precedent.[137] A number of subsequent cases also have declared that pre-conviction release-dismissal agreements are void.[138] The weight of prece-

130 394 F.2d 966 (D.C. Cir. 1968).

131 *Id.* at 968.

132 *Id.*

133 *Id.*

134 *Id.* at 969.

135 MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970).

136 *Id.* at 375.

137 Rumery v. Town of Newton, 778 F.2d at 78.

138 *See* Boyd v. Adams, 513 F.2d 83, 88 (7th Cir. 1975)("We think that the release is void as against public policy."); Horne v. Pane, 514 F. Supp. 551, 552 (S.D.N.Y. 1981)("It seems to us beyond question that a criminal defendant forced to choose between being prosecuted on criminal charges on the one hand, and not being prosecuted but giving up certain constitutionally guaranteed civil rights on the other, cannot as a matter of law make an uncoerced choice."); Shepard v. Byrd, 581 F. Supp. 1374, 1386 (N.D. Ga. 1984)("The Court considers this practice as against public policy because . . . it forestalls civil actions designed both to compensate citizens for lawless governmental conduct and to deter such conduct."); Brothers v. Rosauer's Supermarkets, Inc., 545 F. Supp. 1041, 1042 (D. Mont. 1982)("But, at a minimum, any person bringing about an arrest is entitled to expect that the decision of the prosecutor will not be based upon considerations extraneous to the proper handling of the criminal case."); Williamsen v. Jernberg, 99 Ill. App. 2d 371, 375, 240 N.E.2d 758, 760 (1968)(Contracts not to prose-

dent prior to the Court's holding in *Rumery*, therefore, overwhelmingly favored the per se abolition of pre-conviction release-dismissal agreements.

### B. EVALUATION OF MAJORITY OPINION

#### *1. Assumption of Prosecutorial Misconduct*

The majority of the *Rumery* Court did not base its holding solely on common law precedent. Rather, the majority also believed that the case-by-case evaluation of release-dismissal agreements produces benefits for society.[139] The majority failed however to identify persuasively any of these benefits.

The only persuasive argument that the majority put forth was its criticism of the dissent for assuming that release-dismissal agreements tempt prosecutors to bring frivolous criminal suits as a means of eliminating section 1983 suits.[140] Indeed, no evidence exists to contradict the majority's declaration that "tradition and experience justify [the Court's] belief that the great majority of prosecutors will be faithful to their duty."[141] Although certain prosecutorial actions are obviously vindictive and are presumed vindictive,[142] release-dismissal agreements do not fall into this category. In fact, prosecutors in certain cases apparently enter the agreements with the defendant's best interest in mind.[143] Moreover, if a prosecutor acts im-

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cute in a private action void as a matter of law.); Gray v. City of Galesburg, 71 Mich. App. 161, 166, 247 N.W.2d 338, 341 (1976)("We find that this agreement is repugnant to public policy because contracts of such a nature may tend to deprive the public of their right to vigorous enforcement of penal statutes."); Kurlander v. Davis, 103 Misc. 2d 919, 926, 427 N.Y.S.2d 376, 381 (N.Y. App. Div. 1980)("To permit the prosecutor, an agent of the State, to confer a benefit on those who surrender their right to pursue the police for wrongs committed in the course of their official duties is to sanction a procedure which creates an imbalance in a system established to insure equal justice."); People v. Wilmont, 104 Misc. 2d 412, 414, 428 N.Y.S.2d 568, 570 (N.Y. App. Div. 1980)("This entire proceeding is an example of the use of the criminal process for other than the ends of pure criminal justice."). *But see* Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 613-14, 620 P.2d 628, 635, 170 Cal. Rptr. 42, 49 (1980)("We conclude that the time honored practice of discharging misdemeanants on condition of a release of civil liabilities or stipulation of probable cause for arrest, does not contravene public policy when the prosecutor acts in the interests of justice."); Food Fair Stores, Inc. v. Joy, 283 Md. 205, 216, 389 A.2d 874, 881 (1978)("To hold that a civil release executed . . . [by a first time offender] is unenforceable as a matter of public policy would be to place an unwarranted constraint upon the prosecutor, who might . . . wish to extend a compassionate hand to a first time offender.").

139 Town of Newton v. Rumery, 107 S. Ct. at 1194.

140 *Id.* at 1193.

141 *Id.* at 1194.

142 *Id.* at 1194 n.7.

