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Un Éspirit Sérieux

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It was a sunny day when we all met in a classroom at McGill University. The gathering went on all day and at the end someone proposed writing up the discussion as essays. Hence, this collection.

I'd like to take a moment of gratitude to express heartfelt thanks to all the participants. And especially to Vincent Forray and Jean d'Aspremont for organizing the event, and to Genevieve Renard Painter and Liam McHugh-Russell for bringing this collection over the finish line. I don't know whether the intellectual generosity of the participants was because of Canada, or Montreal, or McGill, or the Law School, or because of the people assembled in that room (though surely it must have been all the above to some degree). The gathering was what legal academia ought to be—people exploring ideas, thinking about possibilities, and reflecting on the professional contexts that shape their work. There was also a certain amount of play. The latter, play, is not required for academic thought, but it is essential to intellectual activity. Not frivolous play, but serious play. Without the ludic element and the freedom it implies, it's all pretty much connect-the-dots, adjust the curves, fill in the blanks, and make sure that the disclaimers and burdens of persuasion are tight and tough.

When I was younger, I used to think that academic and intellectual life were not only congruent, but largely coterminous. I now view that sentiment as a serious category mistake. The activities are in mutual opposition in some significant ways. Indeed, a great number of the institutions of academia seem implacably opposed to thinking. A couple decades ago, a member of my university's tenure and promotion committee spoke up in between discussions of two tenure files and said, smiling, "Ideas are cheap." This produced a small wave of knowing laughter from the faculty seated around the table. At the time, already impressed with the hard work of faculty in the natural and social sciences, engineering, and the humanities, I agreed. "Yes," I thought, "ideas are cheap."

No, they are not.

Ideas are hard to come by. They require a struggle not only against the various orthodoxies that compose the university, but also a struggle against their very *forms*. Many of these institutional forms present innocently enough, bearing such anodyne names as "faculty workshop," "conference panel," "law review article," and so on. After five or ten years of exposure to these venues, it can become apparent that they might be less than wholly receptive to thought. More receptive, in fact, to repetition and its enforcement.

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Form is hard to change. Not the least reason is that the venues that offer themselves as pathways to change are sometimes (often?) open only to the kind of change that does not disturb the status quo. And since one of the hallmarks of the status quo is to be always changing anyway, being open to change is neither the burden nor the concession it often appears to be. Change? Sure—door number 3.

And what lies behind door number 3? Change, of course.

What kind of change? Any kind of change. Any kind of change that can be assessed in terms of merit (rankings?), scholarly achievement (citation counts?), intellectual breakthroughs (thought leadership?), accountability (metrics?), and administration (strategic planning?).

Eventually, technology, accountability, calculation, planning, ranking, marketing, and consulting became the go-to forms of governance. And, unsurprisingly, those disciplines that excelled in these things thrived (engineering?) while those that couldn't (classics?) did not.

Law muddled through.

Now imagine that the above is correct. And imagine that you were faculty in a law school. What would you do? One thing you might do is pay attention to the professional conditions in which knowledge itself is produced. And you might inquire into whether this “knowledge” really counts as “knowledge”—whether the conditions in which it is produced and the forms it is required to take enable it to be knowledge or thought at all.¹ These are important questions particularly for the law school where an education in legal knowledge is preliminary training for putting law in action.² Once legal knowledge is propagated and impressed upon law students, it becomes the conceptual configuration deployed by the students as they enter their professional lives. This is the conceptual configuration of mental screens and channels through which the social, the economic, the cultural, and the political are apprehended. In extreme cases, the screens eclipse what they are supposed to reveal, while the channels bypass parts of the scene altogether.

Now suppose you thought all this was happening. Wouldn't it be important to think about it, to find ways through or around it and even to try to countermand it? Wouldn't you find that to be a worthy intellectual, aesthetic, and political endeavor—and particularly so in the world of the law school? To be sure this would not be easy because, in the midst of

1. For a brief presentation of these themes, see Pierre Schlag, “The Knowledge Bubble: Something Amiss in Expertopia” in Justin Desautels-Stein & Chris Tomlins, eds, *Searching for Contemporary Legal Thought* (Cambridge, UK: Cambridge University Press, 2017) 428.

