

## THE RELEASE-DISMISSAL AGREEMENT: AN IMPERFECT INSTRUMENT OF DISPUTE RESOLUTION

On the night of January 12, 1989, police officers in Washington Township, Pennsylvania, responded to a domestic violence call at the Livingstone residence.<sup>1</sup> A scuffle ensued between the police and Mrs. Livingstone, and she was subsequently charged with several criminal offenses including aggravated assault.<sup>2</sup> Mrs. Livingstone claimed that the police struck her, applied a stun gun between her legs in the vulval area, dragged her out of the house, banged her head on the ground several times, and dropped her into a muddy puddle of water.<sup>3</sup> The police officers, on the other hand, claimed that they used only "necessary" force to control Mrs. Livingstone.<sup>4</sup> These conflicting claims were not resolved at trial. Instead, the prosecutor negotiated a deal whereby the state dropped the criminal charges against Mrs. Livingstone in exchange for her promise not to proceed with civil actions against the police officers or the municipality.<sup>5</sup>

The above account demonstrates the use of a tool known as a release-dismissal agreement. Release-dismissal agreements are settlements in which a prosecutor promises to drop criminal charges in exchange for a defendant's agreement to drop civil claims against the police, municipality, or state.<sup>6</sup> As suggested by the preceding example, these agreements

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1. The following facts are taken from *Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205 (3d Cir. 1993).

2. *Id.* at 1207-08. Mrs. Livingstone was initially charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. *Id.* at 1207.

3. *Id.* at 1206-07.

4. *Id.* at 1207.

5. *Id.* at 1208.

6. Criminal defendants who enter into release-dismissal agreements often agree to waive their civil claims against the police, municipality, or state arising under 42 U.S.C. § 1983. Section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or The District of Columbia, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

42 U.S.C. § 1983 (1988).

This Note only examines the traditional preconviction release-dismissal agreement and does not address variations on the traditional form. For examples of other forms of agreement, see *Vallone v. Lee*, 7 F.3d 196 (11th Cir. 1993) (dealing with agreement of criminal defendant to release police officials from civil liability in exchange for pretrial release from jail); *Jones v. Taber*, 648 F.2d 1201 (9th Cir. 1981) (discussing agreement of state/municipality to pay monetary compensation for injuries in exchange for defendant's promise to drop civil suit); *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989)

harbor enormous potential for abuse. The agreements essentially allow police departments, municipalities, and states the opportunity to absolve themselves of accountability in cases of misconduct. Because of this potential for abuse, release-dismissal agreements have been the subject of controversy and recent litigation.

This Note weighs the interests of the criminal defendant, the state, and the public to determine the wisdom of enforcing release-dismissal agreements. First, this Note argues that the agreements provide mutual benefits for both the criminal defendant and the state in a narrow set of circumstances. Existing court decisions have focused on preserving the rights of criminal defendants and upholding the interests of the state. However, this Note argues that release-dismissal agreements, by their failure to address police misconduct, can expose the public to danger. Although judicial solutions protect the interests of the criminal defendant and the state, courts have failed to remove the risk of continued police misconduct which the public still bears. Ultimately, this Note concludes that release-dismissal agreements have considerable merit, but proposes that they must not be enforced unless the public is adequately protected from potential abuses. In order to achieve this protection, state legislatures should implement civilian oversight committees as a means of retaining the benefits of release-dismissal agreements while ensuring independent review of alleged police misconduct.

Part I provides a history of release-dismissal agreements and discusses how they have been received by courts. Part II examines judicial decisions concerning release-dismissal agreements and proposes a model judicial framework that preserves benefits for both the criminal defendant and the state. Part III identifies unresolved problems with judicial solutions that expose the public to danger. Finally, Part IV proposes state legislation to establish civilian oversight committees designed to protect the public from potential abuses. These oversight committees would publicly reveal and remedy police misconduct that might otherwise be buried by a release-dismissal agreement. The committees would also deter future police misconduct.

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(enforcing preconviction probation agreement used to secure defendant's promise not to pursue a civil suit); *Bushnell v. Rossetti*, 750 F.2d 298 (4th Cir. 1984) (regarding postconviction release-dismissal agreements).

## I. JUDICIAL TREATMENT OF RELEASE-DISMISSAL AGREEMENTS

In the initial cases regarding the validity of release-dismissal agreements, courts focused their attention on three factors: the criminal defendant's rights; the state's interests; and the public's right to be informed of police misconduct. Over time, however, courts have narrowed their focus to the first two of these factors and have neglected to address the public's interest in receiving notice of police misconduct.

### A. Pre-1987 Cases

Prior to 1987, federal courts generally held that release-dismissal agreements were per se impermissible and devoid of any benefits to justify their use.<sup>7</sup> *Dixon v. District of Columbia*<sup>8</sup> represents a typical pre-1987 case. In *Dixon*, the United States Court of Appeals for the District of Columbia held that release-dismissal agreements are invalid, and characterized the agreement at issue as "odious" and contrary to public policy per se.<sup>9</sup> The prosecutor and Dixon had allegedly entered into a "tacit" agreement, whereby the prosecutor would not prosecute traffic charges pending against Dixon in exchange for Dixon's promise to drop any civil

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7. See, e.g., *MacDonald v. Musick*, 425 F.2d 373, 375-76 (9th Cir. 1970) (analogizing a prosecutor's actions in seeking release-dismissal agreement to extortion), *cert. denied*, 400 U.S. 852 (1970); *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) (holding agreement "invalid as a matter of public policy"); *Home v. Pane*, 514 F. Supp 551, 552 (S.D.N.Y. 1981) (holding that "[criminal defendants] cannot as a matter of law make an uncoerced choice" about whether to enter into release-dismissal agreements).

However, a few courts found that release-dismissal agreements did not violate public policy per se. See, e.g., *Bushnell*, 750 F.2d at 301. The *Bushnell* court distinguished the case from other cases in which courts had held the agreements to be invalid. *Id.* at 301. The court reasoned that because the case involved a postconviction release-dismissal agreement, it did not carry the same public policy concerns found in preconviction release-dismissal agreements. *Id.* In *Bushnell*, the plaintiff agreed to drop the civil suit in exchange for the state's recommendation of probation. *Id.* at 299. However, in typical release-dismissal agreements, a prosecutor attempts to make a deal before trial or even before seeking an indictment, and offers to drop criminal charges entirely in exchange for the criminal defendant's promise to drop civil § 1983 claims.

See also *Hoines v. Barney's Club*, 620 P.2d 628, 634 (Cal. 1980) (concluding that release-dismissal agreements are a legitimate exercise of prosecutorial power similar to plea bargaining); *Food Fair Stores, Inc. v. Joy*, 389 A.2d 874, 881 (Md. 1978) (stating that "[invalidating agreements per se would] place an unwarranted constraint upon the prosecutor, who might . . . wish to extend a compassionate hand to a first time offender").

8. 394 F.2d 966 (D.C. Cir. 1968).

9. *Id.* at 969.

claims.<sup>10</sup> Three months later, Dixon decided to press civil claims; in response, the prosecutor decided to pursue the traffic violations.<sup>11</sup> At trial, the judge granted a series of continuances to the prosecutor and later directed findings of not guilty after the prosecutor insisted on entering a nolle prosequi in order to preserve the right to prosecute at a later date.<sup>12</sup> On appeal, the District of Columbia Court of Appeals reversed and found that the prosecutor had discretion to nolle prosequi the case.<sup>13</sup>

On further appeal, the D.C. Circuit vacated the lower court's decision and concluded that the prosecutor should not have even proceeded to trial because the release-dismissal agreement was illegal per se.<sup>14</sup> First, and most importantly, the court concluded that these agreements "suppress complaints against police misconduct which should be thoroughly aired in a free society."<sup>15</sup> Second, the court expressed concern that allowing these agreements might tempt prosecutors to "trump up charges" to use as

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10. *Id.* at 968. The police stopped the petitioner for traffic violations but did not ticket him at the time. *Id.* After the petitioner submitted a written complaint to the police department regarding the officers' actions, the prosecutor offered the release-dismissal agreement. *Id.* Apparently, the prosecutor acted in defiance of a 1964 directive from the D.C. Board of Commissioners, which specifically prohibited prosecutors from using release-dismissal agreements as a precondition to dropping criminal charges. The directive also prohibited prosecutors from exercising a nolle prosequi in order to protect the police from liability. *Id.* at 969.

11. 394 F.2d at 968. The Chief of the Law Enforcement Division of the Corporation Counsel stated:

[E]verybody was happy to forget the whole thing . . . . But three months later he comes in and makes a formal complaint. So we said "If you are going to play ball like that why shouldn't we proceed with our case?" . . . I had no reason to file until he changed back on . . . what we had all agreed on.

*Id.*

12. *Id.* at 967. A nolle prosequi is a formal entry by a prosecutor declaring that he "will no further prosecute" the case. BLACK'S LAW DICTIONARY 1048 (6th ed. 1990). In *Dixon*, the prosecutor chose to enter a nolle prosequi after the judge refused to grant a continuance based on the absence of the prosecution's main witness. 394 F.2d at 967.

13. 394 F.2d at 967-68. The District of Columbia Court of Appeals concluded that Dixon did not make the requisite showing that the nolle prosequi was exercised in a "scandalous or corrupt manner" nor in a "capricious and vexatiously repetitious [manner]." *Id.* However, that court did not address the concern that charges were improperly brought in the first place. *Id.*

14. *Id.* at 969. The court could have concluded that the prosecutor originally had no interest in prosecuting the case and later decided to prosecute only in retaliation for Dixon's broken promise not to sue. However, the court explicitly rejected this theory as "naive." *Id.* Rather, the court argued that the prosecutor's original decision not to prosecute was made independently of the merits of the case, and was based solely on a desire to protect the police officers. The court further contended that the prosecutor probably should have prosecuted in the first place, but declined to do so in the interests of negotiating a deal to protect the police from liability. *Id.*

15. *Id.*

bargaining chips in coercing criminal defendants to drop their civil suits.<sup>16</sup> Third, the court saw “major evil” in allowing culpable criminal defendants to avoid legitimate prosecution.<sup>17</sup>

### B. Town of Newton v. Rumery

The position taken by the *Dixon* court maintained general acceptance in the federal courts<sup>18</sup> until the Supreme Court’s 1987 decision in *Town of Newton v. Rumery*.<sup>19</sup> In *Rumery*, a plurality of the Court departed from prior decisions by limiting its examination to two factors, the criminal defendant’s rights and the state’s interests, and neglecting to address the public’s right to obtain notice of police misconduct. The *Rumery* plurality concluded that release-dismissal agreements are not impermissible per se, but should be examined on a case-by-case basis to determine their validity.<sup>20</sup> Justice Powell, writing for the plurality, identified three relevant issues to consider in each case: the voluntariness of the criminal defendant’s decision to enter the agreement; the public policy interests being served; and the potential for prosecutorial misconduct or overreaching.<sup>21</sup>

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16. *Id.* The court added that the temptation to trump up charges is especially strong, because civil complaints against the police are usually connected with “extremely vague” criminal charges, such as disorderly conduct or resisting arrest. *Id.* The court implied that the vagueness of the charges would make it easy for police officers to charge a criminal defendant falsely based on little evidence. *Id.*

17. *Id.*

18. *See supra* note 7.

