The New Casuistry

Peter Goodrich

And in this case, not the best Lawyers, nor the best Grammarians, but the best Historians are the best measures to our Conscience.¹

On 5 June 2005 the New York Times Sunday Book Review reported that Harry G. Frankfurt’s On Bullshit was the best-selling hardcover work of nonfiction for the preceding week. Only that is not quite what the Times said. The number one book’s title was printed as On Bull—, thus censoring the last syllable. In a column to the side of the bestseller list, there is a picture of the moral philosopher Frankfurt, head tilted to the left, brow slightly furrowed, and some insider comments by Dwight Garner. He records that the book is “among the most unlikely best sellers” and then goes on to note another novelty: “it is also the first No. 1 book in the history of the Times list to bear a title that this newspaper will not print in its entirety.”² Once acknowledged, however, the aposiopesis is left unexplained. No attempt to justify the caesura is deemed necessary. The case is presumably too obvious or just possibly too difficult to require elaboration. Granted the topic that the book addresses, this is strikingly paradoxical. It is hard not to think that the censorship exemplifies the thesis.

On Bullshit is not an obvious candidate for linguistic revision or political correctness. It is a work of moral philosophy concerned with elucidating “a theoretical understanding of bullshit.” Its goal is to offer some “tentative and exploratory philosophical analysis” with a view to articulating “more

¹ Jeremy Taylor, Ductor dubitantium, or, The Rule of Conscience in All Her Generall Meaures Serving as a Great Instrument for the Determination of Cases of Conscience (London, 1660); hereafter abbreviated DD.
The case of bullshit will thus be addressed abstractly, condemned morally, and treated less as a casuistic particular—as a practical problem of conscience—than as a general diagnosis of declining standards of public discourse. Which allows us to observe already that this work is less about the deleted shit than about the bull, the papal or latterly pontifical public intellectual declarations and opinions that fail to match any observable criterion of truth. In this dimension the refusal to print the suffixed shit is the equivalent of eliminating the prefixed shit from shitake mushroom, although in the latter case the argument as to the proximity of the term to the referent excrement is much closer and so if anything a better candidate for deletion.

Consider next that on the day in question the book is the number one nonfiction bestseller in the country. It has temporarily nosed out Freakonomics, and it is two ahead of Blink. Take account of the fact that the book has been on the list for ten weeks, and this has to mean that a lot of copies have been sold. Unusual numbers: over 400,000 people have purchased copies of this hardcover book whose spine, front cover, title pages, and verso page headers throughout all carry the words on bullshit in capital letters. Add to this that you find the book stacked up on display by the cash register in many chain bookstores, and the conclusion has to be that the Times is neither saving many of its readers from embarrassment nor protecting a vulnerable public from improprieties of expression. The reporting of the success of the book on bullshit is thus accompanied by its own little touch of journalistic bullshit. An exemplification of what the stern-looking Frankfurt has castigated in his text. Or so one could be forgiven for thinking.

But there is more to this. Emeritus Professor Frankfurt is not concerned with the particular. He does not address the details, doesn’t even seem to want to. He proclaims straight off and quite hygienically: “I shall not consider the rhetorical uses and misuses of bullshit” ([OB], p. 2). His text may present itself as a casuistic endeavor to the extent that he wishes “to say something helpful,” that he intends in his somewhat indecisive way to be “docteur dubitantium” or a guide for the perplexed, but that is as far as it

4. It has to be noted that even the publisher plays a little of the game, using the title as a running head on the verso page and putting it in brackets. We will let them off, however, because it is arguably a question of typographic aesthetics and because Frankfurt must have approved this bracketing of the term.

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No cases are analyzed, no dilemmas are resolved, and when it comes to the suffixed shit of bullshit Frankfurt cannot get away quick enough. “Excrement is not designed or crafted at all; it is merely emitted or dumped”; it is “certainly not wrought” (OB, p. 2). Civility one could say involves looking away from shit, privatizing excrement as Dominique Laporte relays in his highly informative History of Shit from the heady or at least less linguistically proper days of seventies continental theory. But Frankfurt avoids both history and practice. He admits that with “a certain inner strain” one can recognize that advertisers and public relations personnel as well as politicians engage in unmitigated bouts of bullshit and so it must be studied, but that is not his enterprise (OB, p. 22). He would rather expose and condemn these purveyors of inaccuracy in abstracto than mire himself in the details or consider the semiotic, linguistic, or rhetorical uses and indeed efficacy of the very thing, the practice of bullshit, that he is deliberating against.

So here we have a term—bullshit—that is introduced in a very public manner into popular intellectual debate and yet is introduced sous rature, in the mode of dissimulation. The suffix is deleted, negated in Freud’s terms, in the very act of being presented. The Times won’t print the word in full, and on a close examination Frankfurt transpires to address the topic so abstractly or cleanly that he barely mentions the practice, turns his nose away from the particulars, and at best sketches the concept. He admits that his intervention is “not likely to be decisive,” and we can probably agree (OB, p. 3). It may have other virtues, but that is not to the point here. The case of bullshit is met with indirection, abstraction, and avoidance of detail. This would be disastrous medically—shit is a prime diagnostic stool—dangerous hygienically, and problematic socially. The question now is whether it is equally unfortunate philosophically. My argument will be that it is. I will argue that, in its minor yet highly popular way, it represents a new form of casuistry, a third casuistic if you like, that is defined by its avoidance of the factual, its reluctance to address let alone resolve actual cases, and its refusal of refuse.

There has been a shift in the use of casuistry. If the first casuistic was Catholic and theistic, the second, reactive and juridical, the third is declamatory and political. The contemporary discourses of denunciation are directed neither at heretics nor at outlaws but rather at political opponents, enemies within. The denunciatory use of antirhetoric figures such as slander, treason, blasphemy, and lies in the public sphere is now concentrated in

the political, displaced first from theology to law and now from theology, via law, to politics. And on the other side of the equation I will argue that there are theses in the feces. If bullshit is everywhere increasing, as Frankfurt claims, then it is precisely the new form of casuistry, the novel rhetorical practices of bullshit, that need to be addressed, analyzed, brought into critical view. I will argue that the new political casuistry involves a return to axiomatic forms of advocacy associated most closely with the antique genre of declamation and more esoterically a return of what Quintilian called the corruption of eloquence along with all that such implies.

To this must be added the phenomenon of the voluble return of religion in political life. That is the contemporary twist, the new face of casuistry, the central dilemma, because the mode of arguing cases with theologians, theists, and Gnostics is rhetorically specific and very different from the Enlightenment norms that still tend to inform scholarly disquisition and dissertation. Hence the caesura, the scholarly separatism, the highbrow dislocations, the absent minds that signal flailingly by dint of a diminishing deluge of academic books. So the initial question that I will pose concerns the genealogy of this new casuistry, its modes of argument, and its distinctive cases: its casus belli or its war on everything from Iraq to terror, from drugs to domestic violence, from liberalism to death itself. On the inside or other face of this casuistic is its diplomacy or casus pro amico, its nepotism, its hiding of politics behind the declared but inscrutable beliefs of the heart. And finally the various forms of turning-away-from, negating or even annihilating that which does not conform to the case being made, to the position adopted, the end projected. These are new forms of old casuistic practices, and to be frank-furtish about it you could say that they resemble bullshit, except that closer scrutiny evidences both a lengthy history and a tightly structured rhetorical form.

Parallel Lines

Start a long way from the present. History is like that, and the questions of casuistry, of how to live, how to govern, how to determine practical moral dilemmas by the rules of faith are for our purposes early modern interrogations. So begin with a curious remark in the English lawyer Arthur Duck’s widely circulated text On the Use and Authority of Roman Civil Law in Christian Kingdoms, written in the first half of the seventeenth century. He

6. See U.S. Congress, “An Act for the Relief of the Parents of Theresa Marie Schiavo,” S.686 ENR, 109th Cong., 2d sess., Congressional Record (20 Mar. 2005). This strange and utterly antimmetrical legislation in the Terri Schiavo case, the refusal to recognize the mere fact of death, is not as strange as it might at first seem. Christianity is historically and at root a fight to the death against death.
reports quite casually that the most famous of the continental jurists, Bartolus, was on record saying that anyone who challenges the authority of Roman law is a heretic. He means that it was an act against the faith, divisive of the church, and so more than a misdemeanor, worse than a crime, an act of heresy, a breach of divine tradition and of God’s authority. These seem strange and strong conclusions, and to make sense of them requires an initial understanding of two things.

First, Rome and the authority of the Christian tradition were deemed, like Latin, to govern the whole world. It was global, and it came in two forms or, to cite the relevant maxim, *duo sunt genera Christianorum*. There are two genres of Christianity. Two forms of law. There is first that of the church, of the pontiff, of *il papa*, of papal bulls, and Roman infallibility. That brings with it a spiritual law, moral rules, a casuistry of conscience that pitches good against evil, faith against irrationality, light against darkness. It has its own rules, its own *Corpus iuris canonici*, and accompanying interpretations, glosses, and axioms of creed and conduct. And then there is the other genre, that of Roman law, the *Corpus iuris civilis* compiled by the Eastern Roman Emperor Justinian and rediscovered in Europe in the 1190s. And we would tend to view that latter law, of persons, actions, and things, as secular. But it is not. If you read it, which is unlikely, you’ll find that its central component, the fifty books of the *Digest*, starts by declaring that God is its author—the opening section is headed *Deo auctore*—and that its subject matter is “knowledge of things divine and human.” On top of that we also have Bartolus and then Duck telling us that variation, contradiction, or denial of the law’s authority makes you a heretic.

