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Who Cares?: Reflections on Law, Loss and Family Values in the Wake of 9/11

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WHO CARES?:
REFLECTIONS ON LAW, LOSS, AND FAMILY
VALUES IN THE WAKE OF 9/11

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Today's panel aims at sharing with you why it is we love thinking, writing about, and doing law. There's nothing that happens in the world, no occurrence, grand, trivial, or in today's case, tragic, that doesn't provoke thoughts about law – about how law structures our lives – about how it impacts, changes, and is changed by every event.

I teach family law, and family law is a wonderful lens through which to examine the "Portraits of Grief," describing those who died in the attack on the World Trade Center on September 11, 2001.¹ After all, what do these portraits describe? Families. Relationships of care and dependency. All the varied, complex ways that people organize and live their lives.

One of the most striking things about Portraits is how much they differ from ordinary newspaper obituaries.² Rather than focusing primarily on the public achievements of those who died, and relegating loved ones to a list of "survived by's," most of the portraits emphasize the caring relationships within families and communities in which the victims were enmeshed – as loving parents, children, siblings, friends,

* Professor of Law, New York Law School. Radcliffe, B.A. 1970; Rutgers, J.D. 1974; Yale, LL.M. 1988. I want to thank my co-panelists, Karen Gross and Faith Kahn, and our moderator, Lenni Benson, for collaborating on this panel. Our aim was to demonstrate to our students that any occurrence could serve as an occasion for looking at law from our various legal disciplines, and become a way to look at our world in a richer way. I learned a great deal from my collaborators, and equally importantly, had lots of fun. I also want to thank Robin Dingle, my faculty assistant, for her tireless efforts, my library liaison Camille Broussard, for putting up with endless emergency requests for assistance and for staying overtime to deal with them, and my research assistant Amy Stutsky, for plunging in after a confusing first year and grasping immediately what needed to be done.

1. *Portraits of Grief*, N.Y. TIMES, Sept. 15, 2001, at A11 [hereinafter *Portraits*]. On September 15, 2001, a team of writers created *Portraits* as a new section in the New York Times.

2. Zack Cooper, *The Attack on America—Faces in the Crowd* (Oct. 2001) (unpublished student paper, on file with the author). There are, of course, many logical explanations for the differences noted above, but it is beyond the scope of this talk to explore them.

co-workers, church-goers, coaches, and community volunteers. At least to those crafting the Portraits and those providing information to the writers, but also to many of us, I think, it is these emotional and caring attributes that most personify the World Trade Center victims.

A few examples: the life work of Joseph Mistrulli, a union carpenter who helped build the Russian Tea Room and Windows on the World, was “not a building at all. It was his family.”³ Barbara Walsh was the “glue that held the family together,”⁴ just as Elena Ledesma was the “heart and soul of her extended family.”⁵ What Josh Rosenthal, a portfolio manager, most liked to do was “play with his nieces.”⁶ “So many people were dependent on” Frederick Kuo Jr., as a centerpiece of his community church, that it almost “wouldn’t run without him.”⁷ Dozens of victims are described as priding themselves on coaching children’s sports teams, on volunteer community service, and, most especially, on relationships with friends and family members.

The second striking feature of the Portraits is how much of the care they describe was delivered outside the framework of the traditional, nuclear family. The Portraits describe cohabiting siblings, friends, and lovers, extended and merged families, divorced fathers and single mothers raising children, gay and heterosexual life-partnerships.

We read of Wesley Mercer, divorced father of two, who lived with his male life-partner in Harlem⁸ and of Anette Dataram,⁹ who lived with (and cooked for) her parents, sister, and two brothers. We learn of Jennifer De Jesus,¹⁰ Nancy Muniz,¹¹ and Elizabeth Darling,¹² single mothers raising children alone, while others like Elena Ledesma¹³ raised children with the support of mothers, aunts and cousins, in

3. *Portraits*, Sept. 15, 2001, at A11.

4. *Id.*

5. *Portraits*, Oct. 7, 2001, at B11.

6. *Portraits*, *supra* note 3.

7. *Portraits*, Sept. 17, 2001, at A10.

