But it is still the Columbia Report of a generation ago which is the most thoughtful discussion of the problem. And the last chapter of Morris on Torts in 1953 or Albert Ehrenzweig's little book *Full Aid Insurance* in 1955 or the introductory chapters to the second volume of Harper and James in 1956 prove more useful than *Traffic Victims* in isolating and dealing with the issues.

Perhaps the ultimate source of my discontent with this book derives from differences in the attitude of Dean Green and myself toward a fault-negligence approach to liability. Dean Green's position is eloquently clear—the fault principle is outmoded and impractical and nonsensical. I agree that it has many difficulties, but among the possible big ideas for allocating liability it seems to me to make enough sense to always deserve serious attention. And this view is reinforced because fault is so deeply held a category of thought in our culture and because also of the difficulties in whatever ideas fault competes with. But in any event Dean Green's attitude toward fault explains much of his emphasis. Since in Chapters 1 and 2 he cannot believe fault was being taken seriously, he must find other explanations for the history of liability. In Chapter 3 fault is so erratic a criterion that it explains why so many deserving victims are outside the law today. And in Chapter 4 since fault is nonsense, there is no real need to pause to justify liability costs that go beyond fault. If I find the issues he deals with more perplexing than he does, it may well be that fault is to blame.

I end as I began. I am grateful to Dean Green for numerous past insights, I am grateful for the clarity and force of his vote against the current negligence system, I am grateful for his aid in legitimating a place for major reforms in the teaching of tort law. His plan is an interesting addition to the models already on record. But I cannot down the regret that what might in his hands have been a great book has turned out this time to be only a reasonably good one.

HARRY KALVEN, JR.*

point that the careful are forced to pay for the careless. My guess, although the text is far from explicit, is that he sees this as accident insurance—hence the reason the car owner should pay is in the end because he or his family is so likely to be the victim of the auto accident and it is thus for his benefit. I agree that an arresting case can be made for compulsory accident insurance and that this approach avoids many of the perplexities which come from continuing to view the problem as one of extending liability. But compulsory accident insurance has some healthy perplexities of its own, for none of which Dean Green pauses.

*Professor of Law, University of Chicago Law School.


This will be both less and more than a book review: less, because it lacks *(inter alia)* timeliness, the book having been published in 1957; more, because in addition to some comment on the book it will include a report on an experiment in the use of the book as a vehicle for the admiralty course.

The instructor who sets out to select a coursebook for admiralty encounters
difficulties. The standard casebook, while satisfactorily complete in its coverage, was last revised in 1950; and, although this may come as a surprise to some shoreside lawyers who consider admiralty a quiet backwater of the law, that date is sufficiently remote to make the book almost hopelessly out of date for classroom use. Since the beginning of the October Term, 1950, the number of cases decided by the United States Supreme Court involving admiralty, or otherwise directly affecting the shipping industry, has averaged seven per term. A more recent casebook is also rapidly becoming obsolete; but the more serious objection to it is that it omits treatment of two important topics: charter parties and marine insurance.

The publication in 1957 of an up-to-date, compact, and comprehensive treatise was, in these circumstances, bound to become a factor in the choice of a coursebook, notwithstanding the weight of the casebook tradition. This was no ordinary hornbook; there is not a "black-letter" statement in it. It is a reasoned discourse, in which the facts of the cases are not only made to appear but are given life and perspective. The style, which is always lucid and often relieved by affectionately whimsical criticisms of the law of the sea and of the ways of the shipping industry, makes for readability; yet it would be a rare student who could read the book passively. Any thoughtful reader must of necessity participate in the authors' analysis of the problems; he is never offered predigested conclusions. Moreover, the book seems impregnated with a quality which, to the land-lubberly instructor, is greatly to be valued: a knowledge of the shipping industry and of the commercial practices which so often underlie admiralty cases. On the basis of these considerations, having previously used both of the extant casebooks, I decided to adopt this text as the vehicle for the course in admiralty offered at Chicago in the winter quarter, 1958-59.