A dual enterprise can be either conjunctive or disjunctive. In the case of Roman law it was the former. Even within the common-law tradition the judges were explicitly priests—first Druids, followers of Pythagoras curiously enough, and latterly Christian *sacerdotes* or holy men according to the English legal sources. They read the Bible first and then the law. They were experts in the divine nature of law, in the enfolding of the sacred and the secular, and they knew their casuistics just as well as they understood their

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8. The other source for this is Gratian, *The Treatise on Laws (The Decretum DD. 1–20)*, trans. James Gordley (c. 1140; Washington, D.C., 1993). Distinction one: *Humanorum genus duobus regiter*—humanity is ruled in two ways. Just to complete the reference, the common lawyers inherited and ritualistically repeated this maxim. See, for example (one of many), John Doddridge, *The English Lawyer: Describing a Method for the Management of the Laws of This Land* (London, 1622), p. 29; hereafter abbreviated EL. “Law is affirmed to be *Rerum divinarum humanarumque Scientia, it doth containe a knowledge of all divine and humane things.*”
spiritual role. In Roman terms, the function of the lawyer was most broadly to institute life—*instituere vitam*—which expression should be understood literally. Law ordains life. It promulgates the rules by which citizens, etymologically the civilized, those subject to civil law, conduct their lives. The dual law could answer any case, resolve any conflict, determine each and every cause. That was because canon and civil, spiritual and secular legal rules were one body and governed according to one faith. Divine or human, visible or vanishing, sublime or ridiculous, all cases could be debated and decided and frequently were. Thus there were lengthy glossatorial discussions of all manner of causes. Magister Albertus, to take an extreme example of the genuinely declamatory, asked:

Suppose a married priest, who has the duty of union with his wife, is at the altar chanting mass; what if his wife comes in the middle of the service and demands her conjugal rights, there and then? Should he listen? Certainly not, because in this kind of case she can wait till the end of Mass and a more propitious occasion. But what if this is not possible, what if the Saracens or others are outside the Church and will kill anyone who leaves? What if they are battering down the doors? Then it is permissible to couple in the sacred space of the Church. In my opinion, the husband must perform his duty.\(^9\)

Invention was here the mother of necessity. Or take John Fortescue, the English Lord Chief Justice of the mid-fifteenth century who devoted an entire book to the question of whether a woman could be monarch. The answer, delivered with downcast eyes, was that according to divine law, natural law, civil law, and common law, in that order, women were unfit to rule.\(^{10}\) Because law, the plurality and plenitude of the rules of life, the learning married to a dual *nomos, utrumque ius*, could answer all questions, interior and exterior, real and imagined, nothing was outside its scope.

The other surprising feature of Dr. Duck’s anecdote is that it is relayed in relation to common law. Sure enough, Fortescue, writing prior to Henry VIII’s throwing off the shackles of Rome and reinstituting an Anglican church, prior to the Reformation and the English settlement, might well speak of Roman law in the Latin tongue. That is understandable. He didn’t


know any better. But shouldn’t the seventeenth-century lawyers have been using the vernacular and avoiding all and every tincture of Normanism, as they liked to call it, as well as the sophistries and endless glosses of an archaic and foreign, inkhorn and hotchpot Roman law? And the answer again, but somewhat counterintuitively, is no. The ideological distance that the common lawyers, and Edward Coke in particular, for he was the great juridical chef of England’s customary norms, put between the Anglican and the Norman was little more than window dressing used to cover over the Roman structure and Latin reason of the two imported laws. A monotheistic faith, the same catholic God, though now claimed as English and not Roman, was still the source of all norms and the progenitor of the reason and modes of ruling that the common-law casuists promulgated.

Put it like this, and fondly. Just to press it home, to state the obvious but invisible: the order of instituted life, the rules of morality and judgment did not change overnight. Traditio is tradition, custom continues, the antique order or longue durée remains as the nomos of merely visible institutions. John Jewel, the most famous and expansive of the defenders of the English settlement, of the new “old” English order and law put it like this: “We have overthrown no kingedome, we have decayed no mans power or right, we have difordered no commonwealth. There continue in thir owne accustomed state and auncient dignitie the kinges of oure countrie of Englane.”

And there is plenty more to that magniloquent and mellifluous effect. I will get to it shortly but want initially to note that the immediate causes of an apparent break, of an Anglican separation, of a new and different local law are underpinned by a much more strident and structural continuity. It is what the Anglican academic, lawyer, physician, and divine John Favour referred to tellingly as “antiquitie triumphing over novelie,” and he then adds that “antiquitie hath no bounds, no limits, it signifieth the age of indefinite time.” And this has to be the case, curiously poetic though it now seems. The source of authority, of all canons and laws, “cannot be evaluated externally or temporally, but only according to the will of God” (non est tempore aestimando, sed numine). Where Nietzsche took the view that understanding the classics required a head for the symbolic, the Anglican lawyers went a step further and intimate that to understand the origin and so the meaning of law your head had to be in the clouds—in nubibus—wet with God’s tears.

This is distant but emotional stuff. It has too often been forgotten or at
least covered over. There is a power and affect, an attachment and intensity to law, a nomistic force that exceeds what we generally view as the appropriate form of serious public discourse, its manipulations of reason, and its making of cases both for friends and for war. Judith Butler notices this briefly in remarking that law “becomes the object of passionate attachment, a strange scene of love,” but she misses the history that informs that passion, its ordinariness, its sanctity.  

Pierre Legendre writes more expansively of the interlacing of desire and dogmatics, of the jouissance of power, the love of the censor, and of the nomos inscribed historically in our hearts—the jurist in the unconscious. I want to fill that in and indicate in rhetorical and argumentative detail what that affective history means for contemporary discourses of law and for the new forms of casuistry, our current cases of conscience. In moving to that topic through a little further foray into local legal history, let me just note an initial discursive feature of the fond exposition of the origin and authority of law. It is placed in the clouds, in indefinite time, in the bosom of God or, as common lawyers put it, in the immemorial, in a “tacit and illiterate consensus,” in a time beyond the memory of men. Note the rhetorical features of this justificatory discourse. There are already a few hints of the declamatory, a suggestion or two of bullshit. They rely heavily upon figures of disorder, hysteron proteron, the preposterous or invented, as well as upon metalepsis, upon the “far fetched” as George Puttenham puts it, upon causes treated as effects. The projective distance of the origins signals a different reality, another order of causes, and with it a preponderance of figures of fantasy: chronographia or the counterfeit of time, topographia or description of imaginary places, and finally noema, the figure of close conceit, of an esoteric knowledge, a private or initiatic reasoning.

Common Law

Straight to the point. Anglican law too is a dual law, both canon and common, ecclesiastical and civil, spiritual and temporal. That is not its dif-


18. For reasons of ease and authority, coolly displaying my own tendency to the “far-fetched,” I have used the Renaissance lawyer George Puttenham’s rhetorical treatise, *The Arte of English Poesie* (1589; Menston, England, 1968), pp. 141, 152, as my source for all the figures referred to here. There are various reprintings.
ference from the Roman tradition that the erudite Dr. Duck extols and expounds in relation to England. There is however a key point, a possible site of misunderstanding, a curiously English moment in the relay of the classical tradition. I will draw it from a text published well after the Anglican settlement and the establishment of the Church of England—a fond and subtle text by the lawyer and judge John Godolphin, the *Repertorium canonicum* of 1678. Here is what he opens with. First page, line one, preliminary words for content. He states unequivocally and very directly that you understand nothing of common law or Anglican government if you have not read and noted the question that Henry VIII put to the two universities in the early 1530s, namely: Does the Roman pontiff have any greater legal authority than any other external bishop in the kingdom of England? The answer given by the king’s academics being negative, the Act of Supremacy was subsequently passed, and, as Godolphin continues, if you do not take note of that act “all that follows would be but insignificant and disfigured Cyphers.”

Godolphin’s point is that ejecting “the Roman Pontifex, and annul[ing] his Usurpation” fused the Anglican church and state, spiritual and secular within the figure of the crown or sovereign. The head of state was from then on head of the church. The sovereign embodied not only “all the Priviledges and Preheminences” incident to the church but also demanded obedience from clergy and laity alike. With foreign power dissolved, it followed that “the Supream Civil Power is also Supream Governour over all Persons, and in all Causes Ecclesiastical” (*RC*, p. 2). This rule, he continues, is of inordinate consequence because it places matters of conscience, of conduct and faith in the hands of the sovereign and from there in the hands of anyone who holds their position *delegatus maiestatis*, as a delegate of the supreme governor, or at the enjoyment of the sovereign. The various offices of government and rule all stemmed from and in their lesser forms embodied a dual polity, a spiritual and secular jurisdiction. It is a point of constitutional significance that the jurist Thomas Smith formulated most graphically in declaring that “no man holdeth lande simply free in Englande.” He explains that “all free lande in Engelande is holden in fee or feodo, which is asmuch to fay as in *fide* or *fiducia*: That is, in truft and confidence, that he fhall be true to his Lorde of whom he holdeth it. . . Thus all faving the Prince be not *viri domini*, but rather *fiduciarii domini*, or *poffefiores*.”

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property are all held by dint of a faith or truth that exists in the very soil, that is literally the law of the earth—*lex terrae*—and the very lifeblood, the decorum and the dignity, of the institution. It is a forgotten point. Lawyers don’t do much history now. But the language of law remembers, and hence property is still held in fee simple or fee tail. Our students learn it, but they are neither told what it means nor asked to comprehend or take account of how these fees, these antique and continuing fidelities underpin and support the authority and *arbitrium* of the legal system. No. They learn the fifty-minute hour and that fees are what you earn. A fee simple is easy money, a fee tail involves some work.

The immediate question is that of how this language of juridical piety and legal fidelity gets incorporated into the body of law and gets expressed in its modes of argument and rules of conduct. It is clear in general terms that the dual legal function had direct expression in the general jurisdiction of common law to watch over the interior of its subjects, to act expressly as a “nursing father” in one felicitously open declaration, and to be *specula pastoralis* or watchtower over its subjects’ souls. So much is clear and general. A *nomos* if you will that gets passed from the bishops to the judges. As to the rules determinative of interior decisions, of conscience and moral conduct, the clearest guides, the original though departing sources are the clerics and the treatises on conscience. They go back to Richard Hooker and the *Lawes of Ecclesiastical Politie* of the turn of sixteenth century. He was preacher to the lawyers at the Inns of Court. Edward Coke would listen raptly to his sermons. Hooker was pretty much both theorist and architect of the early modern version of what English jurists felicitously enough call the unwritten constitution, by which is meant a self-restricting temperament, an invisible or faith-based law. He was the harbinger of a new casuistry, its second invention, the new old order of governance that now passed to the common lawyers and thus to the other branch of the king’s courts. And here, as elsewhere on questions of conscience, it is the detail that is significant. We need to look to ecclesiastical lawyers and the tradition of their laws. What do Christian lawyers—princes or presidents—learn when they go to church?

