2018

Salvaging Recreational Boating: Reforming an Antiquated Maritime Practice

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CONNECTICUT
LAW REVIEW

VOLUME 50 | DECEMBER 2018 | NUMBER 4

Note

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This note looks at the history and development of the law of maritime salvage from antiquity to its modern iteration and outlines how the modern recreational mariner is being made the victim of an outdated and imbalanced system. In doing so, this article looks at the evolution of maritime salvage laws and the public policies that support and argues that the reasons underlying those policies have either evaporated as society and technology have changed and that salvage law, in the context of recreational vessels, is grossly mismatched to the realities of modern boating and needs to be changed to reflect current maritime practices and protect recreational boaters.

NOTE CONTENTS

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INTRODUCTION

The phrase "maritime salvage" will often call to mind images of James Cameron's exploration of the Titanic or engender fantasies about aquatic Indiana Jones-esque adventuring and treasure hunting. Indeed, roughly half of the international salvage trade is made up of wreck recovery; however, that number has been steadily decreasing for more than a decade, and the contract salvage of individual private vessels has been on the rise.[1] Problems arise when recreational sailors are forcibly brought into the archaic and complex world of salvage law and are pressured into salvage contracts that they can't hope to understand.

The recreational boating industry has exploded in popularity in recent years; as of 2014 there were 15.8 million recreational vessels in use in America, and more than 87 million Americans participated in recreational sailing.[2] Compare this to just over 100 years ago when there were only 15,000 recreational vessels on American waters,[3] and it's easy to see that recreational sailors are taking over navigable waters in America.[4] Despite the aquatic and economic dominance of amateur recreational vessels, maritime law remains a morass of arcane legal concepts through which the inexperienced must struggle.

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[*] University of Connecticut School of Law, J.D. 2018.

[1] *International Salvage Union 2015 Statistics Demonstrate the Value of the Salvage Industry*, INT'L SALVAGE UNION (Apr. 18, 2016), http://www.marine-salvage.com/media-information/press-releases/international-salvage-union-2015-statistics-demonstrate-the-value-of-the-salvage-industry/ [https://perma.cc/DN47-J44G]. The data is published by the International Salvage Union and gathered from its members. It is important to note that these values represent numbers on an international scale and tend to exclude smaller scale salvage operations and individual salvors.

[2] *2014 Recreational Boating Statistical Abstract*, NAT'L MARINE MFRS. ASS'N, 2 tbl.1.1, 133 tbl.7.1 (2015), http://www.nmma.org/assets/cabinets/Cabinet449/Preview.pdf [https://perma.cc/Y6NE-YJEF].

[3] Joseph E. Choate, *Recreational Boating: The Nation's Family Sport*, 313 ANNALS AM. ACAD. POL. & SOC. SCI. 109, 110 (1957).

[4] *See* Matthew Chambers & Mindy Liu, *Maritime Trade and Transportation by the Numbers*, HOMELAND SECURITY DIGITAL LIBR., 1 (2014), https://www.hsdl.org/?view&did=715479 [https://perma.cc/HS93-8WXU] (reporting that water transportation contributed $36 billion to the economy); *Boat Sales on the Rise Heading into Summer*, NAT'L MARINE MFRS. ASS'N (May 24, 2016), https://www.nmma.org/press/article/20566 [https://perma.cc/MW3Y-6HJV] (reporting that the recreational boating industry has an economic impact of more than $121.5 billion).

Recreational vessel owners will often learn about salvage law only when they are served with a salvage claim, creating an opportunity for predatory salvors to overcharge distraught vessel owners. Pure salvage in the context of recreational vessels presents two major issues by which salvors can prey on recreational sailors and take advantage of their inexperience. The first issue is that the legal definition of "peril" includes situations that the layman would never anticipate or consider to be a danger.[5] The second major issue that faces recreational vessel owners in the salvage context is that the difference between towage and salvage is simultaneously highly technical and nebulously defined by courts.[6] This is compounded by the fact that many recreational vessel owners have preexisting towage contracts with terms providing for assistance in situations such as "soft ungrounding[s],"[7] yet aid rendered in ungrounding a vessel from the beach is considered salvage and falls outside such a towage contract.[8]

I. WHAT IS THE LAW OF SALVAGE?

A. *History and Evolution of Salvage Law*

Salvage law has its origins in the ancient Roman concept of *negotiorum gestio*, a legal principle which gave "to the volunteer who preserved or improved the property of another a right of compensation from the owner, although the services were rendered without the owner's request or even without his knowledge."[9] *Negotiorum gestio* was later codified into Roman law as a form of maritime salvage that looks shockingly similar to the current iteration.[10] The concept of salvage was maintained in the Mediterranean area for some time and can be seen in the Marine Ordinances of Trani, a city in Italy circa 1063 C.E., which further provided that anyone who found goods "cast upon the sea" was entitled to half the value of the goods in the event

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[5] *See* David Liscio, *Know Your Salvage Rights*, SAILING MAG., Apr. 4, 2013, http://sailingmagazine.net/article-1332-know-your-salvage-rights.html [https://perma.cc/K87V-RZ7Y] (relating a situation in which a recreational boat owner was charged with a large salvage bill for seemingly innocuous services).

[6] *See* Mahoney Marine Servs., v. Ellie Rose, 2002 A.M.C. 2838, 2840–42 (2002) (Cattell, Jr., Arb.) (describing the salvage of a distressed vessel that is legally, but not plainly, distinct from towage); MARTIN J. NORRIS, THE LAW OF SALVAGE §§ 16–19, at 25–31 (1958) (discussing the technical definition of towage and how it is legally distinct, but often not plainly distinct, from salvage).

[7] *Ellie Rose*, 2002 A.M.C. at 2842.

[8] *Id.* at 2842–43.

[9] NORRIS, *supra* note 6, § 6, at 6.

[10] *See id.* § 5, at 4 (discussing how the Roman statute served to codify the much older Rhodian law). In relevant part, the statute read "If a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one-fifth of what he saves." *Id.* The statute also allowed for a greater reward depending on the depth from which the salvage was drawn. *Id.* at 5.

that the owner came forward, and if the owner did not, they were entitled to the entire value of the goods.[11]

The concept of maritime salvage was introduced to England in the late 12th century by Richard the First in the form of the Laws of Oleron.[12] The Laws of Oleron contained much of the same language as the earlier Mediterranean laws but also greatly expanded the scope of awardable salvage and incorporated many of the elements of modern salvage law.[13] As feudalism grew in England, the older view of salvage began to fade away, and any shipwrecked property came to be seen as the property of the lord upon whose land the property came to lay.[14]

This view of salvage, commonly known as "pure salvage," is "salvage that is conducted without a pre-existing agreement between the salvor and the owner of the property to be salved."[15] This is not, however, the only form of salvage; in 1890, contract salvage first appeared in the form of the Lloyd's Open Form (LOF).[16] The original salvage agreement involved Lloyd's of London, an international insurance organization. Salvage service was granted on an ad hoc basis and the parties agreed that the award would be decided by Lloyd's at a later date.[17] Two years later, Lloyd's published the first ad hoc salvage form for widespread use, and in 1908, the first standardized LOF was published.[18] The LOF swiftly came to dominate the realm of the salvage award, and arbitration before the Committee at Lloyd's of London displaced almost all other forms of determining a salvage award.[19] The LOF has, however, come under criticism in America, and some courts will no longer enforce LOF contracts because they violate the Federal

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[11] *Id.* § 7, at 7.

[12] *Id.* § 8, at 8.

[13] *See id.* at 8–13 (taking a dim view of the formation of contracts while a vessel was in danger and allowing for courts to assign a value to the salvage apart from what the contract stated, as a sort of earlier arbitration). The law also condemned opportunistic salvors and condemned any lord who condoned such practices to be "fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together, the walls thereof shall be demolished, the stones pulled down, and the place converted into a market place for the sale only of hogs and swine to all posterity." *Id.* at 10. This is a more extreme measure than this Note purports to take.

[14] *Id.* § 11, at 15.

[15] Edward V. Cattell, Jr., *Recreational Vessel Salvage Arbitration: An Interim Report*, 29 J. MAR. L. & COM. 257, 258 (1998).

