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The Haunting of Wealth Law

Allison Tait*

If I am getting ready to speak at length about ghosts, inheritance, and generations, generations of ghosts, which is to say about certain others who are not present, nor presently living, either to us, in us, or outside us, it is in the name of justice.

-Jacques Derrida, Specters of Marx

Wealth law is full of ghosts, ghosts everywhere all at once. As a form of both preservation and disruption, a form of continuance as well as a form of interruption, ghosts are reminders of the past in its multiple forms. But they are also figures that prompt consideration of the present as well as speculation about the future. Jacques Derrida, who suggested the idea of “hauntology,” posited haunting and the ghostly as being “time out of joint,” a reference to Hamlet’s confused cry upon seeing his father’s ghost that Derrida analyzes extensively. In this sense, ghosts are akin to inheritance, a legal schema in which the past persists into both present and future. Like ghosts, inheritance and wealth transfer laws represent ruptures in time, enabling the destabilizing presence of the past alongside the various possibilities for the present and future.

It should come as no surprise then that ghosts of many shades and stories populate the lawscape of inheritance. There are images of ghosts who return to monitor the afterlives of their wealth, full of fear and skepticism about how relatives will manage their legacies. These are the ghosts of decedents with property to control, ghosts concerned about legacies and the perpetuation of personal and family legacies. These ghosts are kindred to the ghosts, cadavers, and hoarders invoked by Karl Marx, tied to specters of asset creation and asset protection, buoyed by the

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2 Id. at xxi; See Merlin Coverley, Hauntology: Ghosts of Futures Past 18 (Nick Rennison ed., 2020) (“In fact, so influential was Derrida’s account that the figure of the spectre was soon to escape the confines of his text, triggering a ‘spectral turn’ in the academic study of the ghost. A subject which had hitherto been largely dismissed as unworthy of serious critical attention now returned with a vengeance, as ghosts, spectres, revenants and all manner of occult entities came to haunt seemingly every aspect of our culture.”).
enchantment of money and the magic of purchasing power. Accompanying and abetting these individual ghosts, there are more diffuse and ethereal ghosts, the ghosts of history and empire, the ghosts of dynastic rule and past property systems.

Differently situated, perhaps haunting different corners and byways (or not), there are also the ghosts who appear to haunt, warn, and upend the peace and comfort of the living, fed by past injuries. These are the ghosts of the dispossessed, the marginalized, and the vulnerable. Avery Gordon, to this point, reminds us that ghosts are sometimes “the things and the people who are primarily unseen and banished to the periphery of our social graciousness.” These are the ghosts whose haunting ways are more likely to be accompanied by wailing warnings and prophetic wisdom than by concern for lost wealth that has been gifted to successive generations. Related (but not in a family way) to the ghosts of history and empire and the ghosts of dynastic rule, the ghosts of the banished are specters of absence and exclusion. Ghosts of banishment, in this way, serve as indicators that, all around us, legal and other social structures exist despite the fact that we cannot see them: “In haunting, organized forces and systemic structures that appear removed from us make their impact felt in everyday life in a way that confounds our analytic separations and confounds the social separations between them.”

This short Article represents a brief and not at all comprehensive attempt to analyze the various kinds of ghosts that haunt property and wealth transfer law and what messages they hold, both specifically for the legal regulation of inheritance law and, more broadly for the political economy of inheritance. On the one hand, as the first Part explores, there are the ghosts of property privilege, ghosts authorized by inheritance law to exercise dead-hand control. These ghosts are emboldened by law, fed by the doctrine of wealth transfer, and kept alive in order to monitor the continuing life of their wealth. On the other hand, as the second Part examines, there are the ghosts left behind by inheritance law, those dispossessed of land, homes, savings, and other properties. Relegated to the margins of both legal structures and imperial histories of property, the ghosts of dispossession help us better understand the embedded privilege of the dead-hand ghosts as well as the notion of spectrality as “the crucible for political mediation and historical memory.”