Start with a reformed alcoholic who became one of the most strident voices in the war against images. Maybe stained glass, statues, paintings reminded him of his youthful bacchanalian hallucinations. Of time spent in the dank ditches of Cambridge. We don’t know, but history does relay that

21. The source has a mouthful of a title but I will give it in full because it is instructive: Roger Coke, *Justice Vindicated from the Falfe Fucus Placed upon It by Thomas White Gent., Mr Thomas Hobbes, and Hugo Grotius: As also Elements of Power and Subjection; Wherein Is Demonstrated the Cause of All Humane, Christian, and Legal Society* (London, 1660), pp. 88–89.
William Perkins picked himself up from his spirited stupors to write innumerable texts on casuistry, law, and the proprieties of judgment. Writing soberly and quickly he is an excellent initial guide. We start with faith. This is the principal axiom of the reformers of conscience. The priority of the text, sola scriptura, has its underlying justification in the principle of faith, sola fide: casuistry or bust. In good Augustinian fashion, the priority of the text brought the subject into proximity with God’s word. Faith, the relation of the individual’s conscience to divine expression, would do the rest. No need for Catholic glosses, priestly interpretations, or tradition. In the primary instance the subject knows and the subject will judge. Here is how it goes in Perkins’s etymological argument: “Scire, to know, is of one man alone by himselfe: and conscire is, when two at the least knowe some one secret thing.... Therefore the name... conscientia, Conscience, is that thing that combines two together” and that combination “is onely betweene man and God.”

So conscience means knowing together with God. God’s knowledge in us, our ability to hear and use what the spirit emits.

If we carry God’s voice within us, then introspection is all we need to determine, to judge what is well done and ill done, good and bad. As simple as that: a court in the soul, an interior forum, “a little God sitting in the middle of men’s hearts, arraigning them in this life as they shall be arraigned for their offences at the tribunall seat of the everliving God in the day of judgement” (DC, p. 9). Conscience is here and expressly the fore-runner of the last judgment, the harbinger of doomsday, the Other’s decision in me. And there is no doubt in Perkins’s text that all else follows from the prescience and the power of this foreknowledge. The giver of the law is inside us. The command of this law overbears all others because my relation to God is in the end all that matters; there is only one Lawgiver, only one law, only one cause of salvation or destruction in the longer term. The superior authority and prognostic power trumps all secular laws; the secret knowledge held in combination with God determines what is to be done: “Example, I. God commaundes one thing, and the magistrate commaundes the flat contrarie,’ and who should be obeyed? The answer is God alone (DC, p. 11).

There are certain peculiarities to Perkins’s interior choreography and the knowledge it produces. There is the inscrutable secrecy of the interior decision, its singularity, and its singular dependence upon the divine voice, a speaking law or lex loquens within the soul. There is next the curious desire

to frame conscience juridically, to make the inner God a judge and the soul a candleless theater of justice. It is in one sense a last resort, a residual jurisdiction and claim against the encroaching power of the secular, of sovereign and state, but it is also an inversion or upending of the apparent law, the visible order of the diurnal realm. The kingdom of belief takes precedence over positive law and over secular reason. It could not be otherwise according to the later and vast systematic work of Dr. Taylor because God’s law is “not in tables of stone or phylacteries on the forehead, but in a secret Table: The conscience or minde of a man is the preserver of the Court Rols of heaven” (DD, p. 8). Again note the judicial quality of the conscience—depicted variously in the later text as judge, guide, pedagogue, and corrector—and its secret transmission or passage by the light of faith. The good man, we are told by Taylor, understands the things of God “because God’s Spirit by secret immiffions of light does properly instruct him” (DD, p. xix).

The heliotropic metaphor of light plays a crucial role in both Perkins and Taylor. Consider the latter, whose polemics are if anything more pronounced. The new casuistry, the reformed Anglican code of moral conduct and of social practice, dispels “the thick and long-incumbent darknefs,” the shadows and the Evil spirits that Roman Catholicism has deployed to prevent the faithful viewing “the whole Light in all its splendour” (DD, p. i). The light of the Spirit, the “secret immiffions” of divine instruction counteract and combat a world of darkness, of temptation, sophistry, and betrayal. The civilians, the Romanists, and the intellectuals have hidden the light, betrayed the cause, and clouded reason with fine and unnecessary distinctions. Against such institutional and intellective hazards the best defence lies in the clarity available by dint of the fact that “there is to every state and to every part of man given a proportionable light to guide him in that way where he ought, and is appointed to walk” (DD, p. 42). It is this light that allows the spiritual being to make his way: “Faith is the eye, and the Holy Spirit gives the light, and the word of God is the lantern, and the spiritual and not the rational man can perceive the things of God. Secreta Dei, Deo meo, & filiis domus ejus. God and Gods secret ones onely know Gods secrets” (DD, p. 43). It is initiate stuff, a rallying call to the faithful, the first inkling of a casus belli or generalized call to war against darkness, which here means against those who exist “without the law” and “without the Gospell” (DC, p. 17). They lack conscience, and their ignorance leads inexorably to their damnation.

There is much more to be traced, details and variations, but the dialectical structure of the argument is reasonably evident, the rhetorical figures common and repeated. Light against darkness propels us into a classically antirrhetic domain of polemic. The figure of antirrhesis is that of founda-
tional discourses against enemies, heretics, those who threaten our kin. That is the definition of a profound, indeed structural mode of antagonism, as well as of a classically imperialistic intervention. Truth is pitched against sophistry, gospel against mere words, law against sin. Discourses emanated endlessly with titles using words like *debllacyon, apology, confutation, refutation, blast, counterblast, weapons-salve*, and other indicia of injury or dismissal. As the discourses and figures are concerned with spiritual diction and its invisible law, its secret truths, it follows that there is a variable geography to this numinous discursive endeavor. That the law does not inhabit a territory—*ius non habet territorium*—was a key medieval maxim precisely because it recognizes that *nomos* in its most foundational moment belongs within a purely iconic space, within the evanescent cartography of thought, prior to exterior things or places. The relevant figure here is that of aposiopesis or of breaking off. It is the supreme characteristic of monotheisms that they divide the world and rule through a dynamic of initiation and excision, approbation and censorship, orthodoxy and heresy. There necessarily comes a point where law takes on its higher meaning, its spiritual aura, and ends further debate through aposiopesis. Faith, which Perkins at one point rather wittily defines as “perswasion, whereby we believe things that are not,” makes its final pronouncement (*DC*, p. 6). Faith informs reason, or, as Taylor puts it, God tells us what to do. And that more or less ends discussion and offers the sole option of choice between light and darkness, accession or war.

**Casuistry and Law**

Faith and common law are intimates and intimately entwined. The Renaissance lawyer William Fulbecke puts it nicely in his aptly named *Direction or Preparative*: “religion, justice and law do stand together.” If we attend now to the secular lawyer and to the vocational curriculum, the message remains familiar and interestingly detailed. The inseparability of law and religion is rehearsed through its abuses: “A wise man without works, an old man without devotion, a young man without obedience, a rich man without alms, a woman without chastity, a gentleman without virtue, a contentious Christian, a proud beggar, an unjust king, a negligent bishop, a congregation without discipline, a nation without law.”

Notice the detail, the rule of conduct, the legal concern that practice be governed by the spirit, that faith inform deeds, and law provide guidance and governance of action. The common lawyers, the *iuris periti* or legally wise were always in on the act.

and concerned to regulate conduct from the inside and according to the law of the heart.

Common law necessarily has a dual function. Fulbecke again is illustrative. He defines conscience: “for conscientia is cordis scientia, and no reason will require that a lie, by any distinction, should be preferred before the truth.” As to the truth, it resides properly in the “reason and conscience of a lawyer . . . and it is a frivolous dream to think, that a lawyer hath one conscience as a lawyer, and another conscience as a Christian. For he hath but one soul, and knowledge of the truth, and therefore but one conscience.”

Monotheism requires this unity of truth, this singularity of purpose and judgment. It lies at the root of the tradition, and it suffuses all later theories of the sources, justice, and conscience of law. Even when the seventeenth-century lawyers claim the separation of church and state, of the theological and the legal, of conscience and the law, such distancing of the juridical from its roots takes place within a unified jurisdictional framework and within a monotheistic and singular conception of legality.

The emphasis of authority or credit changes. The judges challenge the power of the sovereign, the common law courts seize the jurisdiction of the ecclesiastical courts, but these transitions are internal to a monotheistic unity of law and its conjunction of religion, justice, and legality. I will address this now and finish the historical excursus, the retracing of the intimations of the longue durée, by looking at some hard law.

The argument is often made that modernity and modern law in particular are marked by the separation of conscience and secular rule, morality, and law. This is not usually a technical argument—the eruditae indeed don’t give it much countenance—but rather a political claim. There was no revolution in England. There was no overthrowing of the church; simply, and as we saw, there was an absorption of the ecclesiastical into the secular, of canon law into common law. With that annexation of the foreign jurisdiction came a shift in emphasis and in the location of the spiritual power and casuistry of conscience. Canon and common law changed their places, moved institutional location, took on new guises, but the principle that all are sub Deo et lege remained. Now, however, the books of common law be-

24. Ibid., p. 87.
25. The most expansive treatise on jurisdictions—ecclesiastical and secular, in that order—is the aptly titled Joannis Baptisae, Cardinalis de Luca, Theatrum veritatis et iustitiae (Cologne, 1691). Book 1 divides totus orbis into dioceses or districts.
26. This argument is made most strongly by David Saunders, Anti-Lawyers: Religion and the Critics of Law and State (London, 1997).
27. See Edmund Leites, “Casuistry and Character,” in Conscience and Casuistry in Early Modern Europe, ed. Leites (Cambridge, 2002), pp. 119–33, showing how the common lawyers in the seventeenth century actually became the repositories of conscience.
came the scripture or first mode of access to spirit and rule of conduct. The common law became supreme and its texts partook of the power that previously had been located externally and exclusively in the Bible and the patristic writings. Now there was a new ratio scripta or written reason to contend with, and we can find it starkly and brilliantly illuminated in an early seventeenth-century judicial text on studying law.