[16] Donald R. O'May, *Lloyd's Form and the Montreal Convention*, 57 TUL. L. REV. 1412, 1413 (1983).

[17] *Id.*

[18] *Id.*

[19] *See* Alex L. Parks, *The 1910 Brussels Convention, The United States Salvage Act of 1912, and Arbitration of Salvage Cases in the United States*, 57 TUL. L. REV. 1457, 1486 (1983) (discussing the history of salvage arbitration in the United States).

Arbitration Act.[20] The development of the LOF and salvage arbitration in America will be more fully discussed below in Part III.

American courts have recognized salvage since their inception;[21] rejecting the English system where the Crown and the local lord had a claim on the salvage property, the courts followed a "liberal approach to salvage."[22] Perhaps the first case the Supreme Court heard on the issue of salvage was *Mason v. Blaireau*,[23] in which Justice Marshall upheld the Rhodian concept of providing a "very ample reward" to a voluntary salvor.[24] Salvage law has remained very steady in American courts since its inception, as the underlying policies and reasoning set out by Justice Clifford remained steadfast hallmarks of salvage claims for centuries.[25] The development of American salvage law will be more fully discussed below in Part III.

B. *Salvage Law as a Matter of Public Policy*

From its beginning, the concept of maritime salvage has been rooted in a strong public policy of encouraging "the hardy and adventurous mariner to engage in . . . laborious and sometimes dangerous enterprises."[26] Furthermore, in order to ensure that any would-be salvor did not turn to piracy, the law allowed for a "liberal compensation" in order to "withdraw . . . every temptation of embezzlement and dishonesty."[27] As discussed above, the modern concept of salvage has its roots in an era when the distinction between a pirate and an honest sailor was often a matter of only a few degrees; as such, any incentive to aid a boat had to be large enough to outweigh the incentive of waiting out the survivors and taking what remained of the ship and its cargo. From that vantage point, the large-percentage awards for salvage make a great deal of sense and are not only justified, but serve the dual purposes of ensuring that people are helped and that piracy is curtailed. However, it is fair to say that in the modern era, concerns of piracy are minimal, therefore the question of what policy

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[20] *See* Brier v. Northstar Marine, Inc., 1993 A.M.C. 1194, 1211 (D.N.J. 1992) (holding that the arbitration clause of a LOF contract was void for violating the FAA as the parties had insufficient connection to the extra-judicial area of enforcement).

[21] The maritime law of salvage has been recognized in America for longer than America has been a country. *See* NORRIS, *supra* note 6, §§ 13–14, at 17–18 (discussing how admiralty matters were borne out in the vice-admiralty courts of the American colonies and noting that "[s]alvage cases were not rare").

[22] Andrew Anderson, *Salvage and Recreational Vessels: Modern Concepts and Misconceptions*, 6 U.S.F. MAR. L.J. 203, 207 (1993).

[23] 6 U.S. (2 Cranch) 240 (1804).

[24] *Id.* at 266.

[25] *See* The Clarita, 90 U.S. 1, 16–17 (1874) ("Public policy encourages the hearty and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to dishonesty the law allows him, in case he is successful, a liberal compensation.").

[26] The Blackwall, 77 U.S. 1, 10 (1869).

[27] *Id.* at 14.

reasons still justify the existence of such liberal salvage awards, particularly in the recreational context, remains.

The underlying public policy reasons of maritime salvage have shifted from curtailing piracy towards encouraging those at sea to assist distressed seafarers and ensure that as few people as possible are injured.[28] While the importance of ensuring that seafarers are safe and that every measure should be taken to assist people who are stranded at sea is as true today as it was in the time of the Law of Oleron, it cannot be overstated how much the safety of sailors has increased in modern times[29] with advancements in GPS technology,[30] heightened safety requirements,[31] and the availability of publicly funded assistance, such as the Coast Guard.[32] So while it is correct to say that modern public policy justifications for salvage law include the safety of seafarers, the often extreme cost to the unsuspecting and untrained recreational vessel owner far outweighs any potential safety benefit when there are any number of more effective and cost-conscious methods available.

If curtailing piracy is no longer a pressing issue for modern maritime law, and the safety of seafarers is adequately guarded by other more effective

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[28] *See id.* (explaining how compensation in the form of salvage functions as an inducement to action to save life and property at sea); *The Clarita*, 90 U.S. at 16 (the purpose is to "encourage[] . . . mariner[s] to engage in . . . laborious and . . . dangerous enterprises").

[29] *See* Mick Bloor, *Fatalities at Sea: The Good and the Bad News*, SEA (July/Aug. 2008), http://www.sirc.cf.ac.uk/uploads/The%20Sea/194%20jul-aug%2008.pdf [https://perma.cc/YTH6-34VF] (noting that in 1885, one in every seventy-three seafarers would die at sea, compared to a rate of twelve per 100,000 in the United Kingdom between 1996 and 2005—a rate that was "less than a third of the . . . rate for the preceding decade and less than a quarter of the rate for the decade before that").

[30] *See, e.g.*, *ACR Electronics ResQLink+ Buoyant Personal Locator Beacon*, WEST MARINE, https://www.westmarine.com/buy/acr-electronics--resqlink-buoyant-personal-locator-beacon--13381207 [https://perma.cc/28A7-ZWEA] (last visited Feb. 24, 2018) (serving as an example of the advent of cheap and lightweight personal locators that are available to recreational sailors); Alexis C. Madrigal, *More Than 90% of Adult Americans Have Cell Phones*, ATLANTIC (Jun. 6, 2013), http://www.theatlantic.com/technology/archive/2013/06/more-than-90-of-adult-americans-have-cell-phones/276615/ [https://perma.cc/YDP7-2PTW] (showing that, as of 2013, 91% of adults in America owned a cell phone). The advent of cheap personal locators and the ubiquity of cell phones strongly indicate that a distressed sailor has the ability to call authorities, friends, or contracted parties for assistance instead of relying on the assistance of passersby, as is contemplated by salvage law.

[31] *See* Tom Burden, *Do-it-Yourself: Safety Equipment*, WEST MARINE (Feb. 6, 2018), https://www.westmarine.com/WestAdvisor/DIY-Safety-Equipment [https://perma.cc/JZ3D-YWF9] (listing safety requirements for recreational boats promulgated by the United States Coast Guard as well as private safety recommendations).

[32] *See* U.S. COAST GUARD NAVIGATION CTR., RADIO INFORMATION FOR BOATERS, http://www.navcen.uscg.gov/?pageName=mtBoater [https://perma.cc/UC2N-VNL6] (last updated Sept. 15, 2016) (discussing how the widespread adoption of VHF marine radios allows for constant communication between vessels at sea and emergency services on shore). Additionally, Digital Selective Calling (DSC) and the Maritime Mobile Service Identity (MMSI) service allow for a level of communication equivalent to on-shore telephone usage. *See* U.S. COAST GUARD NAVIGATION CTR., DIGITAL SELECTIVE CALLING, https://www.navcen.uscg.gov/?pageName=AboutDSC [https://perma.cc/6M73-SG4R] (detailing the uses and history of the DSC system).

and cost efficient, measures what then are the policies justifying the continued existence of salvage law? One potential reason that has only recently been developed is that salvage awards help protect the maritime environment.[33] Proponents argue that a ship is unlikely to be saved if it is more economical to leave the vessel where it is, resulting in damage to the surrounding marine environment.[34] While this is a proper, and laudable, goal, it should not be justification for the continuance of the practice of liberal salvage awards in the context of recreational vessels. The kind of harm contemplated by these awards is that which comes from large commercial tankers filled with harmful chemicals, not average recreational vessels, which are almost all under twenty-six feet in length.[35]

II. THE MODERN LAW OF MARITIME SALVAGE

A. *Development of Salvage Awards in America*

1. *Salvage Awards in the Courts*

As noted above, American courts have recognized salvage awards since the inception of the American legal system.[36] Salvage awards occupy a nearly unique legal niche and are treated both as compensation and reward. Because salvage awards have their origin in a public policy of encouraging seafarers to not just save property but restore it to its rightful owner, and as a corollary to reduce piracy, the amount awarded is unique in that it has essentially no relationship to the amount of work or time put in by the salvor.[37] Consequently, in order to ensure that seafarers are willing to take the risks necessary to assist distressed ships and to ensure that the property is returned to the rightful owners, salvage awards need to be "liberal."[38]

There are six factors a court considers in determining the amount of a salvage award, originally spelled out by Justice Clifford in *The Blackwall*. The Second Circuit listed them in order of descending importance:

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[33] Anderson, *supra* note 22, at 229.