19. 480 U.S. 386 (1987). Bernard Rumery learned that his friend had been indicted for sexual assault. Rumery called a mutual acquaintance, who happened to be the victim, to obtain more information. *Id.* at 389. The victim later called the police, alleging that Rumery put pressure on her to drop the charges against his friend. Subsequently, police arrested Rumery and charged him with witness tampering. *Id.* at 389-90. Rumery’s attorney successfully negotiated with the prosecutor to obtain a release-dismissal agreement. Ten months after signing the agreement, Rumery filed a suit against the town and police officers for false arrest, defamation, and false imprisonment under 42 U.S.C. § 1983. 480 U.S. at 391. The trial court dismissed the suit, finding that the release-dismissal agreement precluded Rumery from filing a civil suit. *Id.* The trial court also found that the agreement was voluntarily entered into and did not violate public policy. *Id.* On appeal, the First Circuit reversed, holding that release-dismissal agreements violate public policy per se. *Id.*

20. *Id.* at 393. The plurality did concede that, in some cases, the “risk, publicity, and expense” of a trial might overwhelm criminal defendants into seeking a settlement even if they believe they have a good defense. *Id.*

21. *Id.* at 393-98. Furthermore, the plurality explicitly reserved opinion on whether a finding of voluntariness could by itself sufficiently validate a particular release-dismissal agreement. *Id.* at 398 n.10. Recent decisions have required the state to show more than voluntariness. *See Lynch v. City of Alhambra*, 880 F.2d 1122, 1126-27 (9th Cir. 1989) (requiring voluntariness and no violation of public policy); *Woods v. Rhodes*, 994 F.2d 494, 499-501 (8th Cir. 1993) (requiring voluntariness, no prosecutorial misconduct, and no violation of public policy); *Coughlen v. Coots*, 5 F.3d 970, 974 (6th

On the question of voluntariness, the *Rumery* plurality rejected the notion that release-dismissal agreements are inherently coercive.<sup>22</sup> Citing the plea bargain process as an example, Justice Powell noted that release-dismissal agreements do not represent the sole context in which criminal defendants must make the difficult decision whether to waive their constitutional rights.<sup>23</sup> Justice Powell listed four factors to be considered in determining voluntariness: the defendant's sophistication; the defendant's jail status; the adequacy of the defendant's legal representation; and the amount of time the defendant had to consider the decision.<sup>24</sup> Applying these criteria, the plurality characterized *Rumery* as a "sophisticated businessman."<sup>25</sup> *Rumery* was not in jail when he signed the agreement.<sup>26</sup> Further, *Rumery* had obtained "experienced" legal representation prior to signing the agreement, and his counsel drafted the agreement.<sup>27</sup> Finally, *Rumery* had three days to weigh the benefits and drawbacks of signing the agreement.<sup>28</sup> Based on the four criteria, the plurality found that *Rumery* made a rational decision to accept the tangible benefits of avoiding a criminal trial and possible conviction in exchange for giving up the "speculative benefits" of pursuing a civil § 1983 suit.<sup>29</sup>

The plurality also examined the public policy interests served by release-dismissal agreements.<sup>30</sup> Justice Powell conceded that, in some cases,

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Cir. 1993) (same); *Hill v. City of Cleveland*, 12 F.3d 575, 578 (6th Cir. 1993) (same); *Cain v. Darby Borough*, 7 F.3d 377, 381 (3d Cir. 1993) (holding that "mere voluntariness is not enough to support enforcement of a release-dismissal agreement"), *cert. denied*, 114 S. Ct. 1303 (1994).

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

23. *Id.* The plurality in *Rumery* emphasized that it did not equate release-dismissal agreements with plea bargaining and further noted some of the shortcomings of the analogy. *Id.* at 393 n.3. The Court apparently used plea bargaining merely as an illustration of an acceptable situation in which a criminal defendant waives constitutional rights. *Id.* at 393. In response, the dissent argued that the dissimilarities with plea bargaining indicate that release-dismissal agreements are inherently coercive. *Id.* at 409-11.

Post-*Rumery* cases demonstrate that the differences between plea bargaining and release-dismissal agreements are not as extreme as the *Rumery* dissent claims. See *infra* notes 87-88 and accompanying text. Some commentators have also argued that plea bargaining is a poor analogy. See, e.g., Erin P. Bartholomy, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331, 351-52 (1993); Brian L. Fielkow, 42 U.S.C. § 1983—*Buying Justice: The Role of Release-Dismissal Agreements in the Criminal Justice System*, 78 J. CRIM. L. & CRIMINOLOGY 1119, 1136 (characterizing the *Rumery* court's plea bargaining analogy as "superficial").

24. *Rumery*, 480 U.S. at 394.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 395-96.

release-dismissal agreements do not serve the public interest.<sup>31</sup> However, he argued that, in other cases, release-dismissal agreements serve a beneficial public policy goal and benefit the state by settling “many . . . marginal and some . . . frivolous” § 1983 suits.<sup>32</sup> Justice Powell argued that by eliminating these borderline § 1983 suits, which often force the government to devote critical resources to defend itself in protracted litigation,<sup>33</sup> release-dismissal agreements serve the state’s policy goals.<sup>34</sup> Unfortunately, Justice Powell declined to give much weight to concerns that the agreements frustrate the public’s right to be notified of police misconduct.<sup>35</sup>

Lastly, the plurality argued that a rule making release-dismissal agreements per se illegal unfairly presumes that prosecutors will always misuse this power.<sup>36</sup> Rather than assuming that prosecutors will “trump up charges,” Justice Powell contended that “tradition and experience” demonstrate that the majority of prosecutors will not succumb to this temptation and will instead perform their duties with proper discretion.<sup>37</sup> Justice Powell added that release-dismissal agreements allow the state to avoid prosecution of minor criminal charges and, instead, to devote valuable resources to the prosecution of more serious criminal charges.<sup>38</sup> Because prosecutors are in the best position to evaluate both the merits of a case and the state’s ability to pursue the case, Justice Powell concluded that courts should give deference to prosecutors’ decisions about when to

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31. 480 U.S. at 395. Justice Powell agreed with the First Circuit that release-dismissal agreements may sometimes be the product of trumped-up charges or suppression of police wrongdoing. *Id.* However, Powell argued that a blanket ban on such agreements “fails to credit other relevant public interests and improperly assumes prosecutorial misconduct.” *Id.*

32. *Id.* The plurality pointed out the settlement of “marginal” suits as one legitimate public policy goal, but did not indicate any other acceptable public policy justifications for the agreement.

33. *Id.* at 395-96. Powell listed many resources that would be wasted in the defense of a marginal civil suit. Legal counsel would be needed for both the official and the municipality/state. *Id.* at 395. Attorneys would be burdened by the time to prepare and actually litigate the case at trial, which may last for several years. *Id.* at 395-96. Finally, Powell argued that the time spent to prepare and litigate the case would force public officials to neglect other important public responsibilities. *Id.* at 395.

34. *Id.* at 396. The plurality’s justification for the agreement rests largely on how the agreement accommodates the civil rights plaintiff. *Id.* at 395. Justice Powell also concluded that the government should be able to accommodate Rumery, who had no public duty to pursue § 1983 litigation and prove police misconduct. *Id.*

35. 480 U.S. at 395.

36. *Id.*

37. *Id.* at 396-97. Justice Powell also pointed out that courts generally recognize the prosecutor’s right to broad discretion in deciding whether to prosecute or drop charges. *Id.* (citing *Wayte v. United States*, 470 U.S. 598 (1985)).

38. 480 U.S. at 396.

prosecute.<sup>39</sup> Applying this deferential standard to the facts of the case, the plurality found no evidence of prosecutorial overreaching.<sup>40</sup>

Justice O'Connor concurred in the result reached by the plurality, but she wrote separately to stress that the party seeking to enforce the release-dismissal agreement bears the burden of proving its validity.<sup>41</sup> Even Justice Stevens, in his dissent, declined to label release-dismissal agreements as impermissible per se.<sup>42</sup> However, Justice Stevens strongly

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39. *Id.*

40. *Id.* Besides voluntariness, consistency with public policy, and the absence of prosecutorial misconduct, Justice Powell identified protection of a witness as an independent reason to uphold the agreement. *Id.* at 398. Powell indicated that the prosecutor in *Rumery* had a right to protect the witness from the burden of testifying in both Rumery's criminal trial and the civil suit against the police. Powell concluded that the prosecutor correctly spared the witness from the "public scrutiny and embarrassment." *Id.*

41. 480 U.S. at 399 (O'Connor, J., concurring). In the plurality opinion, Justice Powell did not explicitly state that the party seeking enforcement of the agreement had the burden of proving the agreement's validity.

