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Professional Commitments in a Changed World

Cover Page Footnote

Associate Professor, New York Law School; Research Affiliate, Yale Institution for Social and Policy Studies. I am grateful to Denny Curtis, Judith Resnik, and Richard Schottenfeld for comments on an earlier draft. Thanks also to Jennifer Meyer for superb research assistance and helpful suggestions. A special thank you to Deborah Rhode for being such a wonderful mentor and good friend.

PROFESSIONAL COMMITMENTS IN A CHANGED WORLD

*Tanina Rostain**

INTRODUCTION

I now teach law in the shadow of death. Nine blocks from my law school several thousand people lie buried in a mass grave. Considering that so many of our students worked as interns in the World Trade Center, lived in close vicinity, commuted through the plaza, and serve as firefighters and police officers, we were extraordinarily lucky: We did not lose a single one. But there are missing family members, friends and at least three graduates. And hundreds of our students—and not a few of my colleagues and coworkers—witnessed the gruesome events of September 11 first hand on their way to the school that morning.

Our building was without power, water, telephone or other amenities for more than a week after the events. A month later, some services are still intermittent, despite the tireless round the clock efforts of providers in the City. As you look downtown from the corner where our law school stands, the shape of the enormous pile of debris has changed over the past weeks: Earlier, two jagged gothic shards of the Towers jutted hundreds of feet into the sky. Now it is harder to make out the disaster site, except when evening descends, and the area is illuminated by huge bright lights. Smoke still wafts up from the area, and sometimes, when the wind shifts, the air around and inside the school smells acrid. (When the smell drifts through, people around school exchange explanations about which building remnants are currently being demolished and removed.) Fire trucks, police cars, construction machinery, tow trucks, Con Ed trucks, AT&T trucks, temporary Verizon phone banks and emergency generators clutter the streets and sidewalks. Men wearing construction hats and facemasks are a routine sight, and work identification card necklaces have become a necessary fashion accessory for men and women. Walking from the subway station, it is

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difficult to leave the streets and enter the building. It is even more difficult, once inside the building, to go back outside. After a two-week hiatus, we were able to start teaching again.

The events of September 11 have created for all of us a before and after. Deborah Rhode's book, *In the Interests of Justice*,¹ came out in the before. For members of the elite legal profession—as for most affluent Americans—the before days were a time of innocence. Elite lawyers could live in the comfortable assurance that if they worked long hours in elegantly furnished offices in high rise buildings, located in New York and other commercial centers, they could contribute to the expansion of free market capitalism around the world and make lots of money besides. Although leaders of the bar routinely voiced their anguish that professionalism was on the decline, the elite bar was a generally self-satisfied lot. *In the Interests of Justice* was intended to serve as an exhortation to lawyers to shake off their complacency and rededicate themselves to the task of improving the legal profession and the American system of justice—aspirations that many of them had entertained when they first chose to become lawyers.

In the book, Professor Rhode argues lucidly and compellingly that the public is entitled to expect much more than is available from our system of justice, which in its current form is cumbersome, overly complex and unaffordable for most people. In her comprehensive discussion, Professor Rhode canvasses the major complaints voiced in recent years about lawyers and the justice system, both from within and outside the legal profession, and demonstrates which are based on myth and media distortion and which have a strong basis in social science research. Throughout, Professor Rhode is committed to getting the facts right, and the book is a treasure trove of data about our current justice system. *In the Interests of Justice* offers a clear-eyed account of the failings of the legal profession and a panoply of ambitious but feasible proposals that would go a long way to addressing them.

Professor Rhode's book not only addressed the public's dissatisfaction but also sought to speak to the deepening level of distress and depression within the legal profession. Under the prevailing conditions of practice, lawyers were having trouble finding personal satisfaction or moral value in their work. Simply put, money had, for many, become the sole measure of professional success. The profit orientation adopted throughout the bar was crowding out other important personal and professional commitments to family, community participation, cultural and intellectual pursuits and public

1. Deborah L. Rhode, *In the Interests of Justice* (2000).

service. As she emphasizes, if lawyers hoped to be happy, they needed to start caring less about material advancement and more about other more meaningful pursuits.