John Doddridge, sometime justice of the King’s Bench, in a work published in 1630 but authored a few years earlier, directly addresses the status of common law as opposed to experience. Common law is historically a customary system, an oral and unwritten tradition, a manipulation of sovereign and judge rather than a textual affair or ratio scripta. That is the history, but the Reformation brought the text to the forefront, and I will argue here that the lawyers, in inheriting the ecclesiastical jurisdiction, also took over a different and more Roman sense of text and textuality. Here Doddridge is extremely informative. The relevant maxim is: “Matters de Record import in eux (per presumption del ley, pur leur hautnesse) credit”—matters of record are of themselves (by presumption of law, on account of their antiquity) to be believed. He then explains the meaning of the presumption by stating unequivocally that records are quite simply true and cannot be denied. This is so even where they “containe manifest and knowne falsehood, tending to the mischief and overthrow of any person” (EL, p. 200). The illustration that follows is of erroneous outlawry, referred to as Assize 38.

A group of persons were outlawed in an action heard before the King’s Bench. Their names were certified, and their goods listed as forfeit in the Exchequer. One of the names was entered in error. A misprision, as it was then called, of the clerk to the court. The individual’s goods were seized, and he in turn issued a writ out of the Exchequer demanding the return of the goods on the grounds that he was not outlawed. To support his claim the falsely outlawed individual came to the Exchequer in the company of one of the judges who had been sitting on the King’s Bench when the writ of outlawry had supposedly been issued. Justice Greene testified that the petitioner had not been outlawed and that the certification was in error. It was held by Skipworth J. that the justices would now record the contrary, but that “they could not be permitted, nor any credit . . . given thereunto, when as there was a Record extant, and not Reversed, testifying the same outlawry: ye, the Law so mightily upholdeth the intended Credit of a Record, that it preferreth the same before the oathes of men” (EL, p. 200). It seems harsh and it would appear to go against conscience, but in fact the presumption is primarily procedural. Oral testimony cannot disprove written records. A version of it ain’t necessarily so. A procedure has to be followed for the reversal of the misprision, and it required a writ of error
directed to the Exchequer to remove the records for examination and review of their authenticity. In essence it was very hard to rectify records, but it could be done. Equity would have to intervene and mercy mitigate the rigor of law or, as the Year Books liked to put it, no one leaves the Court of Chancery without a remedy.\(^{28}\)

Doddridge’s example is a strong one. Records, like the scriptures themselves, have a special status. They are presumed true. Elaborate procedures are necessary to inscribe the records, to table the rolls, let alone to alter or amend them. They belong to one order and system, that of authorized texts, whereas speech and the voice of experience belong to another, and there are rules that govern the transition between them, the entry into the veridical and the legal, the symbolic as such. It is this salient strength of records that Doddridge and then Coke and others later relayed and exhorted. Listen to Coke, if you have the patience and believe in writing: “It is called a record, for that it records or bears witness to the truth. . . . It hath this sovereign privilege, that it is proved by no other but by itself—monumenta (quaes nos Recorda vocamus) sunt vetustatis et veritatis vestigia—a record is perpetual evidence.”\(^{29}\) And there is much to that effect in Coke and his contemporaries, the sages of common law. The record is an act judicial, entered in parchment in the right roll. It is inscribed, tabled, ritually locked into the holy libraries, the sacramentorum latibula of law.

My next example, Marriot and Pascalls Case, has to be read in this light. It is again a case about writing, about the social relation to textuality, the power of scripture as the visible form of law. It concerns another instance of misprision. The question was whether a lease was void for being put in the wrong name. The misnomer in question was an error in the Latin used to describe the hospital that was the subject of the lease: “de Savoy” in the founding grant was replaced with “vocat. Le Savoy” in the lease, which is different and caused the lease to fail in an action before the Court of Exchequer.\(^{30}\) The record had to be followed to the letter and that meant that if “vocat. Le Savoy” did not refer to the hospital in question, if it was not its proper name, then there was no lease of the hospital.

In the course of discussion the judges distinguished private understanding from legal knowledge. They cited a case

where a man killed another in the presence of a Judge travelling on the way where the murther was, and at the next assises in the said county before the same Judge, another man is indicted of the same murder, and

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\(^{28}\) “Nullus recedat a Curia Cancellariae sine remedio” (Year Book 4, Henry 7, fol.5a).


\(^{30}\) The argument is that de “is a matter of certainty and location,” while vocat, is a “matter of reputation” (Marriot and Pascalls Case, 1 Leonard 164, 162; 159 Eng. Rep. 151, 149).
arraigned, and convicted by verdict; in that case, the Judge he ought not
to carry himself according to his private knowledge... to acquit the
prisoner, but all that he can do is to respite judgment against the party,
because of the Judges knowing to the contrary, and to make further re-
lation thereof to the King for his pardon of grace for the party.

The reason given is that “the record is your eye of justice, and you have no
other eye to look unto the cause... but the record.”31 Again, however, this
is a principle of procedure, a question of the proper manner of contro-
verting a jury verdict and overturning the record. It is not a question of
denying conscience or of the Judge being without means to give effect to
his knowledge of what happened. The judicial task is very clear. This secret
knowledge implies another jurisdiction. To “respite”—meaning to provide
asylum from the decision—the judge has to make a transfer, go to melior
lex, to equity, or make an appeal to the sovereign and overturn the holding.
Similarly, to confirm the point, the misnomer in the lease could not simply
be gainsaid or struck out, but rather proper procedures for reform of the
transcription error needed to be followed. Thus and conclusively the ques-
tion had to be determined by calling up the records from the chirographers
(drafters) office, and if there was a defect or slip it was to be reformed.

Far from supporting the argument that common lawyers had adequately
and successfully separated truth and law, conscience and judgment, the two
cases indicate the contrary. Truth and conscience enter law. The text be-
comes the truth, and only certain rare and inaccessible procedures will allow
for its revision according to conscience or the truth of experience. Equity
will overturn an improper outlawry and a false conviction. The experts, the
chirographers, will allow for reform of a document, but the jurisdictional
writs that stole cases from the ecclesiastical courts to the common law must
be allowed to have their play. That is what the cases indicate, and the last
and most famous example, Cook v. Fountain, decided by Chief Justice
North, is to the same effect. It also concerns a presumption, but here it is
one relating to the creation of a trust. Trusts, and this remains the law, must
be proven rather than presumed. The judge or chancellor in equity cases
cannot simply invent or imagine a trust and so “construe or presume any
man in England out of his estate.” It is not enough to assert friendship or
kindness and a “secret trust.” Conscience as expressed through the sworn
belief of the petitioner, “conscience as is only naturalis et interna,” has no
place in courts of law, nor will it determine the disposition of real property.32

This simply affirms the Statute of Frauds, legislation requiring (among

31. Ibid., pp. 162, 149.
32. Cook v. Fountain 3 Swans. 592, 600 (App.) (1672).
other things) proof of certain kinds of contracts in writing, which passed
into effect in 1677, five years after the decision in *Cook v. Fountain*, and it is
to exactly the same effect. Without proof, the assertion of claim in relation
to contract or other disposition of property will be unenforceable for fear
of fraud.

Much as common lawyers might transiently have aspired to separate
spiritual and secular, Salem and Bizance, the aspiration remained exactly
that: a hope, a dream, an imagining that the dawn will sweep away. As Go-
dolphin, writing at exactly the same time as the Statute of Frauds, put it,
questions of the conduct of conscience are questions of law that judges ap-
pointed by the sovereign will now decide. It is an interesting case of faith
and specifically of what the Roman lawyers termed faith in instruments—
de fide instrumentorum—meaning belief in writings and official records.
There is a common law presumption in favor of records, and it is hard to
rebut. It is an article of faith, a first stand in the war of interpretations, but
it is not the ultimate arbiter. The presumption can be overturned. Con-
science can intervene and equity provide a remedy that reforms and even
contradicts the record. It is simply that it will not be done lightly, it will not
be proven easily, and it will not be successful very often. That is because
lawyers hold great store in their instruments, and much faith is expended
in their promulgation and interpretation. The rules of conscience, in other
words, become incorporated by presumption into the texts of law. Faith in
law is presumed to be in harmony with moral theology and ecclesiastical
canons. Yet where they conflict conscience will always take precedence over
law.

**The New Casuistry**

When casuistry returns, it always returns in its old form. Nothing new
in that. The Reformers castigated the Roman casuists and then reinvented
the old casuistry in the guise of a Reformed method. The great rallying call
of the second casuistry was that the individual should be ruler of his own
conscience. The church should facilitate such autonomy by making the rule
book of conscience, the Bible, available in the vernacular and open to each
individual to interpret and apply. And yet the guide for the perplexed that
Taylor published, at least the edition I have—formerly property of the Lon-
don Borough of Lambeth Library—is 1157 pages long. The pages in question
are themselves just over a foot tall and seven and a quarter inches wide.
About one and a half times the page size of a contemporary book. Which
leads me to suspect that even if good citizens were equipped to trawl their
way through the Greek and Latin antiquities that smatter the text, it is un-
likely in the extreme that anyone other than a professional would make their
way through these treatises, let alone make much sense of them as a guide to conduct. Which is to say that it is really not much different from the Roman casuistry that it claims to debunk and replace. These Anglicans were hardly abolitionists. They proposed obedience as the mode of interpretation: “obedit & intelligitis, If ye will obey, then shall ye understand” (DD, p. 43). They gave the determination of right and wrong back to the priesthood; they simply issued a new edition of the rules of casuistry hoping in part for better sales. They were in all very canny dissimulators. They pretended not to be ill of the casuistic virus while at the same time rein-stating it.

