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RELEASES, REDRESS, AND POLICE MISCONDUCT:
REFLECTIONS ON AGREEMENTS TO WAIVE
CIVIL RIGHTS ACTIONS IN
EXCHANGE FOR DISMISSAL OF CRIMINAL CHARGES

SETH F. KREIMER[†]

I. INTRODUCTION

For several years, the Supreme Court has echoed the emerging literature of Alternative Dispute Resolution ("ADR")¹ in encouraging disposition of legal disputes by means short of full-scale litigation.²

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¹ "One of the motivating impulses behind the alternative dispute resolution movement is the notion that dispute resolution outside of full adjudication is a good thing." Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 485 (1985).

For overviews of the profusion of writing that surrounds the growth of this impulse, see, for example, Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893; Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986).

² The Court has promulgated amendments to the Rules of Civil Procedure that provide for mandatory settlement conferences. See FED. R. CIV. P. 16 (1983 amendments). It has extended the applicability of compulsory arbitration under the Federal Arbitration Act. See, e.g., *Perry v. Thomas*, 107 S. Ct. 2520, 2526 (1987) (Federal Arbitration Act, embodying a congressional policy of enforcing arbitration agreements, preempts state law requirement of judicial forum); *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2343, 2345-46 (1987) (RICO claims and claims under § 10(b) of Securities Exchange Act arbitrable under predispute arbitration agreement); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (under Federal Arbitration Act, arbitration clause of international sales agreement requires arbitration of antitrust claims); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (Federal Arbitration Act requires district courts to compel arbitration of pendent arbitrable state law claims upon a motion to compel); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) (enforceability of arbitration agreements under the Federal Arbitration Act not subject to any state law limitations). The Court has emphasized "Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims' under Title VII," *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3073 (1986) (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)), and encouraged the use of consent decrees in such

While this trend has not been without its critics,³ civil rights cases have been fertile fields for the growth of the Court's enthusiasm for negotiated settlements. In *Marek v. Chesny*,⁴ the Court extended the settlement incentives of Federal Rule of Civil Procedure 68 to civil rights attorneys' fees, commenting that "Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives."⁵ In *Evans v. Jeff D.*,⁶ the Court overturned a decision forbidding waivers of attorneys' fees in civil rights cases because "a general proscription against negotiated waiver of attorney's fees . . . would . . . reduc[e] the attractiveness of settlement."⁷ Settlements, the Court asserted, "will serve the interests of plaintiffs as well as defendants."⁸

The usual paradigm for ADR involves an attempt to avoid civil litigation between two private parties. Last Term, the Court carried the litigation-avoidance process two steps further in the civil rights area. In *Town of Newton v. Rumery*,⁹ a majority of five Justices upheld a bargain struck between a public prosecutor and a private criminal defendant that was designed to keep the defendant's civil rights claims against third parties out of court.¹⁰ The majority approved the exchange of a criminal defendant's covenant not to sue the police on a civil rights

contexts, *see id.* at 3073; *see also* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985) ("It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys [when seeking benefits from the Veterans' Administration] an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation.").

³ *See, e.g.,* Abel, *The Contradictions of Informal Justice*, in 1 *POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 267, 309 (R. Abel ed. 1982) ("informal legal institutions can cool out grievances only temporarily, at most"); Abel, *Informalism: A Tactical Equivalent to Law?*, 19 *CLEARINGHOUSE REV.* 375, 381-83 (1985) (informal dispute resolution deprives the poor of their only source of power and protection—formal law); Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 *HARV. L. REV.* 1808, 1835-36 (1986) (managerial judging may threaten the fair operation of the judicial system); Fiss, *Out of Eden*, 94 *YALE L.J.* 1669, 1673 (1985) (adjudication more likely to do justice than any form of ADR); Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1075 (1984) ("[S]ettlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. CHI. L. REV.* 494, 544-46 (1986) (neither ADR nor managerial judging offers adequate solutions to shortcomings of formal adjudication); Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 424-31 (1982) (judicial control over all phases of a case threatens due process values).

⁴ 473 U.S. 1 (1985).

⁵ *Id.* at 11.

⁶ 106 S. Ct. 1531 (1986).

⁷ *Id.* at 1540.

⁸ *Id.* (quoting *Marek*, 473 U.S. at 10).

⁹ 107 S. Ct. 1187 (1987).

¹⁰ *Id.* at 1195.

claim for the dismissal of pending criminal charges.¹¹ It did so, however, with some trepidation, since the exchange of monetary consideration for the dismissal of criminal charges looks suspiciously akin to extortion or bribery.¹²

Unlike *Evans* and *Marek*, *Rumery* did not purport to be grounded in statutory intent or court rule. It was, rather, an explicit attempt by the Court to resolve the issue by "reference to traditional common-law principles,"¹³ the application of which leaves substantial latitude for future case-by-case development. This Article will canvass the considerations that should shape that development and will counsel caution in extending the enthusiasm for nonjudicial composition of civil rights claims in this direction.

The majority upheld Mr. Rumery's release after weighing "the interest in its enforcement . . . in the circumstances" against the "public policy harmed by enforcement."¹⁴ The decision in *Rumery* may well have been justified by the facts in the case. Nonetheless, after introducing the background and reasoning of *Rumery* in Parts I and II, this Article argues in Part III that the images that emerge from the majority's opinions do not correspond to the reality of the typical release-dismissal transaction.

The relevant empirical literature and interviews with prosecutors and defense attorneys in twenty jurisdictions suggest that the benefits that the *Rumery* majority expected to flow from the release-dismissal transaction are exaggerated. Release-dismissal agreements do not predictably redound to the benefit of the criminal defendants who sign them. They are widely disapproved by prosecutors as legitimate tools for law enforcement. And they constitute unreliable mechanisms for screening out "unjust" civil rights actions. Prosecutors who use the agreements appear to do so primarily as a means of routinely eliminating civil rights claims and accomodating police and municipal claims departments.

Part IV suggests that the practice's dangers were not fully explored by the *Rumery* majority. In many situations, release-dismissal

¹¹ *Id.*

¹² See *id.* at 1192 (noting "wide variety of factual situations that can result in release-dismissal agreements," weighing interests "in the circumstances"); *id.* at 1195-96 (O'Connor, J., concurring in part and in the judgment) ("case-by-case approach"; "[n]o court would knowingly permit a . . . plea . . . in exchange for the defendant's cash payment to the police officers who arrested him."); *id.* at 1200 (Stevens, J., dissenting) (analogy to "promise to pay a state trooper \$20 for not issuing a ticket for a traffic violation").

¹³ *Id.* at 1192.

¹⁴ *Id.* at 1192.

transactions entail substantial threats of abridging the right to petition for redress of grievances. The exchange of civil releases for dismissal of criminal charges, moreover, compromises the ideal of the criminal process, the impartiality of the role of the prosecutor, and often the criminal justice policy of the states. The transactions create tensions with both the structure and function of section 1983 as an avenue for vindicating constitutional rights.

These concerns suggest restraint in extending *Rumery*'s approval of release-dismissal transactions. Part V concludes with the proposition that readings of *Rumery* can achieve such restraint by taking seriously the *Rumery* majority's admonition that releases must be sought for "legitimate reason[s] directly related to . . . prosecutorial responsibilities."¹⁵

A. *The Background of Release-Dismissal Agreements*

The problem posed by release-dismissal agreements is not a new one. The leading cases, beginning with Chief Judge Bazelon's opinion in *Dixon v. District of Columbia*,¹⁶ held the agreements per se invalid as inconsistent with the legitimate prosecutorial role and as unduly suppressing the airing of civil rights complaints.¹⁷ The Court of Ap-

¹⁵ *Id.* at 1195.

¹⁶ 394 F.2d 966 (D.C. Cir. 1968).

¹⁷ See *Oliveri v. Thompson*, 803 F.2d 1265, 1278 (2d Cir. 1986) (dictum) (noting the line of cases condemning the practice of seeking release-dismissal agreements), *cert. denied*, 107 S. Ct. 1373 (1987); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984) ("when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action . . . qualifies as a deprivation of due process"), *vacated sub. nom.* *City of Lawton v. Lusby*, 106 S. Ct. 40 (1985) (remanded in light of *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)), *aff'd sub. nom.* *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307 (10th Cir.), *cert. denied*, 107 S. Ct. 275 (1986); *Boyd v. Adams*, 513 F.2d 83, 88-89 (7th Cir. 1975) (stating that release-dismissal agreements are inherently coercive and against public policy); *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir.) (likening release-dismissal agreement to extortion of property from the defendant), *cert. denied*, 400 U.S. 852 (1970); *Hall v. Ochs*, 623 F. Supp. 367, 370 (D. Mass. 1985) (holding agreement invalid under both state and federal constitutional law because the parties lacked equal bargaining power), *aff'd*, 817 F.2d 920 (1st Cir. 1987); *Horne v. Pane*, 514 F. Supp. 551, 552 (S.D.N.Y. 1981) (a defendant offered a release-dismissal agreement "cannot as a matter of law make an uncoerced choice"); *Foley v. Lowell Div. of the Dist. Court Dep't*, 398 Mass. 800, 804-05, 501 N.E.2d 1151, 1153-54 (1986) (practice of dismissing criminal complaints on condition that releases be executed is "inappropriate" use of an "extraneous" factor in the criminal process, relying on *Dixon* line, state common law, and constitutional powers); *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 212 n.3a, 389 A.2d 874, 879 n.3a (1978) (approving of the *Dixon* line of cases but distinguishing them on the facts); *Gray v. City of Galesburg*, 71 Mich. App. 161, 166-67, 247 N.W.2d 338, 341 (1976) (finding release-dismissal agreements "repugnant to public policy" because they undermine the prosecutorial function and are coercive); *Kurlander v. Davis*, 103 Misc. 2d 919, 926, 427 N.Y.S.2d 376, 380 (Sup. Ct. 1980)

peals in *Rumery* followed this line of cases.¹⁸

A second set of cases evaluating section 1983 releases did not reach the *Dixon* issues but focused on the question of whether the releases were voluntarily granted in particular factual settings.¹⁹ A majority of the Supreme Court of California, however, adopted a third approach, concluding that "the time honored practice of discharging misdemeanants on condition of a release of civil liabilities . . . does not contravene

("Representation of the civil interests of the police plays no part in the performance of [the prosecutor's] duties. . . . [E]xtraction of this waiver . . . clearly violates the protections guaranteed by the bill of rights . . ."); see also *Sexton v. Ryan*, 804 F.2d 26, 27 (2d Cir. 1986) (finding that release-dismissal agreements are "inherently suspect"); *Brewer v. Blackwell*, 692 F.2d 387, 399 (5th Cir. 1982) (requiring detainees to sign hold-harmless agreement before release is a deprivation of liberty); *Henzel v. Gerstein*, 608 F.2d 654, 657 n.4 (5th Cir. 1979) (proposal of release-dismissal agreement not within the scope of prosecutorial immunity); cf. *Bushnell v. Rossetti*, 750 F.2d 298, 301 (4th Cir. 1984) (finding "no quarrel" with the *Dixon* line of cases, but different standards apply when releases are given in "exchange for post-conviction sentencing recommendations").

In addition, the negotiation and execution of release-dismissal agreements by prosecutors has been condemned as a violation of professional ethics by several state bar associations. See, e.g., Colo. Bar Ass'n Ethics Comm., Op. 62 (1982), reprinted in 12 COLO. LAW. 455, 455 (1983) (finding it ethically improper for a prosecutor to require a defendant to release governmental agencies or their agents from civil rights liability as a condition of charging or sentencing concessions); Or. State Bar Legal Ethics Comm., Op. 483 (1983), reprinted in 1984 Law. Man. on Prof. Conduct (ABA/BNA) ¶ 801:7111 (1984) ("[a] district attorney may not agree to drop a charge pending against a defendant in exchange for the defendant signing a release of civil liability against a municipality and its employees charged with violating the defendant's civil rights"). See generally Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41, 46-48 (arguing that release-dismissal agreements both compromise the prosecutorial function and deprive defendants of constitutional and statutory rights).

¹⁸ See *Rumery v. Town of Newton*, 778 F.2d 66, 69-70 (1st Cir. 1985), *rev'd*, 107 S. Ct. 1187 (1987).

¹⁹ See, e.g., *Bushnell*, 750 F.2d at 302 (a release given in exchange for post-conviction sentencing recommendations upheld because court found, after inquiry, that decision to grant release was "voluntary, deliberate, and informed"); *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981) (enforceability of release of civil rights liability by prisoner could not be resolved on summary judgment; conflicting inferences regarding plaintiff's state of mind and presence of "coercive pressures" precluded resolution of the issue of "voluntariness"; enforcement of waiver requires "unusually strong showing that the nature and extent" of federal remedy was "explained clearly"); *People v. Wilmot*, 104 Misc. 2d 412, 413-14, 428 N.Y.S.2d 568, 569 (Crim. Ct. 1980) (an offer of dismissal in exchange for waiver of right to pursue civil remedies is inherently coercive); *Hylton v. Phillips*, 270 Or. 766, 773, 529 P.2d 906, 909 (1974) (release signed as condition of liberty by criminal defendant in custody was "as a matter of law obtained by duress and therefore void"); see also *Bucher v. Krause*, 200 F.2d 576, 585 (7th Cir. 1952) ("the concept of duress by imprisonment is old in the law"), *cert. denied*, 345 U.S. 997 (1953); cf. *Dziuma v. E.J. Korvettes*, 61 A.D.2d 677, 679, 403 N.Y.S.2d 269, 270 (1978) (release-dismissal agreements "must be scrutinized with utmost care to determine whether the consent was freely and voluntarily given"; conditioning of dismissal by court, not prosecution, upon defendant's release of public officials from liability is inherently coercive).

public policy when the prosecutor acts in the interests of justice.”²⁰ Until *Rumery*, the United States Supreme Court had not spoken to the issue.

B. *The Rumery Case*

On May 11, 1983, Bernard Rumery, Jr., a marketing representative for an insurance company, was arrested on the order of Newton's Chief of Police, on the felony charge of witness tampering. Chief Barrett had learned the day before that Mary Deary, the complaining witness in a sexual assault case against a former hunting companion of Mr. Rumery, had been upset by alleged threats of retaliation for pressing the charges. Mr. Rumery had allegedly made the threats during a telephone conversation with Ms. Deary. Mr. Rumery denied the threats but not the conversation.²¹

Claiming that he had been wrongfully accused, Mr. Rumery retained an experienced criminal lawyer, who was later elected County Attorney of Rockingham County, both to defend the criminal charges and to seek affirmative redress for false arrest. Mr. Rumery's attorney, who had never before brought an action in federal court, thereupon contacted the Deputy County Attorney, who was responsible for prosecuting both Mr. Rumery's case and the sexual assault charges, and threatened a civil suit unless the charges against Mr. Rumery were dropped.²²

The Deputy County Attorney later testified he was concerned that requiring Ms. Deary to testify in the prosecution of Mr. Rumery would further traumatize her, thus diminishing her effectiveness as a witness in the sexual assault case. In light of this concern, an arrangement was proposed by which the prosecutor would dismiss the criminal charges against Mr. Rumery in exchange for Mr. Rumery's release of the officials involved and Ms. Deary from civil liability—the first such agreement into which he had ever entered. Mr. Rumery's attorney then successfully convinced Mr. Rumery that the risks of the criminal process were great enough to mandate acceptance of the agreement.²³

²⁰ *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 613-14, 620 P.2d 628, 635, 170 Cal. Rptr. 42, 49 (1980); cf. *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 212 n.3a, 389 A.2d 874, 879 n.3a (1978) (finding that releases are enforceable if private party is complainant, but agreements benefiting state agents are properly invalidated).

²¹ See *Rumery*, 778 F.2d at 67-68; Joint Appendix at 24-27, 30-31, 35, 49, *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987) (No. 85-1449) [hereinafter Joint Appendix].

²² See *Rumery*, 778 F.2d at 66, 68; Joint Appendix, *supra* note 21, at 11, 13, 18, 51.

²³ See Joint Appendix, *supra* note 21, at 14, 51-53, 55-56.

Ten months after executing the release-dismissal agreement, Mr. Rumery, by new counsel, filed a federal civil rights action against the Town of Newton and its officials seeking to recover damages for his arrest. The district court dismissed his claim on the basis of the release, and Mr. Rumery appealed.²⁴

C. *The Rumery Opinion*

Rumery brought these issues before the Court for the first time, yielding three avowedly tentative opinions which combined to sustain the release by a five-to-four majority. Three Justices joined Justice Stevens in his dissenting opinion that Mr. Rumery's release-dismissal agreement was invalid.²⁵ Three joined Justice Powell's conclusion that under the circumstances, Mr. Rumery had not made out a case for overturning his bargain.²⁶ Justice O'Connor voted to enforce the release-dismissal agreement on the ground that the civil rights defendants' evidence affirmatively demonstrated that the release agreement was appropriate.²⁷

Justice Stevens noted the *Dixon* line's concern with unduly suppressing civil rights complaints.²⁸ He was troubled by what he regarded as the coercive character of the threat of criminal prosecution, as well as the conflict of interest confronting a prosecutor concerned with both civil liability and criminal justice.²⁹ Yet Justice Stevens was still "hesitant to adopt an absolute rule invalidating all such agreements."³⁰ Although "a full development of all the relevant facts might provide a legitimate justification for enforcing the release-dismissal agreement," Justice Stevens found that the evidence presented was insufficient to overcome the "strong presumption against the enforceability of such agreements."³¹ Justice Stevens, however, gave no hint as to what facts would have cured this defect.

The majority that voted to enforce Mr. Rumery's release was equally circumspect in explaining the circumstances under which such an agreement would be unenforceable. Justice Powell's opinion, joined on this point by four other Justices, rejected the *Dixon* line's per se prohibition of release-dismissal agreements and emphasized the "wide

²⁴ See *Rumery*, 107 S. Ct. at 1191.

²⁵ *Id.* at 1198, 1205-06 (Stevens, J., dissenting).

²⁶ *Id.* at 1190, 1195.

²⁷ *Id.* at 1195, 1197-98 (O'Connor, J., concurring in part and in the judgment).

²⁸ *Id.* at 1205-06, 1205 n.23 (Stevens, J., dissenting).

²⁹ *Id.* at 1202 (Stevens, J., dissenting).

³⁰ *Id.* at 1205 (Stevens, J., dissenting).

³¹ *Id.*

variety of factual situations that can result in release-dismissal agreements."³² "[A]lthough we agree that in some cases these agreements may infringe important interests 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."³³ Rather, the release would be unenforceable "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."³⁴ The majority agreed that Mr. Rumery's release was enforceable, because it was voluntary, because its extraction was "directly related to a legitimate prosecutorial interest," and it "would not adversely affect other public interests."³⁵ The majority offered little guidance, however, regarding how to strike this balance in future cases.

Justice Powell's majority began its analysis of the circumstances surrounding Mr. Rumery's release-dismissal agreement by rejecting his claim that the release was "inherently coercive."³⁶ The Court noted that:

Rumery is a sophisticated businessman. He was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement. Rumery considered the agreement for three days before signing it. The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost.³⁷

Although five Justices agreed that "voluntariness" was a necessary condition for the enforcement of release-dismissal agreements,³⁸ the Powell plurality did not explicitly specify which factors in *Rumery* were crucial in determining voluntariness.³⁹ Indeed, part of the opinion intimated that the voluntariness issue was a function of simply whether the decision was "highly rational" rather than a question as to the nature

³² *Id.* at 1192.

³³ *Id.*

³⁴ *Id.* Justice O'Connor's partial concurrence highlighted her agreement "with the Court that a case-by-case approach appropriately balances the important interests on both sides of the question . . . and that on the facts of this particular case Bernard Rumery's covenant not to sue is enforceable." *Id.* at 1195 (O'Connor, J., concurring in part and in the judgment).

³⁵ *Id.* at 1195.

³⁶ *Id.* at 1192-93.

³⁷ *Id.* at 1193.

³⁸ *See id.* at 1192; *id.* at 1197 (O'Connor, J., concurring in part and in the judgment).

³⁹ *Cf. id.* at 1197 (O'Connor, J., concurring in part and in the judgment) (listing "relevant" and "important" factors).

of the pressure or deliberation.⁴⁰

The Court ultimately found Mr. Rumery's decision to be voluntary and "highly" rational. A plurality of the Justices still acknowledged "that in some cases there may be a substantial basis for [the] concern" that release-dismissal agreements "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."⁴¹ Apparently, the Justices considered unethical the practices of either pressing or dismissing charges "to protect the interests of other officials."⁴² Nonetheless, three Justices joined Justice Powell's conclusion that per se invalidation insufficiently credits the capacity of release-dismissal agreements to "protect public officials from the burdens of defending . . . unjust claims" and insufficiently supports the "tradition . . . that the great majority of prosecutors will be faithful to their duty."⁴³ Justice O'Connor similarly rejected the per se prohibition and emphasized two concerns: the interest in avoiding "meritless" section 1983 litigation and the possibility that "particular release-dismissal agreements may serve bona fide criminal justice goals."⁴⁴

While the *Rumery* Court concluded that some release-dismissal agreements should be enforced, the majority failed to elaborate standards for identifying which agreements would be upheld. Mr. Rumery's suit was barred because, first, "the prosecutor had an independent legitimate reason to make the agreement directly related to his prosecutorial responsibilities," and, second, the agreement "would not adversely affect the relevant public interests."⁴⁵ There is scant discus-

⁴⁰ *Id.* at 1193. The Court did not explicitly invoke the standard in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver must be an "intentional relinquishment of a known right or privilege"; a court should recognize "every reasonable presumption against waiver"); the *Brady* formulation, *United States v. Brady*, 397 U.S. 742, 748 (1970) (waiver in criminal proceeding must be "voluntary, knowing, and intelligently made"); or the lower standard associated with contract law and suggested in *Overmeyer Co. v. Frick*, 405 U.S. 174, 188 (1972) (cognovit clause "may well serve a proper and useful purpose in the commercial world, and at the same time not be vulnerable to constitutional attack", at least when contract is not one of adhesion, and there is no disparity of bargaining power).

Nor did it comment on the status of the suggestion in *Hylton v. Phillips*, 270 Or. 766, 773, 529 P.2d 906, 909 (1974), that releases executed by imprisoned persons are per se involuntary or Judge Kennedy's proposition in *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1981), that "a release's validity must be predicated on an unusually strong showing that the . . . claimant understood the nature of whatever statutory and common-law remedies he waived by the release." *Id.* at 1203.

⁴¹ *Rumery*, 107 S. Ct. at 1193 (Powell, J., plurality) (quoting *Rumery*, 778 F.2d at 69).

⁴² *Id.*

⁴³ *Id.* at 1194 (Powell, J., plurality).

⁴⁴ *Id.* at 1196 (O'Connor, J., concurring in part and in the judgment).

⁴⁵ *Id.* at 1195 (Powell, J., plurality). Justice O'Connor phrases the first standard

sion, however, of either standard. The ruling does not identify "illegitimate" objectives or whether those "legitimate objectives" which are indirectly related or unrelated to prosecutorial responsibilities are sufficient. Similarly, the decision fails to instruct potential plaintiffs on how they might prove an "adverse effect on relevant public interests." Indeed, even the burden of proof is unclear.⁴⁶

In sum, the Court declined to specify the "common law principles" for validating release-dismissal agreements. By stating that the enforceability of releases is a matter of "case-by-case" development according to "common law principles," the Court has in effect remitted to the lower courts the task of developing a federal common law of release-dismissal agreements.

II. "COMMON LAW PRINCIPLES" AND "PUBLIC INTERESTS"

"Traditional common law principles" and a pragmatic assessment of the public interest shaped the analysis of release-dismissal agreements in *Town of Newton v. Rumery*.⁴⁷ Indeed, for the *Rumery* Court the "common-law principles" and "public interests" were identical; the Court's evaluation rested on the "well-established 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

Reference to the "common law" as a touchstone of section 1983 jurisprudence is a regular feature of the Court's interpretations of sec-

in terms of "legitimate criminal justice concerns," "legitimate criminal justice objectives," and "bona fide criminal justice goals." *Id.* at 1196 (O'Connor, J., concurring in part and in the judgment).

⁴⁶ The civil rights plaintiff, according to the plurality, bears the ultimate burden of establishing the enforceability of the releases. Justice O'Connor's crucial concurrence, however, requires that civil rights *defendants* prove that the exchange of the release for dismissal of criminal charges "was voluntarily made, not the product of prosecutorial overreaching, and in the public interest." *Id.* at 1197 (O'Connor, J., concurring in part and in the judgment). Nonetheless, Justice O'Connor joined in a portentous footnote, suggesting that the Court had "no occasion in this case to determine whether an inquiry into voluntariness alone is sufficient to determine the enforceability of release-dismissal agreements." *Id.* at 1195 n.10 (Powell, J., plurality).

Both Justices Powell and O'Connor suggest that judicial supervision of the release's execution would strengthen the case for enforcing release-dismissals. *See id.* at 1195 n.10 (Powell, J., plurality), 1196-97 (O'Connor, J., concurring in part and in the judgment). Without guidance as to the elements of a legitimate release, however, it is difficult to discern how judges would effectively exercise supervision, particularly given the assembly-line atmosphere that prevails in the misdemeanor courts in which most releases are sought. *See infra* notes 96-99 and accompanying text.

⁴⁷ 107 S. Ct. 1187 (1987).

⁴⁸ *Id.* at 1192 & n.2 (citing RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981)).

tion 1983.⁴⁹ It is debatable, however, whether the *Rumery* majority identified the appropriate "well-established" common law principle. The common law fairly bristles with other appropriate starting points for analysis, most of which would point to the per se voidability of release-dismissal bargains. Contracts induced by threats of prosecution are voidable at common law,⁵⁰ and duress by imprisonment can prevent the enforcement of releases.⁵¹ At common law, obtaining items of value

⁴⁹ See, e.g., *Anderson v. Creighton*, 107 S. Ct. 3034, 3041 (1987) (qualified immunity for FBI agents); *Memphis Community School Dist. v. Stachura*, 106 S. Ct. 2537, 2542 (1986) (level of damages); *Malley v. Briggs*, 106 S. Ct. 1092, 1095-97 (1986) (immunity for complaining witnesses); *Cleavinger v. Saxner*, 474 U.S. 193, 199 (1985) (qualified immunity for prison disciplinary committee); *Tower v. Glover*, 467 U.S. 914, 921 (1984) (no absolute immunity for public defenders); *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) (no immunity for injunctive relief against a judge); *Smith v. Wade*, 461 U.S. 30, 34 (1983) (standard for punitive damages); *Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983) (absolute immunity for police officer as witness); *Carey v. Phipps*, 435 U.S. 247, 257-58 (1978) (absent proof of actual injury, no damages); *Imbler v. Pachtman* 424 U.S. 409, 422-24 (1976) (immunity for prosecutors); *Pierson v. Ray* 386 U.S. 547, 554-55 (1967) (qualified immunity for police officers); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (absolute immunity for legislators). See generally Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1484-88 (1987) (the Court has used modern common law to fill in gaps in § 1983); Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 604-611 (1985) (in contrast to legislative history and some early court interpretations, "modern" common law has provided the guidance for determining the extent and conditions of liability for a cause of action under § 1983).

It has never been clear whether the "common law" is relevant because it was implicitly incorporated into the statute at its passage in 1871 or as a means of tapping the evolving wisdom of contemporary "common law". I have previously offered the view that the reference to "common law" in 42 U.S.C. § 1988 suggests an evolving and autonomous federal common law of civil rights remedies. See Kreimer, *supra*, at 610-11.

⁵⁰ A contract is voidable if "assent is induced by an improper threat . . . that leaves the victim no reasonable alternative . . ." RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981). A threat of criminal prosecution is improper even if the threatener believes that the threat's recipient is guilty; the threat "involves a misuse, for personal gain, of power given for other legitimate ends." *Id.* at § 176(1)(b) comment c; see also *Willig v. Rapaport*, 81 A.D.2d 862, 864, 438 N.Y.S.2d 872, 874 (1981) (threats of imprisonment or arrest, whether legitimate or not, may render a contract entered into voidable at the election of the person threatened); *Triad Distrib., Inc. v. Conde*, 56 A.D.2d 648, 648-49, 391 N.Y.S.2d 897, 898 (1977) ("wife may avoid mortgage induced and obtained by threats of imprisonment by her husband, and it is of no consequence whether the threats were of a lawful or unlawful imprisonment"); 13 S. WILLISTON, WILLISTON ON CONTRACTS § 1612 (3d ed. 1970) ("a threat of criminal prosecution, when it is coercive, will make voidable a contract induced thereby").

