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"Tradition": A Buzzword As Evidence In Maritime And Common Law

Graydon S. Staring

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MARITIME AND COMMON LAW

INTRODUCTION

There must have been countless traditions in the world. Some were, and still are
bloody and unpleasant. Here, however, most of our traditions have to do with holidays,
festivals, games, reunions, and foods and drinks, and are pleasant except when they are
boring. We probably consider pleasure (to some of us at least) to be the reason for their
continued observance and, if we don’t care for them and they don’t involve people close
to us, we can evade them because they are not compulsory by law, which has little more
to do with them than prevent public harm. Yet if not necessarily permanent, or
compulsory, they remain invariable; that, together with their being old and unwritten, is
their charm and distinctive character.

In addition to genuine or authentic traditions of that sort, “invented” traditions
have been recognized and exposed, practices created, developed and perpetuated for
social or political purposes and far from unwritten but ordinarily well documented. ¹

Tradition has for a long time had very narrow and limited uses in law, while
becoming in common usage a word loosely malleable as to the practices described, their
origins, ages and influences, and having little in common beyond being handed down by
unwritten communication. In its nominal, adjectival and adverbial forms, the word has
recently proliferated in judicial opinions to an appalling degree and in questionable uses,
mostly in regard to practices having no possible claim to be genuinely traditional,
blurring their significance, and representing an expansion of invention with no social
purpose. What tradition means, what it doesn’t, its relationship to custom, usage and
positive law, and its potential to corrupt both legal norms and legal proof of the
significance of practices deserves examination.

Although for convenience the cases cited below are mostly maritime, there is no
reason to suppose that counsel and courts do not use the word with the same carefree liberality in
non-maritime cases.

WHAT TRADITION IS AND IS NOT

What does it mean?

Tradition is from Latin traditio, meaning delivery. It has for a long time been a
term in law for delivery of documents or goods, “the transferring of the thing sold into
the power and possession of the buyer”. Apart from that somewhat archaic use, it has
been of carefully limited significance in law, restricted to proving boundaries or
questions of pedigree by belief handed down orally in a family or community. ² In
common usage the original meaning evidently persists only in reference to the delivery of
its unwritten communication. American and English dictionaries give us these relevant
definitions:

1 a: an inherited, established, or customary pattern of thought, action, or behavior (as a
religious practice or a social custom) b: a belief or story or a body of beliefs or stories relating to
the past that are commonly accepted as historical though not verifiable ²: the handing down of

¹ See generally ERIC HOBSBAWN & TERENCE RANGER (EDS.), THE INVENTI ON OF TRADITION
² See, e.g., BLACK’S LAW DICTIONARY 1746 (3d ed. 1933) citing Civ. Code La. Art. 2477; C.J.S.
Evidence § 284 (not sufficiently probative to warrant inference of truth, with limited exceptions)
information, beliefs, and customs by word of mouth or by example from one generation to another without written instruction.\textsuperscript{3}

1 Delivery, esp. oral, of information or instruction … 2 a A statement, belief, custom, etc., handed down by non-written (esp. oral) means from generation to generation; such beliefs etc. collectively. b The action of handing down something, from generation to generation; transmission of statements, beliefs, customs, etc., esp. by word of mouth or unwritten custom; the fact of being handed down thus. \textsuperscript{4}

Whatever it does mean as a description of practice, its only unifying and characteristic feature has been that it is unwritten. This distinguishes it from practices more rigorously defined as custom or usage. But see this more recent definition, over which the distinguished editor and author Bryan Garner must have nodded as it passed into print:

1. Past customs and usages that influence or govern present acts or practices. 2. The delivery of an item or an estate.\textsuperscript{5}

One may doubt that linguistic evolution justifies revising a word’s meaning, especially in a legal lexicon, to eliminate a distinctive characteristic that limits its legal significance.

