

ARTICLES : SPECIAL ISSUE
A DEDICATION TO JACQUES DERRIDA - MEMOIRS

Critical Intimacy: Jacques Derrida and the Friendship of Politics

By Anne Orford*

Since receiving the invitation to participate in this special issue, I have been wondering about whether I can do justice in this brief space to what I have learnt from reading Derrida. And as someone who long ago began to distrust those versions of the history of ideas organized around the names of important individuals, I've also wondered about how and why I would want to link lessons to the proper name "Jacques Derrida." Indeed the pleasure, and even the reward, I have received from reading Derrida is hard for me to separate out from the experience of living as part of a community that exists within and across the institutions I inhabit, with colleagues, students and friends. I associate Derrida with a way of life, a way of reading, writing, speaking and listening to each other, that is part of the "simple day-to-dayness" and "the intense moments of work, teaching and thinking" that constitutes this community, that allies us.¹ I hope I can communicate a little of what reading Derrida has meant, and still does mean, to me then within this particular institutional life.

When I mentioned to one such friend and colleague that I was writing this, he responded "I never felt personally linked to jd in a way that say foucault or barthes or agamben got under my skin." This started me thinking about why encountering Derrida has had that intimate, "under the skin" quality for me.² While many theoretical masters offer us a sociological description, a grand vision of where we have been, a history of the present or a plan for the future, Derrida offered me a lesson in how to be surprised by the world. The "task of reading" that he sets

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¹ JACQUES DERRIDA, *THE WORK OF MOURNING* 74, 115 (2001).

² Admittedly, my first thought was: how uncomfortable, that's a lot of people to have under your skin; sounds quite lumpy.

himself and us in *Of Grammatology* involves looking within the text, to the interior, to find the traces of the unique or the singular or the excessive, that which escapes the circle of exchange or the economy of substitution.³ As Gayatri Chakravorty Spivak comments, his style is one of critical intimacy rather than critical distance,⁴ a style that I also associate with feminist theorists such as Luce Irigaray, Judith Grbich and Shoshana Felman. We cannot know in advance what such a reading will produce – each text will push away that which it marks out as other, hesitate before that which it cannot decide, guard its own secret, have at its origin the question which it cannot answer. Since reading Derrida, I have begun to find myself in a new relation to the resources of language, and to hear words “otherwise.”⁵

This has been accompanied by the wondrous realisation that any text could be read in this way, could “suffer such a sea-change/ Into something rich and strange.”⁶ It might seem odd for someone educated, as I have been, in a common law legal system to learn this task of reading from philosophers like Derrida, or from literary theorists like Felman, rather than as part of being disciplined in the traditions of the law. After all, the common law is supposed to be organised around a respect for the uniqueness of each case, the singularity of each text. Yet while the common law is a fundamentally text-based system, it is one that tries to preserve its authority by denying the fictional nature of its grounds or the written nature of its origins. Thus it attempts to preserve from the work of interpretation those texts marked as facts, evidence and so on. To the extent that law is unable to see itself as writing, “law understands itself as reflecting a state of affairs, rather than producing it, and ... it believes it can control the contexts in which its texts emerge and take on meaning.”⁷

Yet for me to open by saying that Derrida transmits to us the task of reading rather than the inheritance of a new tradition for which he is the sovereign authority is perhaps a little naïve. It ignores the institutionalisation of deconstruction as part of academic life in the late twentieth century. This sense I have of Derrida as a scholar who persistently puts into question notions of sovereignty, authority and mastery is in part a result of the fact that I haven’t ever had an institutional or disciplinary

³ JACQUES DERRIDA, *OF GRAMMATOLOGY* 157-164 (Gayatri Chakravorty Spivak trans., 1976).

⁴ GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* 425 (1999).

⁵ DERRIDA, *supra* note 1 at 201.

⁶ WILLIAM SHAKESPEARE, *THE TEMPEST*, I, 2.