[34] *See id.* (noting that a salvor is unlikely to "expend time and money on salving a vessel with little hope of receiving a reward").

[35] U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, 2014 RECREATIONAL BOATING STATISTICS 69 tbl. 37 (2014), https://www.uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2014.pdf [https://perma.cc/Z7FM-5KDM].

[36] *See supra* note 21 and accompanying text (explaining how salvage awards have been recognized since the country's founding).

[37] Anderson, *supra* note 22, at 228; *see also* Seaman v. Tank Barge OC601, 325 F. Supp 1206, 1209 (S.D. Ala. 1971) (awarding a salvor $7553 for towing a distressed boat twenty-five miles and, in part, justifying such a large reward by stating that "it is unquestioned that salvage awards are not quantum meruit, but are rewards for seamen who voluntarily act to rescue life and property from the perils of the sea"); Girard v. The M/Y Quality Time, 4 F. Supp. 3d 1352, 1356 (S.D. Fla. 2014) (awarding $16,896.05 for four hours of salvage involving neither "unusual risks" nor the use of "special skills or equipment").

[38] *Seaman*, 325 F. Supp. at 1209.

i. Degree of danger from which the property was rescued;
ii. Value of the property saved;
iii. Risk incurred in saving the property from the impending peril;
iv. Value of the property employed by the salvors in rendering the service, and the danger to which it was exposed;
v. Promptitude and skill displayed;
vi. Labor expended in rendering the salvage service.[39]

Courts have also considered the "dangers presented by the situation that might have foreseeably developed but or the actions of the salvors" in determining the salvage award.[40]

In the modern context, these *Blackwall* factors are used to demarcate whether or not a salvage is considered low order, medium order, or high order.[41] Low order salvage is salvage that involves a low degree of peril, minimal effort or time investment, and no special expertise on the part of the salvor.[42] Low order salvage can be the most frustrating type of salvage for a recreational vessel owner, because it often looks like nothing more than a simple towage and requires only that a salvor acts promptly and successfully.[43] Low order salvage awards range between 1% and 10% of the value of the salvaged property; this can lead to salvage awards, for example, in excess of $7,000 for a few minutes' worth of work,[44] which perfectly exemplifies why salvage awards in the recreational boating context are inappropriate.

Medium order salvage is distinct from towing and often requires greater risk to the salvor, a large expenditure of time and effort, and can require specialized skill or equipment on the part of the salvor.[45] Medium order salvage awards range from 11% to 19% of the value of the salvaged property. While it is often more palatable to the vessel owner than low order salvage because the danger is more readily visible, the fact that the danger need only be reasonably apprehended by the salvor leads to situations where an award of $85,000 is granted when there is a dispute over whether or not the vessel was in any actual danger of sinking.[46]

Finally, high order salvage is generally typified by the high degree of peril that the salvor must subject themselves to in order to perform the

[39] The Blackwall, 77 U.S. 1, 14 (1870); *see also* B.V. Bureau Wijsmuller v. United States, 702 F.2d 333, 339 (2d Cir. 1983) (applying the *Blackwall* factors); Ocean Servs. Towing & Salvage v. Brown, 810 F. Supp. 1258, 1263 (S.D. Fla. 1993) (also applying *Blackwall*'s factors); Brown v. Johansen, 881 F.2d 107, 109 (4th Cir. 1989) (applying *Blackwall*'s factors, as well).

[40] Anderson, *supra* note 22, at 226.

[41] Vickey L. Quinn, *Hard Aground: A Primer on the Salvage of Recreational Vessels*, 19 U.S.F. MAR. L.J. 321, 349 (2007).

[42] *Id.* at 350–52.

[43] *Id.*

[44] *Id.* at 355.

[45] Quinn, *supra* note 41, at 355.

[46] *Id.* at 358–59.

salvage. ; as a consequence of that peril, high order salvage awards can be anywhere from 20% to 100% of the value of the salvaged property.[47] High order salvage situations would seem, on their face, to be the exact situations contemplated by courts when they attempt to justify the liberal nature of salvage awards, and to be sure, they are the situations that the law of salvage initially intended to mitigate. The problem that arises, however, in the context of recreational boating is two-fold: first, these situations are the most susceptible to abuse by predatory salvors, as the vessel owner is under extreme duress; and second, these situations are almost always emergencies attended to by the Coast Guard, which plays a major role in the rescue and salvage of such vessels.

In the years since *Blackwall*, both international and American courts have recognized other factors that can impact the value of the salvage award granted to the salvor. Beginning in 1980, the LOF provided that, contrary to the no-cure-no-pay basis, a salvor who failed in an attempt to salve a "tanker laden or partly laden with a cargo of oil" would be awarded expenses plus 15% as a reward for attempting to mitigate damage to the environment.[48] In 1989, the International Convention on Salvage was held and ratified by the United States in 1990, further providing that any salvor could receive his expenses and up to 200% of that value as a reward for efforts "to prevent or mitigate damage to the environment."[49] While an ultimately laudable goal, the Convention contemplated the environmental harm of a large scale loss of toxic cargo at sea, not the relatively small and harmless dangers posed by distressed recreational vessels.[50]

Ultimately, the public policies pursued by the courts in granting liberal salvage awards have a disproportionate and harmful effect on recreational vessel owners. Since salvage was traditionally performed by someone who can be best compared to the good Samaritan of yore,[51] courts were concerned with not only properly rewarding such passersby, but encouraging everybody on the sea to assist anyone they saw to be in danger. The rise of both recreational vessels and the professional salvor, however, has brought to the surface the inherent problem with applying the traditionally liberal view of salvage awards to the "salvage" of recreational vessels.

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[47] *Id.* at 359.

[48] Anderson, *supra* note 22, at 229.

[49] *Id.*

[50] Nicholas J.J. Gaskell, *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, 16 TUL. MAR. L.J. 1, 6 (1991).

[51] To be sure, courts have, from their earliest point, recognized that professional salvors exist, but the underlying public policy reasons for salvage awards is contemplative of the Good Samaritan. *See* The Lamington, 86 F. 675, 684 (2d Cir. 1898) (discussing that professional salvors are entitled to the same liberal awards as a more traditional salvor).

2. *Salvage Awards in Arbitration*

The liberal awards granted by the court system in England scared vessel owners and their insurers and as such, the initial purpose of arbitration in salvage award disputes was motivated by the protection of vessel owners and their insurers from what they saw as unfair and extravagant awards.[52] Over time, as the LOF contract gained international acceptance and the arbiters at Lloyd's became known for their knowledgeable decisions, arbitration became the primary means of settling disputes. This translated to modern salvage disputes as the number of professional salvors and recreational vessel owners increased, however at this point, actual arbitration in England rarely happened and the LOF was used more as a standard from which to operate.[53] The threat of arbitration in a foreign court and the fight between vessel owners, salvors, and insurers demonstrates the confused state of salvage awards in the recreational context, and in order to understand that, we must look at the development of arbitration in American jurisprudence.

In early American jurisprudence, arbitration of salvage awards frequently occurred alongside litigation.[54] Before American courts became concretely established, while the states were still being consolidated and jurisprudence was young, there was often confusion about how and where disputes would be settled. In the salvage context, this often resulted in arbitration being the de facto and primary method of settling disputes.[55] With the arrival of LOF contract salvage in 1890 and the establishment of LOF as the international gold standard for salvage dispute resolution, arbitration in the United States was replaced and almost completely faded away.[56] Despite efforts by the United States to encourage domestic arbitration,[57] the LOF remained the gold standard for dispute resolution, and the majority of arbitrations took place before a Committee at Lloyd's. That changed, however, in 1992, with a seemingly innocuous case: *Brier v. Northstar Marine, Inc.*[58]

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[52] *See* INTERNATIONAL SALVAGE UNION, THE ORIGINS OF LLOYD'S FORM, http://www.marine-salvage.com/overview/the-origins-of-lloyds-form/ [https://perma.cc/M8UC-LS5R] (discussing the origins and importance of the Lloyd's Open Form as a response to complaints surrounding the unreasonable and coercive acts by salvors).