⁵¹ "The extraction of such a release while the defendant is in custody presents too great an opportunity for officials to employ coercion. The concept of duress by imprisonment is as old as our law." *Gray v. City of Galesburg*, 71 Mich. App. 161, 165, 247 N.W.2d 338, 340 (1976); see *Boyd v. Adams* 513 F.2d 83, 88 (7th Cir. 1975) ("[U]nder the age-old concept of duress by imprisonment," plaintiff's release "secured in such an inherently coercive context" was not an effective waiver of a civil rights action brought against arresting police officers); *Bucher v. Krause*, 200 F.2d 576, 585 (7th Cir. 1952) ("The concept of duress by imprisonment is old in the law."); see also *Baker v. Morton*

under color of public office constituted the crime of extortion,⁵² and the common law offense of "compounding a crime" punished agreements not to prosecute a crime in exchange for payment.⁵³ It should be no surprise, therefore, that before *Rumery*, the weight of state and federal precedent had prohibited such agreements.⁵⁴

The *Rumery* majority, however, did not refer to any common-law precedent. Rather, it followed the modern tendency to make the balance the measure of all things.⁵⁵ The majority determined to resolve the issue on the basis of a fresh comparison between the weight of the interests favoring and opposing enforcement of releases unencumbered by legal doctrine in cognate areas.

79 U.S. (12 Wall.) 150, 157-58 (1870) ("consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency"); *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 215 (1868) (whether the arrest is justified or unjustified, "if the person arrested execute[s] a contract or pay[s] money for his release, he may avoid the contract as one procured by duress").

⁵² See, e.g., *United States v. Laudani*, 134 F.2d 847, 851 n.1 (3d Cir. 1943) ("At common law, extortion is the taking, by color of office, of money or the thing of value that is not due, before it is due, or more than is due. . . . The offense required an official as the perpetrator."); *United States v. Deaver*, 14 F. 595, 597 (W.D.N.C. 1882) ("The word 'extortion' has acquired a technical meaning in the common law, and designates a crime committed by an officer of the law, who, under color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due. The officer must unlawfully and corruptly receive such money or article of value for *his own benefit or advantage*"); see also *infra* notes 182-84.

⁵³ See Note, *Compounding Crimes: Time for Enforcement?*, 27 HASTINGS L.J. 175, 175 (1975) ("[O]ne who accepts something of value under an unlawful agreement not to report or prosecute the perpetrator of the antecedent crime, or to handicap the prosecution of his case, compounds the original crime."). Historically, the official engaged in compounding a crime was made an accessory. 4 W. BLACKSTONE, *COMMENTARIES* *134. "This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment." *Id.*; see also *St. Louis, V. & T.H. R.R. v. Terre Haute & I. R.R.*, 145 U.S. 393, 407-08 (1892) ("[P]roperty conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, [is] . . . therefore clearly illegal . . ."); *Boyd*, 513 F.2d at 87 n.5 ("[t]he universal rule . . . is that [c]ompounding a crime being itself criminal, an agreement not to prosecute is void, not only because it is against the policy of the law, but also because the agreement is itself a crime" (citing *Williamson v. Jernberg*, 99 Ill. App. 2d 371, 375, 240 N.E.2d 758, 760 (1968))); 6A A. CORBIN, *CORBIN ON CONTRACTS* § 1421 (1962) (agreements compounding a crime typically include promises not to prosecute, promises to conceal evidence, and promises to stop a prosecution already begun; these bargains are illegal whether the party for whom they are made is innocent or guilty); cf. *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 209 & n.2, 389 A.2d 874, 877 & n.2 (1978) (common law offense of compounding a crime is driven by the public policy that criminal laws must be duly prosecuted).

⁵⁴ See *supra* notes 17, 19; *infra* note 224.

⁵⁵ See Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987); Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

According to the majority, the per se invalidation of release-dismissal agreements that the court of appeals adopted from the prevailing line of federal authority "fail[s] to credit the significant public interests that such agreements further" and exaggerates their dangers.⁵⁶ It is well, then, to begin the attempt to give substance to the federal common law of release-dismissal agreements adumbrated in *Rumery* by examining in some detail the public interests served by the agreements and then to turn to the dangers they bring in their train.

The Court undertook the analysis of the costs and benefits of release-dismissal agreements in *Rumery* on the basis of the facts of the case and the published opinions.⁵⁷ This background sufficed to evaluate Mr. Rumery's release. A useful expansion of the analysis, however, requires some sense of the real world context of release-dismissal agreements. It is difficult to parse the nature of "legitimate law enforcement interests," to evaluate "adverse effects of the release on relevant public interests," or to assess the potential of release-dismissal agreements for eliminating "frivolous" civil rights cases from the information available in the pages of U.S. Reports.

In order to gain some empirical leverage on these issues, during June and July of 1987, I conducted interviews of prosecutors, police, and defense attorneys in twenty jurisdictions. Table I summarizes the interview results.⁵⁸

⁵⁶ *Rumery*, 107 S. Ct. at 1192 (1987).

⁵⁷ None of the briefs in the case provided data regarding the prevalence of the release-dismissal practice, the circumstances in which the practice is used, its effects, or indeed, even a survey of state law on the subject. The closest any of the briefs came to empirical information was a quotation in the amicus brief of Americans for Effective Law Enforcement from an address by the President of the National Sheriffs Association, which claimed that civil rights claims filed against police officers are without merit and are filed in hopes of an out-of-court settlement. See Brief of Amicus Curiae Americans for Effective Law Enforcement, Inc., at 5-6, *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987) (No. 85-1449) (quoting Richard L. Germond).

⁵⁸ Appendices I and II provide details on the interviews. A series of referrals by a staff member of the American Bar Association's Section on Criminal Justice to prosecutors and public defenders active in the Section formed the core of the interviews. Interviews with the subjects of these referrals generated to other referrals beyond the Criminal Justice Section activists, which were supplemented by my own personal contacts. I attempted to obtain interviews with both policymaking prosecutors and defense attorneys in each jurisdiction. The sample was thus neither random nor representative. The interviews were not social science, but in Professor Alschuler's felicitous phrase, "a kind of legal journalism." Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975).

Table I

Reported Use of Release-Dismissal Agreements
By Prosecutors in Twenty Jurisdictions
June-July 1987

<u>Do Not Use (as a Matter of Policy)</u>	<u>Do Not Use (Forbidden by Outside Ruling)</u>	<u>Do Not Use (Custom)</u>
* Arizona State Attorney General Cook County State's Attorney (Chicago, Ill.) Denver, Colo., District Attorney Lake County State's Attorney (Waukeegan, Ill.) State's Attorney, Montgomery County, Md. State's Attorney, 15th Judicial District (Palm Beach County, Fla.) Philadelphia, Pa., District Attorney Seattle, Wash., City Attorney (Criminal Division) Suffolk County District Attorney (Boston, Mass.)	* Denver, Colo., City Attorney Monroe County District Attorney (Rochester, N.Y.)	Maricopa County Prosecutor (Phoenix, Ariz.) San Francisco, Cal., District Attorney
<u>No Formal Policy (Some Use, Some Oppose)</u>	<u>Use Without Forms</u>	<u>Use With Forms</u>
New York County District Attorney (New York, N.Y.)	Prosecuting Attorney 12th Judicial District (Fort Smith, Ark.) King County Prosecutor's Office (Seattle, Wash.) State's Attorney, Dade County, Fla. Pima County Attorney (Tucson, Ariz.)	* Columbus, Ohio, City Attorney * Public Prosecutor Rivera Beach, Fla. + Allegheny County District Attorney (Pittsburgh, Pa.)

* Prosecutor represents civil defendants in suits arising out of arrests

+ Initial prosecution at magistrates court often conducted by police officers

The most striking observation that emerged from the interviews is the widespread prosecutorial hostility toward release-dismissal agree-

ments. Far from being a standard tool for advancing "legitimate prosecutorial interests," the policy-making prosecutors in roughly half of the jurisdictions regard the release-dismissal practice as illegitimate, and they forbid the practice. Two of the seven offices that approve of the practice use it only rarely.⁵⁹ Moreover, offices that were forced to abandon the practice by court order or bar association ruling report no difficulty in functioning without it.⁶⁰

Almost equally arresting was the recurrence of the open use of form release-dismissal agreements routinely demanded by offices that would represent defendants in civil rights actions arising from the charges released. 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.

The details gathered in these interviews form the framework of facts for the discussion of the costs and benefits of the release-dismissal practice in the remainder of this Article.

III. BENEFITS OF RELEASE-DISMISSAL AGREEMENTS

A. *Benefits for the Accused*

The majority in *Town of Newton v. Rumery*⁶¹ emphasized that "[t]he benefits of the agreement to Rumery are obvious."⁶² Mr. Rumery's decision was the "highly rational" and voluntary judgment of

⁵⁹ See Interview with Ronald Fields, App. I (over the past 14 years, releases have occurred, within memory, only five or six times in the Fort Smith office); Interview with Stephen Neely, App. I (over the past 18 years, releases have occurred, within memory, only six or seven times in the Tucson/Pima County office).

⁶⁰ See Interview with Stephen Kaplan, App. I (Denver City Attorney) ("We have learned to live with [the prohibition on release-dismissal practice], and live with it quite well . . ."); Interview with John Palermo, App. I (Assistant City Attorney, Denver) ("Things were pretty much the same after we dropped the releases."); Interview with Carl Mangino, App. I (Assistant City Attorney, Denver) ("Today, the issue of proceeding in police cases is a matter of discretion at the prosecutor's offices."); Interview with Howard R. Relin, App. I (Monroe County (Rochester, New York) District Attorney) (abandoned practice after court order); Interview with Lt. Edmund Pecinovski, App. I (San Francisco Police Department) (Releases were never required routinely because the District Attorney believed that they were coercive.).

Indeed, the policymaking prosecutor in the Cook County prosecutor's office, which abandoned the practice in the shadow of federal litigation in *Boyd v. Adams*, 513 F.2d 83 (1975), now regards the practice as indefensible. Interview with Michael J. Angarola, App. I.

⁶¹ 107 S. Ct. 1187 (1987).

⁶² *Id.* at 1193 (Mr. Rumery "gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost.").

a counseled and sophisticated defendant.⁶³ In the Court's view, section 1983 was adopted to protect the rights and interests of individual citizens in whom "Congress has confided the decision to bring such actions."⁶⁴ Mr. Rumery's rights are, in short, his to dispose of as he wishes, and as long as his decisions are voluntary, his decision is owed deference by the Court. Justice Powell's plurality "hesitate[s] to elevate more diffused public interests above Rumery's considered decision that he would benefit personally from the agreement."⁶⁵

Judge Easterbrook interprets *Rumery* to be a case that "start[s] from the premise that people may strike such bargains as they please."⁶⁶ Enforcement of the bargains regarding statutory rights, in his view, implements the underlying statute:

A statutory right affects the initial bargaining position of the parties, so that the contract affords people the benefits of the statute even as it alters the rules. The beneficiary of the statutory right may enjoy it or trade it for something he prefers To forbid the contractual waiver is to make the class of statutory beneficiaries worse off by depriving them of the opportunity to obtain the benefits of the statutory entitlement by using it as a bargaining chip⁶⁷

With regard to "knowledge" and "voluntariness," however, Mr. Rumery's situation shares little with the circumstances often attending release-dismissal agreements. Mr. Rumery was a sophisticated businessman who had been released on bail, consulted at length with counsel, and evaluated the release-dismissal proposal for an extended period

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (Powell, J., plurality). There is some irony in Justice Powell's reluctance to deprive Mr. Rumery of the benefits of trading his § 1983 rights in the service of "diffused public interests," in light of the Court's willingness to elevate the "diffused public interests" associated with the danger of overdetering constitutional violations to a level that entirely eliminates recovery in large classes of § 1983 actions under the guise of absolute or qualified immunity. See, e.g., *Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987) (whether an FBI agent is protected by qualified immunity turns on the "objective legal reasonableness" of the action); *Malley v. Briggs*, 106 S. Ct. 1092, 1098 (1986) (police protected by qualified immunity so long as they act in a manner consistent with objective reasonableness); *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978) (judges entitled to absolute immunity unless they act in the "clear absence of all jurisdiction"); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (prosecutor is absolutely immune from a civil suit for damages for violations of accused's constitutional rights); *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951) (legislators are immune when acting within the sphere of legitimate legislative activity).

⁶⁶ *Cange v. Stotler & Co.* 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring).

⁶⁷ *Cange*, 826 F.2d at 596 (Easterbrook, J., concurring).

of time. By contrast, in *Hylton v. Phillips*,⁶⁸ Hylton was arrested and placed in jail, although no complaint had been filed.⁶⁹ "Immediately after locking plaintiff [Hylton] in the jail," the arresting officer conferred with the district attorney who "advised him to try and persuade plaintiff to sign a release in an effort to avoid the possibility of any liability for false imprisonment."⁷⁰ The arresting officer "presented the release to plaintiff in jail and told him as soon as it was signed he would be released."⁷¹ In *Jones v. Taber*,⁷² "Jones 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. He was then placed in a special segregation facility and held there for nineteen days until" he was asked to sign a release.⁷³ In *Hall v. Ochs*,⁷⁴ police officers and the Town of Milton had, since the 1950s, insisted on execution of a form waiving civil actions as a condition precedent to a release from custody after arrest.⁷⁵

Such releases hardly flow from the deliberate and informed decision that undergirded the plurality's conclusion that Mr. Rumery had voluntarily decided that he "would benefit personally from the agreement."⁷⁶ Given the coercive impact of custody,⁷⁷ there should be little doubt that station house releases are generally impermissible. The concern repeatedly voiced in *Rumery* that releases be the result of "considered" and "voluntary" choice⁷⁸ requires at least counsel and the liberty

⁶⁸ 270 Or. 766, 529 P.2d 906 (1974).

⁶⁹ *Id.* at 769-770, 529 P.2d at 908.

⁷⁰ *Id.* at 770, 529 P.2d at 908.

⁷¹ *Id.*

⁷² 648 F.2d 1201 (9th Cir. 1981).

⁷³ *Id.* at 1202. Jones's release occurred in a coercive environment aggravated by the fact that sentence was still pending. *Id.* at 1205.

⁷⁴ 817 F.2d 920 (1st Cir. 1987).

⁷⁵ *Id.* at 922. Shortly after Hall's arrest and upon his arrival in the booking area of the police department, the commanding officer "announced that, if Hall would sign a waiver giving up his right to sue the police officers, the charges would be dropped and he [Hall] could leave." *Id.* at 922. Hall refused and was placed in a cell. A friend of Hall's arrived and urged him to sign the waiver. *Id.* "Finally, Hall called a lawyer who had helped him with some real estate transactions. The lawyer recommended that he get out of there as fast as he could." *Id.* The First Circuit held that Hall was "coerced, pure and simple by the threat of continued incarceration." *Id.* at 923.

⁷⁶ *Rumery*, 107 S. Ct. at 1193 (Powell, J., plurality).

⁷⁷ See, e.g., *Edwards v. Arizona*, 451 U.S. 477, 479-80 (1981) (defendant did not voluntarily waive *Miranda* rights when after an initial interrogation in which defendant sought counsel, but before counsel was secured defendant was required against his will to speak to detectives in a second interrogation); *Miranda v. Arizona*, 384 U.S. 436, 465 (1966) ("the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant" to waive fifth amendment rights).

⁷⁸ See *Rumery*, 107 S. Ct. at 1192-93, 1195; *id.* at 1197 (O'Connor, J., concurring in part and in the judgment); see also *Hall*, 817 F.2d at 923 ("While individual

of the criminal defendant.⁷⁹

But even in situations where a counseled criminal defendant's will was not overborne by the impact of custody or incarceration, the argument that release-dismissal agreements should be sanctioned because of their "obvious benefits" to the prospective civil rights plaintiff rests on the assumption that the "benefits" are, in fact, real. In his study of misdemeanor courts in Connecticut, Professor Feeley observed that the benefits of the "deals" offered by prosecutors are often illusory:

It is the salesman's stock-in-trade to represent a "going rate" as if it were a special sale price offered only once. The gap between theoretical exposure and the standard rate allows defense attorneys and prosecutors to function much the same way, making the defendant think he is getting a special "deal" when in fact he is getting the standard rate. Together prosecutors and defense attorneys operate like discount stores, pointing to a never-used high list price and then marketing the product at a supposedly "special" sale price, thereby appearing to provide substantial savings to those who act quickly.⁸⁰

If prospective civil rights plaintiffs are often induced to exchange waivers of section 1983 actions for dismissals that they would obtain in any event, it is hard to maintain that such dismissals should be allowed because the benefits to those plaintiffs outweigh competing public interests.

As a matter of abstract logic, it is hard to predict what would happen if release-dismissal agreements were forbidden entirely. As a

rights may be waived, such waivers must be voluntary.").

⁷⁹ There is merit as well to the suggestion by Judge Kennedy that "a release's validity must be predicated on an unusually strong showing that the . . . claimant understood the nature of whatever statutory and common-law remedies he waived" *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981).

If much is to rest on the "voluntariness" of the waivers, there are a variety of issues that the Court has failed to address. See, e.g., *Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 206 (1977) (surveying the problem of waivers and suggesting that "a defendant have articulated an awareness of sufficient information about the nature and effect of his choice to establish that the waiver was voluntary" as a requirement for effective waiver); Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 537 (1981) (proposing a new theory of waiver requiring that "parties who waive a particular right obtain the functional equivalent of that right in context of their more informed interaction"); Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 9 (1970) (arguing that the effective waiver standard enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938), has been ignored or "has received a kind of token obeisance" in subsequent cases).

⁸⁰ M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 191 (1979).

matter of fact, interviews suggest that situations in which the dismissal is the "going rate" for the civil rights plaintiff's actions are not uncommon when release-dismissal agreements are obtained, whether or not defendant's lawyers are aware of the "going rate." The comments of the interview participants are summarized in Table II.

Table II

Use of Release-Dismissal Agreements
and Case Disposition

<u>Discontinued Use of Release-Dismissal Agreements</u>	<u>Continued Use of Release-Dismissal Agreements</u>
+ Chicago, Ill.	+ Allegheny County (Pittsburgh, Pa.)
* Denver, Colo. (City Att'y)	+ Columbus, Ohio
* Philadelphia, Pa.	° Dade County (Miami, Fla.)
* Rochester, N.Y.	° Fort Smith, Ark.
° San Francisco, Cal.	* King County (Seattle, Wash.)
	° New York County (New York, N.Y.)
	* Pima County (Tucson, Ariz.)
	° Riviera Beach, Fla.
* No change in disposition if release offer refused or practice abandoned	
+ Some cases dropped, some go forward if release offer refused or practice abandoned	
° No data	

Prosecutors in Tucson and Seattle stated that if a release-dismissal offer was refused, their offices generally would not insist on the release.⁸¹ The New York Legal Aid Society takes the position that such agreements are never in the interest of their clients.⁸² So, too, several "natural experiments" in which the release-dismissal practice was eliminated are reported to result in no adverse impact on the interests of prospective civil rights plaintiffs. In Rochester, both prosecutors and defense attorneys observed that the judicially-ordered elimination of release-dismissal agreements has resulted in no change in the number or character of dismissals.⁸³ In Denver, a state ethics ruling that elimi-

⁸¹ Interview with Robert Lasnik, App. I (In the Seattle District Attorney's office, once a case has reached the stage that an offer is made, "if our bluff is called, we will usually cave in" because the decision has been made that pushing the case to trial would not be in the public interest); Interview with Stephen Neely, App. I (In Pima County, "we are not in a strong bargaining position, and the defendant's attorney knows it, since we have already decided to drop the charges"); *see also* Oliveri v. Thompson, 803 F.2d 1265, 1268 (2d Cir. 1986) (representative of Suffolk County District Attorney offered to dismiss charges if defendant signed release yet dropped charges after defendant's refusal to sign release), *cert. denied*, 107 S. Ct. 1373 (1987).

⁸² Interview with Susan B. Lindenauer, App. I (release-dismissal agreements are not in the interests of client and have an adverse impact on justice system).

⁸³ Interview with Karl Salzer, App. I; Interview with Edward Nowak, App. I;

nated the city attorney's practice of requiring form releases of liability before dropping criminal charges produced no discernible change in the nature or number of cases that were actually dropped,⁸⁴ and the District Attorney of Philadelphia reported no increase in the number of cases going to trial as a result of his elimination of the practice.⁸⁵ It seems fair to infer that if release-dismissal agreements in fact resulted in dismissals that would not otherwise occur, then their elimination would have reduced the number of dismissals reported.

On the other hand, some respondents in Columbus⁸⁶ and Pittsburgh⁸⁷ suggested that releases sometimes—though not always—generated dismissals that would otherwise be unavailable. In Chicago, some attorneys believe that the elimination of releases in the shadow of federal litigation⁸⁸ worked to the disadvantage of criminal defendants, by forcing the prosecuting attorneys to try cases they otherwise would have dropped with releases.⁸⁹ On the other hand, the for-

Interview with Howard Relin, App. I. In October, 1979, the district attorney's office in Rochester, New York, had adopted a policy of requiring release of civil actions as a condition of adjournments in contemplation of dismissal; the policy was invalidated in *Kurlander v. Davis*, 103 Misc. 2d 919, 926-27, 427 N.Y.S.2d 376, 380-81 (Sup. Ct. 1980).

⁸⁴ Interview with John Palermo, App. I ("Things were pretty much the same after we dropped the releases"; no change in the ultimate disposition of cases); see also Interview with Carl Mangino, App. I (Since the elimination of the release-dismissal practice in 1983, weak cases will still be dropped, although the claims division attempts to encourage the prosecutor to press cases where police are involved.). *Contra* Interview with Stephen Kaplan, App. I (stating that reinstitution of release-dismissal practice would often help defendants, but that many cases are dismissed even without release). See generally Colo. Bar Ass'n Ethics Comm., Op. 62 (1982), reprinted in 12 COLO. LAW. 455, 455 (1983) (finding it ethically improper for a prosecutor to require a defendant to release governmental agencies or their agents from civil rights liability as a condition of charging or sentencing concessions).

⁸⁵ Interview with Edward Rendell, App. I.

⁸⁶ See Interview with James Fais, App. I (Chief Prosecutor, City Attorney's Office, Columbus, Ohio) (When defendants refuse to sign releases, sometimes the case is dismissed, sometimes it is pressed to trial.). But see Interview with James Kura, App. I (Franklin County Public Defender, Columbus, Ohio) (Since invalidation of releases by Ohio courts, it does not appear that more cases go to trial. "By the time you get down to that level, they [prosecutors] are just looking for any kind of a bone.").

⁸⁷ See, e.g., Interview with Claire Capristo, App. I (Deputy for Operations, Allegheny County District Attorney's Office, Pittsburgh, Pa.) (District Attorney will agree to police-generated release-dismissal agreements. If no agreement is reached, the case goes forward.); Interview with James Lieber, App. I (Executive Director, ACLU, Greater Pittsburgh Chapter) (availability of releases benefits defendants sometimes; in other cases, if defendants hold out, cases will be dropped).

⁸⁸ See *Boyd v. Adams*, 513 F.2d 83, 87-89, 89 n.6 (7th Cir. 1975) (Chicago District Attorney's policy of demanding releases as a condition of dismissal held illegal; policy was discontinued shortly after suit was filed).

⁸⁹ E.g., Interview with Matthew J. Piers, App. I (Deputy Corporate Counsel, City of Chicago) (Release dismissal agreements were "an effective tool for the powerless person to obtain bargaining leverage in criminal prosecution." Waivers also "re-

mer Deputy Superintendent for the Chicago Police Department's Bureau of Administrative Services sees the demise of release-dismissal forms as a factor in the reduction of disorderly conduct arrests made simply to remove individuals from the street.⁹⁰

If the reports in Tucson, Seattle, Rochester, Philadelphia, and Denver are representative of prosecutorial practices across the country, the availability of the release-dismissal procedure works to the unequivocal detriment of prospective civil rights plaintiffs. The agreement merely extinguishes causes of action by defendants whose charges would be dismissed or never brought if the practice were unavailable. This effect is hardly an "obvious benefit" that supports the enforcement of release-dismissal bargains.

On the other hand, to the extent that the Columbus, Chicago, and Pittsburgh experiences are typical, the existence of release-dismissal bargains benefits some prospective plaintiffs at the same time that it disadvantages others. In these jurisdictions, release-dismissal agreements allow some criminal defendants to obtain a "discount" on their criminal exposure by invoking possible section 1983 actions. But they also allow prosecutors to bluff other defendants into relinquishing their civil rights claims in exchange for dismissals that would be granted in any event, and release-dismissal agreements encourage police to press charges that otherwise would not be brought so that they may trade dismissal of charges for release of civil rights liability later.⁹¹ Even in

move the pressure on police to pursue false charges."); Interview with David C. Thomas, App. I (Associate Clinical Professor, Chicago-Kent College of Law and civil rights attorney) (After the waiver practice was discontinued, more cases went to trial. Prosecutors will generally not drop charges, even if they are convinced they are not meritorious. "There are institutional pressures to pass the heat to the judge or jury."). *But cf.* Interview with Michael J. Angarola, App. I (First Assistant State's Attorney, Cook County) ("As much of a service as it may be to victims of crime, this is not what we [the prosecutors] are in business to do. We represent the interests of the people of the state of Illinois" not the victims; matters do not differ where the victim is a police officer.).

⁹⁰ Interview with Lt. Dennis Nowicki, App. I (Chicago Police Department) (history of requiring release-dismissals before dropping charges for disorderly conduct when arrest made merely to diffuse potentially violent situations); *cf.* Interview with David H. Bludworth, App. I (State Attorney, 15th Judicial Circuit, Palm Beach County) (release-dismissal practice would mean the police would be "likely to get bad arrests"); Interview with Edward Rendell, App. I (former District Attorney, Philadelphia, Pa.) (release-dismissal practice creates the impression in policeman's mind that "the best way to protect himself if he breaks the rules is to file a phony charge").

⁹¹ There may be a third effect. Prosecutors who would in fact press a case to trial in order to retain bargaining credibility in future efforts to obtain releases, as long as the releases are permitted, might drop cases if they were forbidden to take civil rights liability into account. The interviews contained a recurrent theme of pressure to push otherwise marginal cases to trial in order to protect police officers. *See, e.g.*, Interview with Armand Durastanti, App. I (Deputy Bureau Chief, Trial Division, Manhattan

these jurisdictions, therefore, the question is not simply whether release-dismissals benefit some prospective plaintiffs, but whether the benefits to those plaintiffs are worth the costs imposed on others.⁹²

It nonetheless remains true that to some extent those costs are the result of the choices made by defendants who bear them.⁹³ The *Rumery* plurality's reference to "Rumery's considered decision that he would benefit personally"⁹⁴ might be read as pointing to the importance of giving the choice of evaluating the prosecutor's probable reaction to the person most directly affected. There is a moral value, perhaps, in giving the criminal defendant a choice even if she may choose unwisely, and no one can account the benefits of avoiding the risks of prosecution more accurately than the defendant who avoids them.⁹⁵ A presumption

District Attorney's Office) (claims division encourages prosecutor to press cases involving police); Interview with Stephen Kaplan, App. I (City Attorney, Denver) ("a successful probable cause hearing helps enormously in defending a civil suit"); Interview with Carl Mangino, App. I (Assistant City Attorney, Denver) (decision to prosecute despite expectation of not guilty verdict because of interest of police officer); Interview with Janet Reno, App. I (State Attorney, Miami) (policy not to drop charges without approval of lead officer, who often seeks a release; city attorney's office seeks expanded use of releases in light of *Rumery*); cf. Interview with Douglas Whalley, App. I (Director, Criminal Division, Seattle City Attorney's Office) (policy not to require or to accept releases despite pressure from police and civil division).

It would appear that Justice Powell's plurality in *Rumery* would regard such motivations as unethical, see *Rumery*, 107 S. Ct. at 1193 n.4. (Powell, J., plurality), and they are probably unconstitutional as well, see *infra* text accompanying notes 155-71. To the extent that release-dismissal agreements are explicitly approved by the courts, it becomes more difficult for a prosecutor to resist such pressures as a matter of principle. Thus, the existence of the practice may itself increase the number of cases in which prosecutors will decline to drop cases.

⁹² There is at present no way of estimating the size of each group, but it is possible to offer some predictions as to their relative characteristics. The elimination of release-dismissal agreements would tend to result in the trial of cases in which, on balance, the factors of strength, cost, and importance of the case point toward trial. Defendants who are accused of relatively high-priority crimes, or whose defenses are relatively weaker, will benefit from release-dismissal practices more than defendants who have stronger defenses against lower-priority crimes, and whose cases are more likely to be dropped. It is far from clear that providing "discounts" to those relatively more likely to be convicted is a strong point in favor of the agreements.

⁹³ Of course, if the costs of the practice arise out of either the encouragement of arrests as a means of suppressing civil rights claims or the encouragement of prosecutors to accede to demands of police departments in prosecuting charges against civil rights claimants, these costs are not the result of the choices of defendants.

⁹⁴ *Rumery*, 107 S. Ct. at 1193 (Powell, J., plurality).

⁹⁵ Many of the standard economic defenses of allowing freedom of contract in market situations are of dubious applicability here, since the prosecutor and defendant are situated in a bilateral monopoly, with asymmetric information, and the prosecutor unilaterally sets the initial endowments with her charging decisions. One could also characterize the dangers of corrupting the administration of justice, encouraging police misconduct, and suppressing civil rights claims as "externalities." For a discussion of economic arguments regarding inalienability, see generally, Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (recognizing the role of inalienability in applying eco-

in favor of the validity of the release-dismissal agreement as a recognition of the criminal defendant's accurate evaluation of her own interests is in tension, however, with the actual role played by lawyers in the criminal justice system.