Justice O'Connor reiterated several factors of the plurality's test of voluntariness, including the sophistication of the criminal defendant and whether the criminal defendant had legal counsel. *Id.* at 401-02. Justice O'Connor also identified the seriousness of the criminal charges as another factor to consider; she argued that, as the charges and corresponding potential punishment become more serious, a criminal defendant will more likely feel coerced into opting for a release-dismissal agreement instead of risking a trial conviction. *Id.* at 401. Because Rumery faced a light punishment, Justice O'Connor concluded that the potential coerciveness of the agreement was lessened. *Id.* at 402. Although Rumery's witness tampering charge was a serious offense, carrying a maximum seven-year jail term, Justice O'Connor argued that a long prison sentence was "unlikely" in his case. *Id.* Rumery was charged with "one of the lesser felonies" under state law; he had no criminal record; and, the state had a weak case. *Id.*

Addressing public policy concerns, O'Connor reiterated the plurality's argument that release-dismissal agreements save the local community the expense of defending civil cases of questionable merit. *Id.* at 399-400 (O'Connor, J., concurring). She argued that the "inconvenience and distraction" caused by marginal suits are "not inconsiderable," and that the expense of prosecuting minor crimes would not be justifiable. *Id.*

Justice O'Connor recognized the benefits of release-dismissal agreements, but took a more cautious view than the plurality by listing potential problems associated with the agreements. Most importantly, she argued that prosecutors do consider problems associated with a related civil suit in deciding the separate question of whether to bring criminal charges. *Id.* at 401. A release-dismissal agreement, O'Connor noted, may tempt prosecutors to pursue meritless criminal charges and later bargain them away in exchange for the dropping of a civil suit. *Id.* at 400. In addition, O'Connor observed that prosecutors may violate their duty to the public by dropping legitimate criminal charges in exchange for a release from civil liability. *Id.* She suggested judicial oversight as a way to ensure that these agreements are entered into wisely. *Id.* at 401-02. Nevertheless, O'Connor found that the facts of *Rumery* indicated that the agreement was entered into voluntarily and in the public interest. *Id.* at 403. Justice O'Connor also agreed with the plurality that protection of the witness provided an independent justification for entering into the agreement. *Id.* at 399.

42. 480 U.S. at 417-18 (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined Justice Stevens in dissent.



disagreed with the plurality's application of the identified factors.<sup>43</sup>

Initially, Justice Stevens asserted that because release-dismissal agreements are inherently coercive they can never be truly voluntary.<sup>44</sup> Justice Stevens argued that these agreements differ from plea bargaining, in which the state and defendant mutually benefit from the settlement.<sup>45</sup> In plea bargaining, the state conserves resources by avoiding the time and expense of a criminal trial, but still obtains punishment of the admitted wrongdoer. The criminal defendant benefits by avoiding the risk of a trial conviction carrying a greater punishment.<sup>46</sup> In release-dismissal agreements, however, the dissent found no mutual advantages for the state and the criminal defendant. Justice Stevens conceded that the state may save money by avoiding the criminal trial, but he insisted that the state does not obtain punishment for the defendants' wrongdoing.<sup>47</sup> Justice Stevens also contended that the prosecution's willingness to deal indicates that the state might have lacked probable cause. Therefore, the defendant does not receive any real benefit from the release-dismissal agreement,<sup>48</sup> and is in fact disadvantaged, because he has waived any right to pursue civil litigation against the police, the municipality, and the state.<sup>49</sup> Moreover, Justice Stevens found this particular release-dismissal agreement to be inherently coercive. Justice Stevens stated that the agreement "exact[ed] a price unrelated to the . . . defendant's own conduct," because it forced the defendant to give up a civil claim that was unrelated to the criminal charge.<sup>50</sup>

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43. Justice Stevens declared the agreement invalid because he found a lack of voluntariness, conflict with public policy goals, and prosecutorial misconduct. 480 U.S. at 417-18 (Stevens, J., dissenting).

44. *Id.* at 411. Justice Stevens stressed that a person could make a voluntary and rational decision; yet, such decisions should not be enforced when circumstances make them inherently coercive. *Id.* at 408. Stevens compared the situation to one in which a person pays \$20 to a state trooper to avoid a speeding ticket. *Id.* The decision to pay the police officer is a rational decision, because the person avoids the ticket. However, Stevens argued that such a situation would be inherently coercive. *Id.*

45. *Id.* at 409-10.

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

47. *Id.* at 410.

48. *Id.* Justice Stevens noted that the prosecutor in *Rumery* had knowledge that the witness did not want to testify against Rumery in the witness tampering case. *Id.* at 410 n.11. Therefore, Stevens argued, the state did not plan on prosecuting Rumery anyway. *Id.*

49. The dissent argues that the release-dismissal agreement does not accomplish anything except to "resolv[e] once and for all the question of § 1983 liability." *Id.*

50. 480 U.S. at 411 (Stevens, J., dissenting). Justice Stevens compared a hypothetical situation in which the defendant gives up a valid civil claim worth \$1,000 in exchange for dismissal of an unrelated criminal charge. *Id.* The state saves \$1,000 it does not have to pay to the criminal defendant. From the

The dissent also argued that release-dismissal agreements undermine public policy goals by negating the congressional purpose of § 1983. Justice Stevens asserted that Congress intended to provide redress to the individual and the public for violations of constitutional rights.<sup>51</sup> According to Stevens, release-dismissal agreements undermine this purpose by denying potential plaintiffs the right to litigate and seek a remedy. He concluded that the need to provide a remedy should not be defeated by concern over the costs of defending frivolous civil claims.<sup>52</sup> Additionally, Justice Stevens contended that release-dismissal agreements eliminate § 1983 claims prematurely based on assumptions about the “marginal” or “frivolous” nature of the claim, rather than properly testing the claims in court.<sup>53</sup>

Finally, the dissent expressed the belief that prosecutorial misconduct occurs each time a prosecutor enters into a release-dismissal agreement.<sup>54</sup> Justice Stevens asserted that the agreement creates an inherent conflict of interest for the prosecutor by permitting the prosecutor to put the government’s interest in avoiding liability above the public’s interest in ensuring full prosecution of crimes.<sup>55</sup> Justice Stevens argued that a prosecutor should base his or her decisions solely on the merits of the criminal case.<sup>56</sup> Furthermore, the dissent claimed that a prosecutor might enter into an agreement simply because the criminal case lacks merit, rather than dropping the charges as is ethically required.<sup>57</sup>

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criminal defendant’s perspective, he or she in effect pays \$1,000 to a “police department’s retirement benefit fund.” *Id.* Commentators have interpreted Justice Stevens’ hypothetical as a criticism that release-dismissal agreements, unlike plea bargaining, do not reflect the defendant’s true bargaining position. *See infra* notes 83-85 and accompanying text.

51. 480 U.S. at 418-19 (Stevens, J., dissenting). Justice Stevens criticized the plurality for preventing the criminal defendant from having his case heard by an impartial body. *Id.* (“[T]he merits of such claims [should be] resolved openly by an impartial adjudicator rather than sub silentio by a prosecutor.”). He added that prosecutors will not properly resolve civil claims because prosecutors do not want to “ensure that all meritorious § 1983 claims prevail.” *Id.*

52. *Id.*

53. *Id.* The dissent’s argument about testing § 1983 claims in court precedes the main discussion about § 1983’s purpose. However, it seems directly applicable to the later points because Stevens’ main public policy argument is that an impartial body rather than the inherently biased prosecutor should be the party to resolve civil suits. *See supra* note 51.

54. 480 U.S. at 412 (Stevens, J., dissenting).

55. *Id.* at 412-13.

56. *Id.*

57. *Id.* at 413-414. Justice Stevens cited several sources to justify his position. First, Stevens cited the MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1984), which states, “[prosecutors] shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” 480 U.S. at 413. Stevens also cited the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1980),

## II. APPLICATION OF *RUMERY* IN THE LOWER COURTS

*Rumery* and its progeny have demonstrated that release-dismissal agreements can benefit both the state and the individual criminal defendant. Courts have adequately protected these dual benefits by upholding the agreements only in a narrow set of circumstances. In the aftermath of *Rumery*, several circuit courts have begun to refine the acceptable conditions under which they will allow the enforcement of release-dismissal agreements. In particular, the Third and Sixth Circuits have established model judicial rationales for other courts to emulate. However, the circuit courts have consistently limited their analysis to the three controlling issues outlined in *Rumery*: voluntariness, public policy, and prosecutorial misconduct.<sup>58</sup> Judicial decisions continue to neglect the public's interest in receiving notice of police misconduct.

### A. *A Model Test for Voluntariness—The Third Circuit*

The Third Circuit issued two en banc opinions in 1993 that examined remaining questions regarding the voluntariness of release-dismissal agreements. In *Livingstone v. North Belle Borough*,<sup>59</sup> the circuit court formulated a model test for voluntariness that the *Rumery* plurality did not provide. Furthermore, in *Cain v. Darby Borough*,<sup>60</sup> the court clarified the importance of voluntariness relative to the other *Rumery* issues.

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which states: "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." 480 U.S. at 413 n.16. Moreover, Stevens pointed to the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14, which states: "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair." 480 U.S. at 413 n.16.

Stevens found further justification in the ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (2d ed. 1980), which states: "It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause." 480 U.S. at 413 n.16. Finally, the dissent cited the MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, which states: "A lawyer should exercise independent professional judgment on behalf of a client." 480 U.S. at 413 n.16.

Justice Stevens also argued that protection of a witness did not constitute a legitimate justification for the prosecutor. *Id.* at 414-15. Rather, Justice Stevens argued that the prosecutor violated his ethical duty by protecting the witness. *Id.* at 415. Stevens insisted that although a prosecutor's duties will often "diverge" from the interests of a witness, a prosecutor must attempt to obtain testimony from a reluctant witness when successful prosecution of a case requires such testimony. *Id.*

58. See *supra* note 21 and accompanying text.

59. 12 F.3d 1205 (3d Cir. 1993).

60. 7 F.3d 377 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1303 (1994).

The *Livingstone* court's test for voluntariness takes into account the criteria established in *Rumery* and, at the same time, evaluates the language and the form of the agreement itself. Adopting the rationale of Justice O'Connor's concurring opinion in *Rumery*, the Third Circuit placed the burden on the prosecution to prove the overall validity of any release-dismissal agreement.<sup>61</sup> This approach wisely protects the criminal defendant from the potential coerciveness of a release-dismissal agreement.<sup>62</sup>

In *Livingstone*, the court determined that the prosecution failed to meet its burden of proving voluntariness.<sup>63</sup> The Third Circuit properly took into account the *Rumery* Court's specific criteria for gauging voluntariness: the criminal defendant's sophistication, whether the agreement was signed in jail, the nature of the defendant's representation, and the time provided for the defendant to deliberate.<sup>64</sup> The court noted, in particular, that the criminal defendant in *Livingstone* only had ten minutes to decide whether to agree to the waiver; in *Rumery*, the defendant enjoyed a three-day deliberation period.<sup>65</sup>

In addition to considering the specific *Rumery* criteria, the Third Circuit went a step further by carefully evaluating both the language and form (oral or written) of the agreement. The *Livingstone* court pointed out that the release-dismissal agreement in that case did not clearly specify that the criminal defendant was waiving any future right to sue the police or the state.<sup>66</sup> Instead, the ambiguous wording of the agreement may have led the

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61. *Livingstone*, 12 F.3d at 1211. See also *Lynch v. City of Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989); *Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993); *Hill v. City of Cleveland*, 12 F.3d 575, 578 (6th Cir. 1993). But see *Woods v. Rhodes*, 994 F.2d 494, 499 (8th Cir. 1993), wherein the court did not expressly place the burden on the state.

