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Geoffrey Christopher Rapp

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AFFIRMATIVE INJUNCTIONS IN ATHLETIC EMPLOYMENT CONTRACTS: RETHINKING THE PLACE OF THE *LUMLEY* RULE IN AMERICAN SPORTS LAW

GEOFFREY CHRISTOPHER RAPP*

In the summer of 2005, American football fans were once again confronted with the ugly specter of a superstar athlete holding out for renegotiation of a contract. Terrell Owens, the Philadelphia Eagles wide receiver who helped his team dominate the National Football Conference (NFC) last year after being traded from San Francisco, publicly threatened to refuse to play unless the Eagles renegotiated his seven-year, \$49 million contract, which he had been more than willing to sign last year.¹ In the end, at least for the moment, it seems that “T.O.” and the Eagles reached an agreement allowing him to return to camp.² Other players, however, maintained their holdouts long into the hot days of August,³ denying their teams their presence during important training evolutions and preseason games.

* Assistant Professor, University of Toledo College of Law; A.B. (Economics), Harvard College; J.D., Yale Law School. John Tehranian, Associate Professor at the University of Utah S.J. Quinney School of Law, provided excellent comments on an early version of this paper. I would also like to thank Rebecca Zietlow, Charles Fornoff Professor of Law and Values, for her input on the constitutional section of the paper. Finally, comments received at the International Contracts Conference at Texas Wesleyan University School of Law in February 2006, were very helpful in the final stages of the production process. Special thanks are due to Professor Frank Snyder at Texas Wesleyan for organizing that conference. Thanks as well to Lois Patek for her tireless administrative assistance.

1. See Jeff Schultz, *No Poisonous T.O. Fiasco Here*, ATLANTA J.-CONST., Aug. 13, 2005, at 2D; Larry O'Rourke, *No-Show Westbrook Angers Eagles*, MORNING CALL, Aug. 2, 2005, at C1. Most observers blame Owens's conduct on his aggressive sports agent, Duke Law grad Drew Rosenhaus, who has advised other clients to become holdouts. See *Drew Rosenhaus*, WIKIPEDIA, http://en.wikipedia.org/wiki/Drew_Rosenhaus (last visited Apr. 11, 2006).

2. See *id.* Following this agreement to have T.O. return to camp, relations between T.O. and the Eagles broke down again, which lead to T.O. being cut from the team. *An Eagle No More; Owens Released; Saints Sign Brees*, HARTFORD COURANT (Hartford, Conn.), Mar. 15, 2006, at C3. However, the eventual breakdown did not have anything to do with his contract, but rather with statements that T.O. made about Eagles quarterback Donovan McNabb. *Id.*

3. See Guy Junker, *Owens, Ward Highlight MNF*, PITT. TRIB. REV., Aug. 15, 2005 (describing Hines Ward's continued holdout from Pittsburgh Steelers' preseason camp).

The contract "holdout"⁴ has become all too common in American sports, particularly in professional football.⁵ One of the reasons a player's threat to hold out is so powerful is that the legal remedies available to a team against a recalcitrant player are deeply flawed.⁶ At best, a team can secure a "negative injunction" to prevent a player from playing professionally for another sports franchise. Given the collusive behavior of the owners of professional sports franchises in each of the big leagues, this remedy is only significant at the rare moments in American professional sports when a rival league emerges to challenge the hegemony of the dominant league.⁷ Ordinarily, the only meaningful remedy available in courts of law for teams stuck with player

4. The holdout is "still the ultimate threat, particularly when you have a good player. If the player holds out, that's what creates the pressure, in many situations, for the team to sign the player." See Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. MIAMI ENT. & SPORTS L. REV. 165, 167-68 (1993) (quoting sports lawyer Richard Woods). One commentator explains the mechanics of a holdout:

Owners will sign a marquee player to a long-term deal to please fans and promote team stability. However, certain players elect to try and coerce ownership into renegotiating existing contracts before the contractual term has expired. These players, usually perennial all-stars at the prime of their careers, will announce, likely during the off-season, that they will 'hold out' from training camp and the upcoming season unless their contract is modified to reflect their 'true value.' When negotiations reach a stalemate, the player will follow through on his threat and refuse to participate with the team.

Basil M. Loeb, Comment, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done*, 11 MARQ. SPORTS L. REV. 275, 275 (2001).

5. See Faber, *supra* note 4, at 169-71 (describing sports agents' approach to contract renegotiation). Why holdouts seem more common in the NFL than in other professional sports is difficult to explain. NFL players are widely believed to have less bargaining power than players in other sports, see Anthony Sica, Note, *Baseball's Antitrust Exemption: Out of the Pennant Race Since 1972*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 295, 380-81 (1996), so perhaps they are forced to turn to holdouts more regularly because they are more likely to have failed to achieve a lucrative contract in the first instance.

6. See generally Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61 (1989).

7. See Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 823 (1991) ("The baseball disputes . . . tended to respond to collective action taken by the players."); Casey Duncan, Note, *Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?*, 13 MINN. J. GLOBAL TRADE 87, 103 (2004) ("Rival league-inspired contract jumping has occurred no less than six times in U.S. professional baseball, three times in the twentieth century."); Sharon F. Carton, *Damning With Fulsome Praise: Assessing the Uniqueness of an Artist or Performer as a Condition to Enjoin Performance of Personal Services Contracts in Entertainment Law*, 5 VILL. SPORTS & ENT. L.J. 197, 203 (1998) (Lumley issues usually arose "during periods in which new leagues were being formed and were liberally stealing from teams in the preexisting league."). The idea of a negative injunction is that it is a "back door" method for obtaining specific performance without having the court actually issue an affirmative order. Faced with an order to not play for a competing team or league, an athlete will presumably choose to negotiate with his or her prior employer. However, where the athlete is merely holding out for midterm contract renegotiation, the threat of not being able to play for any other team has no particular salience.

holdouts is contract damages. This is so because of the long-standing rule that courts of equity shall not issue affirmative injunctions in employment contract disputes, precluding what would be the most effective remedy. This is the so-called *Lumley* doctrine, articulated famously in the English case *Lumley v. Wagner*.⁸

This paper argues that this long-standing rule should be modified in the case of athletic employment contracts. Ordinarily, four arguments provide the intellectual basis for courts' refusal to order specific performance in employment matters. First, granting an affirmative injunction would be to award a plaintiff a false remedy since the defendant might then render substandard service.⁹ Second, as a result, judicial monitoring and post-injunctive enforcement proceedings would be required to enforce affirmative injunctions.¹⁰ Third, affirmative injunctions supposedly constitute involuntary servitude in violation of the Thirteenth Amendment.¹¹ Fourth, market imperfections may prevent post-injunction Coasian bargaining and the affirmative injunction may therefore create too strong a bilateral monopoly in favor of the employer.¹²

None of these rationales is compelling in the context of athletic employment arrangements. The professional athletic career is different than other jobs and has built-in incentives to prevent players from providing service pursuant to a court order at less than their full ability.¹³ Information on whether players are shirking, in violation of the spirit of court decrees, is also readily available and more quantifiable than in other fields.¹⁴ The assertion that affirmative injunctions are unconstitutional is one that has rarely been tested in the courts and seems contrary, at least in the context of athletic employment agreements, to the intent of the framers of the Thirteenth Amendment.¹⁵ Finally, the market imperfections that prevent Coasian post-injunction bargaining in typical employment relationships are more limited in the professional athletics context.¹⁶

8. 42 Eng. Rep. 687, 693 (Ch. 1852). The *Lumley* court was of course not the first to express a reluctance to specifically enforce a labor agreement. Courts of equity had long been reluctant to issue such relief in labor cases. Actually, the reluctance of courts to order specific performance of labor contracts appears to be an antebellum American invention.