143 *See, e.g.*, Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 606, 620 P.2d 628, 630, 170 Cal. Rptr. 42, 44 (1980), in which the prosecutor testified that the primary factor moti-

properly, rules already exist to remedy the misconduct.[144] It is, therefore, illogical to assume that release-dismissal agreements cause prosecutors to act improperly. However, a plethora of other reasons, as discussed below, exist which indicate that release-dismissal agreements are not in the public's interest.

### 2. *Elimination of Trivial Claims*

The plurality upheld release-dismissal agreements partly because they purportedly reduced section 1983 claims.[145] The majority pointed out that many constitutional tort claims are "frivolous" and "marginal."[146] Understandably, the federal courts resent having to allocate their scarce resources to hear claims of lost shoes, cigarettes, and toothpaste.[147] However, the "difficult issue is how to avoid trivializing the concepts of constitutional protection inherent in section 1983 without seriously impairing its utility as a method for protecting essential liberties."[148] The majority focused on such trivial claims while ignoring section 1983's legitimate function of providing a remedy to victims of public misconduct.

The *Rumery* Court failed to give adequate weight to the public's great interest in providing redress for official abuses of power and protecting essential constitutional liberties. In contrast to the majority's view, a Michigan court articulately stated:

> [I]f the officers' conduct was tortious, the public has no interest in denying their victims redress. If, on the other hand, the officers acted legally, they are afforded the full protection of the law and need not resort to the release for vindication.[149]

Moreover, the very existence of section 1983 means that the government sees a need to remedy constitutional torts.[150] A claim

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vating him to propose a release-dismissal agreement was the plaintiff's concern that a conviction could prohibit him from admission to the California bar. *See also* Bushnell v. Rossetti, 750 F.2d 298, 299 (4th Cir. 1984) in which counsel for the civil defendant pointed out to the prosecutor that a criminal conviction would pose professional problems for Bushnell. The prosecutor cooperated with the civil defendant and recommended probation.

144 *See supra* note 56.

145 Town of Newton v. Rumery, 107 S. Ct. at 1194 (plurality opinion).

146 *Id.*

147 Mead, *Evolution of the 'Species of Tort Liability' Created By 42 U.S.C. [section] 1983: Can Constitutional Tort be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 13 (1986).

148 *Id.*

149 Gray v. City of Galesburg, 71 Mich. App. 161, 164, 247 N.W. 2d 338, 340 (1976).

150 North American Cold Storage Co. v. County of Cook, 531 F. Supp. 1003, 1006 (N.D. Ill. 1982)("Plaintiffs in the instant case asserted a federal right to be fully compensated for injuries arising from a constitutional violation. . . . [W]hen a cause of action under [section] 1983 has been proved, there is a federal right to be fully compensated for the injury.").

arising under section 1983, like any other cause of action, will invite some meritorious and some frivolous claims. Certainly, no other cause of action is stifled simply because some claims are frivolous. Thus the Court should not have approved release-dismissal agreements merely because they allegedly reduce frivolous claims. This is especially true since the majority offered no proof that the agreements target only frivolous claims. In fact, it appears that release-dismissal agreements eliminate the most meritorious of all section 1983 claims.[151]

The handful of cases that deal with release-dismissal agreements are woven together by the common thread of meritorious civil rights allegations. The claimants have alleged, for instance, police misconduct,[152] racially motivated violence,[153] and even the abuse of a pregnant woman.[154] Indeed, the police arrested Bernard Rumery under questionable circumstances that might possibly have given his claim merit.[155] In these circumstances, the public's interest in providing redress is great. Yet, it is also in these cases that the benefits of a release-dismissal agreement become most apparent to the public officials. The people who most deserve redress may well be the first offered the opportunity to enter into the agreements. Thus, release-dismissal agreements may stifle the most meritorious claims, not the most frivolous claims.

### *3. Commingling Civil and Criminal Justice Systems*

The majority of the *Rumery* Court recognized that criminal defendants face a number of difficult choices as they proceed through the criminal justice system.[156] The Court recognized that plea-bargaining does not violate the Constitution, even though these agreements result in the waiver of important constitutional rights.[157] Following this premise to its logical end, the Court upheld release-dismissal agreements even though these agreements result in the waiver of important rights to a civil remedy.[158]

The Court's analogy of plea bargains to release-dismissal agreements is superficial. The analogy highlights the similarities between

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151 *See infra* notes 152-155 and accompanying text.

152 MacDonald v. Musick, 425 F.2d 373, 374 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); Dixon v. District of Columbia, 394 F.2d 966, 967 (D.C. Cir. 1968); Horne v. Pane, 514 F. Supp. 551, 552 (S.D.N.Y. 1981).

