

LIBERALISM, DEPENDENCE, AND . . . ADMIRALTY*Edward A. Hartnett**

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Abstract

Liberal political and legal theory posit a world of autonomous individuals, each pursuing their own chosen ends, linked to each other by one or more agreements. But this is not how most of us experience most of our lives. Instead, most of us spend most of our lives either dependent on others, responsible for others who are dependent on us, or both. Moreover, climate change is putting into sharp relief our mutual dependence on others who live thousands of miles away and whom we will never meet. This past summer's record-breaking heat waves and wildfires brought the point home to many. Fires in Canada not only created dangerous smoke conditions in North America, but also darkened the skies in Europe. Meanwhile, liberalism is in trouble, threatened by the rise of authoritarianism.

This Essay seeks to open a conversation about resources in our legal history and culture that work from different assumptions—and might perhaps be a source of inspiration—by pointing to one such resource: admiralty. It explores three areas of admiralty law that are premised on the recognition that people at sea are vulnerable and dependent. It invites us to consider what our law might look like if we imagined ourselves, not as autonomous individuals each pursuing our own vision of the good through contracts with each other, but instead as voyagers on a shared vessel, journeying together through waters beautiful and dangerous.

I. The Disconnect Between Liberalism and Lived Experience

Liberal political and legal theory posit a web of autonomous individuals linked to each other by one or more agreements as they pursue their own chosen ends. Those agreements might be express or implied; they might be actual or figurative. In this view, obligations to others are voluntarily chosen, even if need and scarcity compel us to enter into some agreements with each other. Absent such an agreement, we have no obligation to feed, clothe, house, welcome, rescue, or preserve one another.¹

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¹ See generally, e.g., THOMAS HOBBS, *LEVIATHAN* (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1689); JOHN STUART MILL, *ON LIBERTY* (1859); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

But this is not how most of us experience most of our lives. We are born as vulnerable beings and are utterly dependent on others, typically on our parents but sometimes on other relatives or caregivers. While that dependence declines as we grow, it remains through childhood and, in recent decades, through a lengthening adolescence, and often into adulthood.

As adults, we typically take on responsibilities for others. We become spouses, mutually dependent on each other. We become parents, responsible for our children, and perhaps more dependent on our own parents for help with our own children. As our own parents age, we become responsible for them, and sometimes for their siblings and friends. As our children, in turn, become parents, we become, to some extent, responsible for our grandchildren. And as we age further, we frequently become dependent on our own children. Indeed, one of the hallmarks of human beings is that our generations overlap with each other, with multiple generations living simultaneously for many years, and our young being dependent on their elders for an extraordinary length of time.² And many who don't have children of their own nevertheless wind up seeing the children of their siblings and friends depending on them to some extent. In short, most of us spend most of our lives either dependent on others, responsible for others who are dependent on us, or both.

Perhaps the times in our lives when we feel most free from such dependencies are late adolescence and early adulthood, when most of us are old enough to sense independence from our parents, but young enough to have no committed partner, no spouse, no children, and no elderly parents. It is perhaps not a coincidence that it is during this phase of life that we tend to form views about political and legal theory.³

² See BERTRAND DE JOUVENEL, *THE PURE THEORY OF POLITICS* 44 (1963) (observing that “[m]an’s prolonged physical dependence upon his begetters is . . . the *sine qua non* condition of his humanity”).

³ *Cf. id.* at 45 (describing social contract theories as “views of childless men who must have forgotten their own childhood” and asking “how the hardy, roving adults pictured could imagine the advantages of the solidarity to be, had they not enjoyed [its] benefits” as children “or how they could feel bound by the mere exchange of promises, if the notion of obligation had not been built up within them by group existence”); *id.* at 48 (noting that pictures of society where “human relations are all bargaining” “seem to assume a club of celibates” and forget “that mankind could not go on if there were no giving” without reward from parent to child).

It is not just close family relationships that reveal our interdependence. Climate change is making more and more clear our mutual dependence on others who live thousands of miles away and whom we will never meet. Greenhouse gases emitted anywhere in the world can affect temperatures anywhere in the world, leading to rising sea levels anywhere in the world.⁴ This past summer's heatwaves and wildfires brought the point home to many. Temperature records were broken across the globe while fires in Canada not only created dangerous smoke conditions in North America, but also darkened the skies in Europe. And climate change reveals that we are vulnerable despite—indeed, because of—our advanced technology, the very technology we use to seek and claim invulnerability.

One way to respond to this disconnect between the fact of dependence and liberal theory is to try to conceptualize these dependencies as voluntarily chosen. But that doesn't describe well the way that we experience these dependencies.

Obviously, none of us have any role in choosing our parents. Nor do we choose whether our parents will be able or willing to care for us, or who will if our parents can't or won't. On the other hand, the decision to marry is almost always voluntary, but it comes with open-ended responsibilities (better or worse, richer or poorer, in sickness and in health) that can only be dimly perceived at the time of the wedding. And while ending a marriage is easier than ever, it still requires a formal legal process. Having children can be more or less voluntary, depending on a host of factors, but it is doubtful that anyone who chooses to have children fully appreciates at the time the enduring responsibilities that parenthood entails. Caring for elderly parents and grandchildren is easier to describe as voluntary. For a variety of reasons—geographic distance, emotional distance, competing responsibilities, economic pressure, hostility, assumptions about gender roles—some may be more willing and able than others to engage in such care. But viewing such care as simply a voluntary agreement between autonomous individuals does not capture the nature of the relationship.

