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# ARTICLES

## It's Not About the Money:

### THE ROLE OF PREFERENCES, COGNITIVE BIASES, AND HEURISTICS AMONG PROFESSIONAL ATHLETES

*Michael A. McCann*<sup>†</sup>

#### I. INTRODUCTION

Professional athletes are often regarded as selfish, greedy, and out-of-touch with regular people. They hire agents who are vilified for negotiating employment contracts that occasionally yield compensation in excess of national gross domestic products.<sup>1</sup> Professional athletes are thus commonly assumed to most value economic remuneration, rather than the “love of the game” or some other intangible, romanticized inclination.

Lending credibility to this intuition is the rational actor model; a law and economic precept which presupposes that when individuals are presented with a set of choices, they rationally weigh costs and benefits, and select the course of

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<sup>1</sup> In the extreme example, consider the ten-year, \$252 million contract Alex Rodriguez signed with the Texas Rangers in 2002. \$252 million represents eleven times the value of North Korea's Gross Domestic Product. See John Blanchette, *But It's Baseball That Is the Real Loser in This Absurd Deal*, SPOKESMAN REV., Dec. 12, 2000, at C1.

action that maximizes their wealth, happiness, or satisfaction.<sup>2</sup> Since athletes are generally presumed to most value financial compensation, they simply behave “rationally” by selecting the most lucrative offer.

Intriguingly, however, for every apparent athletic mercenary, there appear to be many who significantly discount financial compensation. Indeed, for a variety of expressed motivations, professional athletes regularly select the non-optimal contract offer, at least in the traditional sense of optimality. Risk aversion and other deliberative strategies occasionally provide an explanation, but more often, the reason lies in intangibles, such as loyalty, regional affinity, weather preferences, familiarity with certain teammates or coaches, prospects for team success, and demographic traits.

A law and economic explanation for such behavior would illuminate the ranking of alternative preferences, and then, as reflected by choice, a maximization of such ranking. Put differently, by accepting a less remunerative offer, professional athletes may consciously substitute subjective value for objective value, and their choice simply reflects that which makes them most happy.

Though diagrammatic in many instances, preferences may not universally explain decision-making among professional athletes. Indeed, like all individuals, professional athletes appear vulnerable to cognitive biases, which are subconscious mental errors triggered by simplified informational processes, and heuristics, which are convenient, if unfinished predictive cues. Though cognitive biases and heuristics enable individuals to manage a complex array of stimuli, they often distort preferences and adversely affect decision-making. For instance, because of confirmation bias, individuals are subject to ignore or discount information that challenges existing beliefs. Alternatively, optimism bias leads individuals to assume that general risks do not apply with equal force to themselves.

In the context of professional sports, these and other cognitive distortions may impair not only the pursuit of objective value, but also rational assessment of subjective value. This is especially true when teams adroitly manipulate distortions, such as impressing illusory variances among

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<sup>2</sup> See Peter A. Alces, *“If You Don’t Have Anything Good to Say . . . ,”* 15 *BANKR. DEV. J.* 383, 409, 411-12 (1999) (reviewing KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* (1997)).

themselves and other teams. Accordingly, when accepting a less remunerative offer, professional athletes may have unknowingly misinterpreted their preferences and rankings.

To date, no published analysis has addressed the potential influence of behavioral tendencies on professional athletes in contemplation of contract offers. Perhaps this is not surprising, given the relative paucity of professional athletes among the general population, their presumptively unique modes of employment, and a general aversion among academics to the study of sports. A more scrupulous assessment of professional athletes, however, suggests a uniquely desirable group for examination. Indeed, aside from their striking influence on the world and economy around them, professional athletes, unlike most groups commonly studied by academics, furnish published commentary of their thought processes, typically through newspaper, television, and radio interviews. Accordingly, professional athletes offer a wealth of narration as to their values, beliefs, and priorities, and, equally important, such narration occurs in real world settings, rather than in experimental circumstances. Along those lines, by evading the alleged “experimental flaw” of many behavioral law and economic studies, analysis of decision-making among professional athletes may prove extraordinarily salient in the broader discussion of behavioral sciences and their influence on traditional law and economics.

In pursuit of the above phenomena, this Article will begin by exploring the rational actor model and how individuals utilize preferences in determining their optimal choice. This Article will then discuss limitations to the rational actor model, namely the role of cognitive biases and heuristics. Thereafter, this Article will canvass decision-making among professional athletes in contemplation of contract offers. In that regard, this Article will examine why some professional athletes pursue the most lucrative offer, while others do not, and to what extent cognitive biases and heuristics influence their decision-making. This Article will conclude by highlighting implications for professional sports and proposing recommendations for further analysis by economists, psychologists, and legal academics.

## II. EXPLORING THE RATIONAL ACTOR MODEL IN BEHAVIORAL ECONOMICS

### A. *Choice and Utility Among Rational Actors*

In assessing explanations for why individuals choose one option over another, many theories have emerged. In the context of economic activity, the rational choice theory has received particular praise for its alleged ability to predict human behavior.<sup>3</sup> It posits that individuals are selfish actors who seek maximum utility, and when presented with a set of alternatives, select the alternative offering greatest utility.<sup>4</sup> Utility may embody objective ends, such as material wealth or tangible property.<sup>5</sup> It may also comprise subjective goals, such as happiness or satisfaction.<sup>6</sup> Irrespective of its characteristics, utility is thought to demand a set of preferences that encourages a particular behavior, namely the satisfaction of utility-driven preferences in the most efficient manner.<sup>7</sup> Put differently, “rationality” consists of pursuing preferences at minimal cost.<sup>8</sup>

While in search of maximum utility, rational actors are presumed to embody only “selfish” interests.<sup>9</sup> Rational choice theorists contend that pursuit of selfish interests promotes cooperation with other persons. Such a contention is partly deduced from the scholarship of Robert Axelrod, who, in *The*

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<sup>3</sup> See, e.g., Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149, 160 n.59 (2001); Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 509 n.114 (1997); Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2061 (1996).

<sup>4</sup> See Alces, *supra* note 2, at 412.

<sup>5</sup> See Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1, 28 n.64 (1996) (noting that when economists refer to “maximizing utility,” they typically equate utility with material wealth).

<sup>6</sup> See Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 513 n.103 (describing traditional law and economic metric of utility as a measure of happiness); see also Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1794-96 (1995) (discussing concept of satisfaction as an economic metric).

<sup>7</sup> See W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 8 (2002).

<sup>8</sup> See JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 11-12 (1989).

<sup>9</sup> See Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603, 625 (2004); see also Neil S. Siegel, *Sen and the Hart of Jurisprudence: A Critique of the Economic Analysis of Judicial Behavior*, 87 CAL. L. REV. 1581, 1583-85 (1999) (discussing self-interest among legal actors).

*Evolution of Cooperation*, concludes that humans interact optimally when their choices depend upon relative cooperativeness, patience, and egocentricity.<sup>10</sup> Thus, rather than for the promotion of societal objectives, laws and normative aspirations are thought to emerge only to facilitate self-interested parties in achieving maximum utility.<sup>11</sup>

Naturally, a purely self-interested pursuit might render individuals predictable, since it would signal anticipated responses to incentives and other external influences.<sup>12</sup> This is particularly true if, as rational choice theorists contend, preferences are “ranked, continuous, and stable.”<sup>13</sup> Indeed, the presumption of stable preferences buttresses the very use and measurability of rational choice analysis; without such stability, it would be difficult, if not impossible, to determine whether a particular choice represents accordance with preferences, change in preferences, or simply disregard of preferences.<sup>14</sup>

A methodological preference among rational choice theorists for equating “utility” with monetary wealth signifies another component of rational choice analysis.<sup>15</sup> Such preference enables legal economists to cultivate a more quantifiable framework,<sup>16</sup> while also complying with traditional economic assessment of behavioral success by level of

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<sup>10</sup> See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 31-33 (1984) (on file with author).

<sup>11</sup> See Robert Sugden, *Contractarianism and Norms*, 100 *ETHICS* 768, 786 (1990); see also AXELROD, *supra* note 10, at 6-8 (examining role of aspirations in pursuit of utility).

<sup>12</sup> See Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 *GEO. WASH. L. REV.* 50, 54 (1987).

<sup>13</sup> Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 *LAW & SOC'Y REV.* 973, 976-77 (2000). *Contra* DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 17-19 (1994) (finding that it may be impossible to determine whether a changed decision over time reflects a violation of the rationality criteria or a change in preferences).

<sup>14</sup> See Rostain, *supra* note 13, at 977.

<sup>15</sup> See Wendel, *supra* note 7, at 8 (noting that rational choice theory might be objectionable because of its overriding concern with wealth maximization); see also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CAL. L. REV.* 1051, 1066 (2000) (concluding that monetary accumulation is typically cited as the underlying motivation for rational actors).

<sup>16</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 *N.Y.U. L. REV.* 630, 641 n.31 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*].

accumulated resources.<sup>17</sup> It also, by implication, engenders a normative ethic whereby “it is normal—and hence appropriate—for people to pursue monetary wealth” and to measure the achievement of others by their extent of financial wealth.<sup>18</sup> Put differently then, rational choice theorists generally assume that “rational actors will seek to gratify fundamental biological drives and, in a market economy, to accumulate monetary wealth.”<sup>19</sup>

Nevertheless, “utility” need not equate to monetary wealth in order to accommodate rational choice analysis. Indeed, though less preferred for purposes of rational choice analysis, individuals may place material value in measurable, but non-monetary forms of “wealth,” such as proximity to family or professional title.<sup>20</sup> Similarly, individuals may value intangible wealth, such as perceived prestige or sense of fairness,<sup>21</sup> and yet still engage in rational analysis.<sup>22</sup> In other words, rational decision-making need not comprise the pursuit of maximum monetary wealth, but only that personal preferences are discernibly ranked and pursued accordingly.<sup>23</sup>

### B. *Application of Rational Choice Theory to Behavioral Relationships*

Legal scholars have applied rational choice theory to human behavior in specific and relatively familiar settings.

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<sup>17</sup> See David R. Lagasse, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347, 1370 (1995) (explaining traditional economic reliance on monetary gains and losses when evaluating micro-economic behavior).

<sup>18</sup> Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2243 (1996).

<sup>19</sup> Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 478.

<sup>20</sup> See, e.g., Russell Korobkin, *Ranking Journals: Some Thoughts on Theory and Methodology*, 26 FLA. ST. U. L. REV. 851, 860-62 (1999) (noting that, because student-run law reviews often select submissions in part based on the affiliation of the author, law professors consider reputation of their affiliated school when choosing between teaching offers).

<sup>21</sup> See Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 280 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)).

<sup>22</sup> Existence of these phenomena is manipulated by related actors, such as employers, who “value prestige as an independent good because it closely relates to individual self-esteem and employee morale.” Andrew Cowan, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2401 (1992).

<sup>23</sup> See, e.g., Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 7-10 (2002) [hereinafter Korobkin, *Aspirations and Settlement*].

Perhaps best illustrating this scholarship is an analysis of litigants and their relative assessment of settlement and litigation.<sup>24</sup> Litigants are said to value rational “aspirations,” which pertain to an “ideal target settlement sum, or set of terms,” and that guide litigants in negotiations.<sup>25</sup> Conversely, a litigant’s “reservation price” comprises the least optimal value nevertheless sufficient for settlement. For plaintiffs, the reservation price dictates the minimum amount worth accepting, while for defendants, it refers to the maximum amount worth paying.<sup>26</sup> The area between these two reservation prices comprises the “bargaining zone,” and when the two parties fail to identify a figure within that zone, adjudication results.<sup>27</sup> Accordingly, rational choice theory regards the achievement of settlement as entirely dependent upon agreement to share wealth, thereby rendering immaterial “blame” or feelings of “revenge” and “justice.”<sup>28</sup> In essence, then, bargaining between litigants resembles any other form of bargaining between rational actors, and it is thus fundamentally indistinguishable from a manufacturer and supplier negotiating a sales contract or a sports team and player negotiating an employment contract.

Of course, this rational approach to civil litigation depends upon the ability of litigants to identify their bargaining zone. Indeed, rational choice theory surmises that litigants can determine the expected value of litigating, as well as the difference in transaction costs between out-of-court settlement and litigating.<sup>29</sup> More concretely, as posited by rational choice theory, litigants equate the expected value of each prospective strategy to the probability of that strategy’s

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<sup>24</sup> *Id.* at 6 (describing the significance of rational choice theory in litigant behavioral assumptions).

<sup>25</sup> *Id.* at 3.

<sup>26</sup> HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 45 (1982); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 27 (1999) (on file with author).

<sup>27</sup> See John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 285 (1973); see also Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 11 (1995) (identifying that parties will not settle when expected judgments exceed their expected costs).

<sup>28</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 12-13 (1984); see also Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 520 (2003) (noting that scholars sometimes view settlement as “just a type of ex ante agreement, one that is ex ante relative to the final judgment”).

<sup>29</sup> Priest & Klein, *supra* note 28, at 12.

success multiplied by its predictive monetary value.<sup>30</sup> For instance, a litigant might conclude that expending extraordinary resources on discovery would increase the chance of victory, and that the value generated from that option would exceed the value generated by expending fewer resources on discovery but with diminished probability of victory.<sup>31</sup>

In determining their bargaining zone, litigants—and their attorneys—must also account for rational choice decision-making among judges. Indeed, rational choice theorists surmise that trial judges consider the probability of reversal whenever ranking their preferences for case disposition.<sup>32</sup> Thus, in its application to litigant behavior, rational choice theory demands expansive knowledge from litigants in order to devise informed preferences.<sup>33</sup>

Although application of rational choice theory most often concerns the pursuit of monetary wealth, “utility,” as noted in the preceding subsection, need not equate to monetary wealth.<sup>34</sup> Indeed, individuals might place material value in measurable, but non-monetary characteristics, or intangible characteristics.<sup>35</sup> Accordingly, rational decision-makers may rank preferences in line with non-monetary objectives, thus generating choices that optimally reflect those non-monetary preferences.

To illustrate these “other” forms of utility, consider application of rational choice theory to decision-making among public actors. For instance, rational choice theory assumes

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<sup>30</sup> See generally ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 20-40 (2003) (explaining how parties can use high discovery strategically to force settlements). Thus, in practice, both litigants will value litigation based on the weighted average value of all potential outcomes. See Korobkin, *Aspirations and Settlement*, *supra* note 23, at 7 (analyzing conclusions of Priest & Klein, *supra* note 28, at 29-30).

<sup>31</sup> See David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 407 n.35 (2000) (discussing “real world assumptions” about the relationship between investment in discovery and probability of success in litigation); see also ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 55-70 (1988) (discussing the theory of rational choice and expected monetary value); Shavell, *supra* note 27, at 11 (illuminating predictive roles of cost and benefit expectations among plaintiffs and defendants).

<sup>32</sup> See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1483 (2003). The idea of “rational” decision-making by judges has received substantial critique in recent years. See generally Siegel, *supra* note 9 (arguing that economic models fail to provide an accurate explanation of judicial decision-making).

<sup>33</sup> See Korobkin, *Aspirations and Settlement*, *supra* note 23, at 7-9.

<sup>34</sup> See discussion *supra* p. 1464.

<sup>35</sup> See *id.*

that elected officials and, more broadly, those drawn to politics, place greatest value in amassing power.<sup>36</sup> Consequently, political actors appear less interested in monetary wealth than is traditionally assumed by rational choice theory.<sup>37</sup> Similar deductions have been made of government attorneys, whose primary self-interest, be it apparent power or civic duty, appears distinct from that of attorneys engaged in private practice.<sup>38</sup>

The utility of these concepts can be further illustrated by observing the American workforce and opportunities for employment change. Indeed, studies find that when workers anticipate an increase in either respect for their labor or positive feelings of camaraderie, they tend to evince diminished demand for tangible compensation.<sup>39</sup> Alternatively constructed, by merely accepting an offer that features less monetary compensation than another offer, an individual implicitly posits a higher *actual* value from the chosen offer.<sup>40</sup> This phenomenon is sometimes apparent when law firm partners have opportunities to become judges or law professors. Although such positions typically pay less in terms of monetary compensation, their relatively high prestige and potential for

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<sup>36</sup> James R. Buckley, *The Political Economy of Superfund Implementation*, 59 S. CAL. L. REV. 875, 889 (1986) (concluding that “maximum wealth” for political actors includes power and job security).

<sup>37</sup> Less admirably, rational choice theory also assumes that those drawn to politics are more interested in power than constituent representation or society’s best interests. See MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977). But see Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 66 & n.303 (dismissing analysis that concludes that politicians are “for sale” as inconsistent with the history of tax law promulgation).

<sup>38</sup> See Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 454-56 (describing unique incentives and motivations of government attorneys); see also Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1115-18 (1995) (reasoning that, due to an absence of private market constraints, government attorneys are more likely to pursue self-interests than are those attorneys engaged in private practice).

<sup>39</sup> Katherine K. Yunker, *Addressing the Real Problems for Law and Economics of Factoring Interest Rates, Earnings Growth and Inflation into Awards for Lost Future Earnings*, 56 U. PITT. L. REV. 1, 23 n.57 (1994).

<sup>40</sup> See Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 802 (1982) (“By accepting a low paying job in lieu of a higher paying one, an individual demonstrates that the total returns from the chosen position—monetary and nonmonetary—are valued more than those from the job not taken.”). But see discussion of cognitive biases *infra* Part III.A.

intellectual flexibility often induce law firm partners into concluding that they are superior positions.<sup>41</sup>

Neoclassical theory offers a useful corollary to employment opportunities in rational choice models. It suggests that workers select employment opportunities that offer “preference-maximizing packages” of compensation, working conditions, and subjective characteristics.<sup>42</sup> Similarly, neoclassical theory finds that individuals order their preferences depending upon value assessed to each preference.<sup>43</sup> To illustrate, consider that when workers may determine their own hours of work before a change in wage rates, they often adjust their work hours to reflect their preferences for work and leisure.<sup>44</sup> Accordingly, neoclassical theory reaffirms predictive characteristics apparent in the application of rational choice theory.

### III. RETHINKING RATIONAL CHOICE DECISION-MAKING

#### A. *Raising Doubts: Cognitive Biases*

Superficially, rational choice theory furnishes a useful tool for assessing why individuals make certain decisions. Upon further reflection, however, it appears limited by cognitive biases, which are subconscious mental processes that impair rational thought-processes and ultimately lead to “irrational” choices. Such biases are prevalent among all

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<sup>41</sup> See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1055 (1995) (noting that attorneys are often attracted to the position of judge because of its prestige and esteem); see also Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANN. SURV. AM. L. 429, 434 (2000) (citing remarks by Justice Cardozo concerning the gradual rise in prestige of law professors in the legal world). But see Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 54 (wondering whether judges “exaggerate the value of their prestige to society”). Some positions, of course, offer both maximum prestige and financial recompense. See A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 23 (2003) (noting that corporate directors often cite prestige and status associated with their occupation as meaningful).

<sup>42</sup> Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 828 (1994).

<sup>43</sup> See Ignacio de León, *A Neo-Institutional Analysis of Vertical Integration and Its Implications for Antitrust Enforcement in Developing Countries*, 26 BROOK. J. INT'L L. 251, 282 (2000).

<sup>44</sup> Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 721 (2000).

persons, and by simplifying the processing of information, often induce mental errors in deliberation of choice.<sup>45</sup> To illustrate cognitive biases, consider that when individuals contemplate choice, many unknowingly distort the degree of risk or only selectively remember pertinent information.<sup>46</sup> Furthermore, cognitive biases are distinct from other forms of biases (e.g., self-interest; ethnic or gender prejudice), as well as intellectual predispositions toward certain conclusions (e.g., conclusory analysis). Instead, they reflect subliminal mental procedures for processing information.

Since 1955, the role of cognitive biases in decision-making processes has intrigued behavioral psychologists. In that year, Herbert Simon published *A Behavioral Model of Rational Choice*, which proposed “replac[ing] the global rationality of economic man with a” model inclusive of “the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist.”<sup>47</sup> Since that time, economists, legal scholars, and psychologists have evaluated the desirability of utilizing cognitive bias analysis in adjusting expectations for human behavior. Such analysis has proven useful beyond the academic setting as well. For instance, businesses routinely adjust marketing and client practices to accommodate for cognitive biases among customers and consumers.<sup>48</sup> Likewise, policy analysts often qualify recommendations to account for potential biases among affected groups.<sup>49</sup>

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<sup>45</sup> See generally RICHARDS J. HEUER, JR., *PSYCHOLOGY OF INTELLIGENCE ANALYSIS* (1999) (observing effects of cognitive biases on decision-makers); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998).

<sup>46</sup> See generally Michelle G. Craske & Deborah C. Pontillo, *Cognitive Biases in Anxiety Disorders and Their Effect on Cognitive-Behavioral Treatment*, 65 *BULL. MENNINGER CLINIC* 58 (2001).

<sup>47</sup> See Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 *Q. J. ECON.* 99, 99 (1955).

<sup>48</sup> See, e.g., MARKET PSYCHOL. CONSULTING, *Money and Investing Personality Test*, <http://www.marketpsych.com/simulations.php> (last visited Jan. 4, 2006) (detailing how cognitive biases elicited from client bases can be exploited to generate profits).

<sup>49</sup> See, e.g., Josh Kerbel (analyst in the Strategic Assessments Group in the Directorate of Intelligence), *Thinking Straight: Cognitive Bias in the U.S. Debate About China*, 48 *STUD. IN INTELLIGENCE* 1 (official journal of the Central Intelligence Agency) (2004), available at <http://www.cia.gov/csi/studies/vol48no3/article03.html> (discussing role of cognitive biases in American perceptions of policy choices by China).

