

## TEACHING AND LEARNING THE LAW OF BOATS

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### INTRODUCTION

I have taught admiralty and maritime law exactly twice. That experience hardly makes me an expert in training future proctors. What that experience does give me, however, is the perspective that comes from having recently confronted the challenges of learning the field myself. And that perspective has led me to teach the admiralty survey course differently from how I teach any of my other classes and differently from how I perceive other admiralty classes that are taught by more experienced teachers. In this essay, I hope to explain how and why I teach admiralty differently, with the hope of offering a new teacher's perspective on revitalizing the admiralty survey course.

The primary reason I teach admiralty differently is that admiralty is a difficult subject to learn, and for reasons that are unlike any other class I've taken or taught.<sup>1</sup> Unlike other difficult courses such as antitrust, taxation, or patent law, admiralty is not a discrete field of law but "just law, in a special factual setting."<sup>2</sup> The "just law" part of the quotation is the reason why the survey course builds on so many other classes,<sup>3</sup> potentially overwhelming students with the all-encompassing nature of the subject. Not much can be done about this problem, and indeed, a strong case can be made that this is not a problem at all but rather an advantage of admiralty in the curriculum.<sup>4</sup> Students who have taken admiralty will actually hear terms such as "personal jurisdiction," "comparative negligence," and "federal question" several more

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1. I suppose I should point out here that the first admiralty class I took was the one I taught last year.

2. Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625, 627 (1998) (quoting GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 46 (2d ed. 1975)).

3. At a minimum, these classes include civil procedure, torts, contracts, federal courts, constitutional law, and conflicts of law.

4. Goldstein, *supra* note 2, at 636–39 (citing the "cross-cutting" and "review" advantages of admiralty).

times between the first year and the bar exam, and that exposure can only reinforce their understanding of those concepts.<sup>5</sup>

The second, more important reason why admiralty is difficult to learn, however, is captured in the second part of the quotation—the “special factual setting” in which admiralty operates. Unlike most of the courses in the law school curriculum, the facts of many admiralty cases are impossibly divorced from the lives of the typical law student. Yes, the class will have the occasional former longshoreman, commercial fisherman, Coast Guard officer, or container ship stowaway, but the typical student’s only experience with navigable waters is likely to be on recreational boats, surfboards, kayaks, SCUBA diving trips, jet skis, and cruise ships. It doesn’t exactly resonate with that student to say, “Imagine you’re a longshoring gang member and you go down to the hiring hall when, instead of your normal stevedoring job, you’re hired for terminal operations and you’re injured rolling a dolly loaded with cheese into a consignee’s truck. Are you engaged in ‘maritime employment?’”<sup>6</sup>

The alien nature of the fact patterns in many admiralty cases can make it difficult for students to understand the cases and difficult to relate those cases they do understand. These problems have led me to modify the standard survey course in three ways. First, I define the course more broadly than the standard admiralty course, mixing international law of the sea together with admiralty. I find that sprinkling in a few basic law of the sea concepts greatly increases the students’ motivation to learn the slower-going topics in admiralty. Second, I try to selectively choose the admiralty topics to make them more “real” to students. Specifically, I emphasize recreational boating cases even though that means spending less time on some of the (concededly important) commercial topics. Finally, I try hard to give the students an experience, not just a class; every student in my admiralty class has at least one opportunity to observe maritime work aboard a vessel.

#### I. REDEFINING THE SURVEY COURSE IN ADMIRALTY WITH LAW OF THE SEA

I sometimes wonder what students envision when they see “admiralty” in the course catalog.<sup>7</sup> Some students probably imagine the class will involve seventeenth century sea battles, while others probably think the class deals

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5. Moreover, students actually already know some admiralty law from their first-year studies. See Goldstein, *supra* note 2, at 631–35 (explaining that admiralty cases regularly appear in the curriculum in these other courses).