Professor Rhode's reform program had not had the opportunity to penetrate the collective consciousness of the bar, when lawyers, among Americans more generally, received a very different type of wake-up call in the terrible events of September 11. The implications of ongoing events for law and the legal profession are many and will be unknowable for a long time to come. Undoubtedly though, the events have precipitated significant soul searching among members of the bar, particularly those with corporate practices centered in New York City. In the aftermath of September 11, professionals in the business world, who counted among their friends and colleagues many victims of the attacks, have been prompted to reflect on the goals and aspirations they had earlier entertained. For the immediate future, financial rewards are no longer presumed to be the measure of success in this world.

This reexamination of values has been reflected in the energetic response to the attacks from the bar, which has exhibited an unprecedented public spirit. Whether this recent enthusiasm for pro bono work will translate into a more sustained commitment in the bar to equal access to justice and civil justice reform is anybody's guess. But there are some promising signs that lawyers might be receptive, in the wake of recent events, to the sort of professional and workplace reforms advocated by Professor Rhode.

Current circumstances have also created an occasion to look beyond national borders, to the role of American lawyers in the global arena. If, as Professor Rhode argues, the elite bar has been insufficiently concerned with the quality of justice in the United States, it has been even less engaged with such questions globally. Transnational corporate practice appears animated by the myth that the growth of free market capitalism will automatically bring improved living conditions and the emergence of democratic institutions around the world. The current state of deep unrest and anti-American sentiment throughout much of the developing world suggests, to the contrary, that lawyers need to develop a much more sophisticated view of the global responsibilities of multinational corporations and the lawyers who represent them. Providing a full-fledged account of the challenges facing transnational corporate lawyers is beyond the scope of this essay, but it is useful as a first step to examine the assumptions underlying benevolent globalization.

I. THE RESPONSE OF ORGANIZED BAR GROUPS IN THE AFTERMATH OF SEPTEMBER 11

A. Local Bar Groups

Since September 11, the New York bar has no longer been engaged in “business as usual.” On the most basic level, thousands of lawyers who had offices downtown, including a number working in elite Wall Street firms, have been displaced. Much effort by the organized bar has been devoted to helping lawyers who no longer have access to their offices find alternative space, reconstruct files, contact clients and resume their practices.²

The bar’s efforts have not been confined to helping displaced lawyers and their existing clients. As the enormity of the damage began to register in the days after the attacks, it became all too obvious to lawyers in New York and elsewhere that families of victims and other people and businesses affected in the neighborhood would be in great need of a range of legal services. Within days, the Association of the Bar of the City of New York, the New York State Bar Association, and the New York County Lawyers Association launched a coordinated effort to provide a clearinghouse for affected people to obtain needed legal services on a pro bono basis.³ In what one lawyer poignantly characterized as the “second wave of rescue efforts,”⁴ the various bar associations—in conjunction with hundreds of law firms, numerous public interest law organizations and ten area law schools—began immediately to provide training sessions for volunteer attorneys in family, estate, business and regulatory law. These groups also set-up legal referral hotlines, established a walk-in-legal clinic for small business owners, reconfigured their web sites to provide easy access to information about available legal and economic assistance, prepared and posted various useful legal forms online, and began to coordinate the pro bono efforts of thousands of volunteer attorneys.⁵ By mid-October, the number of lawyers offering their

2. See, e.g., *A Message from NYSBA President Steven C. Krane*, at <http://www.nysba.org/wtc/presidentsmessage.html> (last visited Feb. 18, 2002); *Open Letter from Court and Bar Leaders*, N.Y. L.J., Sept. 26, 2001, at 2, <http://www.courts.state.ny.us/barnotice92501.html>; *Professional Services for Displaced Firms and Attorneys*, at http://www.abcny.org/currentarticle/world_trade_attack2.html (last visited Feb. 18, 2002).