\textbf{What it does not mean: relationship to custom, usage, convention, etc.}

“ Tradition” is ordinarily used as a description of practice. Repeated practice is known to be of significance in the law in three ways, as custom, as usage, or as personal practice or habit, indicating ability or inclination. Habit has no relevance here,\textsuperscript{6} and only the first two are relevant in both the common law and maritime law as ways of proving a pattern of practice binding parties to conduct or understandings. Both custom and usage rest on foundations of objective evidence implicit in their definitions:

\textbf{custom, n.} 1. A practice that by its common adoption and long, unvarying habit has come to have the force of law. \textsuperscript{7}

\textbf{usage.} 1. A well-known, customary, and uniform practice, usu. in a specific profession or business.\textsuperscript{8}

The Supreme Court has ruled as a matter of common law that a custom “must, in order to be valid, be ancient, reasonable, and generally known …and also be certain …”\textsuperscript{9} These elements, of course, require credible testimony of objective facts, as equally do the knowledge, uniformity and range of a usage.\textsuperscript{10}

Although rules of law are often founded on usage, usage is not in itself a legal rule but merely habit or practice in fact. A particular usage may be more or less widespread. It may prevail throughout an area, and the area may be small or large — a city, a state or a larger region. A usage may prevail among all people in the area, or only in a special trade or other group. Usages change

\textsuperscript{3} 	extsc{Merriam-Webster On-Line Dictionary} (2009).
\textsuperscript{4} Shorter Oxford English Dictionary, 3317 (5th ed. 2002).
\textsuperscript{5} Black’s Law Dictionary (8th ed. 2004).
\textsuperscript{6} See Fed. R. Evid. 406.
\textsuperscript{7} Black’s Law Dictionary (8th ed. 2004).
\textsuperscript{8} \textit{Id}.
\textsuperscript{9} United States v. Buchanan, 49 U.S. (8 How.) 83, 102, 12 L. ed. 997 (1850).
over time, and persons in close association often develop temporary usages peculiar to themselves.”  

Thus custom and usage, in their natures, can rarely, if ever, be established without reliance on written evidence.

The distinguishing features of tradition are, however, that it depends on unwritten evidence, most frequently the memory of a family member, and imposes no legal duty or restraint on anybody. As a norm it is perplexing and unlikely ever to be otherwise. While it refers to practice, it does not connote the uniform acceptance or compulsion of usage or custom, or the required longevity of the one or antiquity of the other. It has many and various sociological uses, ranging from undocumented history and old lyrics to family holiday dinners. Only one of the two major legal encyclopedias attempts to define it, and then only to assert that it has no evidentiary significance beyond possibly family practices and historical facts.

It may be interesting, however, to mention here a case supporting the possibility (no doubt rare) of proving by tradition the unreasonableness of an expectation, in this case the expectation that Massachusetts fish chowder should be free of fish bones. The Supreme Judicial Court of that state held unanimously that the chowder complained of, bones and all, was a “hallowed” culinary tradition from a long time ago. They cited published recipes, ancient and modern, not as the tradition itself nor as its foundation, but as showing its persistence, and overturned the plaintiff’s judgment.

The catalogues of the vast libraries of the University of California disclose in the past half century many books on traditions in discrete geographical, ethnic and cultural fields but that books on their nature generally are scarce. One, a volume of scholarly essays published in 1983, is devoted to “invented traditions,” distinguished from those that develop from unrecorded and often unknown sources by the fact that they are purposely created and supported for political or social purposes. Passages from the introductory chapter by its editor, Professor Hobsbawn, describing invented tradition, expose the malleability of the word and indefiniteness of its content:

'Traditions' which appear or claim to be old are often quite recent in origin and sometimes invented.…

The term 'invented tradition' is used in a broad, but not imprecise sense. It includes both 'traditions' actually invented, constructed and formally instituted and those emerging in a less easily traceable manner within a brief and dateable period -- a matter of a few years I perhaps -- and establishing themselves with great rapidity.…

“Invented tradition” is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past. A striking example is the deliberate choice of a Gothic style for the nineteenth-century rebuilding of the British parliament [think Yale, Princeton or Chicago] …The historic past into which the new tradition is inserted need not be lengthy, stretching back into the assumed mists of time.… However, insofar as there is such reference to a historic past, the peculiarity of 'invented' traditions is that the continuity with it is largely fictitious. In short, they are responses to novel situations

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11 Restatement (Second) of Contracts § 219 cmt. a (1979).
12 See C.J.S. Evidence § 284 (not sufficiently probative to warrant inference of truth, with limited exceptions).
which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition.\textsuperscript{15}

Thus a “tradition” may be no older than last year. When we hear of it, we may fairly ask where and when it started.  

