SPECIFIC PERFORMANCE OF ENLISTMENT CONTRACTS

MAJOR UDI SAGI*

I. Introduction

In a famous Monty Python sketch a Regimental Sergeant Major yells at a group of soldiers: "Now! Today we're going to do marching up and down the square. That is unless any of you got anything better to do? Well, anyone got anything they'd rather be doing than marching up and down the square?"[1] When a soldier puts his hand up, the Sergeant Major asks him contemptuously, "Yes? Atkinson? What would you rather be doing, Atkinson?"[2] Atkinson replies, "Well to be quite honest, Sarge, I'd rather be at home with the wife and kids."[3] Surprisingly, after making sure he heard correctly, the Sergeant Major replies: "Right, off you go."[4]

The sketch is surprising and funny because, as most know, a soldier cannot leave his position or military service whenever he sees fit.[5] This common knowledge forms a fundamental perception of what it means to be in the military: Soldiers cannot just quit, no matter how unsavory or hazardous the task. This article examines the military service obligation from the perspective of the enlistment contract and the legal rules that apply to its enforcement, in particular, whether the enlistment contract is enforceable against servicemembers who seek to breach it and leave military service.

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* Israel Defense Force (IDF). Presently assigned as head of Security and Criminal Law Section, Office of the Legal Adviser to Judea and Samaria Division, IDF; LL.M., 2010, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; M.B.A., 2005, Tel-Aviv University, The Faculty of Management, Israel; L.L.B., 1999, Tel-Aviv University, Faculty of Law, Israel. Previous assignments include Legal Adviser to the Personnel Branch, IDF 2005–2009; Deputy Legal Adviser to the Surgeon General's Corps, 2003–2005; Legal Adviser to the Personnel Planning and Management Division, Personnel Branch, IDF, 2000–2003. Member of the Israel Bar Association. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] THE MEANING OF LIFE (Celandine Films 1983).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See infra* Part II.

Since the abolishment of the draft in the United States during the 1970s, the enlistment contract has been the main vehicle for individuals to join the Armed Forces.[6] Throughout the decades, courts have addressed the legal aspects of the enlistment contract.[7] Today, courts widely agree to view the enlistment contract as an ordinary contract and, consequently, resolve enlistment cases using normal contract law principles.[8] However, as demonstrated in this article, this view poses a legal question that has not yet been addressed by the courts or scholars.

For the last 150 years, courts of equity have followed the well-established common law rule against specific performance in case of a breach of a contract for personal services.[9] A personal services contract is defined as a contract in which one of the sides agrees to render to the other side services that are "continuous [and] involve skill, personal labor, and cultivated judgment."[10]

Enlistment contracts are examples of contracts for personal services.[11] Thus, by entering into an enlistment contract, the individual takes upon himself the obligations of a personal services contract, which cannot be specifically enforced under normal contract principles. If accurate, the Armed Forces are not legally allowed to enforce enlistment contracts against servicemembers who decide to breach their contracts before the end of their periods. Military regulations, such as Army

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[6] Neil J. Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121 (1974).

[7] *See, e.g.*, Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971); Brown v. Dunleavy, 722 F. Supp. 1343, 1349 (E.D. Va. 1989). As can be deduced from the cases cited in this article, courts usually address three different kinds of enlistment contract issues: servicemembers seeking discharge from military service based on their enlistment contracts; servicemembers seeking to avoid certain duties or positions based on their enlistment contracts; and servicemembers facing court-martial claiming not to be subject to the Uniform Code of Military Justice (UCMJ) because they were not legally enlisted at the time of the alleged offense. This article addresses each of these arguments.

[8] Santiago v. Rumsfeld, 407 F.3d 1018 (9th Cir. 2005); Gengler v. United States, 453 F. Supp. 2d 1217 (E.D. Cal. 2006); Qualls v. Rumsfeld, 357 F. Supp. 2d 274 (D.D.C. 2005). This rule does not apply to servicemembers' entitlement to pay and allowances, which is "determined by reference to the statutes and regulations . . . rather than to ordinary contract principles." United States v. Larionoff, 431 U.S. 864, 869 (1977). *See infra* Part III for a detailed analysis of the contractual nature of the enlistment contract.

[9] RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through Aug. 2009). *See also* Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.).

[10] Rutland Marble Co. v. Ripley, 77 U.S. 339, 358 (1870).

[11] *See* Baldwin v. Cram, 522 F.2d 910 n.4 (2d Cir. 1975).

Regulation (AR) 635-200,[12] which dictate that enlisted persons can only be discharged in specific circumstances, not whenever they choose to leave, would be unenforceable under this contractual approach. Taken to the extreme, it would likewise be illegal to force a servicemember who wishes to turn his back in the midst of a battle to stay and fight with his fellow servicemembers.[13]

Surprisingly, in their application of legal precedents, courts have largely failed to consider how the traditional prohibition against specific performance of personal services contracts affects enlistment contracts enforcement. If the doctrine is still valid and applies to military service, it could have devastating consequences for Congress's ability to "raise and support armies."[14] While addressing enlistment contracts, some courts[15] and scholars[16] have assumed that enlistment contracts are enforceable despite being personal services contracts; however, their assumptions have lacked actual legal analysis.[17] This article provides a detailed, and much needed, explanation for why there is no place for the

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[12] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (17 Dec. 2009) (RAR, 27 Apr. 2010) [hereinafter AR 635-200].

[13] A behavior that constitutes a capital offense. UCMJ art. 99 (2008).

[14] U.S. CONST. art. I, § 8, cl. 12.

[15] Out of hundreds of cases concerning the enlistment contract, a court directly referred to this question only once, stating that "enlistment contract, the kind of contract which as regards forms of service other than the military is not specifically enforceable by an affirmative decree . . . ." *Baldwin*, 522 F.2d at 910 n.4.

[16] Dilloff, *supra* note 6, at 147–48, states that

> An enlistment contract is a personal services or employment contract. It is almost universally held that a contract for personal services will not be specifically enforced, either by affirmative decree or by an injunction. The general rule is apparently not applicable to enlistment contracts, since the courts have, in effect, ordered specific performance in the many different situations which have already been discussed. . . . No cases have expressly discussed the question of making a volunteer specifically perform, but the basic rationale which has precluded any consideration of this contractual issue has been the all-encompassing supervening power of the Government in dealing with its military forces. Until this mantle of protection can be completely removed from enlistment agreement negotiations, it is unlikely that the issue will arise.

Id. (footnotes omitted); *see also* Captain David A. Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1 n.138 (1977) ("Although courts hesitate to specifically enforce personal services contracts, the military enlistment contract seems to be the exception.") (citing Dilloff, *supra* note 6).

[17] *See supra* notes 15–16.

rule that prohibits specific enforcement of personal services contracts. This analysis should lend some reliability and validity to both federal courts' and military courts' approaches to cases concerning the enlistment contract.

The issue of enlistment contract enforcement is complex and involves matters of criminal and contract law, substance and procedure, and theory and practice. Part II of this article refines the legal issue surrounding specific performance of enlistment contracts and provides the framework for the analysis. Part III then explores the legal characteristics of the enlistment contract in detail. Next, Part IV surveys the origins, scope, and rationales for the common law rule against specific performance of personal services contracts and argues, in light of those rationales, that the prohibition against specific performance of personal services is inapplicable to enlistment contracts.

II. Refining the Question

In the context of enlistment contract enforcement, some may suggest that the prohibition against specific performance is irrelevant because it has no practical effect in military service. For example, it could be argued that criminal justice mechanisms in the Uniform Code of Military Justice (UCMJ) appropriately address breaches of enlistment contracts. Articles 85 and 86 establish the offenses of Desertion and Absence Without Leave, both of which make it a criminal offense to be absent "without authority" from one's "unit, organization, or place of duty."[18] Thus, a servicemember who fails to abide by his enlistment contract by willfully absenting himself from duty commits a criminal offense. With the reins of criminal process in its hands, the military need not resort to contractually based enforcement to obtain compliance.

Another possible argument concerns the difficulty of applying the doctrine of specific performance in practice. Specific performance of a contract is an equitable remedy that can be granted in two different situations. First, an order for specific performance can be granted when a party to a contract has breached a contractual obligation owed to the other party to the contract.[19] In this case, the specific performance order

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[18] UCMJ arts. 85–86 (2008).

[19] Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 274 (1980) ("Specific Performance is the most accurate method of achieving the compensation goal

is granted as a remedy for a breach that already took place, and it is meant to mend it.[20] Second, a specific performance order can also take the form of an injunction.[21] In this form, the specific performance order is an anticipatory relief, preventing a future breach.[22] In both cases, specific performance is a court-ordered decree. Although a breach of enlistment contract by a servicemember is not an imaginary option, recalling that the military can use the UCMJ, it is hard to contemplate a situation in which the military will seek a court order to enforce the enlistment contract upon that servicemember, both before the breach and after.[23]

While these arguments may seem compelling at first glance, they do not automatically invalidate doctrines that are regularly applied in the courts.

Even without court intervention, enlistment contracts are routinely enforced.[24] Under current practice, servicemembers cannot leave the service or obtain a discharge unilaterally.[25] A breach of the enlistment contract by a unilateral act may constitute a criminal offense.[26] As the Court of Appeals for the Second Circuit in the case of *Baldwin v. Cram*[27] noted, "The statute is a way for the Army in effect specifically to enforce

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of contract remedies because it gives the promissee the precise performance that he purchased.").

[20] *Id*.

[21] *See, e.g.*, Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.).

[22] *See* Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L.J. 261, 262 (2006).

[23] This scenario is hard to imagine for two main reasons. First, the option to court-martial the servicemember or to impose other disciplinary action against him is readily available while a court decree takes time. Second, one legal approach to the enlistment contract holds that it applies only to one's status, and a breach of contract that changes the status of the sides does not relieve those sides of their contractual obligations. *See* United States v. Grimley, 137 U.S. 147 (1890). *See also* Part III.

[24] Partially through the use of UCMJ arts. 85–86 (2008).

[25] *See, e.g.*, AR 635-200, *supra* note 12 (establishing that, notwithstanding some exceptions, an enlisted person can initiate his separations only if the Army consents to his request). For example, according to paragraph 6-6, a soldier may request separation due to dependency or hardship, but the Army does not have to approve the request, since separation because of dependency or hardship is "for the convenience of the Army." *Id.* para. 6–1. Another example, under paragraph 4–4, would include a soldier serving on indefinite enlistment who requests a voluntary separation; his request can also be denied.

[26] UCMJ arts. 85, 86 (2008).

[27] 522 F.2d 910 (2d. Cir. 1975).

its personal services or enlistment contract."[28] Furthermore, unlike other kinds of contracts, where a breach of the contract can lead to the termination of the contractual relationship, a mere breach of the enlistment contract does not normally lead to a discharge of the enlisted soldier.[29] Instead, a soldier who has breached his enlistment contract will probably be prosecuted or otherwise disciplined, but his status as an enlisted soldier will not immediately end, unless the military takes affirmative steps to end it. The fact that the military routinely enforces enlistment contracts justifies further inquiry into the nature of enlistment contracts and their enforceability.