Numerous studies have illustrated the role of cognitive biases in decision-making processes. Perhaps most heralded, consider the role of “framing effects” in shaping choice, and how they diminish assumed rationality among actors. The most notable such study was conducted by Daniel Kahneman and Amos Tversky in 1984. It revealed how individuals respond varyingly to two identical outcomes worded slightly differently.<sup>50</sup> Specifically, the authors found that when individuals are presented with a hypothetical choice on how to dispense finite medical care to 600 persons afflicted with a fatal disease, with one choice resulting in 200 people being saved, and the other resulting in 400 people dying, they are less likely to endorse a policy where “400 people will die” than one where “200 people will be saved.”<sup>51</sup> Such a conclusion contradicts the rational choice model, since a rational actor would make the same choice regardless of its description.<sup>52</sup> Framing effects of these kinds have been found in other settings as well, and they diminish the certainty of rational choice predictions.<sup>53</sup> Along those lines, framing effects belie the rational choice assumption that choices reflect a maximization of utility or relative strength of preferences, as such choices instead appear modifiable by unappreciated factors, such as wording of questions and other circumstances.<sup>54</sup>

Similarly, consider the effect of confirmation bias, whereby individuals are subject to ignore or discount information that challenges existing beliefs.<sup>55</sup> Confirmation bias is especially prevalent among those who are overconfident,

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<sup>50</sup> See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984).

<sup>51</sup> *Id.*

<sup>52</sup> See David A. Hoffman & Michael P. O’Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 361 (2002) (describing how rational actor theory presumes that individuals rank outcomes with identical outcomes as equal, and thus would not prefer one option over the other).

<sup>53</sup> See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 16, at 644-46 (discussing use of framing effects by exploitative industry actors).

<sup>54</sup> See Hoffman & O’Shea, *supra* note 52, at 361.

<sup>55</sup> See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 16, at 647-50. A corollary to confirmation bias is “self-serving” or “egocentric” biases, whereby individuals “interpret information in a way that disproportionately favors their own position.” Unlike confirmation bias, however, self-serving or egocentric biases are likely consciously present. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 206 n.199 (2000) [hereinafter Guthrie, *Framing Frivolous Litigation*] (noting that these biases may increase plaintiffs’ risk in seeking frivolous litigation). See generally Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997) (discussing the impact of self-serving biases on settlements).

and it frequently leads to “irrational” decision-making.<sup>56</sup> For instance, when business or policy managers discuss strategic planning, they often avoid consideration of worst-case scenarios, as well as refrain from consulting with “Devil’s advocates” among their group of advisors.<sup>57</sup> Confirmation bias also affects how employers regard individual employees. Indeed, as soon as a manager develops reservations about an employee’s competence, the manager often becomes prone to negatively interpret confusing or ambiguous circumstances concerning that employee, while attributing positives circumstances to luck, coincidence, or someone else’s assistance.<sup>58</sup> Also consider confirmation bias in the law enforcement setting: When police investigators believe they have identified the guilty party within a police lineup, they tend to ask eyewitnesses specifically about that person while not asking those same questions about others in the lineup.<sup>59</sup>

Optimism bias has likewise received scholarly attention as disturbing traditional assumptions among rational choice theorists. The concept posits that individuals assume that general risks “do not apply with equal force to themselves.”<sup>60</sup> Put differently, optimism bias is “the belief that good things are more likely than average to happen to us and bad things

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<sup>56</sup> See John Kelly, *Putting Investors on the Couch; With Equity Prices Having Fallen, Now Would Be a Good Time for Investors to Reappraise Their Portfolios, but Why Are So Few Actually Doing So?*, INVESTMENT ADVISER, Mar. 24, 2003, available at [www.lexis.com](http://www.lexis.com) (search “News, All (English, Full Text)” for full title in quotes) (noting need for investment advisors to counter confirmation biases particularly among those overconfident investors).

<sup>57</sup> See Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1394 n.146 (2002).

<sup>58</sup> Jean-Louis Barsoux & Jean-Francois Manzoni, *The Downward Spiral*, FIN. TIMES, Nov. 15, 2002, at 6.

<sup>59</sup> See Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POLY & L. 765, 767 (1995). Academic studies present another area where confirmation biases often emerge, as researchers tend to discount conflicting data discovered after conclusions have been made. See Richard E. Petty & John T. Cacioppo, *Addressing Disturbing and Disturbed Consumer Behavior: Is It Necessary to Change the Way We Conduct Behavioral Science?*, 33 J. MKTG. RES. 1, 5 (1996); see also Hans Baumgartner, *On the Utility of Consumers’ Theories in Judgments of Covariation*, 21 J. CONSUMER RES. 634, 638 (1995) (discussing existence of confirmation bias during process of data sampling by academic researchers).

<sup>60</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1511 (1999) [hereinafter Hanson & Kysar, *Some Evidence of Market Manipulation*]; see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 216 (1995) (finding that “as a systematic matter, people are unrealistically optimistic”).

are less likely than average to happen to us.”<sup>61</sup> Most illustratively, because of optimism bias, the average American estimates a one in five chance of personally being the victim of a non-terrorist violent crime, yet believes that the average American has about a two in five chance of being one.<sup>62</sup> Alternatively, consider that smokers are inclined to perceive smoking as significantly less risky for themselves than for other smokers.<sup>63</sup> Indeed, optimism bias tends to flourish when risks are long-term, or are presumed modifiable through behavior.<sup>64</sup> For that reason, when consumers assume that signs of toxicity will appear early in product usage, they tend to then assume that an absence of such signs foretells exemption from future risk.<sup>65</sup>

Individuals are also distracted by irrelevant third options when making decisions. These options most often emerge in the consumer context. For instance, automobile manufacturers routinely make a particular model “appear less expensive by adding a higher-priced option to the product line.”<sup>66</sup> Similarly, manufacturers of “risky” products, such as unfiltered cigarettes or untested dietary supplements, tend to

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<sup>61</sup> Korobkin & Ulen, *supra* note 15, at 1091.

<sup>62</sup> See Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 981 n.82 (2003) (citing Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCHOL. SCI. 144, 149 (2003), available at <http://www.hss.cmu.edu/departments/sds/faculty/Lerner/EffectsOfFearAndAngerOnPerc.pdf>).

<sup>63</sup> See William B. Hansen & C. Kevin Malotte, *Perceived Personal Immunity: The Development of Beliefs About Susceptibility to the Consequences of Smoking*, 15 PREVENTIVE MED. 363, 370-71 (1986); see also Suzanne C. Segerstrom et al., *Optimistic Bias Among Cigarette Smokers*, 23 J. APPLIED SOC. PSYCHOL. 1606, 1614-17 (1993). But see W. Kip Viscusi, *Constructive Cigarette Regulation*, 47 DUKE L.J. 1095, 1113-14 (1998) (presenting evidence that optimism bias is unsupported in the context of cigarette smoking, as “research on adolescents fails to indicate any significant difference between risks to oneself and one’s peers”).

<sup>64</sup> See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 16, at 657 & nn.106-09; see also Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 806 (1980) (presenting evidence that individuals ascribe to “unrealistic optimism”).

<sup>65</sup> Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 DUKE L.J. 1133, 1137 (1998). Along those lines, optimism bias may prove most pronounced among children smokers, who often rate their own chances of contracting lung disease as nearly identical to those of non-smokers. See Jonathan D. Reppucci et al., *Unrealistic Optimism Among Adolescent Smokers and Nonsmokers*, 11 J. PRIMARY PREVENTION 227, 235 (1991); see also Michael A. McCann, *Dietary Supplement Labeling: Cognitive Biases, Market Manipulation & Consumer Choice*, 31 AM. J.L. & MED. 215, 223-27 (2005) [hereinafter McCann, *Dietary Supplement Labeling*] (discussing optimism bias among consumers of dietary supplements and how supplement manufacturers may exploit such a bias).

<sup>66</sup> Hanson & Kysar, *Some Evidence of Market Manipulation*, *supra* note 60, at 1440 (discussing irrelevant third options in context of used car sales).

adroitly frame the choice between something dangerous (e.g., regular cigarettes; supplements containing ephedra), something much less risky (e.g., “unfiltered cigarettes”; “ephedra-free supplements”), and no action at all. In doing so, they encourage continued usage from would-be quitters, as the individual becomes biased in favor of options that he originally disfavored.<sup>67</sup>

Also consider the salience of irrelevant third options in disturbing the presumed stability of ranked preferences within the rational actor model. For instance, when an individual is presented with a small or large box of popcorn, she might choose the small. That same consumer, however, would more likely choose the large box when also presented with the option of an extra large box.<sup>68</sup> As noted by Richard Thaler, if actors were entirely rational in their deliberation of choice, and thus possessed stable options, then the presence of an extraneous choice, like an extra large box, would not affect the choice between a small and large box.<sup>69</sup> Yet it does.<sup>70</sup>

Informational deficiencies and time constraints likewise inhibit strategic and rational decision-making, and they encourage individuals to make inferences from small sample sizes. For instance, law enforcement officers, who are uniquely taxed for time and expected to promptly solve cases, regularly make conclusive judgments of guilt on the basis of only one or two witness interviews.<sup>71</sup> Similarly, consider trial judges, who, in contemplating judgment, often consider the probability of appeal.<sup>72</sup> Rational actor analysis maintains that such consideration should compel judges to rank potential outcomes (e.g., appellate reversal; appellate remand) associated with

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<sup>67</sup> *Id.* at 1515 (discussing irrelevant third options in context of cigarettes); see also McCann, *Dietary Supplement Labeling*, *supra* note 65, at 224 & 226 (discussing irrelevant third options in the context of dietary supplements).

<sup>68</sup> Daniel T. Ostad, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 294 (2001).

<sup>69</sup> See generally RICHARD H. THALER, QUASI RATIONAL ECONOMICS 42 (1991).

<sup>70</sup> Ostad, *supra* note 68, at 294. See Roger Mason, *Interpersonal Effects on Consumer Demand in Economic Theory and Marketing Thought, 1890-1950*, 25 J. ECON. ISSUES 871 (1995) (finding that marketing schemes often construct, rather than react to consumer interests).

<sup>71</sup> See Wells & Seelau, *supra* note 59, at 767 (explaining how law enforcement officers tend to make “strong judgments of validity on the basis of only one eyewitness”); see also Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1709-10 (2003) (assessing cognitive biases experienced by witnesses while being interviewed by police).

<sup>72</sup> See discussion *supra* p. 1465 and accompanying notes.

possible trial choices (e.g., motion denied; motion sustained).<sup>73</sup> Trial judges, however, often encounter time constraints, heavy workloads, and uncertain information that may impair any strategic value in pursuing these preferences.<sup>74</sup> Legal scholars have observed that in order for judges to accurately discount the corresponding probability of reversal for each preference, they would have to possess information concerning the probability of appeal and settlement, as well as knowledge of precise preferences embraced by the relevant appellate judges.<sup>75</sup> Thus, in the absence of such information, “rational” decision-making appears more like guesswork and conjecture.

Cognitive biases may also affect retrospective assessment of choice. This is especially apparent with hindsight bias, which refers to the tendency of individuals to overestimate the extent to which they anticipated the fruition of a particular event.<sup>76</sup> Put differently, individuals often believe that they knew something was going to happen when in fact they did not.<sup>77</sup> This phenomenon is especially apparent when interviewing those prior and after a particular event. For instance, when voters are asked to project the outcome of an imminent election, and are later asked to remember their choice, far more claim to have predicted the correct outcome than actually did.<sup>78</sup> Similarly, when individuals are asked to

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<sup>73</sup> See Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 492 (1998).

<sup>74</sup> Cross, *supra* note 32, at 1485; see also Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1124-25 (1996) (describing indifference of the public and politicians to insistence by trial judges of onerous workloads and corresponding diminution of quality of judging); Jeffrey A. Parness & Matthew R. Walker, *Thinking Outside the Civil Case Box: Reformulating Pretrial Conference Laws*, 50 U. KAN. L. REV. 347, 363 (2002) (identifying time pressures as observed by Judge Richard Posner).

<sup>75</sup> See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1767-68 n.103 (1997) (describing immense complexity of predicting reversals on statutory grounds); see also DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* 14 (2002) (illuminating obstacles for trial judges attempting to forecast probability of appeal success).

<sup>76</sup> See W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 328-29 (1998).

<sup>77</sup> See, e.g., Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311, 311-12 (1990); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. HUM. PERCEPTION & PERFORMANCE 288, 288 (1975) (first describing the effect).

<sup>78</sup> Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 577 (1998). Similar findings have pertained to subjects who are asked to predict whether a business would be successful, with subjects claiming “I predicted it” at a higher rate than actually did. Clifton E. Brown & Ira

predict whether a particular line of products will succeed, an artificially high percentage will later claim to have identified the correct outcome.<sup>79</sup> Significantly, by distorting individuals' capacity to objectively evaluate their decision-making and pursuit of preferences, hindsight bias limits the potential for ameliorative redress of any other cognitive biases.

Regret aversion, or the tendency to avoid feedback on forgone conclusions, only exacerbates hindsight bias.<sup>80</sup> Such aversion encourages individuals to shield themselves from discovering "what might have been" had they pursued alternative choices.<sup>81</sup> Individuals experiencing regret aversion are similarly averse to comparisons with imagined outcomes, which may likewise promote sadness or regret.<sup>82</sup> Accordingly, both hindsight bias and regret aversion discourage retrospective analysis of decision-making. Empirical data corroborates this idea. Indeed, regret aversion has been found to influence consumer purchase decisions,<sup>83</sup> investor preferences,<sup>84</sup> physician choice of care,<sup>85</sup> and, most recently, litigant behavior.<sup>86</sup>

Importantly, in light of the aforementioned cognitive biases, ostensibly objective measures, such as "market value" and "fair compensation," may reflect irrational cognitive biases

Solomon, *Effects of Outcome Information on Evaluations of Managerial Decisions*, 62 ACCT. REV. 564, 568-75 (1987).

<sup>79</sup> Brown & Solomon, *supra* note 78, at 570-73.

<sup>80</sup> See Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 43 [hereinafter Guthrie, *Better Settle Than Sorry*].

<sup>81</sup> See David S. Boninger, Faith Gleicher & Alan Strathman, *Counterfactual Thinking: From What Might Have Been to What May Be*, 67 J. PERSONALITY & SOC. PSYCHOL. 297, 297 (1994); see also Richard P. Larrick, *Motivational Factors in Decision Theories: The Role of Self-Protection*, 113 PSYCHOL. BULL. 440, 445 (1993) (describing behavioral predilections commonly associated with avoidance of risk).

<sup>82</sup> See Guthrie, *Better Settle Than Sorry*, *supra* note 80, at 69-70 & n.133 (citing conclusions in Marcel Zeelenberg et al., *Consequences of Regret Aversion: Effects of Expected Feedback on Risky Decision Making*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 148, 149 (1996)).

<sup>83</sup> J. Jeffrey Inman & Leigh McAlister, *Do Coupon Expiration Dates Affect Consumer Behavior?*, 31 J. MARKETING RES. 423, 423 (1994) (reasoning that anticipated regret may account for the increase in consumer coupon redemption behavior prior to coupon expiration dates).

<sup>84</sup> Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 652-53 (1996).

<sup>85</sup> See Cheryl B. Travis et al., *Judgment Heuristics and Medical Decisions*, 13 PATIENT EDUC. & COUNSELING 211, 215 (1989) (proposing regret theory as one possible explanation for clinical treatment decisions).

<sup>86</sup> Guthrie, *Better Settle Than Sorry*, *supra* note 80, at 72-79.

as much as any rational bargaining. As a result, individual preferences may only partially account for market determinations, such as the “going-rate” for a particular type of worker (e.g., a talented chief executive officer; a 20-game winner in Major League Baseball).<sup>87</sup> Indeed, for that very reason, Cass Sunstein maintains that rational choice models are “often wrong in the simple sense that they yield inaccurate predictions.”<sup>88</sup> Similarly, Russell Korobkin and Thomas Ulen find that “individuals are systematically biased in their predictions of the probable results of various events<sup>89</sup> . . . they frequently act in ways that are incompatible with the assumptions of rational choice theory.”<sup>90</sup>

### B. *Raising Doubts: Heuristics*

The failure of rational choice theory to absorb cognitive biases invites discussion of further cognitive limitations, namely human tendencies to incorporate rules of thumb into their decision-making processes. These “rules of thumb” are also known as heuristic devices or heuristics, which are convenient, if unfinished methods to process information.<sup>91</sup> Such devices emerge primarily because of processing devices within the human brain that seek to conserve scarce resources.<sup>92</sup> These devices allow the brain to manage a complex array of stimuli through shortcuts, largely based on predictive probability.<sup>93</sup>

Heuristics, however, exhibit a tendency to encourage decisions based on illusions, or distorted perceptions.<sup>94</sup> For instance, heuristics may lead individuals to exaggerate health

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<sup>87</sup> Hoffman & O’Shea, *supra* note 52, at 361.

<sup>88</sup> Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1175 (1997).

<sup>89</sup> Korobkin & Ulen, *supra* note 15, at 1085.

<sup>90</sup> *Id.* at 1055.

<sup>91</sup> See Cass R. Sunstein, *Introduction*, in BEHAVIORAL LAW AND ECONOMICS 1, 3 (Cass R. Sunstein ed., 2000).

<sup>92</sup> Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 137 (2003).

<sup>93</sup> Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 61 (2000). See Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1275 (2002) (describing these phenomena in choices among individuals to seek litigation).

<sup>94</sup> Rachlinski, *supra* note 93, at 61.

ailments,<sup>95</sup> particularly when those individuals are unable to measure the presence of actual risk.<sup>96</sup> Moreover, the human mind tends to minimize the role of complexifying context (e.g., background factors; situational pressures) and accentuate the role of salient behavior (e.g., expressed words; physical manifestations).<sup>97</sup> For that reason, individuals tend to attribute another person's behavior to her own dispositional qualities, rather than to circumstances or situational factors.<sup>98</sup> The attribution of behavior to disposition rather than circumstances is considered part of a broader defect called the "fundamental attribution error," and heuristics can evince its effect.<sup>99</sup>

Heuristics can also adversely influence negotiations. This is especially apparent with "anchoring and adjustment" effects, whereby a negotiator begins with a presumptively rational reference point, but then fails to adjust adequately for new information.<sup>100</sup> Psychologists sometimes describe this effect as "belief perseverance," or the tendency to cling to a viewpoint in the face of disconfirming evidence.<sup>101</sup> For instance, a professional athlete negotiating a contract might estimate his market value based on a contract earned by a similar player.<sup>102</sup> He might then adjust that figure based on perceived variances between himself and the similar player, such as age, experience, and injury-history.<sup>103</sup> Although such an approach

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<sup>95</sup> See Robert A. McNutt et al., *Patient Safety Efforts Should Focus on Medical Errors*, 287 J. AM. MED. ASS'N 1997, 2001 (2002); see also Stephen B. Soumerai et al., *Effect of Local Medical Opinion Leaders on Quality of Care for Acute Myocardial Infarction: A Randomized Controlled Trial*, 279 J. AM. MED. ASS'N 1358, 1363 (1998) (discussing the salience of heuristics in the context of acute myocardial infarctions).

<sup>96</sup> See Sidney T. Bogardus, Jr., Eric Holmboe & James F. Jekel, *Perils, Pitfalls, and Possibilities in Talking About Medical Risk*, 281 J. AM. MED. ASS'N 1037, 1041 (1999) (noting that people frequently utilize heuristic guides to counter difficulties in understanding risk).

<sup>97</sup> See Hanson & Yosifon, *supra* note 92, at 137.

<sup>98</sup> See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 67-86 (2d ed. 1991).

<sup>99</sup> For an extensive analysis of the fundamental attribution error, see Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004).

<sup>100</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974).

<sup>101</sup> See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 16, at 652-53.

<sup>102</sup> See Donald Fehr, *Union Views Concerning Agents: With Commentary on the Present Situation in Major League Baseball*, 4 MARQ. SPORTS L.J. 71, 79 (1993).

<sup>103</sup> See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 169-

might appear sensible, studies find that individuals often fail to adjust sufficiently away from the initial anchor.<sup>104</sup> Indeed, even in the absence of anchor-affirming information, individuals exhibit a natural reluctance to alter anchors.<sup>105</sup> Consequently, the professional athlete might modify the anchor, but in a way that insufficiently reflects actual variations between himself and the similar player. Such phenomena are notable in other fields as well. For instance, in litigation, the opening offer in a settlement negotiation can influence the recipient's judgment of a subsequent final offer, even when the opening offer does not convey relevant information.<sup>106</sup>

Likewise influential are "endowment effects," whereby individuals perceive more utility from their current state of affairs than from altered and equivalent circumstances.<sup>107</sup> As a consequence, individuals often demand more to relinquish an item than they would pay to obtain that same item.<sup>108</sup> For instance, Kahneman and Tversky find that when individuals are hypothetically assigned one of two jobs, the first with a higher salary and the second with better working conditions, they prefer to remain in their assigned job rather than switch,

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72 [hereinafter McCann, *Illegal Defense*] (discussing impact of age and experience on contract negotiations in the NBA).

<sup>104</sup> See Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 799 (2004).

<sup>105</sup> See Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 130-33 (Thomas Gilovich et al. eds., 2002); see also Nicholas Epley & Thomas Gilovich, *Putting Adjustment Back in the Anchoring and Adjustment Heuristic*, 12 PSYCHOL. SCI. 391 (2001) (discussing reluctance of individuals to move away from initial anchors).

<sup>106</sup> See Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 11-13, 18-19 (1994). Anchoring and adjustment has also been illustrated by utilizing different reference points in questioning. See, e.g., Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 120, 122-23 (1981) (illustrating how individuals' estimation of the likelihood of corporate fraud varies significantly based on the phrasing of the question).

<sup>107</sup> See Korobkin & Guthrie, *supra* note 104, at 802-03; see also Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (supplying findings that confirm the prevalence of endowment heuristics); Russell Korobkin, *Policymaking and the Offer/Asking Price Gap: Toward a Theory of Efficient Entitlement Allocation*, 46 STAN. L. REV. 663, 668-69 (1994) (discussing endowment heuristics in the context of negotiations).