62. The allocation of the burden to the state not only provides a check on the potential coerciveness of the agreement, but also places a check on courts that might be too anxious to enforce the agreement. For example, in *Coughlen*, the Sixth Circuit reversed the district court's decision because the lower court treated the agreement as "presumptively valid." 5 F.3d at 974. In doing so, the Sixth Circuit advocated Justice O'Connor's position that the burden should fall on the party seeking enforcement of the agreement. *Id.*

63. *Livingstone*, 12 F.3d at 1213.

64. *Id.* at 1210-11. See also *supra* notes 24-29 and accompanying text.

65. 12 F.3d at 1214.

66. *Id.* at 1211-12. The Third Circuit pointed out that neither the judge nor the prosecutor ever informed Mrs. Livingstone that the oral agreement was a "settlement" by which she agreed to waive civil claims. *Id.* at 1214. Also, no party ever explained to Mrs. Livingstone what "full and complete release" actually meant. *Id.* Therefore, the Third Circuit characterized the agreement as "patent[ly] ambiguous." *Id.* at 1213.

defendant to believe that she retained her right to pursue litigation.<sup>67</sup> Moreover, the prosecution in *Livingstone* never put the terms of the agreement in writing.<sup>68</sup> Although the Third Circuit did not reject oral release-dismissal agreements per se, it reasoned that an oral agreement should be reviewed more strictly by the court.<sup>69</sup> The court additionally noted a "pronounced" contrast between the circumstances surrounding the agreement in *Livingstone* and those present in *Rumery*.<sup>70</sup> Applying its

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67. 12 F.3d at 1214.

68. *Id.*

69. *Id.* at 1212. The court listed several advantages that written agreements have over oral agreements. First, written agreements provide more "opportunity for deliberate reflection." *Id.* Second, written agreements create a more cooperative atmosphere where parties feel more freedom to "propose modifications to the agreements." *Id.* at 1213. Finally, a written agreement provides a record to indicate each party's bargaining power. *Id.*

The Third Circuit pointed out that neither *Rumery* nor any other case following *Rumery* has even considered enforcing an oral release-dismissal agreement. *Livingstone*, 12 F.3d at 1213. Additionally, the Third Circuit noted that the *Rumery* plurality "never mentioned the possibility of an oral release-dismissal agreement." *Id.* Finally, the Third Circuit stated that Justice Stevens in his dissent assumed the agreement would be written, as evidenced by Stevens' statement: "A court may enforce such an agreement only after a careful inquiry into the circumstances under which the plaintiff signed the agreement." *Id.* (quoting *Rumery*, 480 U.S. at 417 n.22 (Stevens, J., dissenting)).

70. *Livingstone*, 12 F.3d at 1214. Although the *Livingstone* court invalidated the agreement largely on the ambiguity of the oral agreement, it did consider other factors, such as whether the criminal defendant signed the agreement in jail and whether the defendant's attorney drafted the agreement. *Id.* at 1210 (citing *Woods*, 994 F.2d at 499). *Livingstone* is a rare case in which voluntariness hinged largely on the terms and form of the agreement. In other cases, courts have dealt with factors other than the actual terms and form of the agreement.

In *Lynch v. City of Alhambra*, for example, the Ninth Circuit found the agreement to be voluntary for several reasons. 880 F.2d at 1127. First, Lynch, the criminal defendant, was "familiar with the criminal process," because he was a peace officer who served for several years as a Los Angeles County Marshal. Second, he was represented by legal counsel. Third, Lynch's attorney drafted the agreement. Fourth, Lynch was not in jail when he signed the agreement. Fifth, Lynch had four weeks to consider the agreement before deciding to sign the document. *Id.*

In *Woods v. Rhodes*, the Eighth Circuit also found the release-dismissal agreement to be voluntary. 994 F.2d at 500. The court concluded that Woods, the criminal defendant, offered no proof of coercion or ignorance of the terms set out in the agreement. *Id.* Woods was represented by an attorney. Woods' attorney did not draft the release, but Woods had "weeks" to consider the agreement before signing it. Finally, Woods was not in jail when the agreement was offered, and the agreement, on its face, indicated no ambiguity. *Id.*

In *Hill v. City of Cleveland*, the Sixth Circuit found the agreement to be voluntary. 12 F.3d at 578. Hill, the criminal defendant, "lacked sophistication," but this factor was counterbalanced by his experienced legal representation. *Id.* Second, Hill was not in jail when he signed the release. Third, Hill had two months to consider the agreement. Fourth, the charges were minor, thereby making the potential coercion relatively minimal. Fifth, the release was under judicial supervision. *Id.* These fourth and fifth factors indicate that the Sixth Circuit relied on Justice O'Connor's *Rumery* concurrence and her suggested additions to the voluntariness test. See *Rumery*, 480 U.S. at 401-03 (O'Connor, J., concurring).

enhanced voluntariness test, the Third Circuit held that the prosecution in *Livingstone* had not proven that the defendant voluntarily entered into her release-dismissal agreement.<sup>71</sup>

In *Cain*,<sup>72</sup> the Third Circuit again addressed the issue of voluntariness, but in terms of its importance relative to the other *Rumery* factors. The Third Circuit held that proof of voluntariness alone is not sufficient to establish the validity of a release-dismissal agreement.<sup>73</sup> A prosecutor must also demonstrate that the agreement served to further public policy goals.<sup>74</sup> The court explained that the settlement of a borderline civil case would constitute a valid public policy goal.<sup>75</sup> However, in *Cain*, the court refused to uphold the agreement because the prosecutor failed to demonstrate whether he had even inquired as to the merits of the criminal defendant's civil suit.<sup>76</sup>

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See also *Vallone v. Lee*, 7 F.3d 196, 198-99 (11th Cir. 1993), in which the Eleventh Circuit applied the *Rumery* test to a nontraditional release-dismissal agreement. In *Vallone*, the criminal defendant signed an agreement whereby he "agreed" to release the sheriff from civil liability in exchange for "good and valuable consideration" from the prosecutor. *Id.* at 198 n.2. The Eleventh Circuit found that Vallone had been coerced into signing the agreement, because the sheriff threatened continued imprisonment unless Vallone signed a waiver. *Id.* at 199. According to Vallone, the sheriff said, "Boy, who do you think has the keys to this building?" *Id.* at 198. Additionally, the "good and valuable consideration" promised was not dropped charges but mere release from jail. Telephone Interview with Dennis J. Webb, counsel for Michael R. Vallone, Atlanta, Georgia (Feb. 3, 1994). Webb stated that only release from incarceration, not dismissal of charges, was part of the terms of the agreement. *Id.* The circumstances surrounding this agreement illustrate the stark contrast between the voluntary and involuntary agreements. In particular, Vallone was in jail when he signed the agreement and the terms of the release were extremely ambiguous. 7 F.3d at 198.

71. 12 F.3d at 1214. The court noted three factors affecting this determination: the ambiguous wording of the agreement itself, the oral form of the agreement, and the ten-minute decisionmaking time. *Id.*

72. *Cain v. Darby Borough*, 7 F.3d 377 (3d Cir. 1993).

73. *Id.* at 381. In *Cain*, the Third Circuit never addressed the voluntariness question because the court invalidated the agreement on public policy grounds and did not need to continue its analysis any further. See *id.* at 383; see also *Coughlen v. Coots*, 5 F.3d 970, 974 n.2 (6th Cir. 1993) (concluding that under *Rumery*, "voluntariness alone is not sufficient to uphold [a release-dismissal] agreement").

74. *Cain*, 7 F.3d at 381.

75. *Id.* at 383.

76. *Id.* In *Cain*, the criminal defendant signed the release-dismissal agreement as a precondition to admission into the state Accelerated Rehabilitative Disposition (ARD) program. *Id.* at 379. ARD is a tool used by prosecutors to place criminal defendants on probation instead of prosecuting them at trial. *Id.* at 382. After successfully completing the rehabilitation program, criminal defendants obtain dismissal of criminal charges against them. *Id.* The court criticized the prosecutor for requiring all ARD candidates, not only Cain, to waive any civil claims they have against the police, municipality, or state. *Id.* at 382-83. The court found the ARD program to be both underinclusive and overinclusive, because it denied admission if the defendants did not waive their civil rights claim, and because it admitted unqualified candidates if they signed a waiver of civil claims. *Id.* at 383. Furthermore, the prosecutor

### B. Relevant Public Policy Interests—The Sixth Circuit

Under a different set of circumstances from those confronted by the Third Circuit, the Sixth Circuit found that a release-dismissal agreement did serve certain public policy interests. In *Hill v. City of Cleveland*,<sup>77</sup> the Sixth Circuit concluded that the state articulated a valid public policy interest in conserving valuable resources that would otherwise be used to litigate a marginal civil claim. The police in *Hill* charged the defendant with three criminal offenses.<sup>78</sup> All of these alleged offenses were closely tied to the civil claim in which the defendant denied any criminal wrongdoing and further alleged that the police had used excess force against him.<sup>79</sup> The Sixth Circuit also noted in *Hill* that conflicting accounts of the same altercation made it difficult to determine the truth of the parties' respective claims.<sup>80</sup> In light of this, the court reasoned that a settlement agreement was appropriate.<sup>81</sup> The state's motivation for entering the agreement stemmed from the valid public policy interest of conserving valuable litigation resources.

Release-dismissal agreements will further beneficial public policy goals by saving enormous resources for the state, especially if many civil suits are, like the one in *Hill*, of questionable merit.<sup>82</sup> Even if only a few civil

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sought admission for Cain because he fell into the domestic violence criminal category, which had a high rate of frivolous cases. *Id.* The court criticized the prosecutor for not reviewing the individual merits of Cain's case, and for relying solely on the statistical probability that Cain's case was frivolous. Because the prosecutor failed to determine whether Cain's case was actually frivolous or marginal, the court refused to uphold the agreement on public policy grounds. *Id.*

77. 12 F.3d 575 (6th Cir. 1993).

78. *Id.* at 577.

79. *Id.* at 576. Hill alleged that the police broke his elbow in three places. *Id.*

80. *Id.* at 579.

81. Intimating that Hill's civil rights action appeared to be of questionable merit, the court noted that a release-dismissal agreement would "allow everyone to declare the case a draw and go home." *Id.* (quoting *Lynch*, 880 F.2d at 1128 n.8).