Moreover, courts and practitioners may find the legal principles discussed in this article relevant in criminal or disciplinary procedures where the service obligation of the servicemember is the issue.[30] Specifically, some of the legal principles that underlie the rule that bars enforcement of personal services contracts are universal in nature and may apply to other proceedings.[31] A defense argument of defective enlistment—i.e., arguing flaws in the enlistment contract should invalidate the enlistment and, thus, annul the court-martial's jurisdiction over the matter—is a good example.[32]

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[28] *Id.* at 910 n.4. By "[t]he statute," the Court of Appeals for the Second Circuit was referring to 10 U.S.C § 269 (repealed 1994) and 10 U.S.C § 673a (current version at 10 U.S.C § 12303 (2006)), which allowed orders to active duty of reserve soldiers who failed to report for training. Even though the statute the court referred to was not a punitive statute but an administrative one, the same analysis could be made with regard to the criminal offenses mentioned above.

[29] United States v. Grimley, 137 U.S. 147, 151 (1890).

[30] *See, e.g.*, Taylor v. Resor, 42 C.M.R. 7 (C.M.A. 1970).

[31] For example, these concerns equally apply to the argument that enforcing a personal services contract contradicts the Thirteenth Amendment. *See infra* Part IV.C.3.

[32] A person is subject to court-martial jurisdiction only when he has one of the military statuses described in UCMJ art. 2(a). Therefore, an argument that an enlistment process was defective, to the point that it failed to change a person's status from a civilian to a servicemember, may be a good defense argument in court-martial proceedings. *See, e.g.*, *Grimley*, 137 U.S. 147; United States v. Quintal, 10 M.J. 532 (A.C.M.R. 1980); United States v. Valadez, 5 M.J. 470 (C.M.A. 1978). Note, however, that this kind of defense argument has to overcome the hurdle set in UCMJ art. 2(c):

> (c) Notwithstanding any other provision of law, a person serving with an armed force who—
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> (1) submitted voluntarily to military authority;
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> (2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submissions to military authority;
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> (3) received military pay or allowances; and

Military criminal or disciplinary proceedings are not the only means to enforce enlistment contracts. Sometimes, although not in the straightforward manner suggested above, federal courts also play a role in the enforcement of enlistment contracts. For instance, when a servicemember files a petition with a federal court requesting a writ of habeas corpus[33] challenging the military's decision to retain him,[34] the court may refuse to grant the writ. The question addressed in this article—that is, whether an enlistment contract can be specifically enforced—may prove helpful for courts contemplating a servicemember's petition for habeas corpus. Even though the whole analysis may not be applicable to all habeas corpus cases, some of the arguments may still be pertinent.[35]

Even if petitioners have not yet raised the rule barring specific performance of personal services contracts in their challenges to their enlistment contracts, the analysis in this article may contribute to the general understanding of the enlistment contract. Because enlistment contracts are a major building block of the military, further study of them and the legal doctrines that apply to them may strengthen the legal

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> (4) performed military duties;
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> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

See also United States v. Gennosa, 11 M.J. 764 (N.M.C.M.R. 1981).

[33] A petition for habeas corpus is possibly the only cause of action available for a servicemember to challenge his service obligation according to his enlistment contract in a federal court. Gengler v. United States, 453 F. Supp. 2d 1217, 1240–41 (E.D. Cal. 2006) (ruling that the Contracts Disputes Act, the equitable estoppel doctrine, the Administrative Action Act, and the Tucker Act cannot be used by a servicemember as causes of action against the military). Of the five causes of action that the complaint in Gengler contained, the court approved only the habeas corpus cause of action. *Id.*

[34] *E.g.*, Santiago v. Rumsfeld, 407 F.3d 1018, 1020 (9th Cir. 2005) (examining a habeas corpus petition of a soldier whose enlistment term was extended by the stop loss policy); Woodrick v. Hungerford, 800 F.2d 1413 (5th Cir. 1982) (denying airman's request for rescission of his enlistment contract on grounds of fraudulent inducement and mistake); *Gengler*, 453 F. Supp. 2d 1217 (discussing the plaintiffs' request to set their term of duty for seven years, as prescribed in their service agreements with the Navy). This would also apply to other types of orders. *See, e.g.*, Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971) (discussing a habeas corpus request against Army's intent to order plaintiff, a reserve soldier, to active duty, after the plaintiff "accumulated more than five unexcused absences from scheduled drills").

[35] For example, the argument that enforcing an enlistment contract violates the servicemember's Thirteenth Amendment rights, as discussed in Part IV.C.3, may also prove useful when a court contemplates whether to issue a writ of habeas corpus.

foundation of the military's personnel practice. In this article, the journey may be more important than the destination.

While the nature of enlistment contracts necessarily requires a contractual analysis, these contracts have a specific character. Enlistment contracts are not commercial; their primary objective is to transform civilians into soldiers, sailors, airmen, Marines, and Coast Guardsmen. The following sections will not overlook this important distinction.

III. The Contractual Aspects of Enlistment Contracts

The question of specific performance of enlistment contracts is only relevant if enlistment contracts are considered contractual vehicles. This Part explores the courts' use of common law contract interpretation principles to evaluate enlistment contracts. It will also explore a limited exception to the general rule, which applies only to pay and allowances, but hardly touches on specific performance.

A. The Supreme Court's Early Approach

A forty-year-old individual enlisted in the military. At the time of his enlistment, the law required enlistees to be no more than thirty-five years of age. Therefore, the individual falsely represented himself when he claimed to be twenty-eight years old in order to enlist.

On the day of his enlistment, the new recruit went home, not without permission, but he did not return until authorities apprehended him three months later. He was court-martialed for desertion, and he subsequently filed a petition for habeas corpus in the federal court, asserting, among other arguments, that his enlistment was void because at the time of his enlistment he was older than the age prescribed by statute for enlistment. That individual's name was John Grimley, and the facts outlined above are the facts of *United States v. Grimley*,[36] the case most commonly cited by courts when considering the nature of enlistment contracts.

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[36] *Grimley*, 137 U.S. 147 (based on research in the Lexis database, as of 10 January 2010, *Grimley* was cited in no fewer than 286 court decisions).

In *Grimley*, the Supreme Court begins its analysis by defining the legal principles underlying its ruling in the case.[37] The Court states, without debate, that the "case involves a matter of contractual relation between the parties,"[38] erasing any doubt that contract law applies to the issue at hand. The Court then proceeds to examine Grimley's argument, and concludes that only the Government can rely on Grimley's failure to meet the maximum age requirement, as "[o]nly the party for whose benefit it was inserted"[39] can take advantage of a contractual qualification that wasn't met. The Court further holds that this "is the ordinary law of contracts."[40]

Having reached a conclusion, based on contractual principles, that there was no merit to Grimley's argument, the Court could have stopped. However, the Court strengthened its opinion by explaining that the enlistment contract is not an ordinary contract.

> But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract, but it is one of those contracts which changes the *status*, and where that is changed, no breach of the contract destroys the new *status* or relieves from the obligations which its existence imposes.[41]

Thus, Grimley cannot avoid the charges preferred against him by using the wrong information he gave the military upon his enlistment.

The Court's status observation was novel, and led many to believe that the main principle of law that can be extracted from the decision is the status-creating nature of the enlistment contract.[42] However, this is

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[37] *Id.* at 150.
[38] *Id.*
[39] *Id.* at 151.
[40] *Id.*
[41] *Id.*
[42] *E.g.*, Collins v. Rumsfeld, 542 F.2d 1109 (9th Cir. 1976); Grulke v. United States, 228 Ct. Cl. 720 (1981) ("The relationship between the soldier and state has changed over the past 90 years since *In re Grimley* . . . ruled that under conditions then existing, enlistment only effects a change of status, thereby making contract principles unnecessary."); United States v. Russo, 1 M.J. 134, 136–37 (C.M.A. 1975) ("Although the Supreme Court in *Grimley* emphasized that a valid enlistment contract gives rise to a change in status which forecloses subsequent claims of breach of contract, that is not to say that the Government knowingly may violate its own regulations . . . .").

not the case. A careful reading of *Grimley* reveals that when the Court referred to the status-creating nature of the enlistment contract, it did not intend to substantially deviate from the principle that it established at the beginning of the decision: that the enlistment contract is an ordinary contract to which contract law applies.

The Court in *Grimley* began its decision by explaining that the enlistment contract is a contract to which contract law rules and doctrines apply.[43] The contractual nature of the enlistment contract was the main basis for the Court's decision. Only after reaching a conclusion using contractual doctrines, did the Court then refer to the status-creating nature of the enlistment contract as additional support.[44] The words that the Court chose to use when introducing the status notion also point in this same direction, "But in this transaction something more is involved than the making of a contract."[45] Indeed, the Court viewed the status-changing power of the enlistment contract as supplementing the contractual attributes of the enlistment contract, not as impairing or replacing them.[46]

The relation between the status-changing aspects of the enlistment contract and its contractual characteristics according to *Grimley* was best described by the U.S. District Court for the District of Colorado in the case of *Pfile v. Corcoran*.[47]

> The fact that the enlistee has changed his status means that he cannot through breach of the contract throw off this status. But change of status does not invalidate the contractual obligation of either party or prevent the contract from being upheld, under proper circumstances, by a court of law.[48]

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[43] *Grimley*, 137 U.S. at 150.
[44] *Id.* at 151.
[45] *Id.*
[46] *But see* William P. Casella, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783 n.14 (1972) (suggesting that at the time of the *Grimley* decision, contract and status were two mutually exclusive concepts).
[47] Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo. 1968).
[48] *Id.* at 556–57.

B. Latter Indecisiveness

Grimley's distinctions still left room for differences in courts' interpretation of enlistment contracts. Although the Court probably did not intend to, its decision in *Grimley* caused some confusion in later decisions of lower courts. Over the century since *Grimley*, courts were unable to agree on a unitary approach for enlistment contracts. Most of the courts chose to examine enlistment through the lenses of contract law. Other courts preferred to view the enlistment contract as a status-changing document, adjudicating enlistment contract cases according to various federal statutes. Some other courts, albeit using a contractual narrative, mistakenly applied legal principles outside of contract law to resolve the cases at bar.[49]

The majority of courts that had to deal with enlistment issues chose to apply contract law principles in order to resolve the legal questions presented.[50] According to this practical prevailing view, "[a]n enlistment contract, as an agreement between the enlistee and the military service involved, is subject to traditional principles of contract law."[51] Courts applied this rule to arguments regarding breach of the enlistment contract,[52] rescission of the enlistment contract,[53] and construction of the

[49] Dilloff, *supra* note 6, at 122. For a detailed description and analysis of court decisions that refer to the legal nature of the enlistment contract, see also Casella, *supra* note 46; Schlueter, *supra* note 16.

[50] Dilloff, *supra* note 6, at 122.