2. Duncan Kennedy, “Legal Education as Training for Hierarchy” in David Kairys, ed, *The Politics of Law: A Progressive Critique* (New York: Basic Books, 1990) 54.

trying to do this, you would encounter the very same obstructions that you are trying to reveal and address.

But it certainly would seem important; at the very least, I have thought so.

The question, and it remains a live one, is—how to do it?

Here instruction can be taken from Jack Schlegel and Genevieve Renard Painter, both of whom are seriously focused on the ironic and the comic. Thomas Schultz, Jean d'Aspremont, and Liam McHugh-Russell offer instruction as well. They focus more on the existential. All of them recognize the serious in the funny and the funny in the serious. I see no contradiction (and neither do they.)

I will begin with Jack Schlegel's story of an encounter with Owen Fiss. Fiss, now retired, was a left liberal vocally opposed to critical legal studies.

The Serious as Funny/The Funny as Serious

Back in 1987 when CLS was still “hot,” I was shopping a piece that was a long review essay on Laura Kalman's history, *Legal Realism at Yale*. An acquaintance who was on that faculty invited me to present the piece—which I am still quite proud of—at the workshop he was running. Owen Fiss was the first person to ask a question. He wanted to know whether the piece was “serious” work or whether it was just an elaborate joke. Surprised and bewildered by the question, I answered, “Both.” In response he asserted that unless it were one or another he could not possibly respond, and for the rest of the workshop he sat squarely in front of me with his arms crossed and a scowl on his face. At that point, I knew that there was something troubling about the use of humor in scholarship, something not captured by the phrase “academic humor.”³

The blend of the serious and the funny, as Jack notes, can make people uncomfortable—especially those who are embodiments of the *esprit sérieux*. This is perhaps why, as indicated in the quote above, Owen Fiss was unable to respond to Jack's paper without first being advised whether the paper was serious or funny. Law professors know how to engage with the serious (they have a repertoire). A great many of them also know how to engage with the comical (again, they have a repertoire).

But when it is not clear whether a text is funny or serious, anxiety can surface. As Jack suggests, one just might find oneself responding to a joke seriously or responding to the serious jokingly. That could be embarrassing—or worse an unpleasant sign that one just might no longer be in “the know.” But there is more to it than that—the idea that the serious

3. John Henry Schlegel, “Humor, a Meditation” (2024) 47:1 Dal LJ (forthcoming).

is also funny (and vice versa) strikes too close to the bone. It would mean, and this is implicit in Jack's story, that the unleavened *esprit sérieux* in the domain of legal thought is perhaps a bit of theatre, a minor contrivance, even a sliver of a fraud. Or as Ngai might say, a gimmick.⁴

Certainly, one can empathize with Owen Fiss's dilemma. Discomfort and reaction are understandable. One doesn't work for years in the trenches of academia to be told by some *enfant terrible* (back then this would have been Jack, a bit later, me) that legal thought may well take itself just a touch too seriously. Nor would it be much fun to be told that legal thought fails to recognize the comic aspect of its own predicament—being neither really law, nor really thought, nor very clearly anything. (Not that it's nothing mind you; it's just *that it is not clearly* anything.) Not being clear about its identity, nor its fitness for some worthy mission, perhaps not even any mission all, it is understandable that those most in thrall to the promise and import of legal thought would demur from investigating the matter any further.⁵ And most especially so if legal thought were perpetually claiming to be on a worthy mission when it is *not*. And there it is: the dissonance between the pretense and the reality, the affect and the substance—a dissonance that creates the gap which allows the comic, the satirical, or the ironic to get its toehold.

I ask you to look at it as I might for just a brief moment: all of this makes legal thought a vulnerable target for satire. If legal thought could be personified, then it could take its place in the company of Moliere's *Bourgeois gentilhomme*, Voltaire's Dr. Pangloss, Carlyle's Herr Teufelsdröckh.

Why did Jack's paper so unnerve Owen Fiss (if it did)? Perhaps it was because satire or irony refuses to dignify or participate in the stabilized coherent ontology so often asserted by the *esprit sérieux*. "Often" can easily slide into "too often"—as when a finished, stabilized, coherent ontology is affirmed in an area (Law, Politics, Moral values) where it is not credible. Again, the incongruity between the pretense and the reality becomes the gap that enables satire, comedy, or irony to get its toehold. The stronger the pretense, the easier the take-down.