⁷ Nina Philadelphoff-Puren and Peter Rush, *Fatal (F)laws: Law, Literature and Writing*, 14 *LAW AND CRITIQUE* 191, 202 (2003).

relationship with Derrida. The kind of arts and legal education that I experienced, in Queensland in the late 1980s and in London in the early 1990s, did not lend itself to reading Derrida, and so I have encountered his writing alone or “in the friendship of an alliance without institution.”⁸ I’ve never had to write a paper on Derrida that received a mark, never had to sit or assess an exam on deconstruction. For whatever reason, I have found the insistence in Derrida’s early work on guarding the question that inaugurates each tradition extremely productive in my exploration of the stakes of writing in the discipline in which I work, international law.

To take a recent example, both the terrorist attacks of September 11, 2001, and the US military responses to those attacks have been experienced by international lawyers, and by many others, as a reminder of that which cannot be enclosed, of that which escapes the law.⁹ In much international legal scholarship, Iraq stands for what lies outside international law or beyond the UN Charter – a world in which international institutions have proved unable to challenge the pragmatists of the new American empire, or proved incapable of acting as the sovereign enforcer of the law. Yet this sense of a crisis of legal authority is not novel for international law – rather, it pervades the discipline.¹⁰ The inability to find a single authority to ground or guarantee the wholeness of the law is a condition of late modernity. Most modern law works by burying the knowledge of this lack at its foundation. For international lawyers, however, knowledge of this lack of ground for the law is inescapable. There is no nation-state or ultimate sovereign that can act as a “guarantor of right,”¹¹ and thus do away with the uneasiness or anxiety caused by an inability to ground international law. International lawyers are thus always “before the law” in the sense that Derrida describes – in the “situation both ordinary and terrible of the man who cannot manage to see or above all to touch, to catch up to the law.”¹²

⁸ JACQUES DERRIDA, *SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, & THE NEW INTERNATIONAL* 86 (Peggy Kamuf trans., 1994).

⁹ This reading of the meaning of this sense of crisis in the discipline of international law is developed in: Anne Orford, *The Destiny of International Law*, 17 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 441-476 (2004).

¹⁰ Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 *MODERN LAW REVIEW* 377 (2002).

¹¹ Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 *CARDOZO LAW REVIEW* 921, 943 (1990).

¹² *Id.* at 993.

Yet to paraphrase Derrida, this is not necessarily bad news.¹³ The persistent crisis of authority experienced by international law is at the heart of the relation that the tradition “maintains with itself, with the archive of its own demon.”¹⁴ International law preserves within it the recognition of the open question of authority that confronted European international lawyers attempting to manage state formation, modernization and imperialism in the late nineteenth and early twentieth centuries. Contemporary international legal debates about the use of force, human rights, terrorism and development are sites where the emptiness that founds the modern relationship to authority and law is again encountered. Perhaps this is one of the functions of international law as a discipline. A question, and a silence about its answer, is transferred through the constitution and inheritance of the discipline of international law. This secret is transferred across generations because there is something “better left asleep” here,¹⁵ that which calls up the legal responses justifying the wars on terror as defensive self-preservation. Often international law responds to the sense of a lack of mastery over its subject matter by acting out, attempting to reassert sovereign control or imagining itself on a journey towards the creation of a powerful world community. However, in reading critical histories of international law, we find moments when international law manages to live with this unresolved, and unresolvable, crisis of authority.¹⁶ At such moments, it may be best able to avoid the temptation to secure the grounds of law through a final solution in which those who are believed to threaten the health, security, emotional well-being or morality of the international community are violently sacrificed for the good of the whole.

While in his early work Derrida thus insists on the priority of the question that inaugurates every institution, his later work is marked by a concern with how one might respond to the call of the wholly other.¹⁷ This “radical alterity” is understood as that from which we set off or push away in order to constitute a subject, an institution or a tradition.¹⁸ For me, *The Gift of Death* is the text which has set out the

¹³ *Id.* at 943.

¹⁴ JACQUES DERRIDA, *THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND* 353 (Alan Bass trans., 1987) (discussing the tradition of psychoanalysis in these terms).

¹⁵ *Id.*

¹⁶ See Orford, *supra* note 9 at 464-476.

¹⁷ SPIVAK, *supra* note 4 at 426 (suggesting that where Derrida’s earlier work was concerned to guard the question or insist “on the priority of an unanswerable question,” his later work has “a greater emphasis on ethics.”).