Another way to respond would be to wall all this off as dealing with families. From this perspective, family law is just different: such

⁴ See *Massachusetts v. E.P.A.*, 549 U.S. 497, 521 (2007) (describing harms associated with climate change, including the accelerated rise of sea levels); *id.* at 543 (Roberts, C.J., dissenting) (“Because local greenhouse gas emissions disperse throughout the atmosphere and remain there for anywhere from 50 to 200 years, it is global emissions data that are relevant.”).

domestic relations are a separate sphere from the world of autonomous individuals. Inside the household, the law of husband and wife, of parent and child, of master and servant (or master and slave) governed the internal workings of the domestic institution. But once outside the household, one enters the public sphere, with autonomous individuals entering into agreements with each other.

One problem with this response is that it may have worked better in a different time. Treating domestic relations as a thing apart may have worked better when there was a master of the house, with servants (or slaves) subject to his authority. It may have worked better when the doctrine of coverture treated married women as being under the protection and authority of their husbands. It may have worked better when men alone voted—on the theory that the rest of the household was represented by him and that someone dependent on others lacked the independence needed for the virtuous exercise of political power.⁵ To be sure, this is not a complete critique, for one could say that the march of liberal individualism has freed slaves and servants, given women autonomy, and made marriage dissolvable at will. From this perspective, the liberalization of family law means that the only area that needs to be walled off is the care of children (or at least young children), given their inevitable dependence.⁶ All other responsibilities can be viewed as voluntarily chosen. Yet even so limited, there still needs to be some basis for deciding on whom to impose the obligation of care for the dependent child: the brute fact of the child's dependency does not tell us who is responsible for the child's care.

And neither of these approaches helps with ecological interdependence and vulnerability. This kind of interdependence and vulnerability is not chosen voluntarily, and certainly cannot be explained by relying on the distinctiveness of family relationships.

If liberalism were thriving, this tension between its premises and people's lived experience might be unimportant, or perhaps only of intellectual interest. But liberalism is not thriving. Some view it as

⁵ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–87 (2002).

⁶ But even there, some call for greater state protection of children's interests in rejecting their families' values. See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 127 (2021) (“[C]hildren should have space to modify and even reject their families’ values. A liberal democracy best advances the value of pluralism by supporting parental guidance and the parent-child relationship while, at the same time, honoring children’s individual interests and future selves.”).

having failed.⁷ Whether or not it has failed, it is certainly vulnerable and under attack.⁸ It is at risk of succumbing to authoritarianism, perhaps because people need to feel connected to someone, something, or to each other, by a connection greater and deeper than an agreement, real or hypothesized. Perhaps liberalism needs to be reinvigorated.⁹ Or perhaps we need to find some way to reorient our political and legal thinking toward some notion of the common good.¹⁰ Particularly after a pandemic that has left one group of citizens angry at those who restricted their freedom and another group angry at those who refused to take steps to protect others—leaving some in both groups less inclined to follow the rules¹¹—the need is great, even if the solutions are far from clear.

I doubt that solutions will come from either doubling down on existing practices or striking out in wholly new ways. Instead, I suggest that the way forward will draw upon, recover, and perhaps repurpose aspects of our past that remain alive, perhaps in

⁷ See generally, e.g., PATRICK DENEEN, *WHY LIBERALISM FAILED* (2018); PATRICK DENEEN, *REGIME CHANGE: TOWARD A POSTLIBERAL FUTURE* (2023).

⁸ See generally, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); JAMES TRAUB, *WHAT WAS LIBERALISM?: THE PAST, PRESENT, AND PROMISE OF A NOBLE IDEA* (2019); FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003).

⁹ See generally, e.g., YASCHA MOUNK, *THE GREAT EXPERIMENT: WHY DIVERSE DEMOCRACIES FALL APART AND HOW THEY CAN ENDURE* (2022); FRANCIS FUKUYAMA, *LIBERALISM AND ITS DISCONTENTS* (2022); GEORGE PACKER, *LAST BEST HOPE: AN ESSAY ON THE REVIVAL OF AMERICA* (2021).