9. See *infra* section II.A.

10. See *infra* section II.B.

11. See *infra* section II.C.

12. See *infra* section II.D.

13. See *infra* section II.A.

14. See *infra* section II.B.

15. See *infra* section II.C.

16. See *infra* section II.D.

Part I describes the available remedies for professional sports teams in the face of a contract holdout, reviewing the major cases importing the *Lumley* rule to the sports context. Part II discusses how the nature of the sports industry and athletic employment contracts obviate the policy and legal considerations favoring the *Lumley* rule. Part III describes the significance of the holdout problem and demonstrates that the arguments discussed in Part II are outweighed by the negative effects of holdouts. Part IV concludes.

I. REMEDIES FOR HOLDOUTS

The problem of widespread holdouts¹⁷ is relatively new,¹⁸ but the problem of how to enforce a personal services contract is not. Employers have long sought to hold employees accountable for the terms of their contracts, with varying degrees of success. This section of the paper explains the *Lumley* rule and its incorporation into American sports law.

A. The Legal Framework

1. The *Lumley* Rule

The most important doctrinal element of the jurisprudence of athletic employment contracts is not a case from athletics at all, but rather the classic English opera dispute, *Lumley v. Wagner*.¹⁹ German soprano Johanna Wagner, "cantatrice of the Court of His Majesty the King of Prussia,"²⁰ signed a contract to perform at the opera house owned by plaintiff Benjamin Lumley.²¹ She was subsequently enticed away by a rival theatre, the Royal Italian Opera, Covent Garden, by a higher offer of pay.²² This prompted Lumley to sue both Wagner and the rival theatre.²³ In his case against Ms. Wagner, Lumley sought an injunction barring her from appearing "anywhere

17. It is impossible to say how widespread the threat of a holdout truly is. While few ballplayers sit out an entire season, many do seem to sit out of portions of training camp and preseason activities. There may be numerous holdout threats that never make it into the sports pages. Moreover, the lack of availability of affirmative injunctions may lead teams to cave to player demands that they otherwise would resist.

18. However, there were holdouts in baseball even in the decades prior to World War II. Babe Ruth hold on numerous times. See Faber, *supra* note 4, at 167-68.

19. Even most first-year law students are familiar with this case. See VanderVelde, *supra* note 7, at 775.

20. *Lumley*, 42 Eng. Rep. at 687-88.

21. *Id.* at 688.

22. *Id.*

23. See *Lumley v. Gye*, 118 Eng. Rep. 749 (K.B. 1853).

on the London stage, rather than simply . . . damages for breach of contract.”²⁴

The court opined that an affirmative injunction was not appropriate: “[B]eyond all doubt this Court could not interfere to enforce the specific performance of the whole of this contract.”²⁵ However, a negative injunction was appropriate because of the uncertainty surrounding plaintiff’s damages and the policy concern favoring enforcement of bargains, as the court “will not suffer [parties] to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give.”²⁶

While *Lumley* was decided in England in 1852, it was not until considerably later that it was noticed by American courts.²⁷ However, it has come to be “the progenitor of a long series of cases in sports law,”²⁸ and remains the chief impediment to an effective remedy against player holdouts.²⁹

Thus, the *Lumley* rule, as I will discuss it, has two parts: First, a refusal to issue affirmative injunctions in personal services arrangements; and Second, a willingness to issue negative injunctions to enforce implied covenants not to compete in personal services arrangements. It is the first aspect of the *Lumley* rule that I will direct the most energy to critiquing.

2. Early Application to the Sports Industry

i. Philadelphia Ball Club v. Lajoie

One of the first³⁰ applications of the *Lumley* doctrine in American professional sports is the Pennsylvania Supreme Court’s decision in *Philadelphia Ball Club v. Lajoie*.³¹ Napoleon “Nap” Lajoie was a star player

24. VanderVelde, *supra* note 7, at 792.

25. 42 Eng. Rep. at 693.

26. *Id.*

27. See VanderVelde, *supra* note 7, at n.5.

28. Carton, *supra* note 7, at 198-99.

29. *Id.*

30. The first application of the *Lumley* rule in baseball probably came in *Am. Ass’n Base-Ball Club v. Pickett*, 8 Pa. C. 232 (C.P. 1890). See VanderVelde, *supra* note 7, at 823. “[*Pickett*] was the only reported nineteenth-century baseball player’s case where an American court, this time a Pennsylvania county court, issued a preliminary injunction against a baseball player.” *Id.* *Pickett* refused to play for Kansas City because its affiliation had been changed from the American Association to the Western Association and because some of his teammates were fired. *Id.* at 823 n. 253.

31. 51 A. 973 (Pa. 1902)

for the Philadelphia Phillies baseball team of the National League.³² Lajoie was "arguably the first superstar of the Twentieth Century,"³³ having hit an "incredible" .422 in 1901.³⁴ In spite of his abilities, he was paid only \$2400 plus \$200 "under the table"³⁵; he was not even the highest paid outfielder on the team.³⁶

After his 1901 salary demand to the Philadelphia Club was rejected, he sought to join the rival American Association team, the Philadelphia Athletics,³⁷ supposedly after he received an offer for a four-year contract valued somewhere between \$16,000 and \$24,000.³⁸ The National League team sought a negative injunction to prevent Lajoie from playing for the American Association team.³⁹

The court found that damages were inadequate in Lajoie's case because he had unique skills that "could not easily be obtained from others."⁴⁰ The court explained that Lajoie was highly skilled and had a strong reputation in the community and therefore an ability to draw fans that could not be easily replicated.⁴¹ Thus, the court issued a negative injunction.⁴²

While courts have shown themselves reluctant to issue negative injunctions in the baseball labor market,⁴³ they have followed the practical outcome in the case to the extent that "professional athletes are often treated as *prima facie* unique."⁴⁴

ii. Central New York Basketball, Inc. v. Barnett

In *Central New York Basketball, Inc. v. Barnett*,⁴⁵ the court came close to articulating a "per se" rule that professional athletes would be considered

32. *Id.* at 973.

33. C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 S.M.U. L. REV. 325, 325 (2002).

34. *Id.* His previous four seasons, he hit .363, .328, .380, and .346. *Id.* at 327.

35. *Id.*

36. *Id.*

37. See Duncan, *supra* note 7, at 104 n. 119 (citing LEONARD KOPPETT, KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL 94-95 (1998)).

38. Rogers, *supra* note 33, at 328.

39. 51 A. at 973.

40. *Id.*

41. *Id.*

42. *Id.*

43. See Duncan, *supra* note 7, at 106-07.

44. *Id.* at 107.