¹⁸ *Id.* Spivak describes this turn as representing “an other-directed swerve” in Derrida’s philosophy.

possibilities and limits of this ethical turn most clearly.¹⁹ Here, Derrida maps the sacrificial tradition of thinking about responsibility, beginning with the story of Abraham, and tracing the meaning of this story for Christianity and for European politics. God demands of Abraham “that most cruel, impossible, and untenable gesture: to offer his son Isaac as a sacrifice.”²⁰ Sacrificial responsibility involves a singular relationship with an unknown other. In the Christian tradition, this other is named God, but in the tradition of international economic law in which I work, we might name this other “the Market.” This responsibility can be acted upon only in silence, in solitude and in the absence of knowledge. It involves a relationship to the other to whom we respond, to whom we are responsible. This “form of involvement with the other ... is a venture into absolute risk, beyond knowledge and certainty.”²¹ Yet, lest we slip into thinking that this answer or responsibility is something that can easily be generalised or universalised, Derrida reminds us that when we respond to the other, we must betray all the other others. In making the decision, in answering the call of the other, we can only ever be responsible to the one who makes the demand.

This unique, singular other might be our child, our lover, our brother or sister, or that irreplaceable other represented in ethics. However, in my writing about international economic law, I have been interested in tracing the ways in which WTO agreements structure this responsibility so that the market becomes the singular other whose demand is to be answered by decision-makers.²² It is the global market to whom the decision-maker must be responsible in this sense. This economy of sacrifice is accompanied by the promise of the reward of the righteous in the future by the Father (God/Market) who sees in secret.²³ WTO agreements ask of most Member States that they sacrifice those values they espouse publicly and collectively – democracy, civility, politics, the family of the nation – for the global market, and as the price of inclusion in the community of believers. These agreements require that the decision-maker imagine himself or herself in the position of Abraham, called to abandon public obligations (the familial tie to his son and wife for Abraham, the civic obligations to citizens and to values of

¹⁹ JACQUES DERRIDA, *THE GIFT OF DEATH* (David Wills trans., 1995).

²⁰ *Id.* at 58.

²¹ *Id.* at 5-6.

²² See ANNE ORFORD, *TRADE, HUMAN RIGHTS AND THE ECONOMY OF SACRIFICE*, *Jean Monnet Working Paper 03/04*, NYU School of Law, available at <http://www.jeanmonnetprogram.org/papers/04/040301.html>. A substantially revised version of this paper will be published in 2005 in the *Leiden Journal of International Law* symposium on aesthetics and international law.

²³ On the reward of the righteous, see Matthew, 10:34-40 (Revised Standard Version).

transparency in the case of the decision-maker) to meet these demands of the market in the expectation of a reward in the future. The question that remains for me is – how can decision-makers be responsible (rather than simply “accountable”) to those they sacrifice in such an economy? How might we think about the responsibility of Abraham to Sarah or to his son Isaac? Is it possible ever to be responsible to all the (other) others who are excluded from the relationship between decision-maker and those to whom the decision-maker is responsible, those whom we sacrifice when we decide to respond to the demands of the Father? Can the law encounter or repay the debts owed to those figures whose bodies seem to be the necessary ground of these internationalist texts, and whose sacrifices remain outside the economy of risk and reward that these texts establish?²⁴

The tension or movement between these two tasks that a text might perform – preserving the self (guarding the question) and responding to the call of the other – is one that we see played out repeatedly in international law. For example, this movement informs the current debate about whether the priority of the inherent right of self-defence offers a basis upon which states are able to derogate from other international norms, such as the prohibition against torture.²⁵ And as I have argued in detail elsewhere, it is this tension which gives the human rights victim such a spectral quality.²⁶ This figure is haunting precisely because it embodies a memory of the trauma of what was done to the other to secure a self for the West. As Derrida shows us, the return of such spectres gives us the opportunity to learn from them about justice.