2 This computation includes cases decided at the October Term, 1958, which had not been concluded at this writing.


4 The difficulty of keeping current is graphically illustrated by the fact that several important cases decided at the October Term, 1953, came down so late—apparently while the casebook was in press—that they could be accorded only minimal treatment. Madruga v. Superior Court, 346 U.S. 556 (1954) (See Morrison & Stumberg, op. cit. supra note 3, at 101, 151, 673); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (See id., at 596, 673, 690, 712); Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953) (See id., at 710, 728); Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) (See id., at 673). Cf. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) (See id., at 673, citing the opinion of the Court of Appeals).

5 Except for a paragraph on page 315.

6 The only comparable text (Robinson, Handbook of Admiralty Law in the United States [1939]) was quite hopelessly out of date. Of course, no book is immune to the obsolescence attendant upon the activity of the courts in this field. Gilmore and Black, like Morrison and Stumberg, had their difficulties with the last-minute decision, fractionally numbered footnotes bearing witness to the effort to make the book current at least as of the date of publication. See, e.g., p. 371 n.377.5.
The admiralty course is perhaps what the instructor chooses to make it. To some it no doubt provides the opportunity for concentration on problems associated with commercial law; others may make of it a comparative study, or an intensive course in tort problems arising under a somewhat recondite system, or a dilettantish dalliance with such esoteric concepts as general average, salvage, and limitation of liability. I have tended to emphasize the problems of federal jurisdiction, of federal-state relationships in general, and of conflict of laws, and also the opportunities for insight into the processes whereby courts resolve legal problems. Gilmore and Black have their own clear conception, an intensely practical one: the book is a study of the distinctive legal framework in which the shipping industry operates. This conception is responsible for much of what is especially good in the book, and for some of what might be captiously referred to as its shortcomings. The emphasis is apparent from the first sentence, which offers an original and strictly functional definition of the law of admiralty: "... a corpus of rules, concepts, and legal practices governing certain centrally important concerns of the business of carrying goods and passengers by water" (p. 1). The student is advised (p. 11) to familiarize himself as widely and as deeply as he can with the "structure and doings" of the shipping industry, and is aided in this undertaking not only by references to source material but by frequent discussion of relevant industry practice and background (e.g., the pervasive importance of insurance, p. 17; the commercial transaction underlying the shipment of goods, p. 87; the function of cargo marks, p. 145; the charter in the context of tramp shipping, p. 174). This consequence of the industry orientation is all to the good.

Not so desirable, at least for teaching purposes, is another consequence: impatience with some of the analytical problems which are given prominence by the casebooks. Thus the authors are not disposed to trouble themselves—or the student—overmuch about the precise demarcation of the boundaries of admiralty jurisdiction: "It should be stressed that the important cases in admiralty are not the borderline cases on jurisdiction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra" (p. 24 n.88). And, as might be expected on the basis of this approach, they are impatient with disputations as to what constitutes a "vessel": "Once in a while, the question arises whether some marginal structure (a floating drydock, a moored showboat, a pumpboat, or something of the sort) is properly to be called a 'vessel.' The student will not find this set of questions to be of great importance; practically all of the business that comes before the admiralty court directly or indirectly concerns what are indubitably 'vessels'" (pp. 29-30). This is an attitude as practical—and as anti-intellectual—as that of the lay zoologist who asks: "What if I don't know how to define an elephant? I know one when I see it." Of course the shipping industry is primarily con-
cerned with ships; but, leaving aside the fact that admiralty courts occasionally do have to deal in a practical way with the question whether a marginal structure is a vessel, this practical, industry-oriented approach overlooks some real pedagogical values. The series of cases dealing with the concept "vessel" provides ideal material for bringing home to the student a truth which is pervasive in the law and difficult to communicate: that the answer to the question as to how a thing is to be classified often depends upon the purpose for which the question is asked.