¹⁰ See generally ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

¹¹ See, e.g., Dana Taylor, *Why Are So Many People Behaving Badly?*, USA TODAY 5 THINGS PODCAST (Sept. 14, 2023), <https://perma.cc/R62T-ZH32> (guest Kirsty Sedgman noting that “there seems to be a pervasive sense that since Covid things have changed remarkably for the worst” in terms of antisocial behavior); Larry Higgs, *Toll Cheats Stiffed N.J. for \$117M Last Year and the Bill Keeps Growing*, NJ.COM (last updated July 26, 2023), <https://www.nj.com/news/2023/07/toll-cheats-cost-people-in-new-jersey-over-100-million.html> (quoting the CEO of the Delaware River Port Authority as saying that “[i]t seems with the pandemic, people have a little less tolerance for following the rules”); Matthew Yglesias, *All Kinds of Bad Behavior Is on the Rise*, SLOW BORING (Jan. 10, 2022), <https://perma.cc/J4M9-LKJE> (noting an increase in shootings, traffic deaths, unruly passenger incidents on airplanes, and discipline and safety issues in schools).

comparatively obscure or neglected places. This Essay explores one such place: admiralty.

II. A View from Admiralty

The sea is a threatening place, and those who are at sea are vulnerable to its perils. A person on board a vessel at sea is dependent on others who are aboard that vessel, and perhaps on others at sea as well. Even the best technology does not eliminate that vulnerability, as the story of the *Titanic*, past and present, teaches those who dare to doubt it.¹² What sort of law emerges if we imagine, not autonomous individuals making contracts with each other, but vulnerable people who are dependent on each other?

Admiralty, I think it fair to say, is viewed by many as obscure.¹³ Law and equity were united in federal court some eighty-five years ago, but admiralty remains separate, governed by its own rules that few students who learn the Federal Rules of Civil Procedure ever see.¹⁴ It is ancient law. One of its traditional images is of a judge sitting in admiralty entering the courtroom preceded by a bailiff carrying a silver oar and “waving it over the judge until he was seated,” after which the oar “was placed in a cradle below the Judge’s bench, where it remained throughout the court session.”¹⁵ While admiralty today covers a wide range of topics, I suggest that there are three aspects of the law of admiralty that particularly reflect this vulnerability and dependence—

¹² See Juan Benn, Jr., *Will Titan’s Loss End Dives to Titanic Wreck Forever?*, BBC NEWS (June 29, 2023), <https://perma.cc/PF8W-JCDB> (“Some are also comparing the hubris of the Titanic—which was famously marketed as ‘unsinkable’—with the recent tragedy on board the Titan.”).

¹³ See, e.g., John D. Kimball, *Raise High the Silver Oar! Teaching Admiralty Law*, 55 ST. LOUIS U. L.J. 657, 657 (2011) (“Admiralty always has been a specialized area of practice, aspects of which are so ancient and considered so arcane that it occupies a unique niche in the legal profession. It is a specialty which some perceive to be a derelict wreck, best left to frustrated sailors and retired mariners.”).

¹⁴ See SUPP. R. FOR ADM. OR MAR. CLAIMS AND ASSET FORFEITURE ACTIONS A–G.

¹⁵ Commander Leonard Rose, U.S. Navy Rsrv., *The Silver Oar of the Admiralty*, 21 JAG JOURNAL 13, 13 (1966); see Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 75–78 (1959) (reproducing the transcript of proceedings before the United States District Court for the Southern District of New York in which the silver oar that had been used by the Vice-Admiralty Court of the Province of New York until that court was dissolved in 1775 by the American Revolution was presented).

and that can serve as a foil to liberal legal and political theory. They are the law of maintenance and cure, the law of salvage, and the law of stowaways. Of course, this is not the whole of admiralty law, and I do not pretend that there aren't major aspects of admiralty that are based on individuals entering into contracts, including insurance, charters, ship financing, and the carriage of goods. But these three aspects, I suggest, give us some glimmer of a law that works from a premise of vulnerability and dependence.

A. Maintenance and Cure

“It has long been a rule of maritime law that when a seaman becomes ill or suffers an injury while in the service of a vessel, he is entitled to maintenance and cure at the expense of the shipowner.”¹⁶ This right “has been recognized by most seafaring nations for centuries.”¹⁷ Justice Joseph Story noted that in his “not inconsiderable” research, he was not “able to detect a single instance, in which the maritime laws of any foreign country throw upon seamen disabled or taken sick in the service of the ship, without their own fault, the expenses of their cure.”¹⁸

Maintenance refers to “food and lodging.”¹⁹ Cure refers to “ordinary medical assistance and treatment.”²⁰ An ill or injured seaman, then, is entitled to food, lodging, and medical assistance and treatment, at the expense of the ship.

There is simply nothing quite like this for landlubbers. The Affordable Care Act,²¹ for example, requires certain large employers to

¹⁶ 1B BENEDICT ON ADMIRALTY § 42 (2015). *See generally* Kenneth G. Engerrand, *Primer on Maintenance and Cure*, 18 U.S.F. MAR. L.J. 41 (2006).

¹⁷ 1B BENEDICT ON ADMIRALTY § 42 (2015).

¹⁸ *Harden v. Gordon*, 11 F. Cas. 480, 482 (C.C.D. Me. 1823); *see also* *Grovell v. Stockard S.S. Co.*, 176 F.2d 121, 122 n.2 (3d Cir. 1949) (“The duty to provide medical care for a sick or injured seaman, even at considerable cost and delay, is certainly well settled.”); *De Zon v. Am. President Lines*, 318 U.S. 660, 668 (1943) (“Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting in to the nearest port although not one of call, [or] hailing a passing ship.”).