If he loves justice at least, the “scholar” of the future, the
“intellectual” of tomorrow should learn it and from the

²⁴ See ORFORD, *supra* note 22. In thinking about international economic law as political theology, I am influenced by: Jennifer Beard, *Understanding International Development Programs as a Modern Phenomenon of Early and Medieval Christian Theology*, 18 AUSTRALIAN FEMINIST LAW JOURNAL 27 (2003); and Judith E. Grbich, *Aesthetics in Christian Juridico-Theological Tracts: The Wanderings of Faith and Nomos*, 12 INTERNATIONAL JOURNAL FOR THE SEMIOTICS OF LAW 351 (2000).

²⁵ The (now infamous) Memorandum for Alberto R Gonzales, Counsel to the President, from Jay S Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, *Re: Standards of Conduct for Interrogation under 18 U.S.C. Sections 2340-2340A* (August 1, 2002) sets out the argument that “a nation’s right of self-defense” would justify a “government defendant” in torturing or otherwise harming “an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A” of the United States Code implementing the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. For the related argument that self-defence offers a basis upon which to derogate from other human rights norms, see SHABTAI ROSENNE, *THE PERPLEXITIES OF MODERN INTERNATIONAL LAW* 216, 234 (2004).

²⁶ ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* 203-219 (2003).

ghost. He should learn to live by learning not how to make conversation with the ghost but how to talk with him, with her, how to let them speak or how to give them back speech, even if it is in oneself, in the other, in the other in oneself: they are always *there*, specters, even if they do not exist, even if they are no longer, even if they are not yet. They give us to rethink the “there” as soon as we open our mouths ...²⁷

According to Derrida, we can exorcise the threat that such spectres represent, not “in order to chase away the ghosts,” but rather so that they may “come back alive, as *revenants* who would no longer be *revenants*, but as other *arrivants* to whom a hospitable memory or promise must offer welcome.”²⁸ It is just such an *arrivant* — the refugee — who most clearly unsettles the comforting separation between self and other, here and there. The refugee, the stranger, is excluded or detained in an attempt to protect a stable, unitary sense of national identity. Yet this foreigner is always already a part of that very identity. In modernity, the subject’s identity is structured through its relations to the nation-state, and one of the “others” against whom the nation is formed is that of the foreigner, the stranger. Thus the subject as citizen has as one of its doubles the alien, or the refugee. For the law, the refugee represents this stranger in its most threatening form, because the refugee seeks to be recognized by the law, and thus to remind the law, and through it the subject, of the repressed otherness at the foundation of identity. Through the claims or demands of these refugees from violence, the law is confronted with the spectre of a suffering other who does not stay at home. Their arrival at the borders of the nation-state:

is experienced as the symptom of the trauma, as the return of the repressed, the sign of the lack in the heart of the citizen. The exclusion of foreigners is ... constitutive of national identity [and] human subjectivity. In asking to be recognised, refugees bring back the exclusion and repression at law’s foundation, and demand of us to accept the difficulty we have to live with the other in us, to live as an other.²⁹

²⁷ DERRIDA, *supra* note 8 at 176.

²⁸ *Id.* at 175.

²⁹ COSTAS DOUZINAS, THE END OF HUMAN RIGHTS 357 (2000).

Yet the human rights tradition as translated into the covenants and constitutions of modern law threatens to tame the unsettling or haunting effect of these *arrivants*. Let me explain what I mean by drawing on the evocative notion of human rights as memory developed in the work of Klaus Günther.³⁰ Günther argues that in the European context, human rights “are embedded in a *memory of injustice and fear*.”³¹ Like many other human rights theorists, Günther argues that human rights function in Europe almost as a collective memory, invoking in particular the Holocaust.³² For Günther, a right to voice flows from this memory of massive trauma and suffering, and this means that the rights to expression and speech are particularly important. As a result, the archives of the state must be opened and remain open.