In much the same vein, the authors frequently suggest that what is requisite for wisdom and competence in admiralty is a "feel" for the subject—that is, for the ways of the industry or of the specialized courts that deal with its legal problems. (See p. 24 n.88, in connection with jurisdiction; pp. 135, 137 n.54, in connection with the distinction between negligent navigation or management and improper care of cargo; p. 236, in connection with general average.) As for the "constitutional puzzle" presented by the power of Congress to modify the maritime law and extend the admiralty jurisdiction: "We need not worry about it at all, partly because over a century of precedent sets it pretty much at rest, and partly because the conception of the commerce power that now prevails would probably suffice, without reference to any inference from the admiralty judicial power, to validate every statutory enactment in question" (p. 42). To a degree one is tempted to sympathize with this easy-going approach. Yet if one conceives of the admiralty course as having a less narrow objective than that of training lawyers to represent steamship lines, one might be concerned with the implications of the legislative power in maritime matters for legislative power in other fields—as, for example, the power of Congress to prescribe rules of decision for the federal courts in diversity cases, notwithstanding Erie R. Co. v. Tompkins. And even a lawyer whose horizons are those of the shipping industry might be interested in the fact that if the powers of Congress in maritime matters were rested solely on the Commerce Clause a jury might be required in many areas in which that institution is now dispensed with.

A basic objection to this reliance on acquiring a "feel" for the law of admiralty is that it is premised on what is surely a fiction. It assumes that the courts which decide admiralty cases have an expertise in maritime law and shipping practice which guides their decisions and is communicated in their opinions. The assumption is sometimes made explicit. "If the court is set up as the special industrial court of the shipping business, then obviously its expertness is just as much needed when the theory of action happens to be quasi ex contractu as at any other time" (p. 26 n.94) (Emphasis supplied.) "Cases concerning

7 In fact, however, the authors do "worry about" the puzzle later on, at pp. 433–34, 571–74.
8 304 U.S. 64 (1938).
9 This possibility is strongly suggested by the history of the admiralty jurisdiction relative to the Great Lakes—a subject which is treated with a brevity out of proportion to its intrinsic, if not its national, interest. See p. 28 n.99.
the reformation of instruments call more urgently than most for that special-industry expertise which is one of the assumed bases for the existence of a separate admiralty court" (p. 37). After reading such passages, it is only with a wrench that one is able to remind oneself that the "separate admiralty court" is just the United States district court. The authors would hardly claim that federal district judges as such are maritime experts, and it is difficult to understand how they acquire expertise by mounting the bench on the admiralty "side" (see p. 30). If the authors were asked to list the federal judges who, in all our history, have been experts in the shipping industry and its law, they would probably find it hard to supply one name for each sail on a China clipper. Add the fact that many, if not most, maritime cases can be brought in state courts, and the student should find diminished satisfaction in the assurance that if he only gets "the feel" he will be en rapport with the expert on the bench. Since even proctors will ordinarily have to persuade ordinary judges, perhaps they too should be encouraged to cultivate the ordinary skills of legal analysis and persuasion.

I note with regret that this review is assuming a critical tone which is likely to misrepresent my general attitude, which is one of gratitude to the authors and admiration for their work. The book is on the whole a refreshing, informed, and transcendently helpful contribution to admiralty law in school and in practice. When so much has been said, however, nothing remains but to point to some matters which may be of interest to others contemplating use of the book as a coursebook, and some which may be of interest to practitioners and courts. Already the book's evident excellence has established it as one of the leading authorities in the field, and there may just be some merit in a timely suggestion that it lacks scriptural infallibility.

As one who has tended to emphasize the problems of federal-state relationships, I find the treatment of the admiralty jurisdiction, and of the related problem of whether the law applied in maritime cases should be state or federal, disappointingly lacking in depth. (See Chapter I, especially at §1–18). Only the Wilburn Boat case rouses the authors to more than a perfunctory treatment of the problem of state versus federal law (p. 61).

The chapter on marine insurance is wholly admirable. I cannot imagine a treatment better calculated to strip the subject of its forbidding aspects and to make it not only intelligible but inviting to students. Whether or not one likes the idea of using this book as a substitute for a casebook, one would be well advised to consider use of this chapter for coverage of the subject of marine insurance.

