

PRACTICE STYLE AND SUCCESSFUL LEGAL MOBILIZATION

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I

INTRODUCTION

What makes a great cause lawyer?¹ Is it dedication to the cause?² Strong ties to a political movement?³ Or can someone with superb legal skills but no political commitment be just as effective at advocating for a cause as a more conventional cause lawyer, employed full-time on behalf of the cause? A significant body of scholarship has explored these questions with mixed results.⁴ Perhaps not surprisingly, dedication, strong political ties, and superb legal skills all play a role in the making of a great cause lawyer, but so does a somewhat less obvious quality, which Marc Galanter described several years ago as practice “style.”⁵

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1. Cause lawyers are activist lawyers who use their legal skills to advance a cause. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 170–99 (1st ed. 1974) (providing an analysis of activist lawyers that would become the foundation of the “cause lawyering” literature); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Sarat & Scheingold, *Cause Lawyering*] (“Cause lawyering . . . is frequently directed at altering some aspect of the social, economic, and political status quo.”); Austin Sarat & Stuart Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in *CAUSE LAWYERING AND THE STATES IN A GLOBAL ERA* 3, 13 (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter Sarat & Scheingold, *State Transformation*] (noting that cause lawyers are those who “deploy their legal skills to challenge prevailing distributions of political, social, economic, [or] legal values and resources.”). A cause lawyer is also generally a lawyer who elevates cause over client, although sometimes the cause is the client herself. See generally Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 *INT’L J. LEGAL PROFESSION* 209 (1998) [hereinafter Scheingold & Bloom, *Transgressive Cause Lawyering*] (describing a continuum of cause lawyers, including those for whom client empowerment is the “cause”).

2. Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Towards an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 31, 32 (Austin Sarat & Stuart Scheingold eds., 1998).

3. MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 61 (1994) (describing cause lawyer Winn Newman’s strong ties to the equal-pay movement as critical to the movement’s success).

4. See, e.g., Sarat & Scheingold, *Cause Lawyering*, *supra* note 1, at 4 (examining the conditions that lead lawyers to engage in cause lawyering); Sarat & Scheingold, *State Transformation*, *supra* note 1, at 13 (observing that in practice, cause lawyering overlaps with conventional lawyering).

5. Marc Galanter, *Mega-Law: An American Invention*, 3 *HUMAN* 16, 16 (1982) [hereinafter Galanter, *Mega-Law*]; Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United*

An attorney's practice style has to do with how she approaches legal problems. Does she research the issue intensively before offering the client a potential solution?⁶ Does she rely on specialists to understand issues with which she is unfamiliar?⁷ Or does she adopt a less legalistic approach to the problem, essentially doing the best she can under the circumstances, with relatively little legal research or outside consultation?⁸ Galanter dubbed the former, more research-intensive style of legal practice "mega-lawyering."⁹ Lawyers who are less legalistic, on the other hand—who, in Galanter's words, undertake "more perfunctory investigation[s]" and engage in "a fair amount of 'winging it,'"—were described as "ordinary" lawyers, employing an "ordinary" practice style.¹⁰

In the early 1980s, when Galanter first set out these distinctions, differences among lawyers and the ways they practice law was understood primarily in terms of differences in the types of clients different lawyers represent.¹¹ Lawyers in the upper stratosphere of legal practice represented corporate clients, while lawyers in the lower stratosphere represented individuals.¹² Then, as now, cause lawyers did not fit easily into this division. This is because, as attorneys who focus primarily on the "cause," they challenge the dominant "ideology of advocacy," which trains lawyers to focus on their clients' interests, while remaining neutral to the cause.¹³

Because they tend to represent individual clients, cause lawyers seem to have more in common with those operating in the lower sphere of legal practice. Like those representing individual clients, for example, cause lawyers tend to work with smaller budgets and offer a relatively narrow range of services.¹⁴ But cause lawyers also have much in common with those representing corporate clients. Like corporate lawyering, cause lawyering is associated with

States, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152, 153 (Robert Dingwall & Philip Lewis eds., 1983) [hereinafter Galanter, *Mega-Law and Mega-Lawyering*].

6. See *id.* at 154 (describing the operating style of mega-lawyering as involving "more elaborate" research and "painstaking" investigation, as compared to that of "ordinary lawyering," which is typified by "less elaborate" research and "more perfunctory" investigation).

7. See *id.* at 155 (describing the "high degree of specialisation" that is "cultivated" in mega-lawyering firms) and at 157 (noting that mega-lawyering usually involves "generous use of experts").

8. See *infra* text accompanying note 10.

9. Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 157.

10. *Id.* (citations omitted).