3. See generally ABCNY, The Association of the Bar of the City of New York, at <http://www.abcny.org> (last visited Feb. 18, 2002); New York County Lawyers’ Association, at <http://www.nycla.org> (last visited Feb. 18, 2002); The New York State Bar Association, at <http://www.nysba.org> (last visited Feb. 18, 2002).

4. See Barbara Ross, *Lawyers Offer Free Help for Victims, Kin*, N.Y. Daily News, Oct. 4, 2001, at 20 (quoting Andrew Martin, Spokesperson for the Association of the Bar of the City of New York).

5. See generally ABCNY, The Association of the Bar of the City of New York, at <http://www.abcny.org> (last visited Feb. 18, 2002); NYSTLA’s Home Page, at <http://www.nystla.org> (last visited Feb. 18, 2002).

assistance significantly exceeded the number of people who had sought help.⁶ Although not surprising in light of the overall public response to the tragedy, this massive effort by the organized bar has been impressive by current bar standards.

Organizers of ongoing pro bono efforts hope that the strong immediate response from the bar will translate into a sustained commitment to pro bono work.⁷ According to organizers, many of the lawyers who volunteered had not previously been involved in systematic pro bono initiatives and may be inspired by this initial experience to continue to do pro bono work over the longer term.⁸ Ongoing involvement has been made all the more easy by the vehicle chosen to coordinate September 11 pro bono efforts. Rather than launch a separate initiative, organizers have turned to *probono.net*, an innovative Internet site that has evolved in the last three years into an important clearinghouse for lawyers interested in participating in pro bono work and clients in need of legal assistance across the country. While accessing the September 11 practice area, lawyers are exposed to numerous other pro bono opportunities.

As lawyers begin to deal with the legal needs of victims, they may come to see that such persons, for all the unique horror of precipitating events, do not necessarily have a superior claim to legal assistance than people who, due to other misfortunes or financial hardship, cannot obtain needed legal services. The people affected run a gamut that includes family members of victims, low wage and undocumented workers who have lost jobs, individuals and businesses suffering property loss, people on public assistance whose benefits have been disrupted, and numerous other categories.⁹ They also presumably have legal needs that predate September 11, which pro bono lawyers will be called upon to address. Although the attack itself was unique in American history, the legal needs to which it gave

www.nystla.org (last visited Feb. 18, 2002); *Probono.net*, at <http://www.probono.net> (last visited Feb. 18, 2002); The New York State Bar Association, at <http://www.nysba.org> (last visited Feb. 18, 2002).

6. As of October 23, 2001, there were 800 individuals and families in the City Bar referral system, and approximately 350 were receiving help from lawyers. Of the 200 small businesses that had sought assistance, nearly 100 had been assigned to Small Business Initiative volunteers. According to Chief Judge Judith Kaye, 1000 death certificates had been issued by that point. October 23rd Volunteer Update, at <http://www.probono.net> (last visited Feb. 18, 2002). Within two months, another 500 individuals and 130 small businesses were receiving legal assistance. December 12th Volunteer Update, at <http://www.probono.net> (last visited Feb. 18, 2002).

7. Thomas Adcock, *Attorneys Flock to Join Pro Bono Efforts to Help Victims of Attack*, N.Y. L.J., Sept. 27, 2001, at 1.

8. Telephone Interview with Laren Spierer, Practice Area Coordinator, *Probono.net* (Oct. 12, 2001). According to Ms. Spierer, the majority of registrants for the September 11 project are first time volunteers.

9. See Stephen Ellmann, *Minutes of the Meeting of September 21, 2001*, at <http://www.nyls.edu/content.php?ID=753> (last modified Dec. 5, 2001).

rise were not.¹⁰ The experience of providing legal assistance to September 11 victims may inspire lawyers to continue their pro bono efforts over the longer term.