8. *Portraits*, Oct. 1, 2001, at B11. According to the Empire State Pride Agenda, twenty-four gay partners had come forward as of December 23, 2001, two-thirds of them New Yorkers. *All Things Considered* (National Public Radio broadcast, Dec. 23, 2001).

9. *Portraits*, Oct. 14, 2001, at B12.

10. *Portraits*, *supra* note 8.

11. *Portraits*, *supra* note 7.

12. *Portraits*, Sept. 16, 2001, at 8.

13. *Portraits*, *supra* note 5.

Elena's case, *all living in the same building*.¹⁴ We encounter Michelle Henrique, who split her time between the homes of her parents and grandparents,¹⁵ divorced Maurice Kelly, raising two sons on his own,¹⁶ Anna Medina,¹⁷ sharing a home with her 87-year-old mother and 11-year-old son, and Aida Rosario,¹⁸ raising daughters by two different fathers in a home shared by her mother, two brothers and a sister-in-law. After the tragedy, these configurations shifted and stretched in an attempt to reassemble the care previously provided by the victims: aunts, uncles, parents, life-partners, and others taking over the care of young children; children, nephews and nieces, siblings, and even friends taking over the care of elders and others previously cared for by the deceased victim.

But what's law got to do with these family vignettes? Among other things, law enters to tell Aida Rosario's mother, brothers and sister-in-law, or the parents and grandparents of Michelle Henrique, or the male life-partner of Wesley Mercer whether they "count" as family for purposes of entitlement to compensation for their loss. And by establishing entitlement rules, the law not only decides who gets money and who doesn't – with enormous immediate consequences for the way these family members will reassemble, cope, and continue after the tragedy – but it also becomes part of a cultural imbroglio about the nature and definition of family in the 21st century. So let's take a look at those rules, rules which for the most part embody a traditional image of family that contrasts sharply with the multiplicity of arrangements of dependency and care reflected in the Portraits.

I will focus primarily on two of the major governmental compensation programs: the Federal September 11th Victim Compensation Fund of 2001 ("Federal Fund") – which provides up to \$3 million dollars per victim,¹⁹ and the New York State World Trade Center Relief

14. *Id.*

15. *Portraits*, Oct. 2, 2001, at B9.

16. *Portraits*, Oct. 4, 2001, at B11.

17. *Portraits*, Oct. 6, 2001, at B11.

18. *Portraits*, Sept. 28, 2001, at B11.

19. September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104 (2002). The Federal Fund provides presumptive awards of \$250,000 for the dependent, plus an additional \$100,000 for the spouse and each dependent of the victim in total compensation (noneconomic losses), and an additional amount in most cases no greater than \$3 or \$4 million for economic losses (future wages and so forth), less monies from life insurance and other collateral sources. 28 C.F.R. § 104.44; 28 C.F.R. § 104.47. For claimants other than spouses, minor children, and IRS-defined dependents, entitlement to share in these funds is to be based on the state law of the victim's domicile. 28

Fund ("State Fund") – which provides \$17,000 and \$7,500 grants to claimants depending on their status in relation to the victim.²⁰

The starting place for eligibility to receive compensation under both Funds is the formal nuclear family: each Fund in the first instance provides compensation to married spouses and minor or dependent children of victims.²¹ But just as family law has struggled with whether the law should extend legal protection to non-nuclear and non-marital relationships,²² the Funds, too, have had to confront the degree to which those beyond the nuclear norm should be entitled to claim compensation.

Several commentators on the proposed rules for the Federal Fund argued in favor of broad eligibility, pointing out that in many cases those who possessed the closest emotional and financial ties to the victims would otherwise be ineligible for compensation.²³ Eliot Spitzer, Attorney General of the State of New York, as well as Amnesty International, argued that surviving partners of gays and lesbians, as well as

C.F.R. § 104.52. After this talk was given, the contours of the Federal Fund, particularly in relation to the amounts of awards, have been both clarified and somewhat altered. Fund Administrator Kenneth Feinberg's projections of award amounts now range from \$300,000 (previously \$250,000) to \$4.5 million (previously \$3 to \$4 million), with the possibility for even higher awards in special circumstances. A number of families as well as Cantor-Fitzgerald, a company that lost 658 employees in the disaster, have challenged the terms of the Fund, although largely in relation to the size of the awards, rather than the limitations on recipients. By September 17, 2002, 52 families had been offered awards averaging \$1.57 million each; 25 had accepted them. David W. Chen, *Worst Hit Firm Faults Fairness of Sept. 11 Aid*, N.Y. TIMES, Sept. 17, 2002, at A1.