The common lawyers pulled a similar sleight of mind. They claimed to "way through these treatises, let alone make much sense of them as a guide to conduct. Which is to say that it is really not much different from the Roman casuistry that it claims to debunk and replace. These Anglicans were hardly abolitionists. They proposed obedience as the mode of interpretation: “obedit & intelligitis, If ye will obey, then shall ye understand” (DD, p. 43). They gave the determination of right and wrong back to the priesthood; they simply issued a new edition of the rules of casuistry hoping in part for better sales. They were in all very canny dissimulators. They pretended not to be ill of the casuistic virus while at the same time rein-stating it.

The common lawyers pulled a similar sleight of mind. They claimed to rid the public sphere of the malignant influence of Roman governance and the sophistries of canon law. In fact they simply made those influences and those sophistries their own. They denounced them as Roman fictions and then claimed them as part of a much older Anglican law. What Jean-Luc Nancy terms the war within monotheism gained a comparable legal expression; it lived on in the genre of law. The enemy back then was Rome, but the project was not in any way to get rid of the law, only to annex it and make it Anglican. Thus the common lawyers even claimed the principles and interpretative methods of the older laws in their original Greek and more usual Latin forms, which should have immediately given their foreign sources away. But casuistry is esoteric in the sense at least of being secretive as to its methods and in essence authoritarian in its applications. The casuist teaches obedience to the rule and reverence for the proper interpretation, that of the sovereign or of his or her delegates, those whom Hooker promoted as our “Directors.” Best to follow them unless they are patently unjust and demand acts contrary to conscience, in which case, as even the secular precedents relay, it is to equity, to the other branch of the learned profession, and finally to the sovereign’s grace that we make our remonstrations. Under what conditions then can strict law be breached and conscience given reign?

Start with Perkins. Where conscience and law conflict it is no sin to omit acting according to law. The reason is that the ends of faith override the letter of the law: “the necessitie of the lawe ariseth of the necessitie of the good end thereof” (DC, p. 35). The logic of this apparent invocation of an-

33. The principle goes back to Augustine’s De doctrina but is made English and properly Anglican in John Hooker, preface to Of the Lawes of Ecclesiastical Politie (1593; London, 1617), n. p.: “In our doubtfull cafes of Law, what man is there who feeth not how requifite it is, that Profeffors of skill in that faculty be our Directors? So it is in all other kinds of knowledge.”
omie is that the greater reason lies within the article of faith and not in the letter of the law. Perkins gives a very standard example: a law prohibits opening the gates of the city in time of war. This is to protect the citizens. It turns out that one citizen, happening upon declaration of war to be outside the city, is pursued by the enemy, and in mortal danger runs to the gates. The question posed is whether it is lawful to open the gates. The answer is yes; the end of the law is not harmed by this infraction but is rather furthered. Dr. Taylor takes the same view but offers a more expansive analysis.

Deep in book 3, Dr. Taylor is busy, in full flight even, discussing the important casuistic question of whether the “Legislator hath authority to dispense in his own laws for any cause?” Dispensation here means a declaration that the laws in certain cases do not bind: “Dispensation differs from diminution in that [it] is wholly by the will of the Prince” (DD, p. 423). It is an act of “grace and favour” that releases the obligation of law for a person or a community. It is not equity, which is a different and better species of law (melior lex), nor is dispensation predicated upon necessity, but rather upon probable arguments that please the prince. The next question, much debated by civil and canon lawyers, is whether a dispensation can be unjust. Answer: no. “For since the cause need not be necessary, but probable, it will be very hard if the Prince can find out no probable reason for what he does” (DD, p. 424). The law is suspended for extrinsic reasons because it has become an impediment to a greater good, to which Taylor adds a maxim from Cicero: “The opinion of the subject can never overcome the opinion of the Prince in those things where the Prince is Judge” (DD, p. 425). The sovereign is the subject’s director.

The suspension of the law, for a greater good, out of grace or favor, cannot be challenged or reviewed. It is a didactic act, a speech act of conscience in its most interior form, that of simple faith or intuition of divine will. The theme is repeated slightly later in relation to the strongest of the modes of suspension, permanent dispensation or abrogation of the law. This is what Giorgio Agamben refers to as the state of exception, the legal declaration of iustitium or abandonment of law. He traces the genealogy in the Roman texts and concludes that iustitium is a time of cessation of law, a juridical standstill, a legal void. He is wrong insofar as the declaration of iustitium is itself an act of law, and far from abrogating all law it simply abrogates civil or “humane lawes,” as Taylor terms them (see DD, 431). What we witness, what needs to be remembered, the reason why theory is often useless without history, is the radical transition from one law to another. If we abrogate

secular law then we are back with God’s law, the law of the sovereign, conscience and nothing more.

The reasons for abrogation are as succinct as they are grandiose: “The caufes of abroging a law are all thofe which are sufficient to make a good and wife man change his mind. The alteration of the caufe of the law, new emergencies, unfit circumstance, public diflike, a greater good: for it is no otherwife in the public then in the private will. . . . The fame power that makes the law, the fame can annul it” (DD, p. 431). And so on, if the ab- breviation of abrogation can be allowed. Now the invisible law reigns, the secret rules of conscience as stored in the sovereign’s breast or the hearts of the wise now dictate directly. Secular anomie transpires to refer to a higher order of law, to rules of right and wrong inscribed in the very sources of nomos itself. Not no law but a different law, to which Taylor adds by way of peroration: “Laws are like the girdles of the Iberian women: if any mans belly or his heart is too big for thefe circles, he is a diffolute and a difhonour’d person” (DD, p. 433). You are one of us or you are beyond the pale, ungirdled, too fat. End of book.36

Agamben addresses iustitium as a radical emptiness, an anomic disorientation generated by the legal void of iustitium. He goes on to elaborate the crowning paradox of a legal act that abrogates law. That takes us some way but no further. It treats iustitium as the inversion of nomos and then postulates eventually that the fictive space between anomie and nomos, between life and law, is the authentic site of politics. He may be right but only if we add that such a fictive space has a long history, both in governance and law, because it is the arbitrium of faith and the law of conscience that rule there. Bare life is a theological fiction. And fiction, to put it more strongly, as the lawyers in their wiser or at least more historically versed days used to say, is the figure of truth—fictio, figura veritatis.37 The aphorism allows us to pick up the theme of the third casuistry, of the new mode of governance and dispensation that marks the contemporary and radical diminution of the public sphere and the current and voluble investment of faith in politics.

Agamben’s blind spot, his resistance to theology, is telling and symptomatically European. The third casuistry is distinctively American and significantly imperialistic. Casuistry is like that, both belligerent and unifying to the exclusion of the uninitiated and the unbelieving. It is a simple and compelling exercise. Just take the earlier principles of the second casuistry,

37. The scholastic maxim addresses the patristic sense in which the figure—image or metaphor—effectuates what it represents: sacramentum, id efficit quod figurat; the sacrament performs what it figures. For commentary on this, see Legendre, Dieu au miroir: Étude sur l’institution des images (Paris, 1994), pp. 203–9 in particular.
the reformed mode of caviling cases, and reformulate them in contemporary, dare we say postmodern terms. Begin with the act of abrogation, or the *iustitium* that Agamben has recoined from obscure early Roman sources. The act of declaring *iustitium*, the case for suspension of law, comes with *tumultus* or tumult. It is a specific case of war, of bad war, a stronger form of belligerence where the public sphere is infiltrated or otherwise threatened by an unrestrained and often invisible enemy. That sounds a lot like the inaugural tumult of the twenty-first century in the West, the attacks of 9/11 and the subsequent building of the *casus belli* as a necessity that exceeded both fact and mere law.

Taylor explicitly says that the sovereign is at liberty to seize upon new emergencies and the greater good as the cause for the abrogation of law. In cases of the exceptional, in new emergencies, in the face of tumult it is the sovereign who can both make and dispense with laws by reference to a power that is necessarily beyond the law. It is a matter of faith, of the intuitions of conscience, “the secret immiffions” of the spirit, and it would be, as Duck reminds us, heresy to imagine otherwise or question such interpretations of conscience as higher law. And thus the first moment of the new casuistry is precisely that of finding a cause by means of which to turn from the visible and factual to the invisible and secretive protestations of faith. Politics is suspended, and with it law—legal right, judicial competence, review of decisions—is placed on hold. A certain standstill or legal lull marks the shift in jurisdictions, the move to theocratic possibilities and their accompanying discourse of faith and faith alone. As long as there is the menace of radical evil, as long as the Beast is lurking, the barbarians at the gates of the city, then in this novel casuistic formation we need as Christians to shift our focus and attentions. The political recedes, the secular and legal is suspended, and in its place we are asked to listen to the inner *nomos*, the higher law, the speech of the father as mediated through his self-appointed son.

And *sola fide* or faith alone can justify many things. Precisely because one cannot see God’s “secret immiffions of light,” because what faith dictates cannot be reviewed, secular law is suspended. Consider then the current sites of the political. It is a matter of the jurisdiction of the global, of the *totius orbis* of both virtual and commodified exchange. Here, or should I say there, a different *nomos* governs. From the perspective of the new casuists this global forum, this jurisdiction or competence of interest, has to be subordinated to faith, to the rule book of conscience, to the true text, its territory and terror. The principle is Gregorian: *Reformatio totius orbis*, which means give the world back its proper form, its emblem, its metaphor. Let dogma—faith—reign. Nothing can properly stand against such a faith-
driven cause. Thus the prior law is abrogated both literally and spiritually. It transpires indeed that secular law is a voluntary jurisdiction whereas the better law is the holy *nomos* and its shock and awe. The institutions of international law are now merely volitional; if you are not with us you are against us. No need to follow procedure, treaties, United Nations mandates, or the jurisdiction of International Criminal Tribunals. They can all be abrogated in the name of the law of the father, in the form of the Patriot Act, patriot itself of course being derived from *patris* or fatherland. The enemy is within and so exteriorize the enemy, make the march to Baghdad, fly to Guantánamo, prepare for Abu Ghraib. And along with these abrogations there is also a certain epistemological *ius titium*, a moment of epistemicide, in which the laws of evidence, the desiderata of proof, diplomatic protocols, or the legal causes of war can also be interned and kept at bay. Goodbye real world, welcome Operation Enduring Freedom, whose acronym, phonetically, sounds like *oaf*. Or even more succinctly put, greetings Thanatos, welcome death.