45. 181 N.E.2d 506 (Ohio C.P. Cuyahoga County 1961).

employed under a personal services contract and subject to the *Lumley* rule.⁴⁶ Again, this case arose at a time when a rival league, in this case the American Basketball League (ABL), emerged briefly to challenge the hegemony of the reigning professional league, the National Basketball Association (NBA).⁴⁷ Dick Barnett had been the NBA Syracuse Nationals's first round draft choice in 1959.⁴⁸ After playing for two seasons for the Nationals, Barnett reached a telephonic agreement for a third year.⁴⁹ He was subsequently wooed by the new Cleveland Pipers and signed a contract.⁵⁰ The Nationals sued for an injunction to prevent Barnett from playing for the ABL team.⁵¹

The Nationals argued that Barnett's "talents and abilities as a basketball player [were] of a special, unique, unusual and extraordinary character"⁵² entitling them to an injunction against him playing for the ABL team. Witnesses for the Nationals testified that Barnett was "one of the greatest basketball players playing the game."⁵³ Ironically, Barnett and his new team argued that he was not in the "class of . . . outstanding players" but was just "pretty good."⁵⁴

The silliness of this defense was not lost on the court. The Pipers obviously thought Barnett was a good player, or they would not have attempted to woo him away; on the other hand, if the Nationals thought he was really so great, they would have offered him a sufficiently high salary to keep him with the team. His contract, however, included a provision in which Barnett acknowledged his "exceptional and unique skill and ability as a basketball player," a provision of the NBA standard players contract.⁵⁵

The court's decision to issue an injunction emanated from its belief that "[p]rofessional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed. Such players, the defendant Barnett included, are not easily replaced."⁵⁶ This statement amounts to a near per se rule that professional athletes will be

46. See *id.* at 517.

47. See PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 109 (3d ed. 2004).

48. *Cent. N.Y. Basketball*, 181 N.E.2d at 507.

49. *Id.* at 510-11.

50. *Id.* at 511.

51. *Id.* at 507.

52. *Id.*

53. *Id.* at 513.

54. *Id.*

55. *Id.* at 514.

56. *Id.* at 517.

considered subject to negative *Lumley*-style injunctions,⁵⁷ particularly when coupled with modern boilerplate language in standard player contracts stipulating that the player possesses unique and irreplaceable skill.⁵⁸

3. Modern Cases

i. Boston Celtics v. Brian Shaw

In 1990, the U.S. Court of Appeals for the First Circuit upheld the district court's decision to enforce an arbitrator's order *requiring* Brian Shaw to exercise his option for release from his contract with an Italian basketball team, Il Messaggero Roma, in order to satisfy a contract subsequently signed with the Boston Celtics.⁵⁹ Shaw had been under contract with the Italian team for several years and had an option to obtain release for the last year of his contract.⁶⁰ He then negotiated a deal with the Celtics, a provision of which required him to exercise his exit option.⁶¹ He subsequently had a change of heart and sought to rescind his Boston contract.⁶²

The court recognized that it was issuing something like a traditional negative injunction, but at the same time somewhat different. The court cited to an earlier case "collecting cases in which professional sports players were enjoined from playing for rival teams."⁶³ However, it was forced to address Shaw's argument that *requiring* him to break his Il Messaggero contract pursuant to his option right was a different animal than a traditional negative injunction *barring* him from playing for the Italian team. Shaw argued the "general policy disfavoring enforcement of personal service contracts."⁶⁴ The court, however, opined that said policy "typically prevents a court from ordering an individual to perform a personal service; it does not prevent a court from ordering an individual to rescind a contract for services and to

57. WEILER & ROBERTS, *supra* note 47, at 126. "Courts . . . apparently adopted the *Barnett* position that the contract clause by which the player represented that he had such skill and ability, plus the very fact of the player being on a professional team roster, satisfied this requirement for an injunction." *Id.*

58. *See* Carton, *supra* note 7, at 209.

59. *Boston Celtics Ltd. P'ship v. Shaw*, 908 F.2d 1041, 1043 (1st Cir. 1990).

60. *Id.* at 1043.

61. *Id.*

62. *Id.* at 1043-44.

63. *Id.* (citing *N. Eng. Patriots Football Club, Inc. v. Univ. of Colo.*, 592 F.2d 1196, 1200 (1st Cir. 1979)).

64. *Id.* at 1048-49.

refrain from performing a service for others.”⁶⁵ While the court asserted that it was not changing the law, it is not clear that is true. That is to say, it is not clear whether *Shaw* represents a departure from earlier doctrine or is merely an odd set of facts.

B. The Limitations of Damages and Lumley Injunctions in Athletic Employment Relationships

The incorporation of the *Lumley* rule into American sports law means that a team faced with a player's threat not to perform the contract unless it is renegotiated has two potential remedies: damages⁶⁶ or a negative injunction against playing for another team. Neither of these remedies is adequate to deter opportunistic holding out and to adequately compensate a team for its losses.⁶⁷

1. Damages

Damages are not an adequate remedy. The main problem with damages as a remedy in all personal services contract disputes is the difficulty of assigning value to the breachee's losses. The services of a player are “extremely difficult to value and impossible to prove.”⁶⁸ Sports contracts do have a relative advantage over, say, opera contracts, in that sports contracts can be compared to one another in relative worth using player statistics. It is possible to determine if players are “under” or “over” paid given their performance and

65. *Id.* (citations omitted).

66. Johnson, *supra* note 6, at 77-78. “Faced with the player/promisor's threat not to perform his contract unless that contract is renegotiated, the club can seek damages if the player carries out his threat and refuses to perform pursuant to the original agreement.” *Id.*

67. See Daniel M. Walanka, Comment, *An Alternative Approach to the Problem of Midterm Demands for Contract Renegotiation in the National Football League: The Incentive-Based Contract*, 17 LOY. L.A. ENT. L.J. 771, 772 (1996). “These remedies . . . are either inefficient, ineffective, or cumbersome because the team wants the player on the field immediately while the player is steadfast in his demand for more money.” *Id.* Other proposed remedies, such as self-help specific performance, proposed in Johnson, *supra* note 6, are largely untested in the courts and subject to a number of lingering questions. Compare Johnson, *supra* note 6, with Stephen C. Wichmann, Note, *Players, Owners, and Contracts in the NFL: Why the Self-Help Specific Performance Remedy Cannot Escape the Clean Hands Doctrine*, 22 SEATTLE U. L. REV. 835 (1999). Incentive-based contracts, proposed by Walanka, *supra* note 67, are also unlikely to take hold because of the tremendous risk associated with such non-guaranteed compensation. Top NFL players would be extremely unlikely to expose themselves to the potential downside of an injury-prone year or sub-par performance. Walanka, *supra* note 67, at 808. However, it is precisely those top players who are most likely to hold out or demand midterm renegotiation of a professional contract.