Increased pro bono, as Professor Rhode and other proponents recognize, will not alone be sufficient to address the problem of unmet legal need.¹¹ The results of a recent extensive nationwide study of unmet legal needs in low- and moderate-income households by the American Bar Association bear out this intuition. Approximately half of the respondents in the study, which was conducted in the mid-90s, reported a need for legal services during the previous year. Of these, nearly seventy-five percent in low-income households and almost two-thirds of those in moderate-income households did not seek the assistance of a lawyer.¹² In 1992, of the estimated 95 million American households, 17 million fell in the low-income categorization and 61 million were at the moderate-income level. Using the results of the comprehensive legal needs study, we end up with a rough total of 27 million low- and moderate-income households with unmet legal needs.¹³ How does that compare with the number of lawyers? In 1995, there were estimated to be some 706,000 lawyers in private practice.¹⁴ These estimates yield 38 legal problems per lawyer. While the Comprehensive Legal Needs Study does not provide estimates of how much time would be required of lawyers to address these needs, it is a fair bet that it is more than an hour or two per household. Even if all lawyers in private practice had put in their fifty hours of pro bono a year, as urged by the American Bar Association, there would still have been a significant distance to go before the needs reported in the Legal Needs Study were addressed.¹⁵ When a price tag is put on the problem, it is estimated that it would cost between three and four

10. Comments of Daniel L. Greenberg, President and Attorney-in-Chief, The Legal Aid Society of New York, *Minutes of the Meeting of September 21, 2001*, at <http://www.nyls.edu/content.php?ID=753> (last modified Dec. 5, 2001).

11. See, e.g., Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 Md. L. Rev. 274, 282 (1986) [hereinafter Rhode, *Professional Reform*]. As Professor Rhode has emphasized, "any meaningful effort to equalize access would require not only massive public subsidies but the prohibition of private markets." *Id.*

12. See Consortium on Legal Services and the Public, American Bar Association, *Legal Needs and Civil Justice: Comprehensive Legal Needs Study 10-12* (1994).

13. Here is a rough calculus, based on statistics from the Comprehensive Legal Needs Study: Assuming of the 17 million low income households in 1992, some 8.5 million had legal needs in that year. Of these, 6.4 million did not obtain legal assistance. Approximately 30 million moderate-income households had legal needs, of which some 20 million did not have recourse to a lawyer or the legal system.

14. This number included 635,000 in private firms and another 71,000 in private industry. Clara N. Carson, *The Lawyer Statistical Report, U.S. Legal Profession in 1995*, at 24 (1995). For the sake of simplicity, I am bypassing the issue of whether government lawyers should be expected to engage in pro bono work as well.

15. See Geoffrey C. Hazard, Jr., *After Legal Aid is Abolished*, 2 J. Inst. for Study Legal Ethics 375, 380 (1999); Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1788 (2001) [hereinafter Rhode, *Access to Justice*].

billion dollars annually to meet the civil legal needs of low-income households, and this amount does not take into account the substantial unmet needs of middle-income Americans.

Meaningful pro bono involvement across the private bar will not be adequate to address unmet legal needs, even assuming that studies such as the Legal Needs Study accurately report the extent of the problem. And there are good reasons to think that these studies, which are based on subjective reports of participants, significantly underestimate the need. Respondents may not report problems that are susceptible to legal intervention because they do not recognize them as legal problems. These studies, moreover, do not take into account the lawyering that is needed to address collective concerns, such as discrimination in public entitlements and services, environmental dangers and failures of the political process.¹⁶

Insisting that lawyers engage in more serious pro bono efforts can be defended, of course, on the ground that something is better than nothing—and if all practitioners made significant contributions, we would end up with a lot of the something. Pro bono involvement also provides an *education sentimentale*.¹⁷ It brings a measure of personal satisfaction absent all too often from much fee bearing work, which, as lawyers increasingly complain, is stressful, tedious and lacks redeeming moral value. Representing clients with limited resources may, in addition, lead lawyers to appreciate more fully the yawning gap between the promise of equal justice and current realities and motivate them to entertain more fundamental changes in the civil justice system of the sort envisioned by Rhode.¹⁸ For example, lawyers who, through pro bono participation, witness first-hand the disadvantages of not having access to any type of legal assistance may be willing to revisit their opposition to proposals to loosen the prohibitions against non-lawyer delivery of basic legal services.¹⁹

16. Rhode, *Access to Justice*, *supra* note 15, at 1788. Other objections have been leveled against survey based legal needs studies, which I will not rehearse here. See, e.g., Rhode, *Professional Reform*, *supra* note 11, at 281-82. Taken together, these criticisms tend to suggest that the risk of underestimating unmet legal need is greater than overestimating it. See, e.g., Rhode, *Access to Justice*, *supra* note 15, at 1788.