[51] Dubeau v. Commanding Officer, Naval Reserve Ctr., 440 F. Supp. 747, 748 (D.C. Mass. 1977); *see also* United States v. Valadez, 5 M.J. 470, 473–74 (C.M.A. 1978) ("Despite scholarly suggestions for a more realistic view of the phenomenon known as enlistment, it has been generally held, as a matter of federal case law, that certain contract law principles are applicable to enlistment contracts.").

[52] *E.g.*, Cinciarelli v. Carter, 662 F.2d 73 (D.C. Cir. 1981) (discussing a breach of an active duty agreement between the Marine Corps and a senior reserve officer); Brown v. Dunleavy, 722 F. Supp. 1343, 1349 (E.D. Va. 1989) ("Claims by members of the military that enlistment contracts have been breached or are invalid are decided under traditional theories of contract of law.") (citing Woodrick v. Hungerford, 800 F.2d 1413 (5th Cir. 1986); *Cinciarelli*, 662 F.2d 73; and Pence v. Brown, 627 F.2d 872 (8th Cir. 1980)); Crane v. Coleman, 389 F. Supp. 22 (E.D. Pa. 1975) (ruling that not every breach of the enlistment contract entitles the servicemember to rescission of his contract).

[53] *E.g.*, *Pence*, 627 F.2d 872 (applying to enlistment contracts the common law rule that a fraud or misrepresentation during the formation of a contract, even if innocently and non-negligently made, may bring to a rescission of it); Withum v. O'Connor, 506 F. Supp. 1374, 1378 (D.P.R. 1981) (granting petitioner's request for habeas corpus, on grounds of false representation by the recruiter); Grulke v. United States, 228 Ct. Cl. 720 (1981); Whitaker v. Callaway, 371 F. Supp. 585 (E.D. Pa. 1974) (addressing mutual mistake in an enlistment contract); United States v. Wagner, 5 M.J. 461 (C.M.A. 1978). The court

enlistment contract.[54] Some courts gave special attention to the effect of new legislation or regulations on pre-existing enlistment contracts.[55]

Because the relationship between servicemembers and the Government is not an ordinary commercial relationship, and because uniform approaches are important to servicemembers within different services, the courts applied federal common law–based contract law in lieu of ordinary, state law.[56] As one judge explained, "[g]eneral principles of contract law are applied, rather than the law of any one state, because of the unique relation between the military and those in the armed services, and the need for a consistent interpretation of enlistment contracts."[57]

At the other end of the spectrum, some courts refused to consider the enlistment in terms of contract law.[58] Those courts emphasized that the relationship between the servicemember and the military are a "matter of

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in *Withum v. O'Connor* summarized the law on false representations in enlistments as follows:

> Military enlistment contracts are subject to traditional principles of contract law. . . . A recruit is entitled to rescind an enlistment contract if the military is unable to perform its obligation; if the terms of the contract are so ambiguous as to be misleading; or if the recruit was induced to enter into the contract by fraud or false representations. Even if the misrepresentations were innocently or nonnegligently made, if they were material and induced the prospective recruit to enlist, the contract may be rescinded. It is not necessary, however, that the false representations deprive the recruit of every benefit of the contract.

506 F. Supp. at 1378 (internal citations omitted).

[54] *E.g.*, Tremblay v. Marsh, 750 F.2d 3 (1st Cir. 1984) (interpreting the petitioner's enlistment contract); Lundgrin v. Claytor, 619 F.2d 61 (10th Cir. 1980) (basing the decision to deny medical student's request for injunction against his orders to active duty on interpretation of his enlistment contract); Rodriguez v. Vuono, 757 F. Supp. 141 (D.P.R. 1991) (examining the plaintiff's argument regarding his military service obligations using common law contractual principles).

[55] *E.g.*, Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971); Winters v. United States, 412 F.2d 140 (9th Cir. 1969); Pfile v. Corcoran, 287 F. Supp. 554 (D. Colo. 1968).

[56] *See* United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947); *Rodriguez*, 757 F. Supp. at 147 ("Claims that military induction contracts are invalid or have been breached are decided under traditional theories of contract law, rather than the law of any state.").

[57] Brown v. Dunleavy, 722 F. Supp. 1343, 1349 (E.D.Va. 1989).

[58] *See, e.g.*, Taylor v. Resor, 42 C.M.R. 7, 8 (C.M.A. 1970) ("Enlistment in an armed force does not establish a contract relationship between the individual and the Government, but a status."); United States v. Russo, 1 M.J. 134 (C.M.A. 1975).

status"[59] that can be created and terminated only as prescribed by law.[60] Thus, "no useful purpose is served by reviewing the common-law rules of contract."[61] Although this approach was adopted mainly by military courts trying to prevent servicemembers from evading the court's criminal jurisdiction by claiming that their enlistment contracts were void, its traces can also be found in the Supreme Court's decision of *Bell v. United States*.[62]

Grimley's ambiguous language caused more than just a split in the way courts approached enlistment contract issues. Some courts, trying to closely follow the *Grimley* methodology, confused principles of contract law with other principles of law. For example, in *Woodrick v. Hungerford*,[63] after being medically qualified to enroll in pilot training, a student—Woodrick—decided to join the Air Force's Reserve Officers' Training Corps (ROTC) program in order to be commissioned as a pilot.[64] Two years later, still a student, Woodrick underwent another set of medical examinations that revealed that he was not qualified to fly.[65] In fact, those examinations showed that Woodrick should never have been qualified to fly in the first place, demonstrating error in his first set of qualifying examinations.[66] After learning of the second examination results, Woodrick stopped attending the ROTC classes and was removed from the program for non-attendance.[67]

Based on his enlistment contract, Woodrick was called to active duty for two years as an enlisted airman.[68] Woodrick did not report to duty, was apprehended, and was placed under investigation for desertion.[69] Soon after that, he petitioned the federal court, requesting a writ of habeas corpus, arguing that the initial medical examinations were material misrepresentations.[70] The Fifth Circuit started with the observation that "claims that enlistment contracts have been breached or

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[59] United States v. Noyd, 40 C.M.R. 195, 202 (C.M.A. 1969).
[60] *Id.*
[61] United States v. Blanton, 23 C.M.R. 128, 129 (C.M.A. 1957).
[62] 366 U.S. 393 (1961). *See also infra* Part III.D (discussing the *Bell* case).
[63] 800 F.2d 1413 (5th Cir. 1986).
[64] *Id.* at 1413–14.
[65] *Id.* at 1414.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1414–15.

are invalid are decided under traditional canons of contract law."[71] However, instead of conducting a contractual analysis of Woodrick's misrepresentation claims, the court rejected his claims because he failed to show that he exhausted all of the administrative remedies available to him within the Air Force.

> [W]here a serviceman seeks to effect a rescission of his enlistment contract by means of the habeas writ in federal court, he must show that he has exhausted all available intraservice remedies, [unless] the petitioner is able to demonstrate that pursuit of intraservice remedies would be futile, or would cause him to suffer irreparable harm.[72]

Despite its initial statement that the case should be decided in accordance with contract law principles, the *Woodrick* court clearly decided not to apply these principles. If the court had done so, it would likely have reached another conclusion. Given that Woodrick's claim of misrepresentation was factually correct, contract law principles may likely have voided his enlistment, which would have meant that his status never changed and he never became an airman.[73] In such a case, all administrative remedies existing within the Air Force would have been irrelevant and unavailable to him. Thus, by refusing to examine his contractual arguments because Woodrick did not exhaust remedies within the Air Force, the court actually decided not to apply contract law principles to Woodrick's case. Instead, the Court followed with a statutory examination of the case.[74]

C. Current Approach

Recently, the confusion created by the courts' perceived indecisiveness gave way to a clearer picture. A series of recent court decisions clearly establishes that the enlistment contract is mainly an ordinary contract, to which, notwithstanding one longstanding exception,[75] contract law principles *do* apply.

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[71] *Id.* at 1416.
[72] *Id.* at 1417. The Eleventh Circuit followed this decision in *Winck v. England*, 327 F.3d 1296 (11th Cir. 2003).
[73] *See supra* note 53.
[74] *Woodrick*, 800 F.2d at 1417–18.
[75] *See infra* Part III.D.

The subject of two of those cases, *Qualls v. Rumsfeld*[76] and *Santiago v. Rumsfeld*,[77] is the Stop-Loss policy.[78] In *Qualls*, the plaintiff joined the Army National Guard for one year.[79] A short while after that, his unit was called for active duty, and his term of service was extended in accordance with the Stop-Loss policy.[80] Qualls challenged the Army's action in court, arguing that the application of the policy to him was a

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[76] 357 F. Supp. 2d 274 (D.D.C. 2005).

[77] 407 F.3d 1018 (9th Cir. 2005).

[78] According to the Stop-Loss policy, the term of service of many Reserve component soldiers (as well as active duty Soldiers) whose enlistments were about to expire was unilaterally extended when their units were called to active duty to deploy. The extensions were for the period of the units' deployment. The Stop-Loss policy was based upon 10 U.S.C. § 12305(a), which provides,

> Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, or 12304 of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

The President delegated his authority under this statute to the Secretary of Defense, who further delegated it to the Secretaries of the military departments. Exec. Order No. 12,728, 55 C.F.R 35029 (1990). Generally, after the 11 September 2001 terror attacks, the Army decided, pursuant to this authority, to extend the period of service of Reserve component soldiers whose units were called to active duty under 10 U.S.C. § 12302 or 10 U.S.C. § 12304.

Besides the *Qualls* and *Santiago* cases, the policy was also challenged in *Doe v. Rumsfeld*, 435 F.3d 980 (9th Cir. 2006). *See also* Daniel C. Brown, *Stop Loss: Illegal Conscription in America?*, 54 AM. U. L. REV. 1595 (2005); Evan M. Wooten, *Banging on the Backdoor Draft: The Constitutional Validity of Stop Loss in the Military*, 47 WM. & MARY L. REV. 1061 (2006); Cheryce M. Cryer, *Stop Loss and the Back-Door Draft: An Illumination of Government Contract Violations and Potential Allegations of Modern-Day Slavery*, 49 HOW. L.J. 843 (2006); Hannah Dyer, *Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures*, 34 PEPP. L. REV. 791 (2007).

The Stop-Loss policy was considerably narrowed two years ago. Message, 210042Z Mar 09, Dep't of Army, subject: Active Army (AA) Unit Stop Loss/Stop Movement (SL/SM) Policy for Units Scheduled to Deploy OCONUS for OIF and OEF Operations—Update/Revision.

[79] *Qualls*, 357 F. Supp. 2d at 278.

