

## THE JOY OF TEACHING ADMIRALTY

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### INTRODUCTION

The admiralty course poses several challenges for a professor that can be turned to one's advantage. It is a survey course that includes issues of jurisdiction, procedure, and a host of areas of substantive law that are related only in that they relate to vessels. No one can hope to be an expert on all of these matters. However, one can use the variety of subjects to one's advantage by focusing on one topic at a time, and sometimes the insights one gains from one topic carry over to another. One can approach any topic in the course in a variety of ways—such as a matter of legal history, comparative law, law and economics, or a practical guide for those about to enter the bar. As my interests have shifted, I have emphasized different subject areas and have varied my approach.

#### I. THE PERIL OF LEGAL IMAGINATION—THE “ADMIRALTY SIDE”

Although the course in admiralty has undoubted value for the student hoping to enter the practice of maritime law, it also provides the generalist with a valuable insight into some of the intrinsic problems of the legal process. One such problem is the potential misuse of legal concepts. One such concept that many lawyers acquire while they are students is there is that an “admiralty court” or at least an “admiralty side” to the federal district court. It might seem that just as there are specialists in areas like tax and bankruptcy, and there are tax courts and bankruptcy courts, there must also be an admiralty court for those who specialize in admiralty. As shorthand for saying that a federal district court has admiralty jurisdiction over a claim, the terms “admiralty court” or “admiralty side” are welcome tools. The terms can get us into trouble, however, if we forget that that is all they mean. Once we begin to think that we are talking about a real “Court of Admiralty” like the old English High Court of Admiralty, or a court of limited jurisdiction like the Tax Court or Bankruptcy Court, we run the risk of creating all sorts of mischief.

For example, there are those who think that if a plaintiff designates a claim as a maritime claim, then the claim is somehow within the admiralty court; and

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therefore, all other claims in the case, whether brought by the plaintiff, the defendant, or other parties, must also be tried in that court.<sup>1</sup> The result is that a jury can try none of these claims in the absence of a statute to the contrary.<sup>2</sup> Similarly, the predominant view is there can be no removal of a state case “to admiralty” and that an admiralty claim filed in state court can only be removed to the “law side” of the federal court, that is, a federal court having diversity or federal question jurisdiction.<sup>3</sup>

These problems begin to disappear once one realizes that there is no such thing as an “admiralty court” or “admiralty side.”<sup>4</sup> The only questions are ones of jurisdiction and procedure, which are solved by looking to the Constitution, statutes, and the Federal Rules of Procedure. So, for example, Rule 9(h) of the Federal Rules of Civil Procedure allows each party filing a “claim for relief” that is within the federal court’s admiralty jurisdiction and also within that court’s “subject-matter jurisdiction on some other ground,” to determine whether that claim will be designated as a maritime claim for certain procedural purposes.<sup>5</sup> That is all Rule 9(h) allows.<sup>6</sup> Because it pertains to each claim, not to the entire case, the plaintiff may designate some—but not all—claims as maritime, and the defendant and other parties possess the same right as to any claims that they bring.<sup>7</sup>

Similarly, the removal issue is not dependent on whether the defendant seeks to remove it to an “admiralty court.” The issue ought to be decided by applying the removal statute,<sup>8</sup> which allows defendants to remove non-federal question cases if none of the defendants were sued in their home state.<sup>9</sup> Normally, this will mean that there is diversity jurisdiction, but not always, as

1. *E.g.*, *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 987–88 (5th Cir. 1978). The Fifth Circuit has recently modified its approach, holding that a longshore worker who had joined an *in personam* claim against a vessel owner with an *in rem* claim against the vessel could have both claims tried by jury as long as the plaintiff alleged only diversity jurisdiction over the *in personam* defendant. *Luera v. M.V. Alberta*, 635 F.3d 181 (5th Cir. 2011).

2. *Id.* at 986.

3. DAVID W. ROBERTSON, STEVEN F. FRIEDEL & MICHAEL F. STURLEY, *ADMIRALTY AND MARITIME LAW IN THE UNITED STATES* 111–12 (2d ed. 2008).

4. *See* Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 11 (1959).