6. See *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 254–55 (1977).

7. Assuming that other law schools arrange their course catalogs alphabetically as we do, it seems likely that students do “see” admiralty in the catalog. See PEPPERDINE UNIV. SCH. OF LAW, 2010–2011 ACADEMIC CATALOG 154, available at <http://law.pepperdine.edu/academics/content/catalog2011.pdf>.

with details of the naval hierarchy. But I would venture that relatively few students, other than those who already have some experience with the subject matter, think of “contracts, torts, and workplace injuries occurring in the course of maritime commerce and other maritime activities,”<sup>8</sup> even though that’s what most of the survey course is about.

Those students who actually do have somewhat concrete ideas about “admiralty” from their first-year classes probably expect that they will learn a parallel system of law that in some way applies to boats and the sea, and to a certain extent, that is what we teach the students in the survey course. But the survey course is actually much narrower than that, and I believe many of the topics students are most interested in learning are left out of the standard survey course. Students want to know, for example, what criminal law applies on a vessel on the high seas? How far out to sea are “international waters”? What does the “flag” of a vessel mean? Is it true that seafarers have a duty to render assistance? What is the legal framework for responses to piracy? In short, many students don’t just want to take a class solely on the law of maritime commerce; they want to take a class on the law of boats.

In my experience, these are some of the questions students hope the admiralty course will address, only to be disappointed when the final topic turns out to be maritime liens. The occasional student might get all fired up about bills of lading, but I have found it useful to sprinkle in a few of the law of the sea topics to keep the students engaged. But if course descriptions and casebooks are any guide, these types of questions are usually relegated to a line item on the syllabus of an international law class, or not taught at all. The student who enrolls in admiralty because he or she loves the sea might feel that the admiralty survey class is a bait-and-switch. Of course, one could respond correctly that those topics are a different course—one in international law—but why not cover at least the international law of navigation in admiralty, where the focus is already on vessels?<sup>9</sup>

I think the admiralty survey is a perfect opportunity to teach a slightly broader course that I like to call the “law of boats.” Accordingly, I have begun to supplement the basic admiralty class with a skeletal survey of international law of the sea, focusing primarily on introducing concepts such as the territorial sea, contiguous zone, and the exclusive economic zone and assigning selected provisions of the Convention on Law of the Sea.<sup>10</sup> These topics are

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8. FRANK L. MARAIST, THOMAS C. GALLIGAN, JR. & CATHERINE M. MARAIST, *CASES AND MATERIALS ON MARITIME LAW* 1 (2d ed. 2009).

9. Indeed, most admiralty casebooks already do cover a number of international conventions, including the Rules for Prevention of Collision at Sea and the Salvage Convention. *See, e.g., id.* at 356–63 (Rules for Prevention of Collision at Sea); *id.* at 847–54 (International Salvage Convention).

10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

nicely introduced by a discussion of the several *United States v. California* cases,<sup>11</sup> which in turn leads naturally to a discussion of the Submerged Lands Act<sup>12</sup> and the Outer Continental Shelf Lands Act.<sup>13</sup> Because the Outer Continental Shelf Lands Act and, to a lesser extent, the Submerged Lands Act are a part of most admiralty courses anyway, the transition is not only seamless, but doesn't look like a detour to the students. I believe that including these topics, together with miscellaneous statutes from Title 46 of the United States Code, rounds out the course and gives students perspective on federal admiralty law, in addition to keeping them engaged.

## II. CONNECTING ADMIRALTY TO STUDENTS' EXPERIENCE: THE "RECREATIONAL" CASES

In addition to trying to engage students' imagination with selected topics from the law of the sea, I have also tried to engage the students' own experiences by emphasizing recreational boating cases over more traditional commercial cases.<sup>14</sup> More and more, the most influential cases in admiralty casebooks contain fact patterns that students can identify with from their own experience—cases about jet skis,<sup>15</sup> cruise ships,<sup>16</sup> and of course, recreational boating.<sup>17</sup> And I have found that the idea of a parallel legal system that applies to such seemingly common experiences is intriguing to many students.