Mr. Rumery "was represented by an experienced criminal lawyer,"⁹⁶ a fact which seemed to weigh heavily in favor of the validity of the release. Release-dismissal bargains are most common, however, in cases involving relatively minor misdemeanors,⁹⁷ in which counsel, though constitutionally guaranteed before imprisonment can be imposed,⁹⁸ is often unavailable or unutilized.⁹⁹ And, as Professor Schulhofer reports, in misdemeanor courts, "even when counsel was present, informal procedures, unofficial norms, and rapid case processing remained the order of the day."¹⁰⁰ Thus, in the situation in which

conomic analysis to property and tort law); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (discussing the three explanations, economic efficiency and distributive justice, personal integrity, and sound judgment, for the paternalistic limitations that exist in the law of contracts); Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (exploring the importance of a market-inalienability and its justifications); Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985) (discussing various restrictions on ownership, transferability, or use of an entitlement and rationales for those restrictions).

⁹⁶ Rumery, 107 S. Ct. at 1193 (Powell, J., plurality).

⁹⁷ See *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 610-11 n.7, 620 P.2d 628, 633 n.7, 170 Cal. Rptr. 42, 47 n.7 (1980) ("Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers . . . will not be subjected to civil litigation" (quoting *Hoines v. Barney's Club, Inc.*, 156 Cal. Rptr. 577, 581 (Ct. App. 1978) (Scott, J., dissenting))); Interview with Robert Holmes, App. I ("never done in felony cases; only misdemeanors"); Interview with Robert Lasnik, App. I ("the process does arise in the district courts"); Interview with James Lieber, App. I ("typically at magistrate's court level").

⁹⁸ See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding that court appointed counsel is not constitutionally required for statutory offenses for which imprisonment upon conviction is authorized but not imposed); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); see also W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 11.2 (student ed. 1985) (noting that counsel is constitutionally mandated only when actual imprisonment is imposed).

⁹⁹ See M. FEELEY, *supra* note 80, at 9-10 (observing that only half of the defendants in the lower courts of New Haven, Connecticut, were represented by counsel); NAT'L INST. OF JUSTICE, *MISDEMEANOR COURTS: POLICY CONCERNS AND RESEARCH PERSPECTIVES* 325 app. B (1981) [hereinafter *MISDEMEANOR COURTS*] (in analyzing questionnaires to 220 judges in medium-sized city/suburban areas, only 27% responded that counsel was "always" present, and 69% responded that counsel was "[f]requently" present); Schulhofer, *No Job Too Small: Justice Without Bargaining in Lower Criminal Courts*, 1985 AM. B. FOUND. RES. J. 519, 520-22 (summarizing various studies of the percentage of defendants represented by counsel and the percentage of guilty pleas in the misdemeanor courts).

¹⁰⁰ Schulhofer, *supra* note 99, at 521-22; see also M. FEELEY, *supra* note 80, at 10-11 (describing the inadequate representation and summary justice meted out in the

the release-dismissal practice is most prevalent, the confidence that releases will be the result of informed legal judgments is least warranted.

Moreover, when a defendant is represented her attorney will often have both a professional predisposition and a personal interest that encourage the acceptance of the release-dismissal bargain. At the most benign level, Mr. Rumery's attorney testified that he overrode Mr. Rumery's initial inclination to reject the proposed agreement because of what he regarded as Mr. Rumery's insufficient appreciation of the risks of the criminal process.¹⁰¹ Mr. Rumery's counsel, an "experienced criminal attorney," was intimately familiar with the risks of the criminal process. He was not a civil rights lawyer. He had never filed a complaint in federal court,¹⁰² while he had obtained dismissals and acquittals on a regular basis. It would be unnatural for him not to favor the relief with which he had experience, and was sure he could obtain, rather than speculate outside of the area of his expertise regarding the possible merits of a section 1983 claim. There is an understandable tendency to want to play on one's home court and to succeed as one habitually defines success.

Defense lawyers also have an economic interest in encouraging the execution of release-dismissal agreements, which risks coloring the ad-

lower courts of New Haven); Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 139 (1986) (arguing that given a defense attorney's hearing caseload, there is little, if any, preparation made by the attorney for misdemeanor cases). The weakness of counsel as a bulwark for protecting civil rights in misdemeanor cases is often compounded by the weaknesses of the bench. See Alfani, *Understanding Misdemeanor Courts: A Review of the Literature and Recent Case Law*, in MISDEMEANOR COURTS, *supra* note 99, at 14 ("Defendants . . . are seldom represented by counsel and some are prosecuted by police officers. The judges in these courts are often non-lawyers."); Ryan & Gutterman, *Lawyer Versus Nonlawyer Town Justices: An Empirical Footnote to North v. Russell*, 60 JUDICATURE 272, 274, 276-77, 280 (1977) (nonlawyer judges comprise a significant percentage of judges in lower trial courts in many states and they "tend to tilt—slightly—the delicate standard of due process away from individual defendants;" empirical evidence suggests nonlawyer judges are more likely than lawyer judges to perceive local police to be "substantially better witnesses" and also to view prosecutors as better prepared).

¹⁰¹ See *Rumery*, 107 S. Ct. at 1200 n.8 (Stevens, J., dissenting) ("I was less, perhaps personally less willing to subject, to want to subject Mr. Rumery to the full panoply of the trial aspects of the system than he was willing to subject himself." (quoting lawyer who was prosecutor at time of Mr. Rumery's release-dismissal agreement)). Mr. Rumery's attorney also testified "I personally thought that too much of Mr. Rumery's attention was directed to the possibility of a civil action rather than what I considered to be the immediate need, which was a resolution of the criminal [19] [sic] matter, and I felt that if I had merely spoken briefly to Mr. Rumery over the phone that he would have rejected the State's offer." Joint Appendix, *supra* note 21, at 12.

¹⁰² Joint Appendix, *supra* note 21, at 18. It should be pointed out that there is nothing in the record to indicate that his lawyer tendered Rumery unprofessional advice. See *Rumery*, 107 S. Ct. at 1200 (Stevens, J., dissenting) (Rumery's "lawyer correctly advised respondent that even if he was completely innocent, there could be no guarantee of acquittal.").

vice tendered to a client. Many private defense lawyers are paid a flat rate in advance, a system that provides an incentive to avoid protracted litigation whenever possible. Commentary suggests that this system provides a substantial incentive to avoid trials.¹⁰³ Moreover, relatively few defense lawyers handle plaintiff's civil rights litigation. They thus have little economic incentive to preserve civil rights claims for they would not handle the claims if they are brought. Public defenders suffer from their own incentives to dispose of cases rapidly¹⁰⁴ and are often entirely barred from private litigation.¹⁰⁵

Thus, as the matter appears to a defendant's lawyer in the light of self-interest, the release-dismissal bargain is one that gives up a speculative cause of action, about which the lawyer may be relatively igno-

¹⁰³ See, e.g., R. NIMMER, *THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS* 42-43 (1978) (arguing that economic motivation is very important in determining the amount of time an attorney will spend on a case); Alschuler, *supra* note 58, at 1200-03 (overworked lawyers feel pressure to negotiate guilty plea to save time and expense, especially where client unable to pay trial costs); Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, *LAW & SOC'Y REV.*, June 1967, at 26, 28 ("[T]he criminal lawyer develops a vested interest of an entirely different nature in his client's case: to limit its scope and duration rather than to do battle. Only in this way can a case be 'profitable.'"); Levin, *Delay In Five Criminal Courts*, 4 *J. LEGAL STUD.* 83, 92 (1975) (Private attorney "feels that he cannot 'afford' to put much time into a case. Since his price cannot be increased, the only way he can maintain his profit margin is to keep down his costs (his time).").

Professor Alschuler has suggested that the wedge between attorneys' and clients' interests and the cursory character of legal advice tendered to defendants casts doubts on the entire practice of plea bargaining. See Alschuler, *supra* note 58, at 1313. Whether these defects render plea-bargaining unconstitutional, however, is a different question from whether, as a matter of federal common law, the federal courts should encourage the disposition of § 1983 claims in such a manner. Plea-bargaining is thought to be essential to the effective functioning of our criminal justice system, see *infra* text accompanying note 168, while over half of the jurisdictions surveyed regarded the release-dismissal practice as impermissible, and less than a third used it extensively, see *supra* text following note 58, Apps. I & II.

¹⁰⁴ For public defenders, the pressure of a staggering caseload exerts similar pressures to dispose of cases quickly, see, e.g., Alschuler, *supra* note 58, at 1254 ("A public defender who strives to 'keep current' must inevitably enter guilty pleas for most of his clients . . ."), although the public defender's office may be institutionally more sensitive to the broader costs of suppressing civil rights claims, cf. Interview with Susan B. Lindenauer, App. I (N.Y. Legal Aid Bureau is not a party to release-dismissal agreements because of their long-term impact on the justice system and because they are not in the interest of the client.).

¹⁰⁵ See, e.g., NATIONAL STUDY COMM'N ON DEFENSE SERVS., *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* 196-97 (1976) (stating that public defenders should be prohibited from engaging in the private practice of law); 1985 OHIO PUB. DEFENDER COMM'N ANNUAL REPORT 17 (1985) (specifying that one branch office of the Ohio Public Defender undertook "representation of indigent involving cases in the areas of felonies, misdemeanors, ordinances, probation revocation, juvenile, family/nondelinquent, involuntary commitment [sic], appeals and other miscellaneous matters").

rant, and from which he cannot profit, in exchange for the inexpensive achievement of short-run client satisfaction. The criminal lawyer is engaged to win a dismissal of charges, and the agreement allows her to accomplish that task without undue expenditure of time or effort.¹⁰⁶

There is thus substantial room for doubt that approval of release-dismissal agreements facilitates the knowing and intelligent disposition of the criminal defendant's civil rights claims in accordance with her self-interest. The best that can be said is that it benefits some defendants at the same time that it disadvantages others. And those benefits, the *Rumery* court recognized, come at a cost to society.¹⁰⁷

B. "Unjust Claims"

The plurality in *Rumery* suggested that release-dismissal agreements could be defended from an entirely different perspective. As well as claiming that releases benefit individual defendants or provide them with an opportunity to exercise autonomy, the plurality envisioned the releases as a method of screening out section 1983 actions that would otherwise impose unwarranted costs on public defendants.

Many [section 1983 suits] are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. . . . To the extent release-dismissal agreements protect public officials from the burdens of defending such unjust claims, they further this important public interest.¹⁰⁸

¹⁰⁶ See, e.g., Interview with Michael Avery, App. I ("most criminal lawyers have little or no knowledge of the implications" of a dismissal for civil rights actions); Interview with Kathleen Roberts, App. I (criminal defense attorneys "do a volume business"); Interview with David C. Thomas, App. I (release-dismissal practice allowed defense attorneys "to charge a fee and still get easy acquittals"); Trowbridge, *supra* note 17, at 43 n.9 (either the client can accept the offer from the prosecution to end case, or the defense lawyer is forced to "invest more time in the case with no assurance that there will be an additional fee"); see also Interview with Robert Lasnik, App. I (defendants' attorneys do not worry about civil rights claims). As one defense lawyer has stated:

Most of us who would be interested in suits against the police do criminal defense work. Plea bargaining with the D.A. is a large part of the practice. If you sue the police, you sue the D.A. It's that simple. You've cut your own throat. Your ability to plea bargain has been cut in half.

R. SULNICK, CIVIL LITIGATION AND THE POLICE: A METHOD OF COMMUNICATION 97 (1976) (quoting a defense lawyer).

¹⁰⁷ See *supra* text accompanying notes 41-42; *infra* notes 155-292 and accompanying text.

¹⁰⁸ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality). Justice O'Connor likewise acknowledged "[c]ertainly some § 1983 litigation is meritless, and the inconvenience and distraction of public officials caused by such suits is not inconsiderable." *Id.* at

In *Rumery*, the plurality read the trial court's findings as giving "little credence" to Mr. Rumery's version of the events leading up to his arrest.¹⁰⁹ Implicitly, the plurality accepted the characterization of Mr. Rumery's particular claim as nonmeritorious. The release, therefore, was simply an expeditious means of arriving at the result that ultimately should have been reached at trial. If one is to generalize from this conclusion, however, there must be some reason to expect that claims barred by release-dismissal agreements are peculiarly likely to be "unjust."¹¹⁰ Otherwise the release-dismissal practice would be no more effective at reducing the incidence of "unjust" claims than a procedure that invalidated a similar percentage of section 1983 actions at random.

To justify the release-dismissal practice as a means of screening out "unjust claims," therefore, the courts must rely on some prediction that the agreements themselves are particularly likely to be signed in cases in which the civil rights claim is without merit. They could believe that the class of cases where bargains are possible is particularly likely to be frivolous, that the cases in which the releases are actually sought are particularly prone to frivolity, or that the bargains are accepted disproportionately in frivolous cases. None of these beliefs seems to correspond to reality.

The release-dismissal agreements often arise from arrests or criminal charges. But there is no reason to think that section 1983 actions growing out of arrest situations are by definition disproportionately frivolous. Frivolous cases clearly exist in the police area.¹¹¹ The federal

1196 (O'Connor, J., concurring in part and in the judgment).

¹⁰⁹ See *id.* at 1195 n.8 (Powell, J., plurality).

¹¹⁰ In a footnote, the *Rumery* plurality responded to the dissent's claim that Mr. Rumery must be presumed innocent with the statement that since "[t]his is a civil case . . . Rumery bears the ultimate burden of proof." *Id.* at 1195 n.8 (Powell, J., plurality). It is conceivable that the implication of the Court's comment is that a sufficiently strong showing of merit in a § 1983 action would invalidate the release. Footnote 8, alternatively, could be read as making the "innocence" of the civil rights plaintiff the determining factor in the enforceability of the release, because the demand of any consideration for dismissal of a case against an innocent citizen would be without a "legitimate prosecutorial purpose." In either event, the comment that "Rumery bears the ultimate burden of proof," suggests that there is some showing that could meet this burden. If the release simply serves to trigger an inquiry into the facts of the underlying cause of action, however, it is difficult to see how the agreement serves to reduce the burdens of defending civil rights suits.

¹¹¹ Government lawyers tend to report a high rate of frivolous cases against police. See, e.g., Interview with Kimberly A. Reily, App. I (there are too many frivolous cases); Interview with Janet Reno, App. I (police officers think that civil suits are a major problem). On the other hand, what little empirical data exists suggests a large stock of meritorious cases. Professor Eisenberg's study of Los Angeles civil rights cases in 1975 and 1976 found that defendants prevailed either by motion or at trial in the disposition of 41% of cases involving claims of false arrest, excessive force, improper

courts, however, have seen their share of arrests associated with legitimate complaints of constitutional violations,¹¹² and field studies suggest that a major determinant of the police decision to arrest is simply an

search, seizure, and police harassment, in contrast to a defendant's success rate of 68% in nonpolice cases brought under § 1983. See Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 550-51 (1981). This is consistent with the later results in T. EISENBERG & S. SCHWAB, *CONSTITUTIONAL TORT LITIGATION IN THREE DISTRICTS, THE GOVERNMENT AS DEFENDANT, AND COUNSEL'S INCENTIVES* 15, 25 (Stanford Law School Law and Economics Program Working Paper No. 34, 1987) (In an intensive survey of 1980-1981 filings in the Central District of California, the Eastern District of Pennsylvania, and the Northern District of Georgia, nonprisoner constitutional tort plaintiffs were successful in 45% of the cases filed, while such actions were successful in 57% of the actions filed against police.); Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 690 (1987) (police misconduct cases have "significantly greater chance of success" than other § 1983 cases); Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 790 (1979) (defendants prevailed either at trial or by dismissal without settlement in 42% of police misconduct cases resolved in federal district courts in Connecticut between January 1, 1970, and September 1, 1977).

¹¹² See, e.g., *City of Riverside v. Rivera*, 106 S. Ct. 2686, 2689 (1986) (police broke up party that was not creating a disturbance, without a warrant, with tear gas and with "unnecessary physical force"); *Rizzo v. Goode*, 423 U.S. 362, 366-67 (1976) (trial court found a pattern of illegal and unconstitutional police mistreatment of minority citizens); *Spell v. McDaniel*, 824 F.2d 1380, 1392 (4th Cir. 1987) (police assault on arrestee at police station necessitated surgical removal of ruptured testicles; appeals court affirmed jury verdict of municipal liability on the basis of testimony supporting "a picture of a police department whose members were either positively encouraged by training and deliberate cover-up to engage in uses of excessive force . . . or were tacitly encouraged . . . by the deliberate failure of responsible municipal officials . . . to halt the widespread, known practices"); *Patzner v. Burkett*, 779 F.2d 1363, 1366 (8th Cir. 1985) (paraplegic unconstitutionally arrested in home without warrant on charge of drunk driving, handcuffed, and dragged across the ground to police car); *Dennis v. Warren*, 779 F.2d 245, 247 (5th Cir. 1985) (plaintiff arrested without arrest warrant and then illegally detained under civil summons regarding child support matter); *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.); *Webb v. Hiykel*, 713 F.2d 405, 407 (8th Cir. 1983) (suspect arrested for armed robbery beaten by five or six police officers at police station who kicked him, stepped on his hand, and dropped him from three feet above a concrete floor); *Black v. Stephens*, 662 F.2d 181, 183 (3d Cir. 1981) (police officers used excessive force and then filed three unwarranted charges against plaintiff); *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); *Linn v. Garcia*, 531 F.2d 855, 860 (8th Cir. 1976) (police officer used "excessive physical force" in arresting plaintiff for misdemeanor offenses although arrest was justified); *Clark v. Ziedonis*, 513 F.2d 79, 80 (7th Cir. 1975) (police officer shot 13 and 14 year-old suspects while arresting them for an alleged entry in progress); *Beightol v. Kunowski*, 486 F.2d 293, 294 (3d Cir. 1973) (plaintiff arrested while free on bail solely so that arresting offices could obtain fingerprints and mug shot); *Joseph v. Rowlen*, 402 F.2d 367, 368 (7th Cir. 1968) (plaintiff arrested and detained without warrant or probable cause); *Morgan v. Labiak*, 368 F.2d 338, 339 (10th Cir. 1966) (plaintiff beaten by police following arrest for disturbing the peace).

attitude of defiance toward police officers.¹¹³ Similarly, there are recurring reports of situations in which police officers who have abused citizens file "cover charges" as a means of justifying the violence they have

¹¹³ See, e.g., Council of Orgs. on Philadelphia Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289, 1317-18 (E.D. Pa. 1973) ("From the record as a whole, it is impossible to avoid the conclusion that in the absence of probable cause for arrest . . . individuals who question or protest the initial police contact [are likely to be detained]. It is apparent from this record that a substantial number of policemen genuinely believe . . . that a person who questions . . . police conduct, or refuses to cooperate with the police should expect to be inconvenienced, or worse . . ."), *aff'd*, 506 F.2d 542 (3d Cir. 1974), *rev'd on other grounds sub nom.* Rizzo v. Goode, 423 U.S. 362 (1976); D. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 36, 169-72 (1980) (criticism of police in a face-to-face encounter is handled as a fairly serious crime); M. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 196, 198 (1981) (observing police use of "attitude test" and noting that "[o]utright defiance of police authority will usually, but not always, result in an arrest" because "the implicit assumption is that a person should *never* question the authority of the police or what they are doing"); P. CHEVIGNY, *POLICE POWER, POLICE ABUSES IN NEW YORK CITY* 136 (1969) ("The one truly iron and inflexible rule we can adduce from the cases is that any person who defies the police risks the imposition of legal sanctions, commencing with a summons, on up to the use of firearms. . . . The police may arrest *anyone* who challenges them (as they define the challenge), but they are more likely to further abuse anyone who is poor, or who belongs to an outcast group."); W. WESTLEY, *VIOLENCE AND THE POLICE* 126-27 (1970) (police tend to believe that use of force is called for when police are treated in a derogatory fashion); Van Maanen, *The Asshole, in POLICING: A VIEW FROM THE STREETS* 228 (P. Manning & J. Van Maanen eds. 1978) (describing escalating responses to "challenge[s] to the policeman's authority, control, and definition of the immediate situation"; categorization of the citizen as an "asshole" justifies physical harassment and arrest); Wordon & Pollitz, *Police Arrests in Domestic Disturbances: A Further Look*, in NAT'L INST. OF JUSTICE, *UNDERSTANDING POLICE AGENCY PERFORMANCE* 77, 85 (1984) ("Previous research has demonstrated that disrespectful behavior increases the probability of arrest in police-citizen encounters. Our analysis shows that this finding holds for domestic disturbances." (citations omitted)); Black, *The Social Organization of Arrest*, 23 STAN. L. REV. 1087, 1097-104, 1108 (1971) (probability of arrest increases when suspect is disrespectful toward police); Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63, 75 Table 6 (1970) (higher probability of arrest for unusually disrespectful juveniles); Lundman, *Routine Police Arrest Practices: A Commonweal Perspective*, 22 SOC. PROBS. 127, 134 (1974) (impoliteness or noncompliance significantly correlated with arrest for drunkenness); Sherman, *Causes of Police Behavior: The Current State of Quantitative Research*, 17 J. RES. CRIME & DELINQ. 69, 81 (1980) (at least eight studies conclude that disrespectful suspects are more likely to be arrested); Smith & Fisher, *Street-Level Justice: Situational Determinants of Police Arrest Decisions*, 29 SOC. PROBS. 167, 170, 172, 175 (1981) ("[a]ntagonistic suspects . . . offer a direct challenge to police authority and police respond with a higher incidence of arrests in these encounters"); Smith & Klein, *Police Control of Interpersonal Disputes*, 31 SOC. PROBS. 468, 472, 479 (1984) (police more likely to arrest antagonistic offenders who questioned their authority or legitimacy); see also Friedrich, *Police Use of Force: Individuals, Situations, and Organizations*, 452 ANNALS 82, 94-95 (1980) (disrespectful manner significantly increases likelihood of being subject to force by police).

Many of these studies are based on field research during the 1960s, and it is possible that the generation of police officers entering the streets now are more tolerant of citizens "disrespectfully" asserting their rights. I have been able to find no studies that support this possibility.

perpetrated.¹¹⁴

If the section 1983 claims likely to be extinguished by release-dismissal agreements are not by their nature disproportionately frivolous, neither can it be said that the releases are selectively invoked by prosecutors in a "frivolous" subset of cases. A majority of the *Rumery* Court apparently believed that prosecutors seek release-dismissal agreements in cases where they accurately judge the civil rights claim to be meritless. The plurality emphasized the "independence of judgment" of the prosecutor,¹¹⁵ and Justice O'Connor adduced cases where "prosecutors . . . legitimately believe that . . . police properly defused a volatile situation by arresting a minor misdemeanor."¹¹⁶ The image at the root of the majority's analysis seems to be that of a prosecutor who fairly evaluates the merits of potential civil rights claims, and demands releases only in cases properly deemed frivolous. But this approach probably does not characterize the bulk of release-dismissals.

Two of the offices that admitted using release-dismissal agreements maintain that they seek such bargains only in what they believe to be frivolous civil rights claims.¹¹⁷ On the other hand, the State's At-

¹¹⁴ See, e.g., *Rizzo*, 357 F. Supp. at 1316 (during 1968-1970, in "2,709 cases filed in Philadelphia which included charges of resisting arrest or assault and battery on a police officer," 78% of defendants were exonerated); M. AVERY & D. RUDOVSKY, *POLICE MISCONDUCT, LAW AND LITIGATION* 8-5 (2d ed. 1987) ("In almost every case of police abuse, 'cover charges' will be placed against the victim in order to protect the offending officer."); P. CHEVIGNY, *supra* note 113, at xiv, 141-46 (false charges by police are pervasive and frequently used to cover street abuse); G. COLE, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 255 (1986) (reporting finding of standard practice in Philadelphia to lodge charge of resisting arrest or disorderly conduct against anyone who accused police of brutality); W. McDONALD, H. ROSSMAN & J. CRAMER, *POLICE-PROSECUTOR RELATIONS IN THE UNITED STATES FINAL REPORT* 243 (1981) [hereinafter *POLICE-PROSECUTOR RELATIONS*] ("Assault on Police Officer" often provided for focus of "overcharging" disagreements between police and prosecutor); U.S. CIVIL RIGHTS COMM'N, *WHO IS GUARDING THE GUARDIANS: A REPORT ON POLICE PRACTICES* 68 (1981) (reporting that in Philadelphia, investigations of civilian complaints are often dropped following the arrest of the complainant); Manning, *Lying, Secrecy and Social Control*, in *POLICING: A VIEW FROM THE STREET* 249 (P. Manning and J. Van Maanen eds. 1978) (describing police officers use of internal lies to cover up what they perceive as mistakes); Hudson, *Police-Citizen Encounters That Lead to Citizen Complaints*, 18 *SOCIAL PROBLEMS* 179, 191 (1970) (62% of complainants to Philadelphia Police Review Advisory Board had been arrested); cf. Reiss, *Police Brutality—Answers to Key Questions*, *TRANSACTION*, July-Aug. 1968, at 10, 18 (reporting study in 1966 of Boston, Chicago, and Washington, D.C., police departments in which 60% of cases of application of excessive force by police, as a result of "open defiance," result in arrests).

¹¹⁵ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality).

¹¹⁶ *Id.* at 1196 (O'Connor, J., concurring in part and in the judgment). Justice Stevens, by contrast, noted that it is precisely the most "meritorious" cases which generate the greatest pressure on prosecutors to seek a release. *Id.* at 1201-02 (Stevens, J., dissenting).

¹¹⁷ See Interview with Ronald Fields, App. I (Prosecuting Attorney, Twelfth Ju-

torney of Dade County, Florida, does not negotiate for the dropping of a charge without the approval of the lead arresting officer, who often attempts to obtain a release. The State's Attorney only refuses to seek a release in the case of an "innocent victim." Her office pursues releases in cases in which there is probable cause, but not "reasonable probability of proof beyond reasonable doubt," or where in the judgment of the prosecutor there is a false civil rights claim.¹¹⁸ A fourth prosecutor's office, in King County, Washington, which includes Seattle, consults the police before any dismissal, and "tr[ies] to protect" the police if there is not enough evidence to reach court; releases are regarded as inappropriate in "high profile situations" or cases where there is "real police brutality."¹¹⁹ The Pima County Attorney, in Tucson, Arizona, similarly, seeks a release if the office is approached by a law enforcement agency "because the individual is a troublemaker." The office only seeks releases regarding police conduct that is linked to the validity of the arrest. Excessive force charges are not within the legitimate scope of release agreements.¹²⁰

Two other offices countenance the practice as a means of accommodating police. The criminal division of the Columbus, Ohio, City Attorney's office endeavors to obtain form releases in assault, resisting arrest, and petit theft cases whenever the prosecuting witness, who is the police officer in resisting arrest and assault of officer cases, requests it.¹²¹ In Allegheny County, the jurisdiction that includes Pittsburgh, Pennsylvania, release-dismissal negotiations are entirely delegated to the arresting officer, the police legal advisor, and the city solicitor, who defends the city in civil rights actions. The District Attorney, whose jurisdiction contains 114 municipalities that have their own form releases, acts only as an advisor and acquiesces in the municipal police

dicial District of Arkansas) (the practice is most appealing in "frivolous" 1983 actions, and he can only remember five or six occasions in 14 years when this was done); Interview with Paul Shechtman, App. I (Special Assistant, Manhattan District Attorney's Office) (responding to Robert Holmes' statement that "we will not do it where there is a serious allegation of a constitutional violation," by interpreting such an allegation as a "colorable claim," but commenting that a release will be sought when "conduct is about even" between the police and the citizen). *But cf.* Interview with Robert Holmes, App. I (Deputy Chief, Trial Division, Manhattan District Attorney's Office) ("We try to avoid it when we can," however, the practice is often used in misdemeanors "where there was a misunderstanding on both sides.").

¹¹⁸ Interview with Janet Reno, App. I (There is no distinction made between false arrest claims, in which probable cause would render a civil rights action meritless, and excessive force claims, where probable cause for the arrest is only marginally relevant.).

¹¹⁹ Interview with Robert Lasnik, App. I (In these two situations, it would not be appropriate to link civil disposition to criminal liability.).

¹²⁰ Interview with Stephen Neely, App. I.

¹²¹ Interview with James Fais, App. I (estimating that 50-75 releases per year are requested).

decision except in cases in which the alleged abuse resulted in serious injury or was so egregious as to warrant criminal investigation.¹²² Similarly, before being discontinued in Chicago, Philadelphia, Rochester, and Denver, the prosecutors' offices regularly sought releases in cases in which a civil rights action might be brought against the police.¹²³

In most of the situations in which prosecutors reported seeking releases, they did not use the practice to weed out marginal or frivolous civil rights cases. The agreement was often invoked to accommodate and to routinely protect police and municipalities. This experience should not be surprising. While the police and prosecutors experience a mutual "traditional antagonism" due to differing roles and priorities,¹²⁴ police and prosecutors feel themselves to be a part of the same enterprise.¹²⁵ There is a tendency on the part of prosecutors, therefore, to

¹²² See Interview with Claire Capristo, App. I (explaining this practice in the seeking of releases); Interview with Robert Colville, App. I (district attorney usually will accede to the police officer's wishes).