[53] *See* Anderson, *supra* note 22, at 222 (noting that the increase of recreational vessel owners and the influx of new insurance carriers prompted an increased skepticism of the use of the LOF).

[54] *See* Cattell, Jr., *supra* note 15, at 257.

[55] *See* Randy W. Miller, *The Case of the Brig Halcyon: A Study in Old Key West Admiralty Law*, 27 J. MAR. L. & COM. 311, 316, 320 (1996) (discussing how arbitration had become common place in larger urban areas and how it eventually became the primary method of settling disputes in Florida).

[56] *See* Parks, *supra* note 19, at 1486 (noting that in 1923, there were only fourteen reported salvage arbitrations in the entire United States).

[57] *See generally id.* (discussing the rise, fall, and rise again of arbitration in the United States).

[58] Brier v. Northstar Marine, 1993 A.M.C. 1194, 1211 (D.N.J. 1992).

In *Brier*, a case before the United States District Court for the District of New Jersey, the vessel owner's insurance company argued that the LOF contract was unenforceable for a number of reasons.[59] The court rejected most of the plaintiff's arguments, but found for the plaintiff and held that a LOF contract was invalid because it violated the Federal Arbitration Act (FAA).[60] The court held that the FAA ordinarily prohibits a court from ordering arbitration outside its own district, and that where such a court may order arbitration in a foreign nation, one of the parties must not be an American citizen or the underlying dispute must have some relationship to the foreign nation, in this instance, England.[61]

The court's ruling in *Brier,* in effect, sounded something of a death knell for the enforcement of a LOF contract as the central arbitration provision was found to be invalid.[62] While a number of district courts have followed this decision, not every district has adopted the *Brier* court's approach, therefore, the LOF contract still has some life left in it, but has largely fallen out of favor.[63]

With the arbitration clause of the LOF contract now functionally worthless, a number of American maritime arbitration societies have attempted to promulgate a new standard for arbitration. The three main organizations that occupy the hole left by the absence of the LOF contract are the Society of Maritime Arbitrators (SMA), the Miami Maritime Arbitration Council (MMAC), and the Boat Owners Association of The United States (BOATUS).[64] In order to get a comprehensive view of how arbitration impacts the amount granted for a salvage award, it is important to look at how each organization has attempted to fill the gap left by Lloyd's.

The SMA was founded in 1963 and was, at the time of the *Brier* decision, considered the premier maritime arbitration organization in America, despite the fact that it had rarely, if ever, been involved in actual arbitration of disputes.[65] After *Brier*, the SMA promulgated a document that sought to duplicate the LOF as closely as possible for use in the U.S., which

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[59] *See id.* at 1195 (discussing plaintiff's arguments that the LOF contract was invalid because it "is a contract of adhesion," it was entered into under fraud and duress, and that such arbitration violated the Federal Arbitration Act).

[60] *Id.* at 1211.

[61] *Id.* at 1203.

[62] *Id.* at 1211.

[63] *See* Jones v. Sea Tow Servs. Freeport N.Y., 828 F. Supp. 1002, 1015–16 (E.D.N.Y. 1993) (enforcing the arbitration clause of the LOF contract and rejecting the idea that a LOF contract violates the FAA when both parties are American citizens and there is no connection, other than the LOF contract, to England), *rev'd*, 30 F.3d 360 (2d Cir. 1994). *But see* Reinholtz v. Retriever Marine Towing & Salvage, 1994 A.M.C. 2981, 2989 (S.D. Fla. 1993) (following *Brier* and holding that the arbitration clause in a LOF contract was unenforceable where there was otherwise no connection to England in the underlying dispute).

[64] Cattell, Jr., *supra* note 15, at 260.

[65] *Id.*

it called MARSALV.[66] The MARSALV document provides one innovation over the LOF that deserves mention: the so-called "Small Vessel Rules," which allow for an expedited process in the context of recreational vessels.[67]

The MMAC was founded in 1986 and was created as an alternative to the LOF, but occupied much the same territory as the SMA. The MMAC's LOF alternative was termed the SALCON 89 and was substantially similar to both the LOF and MARSALV, but differed in that it was more closely tied to the 1989 Salvage Convention.[68] In most respects, the MMAC conducts arbitration in much the same manner as the SMA, except that the MMAC provides more security to salvors[69] and the final rulings are confidential, unlike both the SMA and BOATUS awards, which are publicly available.[70]

BOATUS occupies a unique place apart from the SMA and the MMAC in that it began as an association of recreational boat owners, instead of as a society purely for the arbitration of salvage disputes. While the BOATUS arbitration process is, again, substantially similar to both the SMA and MMAC processes, it does provide a bit more protection to the boat owner in that arbitration costs are more limited and are split between parties, and the list of approved arbitrators is substantially more restrictive, generally only consisting of marine professionals and admiralty attorneys.[71]

B. *Elements of Pure Salvage*

The Sabine[72] is the seminal Supreme Court case on the current iteration of salvage law in the United States. The Court defined salvage as "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."[73] The Court went on to articulate the three elements required for a valid salvage claim: "1. A marine peril. 2. Service voluntarily rendered when not required as an existing duty or from

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[66] The document was a copy of the LOF in all but name. It allowed for four types of compensation: (1) no-cure-no-pay; (2) fixed amount; (3) hourly rate; and (4) another form of compensation agreed upon by both parties. The form also allowed compensation for minimizing environmental damage and provided that all disputes would be heard before a committee at the SMA. *Id.* at 260–261.

[67] It should be noted, however, that the process is still carried out in accordance with U.S. maritime law regarding salvage awards and carries with it all the problems discussed in this Note.

[68] Cattell, Jr., *supra* note 15, at 262.

[69] It allowed for the salvor to demand security equal to 150% of the salvage claim. *Id.* at 262–63.

[70] *Id.* at 263.

[71] *Id.* at 264–65.

[72] 101 U.S. 384 (1879).

[73] *Id.* at 384.

a special contract. 3. Success in whole or in part, or that the service rendered contributed to such success."[74]

1. *Actual Danger*

The "marine peril"[75] articulated by the Supreme Court in *The Sabine* has had a tumultuous history; it is a very fact-sensitive consideration on which courts often take a very liberal view.[76] Courts that have addressed the issue of marine peril have found the dispositive question to be not whether the peril was imminent, but rather "whether it [was] 'reasonably to be apprehended.'"[77] To make the definition even broader, courts have held that the peril contemplated by the salvor does not even need to be a peril that the imperiled vessel could not have solved on its own; a salvor can be awarded a large sum of money for "saving" a ship that did not need to be saved.[78]

In holding that a salvage claim is appropriate not only when there is actual danger to a vessel but also when such danger is "reasonab[ly] apprehen[ded]," courts have allowed for a dangerously wide range of circumstances in which salvage claims can be awarded.[79] Claims have been found where a vessel had run aground on a rocky ledge,[80] was adrift with no power near the coast,[81] was still at the dock but was near a fire,[82] and where the vessel itself was otherwise fine, but the crew was incapacitated.[83] Despite the very generous definition courts have afforded to the word "peril," they

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[74] *Id.*

[75] *Id.*

[76] *See* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 42–43 (1801) (holding that peril need not be "inevitably certain" but rather that the danger should be "real and imminent"). It is worth noting that the Sabine was in seemingly serious danger. The ship had been grounded on a hidden obstruction. "Many of her flooring timbers and bottom planks were broken, and . . . she had in her hold sixteen to eighteen inches of water . . . ." *Sabine*, 101 U.S. at 385.