The chapter on carriage of goods under bills of lading is distinguished by its preliminary discussion of the underlying commercial transaction: the bill of


lading as a negotiable instrument (p. 87), the sale and the terms of shipment (p. 93), the documentary sale (p. 99), and the letter of credit (p. 104). For the rest, it is a workmanlike analysis of the Carriage of Goods by Sea Act (familiarly referred to as "Cogsa") and of the relevant cases. The most cavilling reviewer will find little to complain of here (apart from the casual attitude, already noted, toward questions of drawing the line between ship management and cargo handling), though it may be noted that the authors have accomplished a feat that one would have thought well-nigh impossible: discussion of the "both-to-blame" clause without reference to the Jason clause.12

The chapter on charter parties is distinguished by its introductory discussion of the industrial context: tramp shipping. Again fault is hard to find; it is here, however, that we encounter one of the very rare instances in which the presentation of a case and its analysis are inadequate. The discussion of the cesser clause (p. 195) does less than justice to the facts of the Argentine Railway case,13 and the analysis of that case seems highly questionable—though one makes such a suggestion with considerable trepidation in view of the expertise of the authors in matters of commercial law. Also, it is just a trifle disconcerting to find that the section on overlap and underlap discusses overlap only (p. 206).

The chapter on injuries to seamen and other maritime workers is on the whole a reliable and no doubt practical chart for the troubled waters of that subject; at least for teaching purposes, however, the presentation seems unnecessarily marred by certain idiosyncratic conceptions. After a brief historical review, the authors state five propositions as having been established by recent developments. Of these, four are open to question—not because of any basic flaw in the analysis, but merely because of the way in which the authors have chosen to view the matter, or the way in which they have distributed their interests. The first is the statement that "unseaworthiness," as applied to personal injuries, "is broad enough to include almost all (perhaps all) types of operating negligence in the navigation and management of the ship" (p. 252). It may be that the admiralty bar would be willing to accept this as a practical rule of thumb, since undoubtedly unseaworthiness covers some—perhaps most—situations which were once regarded as involving only operating negligence. But the proposition is rested primarily on an analysis and criticism of the Mahnich case,14 and the argument is unconvincing. The authors regard the case as holding, in effect, that unseaworthiness includes operating negligence (p. 317). It seems at least equally reasonable to regard it simply as a case in which a close question of classification was resolved in favor of the seaman by emphasizing the fact that defective equipment was involved rather than the fact that negligence was involved. Thus the decision enlarged the concept of unseaworthiness to include

12 See p. 152 et seq. The Jason clause is discussed in the chapter on general average, where the tour de force is perfected: there no reference is made to the both-to-blame clause. See p. 243.


cases in which negligence was an important factor, but not so as to cover operating negligence irrespective of defective appurtenances. However this may be, the course steered by the authors brings the pedagogical ship into the doldrums. Once assured that there is no practical difference between unseaworthiness and negligence, students lose interest in the distinctive origins of the concepts, in the possibility that some practical difference may yet exist or at least re-emerge in the future, and in any attempt to suggest that the injury in Mahnich was attributable in part to the fault of the owner, and not entirely to the fault of those seagoing servants for whose acts the shipping industry has persistently sought to escape liability.

The second doubtful proposition is that when an unseaworthiness count is joined with a Jones Act count both may go to the jury (pp. 252, 289). I am prepared to accept the suggestion that this was settled as a matter of practice in most district courts; but when the book was published the legal basis for the practice—except in Great Lakes cases—was far from clear. Even now, when the Supreme Court has addressed itself directly to the problem, the question has been formally left open.15

The third doubtful proposition is that “[m]ost (perhaps all) types of harbor workers are ‘seamen’ entitled to recover for unseaworthiness” (p. 252). My quarrel here is not with the general proposition that most harbor workers are entitled to recover for unseaworthiness, and is not based on the fact that the Court has recently trimmed its sails so far as this matter is concerned;16 it is with the authors’ insistence upon referring to harbor workers as seamen. This usage adds nothing to understanding of the fact that most such workers are protected by the warranty of seaworthiness, and it leads to confusion. Specifically, students think of the Jones Act as a seaman’s remedy, and when they are encouraged to regard longshoremen as seamen it helps little to remind them that longshoremen cannot sue the shipowner under that Act because they are not employed by him.17