¹²³ See Interview with Edward Rendell, App. I (In Philadelphia, Rendell changed this policy because the practice served to "shield the police" from charges of misconduct.); Interview with John Palermo, App. I (Until 1983, Denver's City Attorney required a release as a matter of course if the charges were dropped.); Interview with Carl Mangino, App. I (After the publication of a local ethics opinion, the practice was eliminated in Denver.); Interview with Howard R. Relin, App. I (explaining changes in Rochester after practice was discontinued); Interview with David C. Thomas, App. I (In Chicago, it was formerly standard practice to drop criminal charges in exchange for a signed release form when a police officer assaulted a citizen.); Interview with Matthew J. Piers, App. I ("It was an effective tool for the powerless person [in Chicago] to obtain bargaining leverage in criminal prosecution."); see also *Boyd v. Adams*, 513 F.2d 83, 85 n.1, 88-89 (7th Cir. 1975) (reproducing form releases used in Chicago and emphasizing the practice of exchanging releases for dismissal); *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir.) (quoting California prosecutor's statement that "[n]ormally a defendant will stipulate to probable cause, and there is only one reason, let's face it, for that stipulation, so that the defendant cannot sue the police department. This particular defendant would not stipulate to probable cause, which made it obvious, at least, there was an inference drawn, that perhaps here is a defendant that does have in mind suing the police department. . . . It seems to me that it is the duty of the Deputy District Attorney, in addition to prosecuting criminals, to protect the police officers . . ."), *cert. denied*, 400 U.S. 852 (1970).

¹²⁴ POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 67 ("police are more sympathetic to . . . pressures for crime control whereas prosecutors are more sympathetic to the requirements of the rule of law").

¹²⁵ See J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 116 (1980) (Police and prosecutor "have adjusted to one another's operations and objectives and operate in a state of relative harmony and accommodation. This is possible simply because the state of symbiosis demands it."); L. KATZ, *JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES* 104 (1972) ("In most cities a fine relationship exists between the police and the prosecutor's office."); POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 144 ("The main mechanisms of coordination and cooperation between police and prosecutors are: informal social structures; exchange relationships; and selected formal structures."); D. NEUBAUER, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 142 (1979) (police and prosecutors perceived as members of same team); McIntyre, *Impediments to Effective Police-Prosecutor Relationships*, 13

regard a threatened civil rights complaint as an attack on a member of "their team."

Prosecutors, moreover, depend on police for the investigation that makes individual prosecutions viable. Without the cooperation and good will of the police, a prosecutor cannot succeed.¹²⁶ At times, the unavoidable conflicts between the police and prosecutor in other areas can be mitigated by seeking those release-dismissal agreements that do not adversely affect the prosecutor's goals. We can expect that the prosecutor will give such a police request more serious consideration than she will to the speculative merits of a hypothetical civil rights action, which she lacks the resources to investigate in any event.¹²⁷

These tendencies are, of course, accentuated when offenses are in

AM. CRIM. L. REV. 201, 227 (1975) ("[P]olice and prosecutors enjoy a relationship that, in many respects, is harmonious."); *see also* POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 144 ("informal social structures" and "exchange relationships" are major mechanisms of coordination between police and prosecutors); *id.* at 120-22 (describing "social structure based on friendship ties between police and prosecutors").

¹²⁶ *See, e.g.*, G. COLE, CRIMINAL JUSTICE: LAW AND POLITICS 173 (1972) (prosecutor is "dependent upon the police for inputs to the system of cases and evidence"); NAT'L INST. OF JUSTICE, BASIC ISSUES IN POLICE PERFORMANCE 53 (1982) ("The prosecutor depends heavily on police for information crucial to case disposition."); POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 132-33 (Prosecutors are often reluctant to criticize police even internally; for example, a police administrator stated that "D.A.'s depend on detectives for information. They need them. Therefore, they feel they can't criticize them" and only former police officers can "get away with" serious criticism.); U.S. CIVIL RIGHTS COMM'N, *supra* note 114, at 103 ("It is well recognized that on a day-to-day basis, district attorneys must work very closely with and rely heavily on the police in the prosecution of . . . criminal cases. It is argued that this necessary dependence makes it difficult for district attorneys to impartially investigate and prosecute police for alleged wrongdoing."); P. UTZ, SETTLING THE FACTS 26-27 (1978) ("Prosecutors have an interest in maintaining the good will and cooperation of the police in investigating cases and compiling evidence adequate for successful criminal prosecution. Consequently, prosecutors have to justify their decisions to police, and become highly sensitive to the police point of view.").

¹²⁷ *Cf.* M. FEELEY, *supra* note 80, at 46 (The police liaison officer "[a]t times . . . intercedes in a case to press the prosecutor to take a hard line. These cases usually involve incidents in which there was an injury or insult to the arresting officer, and in such instances the prosecutors will usually oblige with a recommendation for higher bond or a reluctance to drop the charges."); P. HEALY, NATIONAL PROSECUTOR SURVEY 116 (1977) (44.4% of prosecutors consult police in cases involving plea bargaining); POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 123-25 (exchange of "public image and honor" for future cooperation common method of coordination between police and prosecutor); P. UTZ, *supra* note 126, at 110 ("Similarly, the D.A. must be mindful of his dependency on the continued collaboration and good will of the police." [citing a situation in which a suspicious case was refiled after dismissal] "Pressed to explain its real reason for pushing such a weak case, the prosecution confessed 'the heat was on.' Because the officer, whose search was in question, had later become a hero killed in the line of duty, the police had conveyed that a dismissal—tantamount to a D.A.'s refusal to accept the officer's word over the suspect's—would constitute a break in the ranks of the law enforcement. The case was taken to trial and the D.A. lost."). For sources discussing the constraints on the ability of prosecutors to investigate, see *infra* note 216.

fact prosecuted by the police officers themselves. Thus, in Allegheny County, Pennsylvania, where police officers initially prosecute many misdemeanor complaints, the District Attorney, who believes that the releases are legally unenforceable, defers to the decisions of the police to request releases, except in cases of serious injury.¹²⁸ While atypical, police prosecution is not uncommon. In one national survey of 660 misdemeanor Court judges, 12% reported that a prosecuting attorney infrequently or never conducted the trial of misdemeanor defendants.¹²⁹

More prevalent is the situation in which the same office that prosecutes the offenses for which releases are sought will defend the civil rights action if the releases are not obtained. In a 1977 nationwide survey of 1136 prosecutors, 48.4% reported that they had responsibility for representing local governments in damage and injunctive actions.¹³⁰ While this civil representation may consist only of counseling county agencies that have limited law enforcement responsibilities,¹³¹ it is a relatively common pattern for prosecution of misdemeanors, including prosecution of resisting arrest and assault cases, to be vested in the city attorney's office, which represents the police department in civil rights cases.¹³² Such offices are duty bound to protect the municipalities they

¹²⁸ See Interview with Claire Capristo, App. I (the district attorney will acquiesce in the police officer's decision); Interview with Robert Colville, App. I (the district attorney will usually follow the police officer's decision); Interview with James Lieber, App. I (in misdemeanor cases, the initial prosecution is undertaken by the police officers). Even a legally ineffective release serves the purpose of deterring suit, since unsophisticated defendants often do not realize their actual rights. See *infra* note 238 and accompanying text.

¹²⁹ MISDEMEANOR COURTS, *supra* note 99, at 325 app. B; see also W. LITRELL, CONSTRUCTING CRIME: POLICE AND PROSECUTOR'S MANAGEMENT OF THE CHARGING PROCESS 25 (1974) (Ph.D. dissertation) (misdemeanor cases presented in New Jersey by municipal prosecutors or police officers); Doan, *Case Study of a Management Innovation in a Misdemeanor Court*, in MISDEMEANOR COURTS, *supra* note 99, at 160, 162 (availability of prosecution services in Minnesota misdemeanor courts is limited). This is consistent with the results reported in P. HEALY, *supra* note 127, at 101 (In 13.6% of the cases, police selected the witnesses for the initial hearings in misdemeanor cases.).

¹³⁰ P. HEALY, *supra* note 127, at 33 (48.4% of prosecutors have responsibility over noncriminal cases); see NAT'L INST. OF JUSTICE, POLICY AND PROSECUTION 71 (1982) (51% of surveyed prosecutors had civil jurisdiction).

¹³¹ This was the case in Fort Smith, see Interview with Ronald Fields, App. I, in Tucson, see Interview with Stephen Neely, App. I, and in King County, see Interview with Robert Lasnik, App. I, where prosecutors request releases. This also occurred in Chicago, see Interview with Michael J. Angarola, App. I, in Waukegan, see Interview with Fred L. Foreman, App. I, and in Maricopa County, see Interview with Hugo Zettler, App. I, where prosecutors decline to request such agreements.

¹³² See Interview with John Palermo, App. I (Denver City Attorney's office supervised misdemeanor prosecutions); Interview with James Fais, App. I (City Attorney's office in Columbus defends police officers civilly if sued for actions within the scope of duty); Interview with Douglas Whalley, App. I (the Seattle City Attorney handles defense of city in cases of police abuse).

serve. To rely on their evaluation as a basis for the belief that release-dismissal agreements achieve just results seems at best dubious.

The problem is exemplified by the history of release-dismissal agreements in the 15th Judicial District in Florida. Until 1975, misdemeanor charges were prosecuted by attorneys employed by the local municipalities who operated from the same office as city attorneys. The municipal prosecutors regularly requested form releases for the benefit of municipal police officers.¹³³ In 1975, when court reform vested most prosecutorial power in the state attorney with county-wide jurisdiction, that state attorney, who owed no allegiance to particular municipalities, disapproved the release practice.¹³⁴ However, in the sole municipality that retains control of misdemeanor prosecutions, release-dismissal bargains continue to be the norm.¹³⁵ It is possible that some peculiar "legitimate prosecutorial interest" is operative in Riviera Beach, but not elsewhere in the Palm Beach area. It seems more probable, however, that release-dismissal agreements are retained simply as a means of protecting the municipal prosecutor's client against section 1983 claims that could cost the taxpayers money, both in legal expenses and in verdicts.

This is not to say that it is impossible for fair-minded prosecutors to endeavor to distinguish frivolous from meritorious section 1983 claims against police and to strive to invoke release-dismissal agreements only in the former cases. In most jurisdictions that admitted using the practice, however, this is not the way the practice evolved, and a "realistic appraisal of psychological tendencies and human weakness"¹³⁶ counsels against relying on the expectation that it will be so invoked in the future.¹³⁷

¹³³ Interview with George Barrs, App. I (waivers were particularly prevalent in the case of an arrestee who had been beaten by police).

¹³⁴ *Id.* (before 1975, releases accomplished with form waivers were the regular practice); Interview with David H. Bludworth, App. I (noting his refusal to allow release-dismissal agreements in his office).

¹³⁵ Interview with George Barrs, App. I (Riviera Beach police officers still seek a form release from the district attorney).

¹³⁶ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (discussing the risk of bias in adjudication); see also *Marshall v. Jerrico*, 446 U.S. 238, 253 (1980) (quoting *Withrow*).

¹³⁷ In *Democracy in America*, Alexis De Tocqueville commented:

It is hardly necessary to say that in a free country like America all the citizens have the right of indicting public functionaries before the ordinary tribunals, and that all the judges have the power of convicting public officers.

. . . [The Americans and English] do not regard the impeachment of the principal officers of state as the guarantee of their independence. But they hold that it is rather by minor prosecutions, which the humblest citizen can institute at any time that liberty is protected"

Finally, the courts cannot rely on an assumption that defendants will accept release-dismissal agreements primarily to discuss legally meritless cases. Many defendants in the misdemeanor cases in which the release-dismissal practice is most prevalent are uncounseled, many criminal defense counsel are not knowledgeable about civil rights litigation, and criminal defense counsel have a series of professional and personal incentives to accept release-dismissal agreements regardless of the merits of civil rights claims.¹³⁸ Moreover, even a perfectly counseled defendant deciding whether to accept a release-dismissal agreement must take into account not only the legal merits of her civil rights claim, but the magnitude of her possible civil rights recovery, the merits of the criminal charge pending against her, the severity of the penalties associated with the criminal charges, and the monetary and psychological costs of a criminal trial. There is little reason to believe that the balance among these factors will result in defendants acceding to release-dismissal requests primarily in cases in which the civil rights claim is meritless. As Justice O'Connor observed, "[t]he risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated."¹³⁹

C. "Rough Justice"

It cannot be said that release-dismissal practices regularly work to the benefit of the criminal defendant. They constitute an unreliable mechanism, both in theory and practice, for screening out civil rights claims in which "the risk of ultimate liability is negligible."¹⁴⁰ Justice O'Connor's concurrence, however, intimates a third "interest" that

1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 107-08 (P. Bradley ed. 1945) (1st ed. 1835). Noting that the French system required that the council of state issue a decree before government agents could be brought to trial, he observed, "[w]hen I showed [the Americans and the English] that the citizen who has been injured by an order of the sovereign is obliged to ask the sovereign's permission to obtain redress, they refused to credit so flagrant an abuse and were tempted to accuse me of falsehood or ignorance." *Id.* at 108-09.

The tort action has succeeded the role of private prosecution in America in calling government functionaries to account in the courts. De Tocqueville's skeptical opinion of a system that allows one administrative functionary to determine whether a citizen will be permitted to obtain redress against another remains as relevant to the new system as the old.

¹³⁸ See *supra* notes 96-105 and accompanying text.

¹³⁹ *Rumery*, 107 S. Ct. at 1196 (O'Connor, J., concurring in part and in the judgment). Nor is it plausible that the overworked judges in misdemeanor courts will undertake sufficient unilateral investigations to act as sufficient guarantors that primarily meritless cases will be waived. For descriptions of misdemeanor courts, see sources cited *supra* note 100 and accompanying text.

¹⁴⁰ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality).

might militate in their favor. Citing the California Supreme Court's opinion upholding pretrial release-dismissal agreements involving police officers, Justice O'Connor commented that "[s]paring the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement."¹⁴¹

As Justice O'Connor articulates it, this interest can be accomplished without release-dismissal agreements. The community can "spare itself" the expense of a criminal trial by simply dropping the charges. Nonetheless, the passage cited by Justice O'Connor goes on to suggest an additional aspect that militates in favor of release-dismissal agreements. While the balance of public concern may tip against prosecution, "[a]t the same time, it is reasonable to seek to protect the arresting officer . . . from the burden of civil litigation" ¹⁴² The California Supreme Court concluded that "[i]n requiring a release from the accused . . . the state accomplishes both the imposition of the bargained-for disability and the protection of those it reasonably deems to be innocently involved."¹⁴³ The net result, therefore, is the correct one; the release-dismissal agreement achieves a rough substantial justice.

Two rationales may support this claim of "rough justice." First, in situations where the facts seem clear but both the criminal defendant and the arresting officer violate the law—as in a legitimate arrest carried out with excessive force—a prosecutor may believe that "the conduct is about even."¹⁴⁴ According to this reasoning, community interests are best served if both sides simply go home, defusing the situation, rather than pushing it to a legal resolution that would reopen antagonisms.¹⁴⁵

¹⁴¹ *Id.* at 1196 (O'Connor, J., concurring in part and in the judgment) (citing *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 620 P.2d 628, 170 Cal. Rptr. 42 (1980)).

¹⁴² *Hoines*, 28 Cal. 3d at 610 n.7, 620 P.2d at 633 n.7, 170 Cal. Rptr. at 47 n.7 (quoting *Hoines v. Barney's Club, Inc.*, 156 Cal. Rptr. 577, 581 (Ct. App. 1979) (Scott, J., dissenting)).

¹⁴³ *Id.* at 612-13, 620 P.2d at 634, 170 Cal. Rptr. at 48.

¹⁴⁴ Interview with Paul Shechtman, App. I. It is not uncommon for internal police investigations of allegations of police brutality to adopt a similar "clean hands" doctrine, exonerating officers of complaints filed by "guilty" suspects. See U.S. CIVIL RIGHTS COMM'N, *supra* note 114, at 65 ("Both homicide investigations of police shootings and IAD [Internal Affairs Division] investigations of civilian complaints of police brutality devote much attention to the victim's wrongdoing."); *id.* at 68-69 (arrest of the victim clears the complaint).

¹⁴⁵ This view of the criminal process as dispute-resolution, which seems to lie behind both Justice O'Connor's opinion and *Hoines*, is characteristic of misdemeanor courts. See M. FEELEY, *supra* note 80, at 283 ("Court officials rarely do focus precisely on formal distinctions between guilt and innocence Rather, they tend to respond directly to the incident and the defendant; they feel their primary task is not to prove or

The second rationale is illustrated by situations in which the prosecutor is confronted with conflicting stories regarding an alleged incident of police misconduct and may be genuinely unsure as to who to believe. If the police officer's story is the truth, the accused "deserves" to be punished, and the officer does not "deserve" civil liability. Conversely, if the arrestee's account is correct, the "right" outcome would require that the citizen be set free and the officer held liable. Given the relevant procedural standards, the conflict in testimony will mean that both the civil and the criminal cases are sufficiently strong to reach trial. In each case, the outcomes will turn on the fact-finders' evaluation of the testimony. Under the second rationale, if the prosecutor relieves the criminal defendant of the necessity of risking trial, the defendant should then be required to reciprocate by signing a release-dismissal agreement.

The first rationale is in essence an objection to the substance of section 1983 actions; it seeks to import a "clean hands" doctrine into civil rights litigation even when the substantive law of section 1983 supplies none. The second is an objection to the procedures by which section 1983 actions proceed and civil sanctions are imposed; it supplants the determination of the judge and jury with the discretion of the prosecutor. Neither rationale merits substantial weight.

Section 1983 provides a cause of action to "any person" deprived of rights, privileges, or immunities. This right is not limited to "innocent" citizens.¹⁴⁶ Although juries may implicitly impose a "clean hands" requirement on civil rights plaintiffs,¹⁴⁷ there has never been any legal warrant for doing so. To allow local prosecutors the discretion to attempt to bar federal civil rights actions when the plaintiff's conduct falls below an idiosyncratic standard of "innocence" both shifts

disprove specific assertions, but rather to come to an understanding about the defendant's involvement in a troublesome situation in order to arrive at an appropriate disposition."); *id.* at 47 ("Like the police . . . the prosecutors in the lower court often take a 'dispute processing' view of the criminal process . . ."). This view also seems to inform the release-dismissal policies of a number of prosecutors. *See, e.g.*, Interview with Janet Reno, App. I (release-dismissal agreement appropriate when charges are reasonable but not sufficient to reach trial; only "innocent victims" are not properly subject to practice); Interview with Stephen Neely, App. I (law enforcement agency seeks release when case is not prosecutable but the individual is a "trouble maker"); Interview with Paul Shechtman, App. I (release-dismissal arguments are used when the conduct of the police and the citizen are "about even"); Interview with Robert Holmes, App. I (When there is "a misunderstanding on both sides," the District Attorney thinks it best for the "parties to shake and go home.").

¹⁴⁶ *See* *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984) (Kennedy, J.) ("As with excessive force, appellants may recover for injuries caused by acts independent of their arrests even if the arrests are found to be supported by probable cause.").

¹⁴⁷ Project, *supra* note 111, at 784 & n.13, 798-99 (juries tend to be biased against civil rights plaintiffs with criminal records).

the decisionmaking from civil courts and juries to criminal prosecutors and distorts the substantive standards applied. A guilty criminal suspect is as fully capable of finding herself subjected to violations of her constitutional rights during the course of an arrest as an innocent one, and the purposes of section 1983 include providing a means of redressing such violations. It is not adequate to argue that although the violation has occurred, the victim is also guilty of misconduct as well. When justice requires both a criminal conviction and civil redress, a practice that results in neither is rough indeed. Moreover, the effort to seek criminal convictions as a means of suppressing civil rights claims may well violate the first amendment's guarantee of the right to petition for redress of grievances.¹⁴⁸

The second rationale is limited to situations where the civil rights claim is the precise converse of the criminal charge. It would not apply in those situations such as a claim of excessive force in which the criminal defendant might admit the validity of the criminal charges but still maintain her constitutional claim.¹⁴⁹ When the elements of the criminal charge and the civil rights claim do not overlap, the prosecutor's lack of assurance regarding the merits of the criminal charge has no bearing on the merits of the civil rights case. No claim of symmetry exists.

Even in cases in which the merits of the civil rights and criminal cases are linked, moreover, one should hesitate before displacing the fact-finding and legal screening functions of federal judges and juries with decisions made by local prosecutors. We are willing to allow pros-

¹⁴⁸ See *infra* notes 156-72 and accompanying text. It may, in addition, be unnecessary. Former Philadelphia District Attorney Edward Rendell observed situations "where both parties were at fault . . . don't end up in civil suits," so simply dropping the charge will probably end the case. Interview with Edward Rendell, App. I.

¹⁴⁹ It is difficult to know how frequently the merits of police misconduct complaints would be "linked" to the merits of arrests. One suggestive piece of evidence is that during 1977-79 complaints of excessive force, harassment, and misuse of firearms were filed with the Houston Police Department's Internal Affairs Division more than four times as often as complaints of false arrests or false charges. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 114, at 168.

In a 1979 study of police abuse litigation in New Haven, Connecticut, the student authors found that 21.5% of the cases filed were based on claims of false arrest (although 25.5% alleged both false arrest and excessive force) 6.8% alleged excessive force or shooting, and 22.2% alleged illegal searches or other harassment. Project, *supra* note 111, at 793; see also Eisenberg, *supra* note 111, at 550-51 (noting that of 276 § 1983 cases disposed of in the federal courts for the Central District of California during 1975-76, 50 involved allegations of false arrest, while 67 involved allegations of improper force, search, seizure, or harassment).

A 1987 survey of 55 police departments regarding lawsuits filed against them during the previous two years reported 651 claims alleging the use of excessive force (deadly or nondeadly), illegal searches or illegal seizures, and 430 claims of false arrest. POLICE EXECUTIVE RESEARCH FORUM, *THE IMPACT OF Concern for Liability on POLICE AGENCY SELF IMPROVEMENT* 34 (1987).

ecutors to drop criminal charges without an adversary hearing or investigation in part because of concern for the presumption of innocence of criminal defendants and in part because of our belief that prosecutors are impartial administrators working in the public interest. To extend comparable solicitude to police defendants in civil rights cases on the basis of the prosecutor's sense of "rough justice" promotes a system that unacceptably skews the enforcement of civil rights toward the section 1983 defendant.¹⁵⁰

D. *The Problem of the Second Best*

To some degree, the criticism voiced above appears to be at war with itself. If the decision of whether or not to demand releases tends to be infected by the interests of police and municipalities in avoiding legitimate civil rights liability, as suggested by Sections B and C, one might well argue that eliminating release-dismissal agreements will simply result in prosecutors pushing criminal cases to trial to protect police, thus contradicting the analysis of Section A. Defendants, therefore, benefit from release-dismissals by avoiding "liability-motivated" prosecutions.

The prosecutor who seeks to accommodate and protect police interests through release-dismissal agreements but is barred from doing so has the alternative strategy of attempting to obtain a conviction in order to accomplish the same goal. After all, the defendant who pleads guilty or is convicted of the substantive crime is all but estopped from claiming that her initial arrest was without probable cause.¹⁵¹ The more pervasive the danger that such a strategy will be adopted, the stronger the argument that release-dismissal agreements benefit criminal defendants. Allowing prosecutors to vent their desires to protect the police by directly extinguishing the criminal defendants' civil rights claims, one might claim, is the price of avoiding liability-motivated efforts to convict the defendant on criminal charges.

¹⁵⁰ See *supra* text accompanying notes 124-27 (discussing tendency of prosecutors to be solicitous of police interests).

¹⁵¹ See *Migra v. Warren City School Dist.*, 465 U.S. 75, 81 (1984) (prior state judgment has the same preclusive effect in § 1983 proceeding granted by the state to its own judgments); *Allen v. McCurry*, 449 U.S. 90, 104-05 (1980) (plaintiff is collaterally estopped in subsequent § 1983 action from relitigating matters necessarily determined in criminal proceedings). While a criminal conviction does not necessarily determine that an initial arrest on that charge met probable cause standards, it would be difficult to make a sympathetic case before a trier of fact that a policeman should pay damages for arresting a guilty defendant without probable cause. Moreover, when the officer's first-hand evidence of criminal violation is accepted by the jury (as in most successful prosecutions for resisting arrest or disorderly conduct), the defendant's false arrest claim will usually be entirely precluded.

The argument assumes that the effort to convict will, in fact, protect the municipality and police from civil rights liability. In fact, there will often be reasons to doubt this assumption. First, a criminal prosecution will not always result in a conviction. A criminal acquittal may actually encourage the defendant to retaliate against the police with a civil rights suit. Second, a criminal conviction does not bar civil rights suits unrelated to the merits of the criminal defense. A civil rights suit for excessive force or unlawful search and seizure would not be barred by a disorderly conduct conviction.¹⁵² There will thus be a broad class of cases in which prosecutors will not be able to obtain the equivalent of a release by pressing the charges to trial.¹⁵³

Even when prospective civil rights defendants might benefit from a criminal trial, the benefit is not free. The prosecution of a criminal case will cost even the most police-oriented prosecutor time and money, and criminal lawyers and defendants may well be less willing to acquiesce to a guilty plea than accept a dismissal. Seeking release-dismissal agreements is costless, while seeking convictions must be weighed against the pressures of the prosecutor's docket.

The likelihood of such "liability-motivated" prosecution, moreover, may itself be reduced by eliminating the release-dismissal practice. Legal rules should not be based on the presumption that prosecutors are solely attentive to the interests of police rather than their own legal obligations. While the view that prosecutors can be relied on to evaluate impartially the merits of civil rights claims is unduly optimistic, prosecutors often seek to obey the law. A clear announcement by the Court of that which was articulated sotto voce in *Rumery*—that to "bring frivolous charges, or to dismiss meritorious charges, to protect the interests of other officials"¹⁵⁴ is improper—would fortify the ability of prosecutors to resist the temptation of liability-motivated prosecutions. Eliminating the occasion for explicitly linking criminal prosecutions and civil rights liability in release-dismissal agreements, moreover, would establish patterns of thought and action that facilitate the tendency of prosecutors of good conscience to avoid the linkage elsewhere. If the Court's assumption that prosecutors are incorruptible is extravagant, neither should the law move to the opposite pole of presuming

¹⁵² See *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (guilty plea to a charge does not preclude a subsequent § 1983 action alleging an illegal search or seizure connected with the arrest on that charge); cf. *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984) (Kennedy, J.) (merits of excessive force claim are triable by jury even if judge finds that arrest met standards of probable cause).

¹⁵³ See *supra* note 149 (discussing the prevalence of linkage between merits of criminal cases and civil rights cases).

¹⁵⁴ *Rumery*, 107 S. Ct. at 1193 (Powell, J., plurality).

them to be completely compromised.

Some defendants benefit from release-dismissal agreements as a means of avoiding liability-motivated prosecutions. But others suffer the gratuitous loss of civil rights claims, and the institution of release-dismissal agreements tends to suggest that avoiding civil rights claims is a legitimate motive for arrest and prosecution. In accounting costs and benefits, the law should not fixate on the first effect at the expense of the other two.

The imposed elimination of release-dismissal agreements in Rochester and Denver, by all accounts, resulted in no increase in the rate of prosecutions. In Chicago, the elimination was so thoroughly internalized that the policymaking prosecutor now regards the consideration of police liability as entirely inappropriate in the decision to prosecute. While it is possible that liability-motivated prosecutorial decisionmaking continues to exist in these jurisdictions, it has been driven from the center of the stage. Occasional hypocrisy is less destructive of the norms of impartiality than is overt disregard. It would be ironic if a practice that the Court justifies on the basis of its faith in the prosecutor's "independence of judgment" could be defended as the only means of limiting the impact of prosecutorial misconduct.

IV. THE COSTS OF RELEASE-DISMISSAL AGREEMENTS

If the plurality in *Town of Newton v. Rumery*¹⁵⁵ seems to overstate the benefits associated with release-dismissal agreements, it also fails to account adequately for the costs of sanctioning them.

A. *The Right to Petition for Redress of Grievances*

According to the *Rumery* plurality, "the only evidence of prosecutorial misconduct is the agreement itself."¹⁵⁶ The first inquiry under established doctrine should be why such an agreement is itself insufficient to establish a constitutional violation of the first amendment.¹⁵⁷

During the late nineteenth and early twentieth centuries, a num-

¹⁵⁵ 107 S. Ct. 1187 (1987).

¹⁵⁶ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality).