As Jack's story illustrates, the *esprit sérieux* is more vulnerable than it might first seem. The *esprit sérieux* requires either the pre-existence or the construction of a stabilized frame. But in legal thought, we do not have a

4. Sianne Ngai, *Theory of the Gimmick: Aesthetic Judgment and Capitalist Form* (Cambridge, MA: Belknap Press of Harvard University Press, 2020).

5. Ronald Dworkin's theory of law as an effort to make of the legal materials the best they can be is not a terribly good theory of adjudication, but it is terrific as an account of what many legal academics try, by their own lights, to do in legal thought.

pre-existing stabilized frame. Contrary to frequent representations, we in the legal academy have no singular stabilized frame of our own. Nor can we borrow a stabilized frame from law or the courts, because they're also empty-handed.⁶ At best, they have several floating frames, and these often conflict. This is not news—it is obvious.

That we have never hit metaphorical *rock bottom* in legal thought is because there almost surely isn't one. That it occasionally seems as if we have hit rock bottom is because the most vital purveyors of critique thus far nearly always arrest critique at the very moment they set eyes on a floor believed adequate to sustain their positive project for law. This is the history of American legal thought—the creation of a baseline floor demolished, iteratively, to make room for the next one. The process repeats itself.

It seems likely that future legal historians will turn back to their past and inquire into late 20th and early 21st century American legal thought in general. They will likely ponder what we thought we were doing. So, what were we doing?

This brings us to Genevieve Renard Painter. She thinks that legal thought has serious consequences. (It does—just not the ones typically imagined.) She wonders whether this is a life; she thinks perhaps we ought to do things differently.

Seriously Funny

Genevieve Renard Painter's essay is hilarious. It's also dead serious. A formidable combination.

I anticipate many of my students would dismiss Schlag's humour, along with his argument, as the work of another self-indulgent white man chuckling from his armchair. The comedian Hannah Gadsby was said by some to have revolutionized stand-up comedy with her show, *Nanette*, simply by doing an entire set as though she were a straight white man, when she is not. Schlag is getting away with something with his humour not just because he is writing for a clique of legal scholars well-primed for his jokes, but also because he is doing so as someone white, male, and privileged. That is not his fault. It is also not his fault that we find him so funny. I am not blaming him for it, even though no one writes satire by accident. I am saying what is true: I cannot be another Pierre Schlag.⁷

6. Schlag, *supra* note 1.

7. Genevieve Renard Painter, "The Political Economy of Outrage and Laughter" (2024) 47:1 Dal LJ (forthcoming).

From here she presses a familiar complaint with a new twist. The complaint is that all this satire and humor with all its focus on the thought of legal academics is perhaps a bit too self-referential, bordering on self-indulgence. The new twist is that the work I do (because of its manifest insider references) re-enforces precisely the norms and practices I am trying to deflate.

Perhaps the new twist is right. But at the same time, it may be that all this insiderism is at least in part a function of the logic of satire itself. For satire to be possible, there needs to be a gap between actual identity and self-image. Satire aims to reacquaint self-image with the actuality of its subject in order to allow the audience, the reader to recognize the humorous juxtaposition. Satire is thus pretty good at exposing hypocrisy, pretense, puffery, exaggerated self-importance, and the like.

When satire is good, it is not mere entertainment. It has a point.

My hope is that my satire will help make conventional legal thought a little less self-assured while making more creative, more searching approaches a bit more plausible.

Satire need not be political, but it can be. One thing: satire is rarely pointless. The performance of the stand-up comedian Hannah Gadsby in *Nanette* that Genevieve mentions in her paper is very funny. But Gadsby has a very serious point (or points). Lest you miss any of these at the beginning of her performances (though that's really hard to do) the end of the shows will make them emphatically clear.

And the point is one that the audience or the reader already half-way knows (or perhaps knows totally). Satire cannot spend a lot of time on set-up. The mark, so to speak, has to be a familiar figure to the reader or the audience—the bourgeois gentleman, Dr. Pangloss. For satire to work, the reader or audience need to have some idea of who or what is going to be satirized before the reading or performance starts. More than that, the mark needs to be important—it needs to matter to the reader before the reading or the performance starts.