<sup>108</sup> See generally Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003) (describing and suggesting strategies for the integration of endowment effect into legal analysis).

regardless of which job they are assigned.<sup>109</sup> Similar findings are evident in the investment context: individuals prefer to maintain existing investment instruments (e.g., stocks; bonds) and their levels of investment, regardless of the instrument type or investment level.<sup>110</sup> Further, when negotiating contracts, individuals often prefer terms of trade that are conventional and generally accepted, simply because they are familiar.<sup>111</sup>

Correspondingly, consider myopic heuristics, which encourage individuals to “stay the course,” even when doing so would diminish their long-term welfare.<sup>112</sup> This in part relates to the human tendency to be more concerned about losses than gains, and thus more averse to risk of loss than tempted by potential gain.<sup>113</sup> For instance, even in the presence of conflicting evidence, shareholders often myopically view earnings reports to assume that short-term earnings are likely to continue indefinitely.<sup>114</sup> Myopic heuristics also pertain to systematic over-estimation of costs inherent in change, such as time, thinking, and soliciting advice.<sup>115</sup> To illustrate, consider that individuals often dismiss future environmental concerns because they are dissuaded by the complexity of the related literature, as well as the requisite effort to overcome such complexity.<sup>116</sup>

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<sup>109</sup> Kahneman & Tversky, *supra* note 50, at 348; *see also* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 627 (1998) (discussing Kahneman & Tversky and related studies).

<sup>110</sup> *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 14 (1988) (studying MBA students at Boston University and public policy graduate students at Harvard University).

<sup>111</sup> Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1587-88 (1998).

<sup>112</sup> Jolls et al., *supra* note 45, at 1479 (describing “bounded willpower” and its effect on human choices); *see also* Erik Luna, *Race, Crime, and Institutional Design*, 66 L. & CONTEMP. PROBS. 183, 197 (2003) (discussing myopic heuristics in context of criminal law).

<sup>113</sup> *Behavioral Finance: Borrowing from Psychology to Explain Behavior*, PENSIONS & INVESTMENTS, May 26, 1997, at 32 (discussing myopic risk aversion in context of investment strategies).

<sup>114</sup> *See* Lucian Arye Bebchuck & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CAL. L. REV. 1075, 1102 (1990) (explaining how management might exploit this behavioral pattern among shareholders to present short-term earnings in a more favorable light by under-investing in research and development and other long-term projects).

<sup>115</sup> John R. Hauser et al., *How Consumers Allocate Their Time When Searching for Information*, 30 J. MARKETING RES. 452, 458 (1993).

<sup>116</sup> *See* U.S. Rep. Earl Blumenauer, *Entrepreneurial Environmentalism: A New Approach for the New Millennium*, 30 ENVTL. L. 1, 5 (2000) (observing that

A more encompassing heuristic pertains to the human tendency to arrive at conclusions that they are motivated to reach.<sup>117</sup> Indeed, motivation to achieve a certain conclusion often induces the mind to form impressions, evaluate observations, and make decisions pursuant to such motivation.<sup>118</sup> The most salient of these motivations is the desire to see oneself in “self-affirming ways.”<sup>119</sup> That is, people tend to view themselves as harboring good intentions and acting in accordance with moral norms.<sup>120</sup> To ensure preservation of such selective views, individuals routinely make dramatic cognitive adjustments, including complete shielding of conflicting information.<sup>121</sup> These adjustments are especially telling when individuals are confronted with challenging philosophical choices, such as participation in war crimes.<sup>122</sup>

Like cognitive biases then, heuristics may lead to systemic errors, as judgments about how to best respond to choice and circumstances can unknowingly discount meaningful data.<sup>123</sup> Taken together, biases and heuristics reveal significant limits to the rational actor model, and suggest that individuals may unknowingly pursue less-than-preferable course of actions. These deleterious tendencies are only accentuated by individuals’ vast and systematic underappreciation of their capacity to utilize and be manipulated by

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“[c]omprehensive environmental approaches are too often laid aside as overly complex or even impossible to implement”); see also Rebecca M. Bratspies, *Myths of Voluntary Compliance: Lessons from the StarLink Corn Fiasco*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 593, 642 (2003) (discussing difficulty of understanding environmental regulation); Edward R. Morrison, *Judicial Review of Discount Rates Used in Regulatory Cost-Benefit Analysis*, 65 U. CHI. L. REV. 1333, 1346-47 (1998) (describing environmental regulation as an example of a topic where its complexity tends to dissuade inquiry).

<sup>117</sup> Hanson & Yosifon, *supra* note 92, at 138.

<sup>118</sup> Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).

<sup>119</sup> Hanson & Yosifon, *supra* note 92, at 138.

<sup>120</sup> *Id.*

<sup>121</sup> Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1659 (2004); see also Abhijit Biswas et al., *Consumer Evaluation of Reference Price Advertisements: Effects of Other Brands’ Prices and Semantic Cues*, 18 J. PUB. POL’Y & MKTG. 52 (1999) (describing how consumers make cognitive adjustments in value judgments).

<sup>122</sup> See Eddie Harmon-Jones & Cindy Harmon-Jones, *Testing the Action-Based Model of Cognitive Dissonance: The Effect of Action Orientation on Postdecisional Attitudes*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 711, 719-21 (2002) (presenting subjects with varying difficulties of decisions and assessing results).

<sup>123</sup> See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1178 (1997).

cognitive distortions.<sup>124</sup> As a result, there often exists a considerable gap between an individual's set of preferences and her pattern of choices, thus undermining the very premise behind rational choice theory.

Nevertheless, the alleged effects of cognitive biases, heuristics, and, more broadly, behavioral decision theory are not without critique. One of the most often cited critiques suggests that while individuals may display cognitive errors in laboratory or controlled experiments, they may act more rationally in real world settings.<sup>125</sup> There are also doubts as to how well cognitive biases and heuristics predict anomalous behavior, or how well such techniques forecast response to policy shifts or circumstantial changes.<sup>126</sup> In the context of professional athletes contemplating contractual offers, the following section will assess the relative strengths and limitations of rational choice models and competing cognitive influences.

#### IV. PROFESSIONAL ATHLETES & CONTRACTUAL DECISION-MAKING

##### A. *Relevance to the Study of Law and Economics and Behavioral Sciences*

The potential influence of alternative preferences and cognitive biases on professional athletes is, to date, an unexplored topic. Perhaps this is not surprising, since professional athletes comprise less than one-tenth of one percent of the population and are thus considered a statistically-insignificant population segment by most demographers.<sup>127</sup> Moreover, with their often exorbitant salaries, generous work schedules, and glamorous lifestyles, professional athletes tend to be considered extraordinarily

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<sup>124</sup> See Hanson & Yosifon, *supra* note 92, at 138.

<sup>125</sup> See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 551 & n.18 (2003) (doubting existence of heuristics and cognitive biases in contract law); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1661 (2003).

<sup>126</sup> See, e.g., Jessica L. Cohen & William T. Dickens, *A Foundation for Behavioral Economics*, 92 AM. ECON. REV. 335, 335 (2002).

<sup>127</sup> See, e.g., Fares al-Braizat, *Muslims and Democracy: An Empirical Critique of Fukuyama's Culturalist Approach*, 43 INT'L J. COMP. SOC. 269 (2002), available at [http://www.worldvaluessurvey.org/Upload/5\\_Islamdem\\_2.pdf](http://www.worldvaluessurvey.org/Upload/5_Islamdem_2.pdf) (describing as "insignificant" a population that comprises less than one percent of the total population).

unique and sufficiently incomparable to more socially-relevant populations.<sup>128</sup> Perhaps for these very reasons, professional athletes have warranted relatively scant consideration by legal academics.<sup>129</sup> Other reasons for their academic marooning include a more than occasional dismissal of sports law as a frivolous area of study,<sup>130</sup> as well as sports law's only recent ascendancy in legal academia.<sup>131</sup>

Overlooking professional athletes, however, appears to be a disservice to the study of behavioral law and economics. Indeed, although a comparatively small group, professional athletes appear strikingly influential on the world around them. Most notably, professional athletes play on teams which supply tangible economic benefit to local communities, including the generation of employment opportunities for vendors, concessionaires, security, and other ameliorated groups, as well as the boosting of sales for adjoining businesses, such as restaurants, pubs, and hotels.<sup>132</sup> Also consider the

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<sup>128</sup> See, e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231, 255-57 (1996) (Stevens, J., dissenting) (highlighting the unique economic position of professional athletes); Dan Messeloff, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 532 (2000) (quoting NATIONAL BASKETBALL ASSOCIATION UNIFORM PLAYER CONTRACT, ¶ 9) (explaining how the "extraordinary and unique skill and ability" of professional athletes renders them sufficiently distinct from other population groups considered by the law); Eric D. Scheible, *No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game*, 73 U. DET. MERCY L. REV. 73, 100 n.209 (1995) (describing unique nature of professional athlete in the labor market, and implying how that nature might make legal comparison more challenging and less predictable).

<sup>129</sup> Timothy Davis, *What Is Sports Law?*, 11 MARQ. SPORTS L. REV. 211, 212 (2001) (noting that many legal academics believe that analysis of sports does not warrant academic attention).

<sup>130</sup> See, e.g., James R. Elkins, *Troubled Beginnings: Reflections on Becoming a Lawyer*, 26 U. MEM. L. REV. 1303, 1311 (1996) (quoting JOHN GRISHAM, *THE RAINMAKER* (1996)).

<sup>131</sup> See Roger I. Abrams, Book Review, 54 U. CIN. L. REV. 1237, 1238 (1986) (describing how sports law became popular in the late 1980s, following growth of the modern sports industry). In fact, since the 1990s, a number of law schools, including Tulane Law School and Marquette University Law School, offer certificates in sports law. Larry Cata Backer, *Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State*, 20 PENN ST. INT'L L. REV. 67, 117 n.115 (2001). See <http://www.law.tulane.edu> (follow links to "Programs of Study" and "Sports Law") (last visited Jan. 25, 2006). In contrast to many legal scholars, economists have tended to regard professional sports as a useful vehicle from which to examine a range of theoretical issues. See, e.g., J. Colin H. Jones et al., *Ethnicity, Productivity and Salary: Player Compensation and Discrimination in the National Hockey League*, 31 APPLIED ECON. 593, 594 (1999) (discussing role of professional sports in economic research).

<sup>132</sup> See generally KENNETH L. SHROPSHIRE, *THE SPORTS FRANCHISE GAME* (1995) (claiming that sports teams provide a multiplier effect on local economies);

capacity of professional sports to effect meaningful broadcast revenue: the television contracts of the four largest leagues (the National Football League (“NFL”), Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Hockey League (“NHL”)) collectively exceed \$4 billion annually.<sup>133</sup> More subjectively, professional athletes supply appreciable, though intangible benefit to their surrounding communities, often in the form of team pride or simply the enabling of fandom and associated enjoyment.<sup>134</sup>

Perhaps more importantly, and unlike most population groups, professional athletes furnish published commentary of their thought processes, as evidenced by regular newspaper, television, and radio interviews. Moreover, burgeoning player-to-fan discussions, such as chat rooms or blogs, offer supplemental avenues for players to explain their decision-making processes.<sup>135</sup> Further commentary is provided by the media, players’ agents, team executives, and a myriad of “insiders.”<sup>136</sup> In short, there exists a wealth of statements by

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SPORTS, JOBS & TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (Roger G. Noll & Andrew Zimbalist eds., 1997) (arguing that sports teams create jobs, boost tourism, and decrease crime). *But see* MARK ROSENTRAU, MAJOR LEAGUE LOSERS: THE REAL COSTS OF SPORTS AND WHO’S PAYING FOR IT (2001) (on file with author) (dismissing the benefit of sports franchises on the local economy as miniscule); PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 267-69 (2000) (equating a publicly-financed stadium to a public park that charges expensive admission); Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace. The Battle to Revive Judicial Rulings and State Constitutional Enactments Prohibiting Public Subsidies to Private Corporations*, 30 U. TOL. L. REV. 393, 418 (1999) (arguing against public finance for professional sports franchises due to lack of credible evidence such financing ultimately yields greater benefit than cost).

<sup>133</sup> See PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 389 (2d ed. 1998).

<sup>134</sup> See WEILER, *supra* note 132, at 170 (observing that sports fans follow their favorite teams and players similar to religious followers); *see also* Bruce W. Burton & Matthew J. Mitten, *New Remedies for Breach of Sports Facility Use Agreements: Time for Marketplace Realism*, 88 IOWA L. REV. 809, 820 n.37 (2003) (illuminating psychological benefits identified by sports fans).

<sup>135</sup> Some players, such as Red Sox pitcher Curt Schilling, regularly utilize chat rooms to post their thoughts. Daniel G. Habib, *Down to the Last Out*, SPORTS ILLUSTRATED, Sept. 27, 2004, at Z8 (noting how Schilling regularly posts on the “Sons of Sam Horn” message board, which is primarily comprised of devoted Red Sox fans); *see also* Howard Bryant, *Schilling’s Off Line*, BOSTON HERALD, June 15, 2004, at 90 (criticizing Schilling for communicating his feelings directly through Sons of Sam Horn while refusing to discuss those feelings with reporters).

<sup>136</sup> Such insiders even include player wives. *See* Steven M. Ortiz, *The Ethnographic Process of Gender Management: Doing the “Right” Masculinity with Wives of Professional Athletes*, 11 QUALITATIVE INQUIRY 265, 273 (2005) (interviewing players’ wives regarding their husbands’ choices in both the personal and professional arena).

athletes and those close to them that attest to their values, beliefs, and priorities when deciding where, and for how much they want to play, among other choices. Accordingly, professional athletes illuminate real world behavioral patterns, rather than stimuli to experimental circumstances, and, in doing so, abrogate the alleged “experimental flaw” of many behavioral law and economic studies.<sup>137</sup>

Thus, exploring the decision-making processes of professional athletes in the context of employment opportunities may prove not only to be an engaging exercise, but an instrumental analysis of behavioral tendencies in real-world settings. This Article will now turn to this exploration, and will begin with a discussion of contracting and choice among professional athletes. Subsequently, it will canvass actual players who accepted the “less-than-optimal” contract offers, assuming optimality is defined as the most lucrative offer. In doing so, this Article will address whether their choices reflected conscious preferences, such as desire to be close to home or partiality to warm weather, or cognitive biases and heuristics that went unappreciated in their decision-making processes.

*B. Exploring Contract Negotiations Between Player, Agent & Team*

Like film actors, musicians, and other high-paid, service-oriented professionals, professional athletes enter into personal services contracts that reflect their unique skills or talents.<sup>138</sup> In the case of professional athletes, those unique skills or talents comprise the exceedingly rare ability to athletically perform in a way that attracts financial remuneration.<sup>139</sup> As a result, their “employment” with professional sports teams entails their “execution of personal services contract[s] with the owner or prospective owner of a

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<sup>137</sup> See *supra* note 125 and accompanying text.

<sup>138</sup> See M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 143 (2003).

<sup>139</sup> To illustrate how exceedingly rare it is for an athlete to ever earn income playing sports, consider that “[o]nly 3 out of every 10,000 boys who play high school basketball ever make it to the pros,” and “[o]nly 1 out of every 75 college players ever makes the jump to the big time.” Fred Bowen, *Going Pro: It's a Long Shot*, WASH. POST, June 29, 2001, at C12 (citing research conducted by the National Collegiate Athletic Association (NCAA)). Also consider that less than one percent of high school athletes receive college athletic scholarships. Tony Hansen, *Havin' a Ball at Camp*, BATTLE CREEK ENQUIRER, May 26, 2004, at 1B.

professional sports team for the purpose of future athletic services.”<sup>140</sup>

Typically, players’ contracts are negotiated by their agents, who are contracted representatives.<sup>141</sup> Generally, agents receive a fixed percentage of earnings under player contracts, which reflects their commission, although some receive compensation based on hourly rates instead.<sup>142</sup> Player agents perform other services as well, such as negotiating endorsement contracts, providing financial management and accounting advice, and resolving disputes that arise under the athlete’s employment contract.<sup>143</sup> Significantly, and as in any agency relationship, the player (client) possess decision-making authority for all aspects pertaining to his profession.<sup>144</sup>

The actual framework for contract negotiation between player/agent and team greatly depends on the sport and the player’s level of experience. In all four major sports leagues (i.e., the NFL, MLB, the NBA, and the NHL), players gain entrance by selection in an entry draft, whereby a team “drafts” the player, and obtains that player’s rights to play in the associated league.<sup>145</sup> The primary purpose of a draft is to

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<sup>140</sup> See Rob Remis & Diana Sudia, *Escaping Athlete Agent Statutory Regulation: Loopholes and Constitutional Defectiveness Based on Tri-Parte Classification of Athletes*, 9 SETON HALL J. SPORT L. 1, 65 (1999) (quoting “Definition of Athlete” under CONN. GEN. STAT. ANN. § 20-553 (West 1997)).

<sup>141</sup> *Id.*

<sup>142</sup> Typically, the fixed percentage is between three and five percent of total earnings. Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN’S L. REV. 1225, 1244 & n.139 (2004) (citing Michael Cohen, *Meet the Real Jerry Maguires*, BOSTON BUS. J., Oct. 5, 1998). More recently, some agents, such as Lon Babby of Williams & Connolly, have begun utilizing an hourly rate, rather than commission. See generally Stacey M. Nahrwold, *Are Professional Athletes Better Served by a Lawyer-Representative than an Agent? Ask Grant Hill*, 9 SETON HALL J. SPORT L. 431, 458-60 (1999) (describing Babby’s work for Grant Hill of the Orlando Magic).

<sup>143</sup> James G. Sammataro, Comment, *Business and Brotherhood, Can They Coincide? A Search into Why Black Athletes Do Not Hire Black Agents*, 42 HOW. L.J. 535, 545 & n.50 (1999) (citing Rob Remis, *Analysis of Civil and Criminal Penalties in Athlete Agent Statutes and Support for Imposition of Civil and Criminal Liability upon Athletes*, SETON HALL J. SPORT L. 1, 6 (1998)); see also Richard C. Webb, *Personal Services Lawyering: Sports, Entertainment, Art or Just Plain Risky Business?*, 5 S.C. LAW. 11, 12 (1993) (describing myriad duties of player agents, some of which include rather undignified duties, such as fielding late-night phone calls pertaining to trivial matters).

<sup>144</sup> See Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 GEO. J. LEGAL ETHICS 543, 587-88 (1999) (discussing rights of client versus those of agent).

<sup>145</sup> See Michael A. McCann & Joseph S. Rosen, *The Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. (forthcoming, 2006), at Part 1 (discussing eligibility for NFL and NBA Drafts) (draft of article on file with

prevent amateur players from bargaining with multiple teams.<sup>146</sup> Indeed, in each of the four major leagues, once a team drafts an amateur player, his playing rights become the exclusive property of that team for at least one calendar year, and he can negotiate with no other teams during that time.<sup>147</sup> If a player chooses not to sign and wait one year, the team that drafted him no longer controls his rights, but that player's only option to gain entry into the league is to enter the draft again, "and if drafted a second time, he again becomes the property of [another] team for one year."<sup>148</sup> Practically, therefore, the draft is the exclusive entrance for amateur players into professional sports.

Once drafted, an athlete signs a player contract in accordance with the league's collective bargaining agreement. There are significant variations among the four major sports leagues for entry contracts, as parameters for such contracts reflect the product of negotiations between individual leagues and players' associations. For instance, while players selected in the NBA Draft sign for pre-determined salary slots in accordance with their draft position,<sup>149</sup> players selected in the MLB Draft can negotiate their own contracts. Though heavily influenced by draft position, such contracts may vary widely upon leveraging circumstances, such as whether the player has remaining collegiate eligibility, or whether the team possesses sufficient funds to sign its draft selections.<sup>150</sup>

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author); Erik Ekblad, Note, *A Slice into the Sand Trap: Why the PGA Was Unwise in Its Decision to Push Its Dispute with Casey Martin to the Supreme Court*, 32 SW. U. L. REV. 151, 174 (2003) (noting mechanics of MLB Draft and NHL Draft).

<sup>146</sup> See McCann, *Illegal Defense*, *supra* note 103, at 130.

<sup>147</sup> See, e.g., NBPA, Collective Bargaining Agreement, July 30, 2005, art. X(1)(b)(ii), available at [http://nbpa.org/cba\\_articles/article-X.php#section1](http://nbpa.org/cba_articles/article-X.php#section1) (last visited Jan. 26, 2006) (stipulating the rule for players selected in the NBA Draft); NFL Collective Bargaining Agreement, art. XVI, 4(b), at 44 (1993), available at <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete#art16> (last visited Jan. 26, 2006) (stipulating that the playing rights of players selected in the NFL Draft remain the property of the drafting team for one calendar year); Jeffrey A. Rosenthal, *The Amateur Sports Draft: The Best Means to the End?*, 6 MARQ. SPORTS L.J. 1, 19 n.79 (1995) [hereinafter Rosenthal] (citing Major League Baseball Professional Rules Book 4(e) (1988), which stipulates that the playing rights of players selected in the MLB Draft remain the property of the drafting team for one calendar year or until the player returns to college, whichever is shorter)). While occasional exceptions to this standard exist, they are seldom employed. Peter N. Katz, Comment, *A History of Free Agency in the United States and Great Britain: Who's Leading the Charge*, 15 COMP. LAB. L.J. 371, 384 n.82 (1994).

<sup>148</sup> McCann, *Illegal Defense*, *supra* note 103, at 129-30.

<sup>149</sup> See discussion *infra* pp. 1487-88.