Similarly, the Eighth Circuit upheld the validity of a release-dismissal agreement on the basis that it is a public policy goal to settle "marginal" civil claims. *Woods*, 994 F.2d at 501 (citing *Rumery*, 480 U.S. at 395-96).

82. *But see* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987). Eisenberg and Schwab point out that "Supreme Court Justices bemoan the rise in [civil rights] filings and consequently restrict the remedies." *Id.* at 642. However, the authors argue that the Court's approach stems from a misperception of civil rights litigation "based on a quick citation to Administrative Office statistics." *Id.* at 643. Statistics maintained by the Administrative Office may not categorize civil rights suits correctly. Therefore, the statistics mislead many into believing that filings of all civil rights suits are dramatically rising when, in reality, the increase is largely attributable to Title VII cases. *Id.* As a result, the statistics wrongly fuel the "perception of . . .

suits lack true merit, the release-dismissal agreement still serves a useful purpose in each individual case where the state avoids defending a marginal or frivolous law suit.

The rationale used by the Sixth Circuit in *Hill* applies to yet another public policy issue which the court did not explicitly address. The *Rumery* dissent argued that release-dismissal agreements can be inherently coercive for the criminal defendant because the agreements fail to achieve adequately the benefits of plea bargaining.

In his dissent in *Rumery*, Justice Stevens voiced concern over the plurality opinion's analogy between plea bargaining agreements and release-dismissal agreements. The terms of a plea bargain generally reflect the strength or weakness of the impending criminal charges. The relative bargaining positions of the prosecutor and the criminal defendant in a plea bargaining situation are thought to be directly related to the defendant's actual culpability.<sup>83</sup> Justice Stevens specifically noted that, unlike plea bargaining agreements, release-dismissal agreements can arise in situations where there is little connection between the criminal charges and the civil allegations.<sup>84</sup> Furthermore, Stevens argued that the potential lack of connection between a civil claim and a criminal charge may force a criminal defendant, unaware of the relative weaknesses of the prosecution's case, to waive a strong civil claim.<sup>85</sup>

The *Rumery* dissent correctly identified a potential public policy problem posed when release-dismissal agreements are used to settle unrelated civil and criminal actions. In these situations, a prosecutor has incentive to trump up weak criminal charges in order to achieve a favorable agreement for the

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section 1983 cases flood[ing] the federal courts with questionable claims." *Id.* at 645. Eisenberg and Schwab's analysis underscores the need to avoid sole reliance on any enormous anticipated savings that release-dismissal agreements might bring. Rather, proponents of release-dismissal agreements should focus on the benefit gained in each case in which an agreement is properly used.

83. See PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* 430 (1988). The authors describe the two parties in a plea bargaining negotiation as "inversely related." *Id.* Both sides cannot claim to have a strong position because either the prosecutor or defendant has a stronger case, leaving the other party in a weaker position. *Id.* See also Bartholomy, *supra* note 23, at 351-52 ("[I]t is unlikely . . . that the arrestee's threat of a civil suit is as intimidating to the prosecutor as is the prosecutor's threat of indictment and trial.").

84. *Rumery*, 480 U.S. at 411. See *supra* note 50 and accompanying text.

85. Justice Stevens argued that the agreement "exact[s] a price unrelated to the character of the defendant's own conduct." *Rumery*, 480 U.S. at 411. Commentators have interpreted this statement to mean that release-dismissal agreements, unlike plea bargains, do not reflect the relative strength of each party's bargaining position. LOW & JEFFRIES, *supra* note 83, at 430. Indeed, when civil claims are completely unrelated to the criminal charges facing a defendant, the defendant may be forced into waiving what would be a strong civil claim. *Id.*



state.<sup>86</sup> The criminal defendant, on the other hand, may be coerced into dropping legitimate civil claims. However, Justice Stevens' argument fails to consider the viability of a release-dismissal agreement when the criminal and civil actions are interrelated.

In *Hill*, the Sixth Circuit confronted a release-dismissal agreement in which the civil and criminal charges were closely related. Although the *Hill* court did not specifically analogize the agreement in that case to a plea bargaining agreement, the case demonstrates that release-dismissal agreements can reflect each party's relative bargaining position.<sup>87</sup> When there is a close connection between the civil and the criminal claims, a criminal defendant cannot be coerced into giving up an unrelated civil claim, and the parties' relative bargaining positions are reflected in the decision to enter the release-dismissal agreement.

Thus, in answer to the legitimate concerns that Justice Stevens voiced in *Rumery*, courts should take the Sixth Circuit's rationale a step further. Courts should prohibit release-dismissal agreements in situations where there is no clear nexus between the impending criminal charges and the potential civil claims.<sup>88</sup> This prohibition will insure that release-dismissal agreements retain the same noncoercive quality inherent in plea bargaining

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86. *Rumery*, 480 U.S. at 412-13.

87. See *Hill*, 12 F.3d at 579. However, the release-dismissal agreement still differs from plea bargaining because, with the former, there is no "inverse relationship" between the two parties in which one party has a strong case and one party has a weak case. See *supra* note 83. Instead, both parties appear to have weak cases. Nevertheless, when release-dismissal agreements involve closely tied criminal and civil claims, the agreements achieve the same functional benefit as plea bargaining. Defendants in these situations give up something related to their bargaining position.

For example, suppose a criminal defendant is charged with resisting arrest, but claims that the police used excessive force. The close relationship between the two charges means that proving the criminal charge would probably disprove the civil claim, and vice versa. However, as *Hill* demonstrates, both parties often have a weak case, because it may be very difficult to determine which side is giving the "true facts." 12 F.3d at 579. Therefore, by entering into the agreement and waiving all civil claims, the criminal defendant simply admits his relatively weak position.

When civil and criminal claims are not closely related, however, criminal defendants asked to enter release-dismissal agreements may be coerced into waiving civil claims that are independent of the strength of the criminal charge against them. Thus, that these defendants waive civil claims does not accurately reflect their relative bargaining positions. For example, suppose another criminal defendant is charged with theft and claims that the police used excessive force by shooting him in the chest to apprehend him. If the prosecutor offers to enter into a release-dismissal agreement, this criminal defendant may be coerced into waiving a meritorious civil claim without knowing the prosecutor's ability to succeed in pursuing a criminal conviction.

88. "Where there is not a substantial nexus between the criminal charge and the civil rights claim, the prosecutor's uncertainty as to the merits of the criminal charge is a less compelling reason to require dismissal of the civil rights claim." 12 F.3d at 579 (citing *Lynch*, 880 F.2d at 1128 n.8).

agreements.

### C. *Prosecutorial Misconduct*

In addition to addressing the issues of voluntariness and public policy interests, the post-*Rumery* courts have also scrutinized the potential for prosecutorial misconduct. The *Rumery* dissent contended that release-dismissal agreements inevitably encourage prosecutorial misconduct. The dissent presumed that prosecutors will enter into the agreements simply because they lack probable cause to prosecute the criminal case.<sup>89</sup> Furthermore, a prosecutor faces a potential conflict of interest when asked to consider simultaneously the liability of the police department and the strength of an unrelated criminal case. In fact, a prosecutor might drop a criminal case, not because of the difficulty of bringing it to trial, but solely to protect the police.

In *Woods v. Rhodes*,<sup>90</sup> however, the Eighth Circuit concluded that release-dismissal agreements are not always driven by these types of illegitimate concerns.<sup>91</sup> The prosecutor in *Woods* wanted to settle criminal charges out of court because prosecution of the case would have been extremely costly.<sup>92</sup> The prosecutor needed to bring an out-of-state witness back for trial, and would have needed to spend state resources to do so.<sup>93</sup> The motivation to seek a release-dismissal agreement in *Woods* did not stem from a lack of probable cause but, instead, from the difficulty and expense of orchestrating a full criminal trial.<sup>94</sup> Consequently, the Eighth

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89. 480 U.S. at 413 (Stevens, J., dissenting). See *supra* note 57 for a discussion of relevant ethical rules regarding probable cause.

90. 994 F.2d 494 (8th Cir. 1993).

91. *Id.* at 500.

92. *Id.* at 498.

93. *Id.* The prosecutor's critical witness was the arresting officer, who had moved to Alabama by the time of the trial. *Id.* at 498 n.2. Therefore, the prosecutor would have needed to fly the officer from Alabama to Sioux City, Iowa, the site of the arrest and trial. *Id.* at 498.

94. See 994 F.2d at 500-01. In discussions between the prosecutor and Woods' attorney, the prosecutor declared his intention to bring the officer back to Iowa for trial. *Id.* at 499. In a letter, Woods' attorney informed Woods that the prosecutor intended to do the following: "If no acceptance [of the release-dismissal agreement] is made . . . he intends to acquire the attendance of [the witness and] . . . will purchase an airline ticket for his flight." *Id.* Based on this evidence, the Eighth Circuit found that the prosecutor would have prosecuted the case at trial. *Id.* at 501. Therefore, the decision to enter into the agreement did not stem from lack of probable cause because it appears that the prosecution would have been able to bring the critical witness back to trial.

The Ninth Circuit, in *Lynch*, 880 F.2d at 1128-29, also faced the issue of prosecutorial misconduct due to lack of probable cause. The court pointed to the statements of several officers who characterized the arrest of Lynch as "questionable." *Id.* As a result, the Ninth Circuit doubted that there was a "very

Circuit noted that release-dismissal agreements may be the product of a prosecutor's legitimate use of discretion in allocating state resources.<sup>95</sup>

### III. EXPOSING THE PUBLIC TO RISK: SIGNIFICANT PUBLIC POLICY CONCERNS UNRESOLVED BY JUDICIAL SOLUTIONS

Courts in the post-*Rumery* era have demonstrated an ability to preserve the benefits of release-dismissal agreements for both the criminal defendant and the government. However, the present judicial framework fails to address two significant public policy concerns linked to a prosecutor's use of release-dismissal agreements. These concerns involve: 1) a prosecutor's ethical duty to seek justice for the public at large; and 2) the intended goals

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strong factual basis for criminal charges." *Id.* Additionally, the court found a second possible type of prosecutorial misconduct. The court pointed out that the prosecutor may have threatened prosecution only after Lynch declared his intention to pursue civil litigation. *Id.* Based on the two possible acts of misconduct, the Ninth Circuit remanded the case to the district court to make findings on the issue of public interest. *Id.*

In *Hill*, the Sixth Circuit found no evidence of prosecutorial misconduct. 12 F.3d at 579. In particular, the court found no evidence that the prosecutor filed criminal charges in retaliation for Hill's stated intention to pursue a civil suit. The police officer asserted that he filed criminal charges without any knowledge of Hill's intention to sue the police. Because Hill did not refute the officer's statement, the court found no evidence of prosecutorial misconduct. The court explicitly distinguished the case from *Lynch*, where the court suspected misconduct. *Id.*

95. The Eighth Circuit listed the following legitimate prosecutorial reasons for entering a release-dismissal agreement: "cost and burden of litigating law suits," efficient "docket control," and avoidance of questionable civil rights claims. *Woods*, 994 F.2d at 500.