[80] *Id.* At the time, Qualls's term of service was extended from 6 July 2004 to 24 December 2031. *Id.* As explained in *Santiago*, the Army truly did not intend to utilize the Stop-Loss policy to retain Reserve component soldiers unilaterally in service for twenty-five years. The date was set for the Army's administrative convenience. *Santiago*, 407 F.3d at 1021 n.2.

breach of his enlistment contract;[81] that signing an enlistment contract for a term of one year was a misrepresentation by the Army;[82] and that by failing to notify him of the possibility of an involuntary extension of his service term, the Army violated his constitutional right of due process.[83] Denying Qualls's request for a preliminary injunction, the court stated that Qualls's contractual arguments, require application of "common law principles of contract law."[84] The court rejected the Army's argument that the issue should be resolved using other principles.[85] Indeed, having performed a thorough contractual analysis, the court concluded that "nowhere in the enlistment contract does the Army forfeit its right to involuntarily extend enlistees pursuant to Unites States laws."[86]

Santiago's facts were similar to *Qualls*'s. Santiago's term of service in the National Guard was just about to expire when his unit was called to active duty and he was informed that his enlistment had been extended in accordance with the Stop-Loss policy.[87] Santiago also petitioned the federal court. His arguments were generally comparable to Qualls's, and so was the court's decision. Once again, the court agreed that "[e]nlistment contracts, with exceptions not relevant here, are enforceable under the traditional principles of contract law,"[88] and the court examined the case using traditional common law contractual doctrines.[89]

This view of the enlistment contract is not unique to the Stop-Loss cases. During the last decade, courts continued to address arguments involving the enlistment contract, such as breach of contract,[90] the effect of legislation and regulatory changes on contractual obligations included

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[81] *Qualls*, 357 F. Supp. 2d at 279–80.
[82] *Id.* at 284.
[83] *Id.* at 285.
[84] *Id.* at 279–80.
[85] *Id.* at n.1.
[86] *Id.* at 284. The court refused to grant Qualls the preliminary injunction he sought. Later, in another decision, the court accepted the defendant's motion to dismiss the suit, on grounds that it was rendered moot when Qualls agreed to extend his National Guard enlistment by six additional years. Qualls v. Rumsfeld, 412 F. Supp. 2d 40 (D.D.C. 2006).
[87] Santiago v. Rumsfeld, 407 F.3d 1018, 1020 (9th Cir. 2005). Santiago learned about the extension of his enlistment while he attended what was supposed to be his last weekend training. *Id.*
[88] *Id.* at 1022.
[89] *Id.* at 1022–23.
[90] Parrish v. Brownlee, 335 F. Supp. 2d 661, 673–74 (E.D.N.C. 2004).

in the enlistment contract,[91] and the effects of contradiction between legislation and enlistment contracts.[92] All courts have ruled according to contract law, where applicable.

It thus appears that there is no further room for confusion or indecisiveness; the enlistment contract is, after all, a contract that is governed by contract law, and its power to change the status of the servicemember does not impair its contractual nature. However, the currently controlling view of the enlistment contract has one exception, recognized by the Supreme Court in *Bell v. United States*.[93]

D. The *Bell v. United States* Exception

The petitioners in *Bell* were enlisted soldiers who were held captive during the Korean conflict.[94] While captive, the petitioners "behaved with utter disloyalty to their comrades and to their country."[95] The petitioners refused to be repatriated when the hostilities were concluded, but eventually, after spending some time in China, returned to the United States.[96] Upon returning, the petitioners requested accrued pay and allowances for the time they spent in captivity, basing their claim on 37 U.S.C. § 242, which read that "[e]very [servicemember] . . . who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance."[97] Despite the statute's apparent language, the Government refused to pay the petitioners, and the petitioners filed a suit in the Court of Federal Claims. During the proceedings, the Government argued that its refusal to provide the petitioners pay and allowance was based on the contractual principle that "one who willfully commits a material breach of a contract can recover nothing under it,"[98] together with the fact that their behavior in captivity amounted to a

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[91] Irby v. U.S. Dep't of Army, 245 F. Supp. 2d 792, 800 (E.D.Va. 2003) (suggesting that regulations in effect are read into the enlistment contract, and apply even if they are later changed).
[92] Gengler v. United States, 453 F. Supp. 2d 1217 (E.D. Cal. 2006) (involving case of Navy fixed-wing pilots who signed seven-year enlistment contracts when, according to 10 U.S.C. § 653(a), they should serve at least eight years of active duty).
[93] 366 U.S. 393 (1961).
[94] *Id.* at 394.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 401.

material breach of the enlistment contract.[99] The Supreme Court rejected the Government's argument, stating that "common-law rules governing private contracts have no place in the area of military pay. A Soldier's entitlement to pay is dependent upon statutory right."[100]

The Supreme Court repeated this ruling in *United States v. Larionoff*,[101] where a group of Navy enlisted men requested a reenlistment bonus that they were supposedly entitled to. This time, both parties to the case, as well as the Court, agreed that "the rights of the affected service members must be determined by reference to the statutes and regulations . . . rather than to ordinary contract principles."[102] This precedent was then implemented by the lower courts and has not been challenged since.[103]

The *Bell* exception is an exception to the generally accepted contractual nature of the enlistment contract. However, this caveat has no effect on the enforceability of the enlistment contract, mainly because the question of specific performance of the enlistment contract does not entail any issues of pay or allowance.[104]

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[99] *Id.*
[100] *Id.*
[101] 431 U.S. 864 (1977).
[102] *Id.*
[103] *See, e.g.*, Jablon v. United States, 657 F.2d 1064 (9th Cir. 1981); Bryant v. Dep't of the Army, 553 F. Supp. 2d 1098 (D. Minn. 2008).
[104] In *Jablon*, 657 F.2d. at 1066–67, the Ninth Circuit suggested a new explanation for the *Bell* exception. According to *Jablon*, the enlistment contract's substance is contractual, even with regards to pay and allowance; however, in suits for pay and allowance, a remedy can only be granted to the extent Congress has statutorily waived sovereign immunity. Thus, even though the basis for a suit for pay and allowance is contractual, a remedy can only be granted as prescribed by statute: "There is a significant difference between the court's power to order the armed services to discharge a soldier because the military has breached the conditions under which he or she enlisted and the power to order the government to pay damages for breach of a contract which the court would have no authority to enforce." *Id.* at 1067. Under this analysis, the *Bell* exception is a practical exception rather than a doctrinal one.

IV. Specific Performance of Contracts for Personal Services and the Enlistment Contract

A. The Enlistment Contract is a Personal Services Contract

As established above, legal disputes between the parties to the enlistment contract—one of the armed services and the servicemember—regarding its validity, applicability, or breach, should be adjudicated in accordance with the principles of contracts law. However, saying that an enlistment contract is a regular contract is not enough. The enlistment contract's nature makes it a personal services contract, a particular type of contract that requires application of special rules.

A personal services contract is a contract to perform "continuous [duties that] involve skill, personal labor, and cultivated judgment."[105] Indeed, if a party to a contract takes it upon herself to perform "personal acts which require special knowledge and experience and the exercise of skill, discretion, and cultivated judgment,"[106] these services are of a personal nature. To determine which duties in a contract are of a personal nature, it is helpful to examine whether they are delegable.[107] Only a non-delegable service can be considered a contract for personal services.[108] Contracts for artistic performance,[109] participation in professional sports,[110] and—to some extent—employment[111] are all well known examples of personal services contracts.

The uniform enlistment contract for all armed services is found in Department of Defense Form 4/1 (DD Form 4/1).[112] In this form, the servicemember (or prospective servicemember) takes it upon himself to "serve a total of eight (8) years . . . . Any part of that service not served on active duty must be served in the Reserve Component . . . ."[113] Although DD Form 4/1 does not explicitly establish it, it is clear that the contracted services performed by the servicemember for the military are

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[105] Rutland Marble Co. v. Ripley, 77 U.S. 339, 358 (1870).
[106] Shubert v. Woodward, 167 F. 47, 55–56 (8th Cir. 1909).
[107] RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through August 2009).
[108] *Id.*
[109] Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.).
[110] Cent. New York Basketball, Inc. v. Barnett, 181 N.E.2d 506 (Ohio Com. Pl. 1961).
[111] *Ex parte* Jim Dandy Co., 239 So. 2d 545 (Ala. 1970).
[112] U.S. Dep't of Def., DD Form 4/1, Enlistment/Reenlistment Document Armed Forces of the United States (Oct. 2007) [hereinafter DD Form 4/1].
[113] *Id.* sec. 10(a).

of a personal nature. First, the servicemember is selected for enlistment for his specific personal capabilities or knowledge. The military "may [only] accept original enlistments . . . of qualified, effective, and able-bodied persons."[114] Second, the services that the servicemember is obligated to perform for the Armed Forces are not delegable; the enlistment contract does not allow the servicemember to end his obligation period subject to him finding a replacement,[115] nor do the regulations that control separations and discharge of enlisted servicemembers.[116] A servicemember who is given an order is required to fulfill it personally, using his abilities and training.[117] Certainly, the military is a profession that requires adequate training.[118] Therefore, the enlistment contract, through which servicemembers enlist, is a personal service contract.[119]

B. Specific Performance of Personal Services Contracts

Specific performance, a remedy for breach of contract,[120] endeavors to make the breaching party comply with his contractual duties.[121] Normally granted as a remedy *after* a breach of contract has occurred, it is imposed to compel the breaching party to perform a neglected contractual obligation.[122] The remedy of specific performance can also

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[114] 10 U.S.C § 50 (2006).
[115] *Id.*
[116] *See, e.g.*, AR 635-200, *supra* note 12.
[117] *See* UCMJ art. 90 (2008).
[118] U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-8 (3 Aug. 2007).
[119] Baldwin v. Cram, 522 F.2d 910 n.4 (2d. Cir. 1975).
[120] *In re* Estate of B.E. Griffin v. Summer, 604 S.W.2d 221, 225 (Tex. Civ. App. 1980) ("The purpose of specific performance is to compel a party who is violating a duty to perform under a valid contract to comply with his obligations.").
[121] Mcklean v. Keith, 72 S.E.2d 44, 53 (N.C. 1952) ("The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is to compel a party to do precisely what he ought to have done without being coerced by the court.").
[122] McCoy Farms, Inc. v. J & M McKee, 563 S.W.2d 409, 415 (Ark. 1978).

> Specific performance is an equitable remedy which compels the performance of a contract on the precise terms agreed upon or such a substantial performance as will do justice between the parties under the circumstances. It is a means of compelling a contracting party to do precisely what he should have done without being coerced by a court.

Id.; *see Mcklean*, 72 S.E.2d at 53.

be introduced as a pre-breach order to prevent a party to a contract from future breach of the contract.[123] However, despite intent to fully perform the original contractual agreement,[124] specific performance is not the default remedy for a breach of contract.[125] Being an equitable relief, this remedy lies solely within the discretion of the court.[126] Generally, courts grant the remedy of specific performance when an order for monetary damages does not completely fulfill the remedial goals.[127]

A long held limitation to the equitable remedy of specific performance is the bar against ordering specific performance of contracts for personal services.[128] According to this rule, a court of equity will not grant a decree for specific performance of a contract for personal services.[129] In the seminal case of *Lumley v. Wagner*,[130] the plaintiff,

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[123] *See* Rapp, *supra* note 22, at 262.