[77] Fort Myers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968); *see also* Girard v. M/V Blacksheep, 840 F.3d 1341, 1355 (11th Cir. 2016) (holding that a salvor need not show that their salvage actions were necessary to save the ailing vessel); Evanow v. M/V Neptune, 163 F.3d 1108, 1114 (9th Cir. 1998) (holding that a vessel is in peril when it is exposed to "any actual or apprehended danger which might result in her destruction"); B.V. Bureau Wijsmuller v. United States, 702 F.2d 333, 338 (2d Cir. 1983) (holding that peril will be found where there is a "reasonable apprehension of injury or destruction if the services are not rendered"). For a slightly narrower view of what constitutes marine peril, see Faneuil Advisors Inc. v. O/S Sea Hawk, 50 F.3d 88, 93 (1st Cir. 1995) (holding that although the peril need not be immediate, it must be "something more than the inevitable deterioration that any vessel left untended would suffer").

[78] *Girard*, 840 F.3d at 1354 (noting that it is a "mistaken notion that . . . salvors . . . must prove that their actions were necessary to eliminate [peril]" (citing Legnos v. M/V Olga Jacob, 498 F.2d 666, 671 (5th Cir. 1974))).

[79] *Wijsmuller*, 702 F.2d at 338.

[80] *Id.* at 335, 342.

[81] H.R.M., Inc. v. S/V Eagle Light, 1997 A.M.C. 1972, 1974 (D. Conn. 1997).

[82] Murray v. The John Swan, 50 F. 447, 447–48 (S.D.N.Y. 1892).

[83] Williamson v. The Alphonso, 30 F. Cas. 4, 5 (C.C.D. Mass. 1853).

have not allowed salvage claims for every mishap that involves a vessel on navigable waters.[84]

The case law showcases that courts can construe peril broadly, liberally, and often times in contradiction to the plain meaning of the word. Furthermore, because peril is not only an essential element required for a salvor to bring a claim, but also one of the defining factors in determining how large the salvage award is going to be,[85] there is often a great deal of confusion on the part of recreational sailors and those inexperienced in maritime salvage.[86] This confusion will often lead to inexperienced sailors, whose vessels have stalled or run aground, agreeing to what they consider towing services, which turn out to be much more expensive salvage services.[87]

2. *Voluntariness and No Prior Duty*

Voluntariness has been an integral part of a salvage claim dating back to its first recorded appearance in Roman law.[88] In the Supreme Court's early jurisprudence, salvage claims take on a somewhat noble cast and are set distinctly apart from being a mere reward for work done. In *The Blackwall*, Justice Clifford waxed poetic about the policy justifications for salvage, stating:

> Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit*, or as a remuneration *pro opera et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.[89]

While the contemporary view of salvage may be less poetic, the concept that salvage is a reward for services offered voluntarily has persevered.

In determining whether the voluntariness element has been met, courts primarily look at whether the salvor had a preexisting legal obligation to

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[84] *See* Clifford v. M/V Islander, 751 F.2d 1, 6 (1st Cir. 1984) (holding that there was no peril where a vessel had a substantial hole in the hull but was otherwise secured and not sinking); Phelan v. Minges, 170 F. Supp. 826, 828 (D. Mass. 1959) (holding that there was no peril where a boat had drifted out to sea during a storm but had come to rest in calm waters); The Viola, 52 F. 172, 173 (C.C.E.D. Pa. 1892), *aff'd*, 55 F. 829 (3d Cir. 1893) (holding that there was no peril where a vessel was adrift but could have returned to port once weather had cleared).

[85] *See* cases cited *supra* note 39 and accompanying text.

[86] Liscio, *supra* note 5.

[87] *See* NORRIS, *supra* note 6, at 25 ("A salvage service is a service voluntarily rendered to a vessel or other marine property in need of assistance . . . . A simple towage service is one which is rendered for the mere purpose of expediting . . . voyage, without reference to any circumstances of danger."); discussion *infra* Part II.D.

[88] NORRIS, *supra* note 6, at 7.

[89] The Blackwall, 77 U.S. 1, 14 (1869).

assist the distressed vessel in "relieving property from an impending peril at sea."[90] Where such a preexisting contract is found for salvage services, the voluntariness is negated and the salvor's award is limited to the terms of the contract.[91] It must be noted, however, that the contract must be express and clearly preexisting in order to negate voluntariness; "[t]he fact that a shipowner requests a salvage service and that the salvors in response furnish it, *standing alone*, does not create an implied contract so as to defeat a salvage claim."[92] The concept that a preexisting contract will void the voluntariness requirement is further weakened by the fact that where a contractor acts beyond the terms of the contract, those actions can be considered voluntary and the salvor may be entitled to a salvage award.[93]

The noble ideal that salvage awards serve to compensate the heroic passersby who risk life and limb to help a distressed vessel is further tarnished by the fact that courts have held that the motive of the salvor is immaterial; any salvor without a preexisting obligation, whether they are working for "monetary gain, humanitarian purposes or merely error," will be considered voluntary.[94] There can be considerable confusion and contention—particularly in the recreational sailing context where people are less familiar with maritime law—over whether salvage services are voluntarily offered. Because there is such an ill-defined distinction between towage and salvage services, many distressed sailors have found themselves having to defend against an expensive salvage claim for work they believed to be covered by a preexisting towage contract.[95] The burden on recreational sailors, who are likely encountering the concept of salvage for the first time while their boat is distressed and they are dealing with well-versed and often predatory salvors,[96] is magnified by the fact that it is the defendant who bears the burden of proving that there was a preexisting contract for salvage.[97] Something which they may find difficult to do, given what they thought was an inclusive services package will likely turn out to be for limited towage services.

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[90] *In re* Petition of Sun Oil Co., 342 F. Supp. 976, 981 (S.D.N.Y. 1972), *aff'd*, 474 F.2d 1048 (2d Cir. 1973).

[91] *See* Flagship Marine Servs. v. Belcher Towing Co., 966 F.2d 602, 605 (11th Cir. 1992) ("[N]othing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events . . . will operate as a bar to a meritorious claim for salvage." (quoting The Camanche, 75 U.S. 448, 477 (1869))).

[92] *See id.* (quoting Fort Myers Shell & Dredging Co. v. Barge NBC 512, 404 F.2d 137, 139 (5th Cir. 1968)).

[93] *Camanche*, 75 U.S. at 477–78; Sobonis v. Steam Tanker Nat'l Def., 298 F. Supp. 631, 639 (S.D.N.Y. 1969); Smith v. Union Oil, 274 F. Supp. 248, 250–51 (N.D. Cal. 1966).

[94] Quinn, *supra* note 41, at 337.

[95] *See supra* notes 5, 72–79.

[96] Liscio, *supra* note 5.

[97] Clifford v. M/V Islander, 751 F.2d 1, 5 n.1 (1st Cir. 1984).

A final problem with the no prior duty aspect of salvage is that many of the major professional salvage organizations also advertise that they offer free towage services with membership or they advertise towing insurance at a low rate.[98] So, a common occurrence is for a recreational vessel owner to have a towage contract with a major corporation, such as BOATUS or Sea Tow, and to call upon them when they are in a situation that is justifiably believed to be within the advertised sphere of the contract, only to be stuck with a bill for thousands of dollars.

3. *Success of Salvage*

The fact that a successful salvage of some amount of either the vessel or the cargo is a necessary element of a salvage claim might seem to conflict with the driving principle behind maritime salvage: that it serves as a method to reward good Samaritans who risk themselves to help others. It follows that if the public policy giving rise to a salvage claim is that people should be encouraged to assist seafarers who are in trouble, then the reward should not depend on whether or not the salvaging was successful. The reason underlying the requirement for success, however, is fairly simple: the salvage award is based on a percentage value of the vessel and cargo saved by the salvor, or more commonly in modern times, a lien placed on the property.

In an attempt to promote the salvage of vessels perceived to have zero value, and thus not be subject to a claim for pure salvage, the LOF was revised in 1980 to provide an unsuccessful salvor with his expenses plus an additional 15% as a reward.[99] Furthermore, the International Convention on Salvage, which was adopted by the United States in 1990, included a provision that entitled a salvor to his expenses plus up to an additional 200% as a reward for an "unsuccessful" salvage that would "prevent or mitigate damage to the environment."[100] Such provisions have been adopted as measures to encourage environmental protection at all levels of maritime commerce.[101]

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[98] *See Membership*, BOATUS, https://www.boatus.com/towing/ [https://perma.cc/2BTK-VUCS] (last visited Feb. 20, 2018) (offering unlimited freshwater towing for $72 per year and unlimited saltwater towing for $149 per year); *Membership*, SEATOW, https://www.seatow.com/membership/ [https://perma.cc/QAL5-YSCD] (last visited Feb. 20, 2018) (offering 100%, nationwide coverage for "towing, jump starts, fuel drops, prop disentanglements & covered ungroundings").