3 Avery F. Gordon, Ghostly Matters: Haunting and the Sociological Imagination, 196 (The Regents of the Univ. of Minn. eds., Univ. of Minn. Press 1997).
4 Id. at 19.
5 Id. at 18.
I. Ghosts/Hoarding/Legacies/Empire

The first kind of spectrality for analysis is the ghosts that return and recur to monitor the wealth of the dead as well as the large and diaphanous ghosts of property and dynasty that embrace their individual brethren ghosts. That is to say, the ghosts that accumulate and preserve financial legacies are both individual and collective, particular and systemic.

A. Ghosts of Hoarders and Men of Capital

On an individual level, there are the ghosts of privilege, their wealth passed down into the hands of subsequent generations with care and often with conditions. These are ghosts obsessed with wealth, their former wealth, and images of Ebenezer Scrooge-like characters, guarding precious piles of gold come to mind because these are ghosts simultaneously consumed and nourished by wealth, legacy, personal empires, and the preservation of family fortunes. These are ghosts kept alive by the fear of losing money and losing control of assets acquired over a lifetime of wealth accumulation and management.

These Scrooge-like ghosts correspond to Karl Marx’s money hoarder, motivated by “the desire to withdraw money from the stream of circulation and to save it from the social metabolism.” Marx’s hoarder is already, before death, obsessed with burial and the entombment of assets, wishing to turn his wealth into “an imperishable subterranean hoard with an entirely furtive private relationship to the commodity-owner.” Caught up in the paradox of wanting something for its value and yet keeping such a tight grip on his possessions and stacks of money that they risk losing its value, the hoarder is

… a martyr to exchange-value, a holy ascetic seated at the top of a metal column. He cares for wealth only in its social form, and accordingly he hides it away from society. He wants commodities in a form in which they can always circulate and he therefore withdraws them from circulation. He adores exchange-value and he consequently refrains from exchange. The liquid form of wealth and its petrification, the elixir of life and the philosophers’ stone are wildly mixed together like an alchemist’s apparitions.

7 Id.
8 Id.
Even during his lifetime, the hoarder is almost already a ghost, spectral as he slowly vanishes in the tomb-like vaults containing his wealth, aspiring to a state of perpetual profit.

Doubling down on the spectral, for Marx, the hoarder trades in paper money - a species of currency that is, on its own, ghostly because it is the shadow of some other, different form of value like gold, and ultimately the “immediate social incarnation of all human labor.” Money is the spectral unit of the exertion of those working in factories and fields, the magic of alchemy, and “[t]his magic always busies itself with ghosts, it does business with them, it manipulates or busies itself, it becomes a business, the business it does in the very element of haunting.” In so doing, according to Derrida, money and the circulation of money brings out the hoarders or, as he writes, “attracts the undertakers, those who deal with cadavers but so as to steal them, to make the departed disappear . . . . Commerce and theater of gravediggers.”

B. Ghosts Fed by Dead-Hand Control

In the legal context, the ghostly hoarders that guard tombs of wealth are enabled in assorted ways in their quest to preserve and enshrine personal fortunes. Decedents are authorized to control their property after death, a power that this quite literally called “dead-hand control,” and set conditions on property use, make requests of beneficiaries, and provide instructions for the use of the decedent’s wealth. This dead-hand control can last for varying lengths of time, depending on the form of transfer. Even with wills, decedents can place conditions on the transfer of their wealth and, as one wealth planning firm tells prospective clients: “Conditions are often used in Wills and Trusts to provide incentives for accomplishments, motivation for achievements, the protection of naïve or immature beneficiaries, or to eliminate bad behaviors.” With the amorphous restraint of “public policy” being the only barrier, the possibilities for the exercise of dead-hand control are almost endless.

In this context, trusts are the preferred vehicle for exercising dead-hand control because of the ability they provide settlors to exert control and have their last wishes actualized as well as supervised by a