68. Johnson, *supra* note 6, at 63.

prevalent market trends.⁶⁹ However, a significant problem remains. The value of a player to a team may not be the same as the overall "market value" of the player.⁷⁰ It is "exceedingly burdensome to establish what the loss of one player, even a superstar player, will have on the club's performance and its financial condition."⁷¹ As a result of these limitations, there are no recorded cases in which a club successfully pursued a claim for damages against an athlete.⁷²

The difficulty of reaching a suitable calculation on damages also undercuts the likely effectiveness of some of the more creative solutions to the holdout problems proposed by law professors, such as the use of tortious breach of contract litigation.⁷³

2. Negative Injunctions

Under the *Lumley* rule as applied in sports cases, negative injunctions are available. A player who holds out on performing a contract to a particular team can be barred by a court from playing for a different team (including one in a different league, and possibly one in a different professional sport as well). However, these negative injunctions are not a very powerful remedy. The first problem with negative injunctions in the holdout context is that there are usually only two parties involved: A player, demanding a trade or contract renegotiation, and a team, reluctant to grant such demand. A negative injunction is only effective where a player is pursuing opportunities with other potential employers.⁷⁴

Negative injunctions also have little social utility, except as a deterrent against player holdouts.⁷⁵ Where a court actually issues an injunction, and the player is barred from providing services to another team, the injunction

69. See Ilyana M. Kuziemko & Geoffrey C. Rapp, *Customer Racial Discrimination in Major League Baseball: Is There No Hope for Equal Pay?*, 7 TEX. HISP. J.L. & POL'Y 119 (2001) (analyzing impact of race on Major League Baseball Player pay).

70. See Junker, *supra* note 3 (arguing that Hines Ward's value to the Steelers depended upon his fit with the team's particular style and personnel, and suggesting that Ward might not command as much money as he had been offered by the Steelers on the open market).

71. Johnson, *supra* note 6, at 78.

72. Johnson, *supra* note 6, at 81. Nor are liquidated damages clause a common tool to enforce teams' rights to secure an athlete's performance. *Id.*

73. This theory was put forth by Kevin Yeam, *New Remedial Developments in the Enforcement of Personal Services Contracts for the Entertainment and Sports Industries: The Rise of Tortious Bad Faith of Contract and the Fall of the Speculative Damages Defense*, 7 LOY. L.A. ENT. L.J. 27 (1987). While this remedy might serve as a more powerful deterrent, because of the potential availability of punitive relief, the actual calculation of damages for holdouts would remain problematic.

74. See Johnson, *supra* note 6, at 83.

75. See *id.* at 85.

“results in the nonperformance of the beneficial activity.”⁷⁶ No one benefits from this punitive character of the negative injunction actually enforced.⁷⁷

Negative injunctions might be viable as a way of overcoming the valuation problems that plague the damages remedy. A negative injunction might be sufficient to induce a player, and the team he wishes to join, to bargain with the team to which he owes a contractual obligation. It is possible that this incentive structure operated to induce agreement between Bill Parcells, the New England Patriots, and the New York Jets to reach an agreement when Parcells sought to jump ship a few years back.⁷⁸ Still, unless there is a viable professional alternative to a given league,⁷⁹ the negative injunction lacks teeth as a remedy for athletes opportunistically demanding contract renegotiation.⁸⁰ Instead, a stronger remedy (the affirmative injunction) may be necessary.

II. THE LACK OF JUSTIFICATION FOR APPLYING *LUMLEY* IN AN ATHLETIC EMPLOYMENT SETTING

Typically, four justifications are offered for the *Lumley* prohibition against affirmative injunctions in personal services contracts. First, concerns have been raised that an injunction will be an illusory remedy because athletes will shirk in the face of a court order with which they disagree. Second, there are concerns that an injunction will require costly and time consuming monitoring by the court. Third, concerns have been raised that affirmative injunctions would run up against the Thirteenth Amendment’s prohibition on slavery. Fourth, are concerns that transaction costs may impede parties from bargaining post-injunction to obtain the economically efficient outcome. As the following discussion articulates, none of these justifications has particular weight in the context of athletic employment agreements.

A. Compliance

It is widely believed that “contracts of employment are . . . difficult to specifically enforce because they require . . . cooperation by the defendant

76. *Id.*

77. *Id.*

78. See WEILER & ROBERTS, *supra* note 47, at 131.

79. It is possible, as in the *Shaw* case, that international or European basketball leagues are developing to the point where they are a viable alternative for some NBA players.

80. One development worth watching is the degree to which international opportunities, in particular in professional leagues in Korea and Japan (for baseball) and Europe (for basketball), provide a scenario in which negative injunctions will gain force. For a thorough discussion of the role of international labor markets in professional baseball, see generally Duncan, *supra* note 7.

and therefore involve an element of moral hazard”⁸¹ The *Lumley* rule is “intended to avoid the award of an illusory remedy” in “situations in which the performance contracted for requires the exercise of creative imagination or artistic skill.”⁸² In *Lumley* itself, ordering the defendant “to sing would be unavailing because the purchaser contracted not for mere sound out of the singer’s mouth, but for the exercise of artistic genius, which cannot be turned on and off at the court’s command.”⁸³

Commentators argue that there will be problems enforcing a decree of specific performance in a personal services context.⁸⁴ Players might continue, in the face of an injunction, to engage in “opportunistic behavior by engaging in conduct that is euphemistically known as ‘dogging it.’” In other words, he can give less than his best efforts on the playing field, and thereby punish the club for its failure to acquiesce to his demands, while collecting his full salary as provided by the contract.”⁸⁵

For a number of reasons, the concern that players will respond to an order to play by “dogging it” should not be a major one. There are a number of features of the athletic employment relationship that make it special. First, players who “dog it” would be lowering their performance statistics, something that would prevent them from earning higher salaries in subsequent seasons. The relatively short length of an athlete’s career makes this particularly salient. In *Lumley*, the popularity of an opera singer was not likely to decline; neither was age.⁸⁶ But athletes have limited careers, and

81. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 784 (1983) (citing S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §1423 (3d ed. 1972)). “The proper performance of the services to the best of the defendant’s ability is uncertain and difficult to gauge. And any attempt to overcome these difficulties might involve to serious an infringement of personal liberty to be tolerable.” *Id.*

82. Calvin R. House, *Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author’s Reasonable Expectations*, 51 BROOK. L. REV. 95, 132 (1984).

83. *Id.* at 132.

84. RESTATEMENT OF CONTRACTS §379 cmt. d (1932). Another requirement for enforcing contract obligations through an affirmative injunction is that the terms of the contract must be sufficiently definite to permit a court to craft an appropriate order. Some commentators have suggested that this poses a problem in the athletic employment context, since most standard player contracts require a player’s “best efforts.” See Wichmann, *supra* note 67, at 843. This is not as severe a problem as commentators make it out to be. Courts will order the player to meet the terms of the contract, and for the reasons discussed in this section, other mechanisms will help ensure that the player actually does devote a reasonable amount of effort to the performance of his obligations.