17. For discussions of the role of local professional context in shaping lawyers' normative judgments and imaginative horizons, see Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev. 1273 (1998); Tanina Rostain, *The Company We Keep: Kronman's The Lost Lawyer and the Development of Moral Imagination in the Practice of Law*, 21 L. & Soc. Inquiry 1017 (1996); Tanina Rostain, *Waking Up From Uneasy Dreams: Professional Context, Discretionary Judgment, and The Practice of Justice*, 51 Stan. L. Rev. 955 (1999).

18. See Deborah L. Rhode, *The Pro Bono Responsibilities of Lawyers and Law Students*, 27 Wm. Mitchell L. Rev. 1201, 1204 (2000). Notably, the topic of pro bono is absent from Rhode's discussion in *In the Interests of Justice* of the problem of expanding access to legal services but appears instead in her discussion of improving the quality of lawyers' professional lives. Compare Rhode, *supra* note 1, at 23-48 (pro bono discussed at page 37) with Rhode, *supra* note 1, at 117-41.

19. See Rhode, *supra* note 1, at 135-38.

B. Trial Lawyers

Recent events met with an equally strong response from national and state trial lawyer organizations. Within hours of the attacks and before legislative relief for air carriers was under discussion in Congress, the American Trial Lawyers Association (“ATLA”) called for a broad moratorium on lawsuits.²⁰ Such a moratorium was an unprecedented event in the history of the trial lawyer bar. Having long insisted on the near sacrosanct status of personal injury lawsuits to provide victims full redress for their injuries, the American trial lawyer bar appeared to recognize, with the moratorium, that the standard formulations of negligence and liability were poorly fitted to the magnitude of the occasion.

Not to be outdone by other bar groups, trial lawyers’ organizations have orchestrated a massive pro bono effort to assist victims’ filing claims under the recent legislation enacted by Congress. In a very short time frame, members of ATLA and the New York State Trial Lawyers’ Association (“NYSTLA”) have launched Trial Lawyers Care, a public interest law organization whose aim is to provide legal assistance without charge to victims seeking compensation from the government for their injuries. Within a few days of being announced, the organization received over one thousand replies from trial lawyers all over the country. Although the Victim Compensation Fund does not require proof of liability, victims will need to submit detailed evidence of damages to support their claims. Initially, trial lawyers estimated that there will be some 15,000 claims under the Fund and that each will require up to 200 hours of work.²¹ By participating in this effort, trial lawyers have predicted that they will collectively forego hundreds of millions of dollars in potential fees.²²

To date, thousands of trial lawyers have signed up.²³ Organizers of the initiative—including Leo V. Boyle, the president of the American Trial Lawyers Association, and Larry Stewart, the president of Trial

20. Remarks of Leo Boyle, President of the Trial Lawyers Association of America and Vice President of Trial Lawyers Care (Oct. 15, 2001), at <http://www.911lawhelp.org/info/news/leotalk.htm> [hereinafter Remarks of Leo Boyle]; Telephone Interview with David Golomb, Board of Directors, Trial Lawyers Care, and Former President, New York State Trial Lawyers Association (Oct. 5, 2001). As of December 20, 2001, one lawsuit had been filed against an airline carrier in connection with the disaster. Phil Hirschhorn, *Sept. 11 Widow Sues United Airlines*, at <http://www.cnn.com/2001/LAW/12/20/wtc.united.lawsuit/index.html> (last visited Feb. 15, 2002).

21. Diana B. Henriques, *Lawyers Offer Free Advice in Tapping Federal Fund*, N.Y. Times, Oct. 15, 2001, at B11.

22. *See id.* At the time these estimates were made, it was feared that upward of 6000 people had perished in the World Trade Center Attack. The number of deceased victims is now calculated to be closer to 3000. Initially, a lawyer participating in Trial Lawyers Care estimated the foregone fees at nearly one billion dollars, based on a traditional one-third contingency fee. *See id.*

23. Telephone Interview with Larry S. Stewart, President, Trial Lawyers Care (Dec. 21, 2001); *see also* Henriques, *supra* note 21, at B11.