<sup>150</sup> Rosenthal, *supra* note 147, at 17-20; see also Jack Curry, *Fulfilling Great Expectations: Barry Lamar Bonds*, N.Y. TIMES, Oct. 7, 2001, § 8, at 1 (describing how

Regardless of the league, a drafted player can only maximize his earning potential by eventually obtaining “free agent” status, whereby the player may negotiate and sign with any team.<sup>151</sup> Typically, such status emerges only after a player has accrued a certain level of service time in a particular league, and only after his existing contract has expired.<sup>152</sup> There are two types of free agency: “unrestricted” free agency, whereby a player can negotiate and sign with any team after his contract expires, and “restricted” free agency, whereby a player can likewise negotiate and sign with any team after his contract expires, but the original team reserves the right to “match” any signed contract or otherwise receive compensation, usually in the form of draft selections.<sup>153</sup> Thus, an unrestricted free agent possesses the optimal bargaining position: he can sign with any team, and the team with which he signs owes no compensation to his prior team.<sup>154</sup>

To illustrate the economic path of a professional athlete, consider an amateur player who seeks to enter the NBA. This player must participate in the NBA Draft, in which he will either be drafted by a team in one of two rounds, or not selected. If he is drafted in the first round, he will sign a guaranteed two-year contract for a pre-determined amount, ranging from \$9.0 million for the first pick to \$1.8 million for the last pick in that round.<sup>155</sup> The NBA team that drafts him

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Barry Bonds was originally drafted in 1982 by the San Francisco Giants, chose to attend Arizona State instead, and in 1985 was drafted by the Pittsburgh Pirates, with whom he signed).

<sup>151</sup> See generally WEILER, *supra* note 132, at 170-97 (discussing free agency’s effect on the professional sports leagues). See also McCann, *Illegal Defense*, *supra* note 103, at 212 (discussing impact of free agency on career earnings opportunities for NBA players); Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503 (1991) (exploring impact of free agency on player salaries in the NFL).

<sup>152</sup> For instance, in MLB, a player can only become a free agent after six years of service time. See Joshua Hamilton, Comment, *Congress in Relief: The Economic Importance of Revoking Baseball’s Antitrust Exemption*, 38 SANTA CLARA L. REV. 1223, 1240 & n.144 (1998) (explaining the history and rationale behind the rule).

<sup>153</sup> See Note, *supra* note 151, at 503 nn.1-2.

<sup>154</sup> See Ethan Lock, *The Regulatory Scheme for Player Representatives in the National Football League: The Real Power of Jerry Maguire*, 35 AM. BUS. L.J. 319, 326-28 (1998) (explaining the implications of unrestricted and restricted free agency for professional athletes).

<sup>155</sup> See NBPA, Collective Bargaining Agreement, *supra* note 147, at Exhibit B, available at [http://nbpa.org/cba\\_exhibits/exhibitB.php](http://nbpa.org/cba_exhibits/exhibitB.php) (last visited Jan. 26, 2006); see also McCann, *Illegal Defense*, *supra* note 103, at 125 & n.37, 128 & tbl. 4 and accompanying text (describing draft pick economics in preceding collective bargaining agreement and how players selected in the first round of the NBA Draft can negotiate between 80% and 120% of stated annual salaries, and how, in practice, they always negotiate 120%).

may extend his contract following his second and third seasons, although he may become a restricted free agent at the conclusion of his fourth season.<sup>156</sup> Only at the conclusion of his fifth season may he become eligible for unrestricted free agency.<sup>157</sup> In contrast, if he is drafted in the second round, he may obtain unrestricted free agency status earlier in his career, although most players selected in the second round sign either non-guaranteed contracts for the league minimum (\$398,762) or simply fail to earn a contract.<sup>158</sup> If he is not drafted in either round, then he immediately becomes an unrestricted free agent, though seldom does such a player ever play in the NBA.<sup>159</sup>

Assuming the player described in the preceding paragraph becomes a star, his earning capacity as an unrestricted free agent would prove quite impressive. Indeed, after completion of his rookie contract, and upon becoming an unrestricted free agent, that player may sign a contract worth up to the “maximum contract,” which reflects the longest and

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<sup>156</sup> NBPA, Collective Bargaining Agreement, *supra* note 147, at art. VIII, available at [http://nbpa.org/cba\\_articles/article-VIII.php](http://nbpa.org/cba_articles/article-VIII.php) (last visited Mar. 2, 2006).

<sup>157</sup> From a practical standpoint, most players remain with their team at the conclusion of the fourth season. Indeed, the 2005 Collective Bargaining Agreement preserves the so-called “Larry Bird exception,” which allows teams to exceed the salary cap in order to re-sign their own players (also called “Larry Bird rights”). See McCann, *Illegal Defense*, *supra* note 103, at 124-25. Thus, when a first round pick concludes his fourth season, usually the team for which he has played can offer him the most.

<sup>158</sup> See NBPA, Collective Bargaining Agreement, *supra* note 147, at Exhibit C, available at [http://nbpa.org/cba\\_exhibits/exhibitC.php](http://nbpa.org/cba_exhibits/exhibitC.php) (last visited Jan. 26, 2006). Very rarely, a second round pick will surprise the NBA and become a competent player or even a star player. Under the 1999 Collective Bargaining Agreement, such star players could gain optimal negotiating power at the conclusion of their second season—when their rookie contracts would typically expire—as they became “non-Larry Bird-rights restricted free agents,” since Larry Bird rights only manifest after a player plays three seasons. As a result, the “restricted” nature of their free agency was curtailed, since, due to the absence of Larry Bird rights, the team for which they played could not re-sign them for any amount above the salary cap. This very machination arose in 2003, when 2001 second round pick Gilbert Arenas of the Golden State Warriors became a restricted free agent, and because Arenas had no Larry Bird rights and because the Warriors’ payroll exceeded the league-imposed salary cap, the Warriors could not match the six-year, \$65 million free agent contract Arenas had signed with the Washington Wizards. See McCann, *Illegal Defense*, *supra* note 103, at 126-27. The 2005 Collective Bargaining Agreement, however, disallows other teams from offering such a player more than \$4.5 million for his third season, an amount all NBA teams may utilize through its “mid-level exception” to the salary cap, regardless of whether the team’s payroll exceeds the salary cap. As a result, teams may hold on to their second-round picks long enough to invoke their Larry Bird rights. See NBPA, Collective Bargaining Agreement, *supra* note 147, at art. XI(5), available at [http://nbpa.org/cba\\_articles/article-XI.php#section5](http://nbpa.org/cba_articles/article-XI.php#section5) (last visited Mar. 2, 2006); see also NBPA, Collective Bargaining Agreement, *supra* note 147, at art. X(1)(b)(ii), available at [http://nbpa.org/cba\\_articles/article-X.php#section1](http://nbpa.org/cba_articles/article-X.php#section1) (last visited Jan. 26, 2006).

<sup>159</sup> See McCann, *Illegal Defense*, *supra* note 103, at 122.

most lucrative contract allowable under the NBA's collective bargaining agreement.<sup>160</sup> Currently, that maximum contract is worth approximately \$91 million over a six-year period.<sup>161</sup> Although such a contract is typically reserved for the league's best players, even far less-heralded players may obtain exorbitant deals as unrestricted free agents.<sup>162</sup> This phenomenon is not unique to basketball, as unrestricted free agents in baseball, football, and hockey likewise position themselves for extraordinarily lucrative contracts.<sup>163</sup>

Thus, the most dynamic setting for professional sports contracting occurs when a player becomes an unrestricted free agent, attracts meaningful interest from multiple teams, and negotiates with those teams to yield the optimal contract. Put differently, this setting offers a "competitive market," since there exists a market of sellers (i.e., the teams) competing for the attraction of a buyer (i.e., the player).<sup>164</sup> Though varying circumstances, such as number of interested teams and relative skill of representation, as well as collectively-bargained restraints of trade, such as "salary caps" and "luxury taxes,"<sup>165</sup>

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<sup>160</sup> See NBPA, Collective Bargaining Agreement, *supra* note 147, at art. II(7), available at [http://nbpa.org/cba\\_articles/article-II.php#section7](http://nbpa.org/cba_articles/article-II.php#section7) (last visited Jan. 26, 2006).

<sup>161</sup> *Id.* This figure is based on an amount up to thirty percent of the NBA's salary cap in effect at the time the contract is executed, and can thus change in correspondence to any changes in the salary cap. *Id.* at art. II(7)(a)(2).

<sup>162</sup> For instance, consider Mark Blount, the much-maligned Minnesota Timberwolves center, who, as an unrestricted free agent in 2004, managed to secure a six-year contract worth \$42 million with the Boston Celtics. Shira Springer, *Celtics Do New Deal for Blount*, BOSTON GLOBE, July 9, 2004, at E1. Another strikingly lucrative free agent contract was obtained by Derek Fisher, the venerable but middling point guard, who, as an unrestricted free agent in 2004, signed a six-year contract worth \$37 million. David DuPree, *Lakers Have Plenty of Retooling To Do*, USA TODAY, July 16, 2004, at 14C.

<sup>163</sup> See, e.g., WEILER, *supra* note 132, at 185 ("[A]verage MLB salaries have soared under free agency."); see also Mélanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 198-201 (describing optimal bargaining position for MLB players); Lock, *supra* note 154, at 335-39 (describing optimal bargaining position for NFL players); Stephen F. Ross, *The NHL Labour Dispute and the Common Law, The Competition Act, and Public Policy*, 37 U.B.C. L. REV. 343, 403 (2004) (describing optimal bargaining position for NHL players).

<sup>164</sup> See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1790 (1997).

<sup>165</sup> A salary cap is a ceiling on the total amount teams may spend on player salaries, while a luxury tax requires teams with payrolls over a particular threshold to pay a percentage of the excess to the other teams in the league. *Id.* Thus, a salary cap imposes an actual limit on team payroll, while a luxury tax serves as a deterrent to teams that would otherwise spend above a certain threshold. See generally Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L.

affect the degree of market competition, meaningful engagement among multiple parties tends to emerge whenever a player becomes an unrestricted free agent.<sup>166</sup>

Lastly, note the relatively brief earnings curve for most professional athletes, and thus their limited window of time to capitalize on lucrative earnings. Indeed, in all four major leagues, the average career only lasts between four and six years,<sup>167</sup> and only a small percent of players within those leagues play into their late thirties or beyond.<sup>168</sup> Along those lines, most professional athletes are considered in their “prime” for a mere two- or three-year stretch, which typically occurs between the ages of 27 and 30; outside of that window, athletes usually possess diminished earnings potential.<sup>169</sup> Thus, and along with the need to accrue sufficient service time in order to obtain free agent eligibility, many professional athletes possess only one opportunity to “cash in” as unrestricted free agents. In part for that reason, many seek to maximize their earnings as free agents. This topic, along with evidence of alternative free agent pursuits, will be explored in the following section.

## V. IDENTIFYING CHOICE, BIAS, AND HEURISTICS AMONG PROFESSIONAL ATHLETES

### A. *Evidence of Monetary-Maximizing Values Among Professional Athletes*

The setting of an unrestricted free agent negotiating with multiple teams drives several analytical interpretations. Traditional rational choice theory would posit that such an athlete, like any rational actor, would pursue maximization of

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REV. 889, 936-39 (1999) (comparing salary caps and luxury taxes as modes to ensure competitive play in professional sports).

<sup>166</sup> Other externalities might include an absence of perfect information and certain obstacles to the execution of contracts, such as league approval.

<sup>167</sup> See McCann, *Illegal Defense*, *supra* note 103, at 170 (noting that the average NBA career lasts five years); Alan Gersten, *Show Me the Money: Why Professional Athletes Make Tough Clients*, FIN. PLANNING, Mar. 1, 2005, at 5 (noting that the average NHL career lasts six years, the average MLB career lasts three and a half years, and the average NFL career also lasts three and a half years).

<sup>168</sup> See, e.g., McCann, *Illegal Defense*, *supra* note 103, at 170 (discussing how only three percent of NBA players are over the age of thirty-five); Martin Miller, *Raising the Bar at 40*, L.A. TIMES, Sept. 29, 2003, at F1 (noting how, in 2003, only eleven MLB players, nine NHL players, six NFL players, and two NBA players were forty or older).

<sup>169</sup> *Id.* But see Michael Russo, *Many Free Agents, Not Much Money*, SUN-SENTINEL, July 1, 2001, at 15C (noting several large contracts obtained by aging NHL players).

“utility,” as best, or most readily evidenced by monetary wealth. This deduction may be observed at both the macro and micro level. Most dramatically, consider the recent precipitous rise in player salaries, an ascent primarily attributed to the maximization of monetary interests during free agent bargaining.<sup>170</sup> For instance, since 1995, the average NHL player salary has risen by 245 percent (\$733,000 to \$1.8 million), during which time league revenue has grown by only 163 percent.<sup>171</sup> Similarly astounding, consider that since 1983, the average NBA player salary has grown by 1,892 percent (\$246,000 to \$4.9 million),<sup>172</sup> or that since 1989, the average MLB player salary has risen by 423 percent (\$497,000 to \$2.6 million).<sup>173</sup> These trends suggest that maximization of wealth proves a salient consideration to many professional athletes, thus corroborating a traditional rational choice model.

On a micro level, traditional rational choice would find that when players (and their representatives) negotiate with teams, they each begin with a reservation price, defined in this context as the maximum amount each is willing to relinquish or the minimum amount each is willing to accept.<sup>174</sup> To illustrate, imagine a player who seeks a contract extension

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<sup>170</sup> See generally MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003) (discussing precipitous increase in salaries among MLB players since the advent of free agency, and how such a development has disadvantaged smaller-market teams); Richard A. Kaplan, Note, *The NBA Luxury Tax Model: A Misguided Regulatory Scheme*, 104 COLUM. L. REV. 1615 (2004) (studying economic trends in the NBA); Sanjay José' Mullick, *Browns to Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1 (1996) (studying economic trends in the NFL); Joseph M. Weiler, *Legal Analysis of the NHL Players' Contract*, 3 MARQ. SPORTS L.J. 59 (1992) (studying economic trends in the NHL); ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY* (2003) (studying economic trends in MLB).

<sup>171</sup> See Dave Stubbs, *Europe Might Elbow NHL out of Picture*, MONTREAL GAZETTE, Feb. 17, 2005, at A3 (noting the increase in player salary); Michael Arace, *Players Ratify New Deal*, COLUMBUS DISPATCH, July 22, 2005, at 1F (noting the increase in league revenue).

<sup>172</sup> See *Looking for a Model? Try the NBA*, TORONTO STAR, Dec. 16, 2004, at C4 (noting the current average NBA salary); David Dupree, *NBA: Red Ink and a Bleak Future*, WASH. POST, Mar. 15, 1983, at D1 (noting the average NBA salary in 1983). The increase in average NBA salary has closely approximated the increase in league revenue, which has risen 1,840 percent since 1983 (\$160 million to \$3.1 billion). *Looking for a Model?*, *supra* (citing current league revenue); *Union Alters Stance*, N.Y. TIMES, Mar. 26, 1983, at 1 (noting projected revenues for 1984-85 season).

<sup>173</sup> See Murray Chass, *Players' Figures Show \$497,254 Pay Average*, SPORTING NEWS, Dec. 18, 1989, at 44 (noting the average MLB salary in 1989) (on file with author); Tim Tucker, *Baseball Pay Creeps Up*, ATLANTA J.-CONST., Apr. 10, 2005, at 2E (noting the current average MLB salary).

<sup>174</sup> See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 51 (1986).

from his existing team, but because he has not yet accrued sufficient service time for free agent eligibility, he cannot pursue employment with any other team should such an extension fail.<sup>175</sup> If this player enters contract negotiations with a reservation price of \$2 million per year, it means that he is unwilling to accept any contract that pays him less than \$2 million per year, and also that he is willing to pursue non-contractual resolutions in lieu of a contract for less than \$2 million per year. The primary such resolution is a “hold-out,” whereby the player refuses to report to his team (and thus forfeits pay) in hopes that doing so will motivate that team to acquiesce.<sup>176</sup>

Importantly, there exists a meaningful distinction between “public” and “private” reservation prices, and such prices may evolve in accordance with unexpected or non-static market conditions.<sup>177</sup> For instance, after completing his most recent contract with the Atlanta Braves in October 2003, pitcher Greg Maddux instructed his agent to inform teams that he would accept no less than a two-year contract worth \$20 million.<sup>178</sup> After four months of unexpectedly lukewarm interest, however, Maddux would agree to a two-year contract worth \$15 million with the Chicago Cubs.<sup>179</sup>

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<sup>175</sup> This fact-pattern arises with some regularity in MLB, the NFL, and the NHL, though less often in the NBA, as the league’s CBA stipulates more discernable contract parameters, thus diminishing opportunities for discord between player and team in negotiating contract extensions. See McCann, *Illegal Defense*, *supra* note 103, at 195.

<sup>176</sup> For instance, during NFL training camp in August 2004, Miami Dolphins’ defensive end Adewale Ogunleye held out in hopes of receiving a long-term extension instead of a one-year extension tendered by the Dolphins. Alex Marvez & Keven Lerner, *Dolphins Reward Chambers*, ORLANDO SENTINEL, Aug. 6, 2004, at D3. Rather than acquiescing to his demand, the Dolphins traded Ogunleye to the Chicago Bears, who promptly signed Ogunleye to a long-term extension. Mike Mulligan, *Bears Can Alter Stingy Image in a Buy Week*, CHI. SUN-TIMES, Aug. 24, 2004, at 105; see also 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, 275-79 (2001) (providing a detailed background of holdouts in professional sports and how players internalize the relative risks and benefits of pursuing holdouts).

<sup>177</sup> See Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1237 n.150 (describing how reservation prices are affected by modified expectations and how they may be strategically revised to accommodate such expectations).

<sup>178</sup> See Tom Verducci, *Hard Line: Will Scott Boras’s Waiting Game Help or Hurt His Clients This Year?*, SPORTS ILLUSTRATED, Jan. 19, 2004, at 84.

<sup>179</sup> Mike Kiley, *Wood Takes Cubs’ Sales Pitch*, CHI. SUN-TIMES, Feb. 28, 2004, at 102 (noting also that the contract included a possible third year for \$9 million if Maddux pitches a certain number of innings during the 2004 and 2005 seasons).

During actual negotiations, rational choice analysis would find players and teams attempting to identify their bargaining zone, which, as discussed in Section II, comprises the range of amounts between competing reservation prices.<sup>180</sup> Within this range, *any* amount would prove “mutually beneficial, or ‘Pareto superior’ to the alternative of not reaching an agreement.”<sup>181</sup> Put more succinctly by Richard Posner, Pareto superior “makes at least one person better off and no one worse off.”<sup>182</sup>

In the context of professional sports negotiations, effectively identifying the bargaining zone depends upon negotiation parameters, such as whether the negotiations concern a free agent or a current employee, as well as the number of potential suitors for the player. Predictably, a free agent with numerous teams pursuing his services generally has less of an incentive to identify a bargaining zone with any one of those teams than would a player negotiating a contract extension with his present team, particularly if that player would not become a free agent in the near future.<sup>183</sup> Bargaining zones may also provide room for settlement when the parties reach incompatible estimates of each others’ reservation price.<sup>184</sup> Along those lines, settlement proves especially likely

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<sup>180</sup> See discussion *infra* pp. 1464-65 and accompanying notes; see also Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1816-17 (2000). Professor Robert H. Mnookin characterizes the bargaining zone as the “zone of possible agreement.” See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 20 (2000).

<sup>181</sup> See Korobkin, *Aspirations and Settlement*, *supra* note 23, at 5.

<sup>182</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 14 (5th ed. 1998).

<sup>183</sup> Even with the more favorable circumstances described herein, a player may nevertheless prove unwilling to constructively pursue the bargaining zone. For instance, as discussed below on pages 1520-1524, at the start of the 2003 MLB season, it is speculated that Boston Red Sox shortstop Nomar Garciaparra was unwilling to negotiate a contract extension, despite the team’s interest in consummating one, and despite the fact that Garciaparra would not be eligible for free agency until after the 2004 season. Dan Shaughnessy, *Damaged Goods: Deal Garciaparra*, BOSTON GLOBE, July 3, 2004, at G1 [hereinafter Shaughnessy, *Damaged Goods*] (asserting that Red Sox management doubted Garciaparra’s actual willingness to negotiate). *But see* Julie S. Turner, *The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CAL. L. REV. 179, 197 (1998) (describing the presence of multiple parties as an impediment to the consummation of an agreement between two parties).

<sup>184</sup> George A. Loewenstein & Don A. Moore, *When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining*, 33 J. LEGAL STUD. 37, 45 (2004) (describing the value of large bargaining zones in difficult negotiations).

when parties perceive limited or unsatisfying alternatives to an agreement.<sup>185</sup>

Nevertheless, incompatible estimates of competing reservation prices occasionally yield impasse, whereby the parties, frustrated by their failure to reach a number within the bargaining zone, cease negotiations.<sup>186</sup> Some traditional rational choice theorists believe that impasse arises due to a lack of shared information, which eventually motivates parties to misinterpret each others' reservation price.<sup>187</sup> More recent analysis, however, suggests that sharing of information may actually *promote* divergence between the parties, particularly when such information invites disparate interpretation.<sup>188</sup> This later finding appears corroborated by the "self-serving" bias apparent during negotiations, as even contemporary rational choice analysis identifies a tendency among parties to interpret information in egoistic ways, thus further impairing their pursuit of a mutually-satisfying number.<sup>189</sup>

To illustrate the difficulties of identifying a number within the bargaining zone, as well as the presence of self-serving bias in estimating the competing reservation price, consider the effect of "market-setting" contracts in professional sports. These contracts establish an economic barometer by which other players and teams may determine market value in the same economic period. This barometer is especially illuminating in a free agency period, as it allows instant and contemporaneous comparisons of existing free agents with those who had recently signed contracts. Often, comparative

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<sup>185</sup> See Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 861 n.106 (1990) (noting that negotiations are guided by the presence of alternative and viable opportunities).

<sup>186</sup> Impasse may be defined as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health and Welfare Trust Fund for N. California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988).

<sup>187</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 525 (3d ed. 1986); see also Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 RAND J. ECON. 183 (1989) (applying information-sharing to the context of litigation, and finding that discovery promotes settlement since it reveals information to opposing parties).

<sup>188</sup> See Loewenstein & Moore, *supra* note 184, at 38-39.