[99] Anderson, *supra* note 22, at 229.

[100] *Id.*

[101] *Id.* at 230 (noting that this shifts the cost of environmental protection from the public to the owner of the vessel and encourages salvors to pursue seemingly "worthless" jobs in order to protect the environment). Vessel owners are encouraged to take precautionary measures so they are not responsible for a costly recovery of valueless property and salvors are encouraged to salvage wrecks that are damaging to the environment but would not otherwise be subject to a pure salvage claim. *Id.*

C. *Contract Salvage*

At its core, contract salvage is the preexisting contract discussed above that negates the voluntariness element of a pure salvage claim. Where there is a preexisting obligation, contractual or otherwise, for a person to render salvage services for a fixed fee regardless of success, contract salvage is found.[102] Salvage would seemingly be separated into two clear and distinct categories: one where there is a preexisting agreement and the terms of the service and award are dictated by a contract, and another where there is no such agreement and the salvor is merely helping on a whim. The distinction is not so clear-cut, however, much to the dismay of many desperate and distraught recreational sailors.

Contract salvage stands as one of the biggest issues for recreational vessels and poses the greatest risk to distraught and uninformed sailors, subjecting them to opportunistic and often predatory salvors. Confounding, infuriating, and often expensive to the inexperienced is the nearly inexplicable concept that "[n]ot every salvage contract results in contract salvage."[103] While contract salvage is traditionally demarcated by a pre-negotiated instrument, when there is a dire situation a contract for salvage services can be presented by a salvor to the owner of the vessel on a "no-cure-no-pay" basis. Such salvage is almost exclusively based on the LOF and, despite the fact that there is a contract involved, is considered a pure salvage service.[104]

Such ad hoc contracts mostly serve the purposes of large commercial or industrial shipping; normally they are negotiated and signed prior to the start of the salvage, and the use of standardized contracts is prevalent to facilitate transactions.[105] Such uniform no-cure-no-pay contracts allow for salvors to help in situations that require immediate action where there is no time to negotiate. However, recreational vessel owners have no seat at the table for the negotiation, will not be repeat customers, are inexperienced in the intricacies of maritime law, and are invariably in a situation of extreme distress. A distraught person is handed a form and essentially told that in order to receive help, he or she must sign on the dotted line.[106] The most disturbing aspect is the fact that the salvors are often companies with whom the vessel owner has a preexisting towage contract, which the vessel owner

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[102] *See* The Elfrida, 172 U.S. 186, 196 (1898) (discussing contract salvage).

[103] Anderson, *supra* note 22, at 219.

[104] *See* Geoffrey Brice, *The Law of Salvage: A Time for Change? "No Cure-No Pay" No Good?*, 73 TUL. L. REV. 1831, 1832-1835 (1999) (discussing that both pure salvage and contact salvage deal with the "no-cure-no-pay" concept and how under the no-cure-no-pay concept a salvor often enters into a "financially abortive service").

[105] Quinn, *supra* note 41, at 340.

[106] *See* Liscio *supra* note 5 (discussing the power a salvor has over a recreational boater in an emergency situation).

more than likely thinks is the nature of the paperwork which they are signing, only to have a lien for upwards of 20% of the value of their vessel placed on it.[107]

While these no-cure-no-pay contracts are nominally subject to the same rules as any other contract[108] and courts will "closely scrutinize[]"[109] efforts to create an agreement while the vessel is "in extremis,"[110] there are few cases in which a court has found an agreement with a recreational vessel to be void because of misconduct by the salvor.[111] Courts cling to definitions and lines drawn up hundreds, if not thousands of years ago and are loathe to deny a salvage claim that meets the very broad limits given to the elements.

D. *Towing vs. Salvage*

One of the biggest areas of confusion for inexperienced vessel owners and thus an area of potential exploitation by opportunistic salvors, and one of the most common arguments against a salvage claim, is that the services rendered were towage services, not salvage services.[112] As discussed above, American jurisprudence treats salvage as a service "voluntarily rendered to a vessel . . . in need of assistance," whereas towage is a service "which is rendered for the mere purpose of expediting her . . . voyage, without reference to any circumstances of danger."[113] This definition often proves unhelpful in practice, as a leading treatise has stated the act of rescuing a ship at sea by towing her to a place of safety is the most basic form of salvage.[114]

The one constant separating towage from salvage is that towage is defined by the absence of peril, whereas salvage requires that there be some peril to the vessel.[115] While the motivation for salvage is ostensibly the safety of the distressed vessel and other vessels at sea—although in practice, contemplation of safety, or any actual danger, is often unimportant—the motivation for towage is "convenience not safety."[116] Despite the nebulous and often confused, line separating towage from salvage, the difference

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[107] *Id.* at 359.

[108] *See* NORRIS, *supra* note 6, at 261 (describing how courts review salvage contracts).

[109] The Elfrida, 172 U.S. 186, 196 (1898).

[110] Quinn, *supra* note 41, at 339.

[111] *See* Anderson, *supra* note 22, at 221 (stating that a court "will set aside the contract if it finds that the salvor took advantage of the situation to impose unconscionable or inequitable contract terms on the vessel").

[112] *See* Liscio, *supra* note 5 (comparing the costs of towing and salvage services); Anderson, *supra* note 22, at 211 (discussing how insurance companies often make such arguments because they are not liable for towage services but are liable for salvage claims).

[113] NORRIS, *supra* note 6, at 25.

[114] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 446 (1957) ("The prototypical act [of salvage] is rescuing a ship in peril at sea and towing her to a place of safety.").

[115] Anderson, *supra* note 22, at 212 ("The hallmark of 'towage' is the absence of peril.").

[116] *Id.*

between the two can end up costing a vessel owner tens, if not hundreds of thousands of dollars.[117]

Because the distinction between towage and salvage is one of such profound importance, and yet is so poorly defined, recreational vessel owners, who are very often inexperienced and at the mercy of an experienced professional salvor, are confronted with a large salvage bill for services that would seem like mere towage to anyone but the most seasoned maritime lawyer.

III. THE RISE OF SALVAGE OF RECREATIONAL VEHICLES

The Coast Guard traditionally performed rescue and salvage of recreational vessels, and as such, professional salvage of recreational vessels was not common. That is, however, until 1983 when the Coast Guard announced that it would no longer provide salvage services to recreational vessel owners and would instead rely on private salvage companies to meet the needs of distressed recreational vessel owners.[118] That change, combined with the explosion in popularity of recreational sailing, the increasing number of recreational vessels out at sea, the attendant increase in inexperienced sailors, and the increased number of insurance carriers entering the maritime field, resulted in the number of recreational vessels subject to salvage awards skyrocketing in recent years.[119][

IV. WHY SALVAGE SHOULD BE REPLACED IN THE RECREATIONAL BOATING CONTEXT

A. *Predatory*

To speak bluntly, the maritime doctrine of the liberal salvage award has not caught up with the modern concept of recreational boating, and unscrupulous salvage corporations take advantage of unassuming and

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[117] Since towing services are provided on a predetermined per-hour basis, but a salvage award is determined by a myriad of factors, including the value of the salvaged vessel and the circumstances of the salvage, a court finding for salvage could mean the difference between hundreds of dollars in towage and hundreds of thousands of dollars in salvage. *See* Am. Home Assurance Co. v. L & L Marine Serv., 688 F. Supp. 502, 509 (E.D. Mo. 1988) (noting that a bill for towing services was $6,114.80 whereas the award for salvage was determined to be $130,000 by arbitration); Ocean Servs. Towing & Salvage v. Brown, 810 F. Supp. 1258, 1264 (S.D. Fla. 1993) (granting a salvage award of $8,000 for work that, were it considered towing, would have been at most $625); Mahoney Marine Servs., v. Ellie Rose, 2002 A.M.C. 2838, 2840–42 (2002) (Cattell, Jr., Arb.) (awarding a salvor $15,600 for seven minutes of work that would have been included with the $95 per year membership at no additional charge had "peril" not been found).