And it is hard not to get caught up in the lofty inquisitions of faith. Hard not to fear the amorphousness of the enemy, the calculated terror of the infidel or outcast. And indeed if the casuistry works then it is likely to proliferate. So a war on drugs, a war on terror, a war on pedophiles, a war on domestic violence offenders. Zero tolerance for sin and sinners, heresies and heretics. A war against understanding, a war against the holy terror of nuance both internal and external. There is a slippage from loyal opposition to a more fraught discourse of sedition and sacrilege, treason and truancy. Conscience comes to reign supreme. It is its own jurisdiction; it is the higher law of moral rules, of the interior forum and the unwritten text. Lucent emissions combat the darkness. The cause, the *casus belli*, takes hold and particularly so if the war is largely unseen, if the immediate audience doesn’t have to fight it, if it can be relegated to the work of drones and distant images of friendly fire and “acceptable losses.” And, still, a human being died that night, a name was lost, a life—a race—expunged before its time. A case, for them, of the future being no time at all.

**On the Causes of the Corruption of Eloquence**

It is the function of criticism to confront practice with history. If diagnosis is to give way, as politically it should, to prognosis and engagement—to voice, free judgment, freedom of opinions, informed public
debate—then we need to return to our starting point, the question of rhetoric, and the causes of the corruption of eloquence. That is the question that Frankfurt raised, and it is indeed the philosopher’s response to casuistry as such. Frankfurt though confines himself to a single example, telling enough but hardly in a good way. He relays an anecdote about Wittgenstein: Fania Pascal, a friend, had just had her tonsils removed, a painful operation in the 1930s, and upon inquiry by a less than solicitous Ludwig she croaked, “I feel just like a dog that has been run over.” [Wittgenstein] was disgusted: ‘You don’t know what a dog that has been run over feels like’” (OB, p. 24). That is the example, the big cheese, a moral philosopher criticizing a linguistic philosopher’s bedside manner. Ridiculous enough. Not enough.

The example illustrates among other things that the relation between philosophy and the public sphere, between theory and politics, is tenuous and prone to evanescence. The passage from thought to public discourse is institutionally vexed, as well as being subject to the peculiarly specific dictates of audience, market, and the competing media of message visibility. To address that mutable trajectory means facing a different set of questions relating to the institutional supports of the new casuistry and the rhetoric of its persuasion. We need to get intimate with the new forms. We need to know more and not less about the erasure of the law tables. First then the rhetorical history. And it takes the form of a lost text of Quintilian’s, On the Causes of the Corruption of Eloquence. That is a bit obscure, I confess, but the argument he makes in relation to a declining Roman imperium, while it may not be Edward Gibbon, is salient, and it informs the later criticisms of rhetorical decay, of empty declamation and the shrinkage of the public sphere.

Start with the definition of eloquence. Much needed today. Quintilian places his discussion of this question at the end of a lengthy review of the relation between virtue and rhetoric. Those who divorce justice from public speech fail to understand the nature of the art of speech. That is his claim, and it leads him to cite Cleanthes, who stipulates that rhetoric is the art of speaking rightly—“scientia recte dicendi”—meaning the art of speaking according to right and rule. Eloquence is correct speech in the sense of veridical expression, which Quintilian himself goes on to define as the art of speaking justly—“ars bene dicendi.” To speak well, bona oratio, is to speak


40. Quintilian, Institutio oratoria, 2.15, pp. 315, 317.
41. Mathieu d’Artigueloube, “De Mandament de Messenhos Chancelier he Mantenido” (1468), in Las Joyas del gay saber, ed. M. Gatien-Arnoult, 4 vols. (Toulouse, 1849), 2:235. D’Artigueloube begins his poem by addressing all the experts in “Tart de Rectorica,” which is nicely put, combining oratio recta or direct speech and rego or rule.

42. See Brink, “Quintilian’s De causis corruptae eloquentiae and Tacitus,” Dialogus de oratoribus, p. 476.
is salutary on the point: “the true basis of eloquence is not theoretical knowledge only, but in a far greater degree natural capacity and practical exercise.”

Quintilian too is committed to a training that prepares the student for real cases, for actual deliberation, as opposed to an education divorced from practice and specifically one that fails to address the ends of declamation in terms of the morality of speaking before the forum, the law courts, other assemblies, and now also diverse media.

The other aspect of estrangement is both disciplinary and didactic. Corrupt speech is defined initially as affected, divorced from the real, inelegant, excessive in style, licentious in tone, far-fetched in content, often turgid in delivery, and in sum immoral. There is much more that is laid at the door of the fictive style of teaching casuistry in Quintilian’s time, but the key lies in the divorce from the real. The displacement of facts by faith. This is a failing of theory, an institutional and disciplinary defection, an educational ineloquence that gives up on the most vital of all the dimensions of the past, the history of the present. The present is by definition the condition of possibility of eloquence. More than that, just speech is the placement of the present case in terms of its origin and its desired end. It sounds almost trite, but that formulation is simply shorthand for the imputation of a further estrangement. Separation of education from practice is also ineloquence in the sense of disciplinary ignorance. History links law ineluctably to the other arts, to philology, literature, and philosophy or the discourse of ends. Tacitus puts it a touch more grandiosely and much better than I. Eloquence depends upon an appreciation of literature and specifically upon its discourse of ends: “Here is the cradle of eloquence, here is its holy of holies; this was the form and fashion in which the faculty of utterance first won its way with mortal men, streaming into hearts that were as yet pure and free from any stain of guilt; poetry was the language of the oracles.”

So ineloquence, unjust speech, is at root the product of an institutional failure, a product of a pedagogy divorced from reality and estranged from the roots of the disciplines in the arts. Put that in modern terms, which is my project here, and the rhetorical and moral failings of lawyers and politicians, the debased casuistry and the empty declamations, the bullshit that we started with, are to be diagnosed in large part in terms of the failure of law school. Because America is Europe without brakes, because in the U.S. of A. religion is now so audibly a part of politics and encroaching upon law, there is a shorthand way of addressing this issue. What is distinctive about the U.S. law school? Why has it impacted political and public discourse dif-

43. Tacitus, Dialogus de oratoribus, p. 321.
44. Ibid., p. 261.
ferently from its European counterparts, its closest sphere of comparison? Two succinct answers, a double antihumanism: it abandoned the art of law for a science of law, and it reduced the study of rules to the study of efficiency. The first was a late nineteenth-century development; the second belongs to our very own era.

The U.S. law school as a distinctive entity teaching a distinct branch of common law is a relatively recent development. In a story that has been told innumerable times and with only faint hints at any species of critical appreciation, it stems from Harvard law school and the development of the case method of teaching pioneered by the aptly named Christopher Columbus Langdell.45 When European law schools were struggling with the “historical school” of jurisprudence, Langdell came up with a method of teaching law derived from the principles of chemistry. He wanted an experimental science of law and believed that this could be produced and inculcated by teaching individual cases, exemplary cases, from which all the principles of the relevant area of law could be deduced. The case became the pure unit of law, and the library became the laboratory and the only reality that the law student needed. It could have been phrenology, but in fact it was law. Law separated from its history, excised from its context and with all links to the patterns of precedent severed. No end in view beyond the internal logic of the system, the momentary purity of a hypothetical hierarchy and its virtual application in imaginary fact patterns. The law teacher was explicitly to erase their students’ experience, their confidence, their past: “If the instructor can break the student expert down and force a reversal of his opinion and then start on him again and break him down a second time, so that he is forced to admit that his first opinion was right, the instructor will score a considerable success.”46 Erase the subject, break the student down, and break him down again. Empty the disciple of content, reason through hypotheticals, imaginary cases, declamatory situations. Ensure that resistance will be futile. Then declare, then teach the “pure law.” The pedagogy of rigor iuris comes to look a lot like rigor mortis, but later on that.

Stage one: A science of law built around a double artifice of epistemic purification. First treat the case as something sui generis, peculiar and singular, a datum of science rather than an artistic probability or product of history. Then focus upon only a very limited number of individual cases as

46. Quoted in Duxbury, Patterns of American Jurisprudence, p. 17.
if they were the embodiment of the very soul of law, the crucible of every principle. So much so that an entire course, a whole substantive discipline such as torts or contracts or criminal law could be and often was taught through a reading of a single case. A little more courage, a Borgesian twist, and it could be taught from a single word. No wonder in such circumstances that the students endlessly relay how the first thing you do upon going into practice is to forget everything that you learned at law school. You are broken down a third time. To intern means to confine. Forget the facts, even if you were never taught them, join the law. Except that forgetting is a positive and skilled act. What you don’t learn is just as much a positivity as what is inculcated and forgotten. Or, to sum up, an undisciplined and inartistic mode of speech is a fast route to ineloquence and injustice.