[124] *Compare* Schwartz, *supra* note 19, at 274 ("Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promise the precise performance that he purchased."), *with* Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1977–1978) (applying economic analysis principle to ascertain that specific performance is not always in the *ex ante* intent of both parties to the contract). Kronman suggests that parties to a contract will *ex ante* prefer a remedy of specific performance, in case of a breach, only "[w]hen the contract is for unique goods or services." Kronman, *supra*, at 369.

[125] *See* Kimball v. Swanson, 177 N.W.2d 375, 380 (Wis. 1970) ("Specific performance is an equitable remedy, addressed to the sound discretion of the court."); Seascape, Ltd. v. Maximum Mktg. Exposure, Inc., 568 So.2d 952, 954 (Fla. Dist. Ct. App. 1990) ("[E]mployment or personal services . . . contracts are not enforceable by injunction or specific performance. . . . The appropriate remedy in such cases is an action for damages for breach of contract.").

[126] United States v. Georgia-Pac. Co., 421 F.2d 92, 103 (9th Cir. 1970) (cited by Gengler v. United States, 453 F. Supp. 2d 1217, 1231 (E.D. Cal. 2006)); Raybovich Boat Works, Inc. v. Atkins, 585 So.2d 270, 272 (Fla. 1991) ("[T]he remedy of specific performance is not a matter of right. To the contrary, the court contemplating an order of specific performance is obligated to consider whether this remedy, based on the facts of the case, would achieve an unfair or unjust result."); *McCoy Farms, Inc.*, 563 S.W.2d at 415; *Mcklean*, 72 S.E.2d at 53; Green, Inc. v. Smith, 317 N.E.2d 227, 233 (Ohio Ct. App. 1974); RESTATEMENT (FIRST) OF CONTRACTS § 359 (1932) (current through August 2009).

[127] *See In re* Estate of Griffin v. Summer, 604 S.W.2d 221, 225 (Tex. App. 1980); Woolley v. Embassy Suites, Inc., 278 Cal. Rprt. 719 (Cal. Ct. App. 1991); RESTATEMENT (FIRST) OF CONTRACTS § 361 (1932) (current through August 2009) (discussing factors affecting the determination to grant specific performance when damages are inadequate, including that estimating the damages may be difficult; the transaction's worth cannot be measured in monetary terms; and damage collection may be difficult).

[128] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through August 2009); MODERN LAW OF CONTRACTS § 13:17 (2009).

[129] Arthur v. Oaks, 63 F. 310, 317 (7th Cir. 1894). The case explains,

"the lesee of Her Majesty's Theatre"[131] in England, entered an agreement with the defendant, Mademoiselle Johanna Wagner, who was a young opera singer, to sing in the theater he operated, and to refrain from "exercising her professional abilities in England without the consent of the plaintiff."[132] However, the defendant later agreed to sing for another opera house, for a larger sum.[133] At that time, it was already established that a court of equity would not order specific performance of the positive part of a personal services contract.[134] Thus, the plaintiff requested the court to specifically enforce only the negative part of the contract, that is, to prohibit the defendant from singing for the competing theater.[135] The defendant based her argument on the common law doctrine that a court of equity would specifically enforce a contractual obligation only if the contract in its entirety is enforceable; and since the positive part of her contract with the plaintiff was unenforceable, the negative part of the contract was also unenforceable.[136]

In its decision, the court immediately agreed that the positive part of the contract—the part in which the defendant agreed to sing for the plaintiff—could not be specifically enforced.[137] The only question that remained was whether the negative part was enforceable. After considering many authorities "that . . . have not been uniform,"[138] the court concluded first, that the common law doctrine upon which the defendant relied applies only to contractual obligations that are separate

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> But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal services of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware.

Id.

[130] *Lumley*, (1852) 42 Eng. Rep. 687 (Ch.). Many consider the Lumley case to be the seminal case in the context of specific performance of personal services contracts. *See, e.g.*, Kaser v. Fin. Prot. Mktg., Inc., 831 A.2d 49 (Md. 2003); Swager v. Couri, 395 N.E.2d 921 (Ill. 1979). *But see* Rapp, *supra* note 22, at 263 n.8 (demonstrating that the *Lumley* case was actually not the first time a court ruled that personal services contracts are not specifically enforceable).

[131] *Lumley*, (1852) 42 Eng. Rep. 687.

[132] *Id.* at 688.

[133] *Id.*

[134] *Id.* at 691.

[135] *Id.* at 698.

[136] *Id.*

[137] *Id.* at 693.

[138] *Id.* at 691.

and independent of each other and second, that the negative obligation not to perform for another theater was actually inseparable from her positive obligation to sing for the plaintiff.[139] Thus, the common law doctrine that the defendant cited did not prevent the court from enforcing her negative obligation not to sing for another theater.[140] The court then decided to grant the plaintiff the requested injunction.[141]

The decision in the *Lumley* case set the standard, presently still applicable, for personal services contracts: A court of equity will not decree specific performance of a positive part of a personal services contract.[142] However, a court will specifically enforce, in appropriate cases, negative stipulations in those contracts.[143] Note, however, that this distinction between positive and negative obligations is less relevant to the issue of specific enforcement of enlistment contracts because the debatable part of the enlistment contract is its positive part—the part that requires the servicemember to serve for a set period of time. For the purpose of analyzing the enforceability of enlistment contracts, the *Lumley* case is important because it reaffirmed the rule that a court of equity will not specifically enforce the positive part of a contract for personal services.

Bearing in mind that the enlistment contract is a contract for personal services, the logical conclusion should be that the rule that bars specific performance of personal service contracts applies to enlistment contracts. In other words, knowing that the servicemember's obligations in her enlistment contract are of a personal nature, it seems reasonable to think that the *Lumley* decision should apply to the enlistment contract; however, this is not the case. A closer look at the rationales that underlie the courts' reluctance to decree specific performance of personal services contracts reveals that these rationales do not apply to enlistment contracts.

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[139] *Id.* at 693.
[140] *Id.*
[141] *Id.*
[142] RESTATEMENT (FIRST) OF CONTRACTS § 380 (1932) (current through August 2009).
[143] *See* Allen R. Grogan, *Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Service Contracts in the Entertainment Industries: The Need for Legislative Reform*, 52 S. CAL. L. REV. 489, 490 (1979) ("Although personal service contracts are not specifically enforceable, in certain circumstances they may be enforced by prohibitory injunction, a decree that prohibits an employee from performing services for any competitor of the original employer under the contract.") (footnotes omitted); Rapp, *supra* note 22, at 262.

C. The Personal Services Rule Rationales and their Applicability to Enlistment Contracts

A court's unwillingness to specifically enforce personal services contracts is ancient, dating to before the case of *Lumley*, and well established.[144] However, even though courts almost always came to the same conclusion—that this kind of contract is not specifically enforceable—they did not always base their decisions on the same rationales. Generally speaking, courts' decisions reveal four different kinds of rationales for the rule: (a) difficulties in the court's oversight of contract's performance; (b) the undesirable effect of lack of trust in the contractual relationship; (c) personal liberty; and (d) the availability of an alternative remedy.[145] These four rationales are complementary. While some courts may rely on only one of the rationales,[146] others rely on more than one rationale when requested to specifically enforce personal service contracts.[147]

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[144] *See supra* note 130; David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 778 (1992).

[145] *See* RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through August 2009); WILLISTON ON CONTRACTS § 67:102 (4th ed. 2009); Rapp, *supra* note 22, at 271–81.

[146] *See, e.g.*, Seaescape, Ltd. v. Maximum Mktg. Exposure, Inc., 568 So.2d 952, 954 (Fla. Dist. Ct. App. 1990) (stating that a court of equity will not enforce a contract for personal services because "[t]he appropriate remedy in such cases is an action for damages for breach of contract.").

[147] *See, e.g.*, Arthur v. Oaks, 63 F. 310 (7th Cir. 1894). However, some scholars, especially those who belong to the Economic Analysis of the Law school of thought, offer a fifth rationale to justify why contracts for personal services should not be enforced. According to this rationale, specifically enforcing contracts for personal services is economically inefficient, compared to the damages remedy. When a court decrees an order for specific performance, the parties to the contract will engage in negotiation. This negotiation should lead to the most efficient outcome for the parties—the breaching party that does not want to perform his contractual obligations, but is enforced to by the court order, will pay the other party the sum of money (or equal to money) that will convince him not to demand the execution of the breaching party's obligation. In a perfect market, the negotiation costs in this case and in a case in which the breaching party was ordered to pay damages to the other party will be the same. However, when the breached contract is a contract for personal services, the breaching party will probably not be in a position to allow him to negotiate freely for his "release" from the contract; therefore, the negotiation's outcome will not be economically efficient. For example, an employee that wants to breach his employment contract cannot hold negotiations for long, since he has to earn his living by working. This will impair his negotiating power and may result in an economically inefficient outcome. *See* Rapp, *supra* note 22, at 262 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 130–32 (4th ed. 1992)). For a further economic analysis of the specific performance remedy,

1. Difficulties in Courts' Oversight of the Performance

The first rationale that underlies courts' resentment of enforcing contracts for personal services is the inherent difficulty of enforcing personal services contracts.[148] As the Supreme Court of California stated, "it is inconvenient, or, as others express it, impossible, for a court of justice to conduct and supervise the operations incident to and requisite for the execution of a decree for the specific performance of a contract which involves the rendering of personal services."[149] When

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see also Kronman, *supra* note 124 (claiming that specific performance is the economically efficient remedy only when the subject of the contract is unique, and cannot be readily substituted with money); Schwartz, *supra* note 19, at 274 (rejecting Kronman's reasoning, and stating that the specific performance remedy does not necessarily invite a less efficient result).

For the purpose of analyzing whether courts can specifically enforce enlistment contracts there is no need to discuss this rationale. First, this rationale is only offered by scholars, but not by the courts. Even Judge Posner of the Court of Appeals for the Seventh Circuit, who proposed this rationale in *Economic Analysis of the Law*, did not discuss this rationale the only time he wrote, as a judge, on the issue of specific performance of personal services contracts. *See* McKnight v. Gen. Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990) (stating solely that courts will "refuse[] to order specific performance of employment contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment," and citing Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.)). It is highly likely that when the subject of specific enforcement of enlistment contracts is discussed in a court, this rationale will not play a role in the discussion. Second, when enlistment contracts are at issue, the theoretical option of bargaining out does not exist. A soldier will not bargain his way out of military service simply because the habitat of the enlistment contract is not a commercial habitat, and the terminology that fits economic analysis of the law does not necessarily fit the context of enlistment contracts.

[148] The Supreme Court of Michigan used this rationale in *Heth v. Smith* to explain why contracts for personal services are not specifically enforceable:

> Contracts for affirmative personal service consisting of a succession of acts, the performance of which cannot be consummated in one transaction, but must continue for a time, definite or to become definite, and which involve special knowledge, skill, judgment, integrity, or other like personal qualities, the performance of which rests in the individual will and ability, and involving continuous duties which a court of equity could not well regulate, are not, as a rule, enforceable by decree for specific performance.