All of this can be read as a very roundabout plea of guilty. None of my work was written for the undergraduates that Genevieve teaches at Concordia. And I am sure she is right that they would not find it funny. Nor insightful nor helpful. Neither would judges for that matter—they wouldn't know what to make of it. But satire cannot spend a lot of time on set-up.

Does this insiderism re-enforce the very norms and practices that I am trying to weaken? On some level, I think so. But it's hard to see how one

might reach the people I am trying to reach by satire without some degree of insiderism.⁸

Now for the more familiar complaint. Is this focus on legal thought self-indulgent? This is where Genevieve and I may have a real disagreement. Where self-indulgence is concerned, I frankly would turn the charge to others first. There are a great number of people ahead of me in line—most notably those who present themselves as deeply concerned about improving the law or changing the world by dint of law review articles or blog posts or conference panels. Sometimes this is genuine. And sometimes, it is simply the adoption of a well-hewn genre in the quest for self-advancement. It is hard to tell which is which when (and often it must surely be both). And perhaps in terms of effect it doesn't matter. But then there's the rub: it may not matter, full stop. And it is not hard to see why that might be so: the medium, the forms, and fora often neutralize the message. Or more bluntly, the form outdoes the substance. Or more technically, in Austinian terms, the performative charge of the performance negates its constative meaning.

For those who are serious about achieving their political ends, the medium, the form, and fora matter, lest any and all of these negate the message or the action from the very start. I happen to think that “normative legal thought,” as I once conceptualized it (not just the usual conception) suffers from this in epidemic proportions. And that too matters, because the ostensible redeeming virtue of normative legal thought lies precisely in the possibility of its efficacy. Scratch that and it's no longer clear what the point is.

This brings us to Thomas Schultz.

Scholarship as Fun

[Time was, when life was a] lifeless sucking black hole of homework, church, school, homework, church, school, homework, church, school, green beans, green beans, fucking green beans.”⁹

This is Thomas Schultz (quoting Bruce Springsteen). Life was once green beans. Worse, Springsteen was almost surely talking about *canned* green beans which is to say, the black hole of black holes.¹⁰

As Thomas' entire paper intones: there's got to be more.

8. For a brilliant, deeply inside laugh-out-loud satire of legal thought, see Gretchen Craft Rubin & Jamie G Heller, “The Restatement of Love” (1994) 104:3 Yale LJ 707.

9. Thomas Schultz, “Scholarship as Fun” (2024) 47:1 Dal LJ (forthcoming).

10. I was curious and so had to look up whether a black hole could suck in another black hole. Apparently, the answer is yes. And apparently it produces exactly one of the things you might expect—a larger black hole.

Yes, there does. (And I do think there is, though it depends on you to create it.)

First, however, why *isn't* there more?

Or put differently in a more hopeful vein, why do we keep doing this?

The law of the law review article, the law of the faculty colloquium, is a law *manqué*. It is not so much law, as it is legal thought. And while the two have some relation, it would be silly to suppose that law is *a priori* ruled by its own internal thought aspect. Law is thought, at the same time that it is also tool, power, leverage, triage, accounting, naming, documentation. More radically, it helps here to think of law as John R. Commons (interpreting Hohfeld) stated long ago—more an affair of verbs than of nouns.¹¹

Why and how then is the elaboration of the law of the conventional law review article, or the typical faculty colloquium, a reasonable, admirable, or even responsible thing to do? One answer—and I have heard it several times—is, “Because lives are at stake!”

Uhm, no. Actually, almost never.¹² That is the whole point. Lives (and much that life entails) are often at stake in a judicial opinion, in a legal brief, or in the pronouncements of some other official legal agency, but in a law review article? At a faculty colloquium? Almost never. Why not? Because the *specific performative apparatus* (in Austin’s sense of performative), so pervasive in judicial proceedings, is almost entirely absent in the practice of academic legal thought. And it is precisely those pervasive illocutionary forces suffusing judicial proceedings that accord the latter their gravitas, their repressed and stylized choreography, their exacting procedures and summary dispositions.¹³ So as much as many authors’ conclusions in law review articles ironically read as wish fulfillment euphemisms for “It is so ordered” or even “The Supreme Court is overruled,” neither is likely to happen as a result of such articles. As the normative prescriptions fly out continuously into the ether, the discursive medium of legal thought remains.