20. New York State, World Trade Center Relief Fund Distribution, at www.nyse.gov/news/WTC_Relief_Dist.htm [hereinafter State Fund]. The State Fund provides \$17,000 to spouses and domestic partners (who have co-habitated at least a year immediately prior to the disaster), \$7,500 to each minor child or each adult child who qualifies as a dependent, and \$17,000 to the parent or parents of the victim if there are no others qualified to receive the fund.

21. *Id.* The State WTC fund provides compensation to children up to the age of twenty-one, which mirrors State requirements for payment of child support. N.Y. Dom. Rel. Law § 240 (McKinney 1999). Federal Fund, *supra* note 19.

22. *See, e.g., Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), where the Supreme Court noted that the term family "is not confined within an arbitrary boundary drawn at the limits of the nuclear family." *See also Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (1989) (New York Court of Appeals emphasizing that the term family should not be restricted to those who have formalized their relationship by obtaining a marriage certificate or adoption order, but should be understood functionally).

23. 67 Fed. Reg 11, 243. Other commentators challenged the Fund's sole focus on the victims of 9/11, arguing that it ought to encompass victims of other tragedies such as the 1993 WTC bombing, the Oklahoma City bombing, those who lost their lives fighting the Taliban, and others.

heterosexual life-partners, should be entitled to compensation from the Federal Fund.²⁴

Others pointed to the unfairness of excluding siblings and adult non-dependent offspring, and others closely related to or involved with the deceased victims. Even if in fact dependent both financially and emotionally on a 9/11 victim – as Elena Ledesma’s mother, aunts or cousins may have been – many will be left out under the Federal Fund rules. Those rules require claimants other than spouses and minor children to prove either that they were in the previous year financially dependent on the victim, according to IRS rules (which require that the victim have been responsible for 50% of the dependent’s expenses),²⁵ or that under state law they are entitled to share in the estate or in any wrongful death or tort award. If, for instance, Michelle Henrique had an estranged husband, he, rather than the parents and grandparents with whom she shared her life, would be entitled to all Fund proceeds.

Another commentator even urged that ex-spouses be eligible to receive compensation, which, although it sounds odd, makes sense in the case of ex-spouses who, because of the victim’s death, will assume significant new care responsibilities, with concomitant reduction in earning capacity and leisure time.²⁶ And fiances of victims challenged their wholesale exclusion from eligibility; several having apparently assumed family-like responsibilities alongside their affianced for considerable periods of time.

Federal Administrator Kenneth Feinberg responded to these urgings by permitting deviation from the rules in cases in which legally entitled family members concurred in sharing funds with persons outside those legally entitled to make claims, but otherwise limited eligibility to spouses and minor children, strictly defined dependents, and those who under state law would be entitled to inherit or claim the

24. Press Release, Office of the New York State Attorney General Elliot Spitzer, Object to 9/11 Compensation Fund Rules (Jan. 23, 2002), at http://www.oag.state.ny.us/press/2002/jan/jan23c_02.html.

25. I.R.C. § 152 (West 2002). The Federal Fund initially required that a claimant be claimed by the victim as a tax dependent in the victim’s most recent tax filing. Based on commentary on the proposed rules, eligibility was expanded to include those who could otherwise prove eligibility for IRS dependency status, even if they were not in fact claimed as such on the victim’s most recent return.