153 *Dixon*, 394 F.2d at 968 n.2; *Horne*, 514 F. Supp. at 552.

154 Boyd v. Adams, 513 F.2d 83, 85 (7th Cir. 1975).

155 *See, e.g.*, Town of Newton v. Rumery, 107 S. Ct. at 1199 (Stevens, J., dissenting).

156 *Id.* at 1192.

157 *Id.*

158 *Id.*

the agreements while it ignores the fundamental and crucial differences between them. The two types of agreements contain undeniable similarities. Plea bargains provide mutual advantages to the state and the defendant.[159] The state may speedily punish a defendant after he has admitted guilt.[160] The state also conserves its judicial resources for those cases which must go to trial.[161] The defendant benefits by avoiding the uncertainty of a criminal trial and by being treated with leniency.[162]

Like plea bargains, release-dismissal agreements contain mutual benefits for the parties. The state conserves its resources by avoiding both criminal and civil suits. The defendant benefits by trading his arguably speculative civil suit for the certain benefits of having the criminal suit dropped. Thus, on an individual level, release-dismissal agreements can benefit both parties. Yet, the overall harm that the agreements cause greatly outweighs any benefits they produce. This harm stems from the fact that release-dismissal agreements improperly mesh the civil and criminal justice systems. Plea bargains, in contrast, do not exceed the bounds of the criminal justice system. The significance of this contrast cannot be overstated. One court has pointed out the basic impropriety of mixing the civil and criminal justice systems, opining that "if the criminal process is to regain its rightful place . . ., courts must resist the use of the criminal process as a civil court . . ., family court, [and] expeditious collection agency."[163]

The principles of contract law also help explain why it is improper to jumble the criminal and civil justice systems. In release-dismissal agreements, the consideration for the dismissal of criminal charges is the value of the defendant's civil suit. Regardless of whether the suit is worth fifty cents or fifty thousand dollars, the

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159 Brady v. United States, 397 U.S. 742, 752 (1970).

160 *Id.*

161 *Id.*

162 *Id.* As a matter of practical policy, American courts accept the concept of plea bargaining. However, the practice of exchanging guilty pleas for lenient sentences is subject to powerful criticism. One judge has noted that plea bargaining "places in the hands of a prosecutor—essentially an administrative officer—the opportunity to usurp the legislative process." Foley, *Plea Bargaining Is: No Bargain!*, 64 MICH. B.J. 505 (June 1985). Moreover, Judge Foley has argued that plea bargains are inherently coercive. "To conclude that a plea of guilty . . . to a lesser offense where it is claimed that the plea is freely, understandingly and voluntarily given . . . is sheer hyprocrisy." *Id.* at 506.

Another author has argued that the government has an unfair advantage in the process. "In spite of the noble language of the Constitution, the government has literally all of the advantages in the criminal trial process." Fierer, *Plea Bargaining in the American Courts: The Lady Is a Tiger*, 19 TRIAL 52, 57 (Oct. 1983).

163 People v. Wilmont, 104 Misc. 2d 412, 414, 428 N.Y.S.2d 568, 570 (N.Y. App. Div. 1980).

contract is tantamount to a sanctioning of the exchange of money for the dismissal of a criminal suit. Because of this result, an Illinois court has held that "[w]here any part of the consideration for a contractual obligation executed to compromise civil injuries resulting from a criminal act is a promise that the prosecution for the criminal act shall be suppressed, the contract is unenforceable."[164] Thus, the *Rumery* Court should have looked beyond any individual benefits that release-dismissal agreements confer to determine whether the transactions serve society's best interests.

Based on society's interest in enforcing only fair contracts, the Court should have kept release-dismissal agreements presumptively invalid. As stated, the consideration in these agreements violates public policy. The dissent in *Rumery* recognized that, if one follows the majority's argument to its logical conclusion, it becomes clear that any form of consideration, from the value of a section 1983 claim to a cash payment, should be permitted.[165] The end, after all, is the same: the defendant does not face criminal charges; the municipality or official does not face the section 1983 claim; but, society's interest in properly resolving both the criminal and civil claims is ignored.