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9 Karl Marx, Capital Volume 1, MARXIST ARCHIVE, https://www.marxists.org/archive/marx/works/1867-c1/ch03.htm (last visited Sept. 16, 2023) [https://perma.cc/3EXY-E4PY].
10 DERRIDA, supra note 1, at 56.
11 Id.
trustee, who serves as the living representative of the ghostly decedent. If the trust settlor is avid to see the family fortune - the buried treasure - persist across generations, the settlor can restrict a beneficiary’s access to the trust principal by limiting distributions to trust income. The trust settlor can equally eliminate mandatory distributions, making all distributions subject to trustee discretion. Moreover, decedents with more specific desires with respect to their treasures can place incentive conditions on the wealth transfer: attending certain schools, attaining certain degrees, getting married, marrying the right kind of person, having children. All of these behaviors can be promoted or discouraged through incentive distributions, instantiating the wishes of the departed settlor. Trust lawyers encourage settlors to make explicit their wishes, if they have deep preferences or concerns: “Have the client write a memo to his trustee telling the trustee what he wants for his children. Ask the client to share some of his hopes and dreams for his children. . . . Have the client request that the terms [in the trust] be interpreted in light of the client’s overall intent in creating the trust.”

C. Ghosts Enabled by Perpetuities

A second mechanism of ghostly control with trusts, apart from control through conditions, is the use of perpetuities. Historically, family trusts could last approximately one hundred years (the infamous life in being plus 21 years) before their terms violated the Rule Against Perpetuities. Intended precisely to reduce the grip of dead-hand control by keeping property, especially land, alienable, the common law Rule governed trust duration beginning in the seventeenth century (ghost of the Duke of Norfolk). As one piece of the deregulatory puzzle in the 1980s, tied also to tax reform measures in 1986, American states began to repeal the Rule propelled by the desire of states to attract high-wealth clients. With the repeal of the Rule, one of the strongest safeguards against dead-hand control, private trusts could last in perpetuity, thereby creating a market for “perpetual” trusts, which trust companies and banks

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also commonly advertise as dynasty trusts, legacy trusts, or even “bloodline” trusts.

With these perpetual trusts, the span of the trust and the age of the assets in trust is limitless, possibly eternal, existing far beyond a lifespan. The time of inheritance, set against this backdrop, encompasses multiple generations and nourishes a plenitude of family ghosts, but most particularly the ghost of the original trust settlor. Provided material form and function by the shape of the living estate, the specters of the settlor and subsequent generations of beneficiaries live on, persist, embodied by the material conditions of the original accumulation and the results of dead-hand control. For these families, time is opportunity and possibility when it comes to family property and, for these families, time is a fluid and flexible spectrum - “out of joint,” the Hamlet refrain. And, more saliently, time for these families embodies - flexible as it is - the “dynastic impulse” as time’s plasticity only serves “to maintain the dynast’s family at the top level of income and status in perpetuity.” That is to say, dead-hand rules and the spectrality that they engender affirm the corporate and imperial nature of the elite family.

D. Ghosts of Empire and Specters of Colonialism

Dead-hand ghosts, the ghost of the hoarder and the ghosts of currency, these are all the ghosts of family money and personal empire, the ghosts of asset accumulation and status preservation. These ghosts intermingle and blend into the ghosts of empire and accumulation itself, the ghosts of property gained and property held. These larger ghosts, the depersonalized ghosts of systems past and present are the collective body of thousands - legislators, landowners, legatees. These “specters of colonialism” represent the “logics of empire” and “they are as pervasive as they are relentless as they work continually and nearly imperceptibly in their efforts to keep the violence, theft, and logics used to legitimate colonialist

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18 See generally John V. Orth, Escaping the Malthusian Trap: Dynasty Trusts for Serious Dynasts, 17 GREEN BAG 29, 35 (2013) (explaining the problems and effects of the Rule Against Perpetuities as it relates to dynasty trusts, and public policy issues on acquiring properties).
19 Id.
endeavors neatly hidden from view.”

Depersonalized and amorphous as they may be, then, “empire’s ghosts are not merely misty products of an overactive imagination, but crucial social mediators with a pressing political presence.” And these ghosts of empire come into view “precisely at the moment when one is made aware that one has unfinished business with the past, at the moment when the past returns as an ‘elemental’ force . . . to haunt the present day.”

