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## Guilty Pleasures of Teaching Admiralty

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## GUILTY PLEASURES OF TEACHING ADMIRALTY

DAVID J. BEDERMAN\*

All right, I admit it: teaching admiralty is a guilty pleasure. Unlike other law professors, for whom an assignment to teach maritime law is the equivalent of a semester-long visit to the dentist (or, worse yet, a torture chamber),<sup>1</sup> for me it is a pure pleasure. There are two equally important reasons for this: the pedagogic challenge of teaching the material in an admiralty class and the exceptionally high quality of the students who take the course. For me, teaching admiralty is an energizing experience, a constant reminder of all the good and noble reasons why I wanted to become a law professor, and why what we do in the classroom matters.

### I.

The declining supply and demand for admiralty scholarship has been observed and lamented elsewhere,<sup>2</sup> and that has carried-over into the realm of teaching. Larry Garvin has said that “admiralty [like commercial law] or equity . . . [is] an area worth teaching from time to time, but hardly essential.”<sup>3</sup> That may well be true. Because admiralty practice has remained steady (if, perhaps, in slight decline) for the past decades<sup>4</sup> and is regarded as a specialized

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1. We do not know if this view was shared by former President Bill Clinton, who taught admiralty at the University of Arkansas School of Law in the mid-1970s. See Lois Romano, *The Judge's In-House Counsel*, WASH. POST, Feb. 9, 1998, at A1 (Judge Susan Wright's recollection of taking the course from Clinton, after which he lost all the students' final exam papers and offered a “free” B+ to all enrolled students; Susan Wright declined and asked to be specially examined so she could preserve her A average); see also Robert M. Jarvis, *Bill Clinton's Maritime Past*, 23 J. MAR. L. & COM. 631 (1992) (discussing generally President Clinton's career as an admiralty professor).

2. See, e.g., Sara K. Stadler, Essay, *The Bulls and Bears of Law Teaching*, 63 WASH. & LEE L. REV. 25, 28, 36 & n.43, 75–76 (2006) (where a colleague of mine sardonically writes “[t]hese subjects [admiralty and trusts and estates] are not marginal at Emory, of course, nor are they marginal at any other law school whose faculty may be asked to decide whether to appoint me, promote me, or grant me tenure”).

3. Larry T. Garvin, *The Strange Death of Academic Commercial Law*, 68 OHIO ST. L.J. 403, 407 (2007).

4. The current roster of the Maritime Law Association of the United States (MLA) boasts a little over 3,000 members. MAR. LAW ASS'N OF THE U.S., HISTORY, PURPOSES, ORGANIZATION

or “boutique” practice (akin to its more robust cousin in federal practice, bankruptcy), student demand for the course may not be as fervent as one would hope.

I teach at an institution which, though not situated at a coastal location, has had a long tradition of quality admiralty teaching.<sup>5</sup> When students approach me—either planning next semester’s courses or “shopping” for classes in those first, frenetic weeks of the term—and ask me why they should take a course on admiralty law, I have two typical responses. The first is cagily instrumental: I inquire whether they are in the hunt for a federal judicial clerkship. If so, I innocently suggest that, based on my experience, having a course in maritime law under their belt might be just the ticket to distinguish their resume from thousands of other aspiring law clerks. I actually know this from experience. I have often “closed the deal” for an Emory applicant after speaking with a judge (usually from a coastal district or circuit with a heavy maritime case load) about a student’s knowledge of admiralty law. One such judge was uncharacteristically blunt: “I usually like to have at least one law clerk who knows something about admiralty or bankruptcy,” he ruminated, and then rejoined, “Your candidate has both—tell her she can expect a call from me soon.” She did; she was hired.