¹⁹ *The Bouker No. 2*, 241 F. 831, 835 (2d Cir. 1917).

²⁰ *Id.* “Cure’ used in its original meaning of care means proper care of the injured seaman and not a positive cure, for obviously, in some cases, a cure may be impossible.” 1 THE LAW OF SEAMEN § 26:23 (5th ed.) (footnotes omitted).

²¹ Pub. L. No. 111-148, 124 Stat. 119 (2010).

provide affordable health insurance, but even those employers are not required to provide housing and food.²² While there are some similarities to worker's compensation, maintenance and cure is more protective of employees.

Significantly, the duty to provide maintenance and cure “does not rest upon negligence or culpability on the part of the owner or master.”²³ That is, the obligation to provide maintenance and cure is not compensation for some wrong done to the seaman. Moreover, at least in the United States, the seaman's own ordinary fault is not a reason to deny maintenance and cure. “So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility.”²⁴

Willful misconduct, such as being the aggressor in a fight, can be “one of the rare exceptions which excuses . . . the obligation to provide maintenance and cure.”²⁵ Traditionally, “injuries received as a result of intoxication” were also excluded, but there has been some relaxation of this limitation, “in recognition of a classic predisposition of sailors ashore.”²⁶ A ship's policy concerning the consumption of alcohol and

²² See Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1483 (2020) (“Under ACA section 1513, a large employer—employing fifty people or more—must pay a penalty if it does not offer full-time employees an opportunity to enroll in affordable minimum essential coverage, i.e[.], coverage that would satisfy the individual mandate.”); 26 U.S.C. § 4980H.

²³ *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938); see also *Brown v. The Bradish Johnson*, 4 F. Cas. 356, 356 (C.C.D. La. 1873) (“If injured while in the service of the vessel and in the discharge of his duty, he is entitled to be cured at the expense of the ship, even where no fault is to be attributed to any one.”).

²⁴ *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730–31 (1943).

²⁵ *Jones v. United States*, 232 F. Supp. 585, 589 (E.D. Va. 1964); see also *Watson v. Joshua Hendy Corp.*, 245 F.2d 463, 464 (2d Cir. 1957) (noting that the libellant-appellant could not recover if he were the aggressor in a fight and if his opponent used no more force than necessary to repel the assault).

²⁶ *Aguilar*, 318 U.S. at 731; see also *The Quaker City*, 1 F. Supp. 840, 842–43 (E.D. Pa. 1931):

As long, however, as human nature is what it is, men who have been cooped up in the narrow quarters of a ship subjected to sharp discipline from their officers and to the sharper discipline of regular and continuous employment with its consequent monotony will, in the exuberance of their first

the sobriety of seamen is relevant in determining what counts as willful misbehavior.²⁷

Even more significantly, maintenance and cure is not simply a no-fault compensation scheme for seamen whose work causes them injury. The duty is not “restricted to those cases where the seaman’s employment is the cause of the injury or illness.”²⁸ The wound or illness need not be caused by the seaman’s labor, so long as he was, “when incapacitated, subject to the call of duty as a seaman.”²⁹ It is not even necessary that the “sickness of the seaman should have originated during the voyage; it is only necessary that it occur during the voyage.”³⁰ The obligation can arise out of a medical condition such as a heart problem, a prior illness that recurs during the seaman’s employment, or an injury suffered on shore. Thus, a seaman may be entitled to maintenance and cure even for a preexisting medical condition that recurs or becomes aggravated during his service.³¹ So long as the seaman entered upon the service “without fraud or

liberty on shore, ‘take their fling’ by indulging in practices which every one must deplore.

...

When the right to cure for hurt and disease became part of the law maritime, ‘drunken sailors’ were not unknown, whatever the fact may be to-day, and our finding is that mere drunkenness does not forfeit the right.

Aguilar noted that another traditional instance of culpable misconduct involves venereal disease. *Aguilar*, 318 U.S. at 731. Judge Henry Friendly once noted, “Arguably, engaging in sexual intercourse while ashore after a long voyage, especially by an unmarried man . . . has become—perhaps always was—as much ‘a classic predisposition’ of sailors as excessive indulgence in alcohol.” *Ressler v. States Marine Lines, Inc.*, 517 F.2d 579, 581–82 (2d Cir. 1975); *see also* *Thomas v. New Commodore Cruise Lines Ltd.*, 202 F. Supp. 2d 1356, 1358 (S.D. Fla. 2002) (applying the traditional rule to reject a maintenance and cure claim based on an HIV infection).

²⁷ *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527, 1531 (11th Cir. 1990) (“[W]e cannot say [in light of the ship’s policy] that a seaman who indulges in intoxicating liquors is engaging in ‘willful misconduct’ that is ‘positively vicious’ or the deliberate disobedience of orders.”).

²⁸ *Calmar*, 303 U.S. at 527.

²⁹ *The Bouker No. 2*, 241 F. 831 at 833.

³⁰ *The Laura*, 17 F. Cas. 1305, 1306 (D. Cal. 1872).