141 N.W. 583, 586 (Mich. 1913).

[149] Poultry Producers of S. California v. Barlow, 189 Cal. 278, 289 (1922). In California, the personal services rule was enacted into statute. CAL. CIV. CODE § 3423(e). The Supreme Court of California is referring to the rationales of the California Statute. However, since the California statute is based on the common law rule, the rationales for

referring to the difficulty involved in specifically enforcing personal services contracts, courts focus on two kinds of interrelated difficulties.[150] First, enforcement of personal services contracts for prolonged periods of time may require more than one court decision, and courts may need to accompany and supervise the performance of the contracts for the duration of those periods.[151] Indeed, "[i]f performance be decreed, the case must remain in court forever."[152] Second, since personal services contracts require some sort of skill or professional merit, courts find it difficult to pass "judgment upon the quality of performance."[153]

However, when the personal services contract is an enlistment contract, those difficulties should not be a major concern. As a matter of fact, unlike employment or other commercial services contracts, the enlistment contract is self-enforcing. The military services have many methods of assessing the quality of the service of servicemembers, such as periodical evaluations and command supervision.[154] Those methods are intended to guarantee objective professional assessments of servicemembers' military performance and skill.[155] Therefore, if an enlistment contract is enforced, it is unlikely that a court or other non-military review authority will have to assess the servicemember's performance of the contract. Furthermore, even if an external authority is required to review a servicemembers' performance, the military's assessment tools should guaranty an objective, usable, and relevant evaluation, which can serve as the basis for the review.

Moreover, the Armed Forces have an enforcement tool that other employers and purchasers of other personal services simply do not have. The military environment is one of discipline and obedience.[156]

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the statute and the common law rule are the same, and the Supreme Court of California's analysis can also be applied to the common law rule.

[150] McKnight v. Gen. Motors Corp. 908 F.2d 104, 115 (7th Cir. 1990) ("Courts of equity traditionally have refused to order specific performance of employment contracts, because it is *difficult* and *time-consuming* for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment.") (emphasis added).

[151] Rutland Marble Co. v. Ripley, 77 U.S. 339, 358 (1870).

[152] *Id.*

[153] Motown Record Corp. v. Brockert, 160 Cal. App. 3d 123, 137 (Cal. Ct. App. 1984).

[154] U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM (10 Aug. 2007) [hereinafter AR 623-3]; U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) [hereinafter AR 600-20].

[155] AR 623-3, *supra* note 154, para. 1-9.

[156] *See generally* Parker v. Levy, 417 U.S. 733, 758 (1974).

Breaches of the enlistment contract and substandard performance are subject to disciplinary measures, starting with informal counseling and ending with criminal prosecution under the UCMJ.[157] In this way, even if the evaluation performed by the military shows that a servicemember does not fulfill his requirements (or contractual obligations), a court or an external authority will not be called to enforce them. The military possesses the required means to enforce the performance by itself.

2. Contractual Inefficiency

The second rationale that courts use to justify their reluctance to enforce personal services contracts addresses the inefficiency that could be caused by enforcing those contracts. As mentioned above, parties to personal service contracts usually expect that skill, judgment, special knowledge, and discretion will be employed during the execution of the contract.[158] Those contracts usually require a "relationship of cooperation and trust" between the contracting parties.[159] Consequently, enforcing a contract when that trust has been broken and probably cannot be fully restored is inefficient.[160] The "confidence and loyalty" that formed the basis of the contract between the parties cannot be restored by a court order, and without trust, it would be undesirable to enforce the contract.[161] As one court mentioned in the context of employment contracts, enforcing a breached contract is unadvisable because it can lead to "the continuance of hostile, intolerable employment relationships."[162]

It is interesting to note that, unlike the first rationale, which is based on narrow institutional considerations, the second rationale looks at enforcement of personal services contracts from a wider perspective. When addressing the second rationale, courts usually refer to contractual

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[157] *See* AR 600-20, *supra* note 154.
[158] *See supra* text accompanying notes 105–108.
[159] Zannis v. Lake Shore Radiologists, Ltd., 392 N.E.2d 126, 129 (Ill. App. 1979).
[160] Poultry Producers of S. California v. Barlow, 189 Cal. 278, 288 (1922) ("Another reason assigned for the rule, according to some of the authorities, is that, in view of the peculiar personal relation that results from a contract of service, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically.").
[161] Felch v. Findlay Coll., 200 N.E.2d 353, 355 (Ohio App. 1963); RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (current through Aug. 2009); MODERN LAW OF CONTRACTS § 13:17.
[162] Lark v. Post-Newsweek Stations, Connecticut, Inc., No. CV-94-070-53-26, 1994 WL 684718, at *7 (Conn. 1994).

efficiency as a matter of public policy, rather than as a matter of importance solely to the parties to the contract; "where one of the contracting parties is to act as the confidential agent of the other, it is necessary, not only for the parties, but for the sake of society at large, that there should be entire harmony and a spirit of co-operation between the contracting parties."[163]

There are several reasons why this rationale does not apply to enlistment contracts. The military is a hierarchal organization. The relationship between the military and its servicemembers is built on coercion, discipline, and obedience, rather than on mutual trust, harmony, and cooperation.[164] This is true both of militaries based on mandatory service or a draft, and all-volunteer military forces. Although ensuring that servicemembers are content with their service may be advisable, the unique structure of the military enables it to efficiently extract and benefit from the skill, judgment, and discretion of servicemembers even when they are no longer content with their service.[165] Therefore, because of the military's unique relationship with servicemembers, enforcing enlistment contracts, even though they are personal services contracts, does not necessarily lead to inefficient execution of the contracts.

The risk of inefficient enforcement of enlistment contracts is further dulled by the camaraderie that characterizes military life. The military is structured around units made up of servicemembers. Often, a unit's ability to achieve its goals depends on the cooperation and contribution of all members of the unit. As members of the unit strive to achieve the objectives set for them, they will often apply group pressure on any member not as motivated as they are.[166] A servicemember who no longer identifies with the military organization or no longer wants to be

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[163] *Barlow*, 189 Cal. At 288–89; *see also Zannis*, 392 N.E.2d at 129 ("[A]s a matter of public policy courts will avoid the friction that would be caused by compelling an employee to work, or an employer to hire or retain someone against their wishes.").

[164] *See* Parker v. Levy, 417 U.S. 733, 744 (1974).

[165] *See id.* ("To maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'") (citing Martin v. Mott, 12 Wheat. 19, 35 (1827)); *see also supra* text accompanying notes 156–61.

[166] *See* CHRISTOPHER C. STRAUB, THE UNIT FIRST 3 (1988) ("To fight well presupposes that at least most of the soldiers in a unit have chosen to fight at all, that they individually have the will to fight. Then the individual wills must combine into a fighting team, a team that has practiced and whose members have confidence in each other and in team performance.").

part of it may be forced by his peers to maintain a certain level of performance to allow the unit to accomplish its mission effectively. In other words, servicemembers in the military must answer not only to their commanders, but also to their fellow servicemembers.[167] Informal peer pressure can supplement the coercive nature of the military hierarchy and reduce the potential for any inefficiency that might result from compelling someone to render personal services.

Furthermore, because the contractual efficiency rationale is rooted in public policy, it does not prevent specific performance of enlistment contracts. It is at the height of public interest that the military achieves its goals efficiently.[168] The specific public interest served by maintaining military services through the enforcement of enlistment contracts is stronger than the general public interest achieved by not enforcing contracts that may prove inefficient.[169] Specific performance of enlistment contracts, therefore, does not contravene public policy in the same way that specific performance of ordinary personal service contracts does.

3. Personal Liberty

The third rationale's concern is the effect of enforcement on the enforced party's personal liberty. In the words of the Seventh Circuit, "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another."[170] This rationale can be based on two different legal bases: the Thirteenth Amendment's prohibition of involuntary servitude[171] and international treaties.[172] While courts and scholars have discussed the Thirteenth Amendment's impact on the remedy of specific performance in the context of personal services contracts and of the military service, they have not yet discussed the international legal basis of this rationale.[173]

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[167] *But see* Rapp, *supra* note 22, at 273.
[168] *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY paras. 1-40, 1-41 (14 June 2005).
[169] *See generally* Gengler v. United States, 453 F. Supp. 2d 1217, 1238 (E.D. Cal. 2006) (effect of public policy considerations on enlistment contract's interpretation).
[170] Arthur v. Oaks, 63 F. 310, 317 (7th Cir. 1894).
[171] U.S. CONST. amend. XIII.
[172] *See infra* Part IV.C.3.b.
[173] *See, e.g.*, *Arthur*, 63 F. at 317; Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020 (2009). In fact, the consideration of personal liberty is also based on general principles of human rights and equity, and not

a. The Thirteenth Amendment

The Thirteenth Amendments reads, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[174] Although the Amendment is closely linked to African slavery, its prohibition is not restricted only to that form of servitude; it applies to any form of slavery or involuntary servitude.[175] The terms "slavery" and "involuntary servitude," however, are not defined by the Constitution. While the term "slavery" is quite clear, the term "involuntary servitude" requires some clarification.[176]

The Supreme Court defined involuntary servitude as a condition in which the employee—or the victim—has no "available choice but to work" due to legal or physical coercion or the threat of such use.[177] This definition excludes employment situations in which the employee has some ability to decide whether to retain his status as an employee, even if

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only on the Thirteenth Amendment and international law. The rule barring specific performance of personal services contracts evolved in England, where, naturally, the Thirteenth Amendment does not apply, and before international law even forbade slavery. *See, e.g.*, De Francesco v Barnum, (1890) L.R 45 Ch.D. 430 (U.K.) ("I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery"). In the United States, however, as long as the Thirteenth Amendment is in place and the courts do not rule explicitly otherwise, the Thirteenth Amendment will continue to serve as the main authority for discussions of this rationale.

[174] U.S. CONST. amend. XIII. Involuntary servitude is also forbidden by 10 U.S.C. § 1854(a) (2006):

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

Id.

[175] Butler v. Perry, 240 U.S. 328, 332–33 (1916).

[176] United States v. Kozminski, 487 U.S. 931, 942 (1988) ("While the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define.").