The articulation, shaping, and reconstruction of this memory are, and can only be, a collective work in progress, a project that will never end. It has to be undertaken by the people themselves, as a part of their collective self-understanding and identity. But it is also a matter of education, of historical research, and of public reasoning and deliberation. As a consequence, the rights of freedom of information and expression have to be defended. It seems that we still have not uncovered all cases of violations, that there are still a lot of experiences of injustice and fear which are not made public and are not part of the collective memory. A perhaps surprising concrete consequence may be the following: a human right to access the archives of the State and its institutions. The archives have to be opened to the public, and they may never be closed!³³

I agree with Günther that a key political and legal question of our time is how we keep faith with those spectres who haunt our communities. Yet his call for the archives to be open suggests a danger in institutionalising human rights. The archive of the state represents a frozen, encrypted vision of the past. This is the

³⁰ Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in *THE EU AND HUMAN RIGHTS* 117-144 (Philip Alston ed., 1999).

³¹ *Id.* at 126 (emphasis in the original).

³² The UN Charter and the major human rights covenants are regularly described in these terms as an international legal response to the Holocaust and an attempt to protect individuals from future excesses of state power.

³³ Günther, *supra* note 30 at 126-7.

situation facing Kafka's man from the country, who finds that he has been calling for the gates of the law to be opened, only to realise that they have been opened all along.³⁴ In a sense, the archives of the state are all too open, we are all inscribed in these archives of the modern bureaucratic state, and it is in part through this inscription that we are controlled and normalized. Institutionalising human rights threatens to tame its unsettling or haunting quality.³⁵ State law is not unsettled if its 'others' have their own institutional location – frozen into an institutional role as victims. At stake in the way we think about human rights might then be what the figure of the human rights victim represents in terms of this engagement with history. These figures from the past confront us each time for the first time – we cannot know in advance what they demand of us or what their memory means for the future.

I want to finish with a passage that captures the sexy, funny, scandalous, intimate address that was and is the pleasure of reading Derrida for me. The passage is from *The Post Card*, a text in which Derrida links sexuality to the impossibility of avoiding the question posed to us by the other. Here, in this recognition that we begin and end with an unanswerable question, death is always present. Indeed, Derrida's meditations on friendship and love repeatedly return us to death, but as Derrida wrote, "they do so precisely so as not to let death have the last word, or the first one."³⁶ I find in much that Derrida has written a preparation for death, a recognition that each of us "lives a life which is made of death."³⁷ To assume the death of the subject as a coherent self, to accept the loss that this entails, is the "symbolic means of the subject's coming to terms not with death but, paradoxically, with life."³⁸ This is developed specifically in *The Post Card* through the question of seduction, and its relationship to the speaking body and the limits of mastery and of possession (of self and other). While the act of seduction on the part of professors often seems part of their production of a valuable self for themselves, here Derrida performs in a way that appears to make him unusually vulnerable. As Jane Gallop argues:

³⁴ Franz Kafka, *Before the Law*, in *METAMORPHOSIS AND OTHER STORIES* 165-166 (Malcolm Pasley trans., 1992).

³⁵ For a related exploration of this question, see ORFORD, *supra* note 26 at chapter 6.

³⁶ DERRIDA, *supra* note 1 at 201; see, particularly, JACQUES DERRIDA, *THE POLITICS OF FRIENDSHIP* (George Collins trans., 1997); and the beautiful collection of elegies and lamentations written by Derrida after the deaths of his friends and collected in DERRIDA, *supra* note 1.

³⁷ JACQUES LACAN, *LE SÉMINAIRE, LIVRE II: LE MOI DANS LA THÉORIE DE FREUD AT DANS LA TECHNIQUE PSYCHANALYTIQUE* 250 (Shoshana Felman trans., 1978) (quoted by SHOSHANA FELMAN, *JACQUES LACAN AND THE ADVENTURE OF INSIGHT* 136 (1987)).

³⁸ *Id.*

By giving up their bodies, men gain power – the power to theorize, to represent themselves, to exchange women, to reproduce themselves and mark their offspring with their name. All these activities ignore bodily pleasure in pursuit of representation, reproduction, production.³⁹

Yet men can also gain these things – power, reproduction, recognition – through strategic and violent deployment of their bodies imagined as self-contained and self-possessed. Instead, Derrida here seems to me to accept the risks of seduction and to recognize that reaching out to an other involves a loss of faith in a whole, autonomous self. He fails to constitute himself as an upright, indifferent, reliable figure who masters himself, embraces the law and is able to possess and thus exchange one feminized figure for another. Instead, Derrida writes himself as an embodied, melancholy lover, one undone by his desire for the singular, unique other to whom all that he writes is addressed. In doing this in a philosophical text, he shows a lack of respect for the father's law, something very desirable in a masculine body.