The gender of that clerkship candidate is not coincidental for my story here. The other thing I tell my students is that if they are interested in litigation, then maritime law offers one of the most attractive avenues for a civilized and humane trial and appeals practice. The small size and coherence of the admiralty bar is one reason for this, and additionally, it is well-documented that courtesies that would not normally be extended in other litigation arenas are routinely granted among maritime practitioners. The one thing that has not been positive about the demographic of the admiralty bar is that, until recently, it has not attracted many female entrants or retained strong women practitioners. I say “until recently” because I like to think (in some small measure) that I have tried to recruit, through my teaching, quality candidates for the profession, especially women. And, to a very gratifying extent, I have succeeded.

I also admit that I have the luxury of teaching the basic three-credit admiralty law course only every other year. The press of my other teaching commitments, including instruction in the first-year curriculum, maintaining

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& ACTIVITIES, CORPORATE BY-LAWS, OFFICERS AND FORMER OFFICERS, COMMITTEES, DIRECTORY OF MEMBERS § 13, at 10 (2008–2010). I understand that this number has been fairly constant over the past decades. See E-mail from Dave Farrell, MLA Membership Secretary, to author (June 14, 2010, 6:23 PM) (on file with author).

5. My predecessor in the course was my departed colleague Donald W. Fyr (1939–1994). He was instrumental in encouraging me to direct my writing and teaching to domestic maritime law subjects.

my constellation of public international law courses, and my occasional forays into legal history, prevent me from doing so more often. This results in “pent-up” demand and usually means that I draw between 25 and 40 students for the introductory course. As already indicated, I feel that the quality of the students who do enroll is exceedingly high—if they are not on track for judicial clerkships, then they are already committed to a sophisticated litigation practice, or (better yet) have some demonstrative interest in the maritime field. Some students who enroll have previously been to sea (I have had former merchant mariners and Coast Guard officers take the class), or at least are sailing or boating enthusiasts. One year, I had the bulk of Emory’s sailing club-team enroll, which made for great discussions on the nautical Rules of the Road and collision law, as well as a memorable end-of-semester party at the university’s boathouse.

In a time of complaints about law student complacency and consumerism, where “less” seems “more” in higher education, I have been struck by the loyalty and excitement that an admiralty course can generate. One year, after a particularly engaging semester for the class, a group of students (all rising third-years) petitioned me and the law school administration to offer an “Advanced Admiralty” course. I did so on the condition that a “critical mass” of students from the introductory course commit to a two-credit hour class, taught on an accelerated basis (meeting three hours a week for nine weeks). They committed, and the ensuing teaching experience was one of the most positive I have had in my nearly twenty years of engagement with legal education. Almost all of the students in that Advanced Admiralty course went on to publish their work (I offered both a paper and exam option; many students chose to write) or to later try their hand with a maritime practice.

In short, there is plenty of “demand” for teaching admiralty today at American law schools. The key is finding the right group (no matter how small) of highly committed and motivated students to share the experience.

## II.

Other teachers in this field have previously espoused a teaching philosophy for admiralty,<sup>6</sup> and we are likely to see such expressed in this Symposium. And while there is much to recommend in an admiralty course that emphasizes international and comparative elements, my tendency is to “teach it straight.” One reason that I usually exclude many international aspects from my basic admiralty course is that I already instruct a course entitled “International Common Spaces,” on an alternate year basis, which (among other topics) has a long unit on law of the sea and other public international law aspects of ocean

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6. See, e.g., Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625 (1998).

commerce. So, students at Emory (if they're diligent and the scheduling Muses are compliant) can take up to seven credit hours of instruction on maritime law subjects—three for the basic admiralty class; two for the advanced; two for Common Spaces.

My approach is to regard admiralty as an advanced federal practice and procedure class, and to provide a broad overview of maritime law as practiced in the United States. I can assume that students have had the first-year Civil Procedure sequence (although foreign LL.M. candidates will not, which makes for (sometimes) interesting class discussions), but not necessarily the Federal Courts and Jurisdiction class. This emphasis on procedure and jurisdiction is significant because the course, at least as reflected on my syllabus, is evenly split between a detailed consideration of admiralty jurisdiction and procedure (the first part) and discussions of specific (and uniquely) maritime law doctrines (the second part).