5. FED. R. CIV. P. 9(h).

6. *Id.*

7. Steven F. Friedell, *When Worlds Collide: The In Rem Jury and other Marvels of Modern Admiralty*, 35 J. MAR. L. & COM. 143, 148 (2004); 1 STEVEN F. FRIEDEL, *BENEDICT ON ADMIRALTY* § 133 (7th ed. rev. 2009).

8. 28 U.S.C. § 1441 (2006).

9. The key provision is the second sentence of 28 U.S.C. § 1441(b). *See* Steven F. Friedell, *The Disappearing Act: Removal Jurisdiction of an Admiralty Claim*, 30 TUL. MAR. L.J. 75, 78 (2006) (describing when claims can properly be removed).

when the amount in controversy is too low or when a plaintiff and a defendant are foreigners or from the same state.

The idea that there is something real about an “admiralty court” led the Supreme Court to effectively re-write the Jones Act, passed by Congress in 1920,<sup>10</sup> to save it from what the Court mistakenly thought was a “grave [constitutional] question” of allowing seamen to “withdraw . . . [their actions] from the reach of the maritime law and the admiralty jurisdiction.”<sup>11</sup> Prior to 1920, a seaman who had a simple claim for negligence against his employer was denied recovery.<sup>12</sup> However, seamen could recover for damages caused by unseaworthiness and were entitled to maintenance and cure.<sup>13</sup> In pertinent part the Jones Act provided:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .<sup>14</sup>

From the text of the Jones Act, it is apparent that Congress intended to provide seamen with an election of remedies: Either they could sue under the old system for unseaworthiness and maintenance and cure, or they could sue for compensation for personal injuries caused by negligence.<sup>15</sup> Congress thought if a seaman sought the latter option he must do so “at law.”<sup>16</sup> Since federal courts in 1920 had separate rules of procedure for law claims, equitable claims, and maritime claims, the intended effect was that federal courts would apply the legal rules of civil procedure to the newly-created negligence claim. However, in a landmark decision, *Panama Railroad Co. v. Johnson*, the Supreme Court was led astray by its belief in the “admiralty side” of the court.<sup>17</sup> It thought that it would be improper for Congress to exclude a class of maritime actions from the “admiralty side.”<sup>18</sup> To avoid that result, the Court interpreted the Jones Act to allow a seaman the option of bringing the new negligence claim on either the “law” or the “admiralty” side.<sup>19</sup>

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10. Merchant Marine Act of 1920, ch. 250, § 33, 41 Stat. 988 (1920) (originally codified in pertinent part at 46 U.S.C. § 688).

11. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 390, 387 (1924).

12. *The Osceola*, 189 U.S. 158, 175 (1903).

13. *Id.*

14. 46 U.S.C. § 688(a) (1926). The text of the statute passed in 1920 was substantially unchanged until 2006. The current version of the statute is at 46 U.S.C. § 30104(a) (2006).

15. 46 U.S.C. § 688(a).

16. *Id.*

17. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391 (1924).

18. *Id.* at 378.

19. *Id.* at 391.

The Court's re-writing provided a minor benefit to seamen. Under the plain terms of the statute, seamen would have no right to preclude defendants from demanding jury trials in federal court for the new negligence cause of action.<sup>20</sup> Under *Panama Railroad*, seamen can do just that by bringing their claims on the "admiralty side,"<sup>21</sup> or in modern parlance, by designating their claim as a Rule 9(h) claim.<sup>22</sup> Most personal injury plaintiffs are unlikely to pursue that option, as they will likely prefer a jury trial.

As *Panama Railroad* shows, one of the effects of imagining the existence of "admiralty courts" or federal courts as having an "admiralty side," is that one is likely to confuse issues of subject matter jurisdiction with issues of substantive law and procedure. A Jones Act claim is within the federal court's admiralty jurisdiction by virtue of 28 U.S.C. § 1333(1) and within its federal question jurisdiction by virtue of 28 U.S.C. § 1331.<sup>23</sup> It might also be within the court's diversity jurisdiction. There are not three separate courts or three separate "sides." There is only one federal district court, and how it comes to possess jurisdiction does not determine the choice of law or the procedure to be followed. Those issues are determined by statute, case law, and rules of procedure. The "grave question" that the Court avoided by its interpretation was a question of its own imagining.<sup>24</sup> Congress was not depriving the federal courts of their admiralty jurisdiction. Nor was it withdrawing any claim from the "maritime law or admiralty jurisdiction."<sup>25</sup> Instead, it was allowing seamen a claim for simple negligence against their employers and mandating that such claims, which are within the federal court's admiralty jurisdiction, be tried according to the legal rules of procedure and tried by juries.<sup>26</sup>