Lawyers Care—have devoted hundreds of hours since September 11 reviewing and commenting on draft regulations, coordinating volunteers and potential clients, preparing teaching and resource materials and brainstorming strategy.²⁴ To participate in Trial Lawyers Care, lawyers must agree not to take a fee regardless of whether they ultimately represent a client under the Fund or in a traditional lawsuit or refer the client to another attorney.²⁵ This pledge eliminates short-term financial incentives and permits participating attorneys to give their clients disinterested advice as to whether to proceed under the Fund or pursue traditional litigation.

Undoubtedly more is involved in this extraordinary effort by the organized trial bar than the selfless desire to do the right thing. The trial bar is well aware of the unfavorable public image it has developed over the last several decades and may simply have recognized that its response was constrained by the magnitude of recent events. Insisting that September 11 cases should be litigated on a traditional contingency fee basis would likely have proven unpalatable to a public already angered by the size of contingency fees in certain cases. Following the announcement of Trial Lawyers Care, members of the air crash disaster bar, despite being highly critical of the Fund, have themselves agreed to pursue traditional litigation on a reduced fee basis.²⁶

Leaders of the trial bar insist that the creation of the Fund and their pro bono participation flow from the *sui generis* nature of the events, analogous to representing victims of the Holocaust seeking reparation, and will not spill over to their usual way of doing business, particularly their usual method of charging fees.²⁷ But it is tempting to hope otherwise. At the very least, the pro bono initiative may afford useful ammunition to critics of the windfall fees obtained by lawyers in recent high profile cases. Contingency fees are ultimately justified because they provide access to the tort system and compensate lawyers for the time and effort expended and risk assumed. But it is hard to see how this rationale holds up in the face of fees, such as those awarded in the tobacco cases, that, if calculated on an hourly basis, earn lawyers tens of thousands of dollars an hour.²⁸ Claims that these types of fees are nevertheless justified are likely to ring all the more hollow in the wake of this pro bono initiative, which implicitly acknowledged that money damages belong first and foremost to

24. Telephone Interview with Stewart, *supra* note 23.

25. See Remarks of Leo Boyle, *supra* note 20.

26. Telephone Interview with Richard Bieder, Board of Directors Trial Lawyers Care (Dec. 21, 2001); see comments of Aaron Broder, in William Glaberson, *Legal Community Is Divided by the Prospect of Lawsuits for Attack Victims*, N.Y. Times, Oct. 10, 2001, at B10; Karen Freifeld, *Dilemma for Families: Quick Claim or Court?*, Newsday, Oct. 4, 2001, A30.

27. Leo Boyle, *Hewing to Our Mission*, Trial Magazine, Dec. 1, 2001, at 20.

28. See Rhode, *supra* note 1, at 178-80.

victims of torts, and amounts allocated to lawyers need to have some reasonable relation to their effort and the risk they take on.

If the Fund works as planned, hundreds, and perhaps even thousands, of lawyers will have contributed much valuable time, and many victims will receive compensation at the same level as would be expected through traditional tort claims. If successful, the Fund will also provide another model for resolving and compensating mass personal injuries. Under the Act, claim procedures have been simplified to discourage litigiousness and provide compensation for victims as quickly as possible.²⁹ Trial lawyers who represent clients under the Fund will be exposed to a process of claim adjudication that is intended to be non-adversarial. The process, assuming it works, may occasion trial lawyers, among others, to reexamine the costs and benefits of litigation as the dominant vehicle for compensating personal injury victims.