³¹ *Messier v. Bouchard Transp.*, 688 F.3d 78, 82 (2d Cir. 2012).

concealment, and believing himself able to perform his duty,” he is entitled to maintenance and cure.³²

The duty applies only when the seaman is in the service of the ship, but that requirement has been interpreted quite broadly. It applies even when the seaman is engaged in recreation on the ship because “during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. . . . [T]he vessel is not merely his place of employment; it is the frame-work of his existence.”³³ The duty also extends to “relaxation ashore” because “[m]en cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline.”³⁴ For example, a seaman who went to a dance hall while on shore leave in Naples, leaned over an unprotected ledge to look at the ocean, and fell, breaking his leg, was entitled to maintenance and cure.³⁵

Concededly, there is a sense in which the duty of maintenance and cure is contractual: it does not apply to everyone who happens to be on board a ship, but only to seamen hired to work for the ship. But it is a duty imposed “by the law itself as one annexed to the employment.”³⁶ It is not simply an implied provision of a contract, based on an inference about what the parties likely agreed to,³⁷ nor a default provision provided by the law that parties can rely on without the need to spell it out.³⁸

³² *Id.* There continues to be some dispute about the standard for determining whether a concealment is disqualifying. *See Engerrand, supra* note 16, at 72.

³³ *Aguilar*, 318 U.S. at 732.

³⁴ *Id.* at 733–34.

³⁵ *Warren v. United States*, 340 U.S. 523, 524 (1951).

³⁶ *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 371 (1932); *Harden*, 11 F. Cas. at 481 (“It constitutes, in contemplation of law, a part of the contract for wages.”).

³⁷ *Cf.* Restatement (Second) of Contracts § 4 (1981) (“A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.”).

³⁸ *See* Charles K. Whitehead, *Sandbagging: Default Rules and Acquisition Agreements*, 36 DEL. J. CORP. L. 1081, 1090–91 n.33 (2011) (noting that “a default rule can lower transaction costs by mimicking what most parties would agree on their own, so long as implementing it is less expensive than negotiation”); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (“By providing standardized and widely suitable

To the contrary, “[w]hen the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate.”³⁹ As Justice Benjamin Cardozo put it, “Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident.”⁴⁰

If the duty of maintenance and cure is not based on fault or wrongdoing, and is not based on agreement, then what is it based on? The law imposes the duty because of the dependence of the seaman. “[L]ogically and historically the duty of maintenance and cure derives from a seaman’s dependence on his ship, not from his individual deserts, and arises from his disability, not from anyone’s fault.”⁴¹ As a judge sitting in admiralty once explained:

Here the obligation is aside from all thought of tort, negligence, or fault. The principle is really one of necessity backed by humanity. Members of the crew have no haven other than the ship. If sickness or hurt befalls them, what can be done? They cannot be left to die or be fed to the sharks. The ship must per force take care of them. There is likewise the humanity appeal which runs into the same necessity. It would be inhuman to leave a helpless man without succor. Some one should give him aid. Who other than the ship?⁴²

risk allocations in advance, the law enables most parties to select a preformulated legal norm ‘off-the-rack,’ thus eliminating the cost of negotiating every detail of the proposed arrangement.”). It is certainly not a penalty default, that is, a default “purposefully set at what the parties would not want—in order to encourage the parties to reveal information.” Robert Gertner & Ian Ayres, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

³⁹ *De Zon*, 318 U.S. at 667; see also 2 THE LAW OF SEAMEN § 26:13 (5th ed.).

⁴⁰ *Cortes*, 287 U.S. at 371.

⁴¹ *Farrell v. United States*, 336 U.S. 511, 515–16 (1949).

⁴² *The Quaker City*, 1 F. Supp. at 841. Also see *Harden*, 11 F. Cas. at 483, noting that:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign

B. Salvage

Just as those aboard a ship are dependent on each other if they become injured or ill, the entire ship is dependent on those aboard other ships should it find itself in peril. Peril can come in many forms: storm, rough seas, collision, running aground, fire, attack, to name a few. In order to encourage such aid to those in need, the law of salvage provides a reward to those who come to the aid of a ship in distress. This principle has been recognized for thousands of years.⁴³

In admiralty, “[s]alvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture.”⁴⁴ In coming to the aid of a ship in distress, a salvor puts himself and his property in danger as well. The compensation is not merely to pay the value of the services, “but as a reward given for perilous services voluntarily rendered, and as an inducement to mariners to embark in such dangerous enterprises to save life and property.”⁴⁵ To obtain compensation, it is necessary to show not only that the property was exposed to peril, but also that the salvage undertaking involved risk, was successful, and was done voluntarily.⁴⁶

The requirement that the service be voluntary excludes those hired to conduct a salvage operation, making clear that salvage is not a matter of contract.⁴⁷ This requirement also means that, except in rare cases, the crew of the distressed vessel cannot be compensated for salvage. Such rare cases occur if the captain in good faith orders the ship to be abandoned at sea, without hope of returning, for the purpose of saving life.⁴⁸ Similarly, when two ships collide, so that there is a duty to assist each other if possible, the vessel at fault cannot make any claim for salvage.⁴⁹ When setting the amount of the reward, the

ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.