The reaction of students to such cases is often, "I didn't know I'd been under admiralty jurisdiction before!" This "realization," that admiralty law can actually apply to ordinary life, is very empowering and motivating to students learning a complicated and alien field of law like admiralty. Indeed, this is the positive and inspirational effect of what one commentator pejoratively called the "general aura of magic that surrounds admiralty."<sup>18</sup> I have found that the "magical aura" of admiralty, when combined with everyday fact patterns from the students' own experience, leads the students to ask many more questions, make far more comments, and pose their own hypotheticals much more often. And my view is that the cases that engage students with activities they can

11. *United States v. California*, 381 U.S. 139 (1965); *United States v. California*, 332 U.S. 19 (1947).

12. 43 U.S.C. §§ 1301–1315 (2006).

13. *Id.* §§ 1331–1356.

14. The standard term for what I'm describing appears to be "pleasure boating," rather than "recreational boating." In the course of writing this article, however, my wife reminded me that on the basis of her experiences on my boat, "pleasure boating" is a contradiction in terms, so I have chosen to use the term "recreational boating."

15. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

16. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

17. *See, e.g., Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

18. Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 665 (1963).

relate to are much more likely to stimulate a durable interest in admiralty as a field.

I know that some would view recreational boating cases as the pathological misfits of admiralty law, unworthy of serving as centerpieces of a course on admiralty. Indeed, some prominent articles have argued that admiralty should have no application to recreational boating.<sup>19</sup> I am going to try to argue, however, that—pathological or not—the recreational boating cases should be a staple of the survey course in admiralty. Using recreational boating as an emphasis in admiralty does more than merely draw the students in. Applying federal admiralty law to recreational scenarios tests the purposes and the limits of admiralty jurisdiction. The cases force us to think more carefully about the purposes behind admiralty jurisdiction in a way that traditional fact patterns do not.

The emphasis on cases that explore the underlying purpose of admiralty jurisdiction and federal general maritime law are particularly apt today, when I think it's fair to say that admiralty law is engaged in a process of searching for its *raison d'être*. The technological advances that produced containerization, multi-modal transport, and increasingly collision-free shipping lanes seem to have marginalized admiralty as a discipline. Some commentators go farther, arguing that the “special status” of admiralty law is not justified and that maritime law should be “normalized.”<sup>20</sup> Similar arguments seem to crop up in other common law jurisdictions.<sup>21</sup> What role can the recreational cases play in helping to shape the future of maritime law? Is the proliferation of recreational cases the overture or the swan song of admiralty law?

I don't know the answer to this question, but in my view, the hand-wringing over the future of admiralty is tied to the idea that maritime jurisdiction should be limited by its connection to *traditional* maritime commerce. I think it is still true that though “the scope of the maritime law and that of commercial regulation are not coterminous, the latter embraces the greater part of all that the former comprehends.”<sup>22</sup> But I believe this is true in the modern day only because of our expansive notion of “commerce” in land-based constitutional law. If we applied as expansive a definition of commerce for purposes of thinking about admiralty's proper scope, as we do for thinking

19. *See id.* (arguing that “if there is no commercial element involved . . . there is no reason to apply admiralty law”).

20. Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 471 (2004); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 277–78 (1999).

21. *See, e.g.*, Paul Myburgh, *Richard Cooper Memorial Lecture Admiralty Law—What Is It Good For?*, 28 UNIV. QUEENSL. L.J. 19 (2009) (examining Australia's attempts to reform its admiralty law and considering the merits of a separate admiralty jurisdiction).

22. 1 BENEDICT ON ADMIRALTY: JURISDICTION AND PRINCIPLES § 109 (Steven F. Friedell ed., 2010).

about the scope of the Commerce Clause, admiralty's boundaries wouldn't be threatened with perpetual retreat. These are the types of questions that I hope that the "recreational" boating cases help my students to think about.