The fourth doubtful proposition is that in saving-clause cases “maritime law probably prevails over most (perhaps all) state law rules which are inconsistent

17 Leaving aside the pedagogical disadvantages of this usage, the statement that harbor workers are seamen may have an intrinsic validity whose consequences the authors may not be willing to accept. An obscure section of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426 (1927), 33 U.S.C.A. §903(a)(1) (1957), declares the statute inapplicable to "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." How are injuries to such persons to be redressed? Possibly under state workmen's compensation acts, though there may be sufficient vitality left in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), to preclude that result. If that is so, the holding in International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), may find a new—though infinitesimally small—are of application, and the remedy may be under the Jones Act. The question is considered in an unpublished paper prepared by Mr. George A. Wray for the admiralty course at Chicago in the winter quarter, 1958—59. Cf. Gilmore and Black, at 283, 338.
with the maritime law" (p. 252). Again, the objection is not grounded on the fact that the Supreme Court has now held broadly that state law governs in wrongful death cases not predicated on federal statute; as of the date of publication, this holding was hardly predictable, and most critics would no doubt have agreed with the authors in the principal point they were making. The objection is to the omission of any reference to the important fact that state law has long been permitted to contradict maritime law in some respects, as by supplying a remedy for wrongful death which is not provided by the general maritime law, and even by creating a maritime lien in support of the remedy. The reasons why state law is permitted to "supplement" the maritime law but not to "derogue" from it are nowhere analyzed in depth by the authors.

The general attitude of the authors, which treats unseaworthiness as having swallowed up negligence and takes the right to jury trial pretty much for granted, leads them in the end to adopt a position which is hardly tenable: "... in almost all cases the pleader would be better off to rely exclusively on unseaworthiness and merely complicates his case and the proof by dragging in the Jones Act. It is safe to predict, unless the Supreme Court reverses its field a second time, that in another ten years the Jones Act will have become a faint and ghostly echo and the law of recovery for maritime injuries will be stated in terms of unseaworthiness alone." Leaving aside the point that the expansion of unseaworthiness is probably exaggerated, one is compelled to ask: When this comes to pass, how will the pleader obtain the jury trial which is presumably so important to him?

The chapter on limitation of liability is the least satisfactory portion of the book. Basically, the difficulty is that the authors adopt a tolerant, if not uncritical, attitude toward this particular form of subsidy to the shipping industry (pp. 700, 712, 713); they do not raise the obvious questions of policy which are associated with the circumstances of the first American limitation statute; and they make statements concerning the practice and the policy underlying the statute which are sometimes dubious and unsupported by authority. For example: (1) Discussing the meaning of the term "seagoing vessel" as employed in the Morro Castle amendments, the authors, without citation of authority or other visible justification, say (a) that "it seems reasonable to conclude that 'seagoing' in this context refers not to salt water or the high seas but to vessels

19 The fullest discussion is at p. 333 et seq. See also p. 534 et seq. Also open to question is the authors' assumption that the Jones Act has abolished the right to recover, with the aid of state law, for the death of a seaman on the theory of unseaworthiness (pp. 302-304). The assumption is based on a dictum in Lindgren v. United States, 281 U.S. 38 (1930). The authors' uncritical acceptance of the proposition seems out of keeping with their usually acute perception of the direction in which the law is developing. The question is considered in an unpublished paper by Mr. Robert L. Doan, prepared for the admiralty course at Chicago in the winter quarter, 1958-59.
20 P. 316. Presumably this passage is intended to refer only to injuries not resulting in death. See note 19 supra.
carrying large numbers of passengers, so that both the Great Lakes steamer and the New York harbor ferryboat would be included” (p. 720); (b) “the exclusion under §183(f) of many types of non-passenger-carrying vessels operates to exclude most merchant seamen from the additional recovery” (ibid.; see also p. 727). The legislative history makes it reasonably clear that Great Lakes vessels, like others plying the inland waterways, were to be excluded; on the other hand, it is clearly not true that merchant seamen are excluded from the benefits of the amendment because their ships do not carry passengers.21 (2) The authors consider the question whether the shipowner may compel creditors whose claims are not subject to limitation to participate in the limitation proceeding (thus diminishing the shares of creditors whose claims are subject to limitation as well as the personal liability of the owner). Their point of view is allied with that of the owner (p. 728). The other side of the problem is not presented: May the creditors whose claims are subject to limitation require the creditor who has recourse to the owner’s personal liability to pursue his personal remedy, by analogy to equitable principles of marshalling?22 (3) The authors are not responsible for the confusion concerning the idea that the claims subject to limitation are only those arising from a single disaster, or a single voyage; but their analysis of the confusion contributes little toward clarification (p. 741 et seq.). The underlying difficulty is a dearth of authority, abetted by statutory provisions and rules of court which were drafted without adequate analysis. To this difficulty the authors have added their unsupported interpretations of the purpose of the limitation act (pp. 745–46). The result is a confused impression that procedural problems have given rise to a special, compartmentalized area of doctrine and argumentation, remote from the basically simple idea of limitation, and difficult to relate to any general understanding of the problem.