<sup>189</sup> See George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 159 (1993) (identifying implications of self-serving assessments of fairness for bargaining).

characteristics include relative performance to date, expectation of future performance, age, and injury history.<sup>190</sup>

For example, consider that when the New York Mets signed pitcher Kris Benson to a three-year, \$22.5 million contract at the start of the 2004 free agency period, observers perceived the contract as “market-setting,” since it established a contemporary value for free agent pitchers of Benson’s ilk.<sup>191</sup> Indeed, following consummation of Benson’s contract, a number of free agent pitchers elevated their asking prices, and estimated their market value as greater than that of Benson, and thus warranting a contract in excess of a three-year, \$22.5 million term.<sup>192</sup> In response, the relevant negotiating teams tended to dismiss the Benson contract as reflective of one team’s desperation to win—and thus its willingness to pay above market value.<sup>193</sup> Therefore, the “new information” of Benson’s contract proved sufficiently ambiguous as to invite contrasting interpretations by the negotiating parties. In fact, several free agent pitchers and teams so disparately internalized the Benson contract that their negotiations reached irreparable impasses.<sup>194</sup> Subsequently, those pitchers initiated negotiations with new teams, and reached contracts consistent with the market established by the Benson contract.<sup>195</sup> Accordingly, by potentially bifurcating existing negotiations, a market-setting contract might establish a barometer of varying compatibility to existing and potential

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<sup>190</sup> See, e.g., Rick Carpiniello, *Free Agent Situations Are Getting Sticky*, J. NEWS, Oct. 17, 1999, at 7C (describing contract negotiations with star players in the NHL); see also Jeffrey D. Schneider, Note, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797 (1991) (discussing relevant characteristics for free agent analysis).

<sup>191</sup> See Larry Stone, *Winners of Winter*, SEATTLE TIMES, Jan. 25, 2005, at D1 (“[T]he pitching market was established, most GMs agree, when the Mets signed Kris Benson to a three-year, \$22.5 million contract.”).

<sup>192</sup> See, e.g., Tyler Kepner, *Age-Wary Yanks Pick Wright over Lieber*, N.Y. TIMES, Dec. 9, 2004, at D7 (noting that the Benson contract prompted free agent pitcher Jon Lieber to increase his own contract demands).

<sup>193</sup> See Mark Hale, *Sosa in Sight: But Fat Pact Could Break Deal for Mets*, N.Y. POST, Nov. 13, 2004, at 72 (describing the desire of new Mets’ general manager Omar Minaya to “make a splash”).

<sup>194</sup> See, e.g., Bob Elliott, *D-Backs on Spending Spree: A Day After Landing Troy Glaus, Arizona Signs Russ Ortiz to a Four-Year, \$33 Million Deal*, TORONTO STAR, Dec. 11, 2004, at S8 (citing remarks by Blue Jays’ general manager J.P. Ricciardi that Russ Ortiz altered his contract demands with the Atlanta Braves after the Benson contract); Todd Zolecki, *Yankees’ Missed Opportunity a Plus for Phillies*, PHILA. INQUIRER, Mar. 6, 2005, at D6 (discussing how the New York Yankees refused the revised demands of free agent pitcher Jon Lieber following the Benson contract, leading Lieber to sign with the Philadelphia Phillies).

<sup>195</sup> See *supra* note 192 and accompanying text.

teams, and thus impair the capacity of contemporaneously negotiating parties to identify a number within the bargaining zone.<sup>196</sup>

*B. Evidence of Alternative Preferences Among Professional Athletes*

The preceding discussion frames player-team contract negotiations as entirely driven by the distribution of monetary resources. That is, it assumes that players exclusively value financial compensation when seeking employment opportunities. Such an assumption is commonly held among Americans.<sup>197</sup> Media and other journalists often feel similarly.<sup>198</sup>

Such framing begs an important question: Why should society assume that professional athletes are *unusually* interested in monetary wealth? Indeed, as discussed in Section II, when individuals pursue employment opportunities, they often identify considerable value in non-monetary forms of “utility.”<sup>199</sup> Such forms of utility might include objective characteristics, such as preferred location or job title, or intangibles, such as projected happiness or anticipated social status.<sup>200</sup> These ideas are also consistent with rational decision-making, since “rationality” of choice refers to the

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<sup>196</sup> See *supra* notes 186-89 and accompanying text.

<sup>197</sup> See Thomas Boswell, *Players, Owners and Us*, WASH. POST, Oct. 21, 1994, at F1. Similarly, most Americans believe that athletes are paid too much money. Don Walker, *Baseball Slips a Bit on State Poll: Interest Drops with Attendance*, MILWAUKEE J. SENTINEL, May 26, 2003, at 6C (citing survey conducted by the University of Wisconsin that found that 89 percent of Americans believe professional athletes make too much money); see also, Michael Hiestand, *Put a Lid on Pro Player Salaries*, USA TODAY, Sept. 2, 2004, at 3C (citing remarks by Ralph Cindrich, an NFL player agent and former NFL player, who stated the opinion that if Americans were polled, 98 percent would say that “athletes are paid too much” money). Data suggests that teenagers feel likewise. See, e.g., Teen Ink, February 2001 Poll: Do Baseball Players Make Too Much Money, available at <http://www.teenink.com/Poll/PastPolls.html> (last visited Jan. 4, 2006) (finding that 71 percent of teenagers believe baseball players “make too much money”); *Most Kids Look Up To Athletes: Fewer Are Influenced by Them*, 12 YOUTH MARKETS ALERT 1 (2000) (finding that 43 percent of children ages ten to seventeen believe that athletes appear in ads for charities to get paid and improve their personal image, rather than caring about the cause).

<sup>198</sup> See, e.g., Mark Patinkin, *For Too Many Pro Athletes, It's All About the Money*, PROVIDENCE J., Feb. 20, 2005, at A2 (regarding the NHL Lockout of 2004-05 as evidence of greed among NHL players); Bob Raissman, *Going Ratings Bad News for Boss*, DAILY NEWS (New York), June 11, 2000, at 67 (“This is [a sports] era where it’s all about the money.”).

<sup>199</sup> See discussion *supra* pp. 1462-63.

<sup>200</sup> See *id.*

methodological pursuit of personal preferences, which vary by individual. Thus, unless professional athletes prove somehow “more greedy” than the average person, they should exhibit, with similar frequency, a preference for non-monetary forms of utility when contemplating employment opportunities.

A review of expressed player motivations for accepting offers reveals a wide-range of preferences. Although many athletes pursue the most lucrative offer available, many others opt for less remunerative opportunities. Through the following illustrations, this Article will explore alternative optimal preferences to monetary aggrandizement, and how professional athletes often embrace those preferences. In doing so, this Article will attempt to explain behavioral tendencies among professional athletes and how those athletes navigate preferences when contemplating contractual opportunities. To begin this analysis, this Article will examine a question framed strikingly dissonant with popular expectations: Why do many professional athletes choose to stay in a setting when playing elsewhere would pay substantially more?

### 1. Environmental Preference: Remaining in Place

According to many economists, individuals find it efficient to preserve familiar settings, such as location or personal contacts, and they attribute appreciable value to that preservation.<sup>201</sup> Similarly, psychologists often maintain that individuals derive confidence from acquainted surroundings, and that such confidence influences their decision-making.<sup>202</sup> This phenomenon is sometimes described as “regional affinity” or “hometown bias,” whereby individuals internalize intrinsic

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<sup>201</sup> See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (assessing value of familiarity in decision-making among individuals in hiring capacities); see also J.D. Trout & Shahid A. Buttar, *Resurrecting “Death Taxes”: Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765, 802 n.118 (2000) (describing the psychological cost of those who fled the United States to Canada to avoid service in the Vietnam War).

<sup>202</sup> See ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 89 (1996) (noting that college students perform worse on tests taken in unfamiliar surroundings); see also Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L. REV. 237, 248 (1996) (describing how individuals function better in familiar surroundings); D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and “Offender Profiling”: Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 CARDOZO L. REV. 193, 275 n.434 (2002) (quoting JOHN E. DOUGLAS ET AL., *CRIME CLASSIFICATION MANUAL* § 132 (1992)) (describing how criminal behavior is in part motivated by confidence through familiar surroundings).

value in remaining in a set location, and perceive themselves as better off by doing so.<sup>203</sup>

Professional athletes sometimes evince striking value in the preservation of their surroundings. To illustrate, consider Edmonton Oilers goaltender Tommy Salo, who, in 2000, agreed to a three-year contract extension worth \$10.4 million.<sup>204</sup> Although impressive, his contract likely reflected a market discount of approximately \$4 million, as he declined the opportunity to pursue unrestricted agency at the earliest date in his career.<sup>205</sup> Salo, however, articulated a preference for staying in Edmonton, as it reminded him of his native land, Sweden, and its citizens reminded him of Swedes.<sup>206</sup> His preferences illuminate how a professional athlete may internalize “wealth” as a concept inclusive of non-economic terms, including preservation of surroundings.

Similarly, during his nineteen-year career with the Cincinnati Reds, shortstop Barry Larkin, a Cincinnati native, identified meaningful subjective value in maintaining existing conditions. Indeed, during that time, Larkin declined several more lucrative opportunities to play elsewhere, reasoning that his continued stay in Cincinnati would exceed in value.<sup>207</sup> Intriguingly, the subjective benefit of preserving familiarity came with a subjective cost: throughout his career, Larkin endured disapprobation from fellow players and their agents for accepting less compensation to stay in Cincinnati, as doing so may have diminished the market value for players of his ilk.<sup>208</sup> Thus, the opportunity cost of forgoing enhanced compensation may include not only the difference in tangible

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<sup>203</sup> See Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 n.50 (1998).

<sup>204</sup> See Mario Annicchiarico, *Stop Sign: Salo Takes Long-Term Lease on Oilers’ Cord Cottage*, EDMONTON SUN, Nov. 3, 2000, at SP1.

<sup>205</sup> *Id.* (citing comments by Salo’s agent).

<sup>206</sup> *Id.* (quoting Salo, “[My fiancée and I] both like it here, it’s almost like back home . . . Friendly people, a good club and I’m happy to be here. That’s why I signed the contract.”).

<sup>207</sup> See, e.g., Hal McCoy, *Reds Sign MVP Larkin Through 2000*, DAYTON DAILY NEWS, Jan. 3, 1996, at 1D (quoting Larkin: “I love Cincinnati—my wife (Lisa) and I are both are [sic] from here. I’m happy here and I’ve been treated well. The Reds have been good to me. And I didn’t want to have to test the free agent market after next season.”).

<sup>208</sup> See Hal McCoy, *Larkin Feels Asking Price Is Fair*, DAYTON DAILY NEWS, July 20, 2000, at 1D (quoting Larkin: “[B]ecause I signed for less money when I signed my contracts in the past . . . I caught a lot of grief from guys around the league and other agents for signing for under value.”).

compensation, but also the “cost” of coping with hard feelings from peers who are more interested in financial recompense.

Other professional athletes indicate a preference to stay in a location because of positive relations with teammates and coaches, coupled with uncertainty as to whether such relations may manifest in other settings. To illustrate, when Teemu Selanne re-signed with the San Jose Sharks in 2002, he accepted a pay reduction of nearly \$3 million from his prior annual salary of \$9 million, even though, as an unrestricted free agent, a number of teams were offering to pay him more than \$9 million per year.<sup>209</sup> At the time, the cash-strapped Sharks lacked the budgetary resources to pay Selanne his market value, thus forcing him to compare the subjective value of remaining a member of the Sharks with the subjective value of playing elsewhere for more money.<sup>210</sup> In explaining his decision to re-sign, Selanne described how, over the course of his eleven-year career, he had become increasingly appreciative of team camaraderie, as well as the feeling of playing for a “classy organization,” and that such “personal goals” proved greater in value than additional millions of dollars.<sup>211</sup> Reflecting upon Selanne’s decision to forgo several million dollars, Sharks’ general manager Dean Lombardi noted, “this is clearly a case where money was not important.”<sup>212</sup>

In exploring the role of alternative preferences among professional athletes, loyalty may offer a useful corollary to positive relations with teammates and coaches. As a behavioral concept, “loyalty” refers to a continuous cognitive affirmation of a particular entity, such as a nation, employer, or team, and its continuousness results from the feelings of well-being that it generates.<sup>213</sup> Continuous cognitive affirmation, however, tends to trigger suppression or obfuscation of negative associations, while promoting the exaggeration or even invention of favorable aspects.<sup>214</sup> More

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<sup>209</sup> See Robin Brownlee, *Selanne’s a Fine Fit in San Jose: Teemu Enjoying Life in Fast Lane with Sharks*, EDMONTON SUN, Oct. 18, 2002, at SP2.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* (quoting Selanne, “I could have got more money other places, but you have to see the whole picture.”).

<sup>212</sup> See *Selanne Spurns East to Stay with Sharks*, OTTAWA SUN, July 6, 2002, at 56.

<sup>213</sup> See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

<sup>214</sup> *Id.*; see also Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087, 1103-04 (questioning the desirability of loyalty when Supreme Court clerks refrain from discussing their experiences on the Court); Randall Morck, *Behavioral Finance in Corporate Governance-Independent Directors and Non-Executive Chairs*,

simply put, loyal persons tend to ignore the bad and focus on the good of their object of loyalty, and they do so because it makes them happy.

Considering the subjective value of happiness engendered by loyalty, perhaps it should come as no surprise that certain professional athletes identify a duty of loyalty to their team as a rationale for accepting less compensation. To illustrate, consider the decision-making process of St. Louis Cardinals pitcher Matt Morris, who, in signing a three-year, \$27 million contract in January 2002, accepted a steep hometown discount.<sup>215</sup> At the time, the 26-year old Morris had recently completed a dominant, 22-win season and was eligible to become a free agent at the conclusion of the 2002 season, when he may have obtained twice the salary on the open market.<sup>216</sup> Though acknowledging that he “definitely left money on the table,” Morris highlighted a sense of loyalty to the team, particularly since it had “always treated [him] well” and helped him recuperate from injuries.<sup>217</sup> For Morris, this sense of loyalty may have been worth \$27 million, thus illuminating the material degree of subjective value associable with alternative preferences.

Professional athletes also occasionally cite family considerations as a rationale for remaining in a location, as some are willing to sacrifice meaningful compensation in order to stay in close proximity to family members. For instance, during the 2002 MLB season, Tampa Bay Devil Rays’ first baseman Fred McGriff initially refused to waive a no-trade clause in his contract after the team had agreed to trade him to the Chicago Cubs.<sup>218</sup> At the time, the Devil Rays were in last place, while the Cubs were positioning themselves for a World Series run. Along with the opportunity to join a contending

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Harvard Institute Economic Research Discussion Paper 2037, at 3 (2004), available at <http://post.economics.harvard.edu/hier/2004papers/HIER2037.pdf> (discussing risks of loyalty among corporate officers).

<sup>215</sup> See Rick Hummel, *Morris Says Cards Were Fair in Negotiations on Contract*, ST. LOUIS POST-DISPATCH, Jan. 5, 2002, at 18.

<sup>216</sup> *Id.* In fact, Morris finished third in the balloting for the 2001 Cy Young Award. See Baseball-Reference.com, Awards Voting for 2001, [http://www.baseball-reference.com/awards/awards\\_2001.shtml](http://www.baseball-reference.com/awards/awards_2001.shtml) (last visited Jan. 4, 2006); see also Bernie Miklasz, *Rams Wouldn't Mind Meeting "Someone New" in Playoffs*, ST. LOUIS POST-DISPATCH, Jan. 5, 2002, at 3 (describing how Morris “could have made a lot more money if he'd waited a season to test the free-agent market”).

<sup>217</sup> See Hummel, *supra* note 215.

<sup>218</sup> See Stephen Cannella, *Inside Baseball*, SPORTS ILLUSTRATED, Aug. 6, 2001, at 70.

team, the Cubs also offered to raise McGriff's annual salary from \$6.75 million to \$7.25 million, as well as extend his contract for an additional year at a salary of \$8.5 million—an extraordinary economic conferral for a 39-year old first baseman.<sup>219</sup> McGriff, however, posited the value of remaining with his wife and two young children as greater in value than playing for a contender and an enhancement in pay: “I get to see my family all the time [in Tampa]; *I'm happy.*”<sup>220</sup> Nevertheless, such subjective value apparently contained a discernable limit: McGriff agreed to the trade 19 days later, after the Cubs had offered even more money, and apparently to a sufficient level for McGriff to value waiving his no-trade clause over remaining with his family in Tampa.<sup>221</sup>

## 2. Environmental Preference: Moving to a Preferable Setting

Professional athletes also choose to play in new locales that satisfy certain wants over other opportunities that might pay more. In some instances, professional athletes yearn to return home, or to be close to family; in others, they seek to experience characteristics of the setting, such as favorable weather, cultural offerings, or societal tendencies. Social psychologists sometimes describe the desire to move to a particular location as part of one's “active agen[cy],” whereby individuals interpret their preferences to be associative of a new locale.<sup>222</sup> As evinced by the decision-making methodology of certain free agents, active agency appears highly salient in professional sports.

To illustrate, consider the much-queried decision of Utah Jazz power forward and unrestricted free agent Donyell

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<sup>219</sup> *Id.* Generally, position players in their late thirties and early forties have difficulty securing such exorbitant contracts. See, e.g., Susan Vinella & John Mangells, *Nothing Personal: The Indians' Analysis Shows It Makes Little Business Sense to Offer Long Contracts to Older Players*, PLAIN DEALER, Sept. 22, 2003, at A1. But see Gordon Edes, *Dodgers Break Bank to Land Ace Brown*, BOSTON GLOBE, Dec. 13, 1998, at E1 (citing concern by Sandy Alderson, executive vice president of baseball operations for Major League Baseball, that players in their late thirties and early forties will eventually obtain lucrative contracts with more regularity).

<sup>220</sup> See Bruce Miles, *Cubs Not Giving Up Hope on McGriff*, CHI. DAILY HERALD, July 13, 2001, at 1 (emphasis added).

<sup>221</sup> See Cannella, *supra* note 218, at 70. McGriff claimed that he ultimately agreed to the trade because he “didn't want to make a hasty decision. I knew I had time to think about it. I wanted to analyze things.” *Id.*

<sup>222</sup> See Dorothy Rowe, *Watching You Watching Me*, 10 OPEN MIND 45, 50 (2003).

Marshall during the 2002 off season: he elected to sign a three-year, \$14 million contract with the Chicago Bulls, even though he was offered a four-year, \$27 million contract to stay with the Jazz.<sup>223</sup> In explaining his decision, Marshall stated a preference for living in Chicago and experiencing its culture over living in Salt Lake City and continuing to experience its culture, and that such a preference was worth more to him than the significant disparity in pay.<sup>224</sup> Paradoxically, that same off-season, Philadelphia 76ers power forward and fellow unrestricted free agent Matt Harpring signed a four-year contract with the Jazz worth \$18.5 million, or \$2.5 million less than he was offered by the Bulls for the same length of contract.<sup>225</sup> In other words, while Marshall was willing to accept less money in order to leave Utah for Chicago, Harpring was willing to take less to move there instead of Chicago.

Similarly influential may be preference for warm weather, particularly after playing in cold weather environments for some years. The decision-making process of nose tackle Fred Smerlas in 1990 demonstrated this concept. At the time, Smerlas, who had played the previous eleven seasons with the Buffalo Bills, was an unrestricted free agent in receipt of three offers: a guaranteed, two-year, \$1 million offer from the New England Patriots; a non-guaranteed, one-year, \$650,000 offer from the Bills; and a non-guaranteed, one-year, \$500,000 offer from the San Francisco 49ers.<sup>226</sup> Smerlas selected the 49ers' offer, even though it was the least lucrative,

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<sup>223</sup> See Rich Evans, *Marshall Gets Less \$\$\$ to Sign with Chicago*, DESERET NEWS, Aug. 17, 2002, at D5.

<sup>224</sup> See Lacy J. Banks, *Marshall Not Money Hungry*, CHI. SUN-TIMES, Aug. 20, 2002, at 99 (quoting Marshall: "One reason was [that Chicago is] centrally located for myself, for my family as well as for [my fiancée's] family" and, despite passing up \$13 million in leaving the Utah Jazz, "[t]his is a decision that is going to . . . make my family happy."); see also Tim Buckley, *No Donyell? Marshall's Agent Says Talks with Jazz Are Stalled*, DESERET MORNING NEWS, July 20, 2002, at D1 (citing comments from Marshall's agent that his client was concerned about "quality of life" and that he expressed a willingness to accept much less in compensation in order to obtain it elsewhere). The following year, Marshall was traded to the Toronto Raptors. Roman Modrowski, *Rose, Davis Headline Bulls-Raptors Trade*, CHI. SUN-TIMES, Nov. 30, 2003, at 114.

<sup>225</sup> Lacy J. Banks, *Harpring Signs with Jazz*, CHI. SUN TIMES, Aug. 16, 2002, at 143; see also K.C. Johnson, *Summer Snub Doesn't Faze Harpring*, CHI. TRIB., Nov. 24, 2002, at 13 (noting that Harpring also rejected a more lucrative contract to stay with the 76ers).

<sup>226</sup> Larry Weisman, *Smerlas, 49ers Agree to Terms*, USA TODAY, Mar. 29, 1990, at 7C. Although the 49ers' offer, unlike the offers from the Patriots and Bills, contained the prospect of a bonus, it lacked the guarantee and total value of the Patriots' offer, and the Bills' base salary was higher. *Id.* For those reasons, Smerlas' agent, Jack Mula, acknowledged "we took less money." *Id.*

and even though it lacked a guarantee.<sup>227</sup> According to his representative, Jack Mula, Smerlas valued the “warm weather” of San Francisco in distinguishing between the offers.<sup>228</sup> Neither Smerlas nor other professional athletes are especially unique in identifying worth in warm weather; scientific data suggests seasonal and weather changes may affect mood and happiness, thus motivating individuals to pursue settings most compatible with weather preferences.<sup>229</sup>

Other professional athletes prefer settings that ascribe to normative desires, and that also reflect appealing contrasts to existing conditions. For instance, when free agent outfielder Kirk Gibson signed with the Kansas City Royals in 1990, he declined several offers of greater economic value, reasoning that, after three years of living in Los Angeles, he most preferred a relaxed setting in a relatively small city.<sup>230</sup> Similarly, he expressly desired an unhurried culture with mid-west values.<sup>231</sup> Gibson’s choice suggests that active agency may be fungible, and influenced by mirrored reflections of current conditions. Such a disposition appears corroborative of findings that individuals often proscribe value to new settings, simply because those settings contrast to existing and unfavorable circumstances.<sup>232</sup> This is sometimes called the “grass is always greener” phenomenon.<sup>233</sup>

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<sup>227</sup> *Id.* Unlike in the MLB, the NBA, or the NHL, player contracts in the NFL may be non-guaranteed. See generally Adam W. Heller, *Creating a Win-Win Situation Through Collective Bargaining: The NFL Salary Cap*, 7 SPORTS LAW. J. 375, 389-97 (2000).