Why this heavy weighting in favor of jurisdiction and procedure? Won't students get bored before they get to the (presumably) more sexy substantive elements of maritime law? I do not think so, or (at least) I hope not. I keep reminding my students that admiralty jurisdiction and procedure is markedly different from the rest of federal practice, and it is essential for a maritime law practitioner to understand those differences. There are simply too many pitfalls and trapdoors for admiralty lawyers to fall into or through.<sup>7</sup> And I have been told by former students of mine who are now in admiralty practice that my supposition is correct: substantive, maritime law doctrines can be more easily absorbed "on the job" than what appear to be the "basic" elements of admiralty practice and procedure. That is why I am prepared to spend six or seven instructional weeks of my course focusing on the contours of admiralty jurisdiction, federalism concerns, and the essential mechanisms of admiralty procedures.

What about the second part of the basic admiralty course? Here, tough choices have to be made. The hardest one is that I do not usually cover—in express, doctrinal terms—maritime personal injury. This omission of material may expose me to the criticism that I have a bias against "brown-water" practice. I do not. I often omit detailed discussions of carriage of goods, which is a mainstay of a "blue-water" emphasis. One justification for my omission of maritime personal injury from the syllabus of the basic course<sup>8</sup> is that I make a self-conscious attempt to cover many of the essentials of that subject pervasively throughout the class, especially in the first part on practice and procedure. I am not sure whether I entirely succeed, but with any three-

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7. See, e.g., Robert M. Jarvis, *The Erring Proctor: Admiralty Lawyers and Malpractice Claims*, 31 J. MAR. L. & COM. 407 (2000).

8. In the advanced course, I teach units on maritime personal injury, carriage of goods, maritime bankruptcy, maritime insurance, pilotage and towage, and marine pollution.

credit hour admiralty course, hard selections have to be made in deciding what substantive doctrines to omit.

The substantive law topics I do cover include maritime liens. This is an essential segue from the first part of the course on procedure because maritime liens are the way that obligations in admiralty are expressed and enforced. I then move on to collisions, salvage, general average, limitation of liability, and insurance coverage. I recognize that this is a somewhat eccentric line-up of substantive doctrines, and it surely would be consistent with a “brown-water” critique for my course. But they have been selected with a view towards elucidating maritime law rules that are at sharp variance with their terrestrial counterparts (as is especially true with maritime liens and salvage). In this sense, I do entertain a “comparative” pedagogy in my course, but the comparisons are between maritime law and traditional common law precepts.

As for admiralty casebooks and materials, I am broadly eclectic. As of now, I am a co-author on one casebook, and that is what I use in class.<sup>9</sup> But I have used other texts with great success.<sup>10</sup> I have also experimented with my own photocopied materials, but, as with such things, there is no substitute (in students’ minds, at least) for a printed casebook. I tend to prefer “less” to “more” in the casebooks I use.<sup>11</sup> “Teachability” and the accessibility of materials to students, are my primary concerns. Problem-oriented casebooks, like the one I now employ, are popular with students because of the perception that they help with preparation for examination and because they give a “real world” feel to the course. But, as with all law teaching, I fervently believe that it is the instructor that makes the course, not the materials.

### III.

What are the best “teaching moments” with admiralty? I have some personal favorites, and they share some common characteristics. One I have already mentioned: unpacking an admiralty doctrine that is diametrically opposite what the students expect from the terrestrial “law of the land” of the common law. Whether it is the contours of the *in rem* action, or salvage law’s grant of a reward to those who gratuitously rescue property, or the principle

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9. See ROBERT M. JARVIS, DAVID J. BEDERMAN, JOEL K. GOLDSTEIN & STEVEN R. SWANSON, *ADMIRALTY CASES AND MATERIALS* (2004).