26. 67 Fed. Reg. 11,243. Of course, if the children receive significant insurance benefits, the loss of earning capacity may not occur or be as significant. However, many victims will not have carried such insurance.

proceeds of wrongful death awards.²⁷ As a result, no matter how important the relationships of Aida Rosario's mother, brothers, and sister-in-law were to her and to her children, they have no independent legal right to Federal Fund proceeds, and either of the children's fathers (should they come forward) will control funds due Rosario's daughters, assuming those fathers have not legally relinquished their parental rights. Because of the Fund's partial purpose to substitute for claims against airlines and other entities (and surely constrained by political concerns), Administrator Feinberg felt himself unable to independently recognize domestic partnerships, instead deferring to state law, a choice unlikely to afford federal compensation to the partners of victims such as Michael Lepore – whose 18-year life-partnership was so tragically cut short.²⁸

Perhaps recognizing the unfairness of excluding domestic partners in New York, where, according to the most recent census, approximately 6.7% of gay couples nationwide live,²⁹ (and not constrained by any purpose to substitute for tort damages), the State Fund has elected to compensate domestic partners able to meet certain requirements.³⁰

27. *Id.* at 11, 242-43. Under the final Rules, the Federal Fund will determine amounts due based on submission by the victim's Personal Administrator, who, in turn, will be responsible for distributing those funds in compliance with the appropriate state laws of intestacy, wrongful death, family status, and any other relevant law. 28 C.F.R. § 104.4, 104.52.

28. *Portraits*, *supra* note 8. Feinberg justified resting eligibility determinations on state law on the ground that since government funds are a substitute for, and require a waiver of, the right to sue airlines and others, for the waiver to successfully bind claimants, state wrongful death and intestacy law must be followed. Only Vermont as a matter of state law affords domestic partners the right to bring wrongful death and personal injury lawsuits, and then only for same-sex partners who have formally established a "civil union." Vt. Stat. Ann. Tit. 15 § 1204 (2001). Feinberg did indicate that if the Personal Administrator (appointed whenever a decedent left no will) obtained the "cooperation" of next of kin, funds could be distributed to those outside of the group defined as eligible – for instance, to heterosexual or gay life partners. But where next of kin are not cooperative (and will not agree to waive their right to sue), state law will govern. Jane Gross, *U.S. Fund for Tower Victims Will Aid Some Gay Partners*, N.Y. TIMES, May 30, 2002, at A1 [hereinafter Gross].

29. *Households Headed by Gays Rose in the 90's, Data Shows*, N.Y. TIMES, Aug. 22, 2001, at A17. Although far fewer than 8% of the WTC victims are described in the Portraits as gay, the true numbers may be higher, given the reluctance of family members and others to "out" the victims in such a public way.

30. Domestic partners must prove financial interdependency and a year's continuous cohabitation immediately before 9/11. New York State World Trade Center Relief Fund, Surviving Spouse or Domestic Partner Application, at http://www.nysegov.com/news/WTC_Relief_Dist.htm.

But the State Fund also fails to provide compensation to those who fall outside the boundaries of the nuclear or consanguineous (blood) family, regardless of the degree of care provided to or received from the victim. This, despite the fact that Governor George Pataki urged the Bush administration to define relationships broadly, according to the “totality of the circumstances,” including “emotional and financial commitment” and “exclusivity and longevity.”³¹

But who counts as a domestic partner? Once entitlement is no longer attached to the formalities of marriage, what are its boundaries? The New York Fund regulations have opted, as have the many courts throughout the United States that have confronted this issue, to extend rights to relationships that are marriage-like. Thus to qualify for State Fund compensation, domestic partners must prove that they would have met the basic qualifications for marriage (other than being of opposite sexes): a claimant must demonstrate that both partners were over 18, that the relationship was not incestuous, and that the partners assumed responsibility for each other’s welfare. But they must also show that their relationship functioned in a manner we associate with the marital family: the claimant must swear that the relationship was monogamous and was meant to remain so indefinitely, and must prove that the partners were financially interdependent and cohabited for at least the previous year.³² These latter requirements are not applied to claimant spouses, who are able to collect regardless of their fidelity, recent cohabitation, or financial entanglement.³³

31. State Fund, *supra* note 20. In the case of the State Fund, a financial dependent of a victim who meets the IRS definition of dependency is entitled to compensation only when there is no spouse, partner, or offspring entitled to compensation, and the same is true of a parent of a victim. Governor Pataki by Executive Order also made domestic partners eligible for funding from the New York State Crime Victims Fund. Exec. Order. No. 113.5, Suspension of Provisions Relating to Crime Victims Awards for Persons Dependent upon Victims of the World Trade Center Attacks (2001), at http://www.state.ny.us/sept11/wtc_exeorders.html (last visited Oct. 27, 2002) [hereinafter Pataki Exec. Order].