II. LAWYERS IN TRANSNATIONAL CORPORATE PRACTICE

The events of September 11 call for an equally strong response from lawyers engaged in transnational corporate practice. In recent decades, American elites have been in the grips of a powerful collective fantasy. As they have experienced an extraordinary increase in wealth through the expansion of markets around the world, they have taken for granted that life was improving for everyone else. Under the logic of this myth, globalization was elevating the standard of living around the world as market economies provided more stable employment and livable wages. Globalization was also supposedly encouraging the dispersal of democratic ideals and practices throughout the world.³⁰ Evidence for this belief was to be found in the demise of communism in Eastern Europe and the simultaneous rise of democratic institutions and market economies in its place, as well as in recent developments in countries in Latin America and East Asia. These myths served as a powerful justificatory framework for enthusiastic participation in the expansion of market capitalism around the world. For American lawyers engaged in transnational practice, they could “do well” and “do good” at the same time: The accumulation of wealth by their multinational corporate clients and their own high incomes did not reflect a diminution in material resources available to others. They were, instead, products of a mechanism that also functioned to enhance the aggregate well-being of all.

29. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (2001).

30. This is a simplified version. For a more detailed account of the master narratives of globalization, see Susan Silbey, “*Let Them Eat Cake*”: *Globalization, Postmodern Colonialism, and the Possibilities of Justice*, 31 *Law & Soc’y Rev.* 207, 211-17 (1997).

The events of the past months require that elite corporate lawyers begin to rethink the role their work plays in perpetuating the current world order. In particular, it is necessary for them to explore how the forces of globalization may be exacerbating economic and social inequality and frustrating the realization of democratic ideals and practices. As an initial step, it is necessary to revisit some of the central premises on which the myth of benign globalization is based.

Perhaps the most cherished conviction in the globalization creed is that the expansion of markets ultimately increases the standard of living for everyone. There is significant evidence that markets unrestrained by any regulatory mechanisms tend to have the contrary effect. As markets create winners, they also create losers. Thus, in the United States and other developed countries, income disparities between the wealthy and the poor have widened sharply over the last three decades.³¹ Considered on an absolute scale, the picture is not improved. While measuring poverty is wrought with contested valuation issues, the evidence that the standard of living is improving for poor people around the world is, at best, equivocal. The overall percentages of persons globally living on less than one dollar and less than two dollars a day—the generally accepted standard for poverty worldwide—have fallen slightly since 1987, but these improved rates mask major regional differences. For example, the percentage of persons living on less than two dollars a day has risen in countries in Eastern Europe, Central Asia and sub-Saharan Africa. In other areas, the past decade has not shown any significant amelioration.³² Most troubling for the advocates of unfettered market expansion, with the advent of what Edward Luttwak has termed “turbo-capitalism,” the incidence of poverty has increased in the United States and the United Kingdom, and there are strong signs of the same trend in other Western European countries.³³ As recent experience in the United States suggests, poverty may be a necessary incident of an unfettered market economy.³⁴

Just as the globalization of markets does not necessarily rain wealth down on everyone, neither does it necessarily sow the seeds of democratization. In their recent comprehensive study of the relation between capitalist development and the advent of democratic forms of rule, Dietrich Rueschemeyer and his co-authors conclude that the

31. See, e.g., Edward Luttwak, *Turbo-Capitalism: Winners and Losers in the Global Economy* 91-101 (1999); Saskia Sassen, *Globalization and its Discontents* 137-51 (1998).

32. See The World Bank Group, *2001 Poverty Update*, at <http://worldbank.org/html/extdr/pb/pbpoverty.htm> (last visited Feb 18, 2002).

33. See Luttwak, *supra* note 31, at 92-94.

34. See *id.* Luttwak, who is enthusiastic about the capacity of markets to eliminate waste and inefficiency, argues that Western democracies have failed to come to terms with the poverty and dislocation they create. *Id.* at ix-xiv.

links between the two are contingent.³⁵ More precisely, in examining both cross-national quantitative and comparative historical research, they find that the rise of democracy is more appropriately characterized as a reaction to capitalist development, rather than a necessary consequence. Refuting the truism that the expansion of market economies naturally brings about political freedom and democratic participation, they emphasize that “capitalism creates democratic pressures in spite of capitalists, not because of them. Democracy [is] the outcome of the contradictory nature of capitalist development, which, of necessity, created subordinate classes, particularly the working class, with the capacity for self-organization.”³⁶ As Austin Sarat and Stuart Scheingold observe in the same vein, “Despite some convergence, . . . democratization and globalization follow different trajectories and are at least as likely to work at cross purposes as to be mutually reinforcing.”³⁷