Despite these rather niggling criticisms, the book is as fine a textbook as one could reasonably hope for; if any such book can serve as a vehicle for a law school course, this one should. Nevertheless, the only candid report on its use for that purpose must be that the experiment, at least so far as classroom sessions were concerned, was a resounding vindication of the case method. The instructor did not know what to do in class. The students reported that reading the textbook did not provide for them the active intellectual experience provided by reading cases. The idea had been that this was to be a problem course, with the textbook providing the background for discussion; and to some extent it was possible to pose relatively uncomplicated problems on the basis of prior experience with teaching the course by the case method. Most of the interesting cases, however, are discussed with thoroughness in the text, so that one was driven to consider problems more industriously contrived. Apart from the fact


22 The subject is discussed in an unpublished paper by Mr. Keith A. Williams, prepared for the admiralty course at Chicago in the winter quarter, 1958–59.
that such contriving of sufficient problems to keep the class going would require industry in quantities which did not seem readily available, the question was: With what resources are the students to be expected to attack the problems—with only the discussion in the text, or with cases and other materials brought to light by research? The evident answer was that problems of that sort—unresolved by the text—would require impracticable research on the part of the students if there was to be intelligent class discussion. The instructor refused to lecture. As a general rule the class was kept in motion by encouraging the students to read the text critically and to bring before the group their doubts and perplexities. This, together with some prompting concerning such matters as have been noted in this review served after a fashion, but did not make for the most stimulating of class sessions. The student reaction, that reading the text was not for them a stimulating intellectual experience, is more a reflection on them than on the authors; yet it is too much to expect that students with no background whatever in the subject can read a text critically enough to provide the grist for forty hours of classroom discussion. When, on February 24, the Supreme Court handed down a batch of five new admiralty cases, all hands turned as if from a liquid diet to a solid week of feasting on the juicy meat of actual decisions, seasoned with the heady sauce of conflict among the justices.

The class sessions, however, were not the whole story. The principal requirement in the course was a research paper from each student, on a problem-type subject proposed by the student and approved by the instructor. The quality of these papers was such as to justify the inference that the textbook had enabled the students to acquire in a relatively short time a general comprehension of the subject and a perspective in which to place their problems. Perhaps they actually learned as much as they would have learned in a case-method course, and learned it more quickly, so that they could put it to use within the brief compass of a single quarter. This aspect of the experience leads me to believe that the idea of using Gilmore and Black as a vehicle for the course is not, after all, to be dismissed conclusively. If it were possible to spread the course over two quarters, a scheme with considerable promise might be devised. Within the first few weeks of the first quarter the students would read the text through, with perhaps occasional class meetings for the discussion of the doubts and difficulties which they actually experience. They would then be in better position to select a problem and discuss it with the instructor. By the end of the first quarter they would be expected to produce the first draft of a paper on the problem, and the second quarter would be devoted to group discussion of the drafts. Discussion in such circumstances should be unforced and rewarding, and the final papers, submitted at the end of the second quarter, should be of even better quality than those produced in the late experiment. Such a consummation would entitle one to feel that the voyage had been safely and successfully completed.

* Professor of Law, University of Chicago Law School.