Furthermore, the *Woods* court outlined two factors which bear on a finding of prosecutorial overreaching. First, the court considered the "nature of the criminal charges." *Id.* This reflects Justice O'Connor's reasoning in *Rumery* that as criminal charges become more serious, the agreement is more likely to be a product of coercion. *See Rumery*, 480 U.S. at 1196 (O'Connor, J., concurring). Secondly, the Eighth Circuit considered the timing of the decision to prosecute. Specifically, the court asked whether the prosecution's "threat" of charges came before or after the criminal defendant filed her civil claims. *Woods*, 994 F.2d at 500-01. In *Woods*, the court found that the prosecutor originally filed criminal charges before *Woods* threatened a civil suit. *Id.* Therefore, the court determined that the prosecutor did not bring criminal charges in retaliation for *Woods*' decision to file civil claims. *Id.* The court stated: "What *Woods* perceives as the 'threat' of prosecution was actually nothing more than the likelihood . . . that their charges will be advanced to their ultimate conclusion." *Id.* See *supra* note 94 for further analysis of the facts of *Woods* and a comparison with *Lynch*.

Although the need to avoid questionable civil rights claims and the nature of the criminal suit are both factors related to the question of prosecutorial misconduct, the test for prosecutorial misconduct often overlaps with concerns regarding voluntariness and public policy. For example, in *Rumery*, the plurality listed the settlement of "marginal" claims as an indication of beneficial public policy goals. 480 U.S. at 395. Also, in Justice O'Connor's concurrence, she listed seriousness of charges as part of the voluntariness test. *Id.* at 401 (O'Connor, J., concurring).

of the Civil Rights Act, particularly 42 U.S.C. § 1983.<sup>96</sup>

### A. *Violation of a Prosecutor's Ethical Duty*

By entering into a release-dismissal agreement, a prosecutor fails to put the public on notice of possible misconduct and, consequently, violates his or her ethical duty to seek justice for the public. The ABA Model Rules of Professional Conduct (Model Rules),<sup>97</sup> the ABA Model Code of Professional Responsibility (Model Code),<sup>98</sup> and the ABA Standards for Criminal Justice (ABA Standards)<sup>99</sup> all define the prosecutor's ethical obligations. Model Rule 3.8 focuses on the prosecutor's obligations to act fairly towards an individual criminal defendant.<sup>100</sup> However, comment 1 to Model Rule 3.8 indicates that the prosecutor also has a duty to act as a

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96. There may also be a third concern: criminal defendants might bring meritless suits in order to bargain for release-dismissal agreements. Under this scenario, a criminal defendant could then waive a meritless civil claim in exchange for a release of any criminal charges. However, civil rights plaintiffs in § 1983 suits have difficulty in establishing a prima facie case because police officers hold qualified immunity. The United States Supreme Court, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), stated that officers are generally "shielded from liability for civil damages . . . [as long as] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Because of a police officer's qualified immunity, a criminal defendant would have difficulty coercing the prosecution to drop criminal charges in exchange for the waiver of an obviously meritless civil claim. Prosecutors would undoubtedly realize that defendants could not prevail in such cases. Therefore, the tough standard of proof would make it difficult for criminal defendants to initiate a "strike suit."

97. MODEL RULES OF PROFESSIONAL CONDUCT (1992) [hereinafter MODEL RULES]. The Model Rules were the culmination of four major drafts created by the ABA-appointed Kutak Commission. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (1993). The ABA House of Delegates adopted the rules in 1983. *Id.* Gillers and Simon estimate that, since 1983, about 36 states have adopted the Model Rules in some form. *Id.*

98. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) [hereinafter MODEL CODE]. In 1969, the ABA House of Delegates approved the Model Code to replace the ABA Canons of Professional Ethics. GILLERS & SIMON, *supra* note 97, at 319. By 1980, virtually every state had adopted a form of the Model Code. *Id.* However, since the adoption of the Model Rules, Gillers and Simon estimate that fewer than 15 states continue to use the Model Code. *Id.*

99. ABA STANDARDS FOR CRIMINAL JUSTICE (1992) [hereinafter ABA STANDARDS]. The ABA Standards were first published as a full collection in 1980. GILLERS & SIMON, *supra* note 97, at 407. Over 40 states have amended their criminal codes to include the ABA Standards. *Id.*

100. MODEL RULES Rule 3.8 (1992). The rule requires that a prosecutor "*shall* (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; . . . [and] (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . ." *Id.* (emphasis added). The rule does not address the prosecutor's duties to the public in general, but focuses only on conduct toward the defendant.

“minister of justice.”<sup>101</sup> The Model Code imposes a similar public duty upon a prosecutor.<sup>102</sup> Therefore, in addition to duties owed to any individual defendant, a prosecutor bears a broad responsibility to seek justice for the community as a whole.

In the context of release-dismissal agreements, a prosecutor could ordinarily argue that the public is well served by the disposition of

101. MODEL RULES Rule 3.8 cmt. 1 (1992). The comment states: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” *Id.*

102. Disciplinary Rules (DR) 7-103 of the Model Code contains language similar to that found in Rule 3.8 of the Model Rules. DR 7-103 states:

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

MODEL CODE DR 7-103 (1983).

The Disciplinary Rule only refers to a prosecutor’s duty towards an individual criminal defendant. However, as in the Model Rules, the comments to DR 7-103 explain the prosecutor’s broad duty to act in the public’s best interest. Ethical Consideration (EC) 7-13 notes that a prosecutor’s role is to “seek justice.” MODEL CODE EC 7-13 (1983). EC 7-13 states:

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 discretionary exercise of governmental powers, . . . [and] (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 . . . .

*Id.*

Additionally, the drafters of EC 7-13 quoted an excerpt from *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958), which states in part:

The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversarial element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. When the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

*Id.* at 1218 n.24.

Moreover, EC 7-14 states:

A governmental lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair . . . . A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

MODEL CODE EC 7-14 (1983).

Therefore, a prosecutor who enters into a release-dismissal agreement could arguably be bringing about an “unjust settlement or result” because the public never receives notice of police misconduct. In the absence of any impartial review of police misconduct, prosecutors violate their ethical duty under the Model Code.

marginal claims against a criminal defendant. However, in some situations, a prosecutor might use the agreement to bury meritorious civil claims. Under this scenario, the prosecutor's actions prevent the public from receiving notice of police misconduct. Thus, the prosecutor fails to uphold his or her general obligation to the public.

In addition to implementing the Model Rules and the Model Code, several jurisdictions have enacted rules patterned after the ABA Standards for Criminal Justice.<sup>103</sup> In contrast to the Model Rules and Model Code, the ABA Standards list a prosecutor's duties to the public in the text of the rule rather than in the comment section.<sup>104</sup> Therefore, the ABA Standards arguably create a more explicit duty on prosecutors to act in the best interests of the public. For instance, Standard 3-1.2 describes a prosecutor as an "administrator of justice" whose role is "to seek justice, not merely to convict."<sup>105</sup> The ABA Standards also require a higher standard of conduct by prosecutors than the Model Rules or the Model Code, because the ABA standards place on prosecutors an affirmative duty "to seek to reform and improve the administration of criminal justice."<sup>106</sup> In certain situations, a prosecutor might argue that release-dismissal agreements "improve" the workings of the justice system by resolving civil suits of questionable merit and by allowing the state to direct valuable time and resources to serious criminal cases. However, when prosecutors use the agreement to bury meritorious civil claims and the flawed agreement is not challenged in court, the prosecutor breaches an ethical obligation to the general public. Despite the gain in efficiency in the criminal justice system, the public loses when it is not made aware of police misconduct.

These ethical considerations received no attention in *Rumery* and subsequent cases. Even Justice Stevens, in his *Rumery* dissent, focused on the duty to prosecute crimes rather than the duty to make the public aware of police misconduct.<sup>107</sup> The dissent did not refer to any ethical rules in

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103. See *supra* note 99.

104. ABA STANDARDS Standard 3-1.2 (1992).

105. *Id.* Standard 3-1.2 (b) and (c) provide: "(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. (c) The duty of the prosecutor is to seek justice, not merely to convict." *Id.*

106. ABA STANDARDS Standard 3-1.2 (d) (1992). Standard 3-1.2 (d) provides: "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action." *Id.*

107. *Rumery*, 480 U.S. at 412-13 (Stevens, J., dissenting). *But see supra* note 57 for relevant portions of ethical rules which Justice Stevens cited as creating a prosecutor's duty toward an individual defendant.

its discussion of the public's right to receive notice. While release-dismissal agreements may accomplish many worthy goals, courts continue to ignore that, in some situations, the agreements are the product of a prosecutor's breach of ethical obligations to the public.

### *B. Conflict with the Purposes of § 1983*

Release-dismissal agreements may also conflict with the policies underlying 42 U.S.C. § 1983. The United States Supreme Court has emphasized individual remedy as the primary purpose of § 1983; however, the Court has also suggested that § 1983 encompasses broader public concerns, including notification of police misconduct and deterrence of future misbehavior.<sup>108</sup>

In 1961, in *Monroe v. Pape*,<sup>109</sup> the Supreme Court examined the legislative history and purpose of § 1983.<sup>110</sup> Justice Douglas, delivering the opinion of the Court, acknowledged that the Civil Rights Act was passed in response to the unchecked lawlessness perpetrated by the Ku Klux Klan.<sup>111</sup> However, Douglas also noted that the Act does not directly target the Klan; instead, it provides a remedy against state officials who fail to enforce state laws that would otherwise curb miscreants such as the Klan.<sup>112</sup> Exploring the legislative history, Justice Douglas pointed out that Congress intended § 1983 to provide a federal remedy to individuals whose civil rights were abridged by persons acting "under color" of state authority.<sup>113</sup>

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108. See *infra* notes 118-25 and accompanying text.

109. 365 U.S. 167 (1961), *overruled by* *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

110. 365 U.S. at 170-92. The court noted that Congress originally enacted § 1983 as section 1 of the Ku Klux Klan Act of April 20, 1871. 365 U.S. at 171.