At the broadest level of American empire, property rules like the Doctrine of Discovery have enabled empire and inequality. Representing an original moment of violent property taking, this doctrine “authorized and ordered conquest and enslavement on the basis of distinctions between tiers of humanity that were characterized as religious, cultural, civilizations, and racial.” Specifically in the United States, the Doctrine of Discovery “help[s] explain how the development of ‘property’ in the Americas produced a society riven by racial distinctions and driven by the willingness of self-interested heteronormative family units to engage in profitable forms of violence.” This and related doctrines of acquisition, akin to the dead-hand control rules as they were burnished through use and over time, transformed into a more complicated set of property rules that facilitated acquisition by some and led to the loss of others. The ghosts circling here are “ghosts birthed from empire’s original violence, the ghosts hidden inside law’s creation myth . . . and the new ghosts on the way as our ruins refresh and mutate.”

Another nebulous but persistent ghost inheres in the rules about family, which families count legally and what types of preferential treatment those families receive. These rules have historically enabled both personal wealth and national empire since, as K-Sue Park tells us, “colonial laws profoundly shaped the ways heteronormative families who were or would be racialized as white helped construct property, not only by promising them title to land in exchange for occupying it for a period of

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23 See id.
24 For example, on title registries see K-Sue Park, Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power, 133 Yale L.J. (forthcoming 2023).
years through headright policies, land grants, and subsidies, but also by encouraging marriages in settlements.”27 In these ways, rules defining the family privileged the nuclear, marital family - itself an inheritance from English upper-classes who also tied property to marriage and the bloodline family. And rules governing property accumulation and transfer consolidated and further compensated the nuclear family by compounding wealth within these conventional families and using them as mechanisms for wealth continuance.

From the wealth-drenched individual, to the legally privileged family, to the collective set of colonizers and empire builders, ghosts abound, haunting wealth law and apparating around the piles of paper fortunes whether they be personal or imperial.

II. Ghosts/Haunting/Warning

If there are dead-hand ghosts, ghostly hoarders, and imperial ghosts, all emboldened by the frameworks of property and inheritance law, its acquisition enabling, and its time-bending rules, there are also the ghosts that are dispossessed by inheritance law, ghosts whose presence and haunting in time serve as a warning and a reminder. These are ghostly apparitions whose presence reminds us that within, on the margins, and outside of the hoarded estate lie the remains of those who did not stand in line to inherit, those who were disinherited, those who never dared to hope that dead-hand control would gild their belongings with its imprimatur. These particular ghosts belong to people who were also, in ways, ghost-like during their lifetimes, living on the margin of power and being caught in necropolitical economies. In this sense, ghosts are a call for notice, an unstated demand for reckoning: “Haunting . . . is the relentless remembering and reminding that will not be appeased by settler society’s assurances of innocence and reconciliation.”28 Spectrality, for these shadow lives, is a strategy meant to provoke unease, instability, and even fear. Spectrality is reprisal since, as Eve Tuck and C. Ree write in A Glossary of Haunting, “Revenge is one head of the many-headed creature of justice.”29

A. Ghosts of “Discovery” and Displacement

One permutation of these ghosts of the dispossessed is the set of ghosts banished and dispossessed by acquisition doctrines like the Doctrine of Discovery and by other property rules, mentioned above, that

27 Park, supra note 23.
28 TUCK & Ree, supra note 26, at 642.
29 Id. at 652.
created exclusionary schemas. At the start of it all, in the United States, is the dispossession of Indigenous people with the arrival of European colonizing powers. This is the story of an unparalleled land grab and the legal disabling of entire first nations, sovereign nations that have yet to untie the cords of colonial rule. Here we can think of the ghostly coterie and “ghostly agency as emanating from the experiential realities of racialized subjects”30 and “Indian ghosts have been and remain an indelible trope in North American narratives and national mythologies: we see Indigenous ‘absence.’”31 Danika Medak-Saltzman also suggests, however, that “[r]ather than thinking of that which haunts as alternatively tangible, visible, or as spirits that can be sensed but not seen as they affect the living in a variety of ways”32 we think instead about what happens when “that which haunts is the very spirit of an idea.”33 This turns us back, as Derrida would have us turn, to empire’s logics and ghosts. Instead of favoring one set of ghosts over the other, however, it might be useful to consider them together, two kinds of ghosts as two parts of the same equation.