Commingling the civil and criminal justice systems is improper because it permits prosecutors, even ones acting in good faith, to consider factors outside of the criminal justice system in deciding whether to prosecute. Prosecutors should not have the ability to base their decisions on the existence of section 1983 claims. A criminal case must stand on its own merits,[166] as extraneous factors could interfere with the proper adjudication of the case.[167] Moreover, "it is not the function of the prosecutor to decide whether a potential civil suit has merit. He is neither judge nor jury; he hears no evidence; his decision is not subject to judicial review."[168]

The *Rumery* dissent's contention that release-dismissal agreements wrongly permit the prosecutor to represent interests not germane to his official duties is persuasive. The prosecutor must represent only the state in the "evenhanded and effective enforce-

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164 Williamsen v. Jernberg, 91 Ill. App. 2d 371, 375, 240 N.E.2d 758, 760 (1968).

165 Town of Newton v. Rumery, 107 S. Ct. at 1200 (Stevens, J., dissenting).

166 MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968).

167 Town of Newton v. Rumery, 107 S. Ct. at 1196 (O'Connor, J., concurring)("By introducing extraneous considerations into the criminal process, the legitimacy of that process may be compromised.").

168 Hoines v. Barney's Club Inc., 28 Cal. 3d 603, 618, 620 P.2d 628, 638, 170 Cal. Rptr. 42, 52 (1980)(Tobriner, J., dissenting).

ment of its criminal laws."[169] In carrying out his duties, the prosecutor may legitimately decide to abandon a charge because he lacks a good faith belief that the state has sufficient evidence to convict, that the case has a low deterrence value, or that the case has little importance to the prosecutor.[170]

However, the existence of a civil suit is not a proper reason to proceed with a case.[171] If the prosecutor considers the civil suit, he must take into account the potential liability of public entities and officials in deciding whether to move toward trial. The results of this inquiry could easily obscure the prosecutor's overriding duty to represent the state's interest in enforcing its criminal laws.[172] For instance, it is not difficult to imagine a case involving a serious criminal offense and a related abuse of the defendant's constitutional rights. Surely, no one would be comfortable if the state allowed the accused criminal to avoid prosecution simply because a public official acted tortiously. On the other hand, the state has an important interest in providing a remedy for the victims of public misconduct. The remedy is monetary and should not be confused with the criminal suit. In sum, the criminal and civil suit each demand individual attention, and it serves no proper interest to mix them together.

In her concurrence, Justice O'Connor suggested that release-dismissal agreements would be more palatable if they were executed under judicial supervision.[173] She apparently believed that this protection would address the argument that release-dismissal agreements give the prosecutor unreasonably broad authority.[174] In reality, judicial oversight would not bolster the credibility of release-dismissal agreements. Even if the prosecutor's discretion were limited, pre-conviction release-dismissal agreements should still be presumptively invalid. As one court pointed out:

> The situation is made no better by the fact that here the record indicates that it was the court that asked [the defendant] whether he would stipulate [to the release-dismissal agreement]. Rather, it makes it worse. It brings the court to the aid of the prosecutor in coercing the defendant into agreeing to what amounts to a forfeiture of his civil

169 Town of Newton v. Rumery, 107 S. Ct. at 1202 (Stevens, J., dissenting). *See also* Berger v. United States, 295 U.S. 78, 88 (1934)("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

170 Wayte v. United States, 470 U.S. 598, 607 (1985).

171 Town of Newton v. Rumery, 107 S. Ct. at 1202 (Stevens, J., dissenting).

172 *Id.* (Stevens, J., dissenting).

173 *Id.* at 1197 (O'Connor, J., concurring).

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

rights.[175]

Release-dismissal agreements are plagued with so many problems that no amount of judicial supervision could make them tolerable in this country's legal system.

### C. PUBLIC POLICY ISSUES

#### *1. Suppression of Allegations of Misconduct*

"A promise or other term of an agreement is unenforceable on the grounds of public policy . . . if the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[176] The many public policy disadvantages of release-dismissal agreements outweigh any interest in their enforcement.

Pre-conviction release-dismissal agreements violate public policy because they suppress evidence of the misconduct of public officials. As Circuit Judge Bazelon in *Dixon v. District of Columbia* stated, "these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society."[177] Moreover, the court in *Bushnell v. Rossetti* distinguished pre-conviction and post-conviction release-dismissal agreements on the ground that the former never provide the civil complainant a hearing on the issue of the civil wrong.[178] While it is true in a post-conviction setting that "a further civil inquiry into police misconduct is avoided, that inquiry would simply be duplicative in a civil forum of one already publicly made in the criminal forum."[179] It is precisely for this reason that the *Bushnell* court upheld only those "release agreements negotiated after determination of guilt, but before sentencing."[180]

Although the *Bushnell* court failed to recognize that post-conviction agreements have invidious features similar to those of pre-conviction agreements, it did recognize the important public interest in exposing and remedying violations of constitutional rights by public officials. If society is to eliminate public abuses of power, it must encourage victims to step forward and expose the abuses. Release-dismissal agreements hinder this significant social goal.