\textbf{THE INCREASED INCIDENCE OF “TRADITION”}

\textit{The numbers}

I have looked at the trend by reference to American Maritime Cases because: 1) as a specialized reporter it provides, year by year, a compact collection of opinions sufficient for comparison but not overwhelming; 2) the judges who produce them produce the much greater volume of non-maritime opinions in which there is no reason to suppose that they use “tradition” differently; and 3) AMC’s electronic publication makes it convenient for the purpose.

In the past 50 years, the pages in the yearly volumes have increased about 20%, while the number of reports has dropped by almost half, a phenomenon attributable to increased verbosity. “Tradition”, in one or more of its forms, appeared in 39 of the 466 reports in 1959 and in 78 of the 273 reports in 2008, an increase from 8% to 29%. Of these uses the majority are inauthentic and unjustified and only two of them, which occur several times, are exceptions.

In most of the instances cited below, the practices called “traditional” are in fact well documented, too well to cross the threshold of tradition. Apart from that objection, however, there are other and more serious objections to their being so called.

\textit{The exceptional valid uses}

Two uses of “tradition” in the chosen class are justified by their use in jurisdictional definitions by the Supreme Court, one by authentic experience and the other not so but required to be followed by the lower courts while it lasts.

The authentic use is found in the well-known words of the \textit{International Shoe} case that exercise of personal jurisdiction over non-residents must “not offend traditional notions of fair play and substantial justice.”\textsuperscript{16} This is a use of “tradition”, not to be confused with custom as defined and compelled by objective precedents, but expressly consisting of “notions” and based in practice on the malleable unwritten impressions shared by judges.

The other use is found in the requirement of admiralty tort jurisdiction “that the wrong bear a significant relationship to traditional maritime activity,” added by the \textit{Executive Jet Aviation} case.\textsuperscript{17} This vague formula must embrace numerous activities undoubtedly within the jurisdiction and arising from positive law and custom or usage and others of unwritten provenance, giving rise to much litigation to classify them. I have written elsewhere:

In what histories may the qualifying tradition be found: e.g., British? Samoan? Biblical? And in what eras, the present only, or the colonial, or anything between or before? … [S]ome federal courts have shown reluctance to recognize tradition in pleasurable frivolities. But the decision is difficult and probably controversial as to which pleasure seekers are more frivolous than reveling.

\textsuperscript{15} \textit{Hobsbawn,} at 1.
passengers who fall overboard from cruise ships, whose fate in the water, or rescue from it, will be readily admitted to the somber dignity of the admiralty.\textsuperscript{18} (Footnotes omitted.)

A number of instances are cited in connection with the passage quoted. The example of scuba diving may illustrate the problem. While no one questions jurisdiction of commercial diving, the courts split on whether scuba (pleasure) diving is traditional,\textsuperscript{19} as they also do on the traditional character of drunkenness on casino vessels.\textsuperscript{20} These very different exceptions show the unmanageable vagueness of tradition as a legal standard applied to a world of unlimited circumstances in contrast to its application to “notions of fair play” in an American court case.

**Misuses**

Excluding the legitimate instances discussed above, 63 remain. Although precise classification of them is impossible in some instances, I think it reasonable to group them in three classes: 1) \textit{positive law}, including for this purpose not only statutory law but mandatory rules and regulations and positive rules found in Supreme Court decisions; 2) \textit{custom}, including customary maritime and common law; and 3) \textit{usual practices}, embracing common practices, objects or sayings, including some that might qualify as usages.

**Positive law.** Of the 17 opinions in this class, six use the word “tradition” in reference to jurisdictional norms, an example being the distinction of a “traditional civil action” from an admiralty suit,\textsuperscript{21} and others being references to a field “occupied by” or “a domain of” state law rather than federal law.\textsuperscript{22} Three in this class deal with substantive rights governed by statute or Supreme Court rulings: one the \textit{Louisiana} Rule that fault is presumed from a drifting vessel’s striking a stationary object,\textsuperscript{23} described as “traditional liability”,\textsuperscript{24} and another describing the rule\textsuperscript{25} validating forum selection clauses in passenger tickets.\textsuperscript{26} The remaining eight refer to court procedures under various rules; examples are reference to the standard stated by the Supreme Court for


\textsuperscript{23} The Louisiana, 70 U.S. (3 Wall.) 164, 2008 AMC 1811 (1866).