111. *Id.* at 172-76.

112. *Id.* at 175-76. Justice Douglas stated: "While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it . . . but against those who representing a State in some capacity were unable or unwilling to enforce a state law." *Id.*

113. 365 U.S. at 180. In support of his view, Douglas cited statements made during the congressional debates which stressed the need to provide a federal remedy to individual victims, regardless of any existing state remedy. Justice Douglas argued that § 1983 originally performed three functions: "overrid[ing] certain kinds of state laws"; "provid[ing] a remedy where state law was inadequate"; and "provid[ing] a federal remedy where the state remedy . . . was not available in practice." *Id.* at 173-74. In support of these three views, Douglas cited the legislative history of § 1983. *Id.* at 173-75.

Regarding the first purpose, overriding state laws, Justice Douglas cited the statements of Mr. Sloss of Alabama, who spoke in opposition. *Id.* at 173. Sloss stated:

The first section of this bill prohibits any invidious legislation by States against the rights or

Although the *Monroe* Court refused to extend § 1983 liability to municipalities,<sup>114</sup> in 1978 the Court made this extension in *Monell v. Department of Social Services*.<sup>115</sup> However, like the *Monroe* Court, the

privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.

*Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 268 (1871)).

Regarding the second purpose, to provide a remedy where state law was inadequate, Justice Douglas cited the statements of Senator Sherman of Ohio. 365 U.S. at 173-74. Senator Sherman stated:

[I]t is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.

*Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. 345 (1871)).

Finally, Justice Douglas cited the statements of Mr. Lowe of Kansas to explain the third purpose of § 1983, to provide a federal remedy even when a state remedy exists. 365 U.S. at 174-75. Lowe stated:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

*Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 166-67 (1871)).

114. 365 U.S. at 191-92. The Court held that a municipality did not constitute a "person" who could be held liable under § 1983. *Id.* See *supra* note 6 for the relevant portion of § 1983. Justice Douglas pointed to a failed amendment proposed by Senator Sherman which he claimed would have included municipalities as parties liable under § 1983. 365 U.S. at 188. Because Congress rejected the amendment, Douglas argued that Congress could not have construed municipalities as persons for purposes of the statute. *Id.*

Although Justice Douglas refused to extend the scope of § 1983 liability, he did make the standard of proof less stringent by not requiring a plaintiff to prove specific intent. *Id.* at 187. Commentators have agreed that *Monroe* sparked growth of § 1983 litigation by relaxing the standard of proof. See LOW & JEFFRIES, *supra* note 83, at 12; Robert H. Freilich et al., *1978-79 Annual Review of Local Government Law: Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty*, in SECTION 1983: SWORD AND SHIELD 47 (Robert H. Freilich & Richard G. Carlisle eds., 1983) (observing that *Monroe* "marked the beginning of modern Section 1983 litigation"); H.E. BARRINEAU, III, CIVIL LIABILITY IN CRIMINAL JUSTICE 11 (1987) ("After ninety years of relative inactivity, Section 1983 was resuscitated by the United States Supreme Court in 1961, and the seed for future fruition was sown.").

115. 436 U.S. 658, 663 (1978). Justice Brennan, writing for the Court, disagreed with Douglas' analysis of the Sherman amendment. Brennan argued that "nothing in the debates on the Sherman amendment" would have precluded a court from holding municipalities liable. *Id.* at 683. Justice Brennan cited legislative history to support his view that several congressmen assumed municipalities would be included under § 1983. *Id.* at 683-87. Also, Brennan analogized municipalities to corporations, which had already been treated by courts as "persons." *Id.* at 687-88. However, nowhere in *Monell* did Justice Brennan dispute the *Monroe* Court's analysis of the legislative history and purpose of § 1983, with the exception of its analysis regarding the liability of municipalities.

The *Monell* Court did set limits on municipal liability, by requiring plaintiffs to prove action in conformity with "official [municipal] policy and rejecting respondeat superior liability." *Id.* at 594. Despite these limits, *Monell*, like *Monroe*, expanded the scope of § 1983 liability. See Freilich et al.,



*Monell* Court focused on an individual's rights under § 1983.<sup>116</sup> Neither the *Monroe* nor the *Monell* Court explicitly recognized that § 1983 was designed to provide public benefits, such as public notice of misconduct or deterrence of future misconduct.<sup>117</sup>

Despite the Supreme Court's focus on the individual's right to obtain a remedy for state misconduct under § 1983, the Court has identified secondary purposes of § 1983 that benefit the public. *City of Riverside v. Rivera*<sup>118</sup> involved a controversy regarding the amount of attorney's fees owed to a victorious § 1983 plaintiff.<sup>119</sup> The Court concluded that Congress, by providing attorney's fees in 42 U.S.C. § 1988<sup>120</sup> to victorious civil rights plaintiffs, recognized that civil rights actions serve the public interest.<sup>121</sup> Writing for the majority in *City of Riverside*, Justice Brennan reasoned that a civil rights plaintiff acts as a "private attorney general" and should be rewarded with attorney's fees for acting on behalf of the public in exposing misconduct.<sup>122</sup> Brennan cited the legislative history of § 1988 to bolster his rationale.<sup>123</sup> The *City of Riverside*

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*supra* note 114, at 63 ("[The Court in *Monell*] embarked on a new trail into the heretofore forbidden realm of municipality liability for the deprivation of constitutional rights of individuals."); BARRINEAU, *supra* note 114, at 14 ("As a result of this ruling, all Section 1983 plaintiffs had a deeper pocket into which they could reach . . .").

116. 436 U.S. at 694.

117. In fact, in 1978, the same year that *Monell* was decided, the Court held that the "basic purpose" of § 1983 is to provide a private remedy for individual victims. *See* *Carey v. Phipps*, 435 U.S. 247, 254 (1978).

118. 477 U.S. 561 (1986).

119. *Id.* at 564-67.

120. 42 U.S.C. § 1988(b) provides in part: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (1988 & Supp. IV 1992).

121. 477 U.S. at 575-76.

122. *Id.* at 575. "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit 'does so not for himself alone but also as a private attorney general' vindicating a policy that Congress considered of the highest importance." *Id.* (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (addressing a claim under the Civil Rights Act of 1964)). *See also* *Hensley v. Eckerhart*, 461 U.S. 424, 444 n.4 (1983) (Brennan, J., concurring in part and dissenting in part). In *Hensley*, Brennan reasoned that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Id.*

123. *City of Riverside*, 477 U.S. at 575-77. Justice Brennan used the legislative history not only to illustrate the purpose of § 1988, but also to point out the purposes of civil rights laws in general. *Id.* For example, Brennan quoted the remarks of Senator Tunney, who stated: "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen suffers." *Id.* at 575

decision and § 1988 suggest that civil rights plaintiffs do not act as ordinary civil litigants, but deserve special recognition and compensation for their public service.

The notion of civil rights plaintiffs as "private attorneys general" implies that § 1983, like other civil right laws, serves broader goals apart from simply providing a remedy for individual victims. First, civil rights plaintiffs, as private attorneys general, expose misconduct on behalf of the public.<sup>124</sup> Second, as the Court noted in *City of Riverside*, damages awarded to civil rights plaintiffs provide a substantial deterrent against future misconduct.<sup>125</sup> Release-dismissal agreements would suppress these two secondary public policy goals.

#### IV. ESTABLISHMENT OF CIVILIAN OVERSIGHT COMMITTEES

The current judicial framework for determining the validity of release-dismissal agreements preserves the criminal defendant's rights and the state's interests, but remains inherently flawed because courts ignore problems that have a significant impact on the public interest. Release-dismissal agreements cause ethical dilemmas for prosecutors and frustrate achievement of the purposes of § 1983 to notify the public of misconduct and deter future misconduct. Nevertheless, release-dismissal agreements allow a state to conserve critical resources that would otherwise be used to

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(quoting 122 CONG. REC. 33313 (1976)). Justice Brennan also noted the remarks of Senator Hathaway, who stated: "[R]ight now the vindication of important congressional policies in the vital area of civil rights is made to depend upon the financial resources of those least able to promote them." 477 U.S. at 577 (quoting 122 CONG. REC. 31832 (1976)). These two statements indicate that civil rights plaintiffs, including § 1983 plaintiffs, are not ordinary litigants, but act on behalf of the public. Awarding attorney fees is one way to compensate them for their efforts.

In addition to the excerpts cited by Justice Brennan, the Senate Report accompanying § 1988 provides more insights into the purpose of § 1988 and the purposes of civil rights laws in general. For example, the Senate Report noted that the purpose of § 1988 was to "remedy anomalous gaps in our civil rights laws created by [previous Supreme Court cases]." S. REP. NO. 1011, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5909. The Senate Report described the "anomalous gaps" as allowing attorney's fees awards in some civil rights cases, while denying them in others. *Id.* at 4, reprinted in 1976 U.S.C.C.A.N. at 5911. In response, the Senate Report advocated awarding attorney's fees in all civil rights cases. *Id.* Additionally, the Senate Report noted that civil rights plaintiffs act as "private attorneys general." *Id.* at 3, reprinted in 1976 U.S.C.C.A.N. at 5910. Therefore, the legislative history of § 1988 indicates that all civil rights plaintiffs, including § 1983 plaintiffs, are to be regarded as "private attorneys general," pursuing litigation on behalf of the public interest. Section 1988 attorney fees are awarded in recognition of these actions on behalf of the public.

124. *Id.* at 3, reprinted in 1976 U.S.C.C.A.N. at 5910.

125. *City of Riverside*, 477 U.S. at 575 (citing *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983)).

defend against marginal civil claims. For these reasons, state legislatures must establish a means by which the state and the defendant can continue to reap the benefits of release-dismissal agreements without subjecting the public to the accompanying risks.

Rather than abandoning release-dismissal agreements, state legislatures should establish civilian oversight committees to review police conduct in cases in which these agreements have been used.<sup>126</sup> Civilian oversight committees constitute a measure necessary to correct the flaws inherent in judicial solutions. In the absence of such committees, courts should not enforce release-dismissal agreements, because the agreements would continue to harm the public by obstructing public notification and deterrence of police misconduct.