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175 *MacDonald*, 425 F.d at 375. *See also Dixon*, 394 F.2d at 969.

176 RESTATEMENT (SECOND) OF CONTRACTS, § 178(1) (1981). The majority of the *Rumery* court also recognized this. Town of Newton v. Rumery, 107 S. Ct. at 1192.

177 *Dixon*, 394 F.2d at 69.

178 *Bushnell v. Rossetti*, 750 F.2d 298, 301 (4th Cir. 1984).

179 *Id.* at 301.

180 *Id.*

### 2. *The Coercive Nauture of Release-Dismissal Agreements*

Release-dismissal agreements also violate public policy because they are inherently coercive. A contract is not enforceable if the defendant can show that he was unfairly coerced into signing it.[181] The general rule is that unfair coercion or duress consists of "any wrongful act or threat which overcomes the free will of a party."[182] One such wrongful act is the threat of imprisonment.[183]

In *Hoines v. Barney's Club, Inc.*,[184] Judge Tobriner recognized that the threat of imprisonment coerces defendants, leaving them with little choice but to enter into a release-dismissal agreement. He argued that,"[t]he threat to maintain a criminal prosecution is . . . necessarily coercive. An innocent defendant may well prefer to surrender his right to redress . . . rather than undergo the risk, expense, and inconvenience of a criminal trial."[185] Thus, for all practical purposes, release-dismissal agreements force defendants into dropping legitimate civil claims and, therefore, unjustly shield public officials from tort liability.

Since release-dismissal agreements are inherently coercive, it is impossible to enter into them voluntarily. The dissent in *Rumery* recognized that a rational person may understand the benefits of the agreement and "voluntarily" enter into it but that the the threat of prosecution makes the word "voluntary" meaningless.[186] Furthermore, the Court of Appeals for the First Circuit recently applied the *Rumery* test and correctly continued to recognize that release-dismissal agreements are coercive.[187] In *Hall v. Ochs*, the court noted that "[n]ot surprisingly, after three refusals [to enter into release-dismissal agreements] and well over an hour in jail, [the defendant's] resolve buckled. No waiver executed under such circumstances can be

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181 J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 262 (2d ed. 1977).

182 *Id.*

183 *Id.* at 264. Justice Cardozo commented on this issue in the context of private threats to prosecute. He stated: "There is to be no traffic in the privilege of invoking the public justice of the state. One may press a charge or withhold it as one will. One may not make action or inaction dependent on a price." Union Exch. Nat'l Bank v. Joseph, 231 N.Y. 250, 253, 131 N.E. 905, 906 (1921)(citing Jones v. Merionethshire Building Society, 1 Ch. 173, 183 (1892)). *But see* Harrell v. Allen, 439 F.2d 1005, 1007 (5th Cir. 1971)("[I]t is clear that under Georgia law a threat to have an individual arrested is not sufficient duress as will be held to restrain the free will and consent of a party to a contract and thereby make it void.").

184 Hoines v. Barney's Club Inc., 28 Cal. 3d 603, 616, 620 P.2d 628, 637, 170 Cal. Rptr. 42, 51 (1980)(Tobriner, J., dissenting).

185 *Id.* at 616-17, 620 P.2d at 637, 170 Cal. Rptr. at 51 (Tobriner, J., dissenting).

186 Town of Newton v. Rumery, 107 S. Ct. at 1202 (Stevens, J., dissenting).

187 Hall v. Ochs, 817 F.2d 920, 924 (1st Cir. 1987).

called voluntary."[188] Thus, the *Hall* court found that only an hour in jail prevented the defendant from voluntarily entering into the agreement. The *Hall* holding further demonstrates that imprisonment or the threat of imprisonment precludes a criminal defendant from entering into a release-dismissal agreement voluntarily. It is, therefore, clear that the *Rumery* majority's use of the word "voluntary" in this context has no meaning because the defendant really has little choice about whether or not to abandon his civil suit. When the *Rumery* majority used the word "voluntary," it really meant that the defendant simply rationally weighs the advantages of the agreement against its burden; it did not mean that the defendant would enter the agreement even if he were not improperly threatened with imprisonment. Thus, the Court considered an agreement voluntary even when the defendant, for all practical purposes, was acting under duress.