## II. THE INTERSECTION OF STATUTES AND JUDGE-MADE LAW

### A. *Wrongful Death Cases*

Another theme I enjoy exploring with my admiralty classes is the intersection of statutes and judge-made law. Federal courts have at times felt free to fashion admiralty law and have not been afraid to depart from the patterns established in the non-maritime sphere. At other times the federal courts have been reluctant to do so. Wrongful death cases provide a good example. In a circuit court case from 1865, Justice Chase penned the famous

20. See 46 U.S.C. § 688(a) (expressly providing for the "right to trial by jury" without reference to party).

21. *Panama R.R.*, 264 U.S. at 391.

22. FED. R. CIV. P. 9(h).

23. 28 U.S.C. § 1333 (2006).

24. *Panama R.R.*, 264 U.S. at 390.

25. *Id.* at 386.

26. 46 U.S.C. § 688(a) (1926).

words, “[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules,”<sup>27</sup> in holding that there was a maritime wrongful death remedy. Some years later, the Supreme Court came to the opposite conclusion in *The Harrisburg*, holding that in the absence of statute, no wrongful death remedy existed in admiralty.<sup>28</sup> It was not until 1970 that the Supreme Court overruled *The Harrisburg* in *Moragne v. States Marine Lines*.<sup>29</sup> Its holding was broad: “[A]n action does lie under general maritime law for death caused by violation of maritime duties.”<sup>30</sup> Four years later, in *Sea-Land Services, Inc. v. Gaudet*, the Supreme Court held that the remedy included a right to compensation for loss of society.<sup>31</sup> Today, however, due to a series of limiting decisions by the Supreme Court, little of *Moragne* and *Gaudet* remain. The new remedy does not apply to deaths on the high seas,<sup>32</sup> and states are not allowed to supplement the recovery under the Death on the High Seas Act to include recovery for loss of society.<sup>33</sup> In *Miles v. Apex Marine Corp.*, the Court held that a seamen’s estate suing for unseaworthiness is limited to the same measure of damages as is available under the Jones Act, which means no recovery for loss of society and no recovery of lost future earnings.<sup>34</sup>

*Moragne* and *Miles* present two different approaches to the use of statutes. The *Moragne* Court looked at statutes as creating “policy . . . beyond the particular scope of each of the statutes involved.”<sup>35</sup> It also thought that a variety of statutes, both state and federal, could provide “persuasive analogy” on particular issues.<sup>36</sup> One of the issues in *Moragne* was whether recovery for wrongful death was against public policy. The Court also thought that state and federal statutes could provide guidance on the questions of determining the beneficiaries and the measure of damages.<sup>37</sup> By contrast, *Miles* looked to statutes for providing specific answers to matters of detail, and once Congress provided an answer to a particular issue, the courts would not be free to depart

27. *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578).

28. *The Harrisburg*, 119 U.S. 199, 213 (1886).

29. *Moragne v. States Marine Lines*, 398 U.S. 375, 378 (1970).

30. *Id.* at 409.

31. 414 U.S. 573, 584 (1974).

32. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1978) (ruling that the Death on the High Seas Act (DOSHA) governs wrongful-death claims for deaths on the high seas).

33. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986).

34. 498 U.S. 19, 37 (1990).

35. *Moragne v. States Marine Lines*, 398 U.S. 375, 390 (1970). *See* Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 561–63 (1982) (discussing influence of *Moragne* on non-maritime cases).

36. *Moragne*, 398 U.S. at 408.