¹⁵⁷ In cases involving release-dismissal agreements, courts both before and after *Rumery* have discerned violations of the first amendment's protection of the right to petition for redress of grievances. See, e.g., *Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987); *Hall v. Ochs*, 817 F.2d 920, 924-25 (1st Cir. 1987); *MacDonald v. Musick*, 425 F.2d 373, 376-77 (9th Cir.), cert. denied, 400 U.S. 852 (1970); *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968); *Kurlender v. Davis*, 103 Misc. 2d 919, 926, 427 N.Y.S.2d 376, 380 (Sup. Ct. 1980).

ber of populist state legislatures endeavored to prevent out-of-state corporations from removing cases to federal court by conditioning permission to do business within the state on the agreement by the corporation not to invoke federal jurisdiction. After a series of inconsistent attempts to resolve this question,¹⁵⁸ in 1922 a unanimous Court came to the conclusion in *Terral v. Burke Construction Co.*¹⁵⁹ that the effort to extract this waiver of federal jurisdiction was unconstitutional:

[A] state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right The principle . . . rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void.¹⁶⁰

Since *Terral*, the Court has generally recognized the right of access to courts as a component of the first amendment's right to petition for redress of grievances.¹⁶¹ On its face the release-dismissal agreement seeks to extract "a waiver of the exercise of a . . . constitutional right."¹⁶² *Terral*, therefore, raises doubts that a waiver of first amendment rights is any more legitimate a precondition to the privilege of

¹⁵⁸ See *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 458 (1874) (invalidating condition); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 541 (1876) (permitting revocation of license in retaliation for removal of suit), *rev'd*, *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Barron v. Burnside*, 121 U.S. 186, 197 (1887) (following *Morse*; license may not be revoked for removal); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 533 (1922) (reversing *Doyle*).

¹⁵⁹ 257 U.S. 529 (1922).

¹⁶⁰ *Id.* at 532.

¹⁶¹ See, e.g., *In re Primus*, 436 U.S. 412, 426 (1978) ("collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment") (quoting *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 221-23 (1967) (right to assemble and petition for redress of grievances protects right of union to provide legal representation in nonpolitical cases); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 7 (1964) (state unauthorized practice statute, which indirectly barred union members from "resorting to the courts to vindicate their legal rights" impermissibly "handicapped" the "right to petition the courts"); *NAACP v. Button*, 371 U.S. 415, 436-37 (1963) (A law that broadly curtails "group activity leading to litigation may easily become a weapon of oppression [The law] limits First Amendment freedoms.").

¹⁶² *Terral*, 257 U.S. at 532.

having a pending prosecution dropped than it would be to condition the privilege of doing business in a state or the privilege of public employment.¹⁶³ Indeed, in *Wayte v. United States*,¹⁶⁴ the Court reiterated that "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification' including the exercise of protected statutory and constitutional rights."¹⁶⁵

When release-dismissal agreements serve to obtain waivers of civil rights claims in exchange for the dismissal of charges that would be dropped in the normal course of events were waivers unavailable, it is difficult to see how the agreements are constitutional. If a state may not constitutionally make it a criminal offense to bring a civil rights claim,¹⁶⁶ then it is no more entitled to punish the attempt to bring such a claim with a criminal prosecution based on other activities of the section 1983 claimant.¹⁶⁷ The Court's pragmatic acceptance of efforts to

¹⁶³ Cf. *Branti v. Finkel*, 445 U.S. 507, 515 (1980) (first amendment protects public employees from discharge based solely on their beliefs); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality) (patronage dismissals violate first amendment); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (the government cannot condition a benefit on a waiver of constitutionally protected speech or association).

¹⁶⁴ 470 U.S. 598 (1986).

¹⁶⁵ *Id.* at 608 (citations omitted) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

The *Wayte* case leaves unclear precisely what role the exercise of free expression under the first amendment must play in the decision to prosecute before that decision will be held unconstitutional. *Wayte* cites *United States v. Goodwin*, which suggests that "[a] charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right" *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982) (emphasis added). However, *Wayte* also says that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards," *Wayte*, 470 U.S. at 608, under which a discriminatory purpose is invalid if "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group," *id.* at 610 (emphasis added) (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)). *Wayte* states as well that an "overtly discriminatory classification" is per se illegal, *id.* at 608 n.10. Cf. *Cox v. Louisiana*, 379 U.S. 536, 557-558 (1965) (discriminatory application of a statute based on the exercise of first amendment rights is unconstitutional). Since the release-dismissal agreement recites on its face that it is based on the nonexercise of first amendments rights, footnote 10 of *Wayte* would suggest per se illegality.

¹⁶⁶ See *In re Primus*, 436 U.S. 412, 438-39 (1978) (holding that an attempt to discipline an ACLU attorney for approaching a prospective client violated the first amendment); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (holding that a Virginia statute unduly infringing on the ability of NAACP lawyers to seek legal redress violates the first amendment).

¹⁶⁷ As the Court stated in *Goodwin*:

To punish a person because he has done what the law plainly allows him to do is a due process violation "of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). In a series of cases beginning with *North Carolina v. Pearce* [395 U.S. 711 (1969)] and culminating in

induce waivers of constitutional trial rights in connection with its recognition of plea bargaining as an "essential component of the administration of justice"¹⁶⁸ should not be read as approving the use of criminal prosecutions as a lever to extract the waiver of the right to affirmative redress in civil cases.¹⁶⁹ There is reason to believe that a number of

Bordenkircher v. Hayes, the Court has recognized this basic—and itself, uncontroversial—principle. For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.

Goodwin, 457 U.S. at 372; see also *Thigpen v. Roberts*, 468 U.S. 27, 33 (1984) (prosecution of a felony charge filed in retaliation for defendant's decision to appeal related misdemeanor conviction rendered felony indictment unconstitutional); *Bordenkircher*, 434 U.S. at 365 (decision to prosecute cannot be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" (quoting *Oyler v. Boles* 368 U.S. 448, 456 (1962))).

In *Bordenkircher*, the Court took the position that a "desire to induce a guilty plea" is not such an "unjustifiable standard" because the "simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty" underlies "the concept of plea bargaining itself." *Bordenkircher*, 434 U.S. at 364-65. In *Goodwin*, the Court stated that the ability to charge based on the desire to induce defendants to waive the right to not plead guilty is necessary "to preserve the plea negotiation process." *Goodwin*, 457 U.S. at 379 n.10. These conclusions, however, do not imply that the quite different desire to induce a release of affirmative civil rights claims extrinsic to the criminal process is a constitutional basis on which to threaten criminal prosecution.

¹⁶⁸ *Santobello v. New York*, 404 U.S. 257, 260 (1971).

¹⁶⁹ In *Brady v. United States*, 397 U.S. 742 (1970), its first approval of plea bargaining, the Court nonetheless voiced concern that plea bargains should not be induced "by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." *Id.* at 755 (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, J., dissenting), *aff'd*, 356 U.S. 26 (1958)); see *Mabry v. Johnson*, 467 U.S. 504, 508 n.8 (1984) (quoting *Brady*); cf. *Bordenkircher*, 434 U.S. at 364 n.8 (expressing concern that pleas induced by threats regarding prosecutions of third parties would result in a greater danger of inducing a false guilty plea by skewing the assessment of risks a defendant must consider). It is doubtful that a city's liability for a civil rights claim has a "proper relationship to the prosecutor's business" of justly and efficiently prosecuting criminal violations. See *infra* notes 168-202 and accompanying text.

Plea bargaining was approved as a way of "promptly impos[ing] punishment" and conserving "scarce judicial and prosecutorial resources . . . for those cases in which there is a substantial issue of the defendant's guilt . . ." *Brady*, 397 U.S. at 752; see also *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (plea bargaining allows the defendant to obtain a "speedy disposition" and "a chance to acknowledge his guilt"; "Judges and prosecutors can conserve vital and scarce resources"); *Santobello*, 404 U.S. at 261 (Plea bargaining leads to "prompt and largely final disposition of most criminal cases"). Plea bargaining was also viewed as a way of protecting "[t]he public . . . from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings." *Blackledge*, 431 U.S. at 71; see also *Santobello*, 404 U.S. at 261. The release-dismissal practice serves none of these purposes.

Finally, "[t]he Court appears to have embraced these highly debatable premises [that underlay its approval of plea bargaining] because it views efficient case processing as a valid state interest and plea bargaining as an essential means of pursuing that interest." Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1092

release-dismissal transactions involve precisely such unconstitutional threats.¹⁷⁰

The situation may, however, differ in cases where the dismissal of charges would not come about in the normal course of events without the bargained for agreement.¹⁷¹ The state does not violate the first amendment by offering to settle a civil rights case for \$10,000, although in form this may be seen as an offer to exchange a "waiver of a constitutional right to resort to the courts" for a "privilege." The right of "access to the courts" for "redress of grievances" is a right to seek redress satisfactory to the petitioner and the \$10,000 is "redress." Why should it be impermissible to substitute the dismissal of criminal charges for the payment of \$10,000?

As a constitutional matter, the issue is opaque. While it is possible to make arguments, the right to petition is so little litigated that reliable guidance is lacking.¹⁷² But, since the issue framed by the Court is one

(1984); see also *Santobello*, 404 U.S. at 260 (" 'Plea bargaining' is an essential component of the administration of justice If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."). The fact that at least half of the jurisdictions surveyed were able to operate without difficulty without release-dismissal agreements suggests that the pressures that led to the outcome in *Bordenkircher*, "mandated by this Court's acceptance of plea negotiation," *Goodwin*, 457 U.S. at 378, exert no comparable force in favor of viewing the deterrence of civil rights claims as a legitimate ground for prosecution.

¹⁷⁰ See *supra* text accompanying notes 68-75.

¹⁷¹ For a discussion of the variety of considerations that enter into an appropriate definition of the "normal course of events" for these purposes and the reasons it is important to make reference to it, see Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1355-78 (1984); cf. *United States v. Goodwin*, 457 U.S. 368, 381 (1982) (arguing against a presumption of prosecutorial vindictiveness when criminal charges are upgraded prior to trial, because the prosecutor's assessment of the case may not have "crystallized" yet); *Bordenkircher v. Hayes*, 434 U.S. 357, 371-73 (1978) (Powell, J., dissenting) (stating that the question to be asked in such situations is what charge might reasonably have been brought in the first place).

As a practical matter, the difficulty of establishing what would have happened in the normal course of events, along with the institutional pressure to augment charges and dispositions in order to limit police liability, see *supra* notes 91, 123-31 and accompanying text; *infra* notes 201, 212-15, might well suggest an across the board ban on release-dismissal agreements. Cf. *Goodwin*, 457 U.S. at 373, 377 (presumption of vindictive motives as prophylactic rule where "institutional pressure might also subconsciously motivate a vindictive prosecutorial or judicial response to a defendant's exercise of his right to obtain retrial of a decided question"); *Thigpen v. Roberts*, 468 U.S. 27, 30-31 (1984) (holding that "to the extent the presumption [of vindictiveness] reflects 'institutional pressure that . . . might . . . subconsciously motivate a vindictive prosecutorial . . . response to a defendant's exercise of his right to obtain a retrial of a decided question,' it does not hinge on the continued involvement of a particular [prosecutor]." (quoting *Goodwin*, 457 U.S. at 377)).

¹⁷² For a thorough recent discussion of the difficulties arising out of government offers to purchase constitutional rights, see Rosenthal, *Conditional Federal Spending*

of "federal common law," it is perhaps best to pursue the issue with regard to the narrower class of cases where charges would not be dropped in the absence of a release on that somewhat less exalted plane.

B. *The Role of the Criminal Process*

One substantial factor that impelled the plurality in *Rumery* to approve of release-dismissal agreements was "the burden of defending" "marginal" civil rights actions.¹⁷³ If a plaintiff chooses to press a case to trial, a single conflict in testimony may be enough to circumvent the screening mechanisms that might otherwise terminate the process. The possibility of an inaccurate jury verdict makes even a weak case a credible threat.

The threats inherent in the criminal process are more than comparable. Once a prosecutor believes, or acts as if she believes, that there is probable cause, the engine of a criminal prosecution is almost impossible for a defendant to stop short of trial or plea. In most states the criminal defendant has far fewer opportunities for discovery than those available in civil cases,¹⁷⁴ and only a full-fledged legal defense at trial

and the Constitution, 39 STAN. L. REV. 1103 (1987). I have previously taken the position that if an offer to purchase constitutional rights in fact makes the citizen better off than she would be in the normal course of events, the question of whether the offer should nonetheless be regarded as constitutional turns on considerations specific to the particular right in question. See Kreimer, *supra* note 171, at 1386-93. In recent Terms, the Court has struck down what might be regarded as offers to purchase rights under the free exercise clause, see *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1048 (1987), the free press clause, see *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1726-27 (1987); *FCC v. League of Women Voters*, 468 U.S. 364, 395 (1984), and the free speech clause, see *Rankin v. McPherson*, 107 S. Ct. 2891, 2899 (1987), while sustaining others, see, e.g., *Bowen v. Roy*, 106 S. Ct. 2147, 2152 (1986) (free exercise); *Bob Jones University v. United States*, 461 U.S. 574, 603-09 (1983) (free exercise); *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) (free speech); *Connick v. Myers*, 461 U.S., 138, 154 (1983) (free speech).

There is no reliable precedent, however, on conditioning the right to petition for redress of grievances through the courts. The government obviously may offer to settle individual suits in exchange for monetary consideration. But there would be substantial doubts raised by a program that sought to purchase blanket waivers from the populace of the right to redress for future constitutional violations or a program, for example, that annually offered to increase welfare payments to recipients who would agree to release the municipality from liability for all past violations of their constitutional rights. Cf. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (property right in continued employment cannot be defined by and conditioned on legislative procedures provided for its deprivation). A regular practice of obtaining releases of police liability in exchange for reductions in criminal charge falls somewhere in the middle.

¹⁷³ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality).

¹⁷⁴ Compare FED. R. CIV. P. 26-34 (allowing depositions upon oral examination (Rule 30), depositions on written questions (Rule 31), and interrogatories to parties (Rule 33)) with FED. R. CRIM. P. 16 (refusing to allow discovery of statements made by

will suffice to avert the possibility of not only financial liability but also loss of liberty. As a practical matter, the legal presumption of innocence is often balanced in the minds of the prosecutor, the court, and the jury by a factual presumption of guilt.¹⁷⁵ Ultimately, a defendant may be acquitted, or an erroneous conviction reversed, but in the interim savage costs can be imposed on a criminal defendant.

We tolerate the prosecutor's essentially unconstrained discretion to impose these pretrial and error costs¹⁷⁶ for two reasons. First, we defer to the importance of the prosecutorial goals. We believe prosecutorial discretion is essential to maintaining the framework of order in society. Second, we have faith in the role constraints of the prosecutor, an officer obligated to act in the interest of criminal justice. The use of release-dismissal agreements, however, undercuts both of these justifications. It encourages the prosecutor to deploy the substantial and unreviewable sanctions at his disposal in the interest of goals other than the enforcement of the criminal statutes, and it undercuts the norms of impartial adherence to the goals of criminal enforcement that would otherwise limit that deployment.¹⁷⁷

government witnesses). See generally Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279, 279 (1963) (arguing for greater criminal discovery). For a discussion of criminal defense discovery, see W. LAFAVE & J. ISRAEL, *supra* note 98, at § 19.3 (examining policy considerations involved in determining standards for criminal defense discovery); Schulhofer, *supra* note 99, at 138 (pointing out the low standards of trial preparation prevalent in the "hurly-burly of practice at trial level").

¹⁷⁵ See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 16-61 (1968) (arguing that an efficient criminal system operates with a presumption of guilt); see also W. LITTELL, *CONSTRUCTING CRIME: POLICE AND PROSECUTOR'S MANAGEMENT OF THE CHARGING PROCESS* 259 (1974) (stating that the presumption of guilt is a key assumption of the criminal justice system); R. NIMMER, *supra* note 103, at 38 (arguing that despite the doctrinal presumption of a defendant's innocence, there is "an administrative presumption of guilt"); cf. Kurtz, *Meese Says Few Suspects Are Innocent of Crime*, Wash. Post, October 11, 1985, at A6, col. 3 (quoting Attorney General Meese's statement that "you don't have many suspects who are innocent of crime. That's contradictory. If a person is innocent of a crime, then he is not a suspect.").

¹⁷⁶ See Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 249 (1980) (quantitative study of the exercise of discretion by federal prosecutors). For arguments in favor of less prosecutorial discretion, see K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 224-45 (1969) (arguing that prosecutors should be required to follow publicly announced prosecutorial rules); Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 57 (1971) (arguing for "comprehensive and detailed policy statements governing the exercise of prosecutorial decision-making"); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-73 (1981) (asserting that prosecutors have great power in pretrial decisions and arguing that these powers need to be controlled by a more accountable system).

¹⁷⁷ Professor Trowbridge has argued:

The public responsibilities of a prosecutor are often inconsistent with the representation of private interests during the course of prosecution.

1. "Abuse of the Criminal Process"

Our system of justice has developed distinctive modes of procedure as well as distinctive sanctions appropriate for the adjudication of civil and criminal liabilities. Except insofar as the rules of preclusion allow application of conclusions reached in criminal proceedings to issues in civil cases, the two systems are independent searches for justice. The vice of the release-dismissal agreement is that it uses the balance of procedural advantages and sanctions developed on the criminal side to shape the adjudication of civil liability. Put simply, the prosecutor is given the authority to threaten criminal prosecution in order to deter, convict, and punish criminals, not to protect police and municipalities from adjudications of civil liability.¹⁷⁸ Hence the *Rumery* plurality insisted that "release-dismissal agreements . . . further legitimate prosecutorial interests."¹⁷⁹

The origins of our legal system recognized this separation between civil and criminal adjudication in at least two areas. First, in the field of legal ethics, it has long been recognized that

[t]he merest novice in the legal profession should know that civil liabilities may not be enforced by threats of criminal prosecution, any more than they may be enforced by threats of physical violence, and that any conduct which has the appearance of a resort to such course is as bad, in law, as the thing in itself.¹⁸⁰

. . . When a prosecutor undertakes to protect the civil interest of a person involved in a criminal case, a conflict is present between the interests of the public in prosecution and the interests of the private parties in a civil adjustment The greatest risk presented [by release-dismissal arguments] is to the integrity of the criminal justice process.

Trowbridge, *supra* note 17, at 61 (footnotes omitted).

¹⁷⁸ Cf. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3148 (1987) (A law that "forbade shouting fire in a crowded theater but granted dispensations to those willing to contribute \$100 to the state treasury . . . would not pass constitutional muster.").

Of course, it is common practice for prosecutors to threaten prosecution as a way of convincing defendants to cooperate in other cases, but this is an effort that is ultimately aimed at criminal law enforcement in a very direct way, not at an abstract "public interest." While it may be legitimate for prosecutors to exercise discretion to dismiss a prosecution if the adjudication itself would harm broader social goals as, for example, by disclosing information that would adversely affect national security, this is a different enterprise from attempts to induce the defendant to avoid actions embarrassing to the government outside of the criminal justice arena.

¹⁷⁹ *Rumery*, 107 S. Ct. 1195 (Powell, J., plurality).

¹⁸⁰ *People ex. rel. Colorado State Bar Ass'n v. . . .*, 90 Colo. 440, 442-43, 9 P.2d 611, 612 (1932). Many states have recently articulated similar standards. See, e.g., *In re Vollintine*, 673 P.2d 755, 758 (Alaska 1983); *Florida Bar Ass'n v. Suprina*, 484 So. 2d 1245, 1246 (Fla. 1986); *In re Walter*, 466 N.E.2d 35, 35 (Ind. 1984); *Robinson v.*

According to the Model Code of Professional Responsibility, upon which all opinions of the *Rumery* court relied:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.¹⁸¹

Second, the common law, incorporated into the federal law by the Hobbs Act,¹⁸² defines the crime of extortion as "an abuse of public

Fimbel Door Co., 113 N.H. 348, 352, 306 A.2d 768, 771 (1973); *In re Barrett*, 88 N.J. 450, 452-53, 443 A.2d 678, 680-81 (1982); *In re McCurdy*, 297 Or. 217, 220, 681 P.2d 131, 132 (1984); *In re Carpenter*, 250 Or. 394, 396, 443 P.2d 238, 239 (1968); see also *Gallagher v. Hertz*, 608 P.2d 335, 338 (Colo. 1979) ("Respondent took advantage of his position of respect and status in the Denver District Attorney's office by repeatedly urging criminal prosecution in matters where his only legitimate professional interest could be in related civil matters."); *Sinclair v. State*, 278 Md. 243, 254, 363 A.2d 468, 475 (1976) ("If a prosecutor has . . . any pecuniary interest . . . in a civil matter which may impair his obligation in a criminal matter to act impartially toward both the State and the accused, then he is . . . disqualified from initiating or participating in the prosecution of that criminal case.")

¹⁸¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-21 (1982). For a discussion of the ethical rules on the subject of threatening prosecution, see Trowbridge, *supra* note 17, at 57-62. The Model Rules of Professional Conduct (1983) contain no parallel provision. Professor Trowbridge suggests that the explanation for this omission is that the drafters may have concluded that the law of extortion made the rule superfluous. See *id.* at 57. The ethics committees of the Oregon and Colorado Bar have explicitly found that release-dismissal agreements violate ethical standards. See *supra* note 17.

¹⁸² The Hobbs Act prohibits "the obtaining of property from another, with his consent, induced . . . under color of official right." 18 U.S.C. § 1951 (1982). For a discussion of the relation between the Hobbs Act and the common law of extortion, see, e.g., *United States v. Zappola*, 677 F.2d 264, 268 (2d Cir. 1981) ("The legislative history reveals that Congress meant to define extortion as it was defined by the states, in particular, New York."), *cert. denied*, 459 U.S. 866 (1982); *United States v. Janotti*, 673 F.2d 578, 594-95 (3d Cir.) (en banc) ("At common law, extortion was defined as 'any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him.'" (citing 4 W. BLACKSTONE, COMMENTARIES *141)), *cert. denied*, 457 U.S. 1106 (1982); *United States v. French*, 628 F.2d 1069, 1073 (8th Cir.) ("[T]he legislative debates on the Hobbs Act suggest that Congress intended to adopt the common law as it had been adopted by the states, with especial reference to the law of New York."), *cert. denied*, 448 U.S. 956 (1980); *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir.) ("Under the common law defini-

justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value that is not due to him," or his office.¹⁸³ As the court noted in *United States v. Margiotta*,¹⁸⁴ "it is the utilization of the power of public office to induce consent to the payments that is the gist of the offense of obtaining money 'under color of official right.' The use of public office, with the authority to grant or withhold benefits, takes the place of pressure or threats."¹⁸⁵ The evil of release-dismissal agreements—like the evil of extortion—is the use of public authority granted for one set of ends to achieve advantage in a different arena.¹⁸⁶

A prosecutor's offer to exchange dismissal of prosecution for release of the city from its obligations on a \$10,000 bond would clearly be

tion, color of public office took the place of the coercion implied in the ordinary meaning of the word extortion." (citing *United States v. Sutter*, 160 F.2d 754 (7th Cir. 1947)), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Kenny*, 462 F.2d 1205, 1228-29 (3d Cir.) ("'[U]nder color of official right' . . . repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress."), *cert. denied*, 409 U.S. 914 (1972); Note, *Misapplication of the Hobbs Act to Bribery*, 85 COLUM. L. REV. 1340, 1346-48 (1985) (New York law of extortion incorporated into Hobbs Act); Note, *Prosecuting Public Officials under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. CHI. L. REV. 1066, 1081-82 (1985) (common law of extortion provides a guide to congressional intent).

¹⁸³ See 4 W. BLACKSTONE, COMMENTARIES *141; see also *People v. Whaley*, 6 Cow. 661, 663 (N.Y. Sup. Ct. 1827) ("[e]xtortion signifies . . . the taking of money by any officer, by color of his office").

¹⁸⁴ 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

¹⁸⁵ *Id.* at 132 (citations omitted); see also *Mazzei*, 521 F.2d at 644-45 (Hobbs Act extortion committed by state senator did not require proof of duress); *Kenny*, 462 F.2d at 1229 (under Hobbs Act, extortion by public official does not require proof of threat, fear, or duress).

The exertion of illegitimate public pressure can come either from a threat to refuse to do a public duty or from an exaction of payment for doing as duty required. See, e.g., *French*, 628 F.2d at 1074 ("It matters not whether the public official induces payments to perform his duties or not to perform his duties . . . So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of [Hobbs Act extortion].") (quoting *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)). Thus, either the threat to prosecute a meritorious or a frivolous case could constitute extortion.

Likewise, the federal law of extortion does not recognize a defense of good faith entitlement to the consideration extorted. See *Zappola*, 677 F.2d at 268-69. The prosecutor's belief that police are "entitled" to a release, therefore, would not be a defense to extortion charges. Cf. MODEL PENAL CODE § 223.4 (1962) (it is an affirmative defense to extortion that the consideration was "honestly claimed as restitution or indemnification for harm done in the circumstances to which the official action relates"). It is difficult to characterize the release of civil rights claims as "restitution" for a criminal violation.

¹⁸⁶ Cf. Lindgreen, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 703 (1984) ("What emerges from these examples is the observation that blackmail is the misuse of an informal (or formal) power of agency or representation. . . . The blackmailer . . . turns someone else's power . . . to personal benefit. The bargaining is unfair in that the threatener uses leverage that is less his than someone else's.").

extortionate. If the consideration is a \$10,000 contingent civil rights liability, rather than a bond, on its face, the transaction seems to raise similar problems.¹⁸⁷

2. The Role of The Prosecutor

Just last Term, seven Justices of the Court joined in the following characterization of the role of the prosecutor:

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.¹⁸⁸

This assurance is provided, in large part, by the norms of fidelity to role that permeate the prosecutor's office. Adversaries, courts, and citizens expect the prosecutor to be a guardian of the interests of justice, not simply the advocate of government positions.¹⁸⁹ In the opinion of a

¹⁸⁷ See *Rumery*, 107 S. Ct. at 1202 (Stevens, J., dissenting) ("Indeed, if the defendant is forced to abandon a claim that has a value of \$1,000, the price that he pays is the functional equivalent of a \$1,000 payment to a police department's retirement benefit fund.").

This is, of course, to be distinguished from normal plea-bargaining in which the pressures exerted on a criminal defendant may be comparable, but the object for which they are exerted is the efficient and just imposition of criminal punishment. See *supra* note 168.

¹⁸⁸ *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2141 (1987).

¹⁸⁹ See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted, but when criminal trials are fair."); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("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."); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ADVISORY COMMITTEE ON THE PROSECUTION AND DEFENSE FUNCTIONS, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 1.1(c) (1971) ("the duty of the prosecutor is to seek justice, not merely to convict"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment 1 (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see . . . that guilt is decided upon the basis of sufficient evidence."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) The prosecutor represents the sovereign and therefore should use restraint in the

number of prosecutors, this impartial, if not neutral, role is threatened by the release-dismissal practice, which injects the issue of civil liability into the criminal decisions.

The president-elect of the National District Attorneys Association (NDAA) regards the release-dismissal practice as infected by an unethical conflict of interest by its mixing of civil and criminal responsibilities.¹⁹⁰ The outgoing president of the NDAA believes the release-dismissal transaction is an "inappropriate function in plea bargaining."¹⁹¹ The State's Attorney for Palm Beach, Florida, characterizes the release-dismissal practice as "a distortion of the system,"¹⁹² and prosecutors in Boston, Manhattan, and Chicago view the practice as an "unseemly mixing of roles."¹⁹³

The director of the criminal division of the Seattle City Attorney's office observes: "If you are going to drop the case because of the release, the converse is also true; you are prosecuting the case in order to gain an advantage of the civil law suit; that is an abuse of power."¹⁹⁴

discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all"); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958) ("The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish [an] adversary element . . . but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice."); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1417 (1981) ("justice" of the case . . . is supposedly the principal, if not only, concern of the prosecutor").

¹⁹⁰ Interview with Fred L. Foreman, App. I (Mr. Foreman is also Chairman of the ABA's Committee on the Prosecutorial Function.)

¹⁹¹ Interview with Norman S. Early, Jr., App. I ("If there is no merit to the case it should be dropped. If there is merit and it gets past a probable cause hearing, there is little danger of civil liability.").

The NDAA signed an amicus brief in *Town of Newton v. Rumery*, urging that the release be upheld, and arguing that the issue in the case was solely one of voluntariness. Brief of Amicus Curiae Americans for Effective Law Enforcement, Inc., joined by the Int'l Ass'n of Chiefs of Police, Inc., and the Nat'l Dist. Attorneys Ass'n, Inc., at 3, *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987) (No. 85-1449). In an interview, however, the executive director of the NDAA stated that the group had no formal policy on the issue. See Interview with Jack Yelverton, App. II.

¹⁹² Interview with David H. Bludworth, App. I.

¹⁹³ See Interview with Judy Zeprun, App. I (Assistant District Attorney, Appellate Division, Suffolk County (Boston, Mass.)) ("we neither condoned [n]or participated in [the practice]"); Interview with Armand Durastanti, App. I (Deputy Bureau Chief, Trial Division, Manhattan District Attorney's Office) ("We don't represent a police department on the issue of civil liability."); Michael J. Angarola, App. I (First Assistant State's Attorney, Cook County (Chicago, Ill.)) (release agreements are "improper"); see also Interview with Raymond Harley, App. I (Philadelphia Deputy District Attorney, Trial Division) ("We try to do the right thing. We can't make decisions on the basis of possible civil liability. If someone gets sued, that's just life.").