85. Johnson, *supra* note 6, at 84.

86. One might argue that most artists or entertainers have relatively short careers as well. What makes those careers, on average, fairly short, is the changing tastes of a fickle public and the proclivity of artists and entertainers to embrace wholeheartedly certain self-destructive pathologies. With artists and entertainers, however, there is a much more limited risk of a career-ending on-the-job injury. Moreover, artists can always hope that, like a U2 or Madonna, their’s will be one of the few

performing poorly in a season might permanently affect an athlete's earning trajectory for his relatively short career.⁸⁷

Second, there are behavioral norms and incentives available in a professional sports setting that may not be present in other personal services relationships. An opera singer who "tanks" intentionally will offend the audience, and maybe fellow performers, but then her run will be over and she is free to, say, return to Germany and sing for the Kaiser. A professional football player or baseball player who is perceived to be intentionally performing below his ability has several someones to answer to—the members of his team.⁸⁸ Several tons of flesh and gallons of sweat suggest that players might not be tempted to try to "dog it" over an extended period of time.

A further factor that would likely influence professional athletes to compete is the simple fact that by the time they reach the professional level, most athletes are highly competitive individuals who have, in effect, internalized norms of competitiveness.⁸⁹ If so, those norms might motivate them to try to win even if they were upset about their contractual arrangements. Athletes generally hate to lose and will do what they can to obtain a victory.

A related issue surfaced in *Cincinnati Bengals v. Bergey*,⁹⁰ in which the National Football League (NFL) Bengals sought an injunction to invalidate star linebacker Bill Bergey's contract to join the Virginia Ambassadors of the newly formed World Football League (WFL).⁹¹ Bergey's obligation to the Ambassadors was to begin two years after the date on which the contract was signed – after his obligation to the Bengals was over.⁹² The Bengals argued,

careers that will span decades. For while U2 started as a punk band in Dublin in 1980 and continues to top the charts twenty-five years later, there are no sports superstars with similarly lengthy careers (save, perhaps, selected steroid-enhanced baseball players such as a certain San Francisco Giants slugger).

87. See Johnson, *supra* note 6, at 67-68. "Because the one highly prized skill the player possess is his youth and ability to play the game at the time the player is drafted, most drafted athletes do sign with the drafting club. It is the rare player, indeed, who will sit out an entire year and thereby forego a year's income, and also incur a year's aging and a year's inactivity that may dull his otherwise valuable playing skills." *Id.*

88. Again, one might object that artists and entertainers face similar "team pressure." For example, the members of a rock band may hound their band mates to perform at rock-star level. But band members typically sign contracts and deals (for records or venues) collectively, so they will also be in the same boat in terms of their contractual aspirations. Thus, while team pressure might help them adopt a unified front, it is unlikely to help deal with post-injunction compliance concerns.

89. See JIM BOUTON, BALL FOUR 373 (1990). "Lost our fifth straight game today . . . If you could disappear from embarrassment I wouldn't have been available." *Id.*

90. 453 F.Supp. 129 (S.D. Ohio 1974).

91. *Id.*

92. *Id.* at 133.

in part, that this "future services agreement" would reduce his effectiveness with the Bengals during his existing contract.⁹³ The court rightly rejected this argument, reasoning that a future obligation would be unlikely to alter his performance under his current contract.⁹⁴ Although the court did not spell out its reasoning, some elements of the considerations discussed in this subsection may have played a role. In sports contracts, there are natural devices to prevent "dogging it" that should relieve courts' worries about the "illusory" aspects of affirmative injunctions.

B. Judicial Monitoring

It is also asserted that judicial supervision would be required to enforce an award of specific performance.⁹⁵ Courts might fear this obligation because of obvious difficulties in assessing the performance of an athlete: "[S]ub-par performance might have been caused by a nagging injury, other clubs 'having his number' defensively, or deliberate suboptimal performance designed to secure a contract modification. The performance will also generally have to be monitored over an extended period."⁹⁶

Again, concerns about judicial monitoring obligations in post-injunctive proceedings should not be very powerful because of the special circumstances of professional athletics. First, professional sports is characterized by better indicators of performance than any other industry.⁹⁷ Unlike an opera singer, whose performance cannot be judged objectively,⁹⁸ an athlete's career is meticulously documented using statistics.⁹⁹ A sudden drop in performance post-relief would be easily proved up, and while there might be other explanations for a downturn, proceedings would be far simpler than in other contexts. Second, information on professional sports performance is widely

93. *Id.* at 136.

94. *Id.*

95. See House, *supra* note 82, at 133 n.180 (citing Jeremiah F. Healy, III & Beth M. Alonso, *Authors' Rights: Waiver, Estoppel, and Good Faith in Book Publishing Contracts*, 15 NEW ENG. L. REV., 485, 512 n.181 (1980); Wichmann, *supra* note 67, at 843-44.

96. Johnson, *supra* note 6, at 103.

97. There are some asymmetries across sports and positions in terms of statistical evidence and its likely utility to courts. For example, baseball is characterized by more thorough statistical information than other sports. Particular positions, like an offensive lineman in football, are difficult to monitor statistically.

98. There are some possible quantitative measures of artists and entertainers' success, such as box office receipts. Those are not direct measures of performance, however, and depend on many factors other than the artists' skill and effort.

99. Some other careers, such as portfolio managers and investment whizkids, can also be monitored using statistics via comparison to market performance averages of other similarly situated individuals.

available in the media, so post-relief discovery costs would also be far lower than in any other arena.

Courts concerned about the cost of supervision could adopt a two tier approach to issuing affirmative injunctions. First, where the costs of monitoring are extremely high because of the particular circumstances of the case, the balance of equities would tilt against an injunction. Second, where an "open rupture" exists in an athlete's relationship with his or her employer, an injunction would be denied. To avoid allowing the exception to swallow the rule, courts would have to be cautious in finding a true open rupture characterized by irreconcilable differences. In a number of other contexts, however, courts do regularly grant specific performance, or alternatively, grant specific performance *unless* the costs of supervision outweigh the benefits of holding the parties to their original bargain.¹⁰⁰ This is even true in high profile sports cases.¹⁰¹ Where there is no "open rupture" in a business relationship, courts have been willing to grant specific performance as a remedy for contractual breach.¹⁰²

There is of course a danger that the "open rupture" criterion could create "tactical temptations" to pursue a sort of "scorched earth" approach to an existing contractual relationship.¹⁰³ Such a strategy is extremely risky since it could risk antagonizing the court and prompting severe damages or even monetary contempt sanctions.¹⁰⁴

C. Involuntary Servitude & Economic Freedom

Recently, constitutional scholars have seen increasing utility in the Thirteenth Amendment as a justification for a host of congressional powers.¹⁰⁵ Regardless of how robust a grant of congressional authority exists in the

100. See House, *supra* note 82, at 133-35 n.181-95 & accompanying text.

101. See Bruce W. Burton & Matthew J. Mitten, *New Remedies for Breach of Sports Facility Use Agreements: Time for Marketplace Realism*, 88 IOWA L. REV. 809, 825 (2003). In the Twins relocation case, the court ignored the possibility that it would find "itself forced to referee a continuous stream of disagreements between the MET and the Twins regarding any conduct by team officials that might devalue the community's SPIVs and thereby undermine the court's central purpose." *Id.* at 825-26. The court concluded that there was no "open rupture" in the business relationship. *Id.*

102. *Id.* at 827-28.

103. *Id.* at 827-30.

104. *Id.* at 831.