Civilian oversight committees are by no means untried experiments. Jurisdictions across the country have used civilian oversight committees as an alternative to internal affairs departments for investigating police misconduct.<sup>127</sup> The New York Civil Liberties Union (NYCLU), in a report on civilian review, scrutinized the strengths and weaknesses of civilian oversight committees in seven cities<sup>128</sup> and recommended some general guidelines that legislatures should follow when creating a model civilian committee.<sup>129</sup> First, the committee should be independent of the police department, and consist of an all-civilian staff.<sup>130</sup> Independent

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126. Several prosecutors' offices do not even use release-dismissal agreements. See Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 864 tbl. I (1988). Nine areas do not use release-dismissal agreements as a matter of internal policy: Arizona State Attorney General; Cook County, Illinois; Lake County, Illinois; Denver, Colorado; Montgomery County, Maryland; Palm Beach, Florida; Philadelphia, Pennsylvania; Seattle, Washington; and Suffolk County, Massachusetts. *Id.* Additionally, the Denver City Attorney and the Monroe County, New York, District Attorney are prohibited by court rulings from entering into these agreements. *Id.* Finally, in Maricopa County, Arizona, and San Francisco, California, the agreements are not used as a matter of custom. *Id.* Based on his research, Kreimer concluded that the release-dismissal agreement was "[f]ar from being a standard tool for advancing 'legitimate prosecutorial interests.'" *Id.* at 865. Of course, in those jurisdictions where release-dismissal agreements are not used, citizens' committees like those proposed in this Note would not be necessary.

127. See Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 794 (1993) (reporting that thirty of the fifty largest cities in the United States use civilian oversight committees); see also NEW YORK CIVIL LIBERTIES UNION, CIVILIAN REVIEW OF POLICING: A CASE STUDY REPORT 3 (1992) [hereinafter NYCLU REPORT] (noting that eighteen civilian oversight committees were established during the two and one-half years preceding the NYCLU case study).

128. NYCLU REPORT, *supra* note 127, at 2.

129. *Id.* at 126.

130. *Id.*

committees remain free from police department domination and cultivate public confidence.<sup>131</sup> Second, in the committee's charter, the state legislature should expressly grant subpoena power to compel testimony and information from police officers and police department heads.<sup>132</sup> This clear delegation of subpoena power would curb police resistance.<sup>133</sup>

In addition to the NYCLU's recommendations, state legislatures should require civilian oversight committees to conduct public hearings. Public hearings would notify the public of police misconduct in specific cases and could also reveal a pattern of department-wide misconduct. Without public hearings, the committees would resemble internal affairs departments,

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131. The NYCLU discussed the difficulties that arise when civilian committees are not wholly independent from police departments. *Id.* at 42. For instance, the Chicago Police Department established the Office of Professional Standards (OPS) as a "civilian" review board. *Id.* However, the police department staffed the OPS with police officers' relatives. *Id.* The committee's lack of independence created distrust from the minority community and led the Chicago Crime Commission (a transition team for the incoming mayor) to characterize the OPS as "nothing more than an extension of the police department . . . totally lack[ing] credibility in both the black and white communities." *Id.*

Notwithstanding these criticisms, Chicago's civilian review board sustained (i.e., did not dismiss for lack of evidence) a greater percentage of excessive force complaints than the police department's internal review board. NYCLU REPORT, *supra* note 127, at 17. The OPS sustained 10.1% of excessive force complaints in its first year of operation, compared to the police department's rate of 1.4%. *Id.* However, the presence of police officers' relatives on the OPS board indicated that there is potential for police department domination of the OPS. Whenever a civilian committee, like the OPS, is created by a police department, even if not officially run by the department, the potential exists for police domination. Therefore, state legislatures would better serve the public and instill needed public confidence by creating independent committees with no ties to police departments.

Independent civilian committees also operate more effectively than the internal affairs division of police departments. The independent civilian committee in Berkeley, California, sustained 70% of its cases in the first year of operation. NYCLU REPORT, *supra* note 127, at 16. A year earlier, the police department had sustained only 4% of the cases filed. *Id.* Minneapolis' independent review board sustained 8 out of 26 cases in its first 21 months of operation, compared to the 17 total cases sustained by the city's police department in the previous 15 years. *Id.* at 17. The large increase in sustained cases tends to prove that independent committees hold police officers to a "higher standard of conduct." *Id.* at 16. Also, statistical comparison suggests that internal affairs departments are more sympathetic to police officers, and thus less vigilant in identifying misconduct. Independent committees, on the other hand, are not as susceptible to police department domination.

132. NYCLU REPORT, *supra* note 127, at 126.

133. *Id.* at 89. The NYCLU pointed to Cincinnati as an example of initial police resistance to civilian committees. *Id.* The Office of Municipal Investigation (OMI), Cincinnati's civilian review board, lacked any express authority to serve subpoenas, but nevertheless tried to subpoena police testimony and records. The police department ignored subpoenas and refused to answer questions on grounds of self-incrimination. Finally, the city amended the ordinance that created the committee to expressly provide the OMI with subpoena power over police testimony and records. This amendment forced the police to cooperate. *Id.*

which do not reveal their findings to the public.<sup>134</sup> Finally, state legislatures should empower the committees to make binding recommendations for appropriate sanctions against offending officers. Although such a provision may engender police hostility, nonbinding recommendations give police incentive to ignore the committee.

The four proposed elements of independence, subpoena power, public hearings, and binding recommendations would make the civilian oversight committee an effective vehicle to curb misconduct. Prosecutors could justify use of a release-dismissal agreement without risking an ethical violation.<sup>135</sup> With an effective oversight committee in place, a prosecutor can arrange a release-dismissal agreement without concern that the alleged misconduct will be kept from the public eye. Claims of questionable merit can be settled while, at the same time, an impartial body determines whether there was actual misconduct. An effective oversight program is also consistent with the purposes of § 1983. Civilian committees accomplish the goals of public notice and deterrence of misconduct regardless of a defendant's motivation for entering the agreement.

Civilian oversight committees, nevertheless, do raise some policy concerns that states should consider. For instance, an overzealous committee's scrutiny might become so burdensome that some states simply would not use release-dismissal agreements. However, this scenario is unlikely to occur because prosecutors generally do not use release-dismissal

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134. Although the NYCLU did not specifically recommend public hearings, it did point out that the city of Berkeley, California, currently includes public hearings as part of its civilian committee's procedures. NYCLU REPORT, *supra* note 127, at 116. Berkeley's Police Review Commission conducts its affairs through public hearings, while the police internal affairs division conducts closed hearings. *Id.* State legislatures should follow Berkeley's example because public hearings promote public notice of police misconduct. Without public hearings, a civilian oversight committee would not remedy the central flaw of release-dismissal agreements: the failure to give public notice. Even though the committee could serve as a deterrent to future misconduct, it would still fail to provide the public with necessary information.

By contrast, Minneapolis' civilian oversight committee operates under closed hearings. However, the committee plans to challenge the Minnesota law that currently requires closed hearings. *Id.* at 11.

135. See Bartholomy, *supra* note 23, at 363. The Colorado Bar Association has already prohibited prosecutors from using release-dismissal agreements. *Id.* "[I]t is improper for a public prosecutor to require that a defendant, as a condition of charging or sentencing concessions, release governmental agencies or their agents from actual or potential civil claims which arise from the same transactions as the criminal episode." Colorado Bar Ass'n., Ethics Op. 62 (1982), cited in Bartholomy, *supra* note 23, at 363.

Bartholomy argues that ethics laws similar to Colorado's would be the ideal solution to the problems associated with release-dismissal agreements. Bartholomy, *supra* note 23, at 363. However, this Note argues that civilian oversight committees are a more effective solution.

agreements to avoid scrutiny but rather to save resources that would otherwise be used to defend against marginal civil litigation. Although the state would be burdened by increased scrutiny, it would continue to save considerable resources. Therefore, oversight committees would not eliminate the state's incentive to enter into release-dismissal agreements.

Oversight programs also create apprehension that police departments would pressure prosecutors to stop using release-dismissal agreements because the agreements invoke unwanted scrutinization of police affairs. However, police departments should recognize that civilian review is a more desirable alternative than civil suits. The Rodney King incident in Los Angeles demonstrated that civil suits can result in a public relations disaster for a police department.<sup>136</sup> A release-dismissal agreement, while still exposing the department to civilian review, is arguably less likely to cause high levels of negative media exposure and public backlash against the police department than a civil trial. Therefore, police departments have a greater incentive to use release-dismissal agreements than to accept the burdens of civil suits.

Another policy concern involves whether police union rules would require states to supply legal counsel during civilian oversight committee hearings.<sup>137</sup> A state may forfeit some of the savings gained through the use of release-dismissal agreements if it were forced to provide legal counsel for all committee hearings. However, state legislatures could alleviate this problem by setting guidelines to ensure that oversight committees make timely recommendations. The committees could resolve cases more quickly than the backlogged court system, and states would ultimately spend less money on legal fees. Also, committees created specifically to scrutinize release-dismissal agreements would gain specific expertise in deciding these types of cases. This experience may serve to expedite the process.<sup>138</sup>

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136. For a description of the Rodney King incident, see *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993), *aff'd in part and vacated in part*, 34 F.3d 1416 (9th Cir. 1994). Alleging civil rights violations, King sued the City of Los Angeles and the police officers involved in the incident. See Christine Spolar, *Officers in King Case Escape Damages*, WASH. POST, June 2, 1994, at A5; William Hamilton, *King is Awarded \$3.8 Million in Los Angeles Police Beating*, WASH. POST, Apr. 20, 1994, at A1.

137. Jurisdictions such as Berkeley, California, already require legal representation for police officers during committee proceedings. NYCLU REPORT, *supra* note 127, at 114.

138. Civilian oversight committees may also create a third concern. A criminal defendant who enters into an agreement might later be reluctant to testify against the police officer before a citizens' oversight committee. State legislatures can respond to this problem by subpoenaing the testimony of the criminal defendant, as well as the testimony of the police officer or officers and police records.

## V. CONCLUSION

Despite their potential problems, civilian oversight committees present the most viable solution to problems with release-dismissal agreements left unresolved by judicial decisions. Although judicial solutions adequately protect the criminal defendant from coercive agreements and preserve the state's interests in resolving unmeritorious claims, courts have neglected important ethical and public policy concerns raised by release-dismissal agreements. Civilian oversight committees would correct the flaws in release-dismissal agreements by providing a means to accomplish public notice and deter police misconduct. Moreover, these committees preserve the state's incentives to use the agreements to save valuable resources that might otherwise be used to defend borderline civil cases. Because committees merely correct the remaining flaws of the release-dismissal agreement, the committees complement rather than inhibit the use of release-dismissal agreements. With the oversight committees in place, release-dismissal agreements can be an effective tool for improving the law enforcement process.

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