[177] *Id.* at 943–44.

the decision entails harsh consequences.[178] Some argue that this relatively narrow definition of involuntary servitude denies some individuals the protection of the Thirteenth Amendment.[179]

When interpreting and applying the Thirteenth Amendment, courts usually draw a distinction between involuntary services provided to private employers and mandatory services rendered to the states or the Federal Government.[180] The Amendment itself excludes from its prohibition servitude imposed as punishment for a crime.[181] Furthermore, according to the Supreme Court's interpretation, the Thirteenth Amendment was not meant to prohibit the Government or the states from compelling the performance of civilian duties, such as military or civic service, by threat of sanction.[182] Courts consider those duties "exceptions" to the general rule.[183] Undeniably, "[t]he great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[184]

Despite the Supreme Court's clear definition of involuntary servitude, courts tend to presume that specific enforcement of personal services contracts impinges on personal liberty in a manner that violates the Thirteenth Amendment, without performing the analysis required by the Supreme Court's definition. For example, in a suit filed by a recording company seeking to prevent another recording company from using the services of an artist who first entered a contract with the plaintiff, the court commented that "an unwilling employee cannot be compelled to continue to provide services to his employer either by ordering specific performance of his contract, or by injunction. To do so runs afoul of the Thirteenth Amendment's prohibition against

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[178] Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 459 (2d Cir. 1996) ("The Thirteenth Amendment does not bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are 'exceedingly bad.'").
[179] *See* Joey Asher, *How the Unites States is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT'L L. REV. 215 (1994).
[180] *Kozminski*, 487 U.S. at 943–44.
[181] U.S. CONST. amend. XIII; *see* Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990).
[182] *Kozminski*, 487 U.S. at 943–44 ("[T]he Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.").
[183] Butler v. Perry, 240 U.S. 328, 333 (1916).
[184] *Id.*

involuntary servitude."[185] The court did not apply the Supreme Court's definition.

Some scholars have objected to courts' presumption that specific performance of all personal services contracts is an inherent violation of the Thirteenth Amendment. For example, Christopher Rapp distinguishes between labor contracts, for which enforcement should be forbidden by the Thirteenth Amendment on its face, and other personal services contracts, which may, to some extent, be enforced.[186]

Nathan Oman, on the other hand, objects to any general rule in this context, arguing that the Thirteenth Amendment prohibits specific performance of only those personal services contracts whose enforcement would constitute degrading slave-like domination, not those involving a well compensated relationship involving no domination.[187] In other words, according to Oman and contrary to the approach taken by most courts, the applicability of the Thirteenth Amendment to personal services contracts merits a separate and specific analysis and cannot be generalized.[188]

Notwithstanding courts' general view of the Thirteenth Amendment in the context of personal services contracts, the courts have made it quite clear that the Thirteenth Amendment has no effect on military service.[189] As discussed earlier, courts construe the Amendment as not applying to services rendered to the Government or to states as part of

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[185] Beverly Glen Music, Inc. v. Warner Commc'ns, Inc., 224 Cal. Rptr. 260, 261 (Cal. Ct. App. 1986); *see also* Poultry Producers of S. Cal. v. Barlow, 189 Cal. 278, 288 (1922) ("[I]t would be an invasion of one's statutory liberty to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States . . . ."); Birmingham Trust & Savings Co. v. Atlanta, B. & A. Ry. Co., 271 F. 743, 744 (Ga. D. Ct 1921) ("The right . . . of one to refuse to serve, even though under a binding contract to do so, is a part of the constitutional personal liberty of the land. The failure or refusal to perform a contract of service may create a liability in damages, but no court will enforce the service"); Arthur v. Oaks, 63 F. 310, 317 (7th Cir. 1894).

[186] Rapp, *supra* note 22, at 277.

[187] Oman, *supra* note 173, at 2025.

[188] Kronman described this approach best, saying "[t]he nature, completeness, and duration of self-imposed limitations on personal freedom determine their legal and moral acceptability." Kronman, *supra* note 124, at 372.

[189] *E.g.*, Hesse v. Resor, 266 F.Supp. 31, 35 (E.D. Mo. 1966) ("The 13th amendment right to freedom from involuntary servitude does not apply to military service.").

one's civic duty or service.[190] This includes military service, despite the heavy burden it may impose on servicemembers' personal liberty. This ruling, issued when military service was still mandatory,[191] is all the more relevant today, when military service is voluntary. Indeed, courts are inclined to reassert this standard when addressing involuntary extensions to enlistment contracts originally entered into voluntarily.[192]

In one case, the plaintiff petitioned the court to enjoin the Air Force from enforcing his enlistment contract claiming an order to report for active duty violated the Thirteenth Amendment prohibition against involuntary servitude.[193] The plaintiff had served with the Air Force for eleven years before the Air Force issued the "'extended active duty order' . . . pursuant to the enlistment contract."[194] The court concluded,

> The plaintiff's thirteenth amendment claim that enforcement of an order requiring him to report for active duty would constitute involuntary servitude, is not well taken. While it is true that enlistment in the armed forces pursuant to a contract differs from involuntary induction into the armed forces, we think that no distinction exists for purposes of applying the thirteenth amendment to the facts of this case.[195]

Therefore, to the extent that the Thirteenth Amendment supports the personal liberty rationale against enforcing specific performance of personal service contracts, it does not apply to the enforcement of

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[190] *See supra* notes 180–184.

[191] United States v. Crocker, 274 F. Supp 776 (D.C. Minn. 1969) (holding that the draft law does not violate the Thirteenth Amendment, even during times of peace); Howze v. United States, 272 F.2d 146, 148 (9th Cir. 1959) ("The power of Congress to raise armies, and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment, or the absence of a military emergency."); Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954) (declaring that the "Doctors Draft Law," Public Law 779, § 4(i)(2), 81st Congress, Second Session, 64 Stat. 826, was within the power of the Congress and does not constitute a Thirteenth Amendment violation).

[192] *See* Clark v. United States, 461 F.2d 781, 784 (Ct. Cl. 1972) (holding that activation of commissioned officers whose ready reserve agreements have expired does not violate the Thirteenth Amendment); United States v. Shy, 10 M.J. 582, 583 (A.C.M.R. 1980) (holding that retention of the accused in service after expiration of his enlistment term in order to conduct court-martial proceedings against him was not prohibited by the Thirteenth Amendment, which "is inapplicable to service in the military.").

[193] Lonchyna v. Brown, 491 F. Supp. 1352, 1352 (D.C. Ill. 1980).

[194] *Id.*

[195] *Id.* at 1354.

enlistment contracts. However, support for the personal liberty rationale can also be drawn from a completely separate source: international agreements.

b. International Agreements

The United States is party to a series of treaties and international agreements banning slavery and involuntary servitude. As Joey Asher has argued,[196] the definitions of "slavery" and "involuntary servitude" included in those agreements have been interpreted more expansively than the same terms in the Thirteenth Amendment have been interpreted by U.S. courts.[197] Asher points out that according to those international agreements, "all means of coercion other than law and physical force are equally impermissible means of coercion into slavery."[198] Because international agreements prohibit a wider array of enforced employment than the Thirteenth Amendment, they could serve as an alternative and independent legal source for the personal liberty rationale against the enforcement of personal services contracts.

The first notable international agreement[199] is the Universal Declaration of Human Rights (Universal Declaration), which maintains that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[200] In contrast to the Thirteenth Amendment, the language of the Universal Declaration is not limited to certain forms of coercion, nor is it restricted to civilian servitude.[201] On the contrary, the Universal Declaration explicitly prohibits slavery and personal servitude "in all their forms."[202] Therefore, on its face, the legal prohibitions of the Universal Declaration appear to support the rule barring specific performance of personal services contracts, and they may even be construed to prohibit enforcement of military service. However, since the Universal

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[196] Asher, *supra* note 179.
[197] *Id.* at 234–48.
[198] *Id.* at 242.
[199] This section addresses only the most relevant international agreements, and they are not necessarily cited in chronological order. *See id.* (analyzing all of the international agreements that discuss slavery and personal servitude).
[200] Universal Declaration of Human Rights art. 4, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].
[201] Asher, *supra* note 179, at 244.
[202] Universal Declaration, *supra* note 200, art 4.

Declaration is not a treaty but merely a widely accepted General Assembly Resolution, it is not binding,[203] and it is not considered part of the "law of the land" of the United States.[204] Consequently, the value of the Universal Declaration as an independent legal authority against the enforcement of personal services contracts, including enlistment contracts, is limited.[205]

In contrast to the Universal Declaration, the Convention to Suppress the Slave Trade and Slavery of 1926[206] (Slavery Convention) is a binding agreement that could serve as an independent source prohibiting enforcement of personal services contracts. Parties to the Slavery Convention, the Unites States included, took upon themselves to prevent the slave trade and to "bring about, progressively and as soon as possible, the complete abolition of slavery."[207] In contrast to the Thirteenth Amendment, the Slavery Convention defines the term slavery,[208] and its definition is somewhat broader than the interpretation of the term "slavery" in the Thirteenth Amendment.[209]

Despite its focus on slavery, the Slavery Convention does not independently prohibit compulsory service or labor. Instead, to prevent "forced labour from developing into conditions analogous to slavery," the Slavery Convention establishes a progressive process to end compulsory labor, and "compulsory or forced labour may only be exacted for public purposes" until then.[210] Consequently, the Slavery Convention's prohibition against "compulsory labour" might, in some circumstances, apply to court ordered specific performance of personal services contracts. Nevertheless, the Slavery Convention would not prohibit specific performance of enlistment contracts because they are

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[203] Hurst Hannum, *The Status of The Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317–18 (Fall 1995–Winter 1996).
[204] U.S. CONST. art. VI.
[205] It has been suggested that the prohibition against slavery embedded in the Universal Declaration represents customary international law and, therefore, is binding on all states. *See* Hannum, *supra* note 203, at 334. However, even if slavery is forbidden in general, the broad definitions of slavery and involuntary servitude are probably not accepted as customary international law.
[206] Convention to Suppress the Slave Trade and Slavery, Sep. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter Slavery Convention].
[207] *Id.* art. 2.
[208] *Id.* art. 1.
[209] Asher, *supra* note 179, at 238–39.
[210] Slavery Convention, *supra* note 206, art 5(1).

explicitly excluded from the forced labor proscriptions of the convention.[211]

The International Covenant on Civil and Political Rights[212] (ICCPR) represents another possible international source. The ICCPR entered into force in 1976, and it prohibits, among other things, "slavery and the slave-trade in all their forms,"[213] as well as "servitude."[214] The ICCPR also mandates that "[n]o one shall be required to perform forced or compulsory labour."[215] Once again, the language of the ICCPR, as well as its historical background, strongly suggest a broad interpretation of the terms "slavery" and "servitude."[216] In this context, it is important to note that the United States' suggestion, which was made during the negotiations period, to add the word "involuntary" before the word "servitude" was rejected, strengthening the conclusion that the ICCPR, by prohibiting servitude conditions entered into voluntarily, is intended to be far more expansive than the Thirteenth Amendment's prohibition.[217] Because the United States has ratified the ICCPR and has incorporated it into U.S. law,[218] its far-reaching prohibition on servitude and forced labor may well serve as a legal basis for the rule barring specific performance of personal services contracts.