105. See, e.g., Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001); ALEXANDER TSEHIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM* 162 (2004). "The amendment . . . is also one of the most important constitutional provisions requiring the government to assess and act to create laws for a country where everyone may live a good life." *Id.*

Thirteenth Amendment, the critical question for the purposes of this Article is whether the Amendment would forbid specific performance in the athletic employment contract context. While it is often assumed, and often asserted, that the Thirteenth Amendment would prevent the use of an injunction to enforce a personal services agreement,¹⁰⁶ that ruling has simply never been articulated by the Supreme Court.¹⁰⁷ While a somewhat related claim was raised in the famous *Flood v. Kuhn*¹⁰⁸ case, as discussed below, no resolution of this question was reached.

The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."¹⁰⁹ It further gives Congress the power to enact "appropriate legislation" to enforce the Amendment.¹¹⁰ Under this power, Congress has enacted statutes to prohibit peonage, "a labor system directly related to slavery that is still perpetrated against some politically and economically disempowered workers. The Supreme Court's definition of peonage is 'a status or condition of compulsory service based on indebtedness of the peon to the master.'"¹¹¹ The cases to which this should apply differ dramatically from professional sports employment relationships.¹¹²

106. Some commentators on drafts of this paper pointed out that the reluctance of equity courts to specifically enforce labor contracts preceded the Thirteenth Amendment. However, prior to the Civil War, remedies such as jailing a contract violator were certainly a part of American jurists' remedial quiver. See ROBERT J. STEINFELD, *COERCION, CONTRACT AND FREE LABOR IN THE NINETEENTH CENTURY* 41-53 (2001).

107. Some state courts have suggested that this would amount to a Thirteenth Amendment violation. See, e.g., *Am. Broad. Co. v. Wolf*, 420 N.E.2d 363, 366 (N.Y. 1981). It seems odd, though, that something that was *unconstitutional* would ever need the "policy justifications" offered by courts and commentators for the supposed "axiom" that a personal services agreement will not be enforced via affirmative decree.

108. 407 U.S. 258 (1972).

109. U.S. CONST. amend. XIII.

110. *Id.*

111. TESIS, *supra* note 105, at 155. See also Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 354 (2001). "Peonage involved a 'man indebted to an employer' and forced, under pain of criminal punishment, to continue laboring for that employer." *Id.*

112. See TESIS, *supra* note 105, at 157:

In the United States, about 50,000 persons are trafficked yearly. Particularly common is the forceful recruitment of women into prostitution, domestic servitude, and sweatshop labor. Once here, employers often withhold wages, confiscate passports, and isolate workers. Most trafficking is from China, Vietnam, Thailand, Mexico, Russia, Ukraine, and the Czech Republic. In one case, women were recruited to be folk dancers, but when they arrived in the United States discovered that they would be forced to perform as exotic dancers. None of the women were permitted to quit their employment nor to keep their earnings. In a case of domestic servitude, an illiterate woman from Bangladesh, Marjina Khalifa, was enslaved as a domestic worker. For six months, her employers forced her to work six days a

“[T]o date, no court has substantively interpreted the amendment as providing more than a right to quit.”¹¹³ The Framers of the Amendment “intended to accord workers the right to quit, but the parameters of this right were more complex.”¹¹⁴ Left-leaning legal scholars assert that in the speeches on the amendment, there was “widespread agreement to prohibit specific performance of labor contracts.”¹¹⁵ While courts describe themselves as “loathe” to issue an affirmative injunction in a personal services case because of the “resemblance” between such an order and involuntary servitude,¹¹⁶ the Supreme Court has never actually said that such an injunction would violate the Thirteenth Amendment.¹¹⁷ Although there has been a “strong suggest[ion]”¹¹⁸ that it “might”¹¹⁹ be “tantamount”¹²⁰ to a violation, that speculation is by no means a clear direction from the Supreme Court as to the meaning of the Amendment.

While the Thirteenth Amendment may ban specific performance to enforce a *labor* contract, it might not apply to a *personal services* contract.¹²¹ The specific labor contracts and practices that concerned the framers of the Thirteenth Amendment bear almost no resemblance to the holdout problem afflicting modern American professional sports:

The particular instances of employee abuse that were held up for examination and criticism assumed several different forms. The most blatant were efforts to physically apprehend laborers who fled from their employers; however, most of the criticized practices were more subtle and indirect. Among the more subtle attempts to recapture

week, eighteen hours a day. At the end of the period, she was paid \$695. The family kept Ms. Khalifa from leaving by confiscating her passport and threatening her with deportation.

Id. at 157 (internal citations omitted).

113. See Lea S. VenderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 n.5 & accompanying text (1989) (citing Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1 (1974)).

114. *Id.* at 489.

115. *Id.*

116. *QVC, Inc. v. Tauman*, No. 98-1144, 1998 WL 156982 at *5 (E.D.Pa. Apr. 3, 1998).

117. The Court's most recent significant Thirteenth Amendment case rejected a “broad construction of ‘involuntary servitude’” *United States v. Kozminski*, 487 U.S. 931, 949 (1988). The Court declined to engage in the “inherently legislative task of determining what type of coercive activities” amount to Thirteenth Amendment violations. *Id.* at 932.

118. *In re Taylor*, 103 B.R. 511, 517 (D.N.J. 1989).

119. *Moss v. Superior Court*, 950 P.2d 59, 70 n.11 (Cal. Ct. App. 1998).

120. ARTHUR L. CORBIN, CORBIN ON CONTRACTS §1204 (1964).

121. Vandervelde, *supra* note 113, at 489 n. 224 (quoting congressional testimony to the effect that a law providing for specific performance as a remedy for “the hirer in a contract for labor” would be void).

dominance in labor relations were a variety of employer efforts designed to limit workers' subsequent work opportunities and thereby discourage them from quitting. Other provisions that received congressional criticism ranged from attempts to fix wage rates to attempts to specify private conduct that would render the employee susceptible to discharge, whether done on or off the job.¹²²

There was a time when professional athletes did operate in a serf-like environment.¹²³ However, thanks to the growth of professional sports unions in the 1960s and 70s, "[t]hose one-sided, pro-management days are . . . over."¹²⁴ In fact, "the pendulum may have swung too far in the other direction, in favor of player rights."¹²⁵

The Thirteenth Amendment should not be interpreted to prohibit affirmative injunctions in athletic employment contract disputes. The Amendment's target was slavery and its attendant circumstances, not a relationship between a multi-millionaire athlete and a sports franchise owned by multi-millionaires. "Slavery is objectionable largely because it involves near-total control. By contrast the domination an employer exercises is partial and limited-the employer only controls certain aspects of his employee's life."¹²⁶

Professional baseball player Curt Flood famously raised Thirteenth Amendment claims in his challenge to Major League Baseball's "reserve system."¹²⁷ The lower court rejected Flood's claims, finding that he failed to prove "compulsion" which is a "prerequisite to proof of involuntary servitude."¹²⁸ The court explained that Flood had the "right to retire and to embark upon a different enterprise outside organized baseball. The financial loss he might thus sustain may affect his choice, but does not leave him with 'no way to avoid continued service.'"¹²⁹ The Supreme Court's majority

122. *Id.* at 487-88 (citations omitted). *But see* Johnson, *supra* note 6, at 104. "These liberty concerns seem equally present in athletic contracts." *Id.*

123. *See* Michael S. Jacobs & Ralph K. Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 3 n. 3 (1971) (likening players in a pre-unionized environment to well-paid slaves); Walanka, *supra* note 67, at 776.