¹⁹⁴ Interview with Douglas Whalley, App. I.

Similarly, the Chief Assistant Attorney General of Arizona views the release-dismissal practice as a derogation of the statutory duty and ethical responsibility of the prosecutor.¹⁹⁵

The threat to the prosecutor's role comes from two dynamics. First, the availability of the release-dismissal practice provides a continuing incentive to modify criminal prosecution decisions in the interests of goals extraneous to the criminal process. In *Young v. United States ex rel. Vuitton et Fils, S.A.*,¹⁹⁶ the Court observed that a private prosecutor in a criminal contempt prosecution who represents one of the parties in the underlying case

may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.¹⁹⁷

Since such private prosecutors "at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety," the Court found such appointment improper.¹⁹⁸

When prosecutors use the release-dismissal practice to explicitly trade civil for criminal liability, a similar temptation to inject extraneous considerations into a criminal decision can only be heightened.¹⁹⁹

¹⁹⁵ Interview with Steven J. Twist, App. I (stating that release agreements are improper and might also amount to bribery); see also *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) ("It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding . . .") (quoting *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir.), cert. denied, 400 U.S. 852 (1970)).

¹⁹⁶ 107 S. Ct. 2124 (1987).

¹⁹⁷ *Id.* at 2136. In *Vuitton*, a lawyer representing one of the parties requested that he and a colleague be appointed special counsel to prosecute a criminal contempt action. The Court held that "courts have . . . the authority to appoint private attorneys to initiate such proceedings when the need arises." *Id.* at 2134. The Court concluded, however, that "[a] private attorney appointed to prosecute a criminal contempt . . . should be as disinterested as a public prosecutor," *id.* at 2136, and that the private prosecutors involved would be impermissibly "subject to extraneous influence," *id.* at 2137.

¹⁹⁸ *Id.* at 2137.

¹⁹⁹ One might argue that since the release-dismissal transaction benefits "public" civil rights defendants that this influence differs from the influence condemned in *Vuitton* in benefiting the litigation position of "private" parties. See *id.* at 2137. The difficulty of this position is that it posits a unitary "public interest" as the legitimate goal for prosecutorial decisions. Prosecutorial decisions are to be guided by public interests in the "attainment of justice," *id.* at 2141, not simply the interest in obtaining some benefit for the public, see *id.* at 2135 (The prosecutor's "duty is to seek justice, not merely to convict." (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13)).

The "public interest" in deterrence achieved by making an example of a person

One need not "assume that prosecutors will seize the opportunity for wrongdoing" or "abandon the independence of judgment required by their public trust"²⁰⁰ to conclude that the prosecutor who is explicitly authorized to trade civil for criminal liability will be less inclined to resist the blandishments of the arresting officer, the police department, or the city attorney than one who is barred from entering into such trades. So, too, the very availability of the practice will increase the pressures brought to bear. Potential civil defendants will be more willing to seek resolutions that serve their interests if the agreements are permitted simply because they believe that such efforts are regarded as legitimate.²⁰¹

Second, the prosecutor who enters into release-dismissal bargaining runs the risk of losing sight of her appropriate role, not only in this decision, but in others. The norm of impartial prosecution is in part sustained by its consistent application. Once the barriers between the responsibility of the prosecutor and those of the interested civil advocate are weakened in one area by allowing the explicit exchange of civil for criminal liability, they may be undercut in other areas as well. It will be harder for a prosecutor to put the potential interest of a police officer out of her mind in making prosecutorial decisions regarding investigation, charging, pleas, and suppression in a second case once she has bargained them for dismissal in the first. If we take seriously the ideal of the "disinterested prosecutor,"²⁰² we should be hesitant to inject

popularly believed to be guilty of a crime would not justify prosecution if that individual is in fact innocent. Similarly, the "public interest" in minimizing drains on the city's treasury would not legitimate an offer to dismiss a drunk driving charge if a former municipal employee drops a claim for back pay. And the "public interest" in the success of a municipal cement plant would not justify seeking to prosecute the city's competitor for disorderly conduct. The temptations that *Vuitton* sought to avoid are the temptations of interests whether "public" or "private," extraneous to "the attainment of justice."

²⁰⁰ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality).

²⁰¹ Douglas Whalley, director of the Criminal Division of the Seattle City Attorney's Office reports that the "civil division jumps up and down on my head once a week" because of his office policy of neither seeking nor accepting release-dismissal agreements. Interview with Douglas Whalley, App. I. In Rochester, the District Attorney reported that the policy of requiring releases as a condition of pretrial diversion was initially entered into "because of calls from corporation counsel" for the city of Rochester, but once their legality was impugned, the district attorneys stopped seeking them. Interview with Edward Nowak, App. I.

Conversely, municipal counsel in San Francisco and Miami have sought, in light of the *Rumery* decision, to persuade prosecutors to enter into release-dismissal agreements on a routine basis. The District Attorney's office in San Francisco would not comment on prospects for adoption of such a policy, and Miami is studying the issues. Interview with Kimberly A. Reily, App. I (San Francisco); Interview with Lt. Edmund Pecinovsky, App. I (San Francisco); Interview with Janet Reno, App. I (Miami).

²⁰² See *Vuitton*, 107 S. Ct. at 2135, 2136.

occasions for explicitly incorporating extraneous interests into the criminal processes.²⁰³

Precisely because individual prosecutorial decisions "are not readily susceptible to the kind of analysis courts are competent to undertake,"²⁰⁴ courts must be alert to structural factors threatening impartiality of criminal prosecutions. Rather than attempting to second-guess the legitimacy of the prosecutor's decisions on a post hoc basis, the Court may more effectively preserve the norms of disinterestedness by eliminating the occasion for partiality. In related areas, the Court has taken notice of the "institutional pressure that . . . might . . . subconsciously motivate [improper] prosecutorial . . . response[s],"²⁰⁵ and has attempted to assess the "realistic possibility that the [prosecutor's] judgment will be distorted."²⁰⁶ From this perspective, decisions upholding the release-dismissal practice are not so much an outgrowth of cases that have deferred to prosecutorial discretion as a step toward undermining their ethical presuppositions.

3. The Accuracy of the Criminal Process

In addition to its impact on the nature and legitimacy of the criminal process, the release-dismissal agreement can affect criminal outcomes both by increasing the probability that the innocent will be punished and exacerbating the danger that the guilty will go free.

In the first federal case to discuss release-dismissal agreements at length, Judge Bazelon commented:

[These agreements] tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly great

²⁰³ See *POLICE-PROSECUTOR RELATIONS*, *supra* note 114, at 121-22 (voicing concern that proposals for cooperation and coordination between police and prosecutors may "undermin[e] the prosecutor's impartiality in dealing with the police").

²⁰⁴ *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (noting that "the decision to prosecute is particularly ill-suited to judicial review" because factors such as "strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan" are more easily evaluated by prosecutors than by courts); see *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality) (quoting *Wayte*, and discussing the difficulty of making "prosecutorial charging decisions" and stressing that courts should therefore "defer to prosecutorial decisions as to whom to prosecute").

²⁰⁵ *Thigpen v. Roberts*, 468 U.S. 27, 31 (1984) (noting the potential for vindictiveness in a case where defendant is tried first for a misdemeanor and later for a felony arising from the same incident (quoting *United States v. Goodwin*, 457 U.S. 368, 377 (1982))).

²⁰⁶ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 251 (1980) (rejecting the possibility of distortion where "enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties").

because complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.²⁰⁷

The release-dismissal practice, therefore, presents the twin risks that innocent citizens will be wrongly accused and that if they refuse to sign the release that they will be wrongly convicted. This concern was echoed in subsequent cases²⁰⁸ and recurred in interviews with prosecutors who refused to engage in release-dismissal bargaining.²⁰⁹ Thus, the State's Attorney for Montgomery County, Maryland, stated "We don't do it. . . . Civil liability is irrelevant to criminal charges. [A contrary policy] would risk the prosecution of innocent people for the purpose of protecting police from civil liability."²¹⁰

The *Rumery* majority acknowledged this "temptation,"²¹¹ but the plurality adopted the presumption that most prosecutors would not succumb:

Against this background of discretion, the mere opportunity to act improperly does not compel an assumption that all—or even a significant number of—release-dismissal agreements stem from prosecutors abandoning "the independence of judgment required by [their] public trust." Rather, tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty.²¹²

²⁰⁷ *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968).

²⁰⁸ See, e.g., *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) (quoting *Dixon* language on the danger of conviction for vaguely defined offenses); *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 209, 213, 389 A.2d 874, 877, 879 (1978) (reaffirming the general rule that "bargains which tend to stifle criminal prosecution . . . are void as against public policy" and identifying protection against "contrived charges for the purpose of coercing execution of the release"); *Gray v. City of Galesburg*, 71 Mich. App. 161, 165, 247 N.W.2d 338, 340 (1976) ("desire on the part of the prosecuting authority to extract police officers from possible liability offers an undeniable temptation to concoct or exaggerate the charges against the defendant to enhance his bargaining position").

²⁰⁹ See, e.g., Interview with Edward Rendell, App. I (It creates the impression in the police officer's "mind that he will be protected if he engages in misconduct, and that the best way to protect himself if he breaks the rules is to file a phony charge."); Interview with David H. Bludworth, App. I ("If you do that, it is a distortion of the system; you are likely to get bad arrests"); Interview with David C. Thomas, App. I (waiver practice "encouraged Holy Trinity charges" consisting of disobeying a police officer, resisting arrest, and battery on a police officer); cf. Interview with Norman S. Early, Jr., App. I ("If there is no merit to the case, it should be dropped"); Interview with Douglas Whalley, App. I (If a case is going to be dismissed, it will be dismissed.).

²¹⁰ Interview with Andrew Sonner, App. I.

²¹¹ See *Rumery*, 107 S. Ct. at 1193.

²¹² *Id.* at 1194 (Powell, J., plurality) (citation and footnote omitted). A footnote provides the basis for the Court's presumption: "[I]n many States and municipalities . . . prosecutors are elected officials and are entirely independent of the civil authorities

If the interviews underlying this Article are indicative, a "significant" proportion of the prosecutors who admit to engaging in the release-dismissal practice are motivated by a view that part of their "duty" is the routine protection of police officers from civil rights suits.²¹³

This is not to say that such offices would consciously countenance the filing of false "cover" charges to protect police. But even if the prosecutor is steadfast in her adherence to the obligation to acquit the innocent as well as convict the guilty, she is dependent in large part on the information provided by the police to identify guilt and innocence. Ac-

likely to be defendants in § 1983 suits. . . . [T]he constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest." *Id.* at 1193 n.5 (Powell, J., plurality).

There is reason to doubt this analysis. While it is true that prosecutors of major crimes are elected in 45 states, *see* NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 10 (1st ed. 1977), it is also a common practice for misdemeanors to be prosecuted by a city attorney, rather than by a state or county prosecutor responsible for felonies. *See, e.g.,* Interview with James Fais, App. I (misdemeanor cases handled by Columbus city attorney while felony cases handled by county attorney); Interview with John Palermo, App. I (Denver city attorney's office supervises misdemeanor prosecutions); Interview with Douglas Whalley, App. I (criminal division of Seattle city attorney's office handles misdemeanor cases). Even among elected prosecutors, about half have civil responsibility, *see* P. HEALY, *supra* note 127, at 33 (Nat'l Dist. Attorneys Ass'n Nat'l Prosecutor Survey, 48.4% with civil responsibility); NAT'L INST. OF JUSTICE, *supra* note 130, at 71 (51% have civil responsibility), and the day-to-day dependence of prosecutors on police cooperation is substantially more salient than the ultimate responsibility to the voters, assuming that the voters would disapprove, *see supra* notes 125-27.

Indeed, it is not uncommon for the police themselves to constitute the portion of the electorate most influential in regard to these issues. *See* H. GOLDSTEIN, *POLICING A FREE SOCIETY* 139-40 (1977) ("Rank-and-file [police] personnel have demonstrated . . . that they can be a formidable political force in the community." One mayor comments that "[t]here is simply no question of the political power of the police in any city. . . . [T]hey can eventually ruin almost any politician."); POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 85-86 ("Incumbent district attorneys are aware that police officers take an active interest in local elections and are cautious about losing their vote.").

²¹³ *See, e.g.,* Interview with Janet Reno, App. I (generally, in Dade County, state's attorneys will negotiate dropping charges only with the approval of the lead officer and the victim; officers often attempt to obtain releases); Interview with Norman S. Early, Jr., App. I (district attorneys only obtain release if requested to do so by police officer); Interview with Robert Colville, App. I (If officer will drop charges only with a release, the district attorney in Allegheny County will accede to officer's wishes); Interview with James Fais, App. I (release not sought in Columbus every time a case is dropped, but only when the prosecuting witness, the police officer in a resisting arrest case, requests a release); Interview with Robert Lasnik, App. I (police are always consulted in King County before dismissal, and district attorney usually tells police he will try to protect them except in cases regarding excessive force); Interview with Stephen Neely, App. I (If Pima County prosecutor is approached by law enforcement agencies seeking a release, office will seek a release); *see also* MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir.) (quoting prosecutor who stated to the court, "It seems to me that it is the duty of the Deputy District Attorney, in addition to prosecuting criminals, to protect the police officers . . ."), *cert. denied*, 400 U.S. 852 (1970).

cording to a 1982 National Institute of Justice survey of urban prosecutors, 62% of prosecutors routinely talked to police detectives before filing charges, while only 28% talked to defendants.²¹⁴ The temptation to "trump up" charges in the hopes of obtaining a release from civil rights claims is stronger for police than for prosecutors, since the police stand to be found personally liable.²¹⁵ Once the charges are filed, a prosecutor with the utmost in good faith will not necessarily—or even probably—resolve conflicting accounts of an incident in favor of an innocent defendant. Thus, Judge Bazelon's concern is not necessarily based on an "assumption of prosecutorial misconduct," but on a lack of assurance of the ability of prosecutors accurately to discern police misconduct.²¹⁶ An assumption of prosecutorial incorruptibility is not an adequate guarantee of the accuracy of the criminal process when the temptation falls on the police.²¹⁷

²¹⁴ See NAT'L INST. OF JUSTICE, *supra* note 130, at 74. In addition, 15% of prosecutors reported that they did not review felony charges brought by police before filing, and 25% did not review misdemeanor charges. See *id.* at 72; see also POLICE-PROSECUTOR RELATIONS, *supra* note 114, at xiv ("In 51% of jurisdictions over 100,000 population, the police still control the initial charging decision."); *id.* at 258 (noting jurisdictions where, "especially in misdemeanor cases," the police officer has "what is tantamount to veto power of the plea bargain"); cf. P. HEALY, *supra* note 127, at 87 (43% of prosecutors report reviewing "all" misdemeanor charges referred by the police while 6.6% report reviewing "none of them" before filing).

²¹⁵ Prosecutors are immune when acting within the scope of their prosecutorial duties while police are entitled only to qualified immunity. See *Anderson v. Creighton*, 107 S. Ct. 3034, 3042 (1987) (qualified immunity for police officials); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (holding that the prosecutor enjoys absolute immunity under § 1983 initiating and prosecuting the state's case).

²¹⁶ See POLICE-PROSECUTOR RELATIONS, *supra* note 114, at 36 (prosecutors without "street experience" are unable to place a "careful check on police behavior" because of their inability to "read between the lines of a police report"); NAT'L INST. OF JUSTICE, *supra* note 130, at 52-53 ("The prosecutor depends heavily on police for information crucial to case disposition.").

The difficulty is exacerbated by the prosecutor's lack of time to explore the evidence of a case, especially in misdemeanor courts where release-dismissal agreements are prevalent. See Ryan, *Adjudication and Sentencing in Misdemeanor Courts: The Outcome is the Punishment*, in MISDEMEANOR COURTS, *supra* note 99, at 93, 99 ("Individual prosecutors in this and other misdemeanor courts rarely have the time or inclination to gauge precisely evidentiary matters." In the courts observed, prosecutors deferred to police in charging and disposition decisions.); Schulhofer, *supra* note 99, at 565 ("One difficulty in municipal court, especially for some of the prosecutors, is the lack of adequate preparation time. . . . [I]t was an obvious problem in a substantial minority of cases, and it was compounded by the D.A.'s uniform lack of significant prior experience."); see also Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1063 (1976) (noting that prosecutors are "invariably unaware of information that even a routine pre-sentence investigation would have uncovered").

²¹⁷ For a discussion of the possibility that police and prosecutors will file charges in an effort to obtain a conviction to "cover" police misconduct if release-dismissal agreements are unavailable, see *supra* text accompanying notes 151-53.

There is, moreover, a cognate threat to the accuracy of the criminal process in the release-dismissal practice. If the practice does not solely extract waivers of civil rights claims from defendants whose charges would be dropped in any event, then individuals who would otherwise be prosecuted are released from criminal liability by reason of the violation of their civil rights. Courts before *Rumery* were skeptical of the release-dismissal agreement because of "its potential for use to defeat the public interest in enforcement of our criminal laws."²¹⁸ Prosecutors since *Rumery* have voiced a similar concern that if release-dismissal practices became established, "defendants' attorneys would use it as a lever to scare us off from prosecuting good arrests."²¹⁹ Given the present Court's avowed concern with ensuring that the outcome of the criminal process be a function of guilt or innocence of the underlying criminal charges rather than of the merits of collateral issues regarding the constitutionality of the arrest and investigation process, it is disconcerting to observe Justice Powell's plurality crafting a new opportunity for "[t]he criminal to go free because the constable . . . blundered."²²⁰ Indeed, in the release-dismissal case, prosecution is dismissed not because of an adjudicated conclusion that the defendant's rights have been violated, but because of a desire to avoid adjudication of the question.²²¹

²¹⁸ *Sexton v. Ryan*, 804 F.2d 26, 27 (2d Cir. 1986); cf. *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 213, 389 A.2d 874, 879 (1978) (expressing similar concern).

²¹⁹ Interview with David H. Bludworth, App. I; see, e.g., Interview with Douglas Whalley, App. I ("You get it as a bluff in a good number of cases, and pretty soon, you would have it in all of them if we accepted them"); Interview with Ronald Fields, App. I (wary of using release agreements because of the danger of allowing leniency unwarranted by public policy); Interview with Andrew Sonner, App. I ("Civil liability is irrelevant to criminal charges; [criminal charges] should be based on evidence.").

²²⁰ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (criticizing the exclusionary rule); cf. *Stone v. Powell*, 428 U.S. 465, 489-90 (1976) (citing *Defore* and noting the "well-known costs" of the exclusionary rule in diverting attention from "the ultimate question of guilt or innocence" when "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.").

²²¹ The importance of the concern that release-dismissal practice may inhibit the prosecution of criminal perpetrators differs depending on the criminal justice policy of the state that may prosecute. As suggested in the next section, in the states in which criminal justice policy regards release-dismissal agreements as inappropriate because of their adverse impact on law enforcement, it is doubtful that strong federal interests justify interfering with this policy. See *infra* note 224 and accompanying text. On the other hand, when states believe that the exchanges of releases for dismissals do not unduly inhibit criminal prosecution, there is no discernable federal interest as a matter of crime control in prosecution of defendants whom the state would permit to avoid prosecution. There are, however, other federal interests that suggest that the transaction of exchanging civil rights claims for criminal releases should not be encouraged. See *infra* notes 228-34 and accompanying text.

4. "Our Federalism"

Justice Powell began his analysis by noting that the enforceability of a waiver of rights under section 1983 "is a question of federal law."²²² Taken on its face, the assertion is indisputable. It elides, however, the rather different question of what deference the admittedly federal common law of release dismissal agreements should give to their status in the law of the state in which they were executed.²²³

The concerns that release-dismissal agreements undermine the integrity of the prosecutorial role and the legitimacy and accuracy of the criminal process are rooted in widely shared views of criminal justice and manifest themselves in state law regarding release-dismissal agreements. A number of state courts and ethics boards have found release-dismissal agreements executed for the benefit of police incompatible with the state's view of legitimate criminal process.²²⁴ In actions arising

²²² *Rumery*, 107 S. Ct. at 1192.

²²³ See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs.*, 107 S. Ct. 2759, 2762 (1987) (state statutes of limitation applied as a matter of federal law unless "a timeliness rule drawn from elsewhere in federal law should be applied." (quoting *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983))); *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 726, 740 (1979) (holding that although federal law governs the rights of the United States under federal programs, absent a congressional directive, state law on liens should not be undermined); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 547-604 (1973) (discussing circumstances under which Federal courts should "borrow" state law); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956) (the litigation at bar between private parties over government notes had too speculative an effect on the United States "to justify the application of federal law to transactions essentially of local concern"). For discussion of the circumstances under which federal law should incorporate state rules, see Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 812 (1986); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

The Court in *Rumery* implicitly held that the choice of law provisions of 42 U.S.C. § 1988 were inapplicable to the validity of releases. Cf. *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (§ 1988 choice of law provisions apply to statute of limitations); *Smith v. Wade*, 461 U.S. 30, 92 (1983) (Rehnquist, J., dissenting) (Court held § 1988 not applicable to damages). See generally Kreimer, *supra* note 49, at 628-32 (discussing the role of federal common law and state law in civil rights actions).

²²⁴ See, e.g., *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 209-12, 389 A.2d 874, 877-78, (1978) ("agreements to refrain from instituting criminal prosecutions are deemed inimical to the impartial administration of justice," but distinguishing facts of case from cases conditioned on release of a police officer); *Commonwealth v. Klein*, 400 Mass. 309, 311, 509 N.E.2d 265, 266 (1987) ("disposition of criminal cases conditioned on the execution of releases as to related civil claims has been deemed improper" but neither judge nor prosecutor proposed the agreement in the case); *Foley v. Lowell Div. of the Dist. Court Dep't*, 398 Mass. 800, 805, 501 N.E.2d 1151, 1154 (1986) ("We consider the practice of dismissing criminal complaints on the condition that releases be executed inappropriate . . ."); *Gray v. City of Galesburg*, 71 Mich. App. 161, 166, 247 N.W.2d 338, 341 (1976) (release-dismissal agreements are "repugnant to public policy because contracts of such a nature may tend to deprive the public of their

in these states, it is difficult to discern any federal interest strong enough to justify allowing agreements enforceable under federal common law to undermine the state's own definition of legitimate criminal process. The dubious advantages of release-dismissal agreements for criminal defendants in such cases have been defined as illegitimate by the state, and the federal interest in screening out frivolous civil rights claims through use such agreements is, as we have seen, of doubtful empirical merit. When a state forbids release-dismissal agreements on criminal process grounds, therefore, the federal law of release-dismissal agreements should give effect to that decision.

But other states may join California²²⁵ in judicial approval of release-dismissal agreements. If a state takes the position that it seeks to merge resolution of civil and criminal cases and does not regard the merger as extortionate in relation to state causes of action, can a federal court then decline to enforce a release of a federal cause of action out of a concern for "tainting" state criminal processes? In *Vuitton*, after all, the Court vindicated its conception of the "disinterested prosecutor" as

right to vigorous enforcement of penal statutes and ordinances for the predominant purpose of benefiting individual persons"); *Kurlander v. Davis*, 103 Misc. 2d 919, 926, 427 N.Y.S.2d 376, 380 (Sup. Ct. 1980) (finding prosecutor's practice of requiring anyone desiring a dismissal to release police department from civil liability unconstitutional); *Hylton v. Phillips*, 270 Or. 766, 773, 529 P.2d 906, 909 (1974) (release of police from civil liability in exchange for dismissal of criminal charges found void as a matter of law because it was obtained through duress); see also *Hazen v. Rich's, Inc.*, 137 Ga. App. 258, 261, 223 S.E.2d 290, 293 (1976) ("[A] release is invalid if its sole consideration [is] the dismissal of . . . criminal charges . . ."); *Murphy v. Rochford*, 55 Ill. App. 3d 695, 700, 371 N.E.2d 260, 264 (1977) ("An agreement not to prosecute is void because it is against public policy, as well as possibly constituting a criminal offense."); *Williamsen v. Jernberg*, 99 Ill. App. 2d 371, 375, 240 N.E.2d 758, 760 (1968) ("The universal rule . . . is that 'compounding a crime being itself criminal, an agreement not to prosecute is void, not only because it is against the policy of the law, but also because the agreement is itself a crime . . .'" (quoting 17 C.J.S. *Contracts* § 228 (1963))); *Kroger Co. v. Demakes*, 566 S.W.2d 653, 658 (Tex. Ct. App. 1978) ("A release executed in consideration of an agreement to seek the dismissal of a pending prosecution is contrary to public policy and unenforceable."); Colo. Bar Ass'n Ethics Comm., Op. 62 (1962), reprinted in 12 COLO. LAW. 455, 455 (1983) (prosecutor may not require release-dismissal on behalf of government); Oklahoma Bar Ass'n Legal Ethics Comm'n, Op. 156 (1970), cited in O. MARU, DIGEST OF BAR ASS'N ETHICS OPINIONS 413 (1970) ("An assistant county attorney may not use his authority and threaten a maker of bad checks with criminal prosecution in order to force him to make regular payments on his debt to the payee."); Or. State Bar Legal Ethics Comm., Op. 483 (1983), reprinted in 1984 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) ¶ 801:7111 (prosecutor may not require release-dismissal agreement for municipal employees).

²²⁵ See *Hoiner v. Barney's Club, Inc.*, 28 Cal. 3d 603, 613-14, 620 P.2d 628, 635, 170 Cal. Rptr. 42, 49 (1980) ("the time honored practice of discharging misdemeanants on condition of a release of civil liabilities . . . does not contravene public policy when the prosecutor acts in the interests of justice").

a matter of federal supervisory power,²²⁸ and there is no supervisory power inherent in section 1983 on its face. The *Rumery* dissenters' claim 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"²²⁷ rings hollow if the public has already announced its desire to have such liability taken into account.

Still, there are weighty federal interests in excluding the influence of release-dismissal agreements from the state criminal process. The agreements themselves are often of doubtful validity under the first amendment.²²⁸ Moreover, they raise substantial due process concerns. The prosecutor's conflict of interest in the use of release-dismissal agreements is more sharply posed than it was in *Vuitton*, which merely acknowledged a "potential" for conflicts to arise. An explicit trade-off between civil and criminal advantage is much more problematic than a mere potential for such mixing of roles. In *Marshall v. Jerico, Inc.*,²²⁹ the Court noted that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."²³⁰ To the extent that release-dismissal practices raise constitutionally dubious pressures on prosecutors, federal courts may legitimately elect to exercise their authority to make federal common law rules that do not exacerbate this problem.

Policies expressed in other federal statutes reinforce these concerns.²³¹ In the Hobbs Act, Congress adopted the common law prohibition against extortion under the "color of official right."²³² Whether or

²²⁸ See *Vuitton*, 107 S. Ct. at 2138. In a concurring opinion, Justice Blackmun stated that "the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Id.* at 2141 (Blackmun, J., concurring). Chief Justice Rehnquist and Justices Powell and O'Connor, however, explicitly rejected the claim of a due process violation. *Id.* at 2147.

²²⁷ *Rumery*, 107 S. Ct. at 1202 (Stevens, J., dissenting).

²²⁸ See *supra* text accompanying notes 155-71.

²²⁹ 446 U.S. 238 (1979).

²³⁰ *Id.* at 249-50.

²³¹ Cf. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2767 (1987) (adopting Clayton Act statute of limitations for civil RICO claims); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72 (1983) (adopting unfair labor practice statute of limitations for duty of fair representation claim); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969) (in civil rights action, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes").

²³² The Hobbs Act, codified at 18 U.S.C. § 1951 (1982), defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1982). The Hobbs Act reaches "[w]hoever in any way or degree ob-

not most release-dismissal agreements have a sufficient impact on interstate commerce to invoke the Hobbs Act directly,²³³ the federal law of extortion can and should exert a "gravitational pull" in the definition of the federal law of release-dismissal agreements in section 1983 cases.²³⁴

Most importantly, even if the state's definition of legitimacy in the criminal process supports release-dismissal agreements, the agreements themselves undercut the system for vindication of civil rights established by the very statute under which the federal law of release-dismissal agreements is elaborated. The availability of the release-dismissal practice is at odds with both the structure and function of section 1983.

C. "Proper Proceedings for Redress"

1. The Structure of the Section 1983 Action

In *Rumery*, the plaintiff's original criminal attorney strongly advised the plaintiff that he could not afford to take the chance of a crimi-

structs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to so do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a) (1982).