In the philosophy of failed seduction that is *The Post Card*, he lets us feel the urgency of his desire to speak to the 'you' to whom the postcards are addressed. Yet at the same time he points to the scandalous nature of seduction. To succeed at seduction is to succeed at the production of an expectation – perhaps that meaning will last, that desire will be satisfied, that bodies might be capable of understanding one another, that the other might be our destination. These expectations can never be fulfilled. In a sense, then, as Felman argues, to succeed at seduction is to succeed at failure.⁴⁰ In signalling this, Derrida reminds us that failure is part of the performative, rather than an accident of the performative.⁴¹ "I am the promise that cannot be kept," as Paul Claudel wrote.⁴² This situating of failure within the performative is exhilarating and, yes, seductive – it separates me from other ways of understanding what it is to speak, to write.⁴³

³⁹ Jane Gallop, *The Father's Seduction*, in *DAUGHTERS & FATHERS* 97, 99 (Lynda E. Boose and Betty S. Flowers eds., 1989).

⁴⁰ SHOSHANA FELMAN, *THE SCANDAL OF THE SPEAKING BODY: DON JUAN WITH J L AUSTIN, OR SEDUCTION IN TWO LANGUAGES* 16 (2003).

⁴¹ *Id.* at 44.

⁴² *Id.* at 41.

⁴³ *Id.* at 44.

Throughout *The Post Card*, Derrida explores “the impossibility that a unique addressee ever be identified, or a destination either.”⁴⁴ Yet, as he writes, “I begin to love you on the basis of this impossibility.”⁴⁵ I sacrifice all the other others, I wait for you – “please, come.”⁴⁶ So although there is no destination and no addressee, we keep trying “to touch each other with words.”⁴⁷

I don't know if I'll send you this letter since you are here in so few days. I will give it to you. But I cannot stop myself ... I have to write to you all the time when you are not here – and even when you are here and I am still alone (the old, impossible dream of exhaustive and instantaneous registration – for I hold to words above all, words whose rarefaction is unbearable for me in writing) ... In the last analysis I do nothing that does not have some interest in seducing you, in setting you astray from yourself in order to set you on the way toward me, uniquely – nevertheless you do not know who you are nor to whom precisely I am addressing myself. But there is only you in the world.⁴⁸

“I hold to words above all” – speech here is “the true realm of eroticism, and not simply a means of access to this realm.”⁴⁹ ‘I cannot stop myself ... I have to write to you all the time’. It is through speech that we set out with such urgency towards the other, yet knowing that “there is no destination, my sweet destiny.”⁵⁰ And so let me leave you with this passage, as a farewell:

Plane from Heathrow tonight. I will have tried to call you back again (*collect*) from now till then, if the line is free. If ever I should no longer arrive, you know what will have been my last, my last what in fact? Certainly

⁴⁴ DERRIDA, *supra* note 14 at 81.

⁴⁵ *Id.*

⁴⁶ *Id.* at 67.

⁴⁷ *Id.* at 56.

⁴⁸ *Id.* at 69.

⁴⁹ FELMAN, *supra* note 40 at 15.

⁵⁰ DERRIDA, *supra* note 14 at 29.

not will. My last image at the back of my eyes, my last word, the name, all of this together, and I will not have kept my belt buckled, one strophe more, the final orgasm and compulsion, I will swim in your name without turning back, but you will never be your name, you never have been, even when, and especially when you have answered to it. The name is made to do without the life of the bearer, and is therefore always somewhat the name of someone dead. One could not live, be there, except by protesting against one's name, by protesting one's non-identity with one's proper name. When I called you, at the wheel, you were dead. As soon as I named you, as soon as I recalled your first name. And you came right out and said so, before the first rendez-vous ... I hope to perceive you when I land.⁵¹

⁵¹ *Id.* at 39.