32. Gross, *supra* note 28; Pataki Exec. Order, *supra* note 31.

33. State Fund, *supra* note 30. The State requires three items of proof of interdependency: one from an A list of “serious” items like mutual powers of attorney, wills, mortgage indebtedness and the like, and two from a B list such as joint bank accounts, credit cards and “other proof establishing economic interdependence.” These requirements, not imposed on those with a valid marriage certificate, although perhaps legitimately aimed at ensuring against claims by mere roommates or transient lovers, add a layer of proof that not only may be difficult to meet, but is also hard to justify for those who are registered as domestic partners under New York City’s law (or who may have

But determining the boundaries of entitlement raises a more fundamental question: Why should the family be defined by reference to a sexual partnership at all?³⁴ Why shouldn't we instead define family according to relationships of care and dependency – the types of relationships reflected in the Portraits? It is hardly accidental that we use the term “cared for” to denote actual care taking and also love. Aren't those the relationships we value – aren't they the stories that kept many of us glued to the pages of *A Nation Challenged*? Many of those described in the Portraits, who will be picking up the pieces of the victims' lives, caring for those left behind, and dealing with financial, legal and other matters, do not fit traditional nuclear family patterns. Many of those who were emotionally, physically, and financially dependent on victims are outside formally established families. Neither the State nor the Federal Fund will compensate these caretakers and dependents.³⁵

These issues are hardly new to family law; the World Trade Center disaster simply created another arena in which they are played out. Defining family is an important issue in estate, bankruptcy and tax law, as well as immigration, employment, insurance and other areas of law. As of the most recent census, nuclear families represented fewer than 25% of families,³⁶ and barely a third of households included children

availed themselves of the benefits of Vermont's civil union or other domestic partnership laws).

See also, David W. Chen, *Lure of Millions Fuels 9/11 Families' Feuding*, N.Y. TIMES, June 17, 2002, at A1 [hereinafter Chen]. This article demonstrates the travesties of justice such rigid rules can produce. In one instance, the separated husband of a victim claimed funds the dependent (and cohabitant) mother of the victim applied for. In another, a woman in a 10-year relationship with a victim, who had born and raised two children by him, was challenged by the victim's eighteen year-old son by a former marriage. State law (and the funds basing decisions on it) would only recognize the son's claim, because of the lack of a marriage license.

34. This question was first raised and has been eloquently defended by Professor Martha Albertson Fineman, to whom I am enormously indebted for her assistance and insight. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 8 - 9 (1995).

35. One of the notable aspects of the Portraits is the number of family members who ascribe importance to such caretaking tasks as home repair, gardening help and shopping for elderly relatives, and baby-sitting for nieces, nephews and grandchildren. Whenever the recipients of these services do not qualify as financial dependents within the specific meaning of State Fund regulations, they will receive no compensation for these losses, even in cases in which because of the absence of this assistance they may no longer be able to continue to reside or live as they were able to with the victim's help.

36. Jason Fields & Lynne M. Caspar, *America's Families and Living Arrangements*, U.S. Bureau of the Census: Current Population Reports at 3 (June 2001). See also Eric

under 18.³⁷ Of those that did include children under 18 years-old, 26% were one-parent families.³⁸ Because of our nearly 50% divorce rate, there are increasing numbers of merged households and step-families, often established without marriage or formal adoption.³⁹ And due to demographic change as well as decreasing public provision of care, more and more adults care for parents and other elderly or disabled relatives.

Courts and legislatures confronted with the injustices produced by rigid formality in family definition have typically extended privileges and benefits only to entities that mimic the nuclear or marital form.⁴⁰ But limiting the definition of family in this way leaves many of those described by the Portraits without assistance. Perhaps rather than making the sexual partnership, married or unmarried, the defining constituent of family law should make care the touchstone.⁴¹

Doing so would hardly be simple. A care-based definition of family will likely complicate determinations such as those involved in compensating survivors of disaster victims, as well as decisions in many other areas of law. In the first place, there is the problem of definition. What sort of caretaking counts? Should law track Fund eligibility rules and recognize only the financial aspects of caretaking and dependency, or should it parse the many, often unrecognized, personal aspects of care, from the physical labor of clothing and feeding, to the intangibles of educating, inculcating values, and offering emotional care and support? How would it do this? It is far from simple to measure the intangible and emotional aspects of care.⁴²

Shmitt, *For the First Time, Nuclear Families Drop Below 25% Households*, N.Y. TIMES, May 15, 2001, at A1.