10. These include NICHOLAS J. HEALY, DAVID J. SHARPE & DAVID B. SHARPE, *CASES AND MATERIALS ON ADMIRALTY* (Am. Casebook ser., 4th ed. 2006); JO DESHA LUCAS, *ADMIRALTY CASES AND MATERIALS* (5th ed. 2003). See also DAVID W. ROBERTSON, STEVEN F. FRIEDEL & MICHAEL F. STURLEY, *ADMIRALTY AND MARITIME LAW IN THE UNITED STATES: CASES AND MATERIALS* (2d ed. 2008).

11. See David J. Bederman, *International Law Casebooks: Tradition, Revision, and Pedagogy*, 98 AM. J. INT’L L. 200, 201 (2004) (book review) (discussing the evolution of casebooks and noting that casebooks today include case reports, pleadings, and excerpts from law journals, legislative materials, and statutes).

that later maritime liens take precedence over prior ones, or the entire limitation of ship owner liability doctrine, it never fails to impress upon students that maritime law is different. What remains to discover is why, as a matter of policy, we suffer these differences. Why is admiralty exceptional? Should it be? How do we harmonize discordant rules?

Another feature of great teaching moments in admiralty is what I call “boomerang” cases: judicial decisions, which like bad pennies, turn up all over the course. For example, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*,<sup>12</sup> is a great vehicle for teaching the contours of admiralty jurisdiction in contract disputes, as well as exploring the intricacies of Himalaya Clauses in multimodal carriage contexts. Likewise, *American Dredging Co. v. Miller*,<sup>13</sup> is useful as a way to instruct on the continuing impact of implied preemption rules (and the continued vitality of *Southern Pacific Company v. Jensen*<sup>14</sup>), as well as the details of *forum non conveniens* dismissals in venue disputes arising in admiralty. Boomerang cases also offer students the comfort of the familiar, being able to revisit earlier class discussions and conclusions.

For the first part of the course (devoted to admiralty jurisdiction and procedure) I have a number of favorite sequences of cases. The extent to which admiralty jurisdiction covers tort actions never ceases to intrigue me, or to befuddle students. Is the bright-line rule of *The Admiral Peoples*<sup>15</sup> (situated on navigable waters) preferable to the last restatement of the combined situs and maritime connection tests in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*?<sup>16</sup> *Grubart* and its progeny usually result in spirited discussions in class, focusing on the degree of specificity to be applied to the characterization of “traditional” maritime activities (whatever that means) and the degree of possibility that they could disrupt maritime commerce. Admiralty jurisdiction and federalism is another contentious area for debate. On this topic, I usually assign two Supreme Court cases that have, regrettably, recently been excised from the canon on land-mark decisions: *Romero v. International Terminal Operating Co.*<sup>17</sup> and *Wilburn Boat Co. v. Fireman’s Fund Insurance Co.*<sup>18</sup> Although these are exceedingly hard cases for students to fully comprehend, I find they are useful in explicating one of the most difficult and enduring issues in admiralty jurisprudence: the correct demarcation of state and federal authority in the field of maritime commerce.

12. 543 U.S. 14 (2004).

13. 510 U.S. 443 (1994).

14. 244 U.S. 205 (1917).

15. 295 U.S. 649 (1935).

16. 513 U.S. 527 (1995).

17. 358 U.S. 354 (1959). See also David J. Bederman, *Romero’s Enduring Legacy*, 39 J. MAR. L. & COM. 27, 27 (2008) (suggesting that *Romero* should get consideration as a “land-mark” decision).

18. 348 U.S. 310 (1955).