124. Johnson, *supra* note 6, at 69; Walanka, *supra* note 67, at 776.

125. Johnson, *supra* note 6, at 69.

126. Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 372 (1978).

127. *See Flood*, 407 U.S. at 266. "In general, the complaint charged violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary servitude contrary to the Thirteenth Amendment" *Id.*

128. *Flood v. Kuhn*, 316 F. Supp. 271, 281 (S.D.N.Y. 1970).

129. *Id.*

opinion did not address the Thirteenth Amendment claim, but even dissenting Justice Marshall acknowledged that he found the lower court's opinion on that point sound.¹³⁰

Flood provides no clear guidance as to the constitutionality of the use of affirmative injunctions to enforce professional athletic employment agreements, although it does suggest the courts' reluctance to find "servitude" in such a setting. Arguably, a legal framework embracing affirmative injunctions against holdouts would not offend *Flood*'s articulation of the Thirteenth Amendment so long as it provided players an unconditional right to retire and pursue ventures other than their chosen professional sport.¹³¹

Another element of professional sports that minimizes the degree to which affirmative injunctions amount to "involuntary servitude" is that the professional sports industry is heavily unionized. This is significant in several respects. First, if affirmative injunctions really are so objectionable to the liberty interests of players, their unions will seek to negotiate a guarantee that clubs will not seek such relief in the event of a holdout. Second, unionized workers have already, to a substantial degree, compromised their individual liberty for the sake of the collective economic power a union provides. A union's members are not free to breach their contracts under any and all circumstances without fear of an order of specific performance. While rare, court orders for a union to return to work during a labor dispute are available.¹³² This is only to say that since professional athletes have already been ordered to "return to work," the marginal impact on their economic liberty and freedom to work that would result from breathing life into affirmative injunctions in the holdout context is reduced.

In some states, there are additional statutory provisions that may prohibit specific enforcement orders for personal services contracts.¹³³ Such prohibitions can be avoided through choice-of-law provisions in athletic employment contracts.¹³⁴ Alternatively, legislatures could enact exceptions for the sports industry where such statutes exist.

130. *Flood*, 407 U.S. at 289.

131. This right to retire, for example, would prevent the Detroit Lions from obtaining an affirmative injunction against former star running back Barry Sanders. See WEILER & ROBERTS, *supra* note 47, at 135-36.

132. See DOUGLAS E. RAY, CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW 348 (1999).

133. See Johnson, *supra* note 6, at 81 n.74, (citing CAL. CIV. PROC. CODE § 526(5)(West 1979)).

134. To be valid, the choice of law would have to have some relation to the location of the parties. Since many athletes maintain their permanent homes in cities and states other than where they play, there might be multiple states available for selection.

D. Transactions Costs

A final objection to affirmative injunctions arises as a function of transaction costs and market imperfections that may exist in typical employment or personal services contracts. From a law and economics standpoint, assuming no transaction costs, an affirmative injunction like the one proposed in this article, and a negative injunction like the one enshrined by the *Lumley* rule, would have exactly the same effect. After the issuance of a decree, the parties would simply bargain for an appropriate "side payment" to settle the matter in the most efficient way possible.¹³⁵ In other words, whether the injunction is negative or affirmative, a player who is unhappy to comply with a court's order will offer to pay the team a certain amount of money.¹³⁶ Through bargaining absent transaction costs, the parties will arrive at an equilibrium transaction price that reflects how much the player values being free of the injunction and how much the team values preventing that player from escaping his contractual obligations.

In an ordinary employment or personal services arrangement, however, transaction costs impede this Coasian bargaining.¹³⁷ Most importantly, a typical employee simply lacks the financial assets to make offers employers are likely to accept. In a world of perfect markets, the typical employee would be able to access credit at reasonable interest rates to borrow an amount sufficient to make an efficient payment. But credit markets are far from perfect, and a typical individual (often saddled with extensive debt prior to the breakdown of an employment relationship) may not be able to access sufficient credit to make a suitable offer to his or her employer. Moreover, once the injunction has been issued, a typical employee cannot bear the costs of a lengthy negotiation because they must service personal and consumer debt. That would force them to compromise on their bargaining positions and would upset the Coasian vision of law and economics.

In professional athletics, however, things are different. Most holdout players have personal net worths amounting to multiple millions of dollars. Such athletes have a substantial war chest they can use to subsidize even the most lavish of lifestyles during whatever length of time is required to reach

135. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 130-32 (4th ed. 1992). "The results of decreeing specific performance are not catastrophic, since the seller can always pay the buyer to surrender the right of specific performance and presumably will do so if a substitute transfer would yield a higher price." *Id.*

136. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 279 (1979). "[I]f specific performance were routinely available, promisors who wanted to breach would often be compelled to 'bribe' promises to release them from their obligations." *Id.*

137. POSNER, *supra* note 135, at 130-32.

agreement with a team. Moreover, such athletes have the resources and the access to credit markets to make an appropriate side payment to their teams to get them out of their contracts.

While the law and economics line of thinking on specific performance does not distinguish between affirmative and negative injunctions and predicts bargaining will occur no matter what, in ordinary employment relationships transaction costs and credit market failures make that unlikely. Such transaction costs and market failures are not present in the context of professional athletic employment arrangements.

One might object that there remain market failures and transaction costs that would impede Coasian post-decree bargaining in the professional athletic employment context. For instance, athletes might be prone to refuse to negotiate in good faith where they feel "dissed." Athletes often express hurt feelings to the media when they realize that contracts they signed a few years back no longer make them the highest paid player at a position or on a team. Such feelings might interfere with bargaining and lead to inefficient results. While it is possible that this will occur in some cases, most athletes are well represented by lawyers, agents, and financial advisors (and certainly better represented than a typical employee); this supporting cast can be counted on to urge athletes to think like rational economic actors even when they feel they have been mistreated. Thus, even if there are some limitations to Coasian bargaining in the professional sports context, those limitations should not be a major concern and certainly should be less of a concern than in the case of a typical employment relationship.

III. THE HOLDOUT PROBLEM

A. Prevalence

In recent years, there have been "a number of legal battles involving players who had each signed a multi-year agreement but then were holding out at the start of an arguably covered season for a new contract after they had become stars."¹³⁸ Opportunistic demands for renegotiation accompanied by holding out are likely to become more and more common based on the success of certain early holdouts like Eric Dickerson.¹³⁹ While most players will not hold out, and "[m]ore often than not, the player eventually reports and insults

138. See WEILER & ROBERTS, *supra* note 47, at 133-34.

139. See Johnson, *supra* note 6, at 73. "[I]n the future the superstar player . . . may engage in a species of opportunistic behavior or wealth transfer that can result in a new, better contract. . . . This type of opportunistic behavior . . . should not be countenanced by the courts and by society." *Id.*

are forgotten, at least until the next off-season,"¹⁴⁰ the costs of even a few holdouts are not insignificant.¹⁴¹

In particularly extreme cases players repeatedly demand renegotiation of contracts they feel do not adequately compensate them for their performance.¹⁴² In some cases, even after players have specifically agreed *not* to seek a contract renegotiation, they do.¹⁴³

B. Consequences

1. Community Externalities

The first reason holding out in athletic employment contracts demands a special remedy is that the effects of opportunistic demands for renegotiation are not limited to the parties to the contract. Holding out demoralizes fans,¹⁴⁴ alters the value of season tickets,¹⁴⁵ and can, in theory, have a profound psychological effect on the city in which the athlete plays.¹⁴⁶ Minimizing these negative community externalities is the primary benefit of modifying the no-affirmative-injunction rule in the athletic employment context.

