

Terms of Art

Occasional Dispatches from the Intersection of Language & the Law

Slogans & Shibboleths

David Franklin

“**H**OW DID CHIEF JUSTICE WARREN manage to achieve agreements among colleagues with diverse backgrounds and views?” asks Herbert Mitgang in a recent *New York Times* review of Ed Cray’s new Warren biography. “His political experience as attorney general and governor of California taught him how to compromise and not try to achieve outright victories. Fairness was his shibboleth.”

Life has been unfair to the poor shibboleth. Originally denoting a word or phrase whose use betokens membership in a select group, it has lived to see its once-distinctive meaning eroded by time and misuse. Today a shibboleth is a slogan or catchphrase of any type, even sometimes (as in the Mitgang excerpt above) little more than a tenet or credo. It is a sad fate for a word that was born in auspicious, albeit rather bloody, circumstances thousands of years ago in ancient Israel.

You can find the etymology in the Bible it-

self, amidst the endless narrative of interne-cine skirmishes among competing Israelite tribes. We pick up the action in Judges 12:6, as the Gileadites begin buttonholing suspected Ephraimite interlopers and subjecting them to a devious pop quiz. “Are you an Ephraimite?” they ask each intruder. “If he said, ‘No,’ then they would say to him, ‘Say now, ‘Shibboleth.’” But he said, ‘sibboleth,’ for he could not pronounce it correctly. Then they seized him and slew him at the fords of the Jordan. Thus there fell at that time 42,000 of Ephraim.” A lawyer might call this the original trap for the unwary. Milton captured the arbitrary cruelty of it all in his poem *Samson Agonistes*:

*In that sore battel when so many dy'd
Without Reprieve adjudg'd to death
For want of well pronouncing Shibboleth.*

The loss of 42,000 of the finest Ephraimites serves as a continuing warning, not only of the importance of good enunciation, but of the

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sometimes irrational significance we ascribe to the earmarks of belonging. (Incidentally, the first earmarks – long before Evander Holyfield – were slots in the ears of sheep: literally marks of belonging. Hence the ancient and now abrogated doctrine of equity, “Money has no earmarks,” meaning it cannot be traced when mingled with the funds of a wrongdoer.)

Because group consciousness is still a potent fact of political life, the term shibboleth in its original sense has by no means outlived its usefulness. The most literal contemporary parallel I can think of (although admittedly it lacks the Bible story’s gory outcome) involves the inability of Czech President Vaclav Havel to pronounce the Czech “r” sound. The Czechs roll their r’s in the Spanish manner, but the best Havel can muster is a back-of-the-throat Frenchified rasp. Many earthy Bohemians, already wary of Havel’s affluent upbringing and his popularity in the West, take his speech pattern as a sign of affectation. Curiously, many of Havel’s ex-dissident colleagues share the same impediment – and the same public relations problem. (This is not to mention the murderous Czech “ř” sound, as in Dvořák, which makes most Westerners, and Havel, just about swallow their tongues.) Another modern analogue might be the tales of German spies during World War II whose unaccented English kept them safe until it surfaced that they didn’t know the winner of the previous season’s World Series.

Looser parallels are legion in our time. From the gang colors teenagers sport at their peril in the wrong neighborhoods to the trendy catchwords that cutting-edge academics toss off at cocktail parties like intellectual mating calls, shibboleths abound. That is why it is so disappointing that the word’s original sense has become so badly blurred over the centuries. It has gone from password to watchword, from a turnkey combination known only to a favored few to a slogan anyone can recite. Of course I have no desire to make nor-

mative judgments here: usage dictates meaning rather than the other way around. But it is always unfortunate to witness the passing of a word’s unique meaning. What’s worse, I’ve begun to suspect that lawyers deserve most of the blame for chiseling off the distinctive edges of shibboleth’s meaning.

For early evidence of the problem one could go at least as far back as Professor Wigmore, who had this to say in repudiation of the terminally vague concept of *res gestae*: “No rule of Evidence can be created or applied by the mere muttering of a shibboleth.” The Supreme Court has taken a similar tack in countless passages like this one from *Frontiero v. Richardson*: “[W]hen we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.” Another example chosen more or less at random comes from an Eighth Circuit opinion of a few years ago: “The doctrine of *res ipsa loquitur* is not a mere shibboleth which, when uttered, relieves a plaintiff of the burden of showing that he would not have been injured absent negligence by the defendant.” These usages retain the aspect of mere recitation from the Bible narrative, but sacrifice the equally important elements of exclusivity and peril.

Indeed, after taking a brief trip through the case law I have begun to suspect that lawyers and judges are confusing the shibboleth with its not-so-distant cousin, the talismanic incantation. The latter can be found in Supreme Court opinions like *California v. Prysock* (“*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures”) or *United States v. Robel* (“[T]he phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.”). The purist understands the simple but crucial difference between the two: the shibboleth is known only to those in the In

Crowd, whereas the talismanic incantation is available to anyone with a few dusty law books and a magic wand to wave. If everyone could pronounce shibboleth, those 42,000 Ephraimites would still be alive today.

From its beachhead in the legal realm, the use of shibboleth as a fancy-sounding synonym for “slogan” has spread to the political world as well. “For starters,” opined Senator Byron Dorgan in a *Washington Times* editorial this past November, “let’s dispense with some of the shibboleths usually hurled at those who oppose fast track trade authority.”

A few conscientious commentators have tried to preserve the word’s unique shadings. Stephen Carter, in his book *Reflections of an Affirmative Action Baby*, describes a shibboleth as “a test that determines who is a genuine member of a group.” Thus he contends that “the single proposition on which dissent [within the black community] seems to be least tolerated is the desirability of extensive systems of racial preference. That is our shibboleth, and black dissenters who instead say *sibboleth* are treated as outsiders.” And William Safire doesn’t stray too far from the term’s Biblical roots when he writes that shibboleth means “a word or phrase characteristic of a group, like compassion for Democrats or balanced budget for Republicans.”

But back to Earl Warren. In fairness to the late Chief Justice – and fairness is my watchword – he used the term only once, in the stirring and oft-quoted peroration to his plurality opinion in *Trop v. Dulles*: “The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation.” As the

passage from *Trop* suggests, in Supreme Court opinions the word has taken on a strongly negative connotation – probably not an inappropriate fate for a word whose invention caused the slaughter of so many people. Perhaps because of this disparaging tinge, the shibboleth seems particularly popular among dissenters. Its most recent appearance at the Supreme Court came in Justice Stevens’s caustic dissent from *Seminole Tribe of Florida v. Florida*: “For this Court to conclude that time-worn shibboleths iterated and reiterated by judges should take precedence over the deliberations of the Congress of the United States is simply irresponsible.”

Indeed the very first appearance of a shibboleth in a Supreme Court opinion came in a dissent. The year was 1905, the author none other than Justice Holmes – and something about the opinion sounds familiar: “The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.” Then Holmes added a sentence that was destined from its inception to be repeated, mantra-like, by generations of legal academics eager to proclaim their belief that the Constitution is agnostic about economic theory: “The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Now there’s a shibboleth if I ever heard one. *GB*

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