Stage two: Removed from the arts to the laboratory, the science of law lacked any intrinsic or inculcated sense of moral or political ends. The student was supposedly a cipher, a palimpsest, or erased tablet upon which the law will now write. The omnipresent Judge Posner is telling on this. Legal education, he announces on page one of the ironically titled *Frontiers of Legal Theory*, “is practical.” You learn “parsing of statutes and . . . of judicial opinions.” That is it. Nothing more. Then according to Posner, after legal education is done, the student becomes a skilled professional by gaining “practical experience as a lawyer with a good firm or in a good government agency.”47 Which is curious semantically and politically. The law student only encounters the good after law school, once drained of purpose and wiped clean of conscience. The firm or the agency will fill in the rest, evidence the good, impose a moral code or in Posner’s view the economic end of efficiency, what I will term the *ecfactic* calculus.48

Put the two stages together. Law school, the Harvard effect, teaches that the lawyer is an instrument, like any other laboratory rat. He or she is trained, as Posner puts it, first to parse and latterly to “work” the system. Theory is on this account both generally “vacuous” and by definition an “external analysis to law.”49 Which leaves a vacuum. An existential and moral void in which the lawyer as parsee must experience an overwhelming subjection to an exterior judgment and law. Posner wasn’t by any means the first to notice that but simply the first to treat that as a supreme good. The idiosyncrasy or indeed flaw in the Harvardization of legal education in

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48. This neologism is taken from the Latin *ecfacio*, one root of efficiency: *ec* or *ex*, meaning “from” or “away,” and *facio*, “to make.” A movement away from making, from producing towards the calculus of what is efficient for those who do not make but consume or profit. A privatizing calculus.
the United States hardly went unseen. There were several attempts to reverse the process and remove legal education from the laboratory, from the blinkers of the case method, from its pure interiority. In the first half of the century American legal realism tried to teach the social history of law by looking at what courts in fact did. But they remained captive of the case; they just looked at what judges did and so at more and more cases. The critical legal studies movement of the post-1960s generation tried to reassess the relation of law to politics and latterly of legal studies to theory and the arts. In the U.S. they failed, or at least they haven’t succeeded yet. A result of corporate buyouts by what were now extremely wealthy vocational trade schools. The sheer force of almost a century of the case method and its extremely cost-effective patterns of training in declamatory techniques derived from insular judgments had produced rigid structures and ingrained practices that a few Left-leaning legal academics could neither match nor destroy. So into the vacuum stepped a theory suited to vacuums: law and economics, a brochure on how to enjoy your vacation from the real. Game theory applied to counterfactuals. The *efactual* dream or something like that.

Here was a theory of law as a science that could be applied fairly effortlessly to any substantive domain of law and that mirrored the case method in being concerned only with the laboratory environment of cases made familiar by the Langdellian revolution. It was theory with a product. A virtual method for analyzing a virtual system of rules. Control for all variables, assume rational actors, and then assess the efficiency of any given rule, judgment, or principle of law. Assume the value of the end—maximization of efficiency, meaning profit, market flow—and then devote your science and energy to evaluating the legal means that will hypothetically foster those ends. It is an interesting enough question to ask, but the method is dubious and potentially insidious. It lacks conscience, bears no relation to history or precedent as the patterning of the past, but it could be sold as a science appropriate to legal education as Langdell conceived of it. A closed method could facilitate maintenance of the closure of the system, its continuing hierophantic status. It helped promote the dubious credentials of the law professor, and perhaps that too is a reason why law and economics took over the law schools and became the dominant theory of how to do law. In the hands of its progenitor and chief populist, the previously mentioned Posner, law and economics is the other of law, the universal criterion, the *efactual* calculus that properly mirrors the neutral universality of jurisprudence, and more specifically the existential void, the exteriorizing of the self that he rather unconsciously proselytizes as the method of studying law.

Law and economics takes over the playing field. Steals the *ratio*. Most obviously it takes law to the market, privatizes legality, and so puts the an-
tirrhetic, the discourse of faith, into the hands of politicians, the last remaining fold of public figures, the political economists whom the market, the lobbyists, the special interests will buy. And for the law and economics types, call them the nomo-cons, this is all as it should be because economics, the ecfactic calculus, should rightfully drive out its competitor arts and most notably law and literature, on which Posner also wrote. Take law and literature as an example. It was the discipline par excellence of false prophets and public intellectual vacuity. It has very little to teach lawyers, he concludes in his book on this nonsubject.\(^{50}\) In a later review essay evaluating a weighty competing text on literary criticisms of law, the judge expands his decision and answers the question “what has literary theory to offer law?” with a laconic “nothing.”\(^{51}\) And then, as if to illustrate my thesis about the new casuistry, the judge and soi-disant top-twenty public intellectual expends significant energy pillorying all and any efforts to link law to political life.\(^{52}\) That would really unleash the false prophets, the erring academic pundits, the others, the theorists. It would be darkness visible.

Conclusions: How to Combat the New Casuistry

I had hoped initially to write a short essay on how the case was John Case, the Renaissance scholastic and I dare say unjustly forgotten author of *Sphaera civitatis* and, more to our point, *Speculum moralium quaestionum* or a treatise on moral questions.\(^{53}\) In fact his text on morals begins with the question of education and usefully supports my synoptic argument above. But John Case is not the case here. His speculations lack the immediacy of the diagnosis of bullshit, and while they are properly educative and indeed “rectorical” they bear only indirectly upon politics and law. You cannot in the end throw Latin texts at contemporary problems. You can learn from them, but what you learn has to be reformulated in practical terms and addressed to the contemporary mode of the casuistic, the current climate of moral governance. To combat the new casuistry requires first an unflinching analysis of the cultural texts that we now inhabit. Then it requires that the declamatory techniques and ineloquence they employ be addressed at the level of their employment. You have to hit back.

First then the lessons of history as they impact the practices of eloquence.

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There is a structure and form to the old casuistry that the new casuistry closely mimics. I have outlined that history and here will only note additionally that the return to a discourse of faith, to the principle of sola fide, is most usually the result of tumult, a moment of perceived exception and consequent declaration of iustitium or abeyance of law. In the common-law world, because theology and with it casuistic governance passed into the hands of the state, became part of the secular law, we have the curious situation of a return to religion that emerges most visibly and vocally in the political domain, in the interstices of the sovereign body, among the lawyers who govern, the most public and exemplary of jurists. The questions of conscience, of determining good and bad, of dictating how to live, were historically fused to law and in times of crisis will reappear in the putatively secular forums of legality—the political stage, the legislature and the media. Their arrival may surprise, but their form is relatively predictable.

The initial sign of transition from law to faith, from text to intuition, comes with the metaleptic markers of another space and time. The governing figure is a variant form of pragmatographia or description of things that are not, a disorder of temporal and spatial location that is generally termed hysteron proteron. A different symbolic order, an alternate reality is promulgated. Under this category we can add a list of more specific figures. Chronographia, the counterfeit of time, the depiction of an imaginary history, in which the dead will rise, as in the Schiavo case, and wars will be won, as in “mission accomplished,” pronounced immediately after the march on Baghdad. Similarly, topographia or the figure of imaginary places is common. Thus, for example, claims that “I have climbed to the top of the mountain and seen the valley below, and it is peaceful,” referencing the Psalms and places of inner peace as exterior political realities. Prosopopoeia or figures of personification, of imaginary people, also fit into this transitional trajectory. Thus the increasingly common invocation of the divine father, as in “God told me to go to war,” or the view of a lesser Bush that a hurricane was a sign of God’s anger. And to this we can add “intelligent design” as a recent recurrence of older casuistic techniques of casting doubt upon reason and its disciplinary elaborations.

What is important is the shift to an exterior cause, an imaginary legitimacy that turns a political and legal question, let’s say the case for war, into a theistic or more technically antirrhetic cause. The shift is also into the declamatory, into what Quintilian termed ineloquence and injustice. It is a change in speech genre, which I have termed antirrhetic or more simply but vehemently polemical. The antirrhetic refers to discourses against sin and against heresy. It turns dialogue into denunciation, speech into the act of silencing the other through a declaration of war, a declaration of the desire
to dehumanize and then atomize the dissenter. The heretic comes in new and mutable guises external to the faith. Thus the terrorist, the drug baron, the violent male intimate, the traitor, the blasphemer, and even the intellectual, anyone who challenges the privatizing of law or the necessary benevolence of the ecfactic calculus. The point is that the category expands, there is no mechanism for controlling its referents, everything gets sucked into the vortex of good against evil, light against darkness, us and them, or U.S. and them, to give it the proper topical assignation.

What is clear with hindsight is that for the new casuists the *casus belli* had no necessary relation to the real. Perkins, as noted, spoke of faith as belief in what is not, and that meaning of *sola fide* strongly supports a view of this old form of advocacy, of making an antirhetical case against an enemy as being intrinsically disconnected from both history and proof. What has to be demonstrated is the evil of the opponent, and historically in the West this figure has included the infidel, the heretical, the Roman, the French, the Egyptian, the feminine, the elderly and ugly hag, the communist, among others. Now the antirhetic blast of light depicts an axis of evil, a terrorist tyrant, a hive leader of subversion, conspiracies, plots, plans of an infinitely benighted influence. In a word, a *prosopopoeia* of Satan, an idolater wanted dead or alive. The idol and his idolatrous practices had to be overthrown as a matter of good triumphing over evil. His statue was toppled, his regime fell, and the new iconic order was declared complete.

Reality, like the repressed, has a blessed tendency to reemerge. The arguments of faith alone eventually have to account for the lives wasted, for the bodies that the mystery has left behind. The antirhetic genre exteriorizes the threat to the foundations of family, state, and law. The exterior will not, however, always be compliant. There has also to be an interior forum, an internal conjugation that can survive the external combat. The exterior invocation of a crusading democracy, of new rights, and of enduring freedom has also to be reflected in a community of visceral or unspoken friends at home. Freedom, ironically, is lexically connected to friendship. The religious brotherhood, the community of the kiss, in a word, the faithful have constantly to define and differentiate themselves. The other face of the new casuistry resides precisely in the initiate rhetoric of interior bonding.

The new casuists adopt the old figures of interior similitude and corporate faith—the *figuralia* not only of amity but also of intuitive knowledge and spiritual guidance from the greatest of friendships with the *amicus mea* above. The best of friends will relay the secrets of God’s knowledge. Closer

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to home in its objects, the antirrhetic becomes more complex, but it is hardly immune to rhetorical analysis or critique. The figure of the friend becomes central. Schmitt was on to this and the cunning of amity. In its more contemporary form, which is nonetheless also a very antique figuration, the friend becomes the key device. Friendship is of and among the faithful. Taylor also wrote a short treatise on friendship that was directly to this point. Amity is a secret knowledge of God and then a “friendship with . . . and to all the world.” 55 The latter and secondary amicability plays out in the form of an *epimone* or repeated invocation of interior connection, intuitive linkage, or absolute confidence in familiars, literally in family and friends. “My true love hath my heart and I have his” is what Sir Philip Sidney wrote and what Puttenham relays of this figure of an interlaced and repeated theme. 56 So take it apart.