B. Ghosts of Enslavement and Dispossession

Continuing with the historical turn, the “notion of haunting” has been over time, “a useful device for many groups in North America as they have sought to reveal long-hidden and silenced histories.”34 And certainly in the United States, understanding that “to be haunted is to be tied to historical and social effects,”35 the ghost of slavery and the ghosts of those who were enslaved are never far out of the historical sightline. Enslavement is a story of property rules enabling violence, acquisition, and accumulation as well as wealth transfer. The property rules of enslavement, while brutally turning people into objects of acquisition, also prohibited enslaved people from property ownership. While each state in the United States had its own slavery code with its own variations, generally developed and expanded from the 1640s to the 1860s, in all states these codes not only made enslavement a permanent and inheritable condition but also disallowed enslaved people from any kind of property rights.

30 Medak-Saltzman, supra note 20, at 16.
31 Id.
32 Id. at 17.
33 Id.
34 Id. at 15.
including ownership and transfer rights.\textsuperscript{36} No acquisition, no accumulation, no generational transfer, no gold for the hoarding ghosts to guard.

Consolidating this direct disallowance of property rights, laws of enslavement also prohibited enslaved people from entering into contracts, including the contract of marriage. Through this prohibition, enslaved people were also barred from accessing and enjoying the panoply of rights attached to and distributed through the marital family. As Margaret Burnham has written, “In the eyes of the law, each slave stood as an individual unit of property, and never as a submerged partner in a marriage or family. The most universal life events marriage, procreation, childrearing—were manipulated to meet the demands of the commercial enterprise.”\textsuperscript{37} This is not to say that enslaved families did not marry, form families, and pass down whatever small forms of personal property they owned; they did so, however, “without the sanction of . . . law.”\textsuperscript{38}

A prime example of this kind of dispossession can be found in a probate case from 1910, \textit{In re Campbell Estate}.\textsuperscript{39} In the case, two adult Black men were seeking to claim inheritance from Basil Campbell. The case turns on whether there was a legal marriage between Basil Campbell and Mary W. Stephens, the mother of the two men. In deciding the legal question, the court’s reasoning turned on the holding from a U.S. Supreme Court case stating that enslaved people were not capable of contracting. The \textit{Campbell} court stated: “The statutory definition of marriage in the state of Missouri, as in our own state, precludes the possibility of a marriage between slaves.”\textsuperscript{40} Moreover, as the \textit{Campbell} court remarked,

\begin{quote}
The relation here shown . . . falls far short of measuring up to the requirements indispensable to a marriage. A relation which neither party has the capacity to create and which either party could terminate at will, or which could be terminated by their master, is not a marriage relation, and it is mockery to speak of it as such.\textsuperscript{41}
\end{quote}

\begin{footnotes}
\item[38] Id.
\item[40] Id. at 673.
\item[41] Id. For more on this case see Jessica Dixon Weaver, \textit{Racial Myopia in [Family] Law}, 132 Yale L.J.F. 1086, 1102-03 n.75 (Apr. 30, 2023).
\end{footnotes}
The court dismissed customary marriages as being wholly different from legal marriages, referencing Joel P. Bishop and his *Commentaries on Marriage and Divorce*, which posited three reasons why law denied the legal sanction of marriage to enslaved people. The third reason, and perhaps most salient, was that marriage would interfere with “the master’s” property rights since “the slave’s acquisitions accrued to the latter.” Wealth accumulation and transfer were, accordingly, the specific and exclusive domain of the white and privileged, the society of owners and traffickers in capital. The enslaved and the dispossessed were left with nothing more than shadows of wealth, ghostly remains of lost fortunes and stolen wealth.

C. Ghosts of Default Disinheritance

Finally, there are the ghosts of banishment created by more current inheritance law -- the inheritance laws of intestacy that govern those families and individuals who fail to use wills and trusts to effectuate dead-hand control. This default inheritance regime, premised on presumed intent, banishes many family members and other loved ones within kinship networks through its tireless prioritization of legal, marital families. And this banishment is particularly acute for low-income decedents, who are particularly likely to die without a will. Furthermore, because of the intersection between low-income families and non-white families, statistics reveal that “African Americans have much higher intestacy rates than the population as a whole: seventy per cent die without a will, a much higher rate than whites.” The phenomenon is present as well with Latinx families and Native American families.