²³³ The broadest definition of commerce or affecting commerce is incorporated in the statute. See 18 U.S.C. § 1951(b)(3) (1982); *Stirone v. United States*, 361 U.S. 212, 215 (1960) (the Hobbs Act manifests a congressional purpose to use all its constitutional power to "punish interference with interstate commerce by extortion"); *United States v. French*, 628 F.2d 1069, 1073-74 (8th Cir.) (holding that the Hobbs Act extends to city marshall who sought \$400 in exchange for accepting less than the forfeited amount of bail bonds), *cert. denied*, 449 U.S. 956 (1980); *United States v. Braasch*, 505 F.2d 139, 151-52 (7th Cir. 1974) (upholding a Hobbs Act prosecution against police who harassed Chicago bars to induce payment of "protection money"), *cert. denied*, 421 U.S. 910 (1975).

²³⁴ Dean Calabresi argues:

Like judicial decisions, statutes may be particular and exert little or no gravitational pull, or they may represent a basic change in attitude toward entitlements generally. These last represent a major development in those principles that must guide the common law courts in their lawmaking. A whole course of statutes, like a set of judicial decisions, is likely to have a greater gravitational pull than an odd statute or an odd decision here and there. But, in the end, the common law must include statutes as a fundamental part of its fabric. To treat like cases alike . . . courts must revise out-of-date precedents and adjust them to this broader, now in part statutory, common law.

G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 85-86 (1982). Professor Dickerson also explains that the courts may also find that a statute provides a useful analogy in an area that lies beyond the scope of its working provisions and even beyond the scope of its policy or purpose. In the latter situation, "[t]he court should select the analogy, whether statutory or common law, that best serves that matter at hand and the coherence of the legal order." R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 250-51 (1975).

nal conviction, even if he was innocent:

Now 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.²³⁵

The advice was hardly idiosyncratic; prosecutors who use the tactic report that defendants rarely refuse offers to exchange their civil rights actions for dismissal of charges.²³⁶ At Mr. Rumery's trial, it would have been his word against that of Ms. Deary. He was a substantial local businessman; she was a private citizen.²³⁷ Yet, he was informed that he had no effective choice but to accept a dismissal. For the normal citizen claiming police misconduct, whose account of events is to be judged against that of a police officer, the release-dismissal agreement is an offer she can't refuse.

In most situations, the prosecutor's decision to seek a release-dismissal agreement will result in the release and the extinction of the civil rights action if the release is enforced. Indeed, even if the release is unenforceable, simply signing the release convinces many potential plaintiffs that they have no legal redress and should not even bother seeing a lawyer.²³⁸ In effect, the release-dismissal practice allows prosecutors to unilaterally confer immunity from section 1983 actions on the

²³⁵ *Rumery*, 107 S. Ct. at 1200 n.8 (Stevens, J., dissenting) (quoting the plaintiff's former attorney from the trial record).

²³⁶ *E.g.*, Interview with James Fais, App. I (releases are sought in 50-75 cases per year out of the 48,000 misdemeanors his office handles, and only occasionally do defendants refuse to sign the release); Interview with Stephen Neely, App. I (even though prosecutor had decided to drop charges, defendants were happy to sign the release in order to have the charges dropped); Interview with Robert Lasnik, App. I (public defenders usually do not consider the question of civil liability).

²³⁷ Mr. Rumery was a marketing representative for an insurance company. *Rumery v. Town of Newton*, 778 F.2d 66, 67 (1st Cir. 1985). Ms. Deary was a widowed social and business acquaintance of Mr. Rumery for whom he occasionally did insurance work. See Brief for Petitioner at 2, *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987) (No. 85-1449).

²³⁸ See Interview with John Palermo, App. I (effect of releases was largely psychological, although releases were probably unenforceable); Interview with Michael Avery, App. I ("If the person believes in it, they don't sue; it's like Santa Claus." The release convinces defendants that there is no legal redress, and they do not go to lawyers.); Interview with James Fais, App. I (releases have a "psychological effect" with the result that "defense counsel and their clients abide by the releases"); cf. A. DER-SHOWITZ, *THE BEST DEFENSE* 285-88 (1982) (arrested criminal defense attorney and son reluctantly agreed to sign release in exchange for dismissal of charges and expungement of criminal record even though attorney doubted that release was enforceable in court).

defendants whom they choose to make the beneficiaries of the practice.

In the last decade, the Court has expended considerable efforts in the attempt to refine the structure of immunities to section 1983 actions that appropriately balance its statutory mandate to provide "proceedings for redress" of constitutional injuries with the dangers of "chilling" enforcement of state law.²³⁹ Prosecutors, judges, and their analogues have been accorded absolute immunity from damage actions,²⁴⁰ but other individual officials can claim immunity only for actions that they reasonably believe to be lawful,²⁴¹ and municipalities have no immunity if unconstitutional actions are a matter of custom or policy.²⁴² Section 1983 actions, like other federal actions, can go forward on colorable allegations of constitutional violations; immunity is a defense that must be pleaded by the defendant.²⁴³ The denial of a claim of immunity, however, is immediately appealable on an interlocutory basis.²⁴⁴

²³⁹ See, e.g., *Anderson v. Creighton*, 107 S. Ct. 3034, 3042 (1987) (qualified immunity for FBI agent); *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (qualified immunity for prison discipline committee members); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity for government officials performing discretionary functions); *Butz v. Economou*, 438 U.S. 478, 505 (1978) (qualified immunity for executive officers); *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976) (absolute immunity for prosecutors).

²⁴⁰ See, e.g., *Harlow*, 457 U.S. at 811-13 (absolute immunity for government officials whose special functions or constitutional status require complete protection from suits for damages); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 735-36 (1980) (judges acting in prosecutorial capacity have absolute immunity); *Butz*, 438 U.S. at 513 (absolute immunity for administrative law judges and federal hearing examiner); *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (absolute immunity for judge unless "he has acted in the 'clear absence of all jurisdiction.'") (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)); *Imbler*, 424 U.S. at 427 (absolute immunity for prosecutors); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (absolute immunity for judges).

²⁴¹ See, e.g., *Anderson*, 107 S. Ct. at 3042 (qualified immunity for FBI agents); *Malley v. Briggs*, 106 S. Ct. 1092, 1098-99 (1986) (qualified immunity for police officer); *Cleavinger*, 474 U.S. at 206 (federal prison's discipline committee is entitled to qualified immunity); *Mitchell v. Forsythe*, 472 U.S. 511, 524 (1985) (attorney general entitled to qualified immunity).

²⁴² See, e.g., *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1298 (1986) (single decision by authorized lawmaker can constitute official policy); *Oklahoma City v. Tuttle*, 471 U.S. 808, 810 (1985) (proof of a single incident of unconstitutional activity is not sufficient; plaintiff must include proof that unlawful activity was "caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policymaker"); *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) (municipality has no immunity from liability under § 1983 for its constitutional violations based on policy or custom); *Monnell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) (cities are not vicariously liable for actions of their employees, but cities are liable for actions of employees during execution of the city's policy or custom).

²⁴³ See *Gomez v. Toledo*, 446 U.S. 635, 641 (1980).

²⁴⁴ See *Mitchell*, 472 U.S. at 524-25 (collateral orders permitted prior to final determination); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (appealable under "col-

The release-dismissal practice, as administered, allows the state prosecutor to effectively replace this structure of immunities with her own conceptions of when there is "real" police brutality,²⁴⁵ whether the plaintiff is a troublemaker,²⁴⁶ and when the fault of the two parties is "about even."²⁴⁷ Moreover, it allows her to import by the back door a municipal immunity that was rejected on the merits.²⁴⁸ In short, the release-dismissal practice delegates to each local prosecutor unreviewable authority to amend in practice the standards of section 1983 liability for wrongs done to citizens accused of crimes in their jurisdiction.

Even if prosecutors in fact sought to replicate the existing standards of section 1983 jurisprudence in their decision to seek release-dismissal agreements, it would be a dubious construction of section 1983 to give those decisions effect. When the Congress of 1871 promulgated section 1983, it sought to provide a judicial forum: defendants were to be held liable "in an action at law, suit in equity, or other proper proceeding for redress",²⁴⁹ and jurisdiction was given to federal courts to entertain such proceedings.²⁵⁰ The purest-hearted of prosecu-

lateral order" doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

²⁴⁵ See Interview with Robert Lasnik, App. I (in high profile situations, such as assaults by prison guards and when there is "real police brutality," it would be inappropriate to link civil disposition to criminal disposition by the execution of a release-dismissal agreement).

²⁴⁶ Interview with Stephen Neely, App. I (if the initial determination is that a case is not prosecutable and the prosecutor is approached by the police agency seeking a release because the individual is a troublemaker, the prosecutor will seek a release).

²⁴⁷ Interview with Paul Shechtman, App. I (use of release-dismissal waivers occurs if "the conduct is about even" between the police and the citizen or if the prosecutor thinks the citizen is bringing a nuisance suit); Interview with Robert Holmes, App. I (it was not atypical for one or two cases per week to arise "where there was a misunderstanding on both sides," and the district attorney thought it best for the "parties to shake and go home"). Holmes, the Deputy Chief of the Trial Division, Manhattan District Attorney's Office, explained:

You can smell these kind of cases: there is a charge of disorderly conduct and resisting arrest. . . . The cop tells someone in a bar to quiet down, he takes a swing at a cop, but by the time they get to arraignment, everybody is sober, and they want to forget it.

Id.

²⁴⁸ The doctrine of municipal immunity has been flatly rejected as a matter of substantive § 1983 law. See *supra* note 242. One might expect prosecutors to be most receptive to police requests when police acted under municipal custom or policy, the very situation where cities are held liable. See *id.*

²⁴⁹ 42 U.S.C. § 1983 (1982).

²⁵⁰ Section 1343(3) provides the federal courts with original jurisdiction over any civil action to

[r]edress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of

tors can attain neither the impartiality nor the information available in a judicial proceeding; to place faith in the decisions of prosecutors as a mechanism for sifting through section 1983 actions is to deny the promise of "proceedings for redress."

The Congress that drafted section 1983 was cognizant of the difficulties that might arise from the tendencies of local law enforcement officials to be less than solicitous of federal rights in the face of local interests. The entire premise upon which section 1983 was based was a lack of faith in the law enforcement system of the states as the vehicle for ensuring the protection of federal civil rights.²⁵¹ A federal forum was provided precisely because the state forum was suspect. To suggest that the Congress that drafted section 1983 envisioned vesting local prosecutors with an effective veto over the opportunity to bring section 1983 suits is to ignore history.

Indeed, the 1871 Congress was explicitly sensitive to the possibil-

the United States.

28 U.S.C. § 1343(3) (1982). The original jurisdiction, codified in § 1343(3) was initially part of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13. It was not until 1875 that general federal question jurisdiction was provided in the Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified at 28 U.S.C. § 1331 (1982)).

The court in *Mitchum v. Foster*, 407 U.S. 225 (1972), traced the history and purposes of § 1983:

Section 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was "modeled" on § 2 of the Civil Rights of 1866, 14 Stat. 27, and was enacted for the express purpose of "enforc[ing] the provisions of the Fourteenth Amendment." 17 Stat. 13. The predecessor of § 1983 was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. . . . Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.

Id. at 238-39 (citations and footnotes omitted).

²⁵¹ See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'") (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)); *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982) (Civil Rights Act of 1871 established the federal government as a "guarantor of the basic federal rights of individuals against incursions by state power"); *Monroe v. Pape*, 365 U.S. 167, 180 (1961) ("It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."); Kreimer, *supra* note 49, at 617 ("During Reconstruction the judiciary of former confederate states served both as a means of resisting and harassing federal officials and as a way of attempting to reestablish white hegemony over the recently emancipated Negro." Section 1983 was designed to remedy this difficulty.).

ity that civil rights plaintiffs might be deterred from taking advantage of the federal forum. The same bill that established both the federal cause of action that became section 1983 and the federal forum to hear the action provided a separate federal cause of action against any conspiracy, public or private, "to deter by force, intimidation or threat, any party or witness in any court of the United States from attending such court . . . or to injure such party or witness in his person or property on account of his having so attended or testified."²⁵² An agreement between police and prosecutors to attempt to extract a release of a federal civil rights action by threatening prosecution may well constitute an independent violation of section 1985(2).²⁵³ And even without an agreement, the attempt by a prosecutor to use her power to deter federal civil rights actions by criminal defendants is in substantial tension with the values embodied in section 1985(2).

2. The Function of Section 1983 Actions

For a citizen simply abused by police without having been accused

²⁵² 42 U.S.C. § 1985(2) (1982) (originally § 2 of the Ku Klux Klan Act of 1871, ch. 22, § 2, 17 Stat. 13, 13); see *Kush v. Rutledge*, 460 U.S. 719, 727 (1983) ("Neither proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal court.").

²⁵³ Section 1985(2) provides:

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws

42 U.S.C. § 1985(2) (1982).

The circuits are split on the question of whether a threat attempting to deter a party from bringing suit is encompassed within the prohibition of threats deterring "attendance." Compare *Wright v. No Skiter, Inc.* 774 F.2d 422, 426 (10th Cir. 1985) (cause of action exists for attempt to deter bringing of federal suits) and *Irizarry v. Quiros*, 722 F.2d 869, 871 (1st Cir. 1983) (same) with *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 757 (5th Cir. 1987) (alleged retaliation for attempting to file a federal lawsuit or for actually filing a lawsuit is insufficient to state a claim) and *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. June 1981) (en banc) (no action for deterring filing, only for deterring attendance), *cert. denied*, 454 U.S. 1110 (1981). Cf. *Keating v. Carey*, 706 F.2d 377, 386 n.13 (2d Cir. 1983) (taking no position on the dispute). It would seem odd for Congress to protect witnesses and parties against harassment once a case is filed but to allow conspirators free rein to prevent the filing in the first place.

of a crime, "it is damages or nothing."²⁵⁴ For those in Mr. Rumery's position, by contrast, a sort of compensation for the violation of his rights is provided by the dismissal of criminal charges.²⁵⁵ A plurality of the Court was "hesitant to elevate more diffused public interests above Rumery's considered decision" that he preferred to settle his action for assurance of the prosecutor's dismissal rather than a chance at the city's coin.²⁵⁶

Why, then, should the courts care what medium a citizen uses to extract compensation for her injuries?

a. *Deterrence*

A decade before the American revolution, John Wilkes, a member of the British parliament, was subject to arrest and the seizure of his papers by authority of a general warrant, as part of an effort by the administration of Lord Halifax to suppress publications critical of the British administration.²⁵⁷ Wilkes was then released and responded with a damage action against the officers who illegally arrested him.²⁵⁸ In instructing the jury at trial, Lord Chief Justice Pratt commented that the general warrant was "totally subversive of the liberty of the subject," and that "damages are designed not only as a satisfaction to the injured, but likewise as a punishment for the guilty, to deter from any such proceeding for the future."²⁵⁹

The Wilkes incident became a cause celebre on both sides of the Atlantic²⁶⁰ and *Wilkes v. Wood*²⁶¹ became a leading case. Justice

²⁵⁴ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("It will be a rare case indeed in which an individual in Bivens' positions will be able to obviate the harm by securing injunctive relief from any court. . . . [A]ssuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.").

²⁵⁵ There is, of course, no real compensation if charges would have been dropped without the release, a situation that is not uncommon. See *supra* text accompanying notes 80-91.

²⁵⁶ *Rumery*, 107 S.Ct. at 1193 (Powell, J., plurality).

²⁵⁷ See G. RUDÉ, *WILKES AND LIBERTY: A SOCIAL STUDY OF 1763 TO 1774*, at 24-28 (1962); A. WILLIAMSON, *WILKES: 'A FRIEND TO LIBERTY'* 61-66 (1974).

²⁵⁸ *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (1763) (£1000 damages awarded).

²⁵⁹ *Id.* at 498-99; see also *Ashby v. White et Alios*, 92 Eng. Rep. 126, 137 (1703) (Holt, C.J.) ("If publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences").

²⁶⁰ See, e.g., N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 43-46 (1970); Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 886, 910-915 (1985); Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369-70 (1983).

²⁶¹ 98 Eng. Rep. 489 (1763).

Pratt's statement was quoted as authoritative in *Scott v. Donald*,²⁸² one of the first cases in which the Court upheld the award of damages for the violation of constitutional rights. More recently, it has become a regular practice of the Court to emphasize the importance of damage awards under section 1983 in providing a deterrent to constitutional violations.²⁸³

The deterrent effect of section 1983 on police officers is clearly reduced if vindication of constitutional rights takes the form of dismissal of criminal charges that the officer has within her power to fabricate in the first place, rather than in the form of a damage verdict for which the police officer is individually liable.²⁸⁴ The police officer who knows that she can avoid a civil rights action entirely if she can convince the prosecutor to seek a release will act differently than one who believes that she ultimately may be forced to defend her acts in court. Thus, State's Attorney David H. Bludworth takes the position that "[o]nce someone is arrested, you can't unarrest him; if you make a bad arrest, you have to take the consequences"; if release-dismissal agreements were countenanced, a prosecutor would be likely to get "bad arrests."²⁸⁵ A former Deputy Superintendent of the Chicago Police Department views the elimination of release-dismissal agreements as an element leading to the substitution of citations for arrests in low-level disorderly conduct violations.²⁸⁶ And in Philadelphia, then-District Attorney Edward Rendell eliminated the practice because he viewed it as

²⁸² 165 U.S. 58, 86-87 (1897).

²⁸³ See, e.g., *Memphis Community School Dist. v. Stachura*, 106 S. Ct. 2537, 2542-45 (1986); *Smith v. Wade*, 461 U.S. 30, 54 (1983); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Robertson v. Wegman*, 436 U.S. 584, 591 (1978); *Monnell v. New York Dep't of Social Servs.*, 436 U.S. 658, 699-701 (1977); cf. *Carlson v. Green* 446 U.S. 14, 21-22 (1980) (since *Bivens* remedies involve recovery from individuals, they have an even more powerful deterrent effect than would a suit solely under the Federal Tort Claims Act, which only provides for a claim against the United States); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring) (relying on the importance of deterrence and finding that, even without any statutory authority, a federal court may award damages to plaintiffs whose constitutional rights have been violated by a federal official); *Mountain View-Los Altos Union High School Dist. v. Sharron B.H.*, 709 F.2d 28, 30 (9th Cir. 1983) (Kennedy, J.) ("Damages serve not merely to compensate an injured party but also to act as an incentive for potential defendants to act prudently. See, e.g., 42 U.S.C. § 1983.").

²⁸⁴ This is not to say that all dismissed charges are fabricated, but none of the prosecutors interviewed admitted to having dismissed a "valuable" case.

²⁸⁵ Interview with David H. Bludworth, App. I.

²⁸⁶ See Interview with Lt. Dennis Nowicki, App. I (It used to be a standard procedure for Chicago police to resolve conflict situations by arresting the parties involved for disorderly conduct. Charges were usually dropped later with the requirement that a release be signed. This practice was abandoned after a federal class action in which such releases were declared improper.).

"totally inconsistent with fair scrutiny of police officers."²⁶⁷ "It creates the impression in the policeman's mind that he will be protected if he engages in misconduct, and that the best way to protect himself if he breaks the rules is to file a phony charge."²⁶⁸

In many cases, the individual civil rights defendant will be indemnified by her employer, which will tend to dilute the deterrent impact of an action under section 1983. But in such cases, as in cases in which the employer is joined directly, the damage action may not only provide an individual police officer with some personal incentive to abide by constitutional constraints but may also mobilize those resources within the government supervisory structure that seek to honor constitutional commands. The litigation process reveals information to the government about itself, since an attorney defending a case must, above all, understand the facts that the plaintiff may use against the attorney's client.²⁶⁹

A lawyer for a city cannot intelligently respond to a claim that the city has a "custom" of sanctioning police brutality without knowing what the customs of the city are.²⁷⁰ Once the lawyer discovers those customs, they are more likely to be revealed to policymakers.²⁷¹ Similarly, a supervisor confronted with constitutional violations by her subordinates in the context of a deposition or trial may well be more inclined to take actions to prevent a recurrence than if a complaint is simply submitted to the "complaint bureau."²⁷² Defense of a civil rights

²⁶⁷ Interview with Edward Rendell, App. I.

²⁶⁸ *Id.*

²⁶⁹ In addition to understanding what facts may be marshalled against his client, Professor Mann observes that defense attorneys may practice what he calls the "informational control" defense. "The defense attorney's first objective is to prevent the government from obtaining evidence that could be inculpatory of his client . . . [which] entails keeping documents away from and preventing clients and witnesses from talking to government investigators, prosecutors, and judges." K. MANN, *DEFENDING WHITE COLLAR CRIME* 6-8 (1985).

²⁷⁰ A municipal "custom" or policy, of course, is the sine qua non of municipal responsibility for its employees' constitutional torts under § 1983. *See Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1294, 1297 (1986) (quoting *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1977)).

²⁷¹ A 1987 survey of 55 police chiefs performed under the auspices of the Police Executive Research Forum found that roughly half of the departments routinely receive from counsel in civil cases "a thorough report on the issues raised in the civil action," "a statement specifying why the case was won or lost," and "an assessment of what department procedures could be redesigned or better enforced to reduce future liability." POLICE EXECUTIVE RESEARCH FORUM, *supra* note 149, at 36. In the departments surveyed, 77% routinely submit proposed policy or procedure changes to legal counsel for review prior to implementation, and 25% had been advised to refrain from program experiments due to concerns about civil liability; legal advice was heeded in all but one case. *Id.* at 35.

²⁷² *See* R. SULNICK, *supra* note 106, at 84 ("Civil litigation can affect police be-

case thus flags for supervisors possible civil rights abuses and forces them to confront those abuses in concrete fashion.²⁷³

Even if a case is ultimately settled, the defense of civil rights cases necessarily means that the actions of police officers will be reviewed by an official entirely outside the officer's immediate workgroup. The perspective of the city attorney or the police civil liability division may be substantially less forgiving of unconstitutional activity, which imposes defense costs, than a prosecutor or supervisor with whom the police officer works on a daily basis²⁷⁴ and over whom the officer can exercise considerable leverage.²⁷⁵ Justice Powell's plurality is correct in noting that "[p]reparation for trial, and the trial itself, will require the time and attention of the defendant officials,"²⁷⁶ but it is not clear that this trial preparation will be "to the detriment of their public duties."²⁷⁷ Those duties include protecting the public against constitutional malfeasance.

The release-dismissal transaction, in contrast, limits information regarding the constitutional malfeasance to the police and the prosecutor, who already deal with the facts in the criminal case. It provides no particular incentives for discovering abuse. On the contrary, as Suffolk County (Boston, Mass.) Assistant District Attorney Judy Zeprun notes,

havior. . . because it is a mechanism of communication which the Number 2 man [a community affairs officer] cannot intercept. It goes directly to the Number 1 man [the police chief].").

²⁷³ Stephen Kaplan, the City Attorney of Denver explains that the Denver Police Department has an internal bureau concerned with civil liability and uses the filing of suits as a means of tracking problem officers. "It is one thing to have a couple of complaints; it's something else for suits to be filed regularly." "It's the same thing with automobile accidents; some police officers just don't know how to drive, and auto suits alert us." Interview with Stephen Kaplan, App. I; *see also* R. SULNICK, *supra* note 106, at 89 ([I]t is not necessary that a judge rule in favor of a complainant against the department for policy change to result. . . . The important factor is that more than one case comes along with a particular violation of [a] citizens' rights . . . that the administrators consider to be meritorious[.] . . . mean[ing] . . . a good case in court").

²⁷⁴ *Cf.* P. SCHUCK, *SUING GOVERNMENT* 135-37 (1983) (Misconduct at low levels tends to decrease when officials demonstrate their commitment to lawfulness; "adding lawyers to an agency's staff may encourage compliance . . . ; professional (and hence legalistic) attitudes can counteract the most powerful peer subcultures"); C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 42-46 (1975) (importance of making sure corporate attorneys are not "frozen out" of information in order to ensure compliance with the law; "legal contingencies are not a part of the subsystem's reality"; compliance requires alerting high levels to legal difficulties); *id.* at 204-06 (many problems of corporate compliance owe to "failures to process [information] upward to people who are in a position to do something about it;" compliance facilitated by making "top executives know certain things they would rather not know").

²⁷⁵ *See supra* notes 125-26 and accompanying text.

²⁷⁶ *Rumery*, 107 S. Ct. at 1194 (Powell, J., plurality).

²⁷⁷ *Id.*

the practice of obtaining releases "covers up situations where the police go beyond the scope of their duties."²⁷⁸

This "covering up" in large measure precludes the possibility of bringing public opinion to bear to correct abuses. Litigation reveals information to the public in concentrated form; the stories of the parties involved are told at a single confrontation in a public arena. Discovery opportunities may reveal facts that would otherwise remain hidden, but even if no such revelation occurs, the litigation represents a theater of civic virtue. It provides an opportunity to declare the norms that protect citizens. Even if the trier of fact concludes that the Constitution has not been violated, the public may draw its own conclusion regarding the legitimacy of the practices revealed. Regular demonstrations that its servants have physically abused or arbitrarily arrested citizens may eventually take their toll on public complacency.

Once a release has been signed, of course, the citizen remains free to take her case to the public. The probability that she will do so and the probable impact of such an effort, however, is lessened. Several interviews report that even when releases are legally unenforceable, they remain psychologically effective by convincing prospective civil rights plaintiffs that they have no claim of having been wronged.²⁷⁹ At a minimum, such an effect will prevent the citizen from seeking costly legal counsel; it may, in addition, deprive the citizen of the sense of her right to public redress. For her, the case is closed.

Without a viable cause of action, opportunities for discovery are nonexistent, and the citizen seeking a public forum is consigned to the faint hope that a news organization or elected official may take an interest in her plight. Our reaction to those who parade alone, their grievances proclaimed on sandwich boards, is to dismiss them as cranks. The plaintiff in a civil rights action partakes of some of the majesty of the law; she cannot be as simply ignored.

b. *Vindication of Constitutional Rights as Intrinsically Valuable*

Admittedly, a policy rooted in the desire to deter violations of constitutional rights requires predictions about the effect of contingent liabilities on complex human interactions and institutions. There is, however, another, less instrumental, and hence, less empirically speculative face to the vindication of rights under section 1983 that also casts doubt on the acceptability of the release-dismissal practice.

The plaintiff who brings an action under section 1983 does not sue

²⁷⁸ Interview with Judy Zeprun, App. I.

²⁷⁹ See *supra* note 238.

to collect a private debt; she sues to redress a constitutional wrong.²⁸⁰ The Congress of 1871 recognized this public function as important enough to create a new head of federal jurisdiction.²⁸¹ The Congress of 1976 deemed it to be of sufficient public moment to provide an exception to the "American Rule" requiring plaintiffs to bear their own attorneys fees.²⁸² In evaluating the release-dismissal practice, therefore, it is insufficient to observe that the prospective plaintiff might prefer a dismissal to the opportunity to vindicate her right. The remedy furnished by section 1983 is not simply a legal advantage but an opportunity to right a wrong; it is not merely a legal power, but an opportunity for rectification. This opportunity serves public values beyond the benefit it may confer on the particular plaintiff. The redress of unconstitutional actions both reflects and contributes to the ethos of constitutionality with which we seek to surround official actions; it purges the taint of injustice from our social system.

In *Marbury v. Madison*,²⁸³ Justice Marshall observed:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

. . . .

. . . "[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws

²⁸⁰ See *City of Riverside v. Rivera*, 106 S. Ct. 2686, 2694 (1986) (Brennan, J., plurality) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms").

²⁸¹ Federal jurisdiction over the redress of civil rights violations, 28 U.S.C. § 1343(a)(3) (1982), had its genesis in § 1 of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13, 13, which was, in turn, derived from § 2 of the Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 26, 27. See *supra* note 250. It preceded § 1331, which traces its origin to the Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470, establishing general jurisdiction over federal questions.

²⁸² Congress provided for the award of a reasonable attorney's fee as part of costs to the prevailing party, if other than the United States, in the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)). See generally Comment, *Giving Substance to the Bad Faith Exception of Evans v. Jeff D.: A Reconciliation of Evans with the Civil Rights Attorney's Fees Awards Act of 1976*, 136 U. PA. L. REV. 557 (1987) (discussing congressional policies behind the Fees Act).

²⁸³ 5 U.S. (1 Cranch) 137 (1803).

furnish no remedy for the violation of a vested legal right.²⁸⁴

A forum in which the claims of citizens against the government may be judged according to a law beyond the discretion of the officials involved encapsulates the democratic relation between governors and governed. The ability of the citizen to hale the functionary into court to answer for the legality of her actions lies at the core of constitutional government. Our litigiousness is, therefore, not unrelated to our liberty.

The power to claim redress recognizes both that the actions of government officials are limited by a law beyond themselves, and that citizens, as much as officials, possess the dignity necessary to invoke the authority of the state. The fact that the officer can be called to account for her actions can have an impact on the officer; she cannot regard herself as the omnipotent arm of the law when a citizen can seriously threaten to use the law herself. That fact will have an equally powerful impact on the citizens who deal with the officer. Quiescent acceptance of injustice is less likely in citizens who can challenge injustice as illegal, for even an unsuccessful challenge to unconstitutional action is a tangible manifestation of the plaintiffs' dignity as citizens of a democratic republic.²⁸⁵

Last Term, in *City of Houston v. Hill*,²⁸⁶ the Court struck down a municipal ordinance that made it "unlawful for any person to . . . interrupt any policeman in the execution of his duty."²⁸⁷ The majority observed: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."²⁸⁸ The ability to call police to account in courts of law free from the specter of criminal prosecution can equally be seen as an element of constitutional democracy.²⁸⁹

²⁸⁴ 5 U.S. at 162-63 (quoting 3 W. BLACKSTONE, COMMENTARIES *109).