There is first the secret brotherhood of friends. They are those whom Derrida even admits will not look at their own history, nor malign or criticize historical acts. 57 They are free of doubt, inspired as they are by an interior likeness, a bond of similarity that allows immediately for disposition of any and all goods and preferments, contracts and profits as part of the already-made *casus pro amico*. Friendship in this model does not require thought. It prohibits reflection because the thinking has already been done. Thus the Anglican casuists simply claim the authorities, the older tradition, the local venue as their own. They can often be persuasive but never that eloquent because repetition masks more than it presents. And so too can the new casuistry and its famous liberality towards friends and the inordinate latitude given to oneself. The intuition that friendship was qualification enough was the modus operandi of the current administration. No one in the inner circle balked until Harriet Miers, a friend without qualification, was proposed as a nominee for the highest judicial office, and even then the more important debilitating factor was not the mode of selection *pro amico* but rather the question of whether she was friend enough to radical Christian causes.

On the other side, the dark side, lies the vast host of the potentially friendless. Not the enemy but the internal opposition. This category is composed of those who do not toe the line, who question, who reprehensibly criticize the activities of the friends. They are characterized as internal outsiders,

57. See Jacques Derrida, *Politics of Friendship*, trans. George Collins (London, 1997), p. 305: “Maligning and cursing, as we have seen often enough, still appertain to the inside of the history of brothers (friends or enemies, be they true or false). This history will not be thought, it will not be recalled, by taking up this side.”
cavilers, sophisticates, elitists who lack conscience or any moral sense of practical conduct. The new casuistry does not have the full-blown status of reformation or recusancy, settlement, or counterreform, but that makes it if anything somewhat more confused. The friends of the new casuists are not part of any obvious set of causes, they are not simply fighting to save the faith from institutional threat, nor are their opponents visibly heretics. That stage of public exhibition of religious belief is not yet upon us, but it is not far away. The hidden history of common law, its narrative of the annexation of faith to law, of the ecclesiastical jurisdiction to that of positive rule still presses against the repression barrier, and it requires only a little translation for the rules of conscience and the axiom *sola fide* to become part of the discourse of the polity.

The appointment of friends thus has a theological character. It may not be self-consciously the case, but it is sufficiently repeated to form a pattern. On the other side, the need to distinguish friend from opponent has also to be converted into a matter of conscience. The old guidebooks have to be renewed, and thus the circle of friends, the executive, and the government define themselves in terms of the moral nature of their causes; those outside these causes become obstructions to truth, the promulgation of an alternate reality. The legal governance of interior conduct returns as a motor for the creation of conflict, for the antirrhetic within. Here witness the move to abolish reason and teach “intelligent design.” Or the issue of gay marriage in which the religious rite of nuptials is challenged in secular courts and in the displaced form of attacks upon civil ceremonies of union. As if they were the same thing—and of course they are in the mind of the new casuist. There is no such thing as a merely civil union simply because the jointure of law and state, the first thing that Godolphin requires that we learn in the history of common law, the lodestone of its interpretation, was an originary sovereign act that placed the lawyers in charge of the soul.

The friends need their enemies within. They are driven to expend considerable energy depicting their face, their ugliness, and their immorality. They kill the unborn, they walk in error, they tend to unbelief and to sedition. You can make your own list, figure out the tabulations and correspondences. I am on to something new. First point: You cannot combat the casuists unless you know something about their modes of argument and their articles of faith. A war of the spirit cannot be won on the ground. Sad fact of political life.

Nicephorus, author of the original *Antirrhetici*, a ninth-century discourse against iconoclasts, remarks early on that all crimes are crimes against the image. It is a useful reminder that when it comes to the

new casuistry and its polemic between the virtue of friends and the anti-portrait of opponents, the discourse is lodged, either expressly or more likely implicitly, at the level of persuasion and hence also at that of images. The fight is not to win by mere argument but to demonstrate a case in a much older sense, that of showing what cannot be seen, that of entering the domain of images and implanting this image, *haec imago*, in the subject of law. The second casuistry was expressly a war over images, control of images, the licit representations of God and world, of prototype and circumscription, and there is good reason to believe that the new casuistry is equally to be interpreted as a battle over images. The fight now is over different media and most obviously over the representations of the causes of war and now of the fighting of the good fight. Image is everything in the rhetoric of persuasion, and the theological history of images and of the struggle to invest and relay them now works to political effect. The image is the perfect transitional object, the veritable express away from facts to persuasion and casuistic declamation.

To combat casuistry requires first understanding it and then deflating it. That is a historical and critical enterprise. The surprising part of my argument is that it is initially a scholarly question and a matter of educational politics. I suggested that legal education might well be an exemplary instance of this failure of education that supports the renewal of casuistry. Law and economics trains professionals in name only. The student is broken down and broken down again. Taught to parse, to work the system, as Posner tells us. Emptied of experience, abstracted from fact, pure and parsed, the legal neophyte is an empty slate upon which to inscribe the *ecfactic* calculus, the pure good of efficiency as the external and only goal of law. Bereft of any internal sense of ends, lacking any artistic training or compass, the ultra-modern lawyer succumbs to the ultra-modern demon of efficiency. Law submits to politics or more accurately to political economy, and the solo lawyer, the “good professional,” Posner’s parse is equipped only to declaim either market interests or private causes. Law, pure law, nomocon jurisprudence is in practice an erasure of legal history, of the artistic reason of law, and we find in its place an inculcation of a finely honed and infinitely abstracted training in virtual instrumentalities that pay no attention to philology, literature, or the interpretations that require attention to what is relayed *sub auditio* or through the text. Law and economics is without any more moral sense or end other than that of maximizing efficiency and profit. It is not even social math. While there is no question that such an approach has a limited heuristic value in relation to the regulation of corporate finance, antitrust, and other market-predicated inefficiencies, even there the goals of such regulation rest unexamined beyond the impact
of practices upon prices. Lawyers, as Stanley Fish puts it, elegantly and antinomically, just do what they do. Which may well be paradoxically true of Posner’s students, but it also dismisses any analysis of the impact of judgment and reduces the lawmaking act to an atemporal moment that would fit well in Langdell’s laboratory, in the library of forgotten texts.

It is not just the lawyers. It is true of course that a few elite law schools send large numbers of progeny to Washington—the nomo-con goes to D.C.—but it is also the business schools, the parsing philosophers, the faith-imbued economists, the legal positivists in the psychology laboratory. If I select the lawyers it is in part because of their centrality to government—they write the serious social speeches, the truth of legislation and decision—and in part because law is the oldest of the social sciences. So let me take a last local example. If you are a clinical law professor in a U.S. law school, you will most likely not get tenure. The position is not sufficiently valuable to be tenured. In the few law schools where clinical professors are tenured, they exist most often in a separate space, as an independent unit, away from the law professor proper, the magister ludi, the Druid, Pythagoras wielding the profit-maximizing truths of law and economics. Law school is eminently about the virtue of trade and technique, vocation as action, but the educators have largely forgotten the links between conscience and law, between norm and life. Here in the U.S., which is not the jurisdiction of my training, things are further advanced than in Europe. They are also simpler. The law school stands on its own, a cathedral of legal science, a laboratory, a latter-day virtual library, quite separate from history and society, clinical questions, and matters of practice. The law student learns that what you say need bear no necessary relation to what you do. To register for the clinical course you have to leave the building, often literally, always metaphorically. And of course an internship requires making the trip downtown. That is how it is. Architecture reflecting nomos, geography repeating the pattern of law.

Casus, the case, last point, also has a root meaning of falling down. In this sense we stumble upon the case, we trip, we collapse. That connotation fits well with the new casuistry, the recurrence of an old mode of religious argument, the return of the antirrhetic in contemporary political discourse. I have argued that we need to learn its forms, apply critical rhetorical analysis to its modes of expression, semiotic skill to its visual elaborations, aesthetic modes of appreciation to its use of images, its antiportrait. I could go on. Humor is important in deflating some of its pretensions; satirical

critiques can gain purchase at times when more prosaic accounts have lost their audience. We can borrow from Blaise Pascal, from Thomas Hobbes even and try to deflate the private divines and private legists. To that we now have to add the privatized sovereigns, the latter-day Druids, the leaders who believe that they see through their inner eye the “secret immiffions” of God’s truth and hear the faceless voice of a private authority.

Finally, an answer to the question with which I began. Is the new casuistry a species of Frankfurt’s designated genre of bullshit? The answer has to be a triple negative. No, it is not nonsense in his sense, a turn to discourse in which the speaker is indifferent to truth. It is precisely a discourse over-imbued with faith, saturated with truth, all truth, but no history, no reality, nothing of this world as opposed to the next. No, secondly, in the sense that spiritual questions depend upon images and the rhetorical fight to control these crucial sites of persuasion and relay. The electronic world has its own forms of veritas, practices that Frankfurt is afraid to review. No, too, in the sense that Frankfurt avoids his imaginary category of bullshit, sees it as unwrought, as waste to be dumped. He cannot be bothered or does not desire to engage with rhetoric, with the facts of bullshit, the everyday world of politics and law. And I have suggested at length that refusing the refuse, turning away from the new casuistry because it fails to meet the sincerity conditions propounded by linguistic philosophy, isn’t going to help. Bear in mind too that Frankfurt’s book is itself a squib. It is in origin a highly encoded and quite unsubstantiated denunciation of unnamed academic practitioners of bullshit. Somewhat paradoxically it cannot itself be said to meet its own criteria of candor. And then of course—encomium, envoi, valediction—to deny thrice makes a biblical yes.


61. This can be gleaned—ironically enough, if we were not privy to the insider knowledge that the earlier book was a satirical dismissal of Paul de Man—from the preface to Frankfurt, *On Truth* (New York, 2006).