In a better world, we academics would write and think differently. We, on our own, would develop media *at least somewhat* resistant to colonization by the grammar and semantics of law, so as to give life to a more independent understanding of the latter’s identity and actions.

11. John R Commons, *The Legal Foundations of Capitalism* 68 (The Macmillan Company, 1924) 68.

12. Some counterexamples could be cited—hence my qualification “almost never.”

13. You are on your own if you want to make jokes in court.

Decades ago, I had hopes that inter-disciplinary work would accomplish such a thing. But in the main, it has not. The most troublesome foreign disciplines for law (cultural anthropology?) never made it past the portcullis. As for the foreign disciplines that did make it, they almost immediately genuflected to law, in roughly the same way that expert witnesses subordinate themselves to the lawyer's theory of the case.

Thomas will have none of it. He aspires to a more pluralistic legal thought, more generous in its inclusion of other narratives, other parallel ways of understanding the world (and thus law):

And so, as befits my profession (I am an academic), my contribution is to think, to think creatively, out of the box; to explore ideas and follow where they might take me, where they might take you; to indulge my curiosity; to conduct thought experiments; to offer new ways to look at a given legal provision, at a given legal theory, at law, at the world; to provoke reflection; to shake certitudes so that we can make progress; to show alternatives in order to release people from others' frames of thinking, so that they can make their own choices and live their own lives with their own thoughts; to encourage alternative thinking in order to prevent ourselves from passing on mistakes of the past to future generations through the illusion that ours is the only choice, to free others from our own flawed thinking.¹⁴

In my view that *is* the job description.

By now it must be clear that there is an ongoing theme that threads all these papers. Everyone here wants their legal thought to have an impact. On what? Here the papers diverge, striving for an impact on everything from politics, to law itself, to legal scholarship, to the professional context, to the professional legal self. There is thus difference on the ostensible target as well as on what is possible or practicable and what is not.

This brings us to Jean d'Aspremont, who offers an equally provocative thesis—something of a complement to what Thomas says above.

The Importance of Unlearning

I have come to think that, most of the time, radical critics of a discursive practice were once true believers in that practice's necessities and naturalistic realities. In particular, I am of the opinion that one comes to appreciate the power of a discourse only when one has genuinely and personally experienced the necessitarian pull as well as the naturalistic realities such discourse creates....What is at stake here is a much greater phenomenological claim...[namely] the greater potential of those who have experienced the full potency of the necessities and naturalistic

14. Schultz, *supra* note 9.

realities created by discourses to develop a very acute sensibility for discourses' hidden works and thought-governing structures.¹⁵

This move from a felt belief in the necessities of law to radical critique is often mediated by a loss of belief. Loss of belief is generally viewed unfavorably. This is perhaps the remaining influence of deeply engrained theological dispositions. Regardless, it is a mistake: loss of belief is a transitive. It matters what belief is lost—for surely some are worth losing.

The specific character of the losses of belief that one actually experiences will affect one's thought and teaching. Perhaps my first major loss of belief occurred in legal practice. I worked for a large D.C. law firm. There were always stakes. It was tacitly understood by everyone that law was a thoroughly instrumentalized and strategic activity. It's not that there were no juridical limits or restraints on the interpretation or elaboration of law. It's just that those limits were themselves *in part* a function of instrumental and strategic goals. This was an important loss of belief.

For me, it was self-evidently clear that any theoretical or doctrinal idealizations of law professors could not begin to contribute to the practice of law unless these idealizations recognized this strategic and instrumental character of legal practice

After practice came teaching in law school. And with the teaching of law students came very different obligations that put law further in question. Against the prevailing sentiment of law professors at the time, I quickly realized that the academic idealization of law is not a virtue. To engage in an unrestrained celebration of law is to mislead students—to lead them astray. And surely that is something that no teacher should do. In my most critical moments, I came to see the celebration of law as a way for academics to avoid recognizing their participation in an endeavor that might not be unequivocally admirable. I came to see the unrestrained normative celebration of law as the moral equivalent of a military education that speaks only of honor.