<sup>228</sup> E-mail from Jack Mula, Chief Administrative Counsel, New England Patriots, to the author (Mar. 30, 2005) (on file with author).

<sup>229</sup> See Leo Sher, *Seasons and the Brain*, 358 LANCET 2092 (2001) (describing research findings pertaining to “seasonal affective disorder,” a disorder causing individuals to become depressed when exposed to prolonged cold or dreary weather); see also Timo Partonen & Jouko Löonnqvist, *Seasonal Affective Disorder*, 352 LANCET 1369 (1998) (recommending greater exposure to warm weather and sunlight as best remedies to seasonal affective disorder).

<sup>230</sup> See *Royals Sign Kirk Gibson*, UNITED PRESS INT’L, Dec. 1, 1990 (Lexis News Wire).

<sup>231</sup> *Id.* (quoting Gibson, “I guess I’ve always been kind of a country boy. Coming from Los Angeles, I know I’ll never have to sit in six lanes of traffic at 1 o’clock in the afternoon to go six miles in 35 minutes.”).

<sup>232</sup> See, e.g., Barbara Millar, *Relocation: Where the Grass Is Always Greener*, NURS. TIMES, June 14, 2001, at 28, 28-29 (2001) (describing methodology of nurses when they seek to move to new hospitals and new cities); Edilberto O. Pelausa, *Moving to America: Is the Grass Really Greener?*, 31 J. OTOLARYNGOLOGY 65, 73-75 (2002) (discussing dissonance between expectations and realities for foreign otolaryngologists who move to the United States).

<sup>233</sup> Miller, *supra* note 232, at 29 (on file with author).

The allure of playing on a championship-contending team also attracts professional athletes to sacrifice fortune. This is especially apparent among those professional athletes nearing the end of their careers. Consider, for instance, the decision of unrestricted free agent Alonzo Mourning to sign a four-year, \$22 million contract with the New Jersey Nets in 2002.<sup>234</sup> Though he was presented with a more lucrative offer from the Dallas Mavericks, Mourning believed that playing with the Nets would provide a greater probability of winning a championship.<sup>235</sup> In the twilight of his career, Mourning identified particular value in this motivation, as he deemed a championship the critically missing piece of his professional biography.<sup>236</sup> For that reason, Mourning expressed a willingness to sacrifice meaningful economic remuneration in exchange for enhanced probability of team success.<sup>237</sup>

Professional athletes also seek new settings that might enhance perceived personality traits. To illustrate, consider the decision-making process of pitcher Eddie Guardado, who, as an unrestricted free agent in 2003, opted to sign with the Seattle Mariners for less compensation than he was offered by teams in larger media markets, including the Boston Red Sox and the Chicago Cubs.<sup>238</sup> Significantly, Guardado articulated a predilection for an environment in which he would “not [be in] the limelight.”<sup>239</sup> Similarly, he aspired a setting where media commentary would prove less hurtful to his family.<sup>240</sup> Thus, Guardado appeared highly cognizant of the relationship between playing environment and happiness, and he placed corresponding value in that recognition when choosing between offers.

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<sup>234</sup> Charlie Nobles, *Mourning Shows the Rust, but Dreams About the Ring*, N.Y. TIMES, July 14, 2003, at D2.

<sup>235</sup> See Mike Celizic, *Give Nets Credit for Major Coup*, MSNBC SPORTS, July 11, 2003, <http://msnbc.msn.com/id/3074478/>.

<sup>236</sup> See Nobles, *supra* note 234.

<sup>237</sup> See Celizic, *supra* note 235 (quoting Mourning: “[I]t’s not just about the money . . . . It’s about winning, too.”). For a similar instance, consider Brett Hull’s decision to sign with the Detroit Red Wings in 2001. He signed for less because he perceived the opportunity to win a Stanley Cup as more valuable than millions extra in compensation. See *Hull Joins Hasek, Robitaille in Detroit*, ESPN.COM, Aug. 23, 2001, <http://espn.go.com/nhl/news/2001/0821/1242288.html>.

<sup>238</sup> See *Red Sox to Hire Francona Today*, SEATTLE TIMES, Dec. 4, 2003, at D2; Mike Dodd, *Setup Men Face High-Pressure Relief with Low Pay*, USA TODAY, Mar. 26, 2004, at 1C. Guardado signed a three-year, \$13 million contract with the Mariners. Dodd, *supra*, at 1C.

<sup>239</sup> Dodd, *supra* note 238, at 1C.

<sup>240</sup> See *Red Sox To Hire Francona Today*, *supra* note 238, at D2.

Lastly, by externally imposing alternate preferences, the families of professional athletes may also influence decision-making of free agent opportunities. Take, for instance, defensive end Sean Jones, who, as an unrestricted free agent in 1996, attracted significant interest from NFL teams.<sup>241</sup> He ultimately chose to sign with the Green Bay Packers, even though he was offered more money by other teams.<sup>242</sup> Jones revealed that his choice was “pretty much [his] wife’s decision,” as she required that he to play in a city where there would be comparatively few “late night” options for players.<sup>243</sup> Indeed, Mrs. Jones wanted assurance that her husband “would be home at a reasonable time of night.”<sup>244</sup>

### 3. Risk Aversion

A separate, non-geographic rational preference also deserves discussion: risk aversion, or the willingness to pay more money (or accept less money) to avoid participation in a risky activity, even when the expected value of the activity is favorable.<sup>245</sup> As captured by the adage, “A bird in hand is worth two in the bush,” risk-aversion signifies that the prospect of losing a dollar already owned weighs more heavily than the chance of gaining a dollar not yet owned.<sup>246</sup> More

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<sup>241</sup> David Aldridge, *Green Bay’s Low-Key High Life; Big-time Athletes Adjust to Small Town*, WASH. POST, Jan. 13, 1996, at F3.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* For perhaps a similar illustration of familial influence, consider remarks by former Boston Red Sox great Johnny Pesky, for whom Fenway Park’s “Pesky Pole” is named, concerning his decision to sign with the Red Sox in 1940:

Back then, you could sign with anybody—there was no draft yet. There were a number of teams interested in me, and some offered more money than Boston. My mother and father wanted me to sign with the Red Sox, though, because their scout brought her flowers when he came to the house—and bourbon for my father. They were immigrants, and even though it was the Depression, that was more important than the extra money. I’m glad it worked out the way it did.

David Laurila, *Interview with Johnny Pesky*, RED SOX NATION, May 29, 2004, <http://www.redsoxnation.net/forums/index.php?showtopic=5219>.

<sup>245</sup> See RICHARD A. BREALEY, AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS 47-54 (1969) (explaining the relationship between risk and value); Lynn M. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE. L.J. 701, 736 (1999) (describing how individuals with greater tolerance for risk can reap benefits by accepting risks avoided by others).

<sup>246</sup> See JOHN MUELLER, CAN FINANCIAL ASSETS BEAT SOCIAL SECURITY? NOT IN THE REAL WORLD 4 (1997), available at <http://heartland.org/pdf/80785B.pdf>. See also

formalistically then, a risk-averse individual would prefer suffering a certain harm of \$100 to suffering a harm of \$1,000 with a 10 percent probability of occurring, in spite of their identical expected values.<sup>247</sup> Such decision-making manifests itself across economic, political, and legal spectrums, and affects both individual and institutional choices.<sup>248</sup>

Professional athletes occasionally evince risk aversion in explaining their acquiescence to below-market contract offers. Cleveland Browns quarterback Kelly Holcomb is one such player. Prior to the start of the 2002 NFL season, Holcomb served as the primary backup quarterback to starting quarterback Tim Couch.<sup>249</sup> At that time, Holcomb was 29 years old and appeared destined for a career as a backup quarterback.<sup>250</sup> The Browns offered him a two-year contract extension worth nearly \$2.2 million<sup>251</sup>, which essentially reflected the going-rate for backup quarterbacks.<sup>252</sup>

Significantly, Holcomb was set to become an unrestricted free agent at the end of the 2002 season. Considering that typically between 10 and 20 percent of starting quarterbacks miss more than five games each year due to injury, and that a similarly meaningful percentage play poorly and are benched, Holcomb, like any backup quarterback,

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DONALD N. MCCLOSKEY, *THE APPLIED THEORY OF PRICE* 65-70 (2d ed. 1985) (providing economic description of risk aversion).

<sup>247</sup> See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1074 (2001) (explaining risk aversion in the insurance context). See also Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 366-67 (1984) (discussing how risk aversion among townspeople affects their preferences for local policies).

<sup>248</sup> See Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 209 (1999) (reconciling risk aversion among criminal defendants with insufficient plea bargain offers by prosecution); Albert J. Boro, Jr., *Banking Disclosure Regimes for Regulating Speculative Behavior*, 74 CAL. L. REV. 431, 451 (1986) (explaining how fiduciary duties and the threat of legal liability encourages risk aversion among institutional investors); David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 CARDOZO L. REV. 691, 697 (2005) (discussing risk aversion of President Bill Clinton when selecting judicial nominees for federal appellate positions).

<sup>249</sup> *American Football Conference Team Notes*, SPORTING NEWS, July 29, 2002, at 51.

<sup>250</sup> *Id.* (describing Holcomb in rather modest terms, "Kelly Holcomb is a steady backup who won't win games but won't lose them either").

<sup>251</sup> See Mary Kay Cabot, *Former Browns Pay Disorderly Conduct Fine*, PLAIN DEALER, Apr. 30, 2002, at D7 (noting that the contract included a signing bonus of \$325,000 and base salaries of \$825,000 and \$975,000, for a total value of \$2,175,000).

<sup>252</sup> See, e.g., Mark Eckel, *Brian's Song*, TIMES OF TRENTON, Aug. 7, 2005, at C9 (noting that, in 2005, NFL back-up quarterbacks tend to make at least \$1.4 million per year).

could have declined a market-value extension, and chosen instead to “gamble” that Couch would either suffer injury or play poorly, thus elevating Holcomb to the starting position.<sup>253</sup> Indeed, in light of established NFL precedent, just one start may have offered the opportunity to catapult his market value: quarterback Rob Johnson had only one start in three seasons with the Jacksonville Jaguars between 1996 and 1998, but played very well in the start, prompting the Buffalo Bills to trade for him, and sign him to a five-year, \$25 million contract.<sup>254</sup>

On the other hand, Holcomb was presented with a contract worth almost \$2.2 million, and chances were, he would not play more than a few plays during the 2002 season, and thus not elevate his market value. Indeed, Couch had proven remarkably durable, not missing a single start in the 2001 season.<sup>255</sup> Moreover, Holcomb recognized the prospect of injury in practice or otherwise during the 2002 season, and would have regretted not signing the extension in the event of such occurrence.<sup>256</sup> Presented with these risk assessment variables, Holcomb elected to sign the contract extension.<sup>257</sup>

During the last preseason game for the Browns in 2002, Holcomb may have suddenly felt regret. In that game, Couch suffered an elbow injury that would cause him to miss the first two games of the regular season. Holcomb went on to start those two games, as well as play in most of the season’s third game, and would play extraordinarily well, throwing nine touchdowns and just two interceptions, while leading the NFL in Quarterback Rating.<sup>258</sup> When confronted with speculation as

<sup>253</sup> See, e.g., Will McDonough, *Ironic Twists in Bledsoe Saga*, BOSTON GLOBE, Apr. 28, 2002, at D2 (noting that one or two starting quarterbacks is typically injured in the preseason, and that several others tend to “fail miserably”).

<sup>254</sup> See Larry Weisman, *Bills’ Playbook a Work in Progress*, USA TODAY, Aug. 5, 1998, at 10C.

<sup>255</sup> See ESPN.com, Green Bay Packers, # 2 Tim Couch-QB, <http://sports.espn.go.com/nfl/players/stats?statsId=4649> (last visited Jan. 4, 2006).

<sup>256</sup> For instance, during the 1994 NFL season, Tampa Bay Buccaneers backup quarterback Trent Dilfer was set to ascend to the starting quarterback position, but was injured in practice, thus delaying his ascension. See David Elfin, *Growing Pains: Rookies Schuler, Dilfer Find Life Tough in NFL*, WASH. TIMES, Dec. 3, 1994, at C1.

<sup>257</sup> See Tony Grossi, *Holcomb Takes What’s Dealt: Backup Quarterback Doesn’t Regret Signing Contract Extension*, PLAIN DEALER, Nov. 17, 2002, at C14.

<sup>258</sup> See *id.* “Quarterback rating” is a composite statistic based on four criteria: 1) percentage of completions per attempt; 2) average yards gained per attempt; 3) percentage of touchdown passes per attempt; and 4) percentage of interceptions per attempt. See *NFL Quarterback Rating Formula*, NFL News, <http://www.nfl.com/news/981202qbrate.html> (last visited Jan. 4, 2006).

to how much more money he *could* have earned had he declined the contract extension and pursued free agency, Holcomb noted a conscious internalization of risk: "It's that old saying, one bird in hand is better than two in the bush."<sup>259</sup> In other words, by signing the contract extension, Holcomb prescribed subjective value to the nullification of risk, and that subjective value was worth more to him than the difference in objective value between the contract extension and his prospective free agent status, discounted by risk of injury, poor performance, or other impairments of play.<sup>260</sup>

Risk aversion also emerges when players attempt to forecast market changes. For instance, when former Red Sox outfielder Mike Greenwell declined to elect for free agency in 1994, and instead surprisingly agreed to a two-year, \$7.3 million contract extension, he highlighted a market strategy based on his risk preferences.<sup>261</sup> Specifically, Greenwell anticipated that because of public outrage associated with the baseball players' strike in 1994, fans would soon turn away from baseball in droves, thus contracting the value of the game and leading to diminished player salaries.<sup>262</sup> Consequently, Greenwell perceived a discounted contract in an existing market as more valuable than a market-value contract in an uncertain and future market.

Unfortunately for Greenwell, his market projections would prove largely erroneous. Even though MLB player salaries dipped 1.3 percent from 1994 to 1995,<sup>263</sup> they increased by 3.5 percent from 1995 to 1996, followed by a 17.0 percent surge from 1996 to 1997.<sup>264</sup> Nevertheless, his expressed

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<sup>259</sup> *Id.*

<sup>260</sup> Recent economic analysis suggests that risk aversion among professional athletes also affects contracting of off-court responsibilities, such as extent of team monitoring of player activities. See Örn B. Bodvarsson & Raymond T. Brastow, *Do Employers Pay for Consistent Performance?: Evidence from the NBA*, 36 *ECON. INQUIRY* 145, 152-58 (1998).

<sup>261</sup> See *Greenwell Remains in Red Sox Tradition*, *N.Y. TIMES*, Mar. 17, 1994, at B12.

<sup>262</sup> See Nick Cafardo, *Greenwell Not Holding a Grudge*, *BOSTON GLOBE*, Apr. 3, 1995, at 46 (quoting Greenwell: "People were wondering . . . why I took the offer they made. Well, I'm not that stupid. I'm a little smarter than people think. I knew what was coming. Right now, I'm extremely happy I signed the contract that I did when I did.").

<sup>263</sup> See *Baseball Salary Decline*, *WASH. POST*, Apr. 30, 1995, at D6 (also noting that while many players took pay cuts following the strike of 1994, the top stars continued to observe their salaries surge considerably).

<sup>264</sup> See Erik Brady & David Leon Moore, *Big Sports, Bigger Bucks: Just How High Can Players' Salaries Go?*, *USA TODAY*, Apr. 3, 1997, at 1A.

rationale for negotiating a below-market value contract extension suggested a conscious, tactical strategy based on risk preferences.

### C. *Evidence of Cognitive Biases and Heuristics*

The preceding subsection described alternative preferences among professional athletes when contemplating employment opportunities. In doing so, it largely endorsed rational choice theory: individuals appear to rank preferences, and then, as reflected in their choices, maximize those preferences in their decision-making process. Thus, when professional athletes choose a “discount” offer, it simply reflects a conscious ranking of non-monetary preferences ahead of remunerative preferences.

Doubtless, a rational choice model strikes an appealing rubric, since it more broadly suggests that individuals act rationally when making decisions, and that such decisions reflect conscious preferences. Moreover, given societal skepticism towards the intellectual capacity of most professional athletes,<sup>265</sup> typical individuals might infer confidence from the capacity of professional athletes to engage in rational decision-making. In short, based on the rational-choices of professional athletes, individuals appear to possess not only the capacity to navigate through difficult professional decisions, but also the tendency to select the “optimal” choice.

This analysis, however, is incomplete. Indeed, as discussed in Section III, cognitive biases and heuristics, unbeknownst to decision-makers, frequently disturb decision-making processes. Perhaps then it should come as no surprise that professional athletes appear likewise influenced by choice distortions.

#### 1. Framing Effects

Framing effects suggest that varied wording of equally-valuable options can induce individuals into valuing them differently.<sup>266</sup> How might framing effects influence professional

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<sup>265</sup> See Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 631 (1995) (describing how, even when they evince high intellectual capacity, collegiate athletes are frequently discouraged by scholastic advisors from taking “hard” classes, and instead enrolled in less burdensome courses).

<sup>266</sup> See discussion *supra* p. 1470 and accompanying notes.

athletes when selecting employment opportunities? Consider the influence of team negotiators, such as general managers or owners, and how some adroitly utilize invention, red herrings, and props to spawn illusory distinctions.

Framing effects among professional teams are especially evident in the NBA, where salaries have maximum limits, meaning that teams often extend identical offers to premiere free agents.<sup>267</sup> Without the potential of distinguishing financial terms, NBA teams routinely employ aggressive recruiting tactics, and these tactics sometimes amplify trivial distinctions. For instance, when the Chicago Bulls courted unrestricted free agents in the summer of 2001, they arranged for a band, assorted mascots, and numerous front office officials to greet each player upon his arrival at O'Hare International Airport.<sup>268</sup> Bulls' general manager Jerry Krause had hoped that such a marketing strategy would frame the Bulls as a franchise of particular "substance" and player care.<sup>269</sup>

Similarly, to promote distinction in relative levels of interest, NBA general managers are known to call free agents at the *very* first moment when teams are allowed to contact free agents. This moment usually occurs at 12:01 A.M. of an early July morning.<sup>270</sup> Occasionally, this strategy appears influential in free agents' decision-making. For instance, in explaining his decision to sign with the New York Knicks in 2004, free agent guard Jamal Crawford highlighted an enthusiastic phone call that he had received from New York Knicks' general manager Isiah Thomas at the very first moment when teams could contact free agents.<sup>271</sup> Crawford

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<sup>267</sup> See discussion *supra* pp. 1488-89 and accompanying notes.

<sup>268</sup> See Lacy J. Banks, *Krause Made the Right Call Targeting Jones*, CHI. SUN-TIMES, July 14, 2000, at 138.

<sup>269</sup> *Id.* This strategy did not work, however, as none of the five primary free agents Krause pursued (i.e., Tim Duncan, Tracy McGrady, Grant Hill, Eddie Jones, and Tim Thomas) signed with the Bulls, and they instead chose identical offers from other teams. See Fred Mitchell, *Local Agent Discounts Talk of Anti-Bulls Conspiracy*, CHI. TRIB., Dec. 12, 2000, at N3.

<sup>270</sup> This date varies, depending upon the NBA calendar, but usually occurs between July 1 and July 15.

<sup>271</sup> See Mike Lupica, *Isiah Giving Crawford His Shot to Score with Fans*, DAILY NEWS (New York), Nov. 3, 2004, at 74. Perhaps more often, however, this strategy proves immaterial. See, e.g., Mark Montieth, *O'Neal to Visit Spurs*, INDIANAPOLIS STAR, July 2, 2003, at 1D (noting that although Isiah Thomas personally called unrestricted free agents Jermaine O'Neal and Reggie Miller, neither of them signed with the Knicks); Liz Robbins, *Kidd's a Free Agent, and Phones Ring*, N.Y. TIMES, July 2, 2003, at D6 (describing unsuccessful efforts by the Dallas Mavericks and San Antonio Spurs to recruit free agent Jason Kidd, and that such efforts entailed calling him at 12:01 A.M.).

regarded the call as instrumental in helping him distinguish between identical offers.<sup>272</sup>

Framing effects also emerge in other professional sports contexts, albeit more conjecturally. For instance, when the New York Mets successfully pursued free agent pitcher Pedro Martinez in 2004, Mets' general manager Omar Minaya is thought to have intimated to Martinez that since he, like Martinez, was of Dominican descent, Martinez could "trust" him more than Theo Epstein, Minaya's counterpart on the Boston Red Sox and for whom Martinez had been playing.<sup>273</sup> Such fact patterns undermine the rational choice model, and suggest that choices may not reflect a pristine maximization of utility or relative strength of preferences, but rather vulnerability to unappreciated factors, such as sales pitches and manipulative overtures.

## 2. Confirmation Bias

Similarly influential is the effect of confirmation bias, whereby individuals are subject to ignore or discount information that challenges existing beliefs.<sup>274</sup> This disposition occasionally arises when professional athletes encounter a uniquely positive experience on a particular team, and are thereafter prone to positively interpret ambiguous circumstances and to dismiss negative associations. Since they are prone to misinterpret signals and cues, professional athletes affected by confirmation bias may unknowingly dismiss salient—and thus valuable—distinguishing characteristics.

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<sup>272</sup> Lupica, *supra* note 270, at 74.