### *3. Increased Burden on the Judicial System*

The majority of the *Rumery* Court upheld release-dismissal agreements as a means of efficiently allocating the scarce resources of the judicial system.[189] Ironically, the Court may have paved the way for an increased burden on the judicial system. Prior to the *Rumery* decision, the majority of courts held release-dismissal agreements invalid per se.[190] The courts have dealt with these agreements infrequently.[191] With the case-by-case approach announced in *Rumery*, however, the courts must now microscopically analyze the merits of each agreement. "This [new approach will] require an extensive investigation into whether the release was indeed made free of coercion."[192]

Those courts which have considered the question have concluded that the issue of coercion is a question of fact to be left up to the jury. For instance, in *Hoines v. Barney's Club, Inc.*,[193] the defendant's private security guard arrested Hoines for disturbing the peace. The parties entered into a release-dismissal agreement.[194] When the plaintiff violated the agreement and brought a section 1983 civil action, the defendant used the agreement as an affirma-

188 *Id.*

189 Town of Newton v. Rumery, 107 S. Ct. at 1194.

190 *See supra* note 138.

191 This is evidenced by the small amount of cases and scholarly literature dealing with release-dismissal agreements.

192 Rumery v. Town of Newton, 778 F.2d at 70.

193 Hoines v. Barney's Club Inc., 28 Cal. 3d 603, 605, 620 P.2d 628, 629, 170 Cal. Rptr. 42, 43 (1980).

194 *Id.* at 28 Cal. 3d at 606, 620 P.2d at 630, 170 Cal. Rptr. at 44.

tive defense.[195] The trial court instructed the jury to determine whether the release-dismissal agreement was valid.[196] The court in *Jones v. Taber* also recognized that "there is a triable issue of fact as to the validity of the release."[197]

These cases suggest that the civil claimants who enter into release-dismissal agreements will have the right to jury trials to determine whether the parties entered into the agreement free of coercion. Thus, as the Court of Appeals for the First Circuit in *Rumery* recognized, courts will have to expend an increasing amount of their scarce resources to find the extremely rare release-dismissal agreement which might merit enforcement.[198] In light of the numerous drawbacks to release-dismissal agreements, the case-by-case evaluation of the agreements will be very costly and will produce so few agreements that are found to be valid that the exceptions "cannot easily be shown important enough to outweigh [their] administrative burdens."[199] The interest in judicial efficiency is best served by prohibiting the contracts per se.

## V. CONCLUSION

The majority of the *Rumery* Court wrongly upheld the validity of release-dismissal agreements. Furthermore, the dissent in *Rumery* failed to go far enough in its criticism of pre-conviction release dismissal agreements. Release-dismissal agreements ignore the interests of public policy, violate the criminal defendant's constitutional rights, and impose an unwarranted burden on the judicial system. In *Rumery v. Town of Newton*, the First Circuit recognized the harm caused by the agreements and wisely adopted a per se abolition of all pre-conviction release-dismissal agreements.

In light of *Rumery*, more states will probably use release-dismissal agreements. Criminal defendants will have ample opportunity to trade their section 1983 claims for freedom from prosecution. As a result, the public will see the state ignore its interests both in punishing criminals and in compensating the victims of constitutional torts. One can only hope that a future session of the United States

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195 *Id.* at 28 Cal. 3d at 607, 620 P.2d at 630, 170 Cal. Rptr. at 44.

196 *Id.* at 28 Cal, 3d at 606, 620 P.2d at 630, 170 Cal. Rptr. at 44.

197 Jones v. Taber, 648 F.2d 1201, 1206 (1981). *See also* Bucher v. Krause, 200 F.2d 576, 585 (7th Cir. 1952), *cert. denied*, 346 U.S. 892 (1953) (Although he was not imprisoned at the time he was faced with a criminal charge, the plaintiff claimed that his criminal charge constituted duress. "At least the evidence was such that the jury could have so found; the issue was properly submitted to [the jury].").

198 Rumery v. Town of Newton, 778 F.2d at 70. *See also* Brief for Respondent at 17-20, Town of Newton v. Rumery, 107 S. Ct. 1187 (1987).

199 Rumery v. Town of Newton, 778 F.2d at 70.

Supreme Court will reconsider *Rumery* and declare that pre-conviction release-dismissal agreements are presumptively invalid.

BRIAN L. FIELKOW