²⁸⁵ See J. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE 134-36 (1974) (an individual's recourse to litigation gives the individual a sense of her rights in the face of oppression as she realizes "that solutions are not solely a matter of individual responsibility"); cf. B. MOORE, INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT 77, 87 (1978) ("From the standpoint of a dominant group the important task is to inhibit any potentially dangerous form of self-esteem," while "[f]or any oppressed group the primary task is to overcome the moral authority of the sources of their suffering.").

²⁸⁶ 107 S. Ct. 2502 (1987).

²⁸⁷ *Id.* at 2506 (quoting Houston Municipal Code § 34-11(a) (1984)).

²⁸⁸ *Id.* at 2510.

²⁸⁹ After *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), only damage actions will provide redress for most police misconduct. *Lyons* requires proof that the plaintiff individually is likely to be subject to similar misconduct in the future before a federal court may entertain a claim for equitable relief. Absent an explicit threat by officers to act unconstitutionally, it is doubtful this standard will be met often.

The empowering aspect of a citizen's right to bring suit is eviscerated by release-dismissal agreements.²⁹⁰ A police officer in a jurisdiction utilizing the practice knows that, as long as there is a plausible cause for arresting the citizen with whom she is interacting, it is unlikely that she will have to defend her actions in court. For the officer, satisfying the district attorney that a release should be demanded serves, in effect, as a substitute for conforming her actions to the law. Within such a system, the citizen who accedes to a demand for a release will not have the opportunity to vindicate her rights by putting her oppressor at risk. Indeed, she is likely to experience the release-dismissal transaction not as a vindication, but as a further act of oppression and subservience.²⁹¹

It is hard to discern the essence of a free society in the ability of one official to manipulate the criminal justice system to cover up another's possible wrongdoing, regardless of any apparent benefit the manipulation confers on the citizen who has been wronged by the official's actions.²⁹² Even if the citizen regards it as beneficial, no one else will

²⁹⁰ Indeed, if field reports are accurate, this may also put the right to verbally challenge police at risk. Researchers have regularly reported that police tend to regard verbal challenges as warrant for arrest or physical abuse. *See supra* note 113. If release-dismissal agreements are available to screen out civil challenges from those who suffer arrest, the feasibility of initial challenge suffers dramatically.

²⁹¹ As Justice O'Connor observed in her concurring *Rumery* opinion:

The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. The coercive power of the criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.

Rumery, 107 S. Ct. at 1196 (O'Connor, J., concurring in part and in the judgment).

²⁹² Writing about the town of "Norheim" in pre-World War II Germany, Professor Allen has recounted:

The Gestapo were particularly anxious to get their hands on Norheim's *Reichsbanner* flags and membership list. . . . Yet despite Friedrich Haase's prominent position in the *Reichsbanner* he was not arrested until the end of April 1933. He was then held for four days without charge, ineptly interrogated but not mishandled, released, and then arrested again a week later. This time he was made to sign a statement promising not to speak of his experiences in jail and not to sue for damages:

I said that I wouldn't sign such a statement and Police Secretary Engelmann said: "If you don't sign that, you will be locked up again." So I said to him "Engelmann! You know as well as I do that that's extortion and that you could be fined or imprisoned for it! It's right in the Civil Code Book—right there on your desk." Engelmann got up and went over to the window and looked out of it for a long time. Then he said: "I can't help it; sign or you'll be locked up again." So I said: "Give me the damned thing—I'll sign it."

W. ALLEN, *THE NAZI SEIZURE OF POWER: THE EXPERIENCE OF SINGLE GERMAN TOWN 1922-45*, at 195 (rev. ed. 1984).

know that authority has been successfully challenged.

V. THE FUTURE OF RELEASE-DISMISSAL AGREEMENTS

The advantages that the majority in *Town of Newton v. Rumery*²⁹³ assumes will accompany the use of release-dismissal agreements are far from automatic. They are purchased at a substantial cost to first amendment rights, the integrity of the criminal process, and the purposes served by section 1983.

The claim that the release-dismissal agreement offers a net advantage to criminal defendants whose constitutional rights have been violated is empirically questionable.²⁹⁴ The special situation in *Rumery*, in which the prosecutor had never before asked for a release, and in which it is likely that the dismissal saved Mr. Rumery substantial further costs, is atypical. Elimination of release-dismissal agreements in several jurisdictions has resulted in no greater rate of criminal prosecutions, and the practice, at best, can be said to benefit certain criminal defendants at the expense of others.²⁹⁵

In contrast to the conjecture of the *Rumery* Court, the predominant use of release-dismissal agreements appears to be neither screening out legally frivolous civil rights claims nor achieving an undefined but legitimate "law enforcement interest." Rather, the principal function is to protect police and municipalities routinely from liability. It substitutes, at best, the prosecutor's sense of rough justice for the structure of immunities and liabilities that the courts have erected around section 1983.

Many prosecutors who use the practice regard their responsibility not as providing impartial evaluations of the merits of citizens' complaints, but as providing a service to cooperating law enforcement officials. Prosecutors who seek releases tend to do so when the police ask for them; they are often members of the same office that would defend any civil rights cases brought. Indeed, in misdemeanor prosecutions, where release-dismissal agreements are most prevalent, often the police themselves, not prosecutors, make the initial charging and prosecution decisions. The police, therefore, are in a position to extract releases governing their own liability. The image of the popularly elected prosecutor impartially judging the conflicting claims of police and citizens—which lies at the root of the argument in favor of using release-dismissal agreements as a screening device—often bears no resemblance

²⁹³ 107 S. Ct. 1187 (1987).

²⁹⁴ See *supra* notes 80-92 and accompanying text.

²⁹⁵ See *supra* notes 88-89 and accompanying text.

to reality.

Equally important, the release-dismissal practice undercuts the prosecutor's impartiality and compromises the independence of her role in the criminal justice process. Both the tradition of legal ethics and the common law definition of extortion suggest that the use of possible criminal prosecution as leverage to obtain advantage in a civil lawsuit is inappropriate. This concern has been expressed in state case law and by a number of prosecutors, who believe that the prospect of entering release-dismissal negotiations threatens their attempt to separate the criminal gatekeeping functions of their office from public officials' narrower interests in municipal finances.²⁹⁶ In *Rumery*, the prosecutor maintained, and the Court accepted, that the release was justified by considerations entirely within the scope of his duty to secure the just conviction and punishment of violators of the criminal laws. In contrast, the more customary release-dismissal transaction requires the prosecutor to dilute the impartiality which the Court so carefully preserved in *Vuitton et Fils, S.A.*,²⁹⁷ by concerning herself with the financial interests and convenience of the municipality and arresting officers.

Finally, an extension of this practice beyond the unusual facts of *Rumery* imperils the important role played by legal remedies in a democratic society. The right to bring a claim before the courts for redress of grievances against officials not only serves the interests of the plaintiff, but also preserves the structure of legitimacy undergirding the rule of law. To allow such claims to be defeated by prosecuting attorneys as a means of "weeding out" frivolous cases is at odds with the intent of Congress, the first amendment, and the structure of limited government—even if the criminal defendant "voluntarily" agrees to such a transaction.

These considerations suggest that the decision in *Rumery*, though perhaps warranted under the special circumstances of the case, cries out for boundaries. Though the Court was understandably reluctant to promulgate a per se prohibition in its first encounter with the potentially diverse problems of release-dismissal agreements, the Court's approval of the *Rumery* agreement is dangerous if left unchecked. Three aspects of the case suggest themselves as vehicles for the development of limiting rules: the merits of Mr. Rumery's substantive case, the relation between the elements of his case and the nature of the prosecution against him, and the nature of the prosecutor's interests in seeking the

²⁹⁶ See *supra* text accompanying notes 190-95 (citing prosecutors' opinions that the release-dismissal practice distorts the true role of the prosecutors' office).

²⁹⁷ 107 S. Ct. 2124, 2135-38 (1987); see *supra* notes 196-97 and accompanying text.

release.²⁹⁸

The majority in *Rumery* emphasized the relative values of the considerations that Mr. Rumery gained and sacrificed in his agreement: "he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost."²⁹⁹ As Justice Powell interprets the case, "Rumery bears the ultimate burden of proof" as to his innocence, and "the District Court's factual findings gave little credence to his testimony."³⁰⁰

One could read Justice Powell's opinion as allowing a different outcome if the case for Mr. Rumery's innocence had been stronger. In an echo of the murky law of unconscionability, the federal law of release-dismissal agreements might allow for the voiding of release-dismissal agreements if the agreements are sufficiently one-sided. A showing of a civil rights claim that "may well" not have lost, or a prosecution that would have been dropped even without the release might suffice to induce courts to refrain from enforcing the release.³⁰¹ Such an approach would avoid the first amendment problems associated with the release-dismissal practice, as well as ensuring that the bargains in fact redound to the interests of civil rights plaintiffs, and—if the threshold of merit were sufficiently low—perhaps limiting the dangers of suppressing meritorious civil rights complaints.

It would do so, however, at the expense of one of the prime supposed benefits of the release-dismissal practice. A "substantive unconscionability" doctrine would replace the ability of prospective civil rights defendants to rely on releases as a method of avoiding the burdens of defending civil rights claims with the necessity of defending a preliminary hearing into not only the merits of the claims released, but the merits of the underlying criminal charge dismissed. And it would embroil the courts in exactly the necessity for reviewing the exercise of

²⁹⁸ All of the *Rumery* opinions agree that voluntariness is a necessary element for an enforceable release. This prerequisite often may constitute a separate limitation on the practice. See *Hall v. Ochs*, 817 F.2d 920, 923 (1st Cir. 1987); *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981); cf. *Leaman v. Ohio Dep't of Mental Retardation*, 825 F.2d 946, 962 (6th Cir. 1987) (en banc) (Merritt, J., dissenting) ("[F]ive members of the Supreme Court in *Town of Newton* emphasized that at a minimum the waiver agreements are subject to strict requirements that they be entered into knowingly, intelligently and voluntarily . . .").

²⁹⁹ *Rumery*, 107 S. Ct. at 1193 (Powell, J., plurality).

³⁰⁰ *Id.* at 1195 n.8 (Powell, J., plurality).

³⁰¹ This seems to be the teaching of the Sixth Circuit's reading of *Rumery* in *Leaman*, 825 F.2d at 954-56. In evaluating what it interpreted as a waiver of a right of action under § 1983, the en banc majority upheld the waiver because "[t]he *quid pro quo* received by Leaman was not illusory, and the bargain she accepted was not unfair."

prosecutorial discretion that the majority sought to avoid in *Rumery*.³⁰² If such a hearing were sufficiently cavalier to retain the benefits of repose, it would sacrifice the advantages of post-hoc judicial review for unconscionability.

These advantages, indeed, are less than overwhelming. The possibility of post-hoc invalidation does not dissipate the "psychological effect" of the releases alluded to in interviews by both prosecutors and plaintiff's counsel.³⁰³ Even if the releases are voidable, once obtained, they may well induce legally naive civil rights plaintiffs to assume erroneously that their claims are meritless. And, to the extent that the very exchange inherent in the release-dismissal practice undercuts the impartiality of prosecutors or the criminal justice policies of states, the fact that the prosecutors pays fair, if unethical, measure for the rights which she purchases is irrelevant. On balance, therefore, a case-by-case evaluation of the fairness of release-dismissal bargains does not seem to be a promising avenue for development.

A second aspect of Mr. Rumery's situation that made enforcement of his release particularly appealing was the fact that the elements of the criminal case dismissed and the elements of the civil rights claim released were in large measure identical. If the criminal case prevailed, the false arrest claim evaporated, and vice versa. This is the situation in which the argument for reciprocity is strongest.³⁰⁴ Since a successful prosecution would be preclusive, it is the scenario in which the risk is highest that elimination of release-dismissal agreements will result in prosecutions pressed forward simply to ward off civil liability. It is, moreover, a context in which the prosecutor is unlikely to have "trumped up" charges in order to trade for civil rights claims; without the charges, there would be no claims. A bright line rule which limited the enforceability of release-dismissal agreements, to the release of false arrest claims, like Mr. Rumery's, might maximize the advantages that can be claimed for release-dismissal agreements without entangling the courts in the necessity of evaluation of the merits of each claim released.

Nothing in the *Rumery* opinions suggests such a rule though it seems to match the practice of several prosecutors.³⁰⁵ It leaves open, moreover, the possibility of effectively immunizing harassment arrests from judicial review³⁰⁶ and does nothing to alleviate either the difficul-

³⁰² See *Rumery*, 107 S. Ct. at 1194.

³⁰³ See *supra* note 238.

³⁰⁴ See *supra* notes 146-49 and accompanying text.

³⁰⁵ See, e.g., Interview with Ronald Fields, App. I (releases not sought in excessive force cases); Interview with Robert Lasnik, App. I (releases inappropriate when there is "real police brutality").

³⁰⁶ Cf. Interview with David H. Bludworth, App. I (release-dismissal agreements

ties which arise out of the first amendment³⁰⁷ or the concerns for the prosecutorial role.³⁰⁸

A third, more restrictive, rule is suggested by the prevailing opinions in *Rumery* itself. The majority in *Rumery* found the particular release-dismissal agreement before the Court to be acceptable because "in this case the prosecutor had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities."³⁰⁹

The facts of *Rumery* present a somewhat unusual situation. In the plurality's view, the prosecutor was willing to drop the charges against Mr. Rumery only because he wished to spare Ms. Deary, the key witness in the underlying rape prosecution, the necessity of testifying in the less serious case against Mr. Rumery.³¹⁰ As Justice O'Connor's

likely to produce "bad arrests"); Interview with Edward Rendell, App. I (release-dismissal agreements tend to encourage police misconduct).

³⁰⁷ See *supra* notes 155-72 and accompanying text.

³⁰⁸ See *supra* notes 188-206 and accompanying text.

³⁰⁹ *Rumery*, 107 S. Ct. at 1195 (Powell, J., plurality). Writing for the majority, Justice Powell emphasized that the prosecutor's responsibilities in this case included protecting his key witness in another criminal case, Ms. Deary, from "public scrutiny and embarrassment," *id.*, and that the district court received specific testimony that this was "a significant consideration in the prosecutor's decision" to seek a release from Mr. Rumery, *id.*; see also *id.* at 1191 (Powell, J., plurality) (quoting the prosecutor's deposition). Justice O'Connor's concurring opinion reiterates this fact, see *id.* at 1197 (O'Connor, J., concurring in part and in the judgment), and is even more careful in affirming that the standards that render a release-dismissal agreement acceptable are exacting:

No court would knowingly permit a prosecutor to agree to accept a defendant's plea to a lesser charge in exchange for the defendant's cash payment to the police officers who arrested him. Rather, the prosecutor is permitted to consider only legitimate criminal justice concerns in striking his bargain. . . . The central problem with the release-dismissal agreement is that public criminal justice interests are explicitly traded against the private financial interest of the individuals involved in the arrest and prosecution. . . .

. . . The defendants in a § 1983 suit may establish that a particular release executed in exchange for the dismissal of criminal charges was . . . not the product of prosecutorial overreaching, and in the public interest. But they must *prove* that this is so

Id. at 1196-97 (O'Connor, J., concurring in part and in the judgment).

³¹⁰ Justice Powell quoted the prosecutor's testimony in the district court:

'I had been advised by Chief Barrett that Mary Deary did not want to testify against Mr. Rumery. The witness tampering charge would have required Mary Deary to testify. . . .

I think that was a particularly sensitive type of case where you are dealing with a victim of an alleged aggravated felonious sexual assault.'

Id. at 1191 (Powell, J., plurality) (quoting from the deposition of Brian Graf, Joint Appendix, *supra* note 21, at 52).

crucial concurring opinion put it:

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 Ms. Deary, *and therefore the Champy case*, could thereby be avoided.³¹¹

The prosecutor sought to shield a witness who was essential to prosecuting a case of higher priority than the case against Mr. Rumery. The release agreement, moreover, was the prosecutor's only means of shielding the witness from the necessity of testifying outside of the Champy case. He could obtain the effect desired only if the witness remained shielded and that required the assurance that Mr. Rumery would not press his civil rights action. If Mr. Rumery's threatened section 1983 action materialized, Ms. Deary would be called as a witness in that case as well. Thus, it was only if he could be assured of the elimination of both the civil and criminal actions that the prosecutor could attain the goal justifying dismissal of the criminal case.³¹² The release and the dismissal were inextricably linked to one another; they were justified by the same law enforcement considerations, and, conversely, there was no reason to drop the charges without the release.

A final reading of *Rumery* suggests that it is only because of the presence of this peculiar linkage that the practice was upheld at all. Justice Powell's plurality opinion recognizes that to "dismiss meritorious charges[] to protect the interests of other officials" would be unethical and inconsistent with the public interest.³¹³ The majority upholds

³¹¹ 107 S. Ct. at 1197 (O'Connor, J., concurring in part and in the judgement) (emphasis added).

³¹² Justice Stevens disagreed with the prosecutor's reasoning on practical grounds: "Presumably, if there had been an actual trial of the pending charge against Champy, that trial would have concluded long before Deary would have been required to testify in any § 1983 litigation." *Rumery*, 107 S. Ct. at 1205 (Stevens, J., dissenting). While Justice Stevens's statement may be accurate with respect to the order of the two trials, Ms. Deary would have been subject to deposition in regard to Mr. Rumery's § 1983 complaint 30 days after he filed it in federal court. See FED. R. CIV. P. 30(a). The prosecutor legitimately might have believed that the deposition process, combined with the prospect of an impending civil trial stemming from events pertaining to the Champy case, would be as likely to interfere with his witness in the criminal case as would testifying in the civil trial itself.

³¹³ *Rumery*, 107 S. Ct. at 1193 & n.4 (Powell, J., plurality). Justice Powell supported his conclusion by reference to the MODEL CODE OF PROFESSION RESPONSIBILITY DR 7-105 (1980), which states: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The fact that there is no parallel ethical prohibition in the more recent

the agreement because "in this case, the prosecutor had an independent legitimate reason to make this agreement directly related to his prosecutorial responsibilities."³¹⁴ So, too, Justice O'Connor's concurring opinion explains that a "prosecutor is permitted to consider only legitimate criminal justice concerns in striking his bargain—concerns such as rehabilitation, allocation of criminal justice resources, the strength of the evidence against the defendant, and the extent of his cooperation with the authorities."³¹⁵ Absent a direct linkage with criminal justice functions comparable to that in *Rumery*, the demand for a release is improper.³¹⁶

This specialized justification for release-dismissal agreements in terms of criminal justice concerns does not seem to characterize those agreements in practice. The reported cases involve attempts to shield arresting officers, their supervisors, or their employers.³¹⁷ Moreover, accounts of the practice in reports from the seven jurisdictions surveyed that admittedly use release-dismissal agreements emphasize protecting police from civil rights and other actions,³¹⁸ not protecting witnesses from potentially damaging ancillary court appearances, or other "legitimate prosecutorial interests" envisioned by the *Rumery* Court. The chief of the trial division of the Manhattan District Attorney's office characterizes the specialized situation in *Rumery* as being "so rare as to be virtually negligible."³¹⁹ Accordingly, if legitimate law enforcement interests must resemble the protection of essential prosecution witnesses from traumatic court appearances, *Rumery* provides a rule that is tan-

MODEL RULES OF PROFESSIONAL CONDUCT (1983) has been the subject of critical commentary. See Trowbridge, *supra* note 17, at 41; see also *supra* notes 180-81 and accompanying text.

³¹⁴ *Rumery*, 107 S. Ct. at 1195 (Powell, J., plurality).

³¹⁵ *Rumery*, 107 S. Ct. at 1196 (O'Connor, J., concurring in part and in the judgment).

³¹⁶ This appears to be the reading of *Rumery* adopted by the D.C. Circuit in sustaining a cause of action against police and prosecutors who allegedly "pursu[ed] criminal charges against individuals who have endured wrongful arrests, solely because they refuse[d] to waive civil suits against the arresting officers." *Haynesworth v. Miller*, 820 F.2d 1245, 1248 (D.C. Cir. 1987). The *Haynesworth* Court observed:

The circumstances attending the decision to press charges against Haynesworth strengthen his assertion that the decision to prosecute was motivated solely by the desire to prevent him from seeking judicial redress for alleged police misconduct; the *Rumery* Court in no wise intended to legalize such an abuse of prosecutorial power. It does not appear . . . that pursuance of the release was motivated by any legitimate law enforcement objective

Id. at 1256-57.

³¹⁷ See *supra* notes 16-20; 157; 224-25.

³¹⁸ See *supra* text accompanying notes 117-24.

³¹⁹ Interview with Armand Durastanti, App. I (reporting the comments of John Fried, Chief, Trial Division, Manhattan Dist. Attorney's office).

tamount to a per se ban on release-dismissal agreements.

Such a result should not trouble us. For the prosecutor in *Rumery* to seek a release as an essential element of his pursuit of a criminal conviction in a rape case is, perhaps, a justifiable exercise of prosecutorial discretion. For a prosecutor to request a release as a means of protecting the police from what she regards as "unwarranted" civil rights litigation is an extortionate attempt to license the exercise of power unimpeded by the rule of law. It is important that a conditional approval of the first atypical practice does not become an unwary acquiescence to the second more prevalent danger.

Appendix I

Information was gathered through telephone interviews with the following individuals. Notes of these conversations are on file at the *University of Pennsylvania Law Review*.

<u>Name</u>	<u>Position</u>	<u>Location</u>	<u>Interview Date</u>	<u>Use of R-D Agreements</u>
Michael J. Angarola	1st Assistant State's Atty, Cook Cty.	Chicago, Ill.	7/1/87	No
Michael Avery	Civil Rights Practitioner	Boston, Mass.	7/9/87	Rarely
Karl Baker	Assistant Defender Defender's Ass'n	Philadelphia, Pa.	7/9/87	Yes
George Barrs	Assistant Public Defender, 15th Judicial Circuit	West Palm Beach, Fla.	7/2/87	Yes
Edwin Bishop	Executive Ass't to Superintendent of Police	Chicago, Ill.	6/25/87	No
David H. Bludworth	State Att'y, 15th Judicial Circuit, Palm Beach Cty.	West Palm Beach, Fla.	6/30/87	No
Terri Brake	Chief Deputy Colorado State Public Defender's Office	Denver, Colo.	7/8/87	Rarely
Bennett H. Brummer	Public Defender, 11th Judicial Circuit, Dade Cty.	Miami, Fla.	6/29/87	Yes
Claire Capristo	Deputy for Operations, Allegheny Cty. District Atty's Office	Pittsburgh, Pa.	6/30/87	Yes
Robert Colville	Allegheny Cty. District Att'y	Pittsburgh, Pa.	6/26/87	Yes
John Crew	Director, Police Practices Project ACLU, Northern California	San Francisco, Cal.	7/8/87	No
Randall M. Dana	Ohio Public Defender	Columbus, Ohio	7/8/87	Yes
Michael Duggan	Senior Deputy Prosecuting Atty., Tort Section, King Cty.	Seattle, Wash.	7/20/87	Rarely
Armand Durastanti	Deputy Bureau Chief, Trial Division, Manhattan District Atty's Office	New York, N.Y.	7/17/87 7/18/87	"Never appropriate"
Norman S. Early, Jr.	District Atty., Denver	Denver, Colo.	6/30/87	"Inappropriate"
Jules Epstein	Assistant Defender, Defender's Ass'n	Philadelphia, Pa.	7/9/87	Yes

<u>Name</u>	<u>Position</u>	<u>Location</u>	<u>Interview Date</u>	<u>Use of R-D Agreements</u>
James Fais	Chief Prosecutor, City Atty's Office	Columbus, Ohio	7/8/87	Yes
Ronald Fields	Prosecuting Att'y, 12th Judicial District of Arkansas	Fort Smith, Ark.	7/7/87	Rarely
Fred L. Foreman	State's Attorney for Lake County	Waukegan, Ill.	6/24/87	No
Theodore Halaby	Private Attorney Defends Police Officers	Denver, Colo.	7/13/87	Yes
Raymond Harley	Deputy District Attorney, Trial Division	Philadelphia, Pa.	6/26/87	No
Patrick Healy	Executive Director, Chicago Crime Commission	Chicago, Ill.	6/24/87	No
Eric Henson	Former Deputy District Atty	Philadelphia, Pa.	6/24/87	No
Robert Holmes	Deputy Chief, Trial Division, New York County District Atty's Office	New York, N.Y.	9/14/87	Rarely
Stephen Kaplan	City Att'y	Denver, Colo.	7/1/87	No
Thomas Karas	Civil Rights Practitioner	Maricopa Cty, Ariz.	7/1/87	No
James Kura	Franklin Cty. Public Defender	Columbus, Ohio	7/8/87	Yes
Robert Lasnik	Chief of Staff, King Cty., Prosecutor's Office	Seattle, Wash.	6/29/87	No
James Lieber	Executive Director, ACLU Greater Pittsburgh Chapter	Pittsburgh, Pa.	6/30/87	Yes
Susan B. Lindenauer	Counsel to Executive Director, N.Y. Legal Aid Society	New York, N.Y.	7/8/87	Rarely
Carl Mangino	Ass't City Att'y, Supervising Att'y Claims Division City Atty's Office	Denver, Colo.	7/23/87	No
Stephen Neely	Pima Cty Att'y	Tucson, Ariz.	7/1/87	Rarely
Edward Nowak	Public Defender Monroe Cty	Rochester, N.Y.	6/23/87	No
Lt. Dennis Nowicki	Commanding Officer, Property Crimes Unit, Area #2; formerly Deputy Superintendent, Chicago Police Dep't	Chicago, Ill.	7/17/87	No

<u>Name</u>	<u>Position</u>	<u>Location</u>	<u>Interview Date</u>	<u>Use of R-D Agreements</u>
John Palermo	Ass't City Att'y, Personnel Litigation; Former Acting Supervisor, City Court Division, Denver City Atty's Office	Denver, Colo.	7/24/87	No
Donald Papy	Civil Rights Practitioner	Miami, Fla.	7/7/87	Yes
Lt. Edmund Pecinovsky	Commanding Officer, Legal Division, San Francisco Police Dep't	San Francisco, Cal.	7/6/87	No
Matthew J. Piers	Deputy Corp. Counsel, City of Chicago	Chicago, Ill.	6/29/87	Rarely
Kimberly A. Reiley	Chief Trial Att'y, City Atty's Office	San Francisco, Cal.	7/7/87	No
Howard R. Relin	Monroe Cty. District Att'y	Rochester, N.Y.	6/23/87	No
Edward Rendell	Former District Att'y	Philadelphia, Pa.	9/15/87	No
Janet Reno	State Att'y, Dade Cty.	Miami, Fla.	7/1/87	Yes
Kathleen Roberts	U.S. Magistrate, S.D.N.Y. (Former Assistant U.S. Attorney)	New York, N.Y.	7/6/87	Rarely
Karl Salzer	Criminal Defense Att'y	Rochester, N.Y.	6/22/87	No
Paul Shechtman	Special Ass't, New York County District Att'y's Office	New York, N.Y.	7/20/87	Rarely
Amitai Schwartz	Civil Rights Practitioner	San Francisco, Ca.	7/8/87	No
Abbe Smith	Assistant Defender, Defender's Ass'n	Philadelphia, Pa.	7/9/87	Yes
Andrew Sonner	State's Att'y, Montgomery Cty.	Montgomery Cty., Md.	7/1/87	No
David C. Thomas	Associate Clinical Professor, Chicago-Kent College of Law and Civil Rights Practitioner	Chicago, Ill.	7/6/87	Rarely
Steven J. Twist	Chief Assistant State Att'y General	Phoenix, Ariz.	7/1/87	No
Douglas Whalley	Director, Criminal Division, Seattle City Atty's Office	Seattle, Wa.	7/17/87	No
Judith Zeprun	Assistant Dist. Att'y, Appellate Div., Suffolk Cty. District Atty's Office	Boston, Mass.	7/13/87	No

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RELEASES, REDRESS, AND POLICE MISCONDUCT

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Hugo Zettler

Trial Group Manager,
Maricopa Cty. Attorney

Phoenix, Ariz. 7/1/87

No

Appendix II

Information was gathered through telephone interview with the following individuals who were not directly involved with the release-dismissal practice. Notes of these conversations are on file at the *University of Pennsylvania Law Review*.

<u>Name</u>	<u>Position</u>	<u>Location</u>	<u>Interview Date</u>	<u>View of R-D Agreements</u>
G. Patrick Gallagher	Director, Institute for Liability Management	Vienna, Va.	6/22/87	no
Jack Yelverton	Executive Director, Nat'l District Attorneys Association	Alexandria, Va.	6/26/87	believes agreements are common