The recreational cases have even more pedagogical significance when one considers the fact that the boundaries of the "recreational" category of cases are not really as clear as they might appear. What is a "recreational" case? The collision between two recreational vessels is about as recreational as possible, and yet, that case is in admiralty.<sup>23</sup> I think passenger vessels, including cruise ships, are clearly considered "commercial" maritime activity, even though the passengers are not engaged in commercial activity at all. Perhaps then the "commercial" nature of the case is measured by whether the defendant is engaging in commercial activity?<sup>24</sup> Then what about salvage cases, where admiralty jurisdiction is not doubted even when the defendant is a recreational boater? Indeed, even in the purest case of a collision between two recreational vessels or a purely non-commercial tort aboard a recreational vessel, recreational vessels are often insured, implicating the insurance company as defendant, as *Foremost Insurance Co. v. Richardson* illustrates.<sup>25</sup> In a sense, there is no purely noncommercial boating on navigable waters.

The blurring of the lines between "commercial" and "recreational" activity in modern boating suggests that even if the purpose of admiralty law is to protect "the business of shipping, the maritime industry, or commerce by water,"<sup>26</sup> we might have to apply admiralty to recreational boating. Objections to applying admiralty to recreational activity seem primarily focused on tort jurisdiction, with recreational vessel collisions often compared to "automobile accident[s] on a national highway."<sup>27</sup> Putting aside the fact that there is more to admiralty than admiralty tort law and the fact that there is more to admiralty tort law than collision, I still feel that this analogy is strained; in my opinion, the similarities between recreational vessels and commercial vessels are closer than those between commercial vessels and commercial land transport. As a simple example, unlike automobiles or tractor-trailers, vessels at sea can't just pull over to the side of the road when a dangerous problem develops; vessels require active navigation every moment to safely reach port and sometimes are

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23. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 669 (1982).

24. To the extent that we identify "traditional maritime activity" with "commercial maritime activity" then it would seem this is the appropriate inquiry. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 539–40 (1995) (explaining that the court should look to whether the tortfeasor's activity is closely related to traditional maritime activity). Of course, I am arguing against equating these two, and indeed, the *Grubart* Court itself made it clear that the inquiry is directed to the "tortfeasor's activity, *commercial or noncommercial*, on navigable waters." *Id.* at 539 (emphasis added).

25. See *Foremost Ins. Co.*, 457 U.S. at 669–70.

26. Stolz, *supra* note 18, at 665.

27. *Id.*

not even safe in port without active intervention.<sup>28</sup> Of course, there are many other comparisons that could be drawn on both sides, but whether one agrees or disagrees with this analysis is beside the point. It is the debate itself that shows how recreational cases can get at the animating principles of the admiralty law.

I believe the tremendous growth in recreational boat ownership and use<sup>29</sup> will pose a challenge and an opportunity for admiralty, one that students versed in these cases will be poised to address. The very same technological innovation that helped to squelch the admiralty docket with the development of behemoth ships and containerization has made recreational seafaring, whether coastal, interstate, or international, within the means of many Americans. One day, voyaging will likely be within the means of many more in the developing world, and when that day comes we will see how “international” recreational boating can be. And this activity will likely produce more and more cases, as one hopes that recreational boaters and cruise ship passengers will never be containerized. Will admiralty be nimble enough to respond to new problems of modern seafarers, or will it go down lashed to the deck of “traditional” maritime commerce? These are questions that I think the recreational cases allow us to explore.

### III. MAKING MARITIME COMMERCE PART OF THE STUDENTS’ EXPERIENCE

Finally, the recreational boating fact patterns can only go so far, even in teaching the law of boats. It would be hard to find a sound recreational analogy to pilotage or carriage of goods by sea, among others. Instead of giving up the idea that the fact patterns should engage students’ experiences, I try to make a few class sessions an experience for the students—to give them a taste of what maritime work is like. I’m not saying we need to give the students as authentic an initiation as recreating the fact pattern in *The Rolph*,<sup>30</sup> but I have found that some engagement with what really goes on “out there” has left the students hungry to learn more.