Without a will or any other form of estate plan, intestacy rules dictate the distribution of a person’s belongings and assets. In all states, legal spouses and children are the main inheritors. The surviving legal spouse is the main inheritor in intestacy, especially if there are no children or if the children are all from the marriage between the decedent and the

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42 Id. at 674.
43 Id. The other two reasons were that enslaved people did not possess the “freedom of will as is required to pass the matrimonial consent” and that marriage would have destabilized the logic and hierarchy of the plantation since “the duties of the husband and wife are incompatible with the duty which the slave owes to his master.” Id.
surviving spouse. If there is no legal spouse, children – biological or adopted children – share any inheritance in equal parts. After that, the inheritance keeps flowing through the branches of the family tree until the legal family has been exhausted and, finally, when there are no more family members on the legal family tree, the money escheats to the state. Absent from the legal family tree are nonmarital spouses, step-children (who are not legally adopted), foster children, and any other member of a kinship collective not tied to the decedent by blood or through legal processes. In this way, the “historical specificity of kinship as an idiom of state power, white supremacy, and Western modernity” and family as a legal tool of both enrichment and dispossession persists. White families with resources tend to fit the state-sanctioned family pattern, while non-white heterocentric families, many queer families of all racial backgrounds and ethnicities, and families brought together by economic need tend to live more on the margins of marital and nuclear family paradigm.

In intestacy, then, these extra-legal categories of family members are disinherited by the default rules and left without either the solace of financial recognition from the decedent and sometimes without financial security. Moreover, in the case of real property, fractionation works against low-income families because owners of “heirs property” lack clear title to the land and, consequently, face various obstacles when seeking to preserve the family home or qualify for loans and government programs (including disaster relief). These intestacy scenarios and these speculative family losses embody the very absence of dead-hand control and the ghosts of the decedents are able only to look in in frustration, perhaps with disappointment and grief as well. Carla Spivack has noted, “These broken links of our property inheritance system deserve attention because they contribute to inequality and vulnerability. They also compound, rather than ameliorate, historical injustice.” The idea of “broken links,” resonant and consistent with the idea of time being “out of joint,” once again highlights how inheritance rules have the potential to create fractured time, or time that is hospitable to ghosts and spectral emergence. Only

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48 See id. § 2-102(1), (3)-(4).
49 Queer Kinship: Race, Sex, Belonging, Form 2 (Tyler Bradway & Elizabeth Freeman eds., 2022).
50 See id. (“[I]nsofar as queerness denotes an excess or perceived deficiency in relation to the normative family, the term always includes and indexes racialization.”).
51 See Spivack, supra note 45, at 206. Thomas Mitchell and others have detailed how intestacy rules have been and continue to be “a major cause of African American land loss” as they enable land speculators to buy out land interests from “far-flung” heirs and subsequently demand a partition by sale. See Thomas Mitchell, Reforming Property Law to Address Devasting Land Loss, 66 Ala. L. Rev. 1, 31-32 (2014).
52 Spivack, supra note 45, at 192.
in this scenario the ghosts that emerge are the ghosts of banishment and disinheritance, rather that the dead-hand control ghosts.

III. Conclusion

Wealth transfer law is a world filled with the ghostly, the spectral, the persistent. Wealth transfer law and inheritance more generally are legal frameworks and phenomena that create ruptures in time and connect the past to both the present and future. The ghosts that emerge from these folds in time, however, are not all the same. The ghosts that appear are both those enabled and supported by wealth transfer law as well as those who have been disinherit. Moreover, the ghosts of the systems themselves apparate and hover, bringing collective force to the temporal disturbances and adding to the spectral substance. The divided nature of these ghosts reminds us, as Derrida says, that “[t]here is no inheritance without a call to responsibility. An inheritance is always the reaffirmation of a debt, but a critical, selective, and filtering reaffirmation . . . .”\textsuperscript{53} The work of making wealth transfer law more just - the call to responsibility - is not only recognizing the ghosts in all their varied formats and filters but also pushing on the nature of the debts and asking how some can be paid and how others can be discharged.

\textsuperscript{53} Derrida, supra note 1, at 91-92.