For much the same reasons, the combination of *Jensen* and *Miller* never fails to galvanize students into intricate discussions as to the continued utility of a rule in maritime law that impliedly preempts any state statute (or common law doctrine) which “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>19</sup> For students that are savvy as to the broad contours of preemption doctrine, admiralty reflects an upside-down universe. Instead of a presumption against preemption, there is usually a judicial disposition for federal maritime statutes preempting state enactments. And this goes further to privilege the judge-made federal general maritime law, which would seem to subvert everything that students have learned from *Erie Railroad v. Tompkins*<sup>20</sup> and first-year Civil Procedure. This weirdness extends even further inasmuch as Congress, itself, appears limited in the extent to which it can delegate substantive law-making power to the states to act in a way that might subvert the uniformity of the general maritime law.<sup>21</sup>

Admiralty exceptionalism is additionally conveyed through even the most basic explication of admiralty procedural mechanisms. Only the least attentive students could fail to be struck by the strange consequences of having *in personam*, *in rem*, and *quasi in rem* procedures available to the admiralty practitioner. Again, after a first-year Civil Procedure course, admiralty’s Rule B attachment process must seem especially strange and counterintuitive, if not downright unconstitutional. The gamesmanship that can be displayed in maritime practice—where literally minutes or miles may matter in the filing of your case<sup>22</sup>—is fun for students to observe. Likewise, problems of sovereign immunity in admiralty—whether those of states under the Eleventh Amendment, the federal government (by statute), or foreign sovereign immunities (also by statute)—are especially intricate.

For the second part of the course (on substantive maritime law) my favorite unit of material is on salvage. As already noted, the entire notion of a judge-made set of incentives for the rescue of property is antithetical to common law principles and yet, is a robust field of admiralty practice. Starting

19. *Jensen*, 244 U.S. at 216.

20. 304 U.S. 64 (1938).

21. See, e.g., *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 150 (1920). But see *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1421 (9th Cir. 1990).

22. See *Heidmar, Inc. v. Anomina Ravennate di Armamento Sp.A of Ravenna*, 132 F.3d 264, 268 (5th Cir. 1998) (concluding that because Ravennate had not appointed an agent for service of process until thirty minutes after the case had been filed, they were not within the district); *Royal Swan Navigation Co. v. Global Container Lines, Ltd.*, 868 F. Supp. 599, 606 n.8 (S.D.N.Y. 1994) (discussing how a party’s use of “New York City” did not accurately reflect whether business activities took place in the Eastern District or the Southern District of New York).



from such metaphysical problems as what property interests are subject to salvage,<sup>23</sup> the problems get only more acute. The general maritime law's requisites for salvage—that the property is in marine peril, that salvage services be voluntarily provided, and that the rescue be successful—can also be confusing and may well depend on a maritime practitioner's fine-eye for factual detail and elaboration.<sup>24</sup> Especially fun for students is to apply the hoary principles of salvage law to contemporary situations, especially to the recovery of historic shipwrecks and their valuable cargoes.<sup>25</sup>

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If I have accounted for the pleasures of teaching admiralty in this piece, why should I feel guilty about enjoying them? As I have written elsewhere,<sup>26</sup> teaching on a law faculty is a great gift. It is the wondrous experience of introducing bright young people into the profession of law, of devoting one's life to public service and law reform, and the freedom to follow intellectual pursuits in chosen fields of study. Teaching admiralty captures for me all of the great bounty of being a law professor. For sure, these great freedoms come with great responsibilities. Chief among these duties is respecting one's professional craft. For me, that means—each and every class—engaging with law students as young professionals and trying, to the best of my ability, to convey both the generalities and nuances of my subject as well as the demands and expectations of practicing in this extraordinary field. What a privilege it is.

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23. See *Provost v. Huber*, 594 F.2d 717, 718, 720 (8th Cir. 1979) (salvage granted for house that fell through ice on a frozen lake); *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 836 (2d Cir. 1977) (salvage granted to a vessel that diverted course to provide medical assistance to a crew-member on another ship).

24. See, e.g., *Saint Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 505 F.2d 1115, 1121–22 (9th Cir. 1974) (in a very factually-contested case, salvage was deemed successful and an award granted).

25. See, e.g., *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999); *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 56 F.3d 556 (4th Cir. 1995); *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992).

26. David J. Bederman, Lecture, *The Pirate Code*, 22 EMORY INT'L L. REV. 707, 707 (2008).