<sup>273</sup> See Filip Bondy, *Pedro Plays N.Y. Way in City, Everyone Has Own Set of Rules*, DAILY NEWS (New York), Dec. 17, 2004, at 104; see also Gordon Edes, *Martinez Is Starting Already in Mets Camp, He's Starting Already!*, BOSTON GLOBE, Feb. 16, 2005, at F1 (citing remarks by Martinez that he gave his word to Minaya while he could not do the same to Epstein, who he believed—in spite of facts supporting the opposite conclusion—was not genuinely interested in re-signing him).

<sup>274</sup> See Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 16, at 647-50. A corollary to confirmation bias is "self-serving" or "egocentric" biases, whereby individuals interpret information in a way that disproportionately favors their own position. Unlike confirmation bias, however, self-serving or egocentric biases are likely consciously present. See Guthrie, *Framing Frivolous Litigation*, *supra* note 55, at 206 n.199 (noting that these biases may increase plaintiffs' risk in seeking frivolous litigation); see also Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON PERSPECTIVES 109 (1997) (discussing the impact of self-serving biases on settlements).

To illustrate, consider the events that led to Jermaine O'Neal's decision to re-sign with the Indiana Pacers in 2003. O'Neal's NBA career began in 1996, when he was drafted by the Portland Trailblazers.<sup>275</sup> After four unspectacular seasons, O'Neal was traded to the Pacers.<sup>276</sup> As a Pacer, O'Neal developed a close bond with head coach Isiah Thomas, who devoted much of his time to O'Neal and helped him become a star. In fact, O'Neal would call Thomas his "father figure."<sup>277</sup> Besides his on-court instruction, Thomas would also serve O'Neal as an emotional buffer, as best evidenced by Thomas' counseling of O'Neal after the player's stepfather attempted suicide by shooting himself in the head—in O'Neal's presence—in 2002.<sup>278</sup>

The O'Neal-Thomas relationship emerged as mutually beneficial. Indeed, O'Neal would often rush to the defense of Thomas, whose coaching strategies were widely-criticized and whose teams often appeared underachieving.<sup>279</sup> For instance, when doubts were raised of Thomas' competence, O'Neal would regularly characterize his coach as a victim of unrealistic expectations, saddled by prior management decisions that created an on-going re-building process.<sup>280</sup> Such comments bewildered many observers, as the Pacers were generally regarded as one of the league's most talented teams, and one

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<sup>275</sup> See Ken Vance, *Blazers President Not Afraid of Change*, COLUMBIAN (Vancouver, WA), June 30, 1996, at C1.

<sup>276</sup> See Brian Meehan, *O'Neal Becoming a Force on the Court for Indiana*, OREGONIAN, Nov. 26, 2000, at C11.

<sup>277</sup> See Lacy Banks, *Pacers in Limbo After Firing Thomas*, CHI. SUN-TIMES, Aug. 29, 2003, at 166 (quoting O'Neal: "[Thomas] was more than a coach to me. He was like a father."); Mark Montieth, *Lineup Shuffle Puts Strickland on Court*, INDIANAPOLIS STAR, Jan. 7, 2003, at 4D (quoting O'Neal: "It's like a father-son relationship"); Christian Red, *O'Neal Gets Over Axing of Thomas*, DAILY NEWS (New York), Feb. 4, 2004, at 48.

<sup>278</sup> See Sekou Smith, *Rising to the Occasion*, INDIANAPOLIS STAR, Mar. 25, 2003, at 1D (describing how Thomas went to the emergency room to counsel O'Neal the night of his step-father's attempted suicide).

<sup>279</sup> See Bob Ryan, *As Game 5 Beckons, Consider These Salient Topics on the Indiana-Boston Series 5 Points—Ok, Actually Five Observations on Basketball with a Bonus Entertainment Topic Thrown In*, BOSTON GLOBE, Apr. 29, 2003, at F1 (describing the Pacers as one of the worst-coached teams in the NBA, particularly with their bizarre substitution patterns); see also Steve Bulpett, *Celts Earn Playoff Berth by Default*, BOSTON HERALD, Apr. 12, 2004, at 82 (criticizing Thomas for his coaching strategies against inferior Celtics teams that nevertheless beat the Thomas-coached Pacers).

<sup>280</sup> See Mark Monteith, *O'Neal: I'll Play Only for Thomas*, INDIANAPOLIS STAR, May 2, 2003, at 1D (quoting O'Neal: "This is still a learning process. Isiah's got a team competing at a high level with a lot of guys who hadn't played in the past. Isiah inherited a team that he didn't put together but he's winning with it.").

led by seasoned veterans, such as Reggie Miller and Brad Miller; a “rebuilding team” they were not.<sup>281</sup>

The 2002-03 season would prove to be a pivotal one for the O’Neal-Thomas relationship. First, consider that the Pacers lost 19 of their last 30 regular season games, and then, in a dismal showing, lost to the Boston Celtics in the first round of the 2003 NBA Playoffs.<sup>282</sup> Following the playoff series, media and even Pacers’ players harshly criticized Thomas for his coaching strategies.<sup>283</sup> Then, in May 2003, Pacers team president Donnie Walsh announced that Thomas would not receive a contract extension, a significant proclamation considering that Thomas had only one year left on his four-year contract, and a team declination of a coaching extension typically foretells a forthcoming coaching dismissal.<sup>284</sup>

Only making matters more dubious for Thomas, in early July 2003, the Pacers hired a new president of basketball operations, Larry Bird—a personal and professional archrival of Thomas—who immediately announced major organizational changes on the horizon.<sup>285</sup> Along those lines, speculation quickly arose that Bird would replace Thomas with Rick Carlisle, Bird’s close friend and former Detroit Pistons’ head coach.<sup>286</sup> In fact, only a year earlier, Bird had opined that if Carlisle, rather than Thomas, were the Pacers’ coach, the team would “be 10 to 20 percent better.”<sup>287</sup> Accordingly, by all objective measures, the future of Thomas as Pacers’ head coach appeared very bleak in July 2003.

For O’Neal, Thomas’ impending demise proved of great relevance, as he was set to become an unrestricted free agent

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<sup>281</sup> See, e.g., Al Iannazzone, *Isiah Pining for Pacers*, THE RECORD (Bergen County, NJ), Feb. 3, 2004, at S6 (describing Pacers 2002-03 squad as one that, “by most accounts, underachieved”); Doug Smith, *Raptors “Open to All Discussions” at Draft*, HAMILTON SPECTATOR (Ontario, Canada), May 28, 2003, at E5 (describing Pacers as “underachieving”).

<sup>282</sup> See Peter May, *Doubts on Thomas*, BOSTON GLOBE, Apr. 30, 2003, at F8.

<sup>283</sup> *Id.* (identifying complaints among players concerning unpredictable substitution patterns, with players receiving significant minutes in one game, and then no minutes in the next).

<sup>284</sup> *Id.*

<sup>285</sup> See Sekou Smith, *Off and Running: Bird Identifies Pacers’ Faults, Wants Solutions*, INDIANAPOLIS STAR, July 12, 2003, at 1D [hereinafter Smith, *Off and Running*].

<sup>286</sup> See Mark Monteith, *“Isiah Thomas Is the Coach”; Carlisle Says He’s Pursuing TV Analyst Jobs, Not Pacers’ Position*, INDIANAPOLIS STAR, July 13, 2003, at 5C.

<sup>287</sup> See Jackie MacMullan, *For Playoffs, Bird Still a Green Backer*, BOSTON GLOBE, Apr. 18, 2002, at E1.

on July 1, 2003.<sup>288</sup> Despite Thomas' precarious status, O'Neal expressed interest in re-signing with the Pacers, but as a precondition, he insisted that Thomas remain the coach.<sup>289</sup> In response, Bird stated only that he had no immediate plans to make a coaching change, which O'Neal interpreted as unwavering confidence by Bird in Thomas.<sup>290</sup> In contrast, most observers not only interpreted Bird's comments as lukewarm support, but that Thomas would be retained only until O'Neal re-signed or signed elsewhere.<sup>291</sup> Nevertheless, O'Neal chose to re-sign with the Pacers—a mere five days after Bird's hiring.<sup>292</sup>

Less than a month later, Bird fired Thomas as head coach, and replaced him with Carlisle.<sup>293</sup> Observers described the move as one of the most predictable coaching changes in recent NBA history.<sup>294</sup> O'Neal perceived it a bit differently. He expressed shock and displeasure, and claimed that he had been "deceived" by Bird into signing the contract extension.<sup>295</sup> He also stated that he would not have re-signed had he known that Thomas was going to be fired.<sup>296</sup>

O'Neal's decision-making process appeared strikingly incongruous with both available information and his stipulated preferences for re-signing with the Pacers. Along those lines, O'Neal appeared to discount myriad informational sources that challenged his core belief, namely that Thomas would remain as his head coach, mentor, and father-figure. Even arguably ambiguous information, such as speculation of Bird's fondness

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<sup>288</sup> See David DuPree, *Big Names Are in Position for Free-Agent Free-for-All*, USA TODAY, July 1, 2003, at 6C.

<sup>289</sup> See Mark Monteith, *Pacers' Star Player Welcomes New Boss*, INDIANAPOLIS STAR, July 12, 2003, at 8D [hereinafter Monteith, *Pacers' Star Welcomes New Boss*].

<sup>290</sup> Monteith, *Pacers' Star Player Welcomes New Boss*, *supra* note 289; Smith, *Off and Running*, *supra* note 285.

<sup>291</sup> See, e.g., Jemal Horton, *Bird and Thomas See a Future Together*, INDIANAPOLIS STAR, July 12, 2003, at 1A (noting "myriad reasons to figure that Thomas' days as the Pacers' head coach were numbered").

<sup>292</sup> Mark Monteith, *O'Neal Makes It Official: Pacers Forward Signs Huge 7-Year Contract*, INDIANAPOLIS STAR, July 17, 2003, at 1D.

<sup>293</sup> See Dave Lewandowski, *Isiah Ousted, Carlisle Courted*, INDIANAPOLIS STAR, Aug. 28, 2003, at 1A.

<sup>294</sup> See, e.g., Michael Lee, *Inside the NBA*, ATLANTA J.-CONST., Aug. 29, 2003, (regarding move as not surprising to any objective observer); Tom Enlund, *Carlisle Clearly Was Saving Himself for Pacers All Along*, MILWAUKEE J. SENTINEL, Sept. 7, 2003, at 19C (stating that Thomas' "days with the team were numbered" following the hiring of Bird).

<sup>295</sup> See Bob Kravitz, *O'Neal Could Have Handled the Truth*, INDIANAPOLIS STAR, Aug. 29, 2003, at 1D.

<sup>296</sup> See Patrick Hruby, *Coming Attractions; NBA Ready to Go Reel-to-Reel in 2003-04*, WASH. TIMES, Oct. 28, 2003, at C1.

for Carlisle, was dismissed by O'Neal with ease. Thus, O'Neal appeared to unknowingly impair his own capacity to maximize choice: though he enunciated meaningful subjective value in playing for the Pacers only if Thomas was the coach, he either disregarded or misread evidence indicating that Thomas would not be the coach. Thus, when Thomas was dismissed, such impairment of preference-maximization dismayed O'Neal, as he had unknowingly suppressed the internalization of salient and distinguishing characteristics.

### 3. Optimism Bias

Optimism bias likewise provides a useful mode of heuristic analysis by which to gauge decision-making among professional athletes, and how they may not always utilize rational choice. As discussed in Section III, optimism bias reflects the tendency of individuals to assume that general risks do not apply with equal force to themselves.<sup>297</sup> Thus, when contemplating employment opportunities, might professional athletes overestimate the probability of positive outcomes and underestimate the probability of negative outcomes?

Evidence for optimism bias sometimes emerges when professional athletes weigh the relative risk of incentive-laden contracts versus guaranteed contracts, with the former naturally offering greater potential for reward—and loss. For instance, consider the choice of New Orleans Saints' running back Ricky Williams in 1999 to agree to an eight-year contract worth between \$11 million and \$68 million, depending upon his capacity to reach certain incentives.<sup>298</sup> At the time, Williams was the fifth overall selection in the 1999 NFL Draft and was negotiating his first NFL contract. As a useful juxtaposition to Williams' decision-making process, consider that of fellow rookie running back Edgerrin James, who was selected by the Indianapolis Colts with the fourth overall selection and was likewise negotiating his first NFL contract.<sup>299</sup> In striking contrast to Williams' incentive-laden contract, James agreed to a seven-year contract worth between \$44 million and \$49

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<sup>297</sup> See discussion *supra* pp. 1471-72.

<sup>298</sup> Mark Wiedmer, *Maybe Ricky Should Lose Master P*, CHATTANOOGA TIMES FREE PRESS, Aug. 26, 1999, at D1.

<sup>299</sup> See *id.*

million, with incentives primarily affecting Williams' potential to void the last year of the contract.<sup>300</sup>

For two players selected at almost the same point in the NFL Draft, the Williams and James contracts appeared of exceptionally disparate values. In fact, performance projections estimated that Williams would earn at least \$30 million less than James over the course of the contract.<sup>301</sup> Indeed, for Williams to obtain much of his annual salary, he needed to amass at least 1,600 rushing yards each season, a feat that had only been accomplished by 15 players in the NFL's 134-year history, and only once by a Saints' running back in the franchise's 33-year history.<sup>302</sup> As a result of his apparent "bad gamble," Williams bore the brunt of considerable ridicule.<sup>303</sup>

In explaining his decision, Williams reasoned that because he believed that he should have been the number one overall selection in the NFL Draft—and thus have warranted a more lucrative contract—the only way for him “to make that kind of money” was to agree to such a heavily-leveraged contract.<sup>304</sup> As to the contract's seemingly quixotic performance thresholds, Williams appeared undeterred, reasoning that if he performed to his potential, he would readily attain them.<sup>305</sup> Further suggestive of optimism bias, Williams maintained this confidence even after seriously spraining his ankle a week prior to the start of his rookie season.<sup>306</sup> Separately, Williams rationalized the contract by stating that he would use off-field promotional earnings to offset any opportunity costs triggered

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<sup>300</sup> See *News Summaries, Colts Sign James to Seven-Year Deal*, SPORTS NETWORK, Aug. 13, 1999.

<sup>301</sup> See Wiedmer, *supra* note 297. See also Peter King, *Inside the NFL*, SPORTS ILLUSTRATED, Aug. 23, 1999, at 48 (noting that, based on probable performance, James would likely earn \$11 million more than Williams over their first three seasons).

<sup>302</sup> King, *supra* note 301, at 48; Rick Reilly, *Ricky Williams, You Got Taken, but Good*, SPORTS ILLUSTRATED, Aug. 9, 1999, at 100 (describing the contract as the worst contract in NFL history).

<sup>303</sup> See, e.g., Ron Borges, *Williams Giving Saints, Fans New Incentive*, BOSTON GLOBE, June 20, 1999, at D4 (noting ridicule from agents); Reilly, *supra* note 302, at 100; Michael Silver, *Rappin' on the Door*, SPORTS ILLUSTRATED, July 19, 1999, at 82 (citing mocking commentary from agents and NFL executives of the contract).

<sup>304</sup> See *Camping with Ricky*, TIMES-PICAYUNE (New Orleans), Aug. 5, 1999, at D2.

<sup>305</sup> *Id.*

<sup>306</sup> See Don Pierson, *Williams, Saints Go Limping In*, CHI. TRIB., Aug. 27, 1999, at N1 (citing remarks by Williams that he believed he would obtain the 1,600-rushing-yard-per-season milestone even if he missed two out of the sixteen regular season games).

by unobtainable incentives (without apparently realizing that such off-field earnings would have been available irrespective of contract type).<sup>307</sup>

As predicted by most observers, Williams' decision proved remarkably unwise. Though he ranked among the top 10 running backs in rushing yards during his first three seasons, he failed to reach most of the onerous performance standards necessary for incentive payment. As a result, he earned far below his market value.<sup>308</sup> This proved most evident in his third season, when despite setting his franchise's fourth-highest single-season record for rushing yards, and despite being named his team's "most valuable player," he earned only \$389,000.<sup>309</sup> To put this figure in perspective, consider that thirty-three of his fifty Saints' teammates earned more that season,<sup>310</sup> or that James—who rushed for fewer yards—earned slightly more than \$7 million.<sup>311</sup>

The costly effect of Williams' optimism bias begs an important question for assessing decision-making among professional athletes: How can player representatives diminish optimism bias and other cognitive biases when their clients seek patently unfavorable terms?

In the case of Williams, a fatal negotiating defect may have existed to prevent such diminishment, as his representative, Percy Miller, had never before represented a professional football player.<sup>312</sup> Indeed, Miller himself appeared the victim of optimism bias, as he dauntlessly assigned the drafting of technical, contractual language to a personal aide who had never before drafted a contract.<sup>313</sup> Nevertheless, more seasoned agents may prove capable in discouraging players from desiring detrimental agreements.<sup>314</sup> In the alternative,

<sup>307</sup> See Kevin B. Blackistone, *Give Saints' Williams Credit for His Play-for-Pay Contract*, DALLAS MORNING NEWS, Aug. 15, 1999, at 5B (quoting Williams: "I'm going to make a lot of money off the field, and I can use that as my salary.").

<sup>308</sup> See Silver, *supra* note 303.

<sup>309</sup> See Brad Townsend, *Unmasked: His Social Phobia in the Open, Williams Tries to Pull off Move*, Dallas Morning News, Aug. 12, 2002, at 1B. See also *New Orleans Saints Total Rushing Records*, <http://www.neworleanssaints.com/custompage.cfm?pageid=72> (last visited Jan. 4, 2006).

<sup>310</sup> See Townsend, *supra* note 309.

<sup>311</sup> *Id.*; USA Today Salary Database: *Edgerrin James*, Dec. 10, 2003, <http://asp.usatoday.com/sports/football/nfl/salaries/playerdetail.aspx?lname=J&player=1162>.

<sup>312</sup> See Reilly, *supra* note 302.

<sup>313</sup> See Silver, *supra* note 303 (describing work by Leland Hardy).

<sup>314</sup> See generally Willenbacher, *supra* note 142 (discussing norms for agent behavior).

and as vividly illustrated by Williams, professional athletes may fail to internalize critical components of the decision-making process, and thus ultimately pursue the non-optimal strategy.

#### 4. Hindsight Bias and Regret Aversion

Hindsight bias also appears salient in the decision-making of professional athletes. As discussed in Section III, hindsight bias refers to the tendency to overestimate anticipated fruition of a particular event.<sup>315</sup> In the context of professional sports, hindsight bias may arise when athletes accept “hometown discounts” for unrealized reasons and then later rationalize those contracts on the occurrence of unanticipated events.

To illustrate, consider the varying, and potentially competing rationales offered by John Flaherty in 1999, and then in 2002, regarding his decision to sign a discounted contract extension with the Tampa Devil Rays. The narrative begins in 1999, when Flaherty weighed whether to sign a three-year, \$9 million contract extension or enter free agency. On one hand, Flaherty could have entered free agency as one of the premiere catchers available, and able to secure a contract far in excess of a three-year, \$9 million term.<sup>316</sup> Moreover, at age 31, and after a career of relatively modest earnings, Flaherty may have viewed free agency as a singular earnings opportunity.<sup>317</sup> Indeed, until an unusually impressive 1999 season, Flaherty had primarily served as a back-up player who had earned not much more than the major league minimum.<sup>318</sup>

On the other hand, Flaherty perceived subjective value in playing on a winning team, with veteran star players, and in a regularly sold-out home stadium.<sup>319</sup> According to Flaherty,

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<sup>315</sup> See discussion *supra* pp. 1474-75.

<sup>316</sup> See Marc Topkin, *Flaherty Signs on for One More Hitch with Devil Rays*, ST. PETERSBURG TIMES, Sept. 28, 1999, at 1C. See also John Romano, *Flaherty Earns Chance with Another Team*, ST. PETERSBURG TIMES, May 20, 2002, at 1C (revealing commentary from Devil Rays’ officials that they thought Flaherty was “selling himself short” by agreeing to the extension, and when he did, they “congratulated themselves on tying up an important position on the field at a reasonable salary”).

<sup>317</sup> See Topkin, *supra* note 316.

<sup>318</sup> See Bob Dick, *Flaherty Becomes Big Hit*, PROVIDENCE J., Aug. 6, 1996, at 1D (discussing Flaherty’s struggles); Kevin Wells, *Flaherty Impressive on, off Field*, TAMPA TRIB., Nov. 30, 1997, at 11 (discussing success of Flaherty in the 1996 and particularly 1997 seasons).

<sup>319</sup> See Topkin, *supra* note 316, at 1C.

those characteristics appeared associable with the Devil Rays, as the team had recently re-signed star first baseman Fred McGriff and had expressed interest in obtaining other star players.<sup>320</sup> Thus Flaherty predicted the Devil Rays would excel.<sup>321</sup> Indeed, Flaherty praised the “commitment” evidenced by both Devil Rays’ management and ownership in developing a “championship” strategy.<sup>322</sup> Taking account of these reasons, Flaherty found the Devil Rays’ contract offer sufficiently attractive, and despite its sub-market value, opted to sign it.<sup>323</sup>

Unfortunately for Flaherty, the Devils Ray would not win many games from 2000 to 2002. In fact, not only did the Devil Rays place last in their division in each of those seasons, but from 2001 to 2002, the team compiled the worst record of any of the 30 major league teams.<sup>324</sup> Moreover, despite promises of pursuing star players, the Devil Rays featured the lowest payroll in baseball from 2000 to 2002.<sup>325</sup> Not surprisingly then, the team attracted minimal fan interest, and because of poor revenue, even encountered difficulty meeting payroll commitments.<sup>326</sup> In short, the subjective value Flaherty attributed to playing on a winning team, and one with star players and devoted fans, never materialized over the course of his contract.