What lessons might lawyers in transnational corporate practice draw from examining the interactions among the globalization of the market, the alleviation of poverty and the advent of democratic ideals? So long as they subscribed to benign globalization, lawyers did not need to consider the specific political and economic circumstances in which their clients operated (or only did so insofar as these circumstances directly affected their clients’ interests). If, however, improved economic conditions and the rise of democratic values are the results of particular social and political processes, then lawyers need to consider their corporate clients’ global responsibilities as well as their own.

With few exceptions, the transnational corporate bar has not engaged questions of human rights and social justice abroad.³⁸ By and large, this type of work has been delegated to “cause” lawyers who function within practice networks that are separate from corporate practice networks.³⁹ Lawyers who are stationed at foreign branches of American law firms are generally not involved in local organized bar

35. Dietrich Rueschemeyer et al., *Capitalist Development and Democracy* (1992).

36. *Id.* at 271.

37. Austin Sarat & Stuart Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering*, in *Cause Lawyering and the State in a Global Era 5* (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter *Cause Lawyering and the State*].

38. A notable exception is a trip that Evan Davis, a partner at Cleary, Gottlieb and the President of Association of the Bar of the City of New York took with several other leaders in the elite New York corporate bar in November 2001 to meet with firms in Buenos Aires to foster participation in pro bono activities. Michael Cooper, *Private Bar Support of Public Interest Legal Work in New York City*, at http://www.probono.net/areas/feature.cfm?ID=8831&Area_ID=811&geographic_area=NY (last visited Dec. 12, 2001).

39. See Sarat & Scheingold, *supra* note 37, at 3-5. Sarat and Scheingold’s path-breaking collections of cause lawyering studies offer detailed accounts of activist lawyering in developing and liberal Western societies. See *id.*

activities,⁴⁰ and, to the extent that they belong to international bar associations, such groups do not encourage pro bono activities, support legal aid or participate in legal reform.⁴¹ The little existing research on lawyers in transnational law practice suggests that they do not collectively engage with political and social issues in the global arena.

My suggestion that American lawyers in transnational corporate practice become engaged in law reform and social justice issues in countries in which their clients operate might be objected to as paternalistic—yet another effort to impose Western values on the rest of the world. But, as the phenomena of cause lawyering illustrate, attempts to create democratic institutions and foster rule of law and of values can be done through grass-roots strategies that take due regard of the commitments and interests of those people whose empowerment is sought.⁴² In any event, the alternative, exporting market regimes to the rest of the world without regard to their effects on local social and political conditions is no less paternalistic and even more unacceptable.

CONCLUSION

March 11, 2002. Six months have passed since the Towers fell, and business in the City has taken on a semblance of normalcy. Daily commuters have become almost inured to the memorial wall near the subway entrance at Grand Central Station. The World Trade Plaza looks more like a construction project than a site of mass destruction.

In the intervening months, Enron collapsed, leaving in its wake a financial disaster affecting many. Perhaps the outrage engendered by this spectacle has been fueled by increased expectations. The Towers, after all, were supposed to stand for the strengths and promise of capitalism. Enron has exposed its ugly side. The greed and feigned ignorance among the principals and professionals involved have provided a striking contrast to the selflessness of rescue workers and volunteers in the weeks after the attacks.

Where does the legal profession stand in this story? They can go back to business as usual. Or they can seize the occasion and follow the guidance provided by Professor Rhode's book to rethink their professional commitments in a changed world.

40. Richard L. Abel, *Transnational Law Practice*, 44 Case W. Res. L. Rev. 737, 750 (1994).

41. *Id.*

42. See, e.g., Stephen Meili, *Cause Lawyering and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil*, in *Cause Lawyering and the State*, *supra* note 37, at 487.

Notes & Observations