[118] Cattell, Jr., *supra* note 15, at 257; *see also* Anderson, *supra* note 22, at 205 (discussing the "large number of small salvage companies [that] have sprung up across the country" in response to the Coast Guard's decision).

[119] *See supra* note 1.

unknowledgeable vessel owners by exploiting the complex legal definitions surrounding towage, salvage, and salvage awards. The explosion of recreational boating in the past several decades has introduced an unprecedented number of vessel owners and insurance companies to the complicated legal world of salvage awards, and they are potential targets for exploitation by professional salvors. Professional salvors are benefited, and recreational vessel owners are done a further disservice, when the Coast Guard is called for assistance. This often forwards nonemergency distress calls to professional salvors and lends them an air of legitimacy that they can exploit for profit.[120]

It is perhaps easiest to see the predatory nature of the professional salvor in the context of recreational boating by performing a brief case study of a typical salvage award dispute. To that end, consider *H.R.M., Inc. v. S/V Eagle Light*.[121] H.R.M., also known as Safe Sea, is a large commercial salvage company based out of Rhode Island that provides salvage and towing services solely to recreational vessels.[122] Safe Sea received radio contact from the Eagle Light, a recreational vessel piloted by Dr. Murray, after it had run aground while operating on auxiliary power at very slow speeds.[123] It is important to note that Dr. Murray had a preexisting towage contract with a similar company called Sea Tow,[124] but he contacted Safe Sea because they were closer and could assist him more readily than Sea Tow could.[125]

Safe Sea sent a vessel, the Kropp Salvor, to assist the Eagle Light, and in short order it towed the Eagle Light off the strand on which it had grounded with minimal expenditure of time, labor, and materials.[126] Once the vessel was ungrounded, the captain of the Kropp Salvor boarded the Eagle Light and presented Dr. Murray with forms for signature that stated services were successfully rendered. The lighting conditions were such that the documents were functionally illegible, and there was no discussion of the contents of the documents, which stated that the services were for pure salvage and not towage, as Dr. Murray believed.[127] There was no discussion

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[120] Peterson v. Allen, No. C07-1866, 2009 WL 666781, at *2 (W.D. Wash. Mar. 10, 2009).

[121] 1997 A.M.C. 1972 (D. Conn. 1997).

[122] *Id.* at 1972. For an idea of how large and sophisticated this salvage operation is, note that the company maintains six salvage vessels worth in excess of $400,000. *Id.*

[123] *Id.* at 1974.

[124] It is also noteworthy that many large maritime corporations, such as Safe Sea, Sea Tow, and BOAT US, provide towing services, salvage services, and insurance services. The fact that a vessel owner can have a towing services contract with a company, receive towing services from that same company, and then be forced to pay a salvage award is indicative of the problem with the current state of salvage awards and is a problem that is present in a large percentage of salvage award disputes.

[125] *Eagle Light*, 1997 A.M.C. at 1974.

[126] *Id.* at 1974.

[127] *Id.* at 1974–75. Dr. Murray believed that he was receiving towage services at a rate of $127 per hour, based on prior radio messages from Safe Sea. *Id.*

of the type of service or cost prior to the rendering of services, and when Dr. Murray offered to pay at the scene, he was refused and the salvage company stated that it only wanted the name of his insurance carrier.[128] Ultimately, Safe Sea sought a salvage award of $12,100, plus 18% interest, from Dr. Murray's insurance carrier for the monumental task of towing the Eagle Light "a few hundred feet from shore," despite the fact that the passengers were not in any danger and could even have walked ashore if need be.[129]

This type of interaction is typical of how large commercial salvage operations prey on unknowing and distraught vessel owners in high-stress situations.[130] By providing for such high salvage awards, the current state of the law encourages salvage companies to be predatory and take advantage of the inexperience of recreational vessel owners by presenting them with complicated and often unintelligible documents that could turn an otherwise basic tow into a salvage that costs upwards of 20% of the value of the salvaged vessel. Far from its roots of encouraging the assistance of distressed sailors, the current state of salvage law encourages salvors to delay assistance until a vessel is in more distress. Instead of encouraging professional mariners to help each other in times of trouble, it now encourages professional salvors to take advantage of inexperienced vessel owners. In the context of recreational vessels, liberal salvage awards accomplish none of the public policies that purportedly justify their existence. Instead, they force unsuspecting vessel owners to fund the misdeeds of unscrupulous salvors and now have the opposite of the anti-piracy effect intended by their inception.

B. *Public Policy*

It is a well-known rule of contract law that one who assents to a writing is presumed to know its contents and cannot void the contract by arguing that she did not read them.[131] While this ostensibly holds true in the context

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[128] *Id.* at 1975.

[129] *Id.* Safe Sea was ultimately awarded $9,000 by the court. *Id.* at 1977.

[130] *See* Stevenson v. October Princess Holdings, LLC, SMA No. 3982, 2007 WL 5911098, at *1–2 (N.Y. Oct. 10, 2007) (Busch, Farrell, Jr., & Carroll, Arbs.) (finding that the services rendered were towing and denying a requested salvage award of $237,300 where a yacht was stranded due to high tide and the owner initially refused assistance; after learning that the salvor was affiliated with BOAT US, with whom the owner had a towing agreement, the owner accepted assistance and was towed to safety, whereupon he signed what was believed to be a receipt for towing services); Sea Tow Servs. Cape Cod Bay v. Baer, SMA No. 3405, 1998 WL 35281239, at *4 (N.Y. Jan. 5, 1998) (Carroll, Arb.) (discussing a salvage in which the owner did not agree to a salvage and was deceived by a salvor from whom he intended to receive towing services); Jones v. Sea Tow Servs. Freeport NY, 30 F.3d 360, 362 (2d Cir. 1994) (detailing facts wherein a salvor neglected to explain arbitration provisions, and when confronted with a vessel owner who had trouble reading and wanted to consult an attorney, stated he "would be unable to render assistance without a signed contract" in an emergency situation; the salvor further implied that the owner's towing insurance would cover the cost of services).

[131] RESTATEMENT (SECOND) OF CONTRACTS § 157 cmt. b (AM. LAW INST. 1981).

of salvage law, the stresses and pressures that are inherent to any situation in which salvage would be required, that is to say where there is marine peril, should be viewed in a light more favorable to the distressed party. As discussed above, the situations in which no-cure-no-pay salvage contracts are signed are invariably ones of high stress in which the vessel owners are often unable to read or comprehend the documents that are being pressed upon them by salvors.[132] Public policy, and the protection of consumers and vessel owners, is best served by placing a greater amount of scrutiny on no-cure-no-pay contracts entered into by salvors and recreational vessel owners.

American courts have recognized that situations involving salvage are inherently dangerous, and the courts have stated that since vessel owners are in a heightened state of vulnerability to fraud and duress in such circumstances, the law of salvage "cannot . . . tolerate . . . dishonesty, corruption, fraud, [or] falsehood, either in the rendering [of] service, or in [the] proceedings to recover the salvage."[133] Despite this paternalistic instinct, there are very few cases in which a salvage agreement involving a recreational vessel has been found void due to duress, fraud, or coercion.[134] The seminal cases regarding salvage law all contemplate informed and equally-matched commercial vessels interacting with one another, and the concept of duress outlined in *The Elfrida*.[135] This precedent, still followed by courts today, is too narrow and does not adequately account for the recreational boating context.