37. *Id.*

from it in analogous situations not governed by the statute.<sup>38</sup> Because there was no statute concerning loss of society for claims based on unseaworthiness, the Court needed to look elsewhere. The closest analogy, it thought, was the Jones Act, which governs claims for negligence.<sup>39</sup> However, the Jones Act is itself silent on the issue, merely incorporating the provisions of the Federal Employees Liability Act (FELA). FELA is also silent, except that in 1913 the Supreme Court ruled that FELA does not allow recovery for loss of society.<sup>40</sup> The *Miles* Court reasoned that the Jones Act must have incorporated FELA's limitation it created in 1913, stating, "[w]e assume that Congress is aware of existing law when it passes legislation."<sup>41</sup> *Miles*, therefore, did not really apply the Jones Act by analogy; it applied by analogy a 1913 decision that was out of step with decades of decisions that had broadened seamen's remedies for injury and death.

It is too simple to assume that Congress must have intended to freeze seamen's remedies to those that existed in 1913 or 1920. The Jones Act and FELA are remedial pieces of legislation, and as the Court has recognized, the recovery under each is not limited to those that Congress specified in those statutes or would necessarily have articulated at the time the statutes were adopted.<sup>42</sup> Further, the Court has chosen to develop the negligence remedy for seamen and railway workers along common law principles and has at times gone beyond well-established common law doctrine.<sup>43</sup>

One might assert that the *Miles* Court imagined itself as having a modest role, subordinate to the will of Congress. If so, it is a false modesty, for *Miles* extended the Court's 1913 interpretation of the FELA to a claim for unseaworthiness governed by neither FELA nor the Jones Act. The use of the Jones Act in this way is ironic. The statute, meant to broaden the remedies available to injured seamen, is being used to constrain them in an area not governed by the statute. A striking contrast is the development of the unseaworthiness remedy itself. It was adopted by the district courts in the late

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38. See *Miles*, 498 U.S. at 32–33, 36 (indicating that there is no recovery under the general maritime law for loss of society or lost future earnings).

39. *Id.* at 36.

40. Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 74 (1913).

41. *Miles*, 498 U.S. at 32.

42. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 541–54 (1994) (recognizing claim under FELA for negligent infliction of emotional distress if within the zone of danger even though FELA is silent on the issue; the Court looks to the purposes and background of FELA and to the common law in determining the scope of the statute).

43. E.g., *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 438–39 (1958) (employer was negligent per se for violating a statute even though the statute was not intended to protect the worker from the type of injury that occurred).

half of the nineteenth century, using an English statute as a model.<sup>44</sup> Originally it required a showing of negligence on the part of the shipowner, but in the course of the twentieth century the Supreme Court developed it into a strict liability regime.<sup>45</sup> The English statute was suggestive, providing “persuasive analogy,”<sup>46</sup> and the Jones Act’s requirement of negligence did not prevent the Court from developing a parallel recovery system that does not require proof of fault.<sup>47</sup>

### B. *Life Salvage*

The admiralty course provides other examples of courts using statutes to limit recovery even though the legislative intent was the opposite. One such area involves saving life at sea. The life-salvage provision of the 1912 Salvage Act<sup>48</sup> was intended to implement part of a 1910 treaty<sup>49</sup> that was meant to provide life salvors with additional rights. Prior to that time, American and English courts gave additional rewards to property salvors if they also saved life.<sup>50</sup> If one salvor saved a life and another saved property, an English statute allowed the life salvor a claim against the property saved.<sup>51</sup> One American case, decided by an authority on salvage law, reached the same result.<sup>52</sup> English law also allowed life salvors to claim an award from a government fund if no property was saved.<sup>53</sup> The 1910 treaty was a compromise between the English view and that of continental countries which did not recognize life salvage.<sup>54</sup> Article 8 of the treaty provided that the amount awarded for

44. Merchant Shipping Act, 1876, 39 & 40 Vict., c. 80, § 5 (Eng.); *See The Osceola*, 189 U.S. 158, 171 (1903).

45. *See generally* *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

46. *See* case cited *supra* note 36 and accompanying text.

47. *Mitchell*, 362 U.S. at 546–50.