\textsuperscript{24} Stuart Cay Marina v. M/V Special Delivery, 510 F. Supp.2d 1063, 2008 AMC 68, 80 n. 9 (S.D. Fla. 2007).


dismission of a complaint for failure to state a claim,\textsuperscript{27} attachment under Fed. R. Civ. P. Supplementary Rule B,\textsuperscript{28} non-jury trial in admiralty\textsuperscript{29} and burdens of proof.\textsuperscript{30}

These are perhaps the baldest misuses and for that reason least directly harmful, since lawyers are likely to know that the point is commanded by law. While there is no danger of the feebleness of tradition overpowering the positive law, these uses have the potential of making the impression that tradition is compulsory.

\textbf{Custom.} This class of 23 opinions includes among “traditions” the maritime doctrine of deviation,\textsuperscript{31} the elements of negligence liability,\textsuperscript{32} the rule that a vessel in construction gives rise to no maritime tort,\textsuperscript{33} the rules of non-carrying tortfeasors’ liability to cargo,\textsuperscript{34} the contrary doctrines of the common law and civil law as to punitive damages,\textsuperscript{35} the standards governing seamen’s maintenance and cure,\textsuperscript{36} and the authority of the flag state over its vessels.\textsuperscript{37} These and more are a rich store of customary law trivialized and likely to tempt us find more under the heading of “tradition” without examining them for evidence of authentic custom.

In discussing tradition generally, and not just invented, Professor Hobsbawn provides a useful description of its contrast with custom:

‘Tradition’ in this sense must be distinguished clearly from ‘custom’ which dominates so-called ‘traditional’ societies. The object and characteristic of ‘traditions’, including invented ones, is invariance. The past, real or invented, to which they refer, imposes fixed (normally formalized) practices, such as repetition. ‘Custom’ in traditional societies has the double function of motor and fly-wheel. It does not preclude innovation and change up to a point, though evidently the requirement that it must appear compatible or even identical with precedent imposes substantial limitations on it. What it does is to give any desired change (or resistance to innovation) the sanction of precedent, social continuity and natural law as expressed in history. Students of the British labour movement know that ‘the custom of the trade’ or of the shop may represent not ancient tradition, but whatever right the workers have established in practice, however recently, and which they now attempt to extend or defend by giving it the sanction of perpetuity. ‘Custom’ cannot afford to be invariant, because even in ‘traditional’ societies life is not so. Customary or common law still shows this combination of flexibility in substance and formal adherence to precedent.

\textsuperscript{31} M-Cubed, LLC v. Maersk, Inc., 2007 U.S. Dist. LEXIS 87660 , 2008 AMC 9, 12 (W.D. Wash. 2007)
\textsuperscript{33} Cain v. Transocean Offshore USA, Inc., 518 F.3d 295, 2008 AMC 831, 838 (5th Cir. 2008).
\textsuperscript{34} Norwegian Bulk Transport A/S v. International Marine Terminals Partnership, 520 F.3d 409, 2008 AMC 975, 979 (5th Cir. 2008) .
\textsuperscript{37} United States v. Jho, 534 F.3d 398, 2008 AMC 1746, 1753 \textit{passim} (5th Cir. 2008).
“Tradition” is therefore a feeble substitute for custom, a vapid epithet to apply to it and, here again, when applied to the compulsion of custom, likely to create the impression that tradition itself is compulsory.

**Usual practices.** Among the activities and objects included in this class of 23 opinions are the types of seagoing vessels, the functions of such vessels, the peripatetic character of maritime parties and consequent transitoriness of their assets, charterparty damages, the mechanics of various methods of salvage, and, in several cases, the work of seamen and that of landsmen, mere conventional routines, some of which may amount to contract usages.

Professor Hobsbawn is again helpful as he explains the contrast of tradition and convention or routine:

A second, less important, distinction that must be made is between ‘tradition’ in our sense and convention or routine, which has no significant ritual or symbolic function as such, though it may acquire it incidentally. It is evident that any social practice that needs to be carried out repeatedly will tend, for convenience and efficiency, to develop a set of such conventions and routines, which may be de facto or de jure formalized for the purposes of imparting the practice to new practitioners. This applies to unprecedented practices (such as the work of an aircraft pilot) as much as to long-familiar ones. Societies since the industrial revolution have naturally been obliged to invent, institute or develop new networks of such convention or routine more frequently than previous ones. Insofar as they function best when turned into habit, automatic procedure or even reflex action, they require invariance, which may get in the way of the other necessary requirement of practice, the capacity to deal with unforeseen or inhabitual contingencies. This is a well-known weakness of routinization or bureaucratisation, particularly at the subaltern levels where invariant performance is generally considered the most efficient.