How then does one become a law professor? What is needed is an effort to understand law's identity and action in ways that are not already steeped in the determinations of law itself. Of course, this can only be an effort: escaping the determinations of law entirely would be to overshoot the mark. Or more simply, as Jean puts it:

Unlearning for the sake of thinking. Thinking for the sake of learning.
Unlearning at the service of learning...The ideal postulates that the

15. Jean d'Aspremont, "Law, Critique and the Believer's Experience" (2024) 47:1 Dal LJ (forthcoming).

present generation of lawyers should learn to unlearn in order to ensure that the next generation of lawyers can learn through the unlearning of what they learnt.¹⁶

This unlearning of what has been learnt (without forgetting the latter) is the struggle that underwrites the further aspirations of Liam McHugh-Russell—to show and tell in a way that changes the reader, the thought and the law.

Show and Tell

At least part of my intention was to encourage an “[intensified] critical reflexivity” among legal scholars. In Austin’s terms, the illocution of my research—the doing intended by the presentation and expression of my findings—was not just to rehearse a logical refutation of a particular orientation toward legal scholarship. My aim was to actually, eventually, disabuse some scholars from embodying that orientation.¹⁷

Which is certainly understandable: one spends hours, months, years writing something. One would like it to matter in some way. Few of us (any of us?) write for the drawer, the hard-drive or the cloud. There must be more. Why? Well, recognize that even Sisyphus had a real rock to push up the hill. Imagine his plight if he were told that, from now on, he would only get a pretend rock.

Liam wants his writing to change his reader’s outlook, perception, sensibility, orientation, self-awareness, experience of, and relations to law. He does not seek to prescribe this change. He is not “calling” for such a change. He is not out to “convince” his reader that such a change is rationally warranted. He wants to transform his reader. And importantly, Liam is skeptical that prescribing, calling for, or convincing a reader to transform would achieve that aim.

Transforming the reader is not generally recognized as the usual aim of legal scholarship. Indeed, conventional knowledge production holds that project at a certain remove. The conventions of legal scholarship and knowledge production hold that both are supposed offer rational argument designed to change or maintain beliefs that have already taken the form of ideas, statements, theories, hypotheses, assumptions, propositions, analytical methods, and so forth. The conventional modes of academic “interventions” (i.e. persuading, calling for, convincing, etc.) are well suited to that sort of engagement. But those modes are not particularly well suited at prompting a change in a reader’s outlook, perception,

16. *Ibid.*

17. Liam McHugh-Russell, “Show and Tell” (2024) 47:1 Dal LJ (forthcoming).

sensibility, orientation, self-awareness, or experience of and relations to law. Developing a different kind of perception or perspective (one that the reader has never had) is not the sort of thing that can be effectuated through mere prescription or persuasion. Giving five or twelve really well thought-out reasons why other people should be funnier, or more empathic or more aesthetically attuned is not a meaningless endeavor. But to expect success merely because the supporting arguments are really good will probably not achieve the goal desired.

But now we get to the crux of the matter. Liam says:

Inasmuch as we are not trying just to tell an audience something, nor even to show them, but to actually have them see, and, more profoundly, to have our readers undergo some change, “as if by having met a new face, crossed a street [they] never crossed before,” it strikes me that we are still mostly in the dark about whether any of this works, to what extent, and when.¹⁸

Yes. But everyone is in the dark. That has to be so. As Liam says, “There is *no* general theory of the relationship between knowledge practices, economic interests, social structure, and legal systems.”¹⁹ Now that is a very difficult insight for legal academics to accept because of the implications. Consider: on the one hand, we know that knowledge practices, economic interests, social structure and legal systems are interactive, but on the other hand, we don’t know what the interactions are nor do we have a “language” in which these interactions might be apprehended and expressed. Instead we just have a lot of disciplines—each constructed by formalizing its internal structure and by excluding as exogenous whatever foreign knowledge might prevent the formalization in the first instance. Why this is not experienced more frequently as a kind of scandal (ours) is an interesting question. Part of the answer is that the stakes are experienced as too high: it is the cogency of disciplines and the integrity of the professional self that is at stake.

But make no mistake: as Liam observes, the institutional context is only part of the problem. Also in question is the possibility of knowledge production. More disturbingly, at stake is the very possibility of meaning—of wresting out and affirming meaning in a world that seems increasingly recalcitrant.

18. *Ibid.*

19. *Ibid.*