48. Salvage Act, Pub. L. No. 249, 37 Stat. 242, 242 (1912) (codified as amended 46 U.S.C. § 80107 (2006)).

49. Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658, *reprinted in* 6 BENEDICT ON ADMIRALTY §§ 4-1, 4-4 (Frank L. Wiswall, Jr. ed., 2010) [hereinafter *Brussels Convention*].

50. *E.g.*, *The Emblem*, 8 F. Cas. 611 (C.C.D. Me. 1840) (No. 4434); *Taylor v. Twenty-Five Thousand Dollars*, 23 F. Cas. 806 (C.C.D.S.C. 1801) (No. 13,807); *The Aid*, (1822) 166 Eng. Rep. 30 (Admlty); 1 Hagg. 82.

51. Merchant Shipping Act, 1854, 17 & 18 Vict., c. 104 § 8 (Eng.).

52. *The Mulhouse*, 17 F. Cas. 962 (C.C.S.D. Fla. 1859) (No. 9910). For a fuller and more accurate report of the case see *Rigby v. The Cargo and Materials from the Wrecked Ship Mulhouse* (1859), a copy of which is contained in 1 Pamphlets Collected by Elbridge T. Gerry 681, at the United States Supreme Court library. Judge Marvin, author of *The Mulhouse*, wrote a treatise on salvage law. WILLIAM MARVIN, A TREATISE ON THE LAW OF WRECK AND SALVAGE (1858).

53. Merchant Shipping Act, 1854, 17 & 18 Vict., c. 104 § 8.

54. Steven F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218, 1242 n.89 (1979).

property salvage should be enhanced when life was also saved.<sup>55</sup> Article 9 provided that life salvors were to obtain a portion of the award made to property.<sup>56</sup> Because American case law already reflected the requirement of Article 8, the 1912 statute only put Article 9 into effect.<sup>57</sup> Moreover, the 1910 treaty was intended to allow countries to provide “greater or more specific rights” than those provided in the treaty.<sup>58</sup> Following its adoption of the treaty, England continued its more generous scheme.<sup>59</sup>

Some American courts have unfortunately taken a different approach. They have read the 1912 statute as providing the only means of obtaining a life-salvage award.<sup>60</sup> Some have read restrictions into the statute that were never intended, such as requiring that life salvors must forego the opportunity to save property if they are to obtain the benefit of the statute.<sup>61</sup> The essential unfairness of the rule has prompted other courts to allow recovery of a life salvor’s expenses under a theory of unjust enrichment.<sup>62</sup>

It ought to be hoped that a salvage treaty signed in 1989<sup>63</sup> would put at least some of the concerns about the restrictive reading of the 1912 statute to rest.<sup>64</sup> The treaty makes it clear that the efforts at life saving are to be taken into account in fashioning a salvage award.<sup>65</sup> Unfortunately, American courts have largely ignored the treaty, regarding it as little more than a restatement of existing law.<sup>66</sup>

Before leaving the subject of salvage, it should be observed that the law and economics school of legal analysis provides a useful explanation of the property salvage rules—the law seeks to put the parties in the same position that they would have been had they been able to negotiate a contract in a competitive market at the moment of peril.<sup>67</sup> The life-salvage rules, however,

55. Brussels Convention, *supra* note 49, § 4-3.

56. *Id.* § 4-4.

57. 46 U.S.C. § 80107 (2006).

58. Friedell, *supra* note 54, at 1244 n.91 (quoting PROCÈS-VERBAUX DU CONFÉRENCE MARITIME 102 (1910)).

59. *Id.* at 1245 n.92.

60. Markakis v. S.S. Volendam, 486 F. Supp. 1103, 1110 n.28 (S.D.N.Y. 1980).

61. The Eastland, 262 F. 535, 540 (C.C.N.D. Ill. 1919) (No. 32,231).

62. *E.g.*, Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc., 553 F.2d 830 (2d Cir. 1977).

63. International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S. 193, *reprinted in* BENEDICT ON ADMIRALTY, *supra* note 49, at §§ 4-2A, 4-13.