⁴³ 1 BENEDICT ON ADMIRALTY § 1.

⁴⁴ *The Sabine*, 101 U.S. 384, 384 (1879).

⁴⁵ *Id.*

⁴⁶ *The Clarita*, 90 U.S. 1, 17 (1874); *cf.* 1 THE LAW OF SEAMEN § 9:8 (5th ed.).

⁴⁷ *See* 1 THE LAW OF SEAMEN § 9:17 (5th ed.).

⁴⁸ *Id.* § 9:27.

⁴⁹ *The Clarita*, 90 U.S. at 18.

Supreme Court considers factors such as the amount of labor expended, the “promptitude, skill, and energy displayed,” the risk incurred by the salvors, and the value of the property saved.⁵⁰

Traditionally, and in reflection of the *in rem* origins of the salvage action, awards were calculated as a percentage of the property saved.⁵¹ Now, while the award is capped at the value of the property saved, it is generally not calculated as a percentage.⁵²

A far more troubling reflection of the *in rem* origins of the salvage action is that the law of salvage did not develop compensation for saving a life unconnected with saving property. With no property to be arrested, “there could be no proceeding *in rem*—the ancient foundation of a salvage suit.”⁵³ This harsh result is tempered in a few ways.

⁵⁰ *The Blackwall*, 77 U.S. 1, 13–14 (1869); *see also id.* at 14 (“Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation.”); *The Clarita*, 90 U.S. at 17:

[S]alvors, in consideration of the large reward allowed to them for their services, are required to be vigilant in preventing, detecting, and exposing every act of plunder upon the property saved, for the reason that the right to salvage compensation presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors.

The International Convention on Salvage of 1989 adds as a factor “the skill and efforts of the salvors in preventing or minimizing damage to the environment.” 1 THE LAW OF SEAMEN § 9:5 (5th ed.).

For an empirical analysis of awards under the *Blackwall* standard, see Joshua C. Teitelbaum, *Inside the Blackwall Box: Explaining U.S. Marine Salvage Awards*, 22 SUP. CT. ECON. REV. 55, 70 (2014).

⁵¹ *See, e.g.*, *The Henry Ewbank*, 11 F. Cas. 1166, 1170 (C.C.D. Mass. 1833) (Story, J.) (affirming an award of a moiety [one-half] of net proceeds as the ordinary rule governing the salvage of derelicts, while noting that such a rule is close to the French rule of one-third of the gross value).

⁵² Teitelbaum, *supra* note 50, at 71.

⁵³ 1 THE LAW OF SEAMEN § 9:37 (5th ed.); *The Mulhouse*, 17 F. Cas. 962, 967 (S.D. Fla. 1859) (“Indeed, if no property is saved, no means are supplied by which the court can reward the salvor.”); *cf. Jerby v. One Hundred & Ninety-Four Slaves*, 13 F. Cas. 550, 551 (D.S.C. 1806) (decreeing salvage award for salvage of slaves).

First, courts incorporate the value of saving lives into the calculation of salvage awards. That is, a salvage award for someone who saved both could take into account that life was saved.⁵⁴ For example, in a case involving the rescue of a passenger steamer that lost power in a heavy sea, the court held that “the large number of passengers whose lives were involved in the safety of the vessel is in this case an important consideration,” because even though “the saving of human life, disassociated from the saving of property, is not a subject of salvage compensation,” when the saving of life is “connected with the rescue of property it is uniformly held to enhance the meritorious character of the service and the consequent remuneration.”⁵⁵

Additionally, two statutes moderate the harshness of the traditional rule. One statute requires a person in charge of a vessel to render assistance to any person “found at sea in danger of being lost, so far as” that person “can do so without serious danger” to that person’s vessel or individuals on board.⁵⁶ A person who violates this requirement can be imprisoned for up to two years.⁵⁷ A second statute reduces the financial incentive to save property rather than lives by allowing life salvors to receive a fair share of a property salvage award arising out of the same maritime accident.⁵⁸

But neither courts nor Congress have changed the core of the “hoary, and almost universally condemned, rule of the sea,” which bars a salvage award for life salvage unconnected to any property salvage.⁵⁹

⁵⁴ *The Mulhouse*, 17 F. Cas. at 967 (“[I]f life is saved in connection with property, it is proper for the court to take notice of that fact, and increase the salvage accordingly.”).

⁵⁵ *The Plymouth Rock*, 9 F. 413, 418 (S.D.N.Y. 1881).

⁵⁶ 46 U.S.C. § 2304.

⁵⁷ *Id.*; see also Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 637 (2020) (describing the “first federal duty to rescue at sea”).

⁵⁸ 46 U.S.C. § 729.

⁵⁹ *Peninsular & Oriental Steam Nav. Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 836 (2d Cir. 1977). For arguments that further changes should be made, see, for example, Martin Cohick, *Proposals for Incentivizing the Rescue of Life at Sea*, 62 S. TEX. L. REV. 39, 54 (2022); Susanne M. Burstein, *Saving Steel over Souls: The Human Cost of U.S. Salvage Law*, 27 TUL. MAR. L.J. 307, 332 (2002); Lawrence Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779, 781 (1954).