The role of community externalities, or "Special Public Intangible Values," has been recognized in high profile sports cases as a legitimate value to consider in injunctive proceedings. In the 2002 case *Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership*,¹⁴⁷ the Minnesota Court of Appeals took into account the public externalities that would result from the departure of the Twins from Minneapolis in granting an injunction ordering the team to continue to play in the local stadium.¹⁴⁸ The team insisted that "specific performance, injunctive relief, and similar equitable

140. See Schultz, *supra* note 1, at 2D.

141. See *infra* section III.B.

142. See Johnson, *supra* note 6, at 71-73.

143. *Id.*

144. See Loeb, *supra* note 4, at 275, 277.

145. *Id.* at 282 (discussing possible contract claims for season ticket holders against holdout players).

146. The degree to which fans are upset by professional athletes holding out on their contracts is perhaps best illustrated by the unsuccessful efforts of season ticket holders to sue hockey player Alexei Yashin after he held out during the final year of his contract. See Potechin v. Yashin, 186 D.L.R.4th 747 (2000). See also Matthew D. Thompson, Note, *When Athletes Breach: Tortious Interference With the Contractual Relation of Season Ticket Holders*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 167 (2002).

147. 638 N.W.2d 214 (Minn. Ct. App. 2002).

148. *Id.*

remedies are not available to commercial landlords when a tenant abandons its lease before the term expires.”¹⁴⁹ Emphasizing the “special nature” of the relationship between the parties,¹⁵⁰ the court effectively carved out a “sports stadium lease” exception to the general landlord-tenant law.

The pivotal consideration in the court’s conclusion was the externality, or SPIV, element of the stadium lease.¹⁵¹ As Bruce Barton and Matthew Mitten noted:

Most of the true benefits sought by the municipality in a leasing arrangement . . . are intangible, but highly valued, psychological factors. They include enhancing civic identity, community pride, municipal self-esteem, a heartier social fabric, and encouraging commercial and tourist growth in the community. All of these positive attributes are well-recognized by many—including, until very recently, MLB’s Commissioner Bud Selig—to constitute a public trust enhancing the overall civic welfare. The presence of a professional team in a city can be perceived as energizing a core of tribalism, as when a professional team bonds with the host community and becomes a symbol of the community itself, a totem personifying its spirit.¹⁵²

On a smaller scale, an individual player comes to play a similar role. Messy contract disputes involving recalcitrant players upset the community’s sense of “team spirit” and lead to the same types of negative externalities that concerned the court in the Twins relocation case. If externalities motivate an exception to the affirmative injunction rule in the commercial stadium lease context, they should also motivate an exception for personal services contracts involving professional athletes.¹⁵³

2. Flouting

A second problem with holdouts derives from their very public nature. Few contractual disputes are ever the subject of major media attention, except

149. See Burton & Mitten, *supra* note 101, at 814.

150. *Id.* at 816.

151. *Id.* at 817.

152. *Id.* at 818-19 (citations omitted).

153. See *id.* at 821 n. 42 & accompanying text. “Generally, when considering the remedies for breach of a *traditional commercial lease of personal services agreement*, the rule is that the breach will be compensated with money damages or an injunction prohibiting performance of services for a marketplace competitor, not an injunction requiring the breaching party to specifically perform the contract.” *Id.* (emphasis added).

those involving professional athletes (and coaches,¹⁵⁴ to a lesser degree). However, when a major sports star holds out, it typically creates a media frenzy.¹⁵⁵

Holdouts suggest that “a person has no obligation to honor a commitment when circumstances change.”¹⁵⁶ Fans cannot help but notice the apparent injustice and unfairness of a player’s demand for contract renegotiation, asking themselves, “How can a player sign a four-year contract and, after playing well for two years, demand a better, more lucrative contract? Surely, it would not be fair for an architect, who contracted to build a four-story building for \$4 million, to threaten to walk off the job after completing the first two floors unless the owner promised to pay an additional \$2 million.”¹⁵⁷

This could lead to a potentially troubling level of disregard for contractual obligations in the general public and business communities. Recent experimental work has substantiated a so-called “Flouting Hypothesis.”¹⁵⁸ When citizens perceive “injustice of specific laws,” the result is “diminished general compliance with the law.”¹⁵⁹ That is to say, citizens are more likely to break the law if they perceive that the legal system is unjust; exposure to unjust aspects of the legal system therefore increases general lawlessness and non-compliance with the edicts of the legal-regulatory state. Individuals who are exposed to unjust laws are more likely to regard lawbreaking themselves as permissible. Holding out raises the specter of higher levels of flouting because it exposes the public to an unjust, or at a minimum, unfair feature of law: specifically, the lack of a remedy for a player clearly in breach of a lucrative employment contract.

3. Increased Bargaining and Transactions Costs

If the holdout phenomenon continues on its present trajectory, bargaining costs in athletic employment contracts will rise. Hedging against the possibility of an opportunistic holdout and demand for renegotiation, teams will be reluctant to sign long-term contracts and to give large up-front bonus payments from which they are unwilling to walk away. The result is not

154. For a discussion of the legal issues surrounding college coaching contracts, see Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127 (2001).

155. See Loeb, *supra* note 4, at 275.

156. *Id.* at 278.

157. Walanka, *supra* note 67, at 771.

158. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

159. *Id.* at 1401.

productive and is cost inefficient.¹⁶⁰

The threat of opportunistic behavior requires “the parties to draft an agreement whose breadth and scope could cost more than the agreement is worth.”¹⁶¹ This will increase the costs of negotiation – making impasses more likely – and ultimately, those costs will get passed along to fans and the viewing public.

IV. CONCLUSION

The holding out phenomenon is an unfortunate feature of what is otherwise the most dynamic professional sports industry in the history of human civilization. Holding out induces negative externalities into communities hosting sports franchises; increases the costs of contract negotiations; and deprives fans of the players they have come to love and for whom they have paid increasingly outrageous prices to get to see.

While the law provides some protection in the event that a rival league emerges and attempts to “raid” an existing league by way of the negative injunction, that remedy is simply ineffective in the case where a player is not seeking to join another team but rather to renegotiate a contract with his existing employer on terms more favorable to the player. In place of some of the speculative remedies proposed in past scholarship on the issue, this article has advocated a straightforward solution—specific performance effected by affirmative injunctions.

Adopting the recommended approach would require statutory modification in some states, as well as heterodox thinking in at least one front office and one judicial chamber. However, eradicating the problem of holding out once and for all would be well worth it.

160. Johnson, *supra* note 6, at 75.

161. *Id.*