In our case, we have the benefit of a law school that overlooks the Santa Monica Bay, and on a clear day we can see ships plying the major coastwise traffic lane in and out of the ports of Los Angeles and Long Beach. I like to

28. For a vivid example, see *Brotherhood Shipping Co. v. St. Paul Fire & Marine Insurance Co.*, 985 F.2d 323, 328–29 (7th Cir. 1993) (discussing a case in which a 590-foot freighter berthed in the Port of Milwaukee suffered severe damage during a Lake Michigan storm).

29. See C. Peter Theut, *Recent Developments in Pleasure Boat Law*, 29 J. MAR. L. & COM. 171, 171–72 (1998).

30. *Rolph Navigation & Coal Co. v. Kohilas (The Rolph)*, 299 F. 52, 53–54 (9th Cir. 1924) (discussing a libel for “assaults and beatings” endured by the hand of the vessel’s mate). The first mate was “of a most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel, and uncalled for assaults upon sailors.” *Id.* at 55.

begin each class by looking at the positions, speed, and destinations of the large vessels operating off our coast from an automatic identification system (AIS) website.<sup>31</sup> We look at nautical charts, depictions of the territorial sea, and the three nautical mile line, and compare these with the *United States v. California* cases cited above.<sup>32</sup> I believe each one of these activities contributes to giving the landlubber a taste of maritime navigation. Not all of these would be transferable to other geographic locations, but the idea would be.

Of course, one can only experience so much of the commercial aspects of the sea from Malibu, so I have begun to incorporate field trips into the course. As an example, last year we toured the pilot station in Long Beach where the students experienced firsthand the technology, precision, and professionalism of the harbor pilots. Giving the students an opportunity to see a pilot climb down a ladder from an oil tanker to our (relatively) tiny pilot boat below, made the pilotage cases resonate for the students in a way that reading the cases can't. And the experience wasn't only meaningful for the students. To see my students awestruck at bobbing on a small boat a few feet away from the hull of an oil tanker at sea was one of the highlights of my young teaching career.

#### IV. PEDAGOGICAL VALUE OF TEACHING THE LAW OF BOATS

The customizations I have made to my admiralty course seem to work well engaging students with the material, making the course more fun to teach, and relating more directly to students' own experiences. One might argue that deviating from the standard survey course material is just self-indulgence or worse—pandering. Am I doing a disservice to students by teaching them more of what they want to know and less of what they “need to know?” Ideally, I could teach them both. But the fact that there is far, far, too much material already for even a three-credit survey course is actually somewhat liberating in this regard. I feel that most of what the students “need to know” about admiralty law will be learned in a specialized law firm practice. I see my role as giving them an analytical framework and the inspiration to seek those jobs in the first place.

Instead of trying to train future proctors, I try to make admiralty fans of students who have never heard of proctors. I use the survey course in admiralty as an opportunity to capture students' imagination, to enable them to relate their own experiences to otherwise impenetrably complex and abstract legal principles, and to inspire them to want to learn more. The single most successful tool in this task has been the simple, stunning realization by students

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31. See, e.g., *Live Ships Map—AIS—Vessel Traffic and Positions*, MARINETRAFFIC.COM, [http://www.marinetraffic.com/ais/datasheet.aspx?datasource=SHIPS\\_CURRENT&alpha=A&level0=200](http://www.marinetraffic.com/ais/datasheet.aspx?datasource=SHIPS_CURRENT&alpha=A&level0=200) (last visited Oct. 3, 2010).

32. See cases cited *supra* note 11.



that this ancient, arcane, parallel system of law that has developed (depending on how one counts) over several hundreds of years, could actually apply to their everyday lives. Instead of attempting to dispel the “general aura of magic that surrounds admiralty,” I try to encourage it.