Setting aside the notion that allowing for liberal salvage awards in the recreational boating context promotes behavior contrary to public policy, it is clear that the policy reasons that originally justified such awards are not applicable to recreational vessels.[136] The current state of maritime navigation is such that a recreational vessel owner is not in as perilous a situation as was his commercial counterpart in the 1800s.[137] The original policy reasons no longer hold sway, and salvage law must pivot in order to accommodate modern public policy concerns such as consumer protection, reducing transaction costs, and ensuring that businesses act scrupulously—all of

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[132] *See Jones*, 30 F.3d at 362 (detailing a situation in which vessel owners were pressured by a salvor into signing a document which they could not read, due to a lack of glasses and poor lighting, or comprehend; the salvor informed them they would be stranded if they did not sign); Black Gold Marine, Inc. v. Jackson Marine Co., 759 F.2d 466, 468 (5th Cir. 1985) (detailing a situation in which a vessel captain, who had never seen a salvage document before and who could not understand the language used, was pressured into signing through false assurances by the salvor).

[133] Church v. Seventeen Hundred and Twelve Dollars, 5 F. Cas. 669, 672 (S.D. Fla. 1853).

[134] Anderson, *supra* note 22, at 221.

[135] *See* The Elfrida, 172 U.S. 186, 197 (1898) (setting a standard for duress that contemplated that the vessel had an experienced "Master" and a sophisticated and informed commercial vessel owner).

[136] *See supra* Part II.

[137] *See* Bloor, *supra* note 29.

which are contravened in a recreational context by the current state of salvage law.

C. *Technology and Alternatives*

As discussed above in Part II, the rise of modern technology and the evolution of recreational boating from a solitary activity to a community-based activity have all but eliminated the concerns that salvage law addresses.[138] Disregarding, for the moment, that a sailor is now orders of magnitude less likely to be injured while at sea,[139] technological advancements and alternative avenues of assistance have obviated the need to incentivize would-be salvors with such obscene awards in the recreational vessel context. The ubiquity of communications devices, the pervasiveness of on-board GPS and maritime radio, and the increased availability of personal locators all mean that average seafarers are increasingly unlikely to find themselves in a situation that requires actual salvage as opposed to towage.[140]

While the rise of the professional salvor has been at the expense of, and a detriment to, the recreational vessel owner, it has shown that there is an industry ready to provide for the needs of the distressed recreational vessel owner. It has also shown that the incentive intended by salvage awards is no longer necessary and serves only to allow predatory salvage practices. Furthermore, while the memberships offered by organizations like Sea Tow and BOATUS are often misleading and play a large role in the predatory practices that typify the actions of salvage companies, they could be a valid alternative, similar to AAA, and their popularity stands as a testament to the idea that such memberships are valued and are a sustainable business model.[141]

V. REPLACEMENTS FOR SALVAGE LAW

It is all well and good to recognize that the application of salvage law in the context of recreational vessels no longer serves the public policies that originally underlined the existence of a liberal salvage award and that such a liberal award serves only to encourage predatory practices by professional salvors. But such recognition is pointless without taking steps to eliminate

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[138] *See supra* Part II.

[139] Bloor, *supra* note 29.

[140] *See supra* notes 29–32 (noting improvements in maritime technology and safety).

[141] *See* Pete McDonald, *On Board With: Capt. Joe Frohnhoefer, Founder of Sea Tow*, BOATING MAG, Mar. 4, 2013, http://www.boatingmag.com/how-to/board-capt-joe-frohnhoefer-founder-sea-tow [https://perma.cc/SAZ5-Z7RT] (noting that Sea Tow had 200,000 members as of 2013); Press Release, BoatUS, Boat Owners Association of The US: By the Numbers (Mar. 28, 2014), http://www.boatus.com/pressroom/release.asp?id=985 [https://perma.cc/2D2H-RDB3] (noting that BoatUS had 500,000 members as of 2013).

salvage awards and replace them with a viable, more easily comprehended alternative.

The most obvious replacement for the capriciously liberal salvage awards currently turned out by arbitrators and judges alike is to turn all salvage awards, whether based on pure or contract salvage, into a purely quantum meruit determination and eliminate the complicated factors that first appeared in *The Blackwall*.[142] Although salvage awards were originally intended as "a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property,"[143] such high-minded ideals no longer hold any sway in the realm of professional salvage. In the context of recreational vessels, these justifications no longer hold true as there is little to no peril in assisting a distraught vessel owner with a boat that has run aground,[144] a ship that has drifted a few miles from shore,[145] or a yacht that sits in the marina taking on water.[146] Modern day professional salvors work a job like any other and should be paid *pro opera et labore* and not based on an antiquated test seeking to reward a maritime good Samaritan. Therefore, it makes the most sense to do away with salvage awards and create a standardized salvage agreement that provides for a default contract that sets a price for the salvage based on the time and materials expended by the salvor.[147]

A similar alternative to the current state of salvage awards, if the legal fiction of a contract is untenable, would be to treat a salvor the same way the law treats a doctor who furnishes aid on a distressed person she may happen upon.[148] A physician may "recover on a quantum meruit basis for the reasonable value of services rendered and materials furnished, in lieu of contract."[149] As noted *supra* in Part III, salvage law occupies a unique niche in law whereby it is a restitution that is not determined by the amount of time or effort expended by the salvor.[150] Courts have ostensibly justified this by pointing to the emergency circumstances that surround a salvage operation and how salvage awards are intended to motivate salvors to assist in times of danger. The same policy reasons, however, also underlie the allowance of quantum meruit restitution in instances of a physician providing emergency

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[142] *See* The Blackwall, 77 U.S. 1, 8–10 (1869) (discussing the circumstances that determine compensation for salvage).

[143] *Id.* at 14.

[144] Mahoney Marine Servs., v. Ellie Rose, 2002 A.M.C. 2838, 2842 (2002) (Cattell, Jr., Arb.).

[145] Phelen v. Minges, 170 F. Supp. 826, 828 (D. Mass. 1959).

[146] Clifford v. M/V Islander, 751 F.2d 1, 6 (1st Cir. 1984).

[147] It is important that this be a default and not a mandatory price setting. The law cannot expect that a distressed sailor will have the time or wherewithal to negotiate a contract at the scene of their peril. Both parties should, however, have the ability to contract around any default rules as they would in any other business setting.

[148] 70 C.J.S. *Physicians and Surgeons* § 172 (2018).

[149] *Id.*

[150] *See supra* Part III.

services to a person with whom they have no prior contractual relationship.[151] There is no discernable reason to treat salvage specially and as deserving of a higher reward than the quantum meruit restitution owed a physician who renders life-saving assistance in an emergency; the two situations mirror each other very closely, except one happens at sea and the other generally happens on land.[152]

One final alternative could be to place the burden of salvage awards on insurance companies and require, just as is required for the operation of a motor vehicle, that recreational vessel owners carry insurance. This alternative would require the insurance companies to maintain pre-negotiated salvage contracts within a certain area of operation, thus taking the burden off the uninformed vessel owner and moving it to the insurance and salvage companies who are well informed and better equipped to handle the task.[153] This would, however, require a greater deal of governmental oversight in an area that has thus far gone mostly unregulated.[154] Due to the increased ownership and ubiquity of recreational vessels, it makes a great deal of sense to treat the insurance and operation of those recreational vessels in a manner similar to the insurance and operation of motor vehicles.

CONCLUSION

While the concept of a liberal salvage award originated as a well-intentioned and well-reasoned policy to discourage piracy and encourage mariners to act as good Samaritans, it contemplated a maritime ecosystem and economy comprised solely of commercial vessels, and it fails to meet the requirements of a modern sea that is permeated by recreational vessels. Courts continue to cling to factors laid out by the Supreme Court in 1869 and refuse to adapt salvage to meet the needs of the recreational vessel owner. When the difference between towage services and salvage services can equate to hundreds of thousands of dollars, the law no longer serves to encourage good Samaritans or curtail piracy—it does the opposite. While liberal salvage awards still have their place in the commercial maritime industry, where parties can negotiate on equal footing and decisions are not made by uninformed and distraught owners of personal vessels, they have no place in the recreational vessel context and serve only as a tool for unscrupulous and predatory salvors to prey on the distressed and unaware.

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[151] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. a (AM. LAW. INST. 2011).

[152] There is some merit to the argument that salvage awards are unique in the realm of restitution in that they are available to non-professionals. *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992). This argument fails in the face of the rise of the professional salvor and the fact that salvage has become an extensive and lucrative professional industry. *See* Int'l Salvage Union, *supra* note 1.

[153] Anderson, *supra* note 22, at 232.

[154] *Id.* at 205.