During the 2002 season—which represented the third and final year of Flaherty’s contract—Flaherty was asked whether he regretted signing the contract extension. After-all, his stated reasons for accepting a “hometown” discount never materialized. Perhaps surprisingly, Flaherty expressed no regret.<sup>327</sup> Instead, he inferred that upon signing the contract, he had looked forward to serving as a mentor to young and inexperienced players, since he anticipated that such activities would prove valuable to him.<sup>328</sup> Thus, Flaherty offered an

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<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> See Bill Chastain, *Flaherty in the Fold*, TAMPA TRIB., Sept. 28, 1999, at 5.

<sup>324</sup> See Dick Scanlon, *Piniella Set to Captain Devil Ray’s Shaky Ship*, LEDGER (Lakeland, Fla.), Oct. 29, 2002, at A1.

<sup>325</sup> See Chris Anderson, *Sweet Lou Is Home*, SARASOTA HERALD-TRIB., Oct. 29, 2002, at C1.

<sup>326</sup> See Carter Gaddis & Joe Henderson, *Naimoli: Rays Won’t Miss Making Payroll*, TAMPA TRIB., May 13, 2001, at 1.

<sup>327</sup> See Romano, *supra* note 316, at 1C (quoting Flaherty: “Do I regret signing that contract? Hell no.”).

<sup>328</sup> See Carter Gaddis, *Veterans Bring Wisdom to Rays*, TAMPA TRIB., Sept. 22, 2002, at 5 (quoting Flaherty: “I will look forward to the day when a winner does show

entirely different subjective rationale for signing a sub-market value contract than he had expressed in 1999. Beyond its variance, such a rationale was likely incompatible, as seldom do winning teams with veteran star players feature young and inexperienced players.<sup>329</sup>

As illustrated by Flaherty, hindsight bias may distort one's capacity to objectively evaluate prior decision-making and pursuit of preferences. As a result, it may impair redress of any defects within the decision-making process, a troubling outcome for athletes since many enter into subsequent series of negotiations. This phenomenon is only exacerbated by regret aversion, or the tendency among those prone to hindsight bias to resist information concerning forgone conclusions or hypothetical outcomes.<sup>330</sup> Indeed, regret aversion offers further explanation for Flaherty's unwillingness to acknowledge regret and for his substituted rationales: by shifting discussion from preferable and forgone alternatives to inferior and existing circumstances, Flaherty avoided discussion of information that might have triggered feelings of regret and unhappiness. Prescriptively then, while hindsight bias offered Flaherty an alternative rationale, regret aversion offered the means by which to discuss it.

##### 5. Anchoring and Adjustment Effects

The failure to adjust for new information may also impair rational-decision making among professional athletes. As discussed in Section III, psychologists often describe this tendency as "anchoring and adjustment" or "belief perseverance."<sup>331</sup> In professional sports, athletes negotiating contracts sometimes appear anchored to certain monetary values, particularly when negotiations occur during market fluctuations. Such anchoring may not only promote acrimonious negotiations, but also inferior outcomes.

To illustrate, consider the futile efforts of shortstop Nomar Garciaparra and the Boston Red Sox to consummate a contract extension during the 2003 and 2004 MLB seasons.

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up out on that field and I'll feel like in a small way . . . not that I'm part of it, but it'll be very gratifying to see.").

<sup>329</sup> See, e.g., Joe Strauss, *Hitting the Road, Eyeing Direction*, BALTIMORE SUN, July 12, 2001, at 1D (discussing difficulties of winning with young and inexperienced players).

<sup>330</sup> See discussion *supra* p. 1475.

<sup>331</sup> See discussion *supra* p. 1477.

The genesis of those negotiations traces back to March 1998, when, as second-year player, Garciaparra agreed to a five-year contract with the Red Sox that included team options for the 2003 and 2004 seasons.<sup>332</sup> All together, the contract offered to pay Garciaparra \$44 million between 1998 and 2004.<sup>333</sup> At the time, observers regarded the contract as highly generous for a player of his experience, though its length also posed risk to Garciaparra, particularly given the rapid growth of player salaries in the late 1990s.<sup>334</sup> Moreover, by enabling the Red Sox to control his rights in the 2003 and 2004 seasons, Garciaparra surrendered two years in which he could have elected to become a free agent.<sup>335</sup>

By 2000, Garciaparra, Alex Rodriguez of the Seattle Mariners, and Derek Jeter of the New York Yankees, were widely-regarded as the three best shortstops in baseball.<sup>336</sup> Indeed, because of their similar talent, production, and age, they were often clustered together in baseball discussion.<sup>337</sup> However, between the 2000 and 2001 seasons, the three would become compensated at highly variable levels. Indeed, Rodriguez would sign a 10-year, \$252 million free agent contract with the Texas Rangers,<sup>338</sup> and Jeter—who was set to become a free agent at the end of the 2001 season—would agree to a 10-year, \$189 million contract extension with the New York Yankees.<sup>339</sup> In contrast, Garciaparra would remain under contract to the Red Sox through 2004, during which time he would earn \$32 million.<sup>340</sup> Observers immediately described Garciaparra as wildly underpaid, because despite their similar

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<sup>332</sup> See Michael Silverman & Tony Massarotti, *Nomar on the Money*, BOSTON HERALD, March 11, 1998, at 100.

<sup>333</sup> *Id.*

<sup>334</sup> See Sean McAdam, *Garciaparra Gets a \$23.5 Million Pact*, PROVIDENCE J.-BULL., Mar. 11, 1998, at 1D.

<sup>335</sup> *Id.*

<sup>336</sup> See, e.g., Larry Lage, *Deivi Cruz Not Known for Control*, SOUTH BEND TRIB., Mar. 1, 2001, at B1 (describing the three best shortstops as Rodriguez, Jeter, and Garciaparra).

<sup>337</sup> *Id.*

<sup>338</sup> See Jay Weiner, *Good for A-Rod, Bad for Baseball*, BUS. WEEK, Dec. 18, 2000, at 59.

<sup>339</sup> See Brad Biggs, *Millions Not Enough: Latest Contracts Have Spawned Disgruntlement Among Stars Stuck in Long-Term Deals*, CHI. SUN-TIMES, Feb. 26, 2001, at 89.

<sup>340</sup> See Silverman & Massarotti, *supra* note 332, at 100.

talent, production, and age, Rodriguez and Jeter would earn three to four times as much.<sup>341</sup>

Unfortunately for Garciaparra, the exorbitant contracts secured by Rodriguez and Jeter likely represented the apex of a prior market. Indeed, the sheer size of such contracts is thought to have triggered a backlash among MLB owners, which subsequently diminished their willingness to spend so unreservedly.<sup>342</sup> Consequently, over the following two years, free agents tended to secure significantly less lucrative contracts than they would have previously secured.<sup>343</sup>

Undeterred by this apparent market contraction, Garciaparra approached the Red Sox in March 2003 about a contract extension that would pay him commensurate with Rodriguez and Jeter.<sup>344</sup> In fact, since the Rodriguez and Jeter contracts paid annual average salaries of \$25.2 million and \$18.9 million, respectively, Garciaparra informed the Red Sox that he would accept no less than \$17.0 million per year.<sup>345</sup> Red Sox management had a different idea of Garciaparra's value, however, reasoning that the Rodriguez and Jeter contracts no longer represented market value for premiere shortstops.<sup>346</sup> Indeed, as Red Sox management noted, no player, of any position, had signed a contract paying in excess of \$15 million per season during the previous two years.<sup>347</sup> Instead of meeting Garciaparra's demand, the Red Sox offered him a four-year

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<sup>341</sup> See, e.g., Jon Heyman, *These Two Red Sox Are Exceptions to the Rule*, NEWSDAY (New York), Feb. 28, 2001, at A71; Bob Hohler, *Martinez Extends Advice to Duquette*, BOSTON GLOBE, Dec. 23, 2000, at F3; Michael Silverman, *Sox Cash In—Get Off Cheap with Nomar*, BOSTON HERALD, Jan. 20, 2000, at 88.

<sup>342</sup> See Tom Haudricourt, *Huge Salaries Not Trickling Down to Journeyman Players*, MILWAUKEE J. SENTINEL, Feb. 3, 2002, at 15C (describing market correction during off season between 2001 and 2002 seasons); Mike Klis, *This Time, Collusion Too Tough to Unearth Superstar's Big Contracts*, DENVER POST, Feb. 2, 2003, at C5 (noting sentiment among free agent players that the owners were colluding to create a market correction during off season between 2002 and 2003 seasons).

<sup>343</sup> Klis, *supra* note 342. See also Hal Bodley, *94 Strike: Lesson Learned?*, USA TODAY, Sept. 13, 2004, at 1D (noting that from 2002 to 2003, free agent salaries declined by 3 percent).

<sup>344</sup> See Michael Silverman, *Breaking Up Is Hard to Do*, SPORTING NEWS, Aug. 2, 2004, at 10 (discussing "failed contract negotiations" between Garciaparra and the Red Sox during spring training in 2003).

<sup>345</sup> See Jeff Horrigan, *Sox Upped the Ante*, BOSTON HERALD, Aug. 4, 2004, at 90; see also Tony Massarotti, *Nomar: I Want to Stay*, BOSTON HERALD, Dec. 8, 2003, at 120 (citing salaries for Rodriguez and Jeter).

<sup>346</sup> See Gerry Callahan, *Trade a Necessary Evil*, BOSTON HERALD, Apr. 10, 2003, at B13 (noting how Red Sox team President Larry Lucchino hoped to convince Garciaparra of the "new economic climate" in baseball (i.e., lower salaries)).

<sup>347</sup> See Horrigan, *Sox Upped the Ante*, *supra* note 345, at 90.

contract worth \$15 million per year.<sup>348</sup> According to Red Sox owner John Henry, Garciaparra immediately rejected the offer, believing that the alleged market correction was either untrue or ephemeral.<sup>349</sup> Garciaparra would then play the 2003 season often appearing unhappy, and his Red Sox teammates believed that his contract status had caused him to become increasingly irritated.<sup>350</sup>

In November 2003, the Red Sox once again offered Garciaparra a four-year contract, yet this time it offered an average annual salary of only \$12 million.<sup>351</sup> In explaining the reduction in annual value from \$15 million to \$12 million, Red Sox management cited a continuing “market adjustment” that had further diminished players’ salaries.<sup>352</sup> Garciaparra refused the offer, vehemently asserting that no such market correction had occurred.<sup>353</sup> In March 2004, the Red Sox made one final attempt to re-sign Garciaparra, offering a four-year contract worth \$12.5 million per season, which Garciaparra also rejected for the same reason.<sup>354</sup> With his free agent status looming, and with his increasingly dour attitude, the Red Sox traded Garciaparra to the Chicago Cubs in July 2004.<sup>355</sup> After the 2004 season, Garciaparra finally obtained the right to become a free agent. Such an attainment proved bittersweet, however, as he would re-sign with the Cubs to one-year contract worth only \$8 million, or less than his “less-than-

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> See Dan Shaughnessy, *Words Don't Do Justice for Garciaparra*, BOSTON GLOBE, July 23, 2003, at F1; see also Ken Fiddin, *The Last Word*, TORONTO SUN, Dec. 24, 2003, at 101 (stating Garciaparra’s disgust at being “disrespected not only by management, but by teammates as well” following his contract squabbles); Shaughnessy, *Damaged Goods*, *supra* note 183 (describing Garciaparra as “wildly unhappy”); Silverman, *supra* note 344 (describing how Garciaparra’s “funk in mood” was evidenced by his decision to physically separate himself from teammates during a pivotal game against the New York Yankees, also describing Garciaparra as “ticked off” at Red Sox management).

<sup>351</sup> See Gordon Edes, *Tales from Two Cities: Garciaparra, Sox Offer Differing Views on Pre-Trade Events*, BOSTON GLOBE, Aug. 2, 2004, at D1.

<sup>352</sup> See *id.*

<sup>353</sup> See Jeff Horrigan, *Sox in Winter Wonderland*, BOSTON HERALD, Dec. 12, 2003, at 118 (noting that Garciaparra “scoffed at the offer” after the Red Sox justified it based on the “changing financial climate in baseball”).

<sup>354</sup> See Gordon Edes, *Force Play: On Trade, Henry Says Epstein Simply Did What He Had to Do*, BOSTON GLOBE, Aug. 4, 2004, at F1.

<sup>355</sup> *Id.*

market value” \$9 million annual salary over the preceding four years.<sup>356</sup>

Garciparra’s decision to refute the existence of a market correction, and instead anchor his value to increasingly less-relevant contracts, proved a great disservice to him. Not only may he have cost himself over \$40 million, but, by participating in unworkable negotiations, put himself through needless anguish. In fact, some believe that his unwillingness to recognize modified market conditions ultimately morphed a happy person into a miserable one.<sup>357</sup> Accordingly, anchoring and adjustment effects may not only impair the pursuit of objective value (i.e., contractual compensation) but also equally-meaningful subjective value (i.e., level of happiness).

## 6. Endowment Effects

Decision-making among professional athletes may also be influenced by endowment effects, whereby individuals perceive more utility from their current state of affairs than from altered, yet equivalent circumstances.<sup>358</sup> Such phenomena are broadly evident among those contemplating new employment opportunities. For instance, as discussed in Section III, employees are often less willing to pay to acquire a right or privilege than they are willing to sell it.<sup>359</sup>

Among professional athletes, endowment effects appear especially apparent when they re-sign at discounted rates, and then, as a reason for accepting diminished salary, cite employment characteristics that are likely constant among employment options. Perhaps best evincing this idea, consider the subjective value ascribed by some professional athletes to the quality of their team training staffs.<sup>360</sup> Primarily, these staffs treat players’ injuries and provide other therapeutic

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<sup>356</sup> See Mike Kiley, *Cubs’ Daily Double: Nomar, Walker*, CHI. SUN-TIMES, Dec. 8, 2004, at 143.

<sup>357</sup> See, e.g., Jim Donaldson, *Leaving Town Was Inevitable for Embittered Garciparra*, PROVIDENCE J., Aug. 2, 2004, at C1; Shaughnessy, *Damaged Goods*, *supra* note 183. See generally *supra* note 349 and accompanying sources (providing insight on Garciparra’s unhappiness as a result of his futile contract negotiations with the Red Sox).

<sup>358</sup> See Korobkin & Guthrie, *supra* note 105, at 802 & n.29, 803.

<sup>359</sup> See discussion *supra* p. 1478.

<sup>360</sup> See, e.g., George Vescey, *Matthews Remembers Houston*, N.Y. TIMES, Jan. 26, 2000, at D1 (citing remarks by Bruce Matthews of the Tennessee Titans).

care.<sup>361</sup> Although they undoubtedly vary in quality, empirical data suggests that among professional teams in the NFL, MLB, NBA, and NHL, all include highly-skilled staff and excellent facilities.<sup>362</sup> In other words, any actual difference in quality may not prove appreciable.

Some professional athletes, however, appear to place significant subjective value in their belief that training staffs vary widely in quality. For instance, when San Francisco Giants' pitcher Jason Christiansen recently re-signed to a 1-year, \$1 million contract—a significantly less lucrative deal than he was offered by both the Tampa Bay Devil Rays and New York Mets—he cited his “affection for the Giants’ training staff” as a reason to take a hometown discount.<sup>363</sup> Similarly, when the Tennessee Titans re-signed offensive lineman Bruce Matthews for less than his market value, he considered the team’s “great training staff” as a motivating reason.<sup>364</sup> Thus, professional athletes may assent to substantial reductions in salary in exchange for presumed relative benefits that might, in practice, prove illusory.

Professional sports teams appear cognizant of these heuristics. In fact, they often showcase their training facilities, and attempt to impress upon players the presence of variances among training facilities and staffs.<sup>365</sup> Teams even construct new facilities in part for the very purpose of keeping star

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<sup>361</sup> See generally Chris Curran & Joe Recknagel of Detroit Lions Athletic Training Staff, *A Week in an NFL Training Camp*, NFL.COM, <http://www.nfl.com/news/story/7616836> (last visited Jan. 4, 2006).

<sup>362</sup> See Cherie Black, *Trainers Help Athletes Get Back on Their Feet*, FLA. TIMES-UNION, Sept. 12, 2004, at B1; see also Brian Biggane, *Conditioning, Contracts Make Age Less an Issue*, PALM BEACH POST, Oct. 15, 2000, at 6B (analyzing investment of NHL teams and players in training and fitness); Paul Hoynes, *Focused on Fitness*, PLAIN DEALER (Cleveland), May 31, 2005, at D1 (discussing “revolution” among training MLB training staffs over last twenty years and outstanding care players receive); Mike Preston, *Bigger, Faster, Stronger*, BALT. MORNING SUN, Sept. 20, 1996 (describing extensive training available for players on the Cleveland Browns and how other teams provide similar training); Patrick Saunders, *Super Human or Super Medicine?*, DENVER POST, May 16, 2003, at D1 (describing modern diagnostic tools available to NBA trainers and trainers in other pro sports leagues).

<sup>363</sup> See Henry Schulman, *Giants Re-Sign Left-Hander*, S.F. CHRON., Dec. 18, 2004, at D3. It should be noted that Christiansen cited additional subjective reasons for his decision to stay in San Francisco, including his relationship with teammates and the geographic location of the team’s training facilities. *Id.*

<sup>364</sup> See Vescey, *supra* note 360, at D1.

<sup>365</sup> See Mike O'Hara, *New Digs Are “Unbelievable,”* DETROIT NEWS, Mar. 31, 2002, at 8D (noting this effect in the NFL); Bob Wolfley, *July Has Become Courting Season for NBA Free Agents*, MILWAUKEE J.-SENTINEL, July 19, 2000, at 2C (noting this effect in the NBA).

players, as well as attracting free agents.<sup>366</sup> These efforts are encouraged by team employees, including those players who regard training facilities and staff as crucial to their performance.<sup>367</sup>

Team manipulation of preferences among professional athletes highlights the malleability of employment choice. Indeed, by promoting the perception of greater utility from current states of affair than from functionally-equivalent states, teams exacerbate endowment effects among their players. Such a phenomenon further amplifies the presence of cognitive biases and heuristics among professional athletes, and thus further suggests non-optimal pursuits of preferences.

## VI. CONCLUSION

In contemplation of employment opportunities, professional athletes appear to embrace a myriad mixture of preferences, and such preferences frequently reflect the placement of considerable value in non-monetary goals. Accordingly, for many professional athletes, “optimality” does not reflect greed, avarice, or other commonly-held assumptions about those individuals; instead, it often comprises intangible, even romanticized inclinations, such as loyalty, camaraderie, and aspiration for team success. For that reason, and upon deeper reflection, behavioral patterns among contemporary professional athletes may not only “remind us of all that was once good” in professional sports<sup>368</sup>—they may also suggest that such good never left.

An analysis limited to preferences, however, ignores the presence of cognitive biases and heuristics among professional athletes. Significantly, such influences may distort preferences, and yield sub-optimal decision-making. This is especially apparent when professional sports teams impress illusory variances among themselves and other teams.

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<sup>366</sup> See, e.g., Matt Winkeljohn, *New Facility an All-Around Improvement*, ATLANTA CONST., Aug. 9, 2000, at E6 (describing thought-process among Atlanta Falcons’ management officials when contemplating the construction of a new training facility).

<sup>367</sup> See Mike Cobb, *Planned Facility Has Bucs Smiling*, LEDGER (Florida), Mar. 18, 2004, at C3 (citing remarks by Tampa Bay Buccaneers wide receiver Joe Jurevicius).

<sup>368</sup> FIELD OF DREAMS (Universal 1989). This particular comment refers to the belief that professional athletes from the early part of the twentieth century cared substantially more about winning games and less about financial remuneration than do contemporary athletes.

Consequently, professional athletes may unknowingly misinterpret their preferences, thereby triggering diminutions in both objective value and subjective value.

The conclusions reached in this Article may prove both novel and complimentary. Indeed, they reflect the first of their kind. Such novelty may offer meaningful insight to professional athletes, their representatives, and teams, a group collectively worth billions of dollars. For professional athletes, knowledge of cognitive biases and heuristics in their decision-making may encourage ameliorative cognitive adjustments. For instance, instead of discounting or ignoring information that challenges existing assumptions about their teams, professional athletes might explore the validity and salience of such information and determine whether to utilize it in their decision-making process. Similarly, rather than assuming that established precedents, such as probable performance metrics, do not apply with equal force to themselves, professional athletes might instead pursue more expansive consultations. By doing so, they might refrain from assenting to poor risk contracts, particularly those that are incentive-based or otherwise unconventionally-constructed.

Player representatives may likewise infer strategic guidance from these conclusions. If anything, their role appears bolstered by the presence of cognitive distortions among professional athletes. Indeed, player representatives may offer objective advice, and because of the intimacy of the player-agent relationship, may do so in uniquely compelling ways. Alternatively, player representatives may become more attune to subjective preferences among players. Although adherence to such preferences might diminish agent compensation, the *quality* of representation would rise commensurate with preference maximization. Of course, with any enlarged role for player representatives comes heightened responsibility, as well as the corresponding need to avoid cognitive biases in representation.

Consider also the capacity of professional sports teams to adroitly manipulate cognitive biases, and how that capacity only amplifies the desirability of professional athletes and their representatives to respond accordingly. As discussed in this Article, teams routinely engage in machinations to distort the decision-making of professional athletes. Moreover, teams' continued choice to do so supplies further evidence of cognitive biases, as otherwise, they would presumably pursue other recruiting and retention strategies. Accordingly, an enriched

ability on the part of players and their representatives to counteract cognitive biases would presumably deter such behavior or make it more costly.

Yet perhaps most engagingly, the conclusions reached in this Article illuminate the potential for behavioral sciences to influence traditional law and economics, as well as theories of contract formation. This is especially true since, unlike other population groups that frequently capture the attention of legal academics, professional athletes spontaneously furnish publishable commentary of their values, beliefs, and priorities, and they do so in real world, rather than experimental settings. Indeed, by escaping the alleged “experimental flaw” of many behavioral law and economic studies, professional athletes offer a uniquely appealing group for further examination. For that reason, recognition of how professional athletes respond to subjective stimuli, as well as cognitive distortions, may reveal as much about us as it does about them.