As with maintenance and cure, salvage does not rely on principles of contract nor on principles of compensation for wrongdoing. As Justice Story once explained:

Salvage, it is true, is not a question of compensation pro operâ et labore [for work and labor]. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium, by way of honorary reward, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life. Treated as a mere question of compensation for labor and services, measured by any common standard on land or at sea, the salvage of one moiety [one-half of the property] is far too high. But treated, as it should be, as a mixed question of public policy and private right, equally important to all commercial nations, and equally encouraged by all, a moiety is no more than may justly be awarded.⁶⁰

Or as Judge Paul Niemeyer put it more recently, in a case involving salvage of the *Titanic*, “Because of the dangers of the sea and the mutual interest of seamen and seafaring nations [in] travers[ing] the sea notwithstanding its dangers, the law of admiralty for almost 3,000 years has uniformly held that those who voluntarily come to the assistance of fellow seamen in distress and perform salvage are entitled to be rewarded.”⁶¹

C. Stowaways

A stowaway is a person “who conceals himself onboard a vessel about to leave port in order to obtain a free passage,” and thereby “imposes himself upon the vessel by his wrongful act.”⁶² A stowaway

⁶⁰ *The Henry Ewbank*, 11 F. Cas. at 1170; cf. *Mason v. Blaireau*, 6 U.S. 240, 266–67 (1804) (Marshall, C.J.) (noting that the “general interests of society require that the most powerful inducements should be held forth to men, to save life and property about to perish at sea,” resulting in “apparent prodigality” and generous salvage awards, and also “require[] that those allowances should be withheld from persons, who avail themselves of the opportunity, furnished them by the possession of the property of another, to embezzle that property”).

⁶¹ *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194, 202 (4th Cir. 2002).

⁶² 1 THE LAW OF SEAMEN § 2:29 (5th ed.).

might board surreptitiously or hide in cargo that is loaded onto the vessel. It is not just a wrongful act but also a federal crime to be a stowaway.⁶³ The statute reaches those who board in the United States.⁶⁴ It also reaches those who board anywhere in the world, so long as they are aboard when the vessel is within the jurisdiction of the United States.⁶⁵ There is no requirement that the stowaway intend to enter the United States.⁶⁶ Stowaways have been called “the shipowner’s nightmare,” costing the shipping industry over \$10 million a year.⁶⁷

Despite engaging in a criminal act, the stowaway is owed the duty of humane treatment while on board.⁶⁸ It is not permissible to simply throw him overboard or refuse to provide food or shelter. It is permissible, for example, to put stowaways off the ship and safely transport them to “a sandy beach on an inhabited island . . . within

⁶³ 18 U.S.C. § 2199.

⁶⁴ *Id.* (making it an offense to board a vessel, without consent and with intent to obtain transportation, from any port or harbor within the jurisdiction of the United States).

⁶⁵ *Id.*; see also *United States v. Menere*, 145 F. Supp. 88, 90 (S.D.N.Y. 1956).

⁶⁶ *United States v. Banjoko*, 590 F.3d 1278, 1279–80 (11th Cir. 2009).

⁶⁷ See generally Paul W. Johnson, *Stowaways—The Shipowner’s Nightmare*, 1997 INT’L J. SHIP. L. 65; *id.* at 70 (describing a situation where the bureaucratic impediments to the repatriation of stowaways led the ship owner to charter a private jet for them).

⁶⁸ *The Laura Madsen*, 112 F. 72, 72 (D. Wash. 1901); see also *Buchanan v. Stanships, Inc.*, 744 F.2d 1070, 1074 (5th Cir. 1984); 1 THE LAW OF SEAMEN § 2:29 (5th ed.). One article reads these cases as holding that stowaways “have no claim to a duty of a care and that the liability of a vessel owner or operator to such trespassers may be grounded only in willful or wanton misconduct.” James C. Winton & Justin T. Scott, *Defending Arctic Drilling Operations Against Environmentalist Pirates*, 39 TUL. MAR. L.J. 85, 108 (2014). It is hard to square that conclusion with the plain language of those cases, which refer to a duty of humane treatment. See Johnson, *supra* note 67, at 68 (noting that a stowaway will often throw himself on the mercy of the captain once a safe distance from port and that the law requires stowaways to be treated humanely). *But see* *In re Harris*, 1953 AMC 1079, 1081 (U.S.C.G. 3d Dist. 1952) (stating that the duty is to avoid reckless or wanton acts in a case where stowaways were plainly treated humanely). *Cf.* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 59 (1971) (asserting that a burglar, an innocent person, or a “people-seed[]” who enters a house on a “very, very rare occasion[]” despite all precautions “[s]urely” does not have a right to use of the house).

walking distance to three towns or villages . . . on a calm clear April evening with excellent visibility.”⁶⁹ It is also permissible for the master of the ship to hire the stowaway, converting his status to that of a seaman, at least for purposes of immigration law.⁷⁰