On the other hand, the ICCPR still could not be used to prevent the enforcement of enlistment contracts. Article 8(3)(ii) of the ICCPR explicitly excludes military service form the definition of forced labor. The article states that "the term 'forced or compulsory labour' shall not include: . . . [a]ny service of a military character."[219] Therefore, the ICCPR does not prevent the enforcement of a military service obligation, whether mandatory or voluntary, including by an order for specific

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[211] Another possible argument is that the Slavery Convention, *supra* note 206, is not self-executing. *See* Asher, *supra* note 179, at 245.
[212] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
[213] *Id.* art. 8.
[214] *Id.*
[215] *Id.*
[216] Asher, *supra* note 179, at 246.
[217] *Id.* at 248. The International Labour Organization's Convention (No. 29) Concerning Forced Labour, June 28, 1930, 39 U.N.T.S. 55 [hereinafter Forced Labor Convention] also prohibits "all work of service which is exacted from any person under the menace of any penalty." *Id.* art. 2. However, contrary to the ICCPR, the Forced Labor Convention does not prohibit forced labor that was entered into voluntarily. *See id*.
[218] S. EXEC. REP. NO. 102-23 (1992), *reprinted in* 31 I.L.M. 645.
[219] ICCPR, *supra* note 212, ¶ 8(3).

performance. Ultimately, while some international agreements may restrict the enforcement of personal service contracts by specific performance, they do allow enforcement of military service, both mandatory and voluntary. International agreements, for that reason, will not prevent specific performance of an enlistment contract.

Even though enforcing enlistment contracts may impinge on servicemembers' personal liberty, neither the Thirteenth Amendment nor international agreements to which the United States is a party formally prevent specific performance of enlistment contracts. Thus, the personal liberty rational cannot justify following the rule barring specific performance of personal services contracts with regards to the enlistment contract.

4. The Availability of an Alternative Remedy

The fourth rationale for the rule barring specific performance of personal services contracts is strongly connected to the equitable nature of the specific performance remedy. Sometimes, courts refuse to order specific performance when another remedy is available.[220] As an equitable remedy, specific performance is appropriate only when another remedy is not available or does not fully accomplish the remedial goal;[221] when another remedy is available—primarily damages—the court will not resort to an equitable remedy.[222] Thus, whenever a breach of a personal services contract is repairable by damages or by any other non-

[220] *See, e.g.*, Rutland Marble Co. v. Ripley, 77 U.S. 339, 359 (1870) ("But what is a still more satisfactory reason for withholding a decree for specific performance is, that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed, and by the contract itself."); Seascape, Ltd. v. Maximum Mktg. Exposure, Inc., 568 So.2d 952, 954 (Fla. Dist. Ct. App. 1990).

[221] *See supra* note 127 and accompanying text.

[222] McMenamin v. Philadelphia Transp. Co., 51 A.2d 702, 704 (Pa. 1947) ("Those rights which have been protected by a court of equity no longer exist, and will not be recreated by a decree of a court of equity requiring specific performance of a contract for personal services. The remedy, if any, is an action at law for damages."); Ryan v. Reddington, 87 A. 285, 286 (Pa. 1913) ("The remedy of the plaintiffs at law was entirely adequate as both the term and compensation for the employment were fixed by the contract. It is, therefore, apparent that a court of equity had no jurisdiction . . . ."); *see also* Loeb v. Textron, Inc., 600 F.2d 1003, 1023 (1st Cir. 1979) (granting damages for breach of employment contract in lieu of specific performance of the contract).

equitable remedy, the courts will not order specific performance.[223] In the words of the Seventh Circuit,

> The right of an employe [sic] engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages . . . .[224]

This rationale has little effect when no alternative remedy can fully compensate or otherwise reverse the consequences of the breach. Such is the case when enlistment contracts are breached by servicemembers. The military provides servicemembers training that is unique to the military, and when a servicemember leaves military service before the end of his obligation, the military not only has to recruit another servicemember to replace him, it also has to train the new servicemember. The total strength of the military and its ability to accomplish its goals are compromised.[225] Meanwhile, ordering a servicemember who has breached his enlistment contract to pay damages to the military cannot fully compensate for the damage he caused. Damages may reimburse the military for the costs of training another recruit, but they cannot make up for the temporary decrease in the readiness of the force. The only way to fully avoid these manpower shortages of trained personnel is to enforce enlistment contracts for the durations established in the agreements.

D. Public Interest Considerations

Examining the rationales offered by the courts for barring specific performance of personal services contracts reveals that none of the

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[223] This rationale is not unique to personal services contracts. Derived from the equitable nature of the specific performance remedy, this rationale applies to all contracts.

[224] Arthur v. Oaks, 63 F. 310, 318 (7th Cir. 1894).

[225] SHEILA NATARAJ KIRBY & HARRY J. THIE, ENLISTED PERSONNEL MANAGEMENT: A HISTORICAL PERSPECTIVE 105 (1996) ("When [servicemembers] leave early not only has the military lost a valuable asset, but it also has to acquire and train a replacement."); *see also* U.S. DEP'T OF DEF., DIR. 1100.4, GUIDANCE FOR MANPOWER MANAGEMENT (12 Feb. 2005); U.S. DEP'T OF DEF., INSTR. 1304.30, ENLISTED PERSONNEL MANAGEMENT PLAN (EPMP) PROCEDURES (14 Mar. 2006).

rationales apply to enlistment contracts. Even though enlistment contracts are personal services contracts, they lack the traits that make personal services contracts unenforceable. The *Baldwin*[226] Court's hunch was correct: enlistment contracts should be exempted from the rule prohibiting enforcement of contracts for personal services. However, even if one or more of the rationales does apply to enlistment contracts, they should not prevent their enforcement because, according to some courts, the application of the contractual doctrine barring specific performance of personal services contracts is potentially subject to general overarching considerations of the public interest. A good example of that is found in *Shubert v. Woodward*, where the Eighth Circuit said,

> Again, the enforcement of the specific performance of the contract in hand will necessarily entail upon the courts through many years the supervision and direction of a continuous series of acts, many of which will present the question whether or not they accord with the contract . . . . It is conceded that a court of equity has ample power to determine all these questions and to conduct this business by its receiver, or master, and that it will sometimes enforce the performance of contracts where the performance involves more intricate details, or longer periods of time, where the other equities of the complainant in the case, or the public interest, are controlling. But in the absence of such public interest, or such controlling equities, or of clear evidence that irreparable injury will probably result to the complainant if it withholds the relief sought, a court of equity does not constrain, and it ought not to compel, the enforcement of the specific performance of a contract . . . .[227]

[226] Baldwin v. Cram, 522 F.2d 910 n.4 (2d Cir. 1975).

[227] *Compare* Shubert v. Woodward, 167 F. 47, 56 (8th Cir. 1909), *with Arthur*, 63 F. at 317 (refusing to order striking railroad employees back to work and relying on the rule barring specific performance of personal services contracts, even though the strike might have caused severe damage to the public). In *Arthur*, the Seventh Circuit further reasoned, "[b]ut these evils, great as they are, . . . are to be met and remedied by legislation restraining alike employes [sic] and employers so far as necessary adequately to guard the rights of the public." *Id.*

Sometimes, courts' decisions to order specific performance of an employment contract, which is another example of a personal services contract, implicitly or explicitly disregard the rule barring specific performance of personal services contracts because of the public interest served by enforcing them. Such is the case, for example, regarding collectively bargained employment contracts.[228] When an employee, employed through a collective bargain contract is fired in violation of the Constitution,[229] or where damages do not constitute a sufficient remedy,[230] courts may reinstate the employee to her prior position, notwithstanding the fact that the reinstatement is *de facto* specific performance of a personal services contract.[231]

As discussed above, there is a vested public interest in maintaining a strong, ready, apt, and trained military force. Just as courts decided that the public interest in protecting collective employment relationships justifies deviating from the rule barring specific performance of personal services contracts, courts may also conclude that the public interest in maintaining a trained and ready military justifies abandonment of the rule in certain cases. In other words, the courts may ultimately decide that military mission readiness is "controlling" even if some or all of the rationales described above were applicable to enlistment contracts.[232] This logic may, perhaps, explain why the court in *Baldwin v. Cram* assumed, almost as if it was a natural fact, that unlike other forms of service, enlistment contracts are enforceable.[233]

VI. Conclusion

After letting Atkinson go home to his wife and kids, Monty Python's Regimental Sergeant Major asks his squad, "Now, everybody else happy with my little plan of marching up and down the square a bit?"[234] This

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[228] MODERN LAW OF CONTRACTS § 13:17.
[229] Reuber v. Unites States, 750 F.2d 1039, 1066–67 (D.C. Cir. 1984).
[230] Thurston v. Box Elder Cnty., 892 P.2d 1034, 1040 (Utah 1995) (explaining that the rationales for the rule barring specific performance of personal services contracts "are susceptible to closer scrutiny in light of contemporary employment relationships and the need to protect at-will employees from wrongful termination of their employment").
[231] *Id.*
[232] *Shubert*, 167 F. at 56. In this context, it is useful to remember that courts are already known to be deferential when they deal with the military. *See* Orloff v. Willoughby, 345 U.S. 83 (1953); Sebra v. Neville, 801 F. 2d 1135 (9th Cir. 1986).
[233] Baldwin v. Cram, 522 F.2d 910 n.4 (2d Cir. 1975).
[234] THE MEANING OF LIFE (Celandine Films 1983).

time Coles, another soldier, raises his hand and says, "Sarge, I've got a book I'd quite like to read."[235] The Sergeant Major replies, "Right! You go read your book then! Now, everybody else quite content to join in with my little scheme of marching up and down the square?"[236] By the end of the sketch, the Sergeant Major ends up marching up and down the square all by himself.[237]

A scenario in which any servicemember can decide to leave the service at will would be a military personnel planner's nightmare. Such unfettered freedom would harm the military's ability to accomplish its goals, which requires strict resource planning.[238] Applying the rule barring enforcement of personal services contracts to enlistment contracts would render them unenforceable. Surprisingly, this issue has never been thoroughly discussed in the courts or by scholars even though the question is not merely theoretical. As explained in this article, a determination that the enlistment contract is not contractually enforceable should have affected the decisions of both federal courts and military courts-martial.

As a common law-based contract law doctrine, the rule barring specific performance of personal services contracts will only apply to enlistment contracts if enlistment contracts are governed by ordinary contract law doctrines. As shown in Part III, past indecisiveness aside, courts currently employ contract law doctrines to enlistment contracts, except when it comes to pay and allowance issues. This makes the focal issue of this article more pertinent than ever: If contract law applies to enlistment contracts, why does the contract law rule regarding specific performance of personal services contracts not apply?

In order to answer this question, this article focused on the reasons and rationales that underlie, according to over one-hundred-and-fifty years of court decisions, the rule prohibiting specific performance of personal services contracts. Of the four different rationales—difficulties in courts' oversight of the contract's performance, contractual inefficiency, personal liberty, and availability of other remedies—none apply to enlistment contracts. The enlistment contract's special characteristics and purpose make it "immune" to the effect of those

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[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] KIRBY & THIE, *supra* note 225, at 105.

rationales on its enforceability. Moreover, as demonstrated, public policy considerations also play a role in the legal perception that the enlistment contract is specifically enforceable despite the rule barring specific performance of personal services contracts. In sum, the assumption that the enlistment contracts are enforceable despite their personal quality is confirmed.