37. *Id.* at 2, 4. The figure refers to children of a householder.

38. *Id.* at 7.

39. Rose M. Krieder & Jason M. Fields, *Number, Timing, and Duration of Marriages and Divorces: Fall 1996*, U.S. Census Bureau, Current Population Reports, P70-80, Washington, D.C. (2001).

40. See *Braschi v. Stahl Assoc.*, 543 N.E.2d 49 (1989); *Connell v. Francisco*, 898 P.2d 831 (1995); *Holtzman v. Knott*, 533 N.W.2d 419 (1995); *V.C. v. M.J.B.*, 725 A.2d 13 (1999).

41. This proposal is not so different from that of Governor George Pataki, in calling on the Bush administration to base compensation decisions on the whole picture, including emotional and financial dependency. See Pataki Exec. Order, *supra* note 31.

42. It might, for example, be necessary to award benefits for economic loss separately from those for non-economic loss, on the theory that financial dependence does not necessarily go hand in hand with emotional and other forms of dependence. Those who lost most financially may not be those who suffered the greatest loss of companionship and care. Those who may have given the most emotional and personal

And, of course, substituting a complex, case by case inquiry for simple formal rules creates difficult problems of administration, judicial and otherwise – raising costs, enlarging discretion, thereby creating unpredictability, and leading to increased litigation. But case by case complex determinations are already necessary in making Fund claim determinations, just as they are in many other aspects of family, estate, and other areas of law.⁴³ It is difficult to justify the use of formal rules simply for the sake of simplicity, if those rules no longer (if they ever did) serve the ends of justice.⁴⁴

I want to close with two further thoughts. The first involves the gender implications of substituting assessments of caretaking and dependency for existing formal definitions of family resting on sexual partnership. In the majority of cases, it is women who step in to care for children and elderly dependents in times of disaster and crisis, as in ordinary life. And, because they live considerably longer, women are also more frequently likely to be those deprived of a caretaker when tragedies like 9/11 occur. Women are thus those most in need of support, yet many are likely to be left out of compensation calculations when formal notions of family hold sway. Gender justice hence demands more flexibility in family definition.

Indeed, we need to think more about these caretakers when we confront tragedies like the World Trade Center disaster. We are quick to recognize the heroes who gave their lives trying to save others, or who, like several in this room, pitch in to help in the aftermath. We are slower to realize that each of these heroes was birthed, raised and

care to the victim may not have contributed the most financially. But to the degree that we ask courts and juries to do this in the case of personal injury awards, why can we not ask it in family matters as well?

43. Those determinations are already complex and muddled because of the complexity of family law. See Chen, *supra* note 34, which noted how a claim based on a 10-year relationship without the benefit of formal marriage was likely to turn on whether the couple's Pennsylvania vacations resulted in establishment of a common law marriage.

44. There is, of course, a concern with the potential strain on judicial resources of making these sorts of determinations. An inordinate proportion of civil dockets are already consumed with family matters. And although it could be argued that if judicial outcomes are less certain, parties will use private instruments (such as wills and formal agreements) to avoid uncertainty, only a small percentage of the population currently writes wills, and the hoped for increase in cohabitation agreements after uncertainty-enhancing decisions like *Marvin v. Marvin* never materialized. *Marvin v. Marvin*, 557 P.2d 106 (1976).

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cared for by someone, often at considerable sacrifice, and that these caretakers, too, are heroes, if almost always unsung.

So, what insights can be gained from looking at the Portraits through the lens of family law? Perhaps among the most important is that the reconstruction necessitated in the aftermath of 9/11 ought not merely be of the sort accomplished in steel and glass, but should take place in the very structures of the legal system itself.