64. Martin Davies, *Whatever Happened to the Salvage Convention 1989?*, 39 J. MAR. L. & COM. 463, 497–98 (2008).

65. International Convention on Salvage, *supra* note 63, § 4-18.

66. Davies, *supra* note 64, at 463.

67. *See* Margate Shipping Co. v. M.V. JA Orgeron, 143 F.3d 976, 986 (5th Cir. 1998) (“In an ideal world, every meeting of salvor and salvee would result in a freely negotiated contract for salvage services priced at a competitive level.”); William M. Landes & Richard A. Posner,



are not so easily explainable. One argument for denying any reward to life salvors is that most would-be rescuers are sufficiently motivated by altruism to rescue lives in peril.<sup>68</sup> However, altruism is too often insufficient to induce even some rescues that might be undertaken at little cost,<sup>69</sup> and in any event, the patchwork pattern of the law cannot be satisfactorily explained in economic terms. For example, it has been suggested that it may be necessary to reward life salvage only when both life and property are saved because it may be only there that the opportunity costs to the life salvor are too high.<sup>70</sup> However, many life salvors have even more substantial opportunity costs than the loss of a handsome property-salvage award—the cost of not remaining safely on board or “snugly on shore.”<sup>71</sup>

### C. Deviation

Some admiralty decisions display an unwillingness to enforce a statute when it changes accepted judicial practice.<sup>72</sup> A good example is the deviation doctrine that has been used to thwart the desire of Congress to limit a

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*Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEG. STUD. 83 (1978) (exploring generally the economics of rescue situations). But see M.B.W. Sinclair, *The Cherry Valley Case: How Wrong Can Economists Be About Salvage?*, 31 TUL. MAR. L.J. 57 (2006) (arguing that Landes and Posner’s theory “fails to consider the culture and motivation of those whose behavior it purports to explain”).

68. See Landes & Posner, *supra* note 67, at 104.

69. In *The Emblem*, Judge Ware had this to say:

[I]n the present case, there are some circumstances which, I am free to say, have struck my mind with considerable surprise. They are, that this vessel should have lain, for four days, in one of the most frequented parts of the American seas, with vessels continually passing her, some of them almost within hailing distance, and when they were in full view of this unhappy company, who were lying thus lashed and dying upon the wreck, and no one came to their relief until more than half of their number were released from their sufferings, by death, and consigned to a watery grave. It is a fact, which would seem to be incredible, if it did not rest upon indubitable and unsuspected proof. If this fact is to be taken as a just measure of the humanity of the persons who frequent those seas, I know not but it may be the part, not only of humanity, but of worldly wisdom, to let them understand that sometimes even in godliness there is gain, and to tempt them by the allurements of pecuniary profit, if they can be led by no other, to acts of humanity and mercy.

*The Emblem*, 8 F. Cas. 611, 612–13 (C.C.D. Me. 1840) (No. 4434).

70. Landes & Posner, *supra* note 67, at 104–05. Even if true, the rationale would suggest that pure life salvors receive an award if they gave up an opportunity to save property. Countries with more generous life-salvage rules do not seem to incur greater inefficiencies as a result.

71. *Taylor v. Twenty-Five Thousand Dollars*, 23 F. Cas. 806, 807 (C.C.D.S.C. 1801) (No. 13,807).

72. See J. Hoke Peacock III, Note, *Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts*, 68 TEX. L. REV. 977, 979–80 (1990) (noting a circuit split in treatment of the Carriage of Goods by Sea Act as a deviation from the common law).

shipowner's liability for cargo loss.<sup>73</sup> Prior to the adoption of Carriage of Goods by Sea Act (COGSA) in 1936, American courts applied the doctrine, not only in cases of geographical deviations,<sup>74</sup> but in cases of other types of breaches, to deprive the carrier of its defenses.<sup>75</sup> Some courts went further and held that a deviating carrier lost its right to invoke the bill of lading's package limitation.<sup>76</sup> A few judges disagreed with this latter point, saying that although the deviation rendered the carrier an insurer, it was an insurer of cargo that the parties agreed was worth a certain amount.<sup>77</sup> Although the records of the Hague Convention and COGSA's legislative history reflected this latter view,<sup>78</sup> most American courts have deprived carriers of the right to limit liability when a deviation occurs.<sup>79</sup> However, the courts have shown a reluctance to extend the doctrine. As one court noted when refusing to extend the doctrine to a case of gross negligence in furnishing an unseaworthy vessel:

[E]ven the holding that a deviation in the geographical sense voids limitations on the carrier's liability seems inconsistent with the language of COGSA. . . . Up to this point the concept of "quasi deviation" in the United States has recognized only one instance, deck stowage of cargo which the carrier had agreed to carry below deck, for which the carrier becomes liable in full as an insurer of the shipper's cargo. Whatever may be thought of that principle, it is easy to administer and carriers know the risks.<sup>80</sup>

73. *Id.*

74. *The Willdomino*, 272 U.S. 718, 725 (1927); *The Indrapura*, 171 F. 929 (C.C.D. Or. 1909) (No. 4757) (holding that the geographical deviations would not limit the ship owners' liability).

75. *E.g.*, *Sidney Blumenthal & Co. v. United States*, 30 F.2d 247, 248 (2d Cir. 1929) (discussing the doctrine in a case where the goods had been shipped via an unauthorized line).

76. *St. Johns N. F. Shipping Corp. v. S.A. Companhia Geral*, 263 U.S. 119, 124–25 (1923). *Accord* *Cunard S.S. Co., v. Buerger*, [1926] A.C. 1 (H.L.) 10–11 (appeal taken from Eng.).

77. *E.g.*, *The Sarnia*, 278 F. 459, 466 (2d Cir. 1921) (Mack, J., dissenting); *see* Steven F. Friedell, *The Deviating Ship*, 32 HASTINGS L.J. 1535, 1551 n.66 (1981).

78. *See* Friedell *supra* note 77, at 1556–58 (discussing Congress's intent to allow ships to invoke a limitation to their liability).

79. *E.g.*, *Gen. Elec. Co. v. S.S. Nancy Lykes*, 706 F.2d 80, 87–88 (2d Cir. 1983); *Nemeth v. Gen. S.S. Corp.*, 694 F.2d 609, 614 (9th Cir. 1982); *Spartus Corp. v. S.S. Yafo*, 590 F.2d 1310, 1317 (5th Cir. 1979). *But see* *Atl. Mut. Ins. Co. v. Poseidon Schiffahrt*, 313 F.2d 872, 875 (7th Cir. 1963).

80. *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68, 72, (2d Cir. 1974); *see also* *Vision Air Flight Serv., Inc. v. M.V. Nat'l Pride*, 155 F.3d 1165, 1176 nn.12, 13 (9th Cir. 1998) (collecting cases limiting the deviation doctrine and limiting the doctrine to the intentional destruction of goods or where the actor believes that the damage is substantially certain to occur); *B.M.A. Indus., Ltd. v. Nigerian Star Line, Ltd.*, 786 F.2d 90, 92 (2d Cir. 1986) (not applying doctrine to allegation of criminal misdelivery).

That is about as far as a court can go without overruling itself.<sup>81</sup> To my knowledge, no other country applies the deviation doctrine to deprive carriers of their statutory right to limitation, and the more recent treaties on carriage of goods by sea, which the United States has not adopted, limit the carrier's right only when it causes damage either intentionally or recklessly and with knowledge that damage would probably result.<sup>82</sup>

#### CONCLUSION

Hopefully this Article gives some glimpse of the range of possibilities open to the professor of an admiralty course. Because the materials in the course cover so much, they are challenging, but also liberating. There is too much for any one person to know, but one can take almost any approach one feels like and apply it to whatever subject is of interest. Moreover, as new problems unfold and as new legal theories arise, the admiralty professor can always explore new vistas.

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81. Perhaps the Second Circuit went a little further when it said, "[T]here are persuasive reasons supporting the view that COGSA has abolished the harsh doctrine that cast a carrier as an insurer after deviation and prevented it from invoking either a contractual or statutory limitation on liability." *Sedco, Inc. v. S.S. Strathewe*, 800 F.2d 27, 31 (2d Cir. 1986).

82. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Signed at Brussels on 25th August 1924, Feb. 23, 1968, 1412 U.N.T.S 128, 130; United Nations Convention on the Carriage of Goods by Sea, 1978, Mar. 31, 1978, 1695 U.N.T.S 3, 8.