The International Transport Workers’ Federation advises those who find a stowaway to: check their state of health, find out their identity and the reasons they are on board, arrange food and lodging, explain emergency procedures and issue them a lifejacket and lifeboat place, inform the ship’s owner or agent, and expect the master to prepare a signed statement containing all information relating to the stowaway, to be given to the authority where the stowaway is delivered.⁷¹

If an alien stowaway lands in the United States, the ship owner is required to pay the cost of detaining the stowaway until an immigration officer completes an inspection of the alien.⁷² The owner must also pay the detention costs of an alien stowaway who is permitted to land temporarily for medical treatment. If a stowaway seeks asylum, the owner is responsible for the cost of detaining him for a period not to exceed fifteen days.⁷³

⁶⁹ *In re Harris*, 1953 AMC at 1085.

⁷⁰ *United States v. Sandrey*, 48 F. 550, 553 (C.C.E.D. La. 1891) (“Prior to his shipment he was a stowaway and destitute, and his purpose may have been to emigrate But when he was enrolled as a seaman . . . his status as a British seaman became fixed.”); *see also* 10 BENEDICT ON ADMIRALTY § 7.03[a] n.34 (2023) (“If a stowaway is discovered and agrees to work aboard the ship in exchange for his passage, her status changes to that of a ‘workaway.’”).

⁷¹ INT’L TRANSP. WORKERS’ FED’N SEAFARERS, *Stowaways*, <https://perma.cc/99A9-35CZ>. The Brussels Convention of 1957 lays out various responsibilities regarding stowaways, but it has never been ratified by enough states to come into force. U.N. HIGH COMM’R FOR REFUGEES (UNHCR), *International Convention Relating to Stowaways (“Brussels Convention”)* (Oct. 10, 1957), <https://perma.cc/JM87-Z948>. The United States has not ratified. *See* 10 BENEDICT ON ADMIRALTY § 7.03[b] (2023). The International Maritime Organization has also established guidelines regarding stowaways. *See* INT’L MAR. ORG., *Revised Guidelines on the Prevention of Access by Stowaways and the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases* (June 8, 2018), <https://perma.cc/Z9B2-F3HX>.

⁷² Michelle Hendrix, *Detention Costs for Stowaways Seeking Asylum: Congress Provides Relief for Carriers*, 22 TUL. MAR. L.J. 703, 706 (1998).

⁷³ *Id.* at 706–07. The fifteen days begin either seventy-two hours after the stowaway is initially presented for inspection or at the time that it is

Of course, people may not always live up to their duties.⁷⁴ And, as a practical matter, suits are rare, in part because “few stowaways are familiar with the United States court system or aware of their rights.”⁷⁵ But “suits against shipowners do occur.”⁷⁶ And legal duties remain duties and may be obeyed as such even when the risk of enforcement is low.

A stowaway is a criminal who has illegally entered someone else’s property against that person’s will. The shipowner has certainly not agreed to care for a stowaway. To the contrary, the shipowner has likely taken considerable precautions to prevent the stowaway’s entry. Yet when those precautions fail, the shipowner must nonetheless meet the need for food and shelter of the very one who evaded or defeated those precautions. This duty has nothing to do with a voluntary agreement but arises instead from the very dependence of the stowaway.

Conclusion

In these three areas—maintenance and cure, salvage, and stowaways—the law of admiralty recognizes that people at sea are vulnerable and dependent. It therefore recognizes duties, or at least creates incentives, to respond to that vulnerability and dependence.

I do not suggest that these doctrines can simply be transported onto land. But they do invite us to think about many areas of the law from a different perspective. What does the law of maintenance and cure suggest about housing, health care, health insurance, and disabilities—or about climate change and bearing arms? What does the law of salvage suggest about incentives to care for those in distress? What does the law of stowaways suggest about areas as diverse as abortion and immigration?

determined that the stowaway has a credible fear of persecution, whichever occurs earlier, and exclude Saturdays, Sundays, and holidays. *Id.*

⁷⁴ See generally Elissa Steglich, Note, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction*, 78 TEX. L. REV. 1323 (2000) (describing horrendous mistreatment of some stowaways and calling for expanding criminal jurisdiction to punish the offenders); Rod Sullivan, *Punitive Damages and a Century of Maritime Law*, 15 FLA. COASTAL L. REV. 1, 57–60 (2013) (recounting two stories, one perhaps apocryphal, of violations of this duty).

⁷⁵ Mary Mason, *Alien Stowaways, the Immigration and Naturalization Service, and Shipowners*, 12 TUL. MAR. L.J. 361, 369 (1988).

⁷⁶ *Id.*

In this Essay, I do not attempt to answer all these questions. Instead, my hope is to open a conversation about ways in which our law might be different if we started from the assumption of shared vulnerability and mutual interconnection and dependence. What might our law look like if we imagined ourselves, not as autonomous individuals each pursuing our own vision of the good through contracts with each other, but instead as voyagers on a shared vessel, journeying together through waters beautiful and dangerous?

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