Such networks of convention and routine … are designed to facilitate readily definable practical operations, and are readily modified or abandoned to meet changing practical needs, always allowing for the inertia which any practice acquires with time and the emotional resistance to any innovation by people who have become attached to it. The same applies to the recognized’ rules’ of games or other patterns of social interaction, where these exist, or to any other pragmatically based norms. Where these exist in combination with ‘tradition’, the difference is readily observable. Wearing hard hats when riding makes practical sense, like wearing crash helmets for motor-cyclists or steel helmets for soldiers; wearing a particular type of hard hat in combination with hunting pink makes an entirely different kind of sense. If this were not so, it would be as easy to change the ‘traditional’ costume of fox-hunters as it is to substitute a differently shaped helmet in armies—rather conservative institutions—if it can be shown to provide more effective protection. Indeed it may be suggested that ‘traditions’ and pragmatic conventions or routines are inversely related.

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39 Grand Isle Shipyard Inc. v. Seacor Marine, LLC, 543 F.3d 256, 2008 AMC 2572, 2577 (5th Cir. 2008).
Activities and designs such as those described above as “usual” are dictated by technology, effectiveness, and the varying needs of business, matters well removed from tradition. The work of seamen, for example, which used to be defined by ability to “hand, reef and steer,” the ordinary test of seamanship,”\footnote{See The Canton, 5 F. Cas. 29, 30 (No. 2,388) (D. Mass. 1858).} varies greatly with the purposes and technologies of modern vessels, and the work of landsmen generally is endlessly various and in the maritime industry alone varies widely with varieties of cargo and mechanization of the work.

A case outside the maritime group featured here indicates the astonishing lengths to which the trend of “tradition” may lead. A federal judge in New York adopts uncritically a conclusion of the Ohio Supreme Court that a broad pollution exclusion clause in a liability policy should be read more narrowly than its plain words to agree with “the traditional understanding” of narrower clauses and exclude only coverage for “traditional environmental pollution,”\footnote{National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. American Re-Insurance Co., 351 F. Supp.2d 201, 211 (S.D.N.Y. 2006).} confining the protection of insurance to non-“traditional” polluters.

CONCLUSION

In most of its appearances in judicial opinions (and presumably lawyer’s briefs), “tradition” is a pretentious intruder, false and misleading. Where a tradition is not actually proved, or being provable would be of no legal consequence, a proper word in most cases would be “practice” or “pattern;” and instead of “traditionally” such words as “usually”, “commonly” and “frequently” will be fitting.

A POSTSCRIPT

I had supposed in the article above that “counsel and courts … use ['tradition'] with the same carefree liberality in non-maritime” as in maritime cases. As I wrote there, I was stirred to comment by a decision on reinsurance, another of my principal interests, but turned first to maritime cases because they are more convenient to survey. After writing the article, I turned back to reinsurance to pursue the pattern as I supposed it to be. I have failed to find the pattern there--only about a half dozen instances a year and most of them unremarkable.

An interesting hypothesis is presented. Judges ordinarily learn the reasons for their decisions from the arguments of lawyers. Admiralty, being ancient, colorful and ich with traditions of the sea, is our most romantic field of civil practice, easily beating out, e.g., taxes, corporations and family law, etc. Can we doubt therefore that romanticism flourishes more abundantly among us in admiralty than in other segments of the bar? It is in our romantic spirit, conditioned by so much of it,, to embrace tradition's genial familiarity, its louche suppleness, in preference to the stern, classical rigidity of usage and custom, in pressing our claims and defenses in the courts.

So, although I started as I did for convenience, I have happily exhorted those most concerned, my colleagues of the admiralty bar, to mend our ways. The judges, too, are responsible for enabling their virus protection and exercising their skepticism when listening to romantics. The unromantic insurance lawyers, however, may go hence sine die.

Graydon S. Staring is Of Counsel to Nixon Peabody in San Francisco.