11. See *id.* at 152 (noting that most scholarship "conclude[s] that much of the variation within the profession is accounted for by 'one fundamental difference . . . the difference between lawyers who represent large organizations [and] . . . those who represent individuals or individuals' small businesses.'") (citations omitted); see also John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 *LAW & SOC'Y REV.* 751, 770-74 (1998) (describing two distinct "hemispheres" of lawyers representing corporate and individual clients).

12. Galanter, *Mega-Law*, *supra* note 5, at 16.

13. See Scheingold & Bloom, *supra* note 1, at 209 (noting that cause lawyers "challenge mainstream representations of professionalism" by "taking sides in social conflicts"); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29, 36 (describing the neutrality principle as one of the bedrocks of the "ideology of advocacy").

14. Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 154.

relatively high levels of prestige.¹⁵ Moreover, much like corporate lawyers, cause lawyers essentially have a “repeat player”—the cause—for a client, with the corresponding advantages of the “repeat player” status.¹⁶

Galanter’s emphasis on the importance of practice style helps us better understand some important similarities between the professional experiences of cause lawyers and corporate lawyers, even when they represent very different types of clients. But Galanter’s fundamental point was much more profound. More focus on practice style, he argued, would shed light on how changes in practice style were marking an important “shift” in American legal practice, with implications not only for lawyers and their clients, but also for the “larger economic and political order.”¹⁷

Although Galanter acknowledged, at that time, that mega-lawyering was associated primarily with lawyers in corporate practice, he argued convincingly that the mega-lawyering style was being adopted by many practicing outside the realm of the corporate law firm.¹⁸ Perhaps more important, the mega-lawyering style was also gaining cultural dominance within the profession as a particularly prestigious (and lucrative) style of practice.¹⁹ In his words, mega-lawyering was becoming “an increasingly visible and influential part of the whole.”²⁰

Some twenty-five years later, Galanter’s insights seem remarkably prescient. Mega-lawyering now describes the practice style of large segments of the bar, including many cause lawyers.²¹ Moreover, there is now a significant literature on the economic, social, and political forces behind this fundamental shift in

15. This greater prestige stems from the role that cause lawyering is perceived to play in providing legitimacy for the legal system and for the profession as a whole by representing interests that might otherwise go unrepresented. *See, e.g.,* David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 459 (1994) (discussing the public-interest lawyer). As Sarat and Scheingold have noted, the legal profession “need[s] lawyers who commit themselves and their legal skills to furthering a vision of the good society because this ‘moral activism’ puts a human face on lawyering.” Sarat & Scheingold, *Cause Lawyering*, *supra* note 1, at 3. In exchange for this service, legal elites tend to view the cause lawyer in a more favorable light than they view other lawyers who practice outside the upper hemisphere.

16. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 140–44 (1974).

17. Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 153. This “shift,” Galanter argued, was “comparable to the movement from the individual general practitioner to hospital medicine.” *Id.*

18. *See id.* at 154–55, 170 (discussing the expansion of mega-lawyering outside the corporate firm), at 167–68 (describing the adoption of a mega-lawyering style by corporate in-house counsel, religious cults, the Defender Association of Philadelphia, and Team Defense, Inc., a nonprofit representing poor defendants).

19. *See id.* at 158 (noting the greater prestige associated with mega-lawyering).

20. *Id.* at 172.

21. *See, e.g.,* Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas*, 80 TEX. L. REV. 1781, 1785–95 (2002) (describing the rise of “heavy hitters” (mega-lawyers) in the plaintiff’s bar and distinguishing them from those with a more ordinary or “bread and butter” practice); MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY 170 (1986) (describing the increasingly elite focus of the public-interest (or cause-lawyering) bar).

legal practice.²² Relatively less attention, however, has been paid to understanding the political implications of this development. And, yet, according to Galanter, it is the political implications of mega-lawyering that should concern us most.

Galanter has not (yet) written all that much on the implications of the rise of mega-lawyering. As of this writing, there are only two articles, totaling under thirty pages.²³ The focus of these articles is to describe mega-lawyering as an innovation in legal practice. But both articles also close with a dark conclusion: “Mega-law heightens our expectations of legal vindication,” even as it “teaches us to despair of their realization.”²⁴

Legal vindication is the coin of the realm for all lawyers, of course, but it is especially so for cause lawyers, who play a uniquely important role in shoring up the legitimacy of the legal system.²⁵ If mega-lawyering “teaches us to despair” of legal vindication, does this mean cause lawyers who adopt a mega-lawyering style are less effective politically? It is not a question Galanter has explored. But Galanter’s articles on mega-lawyering do provide important conceptual tools that may be used to evaluate how practice style affects the efficacy of cause lawyers.

What follows is both a fuller explication of those tools and a more grounded exploration of how differences in practice style affected the outcomes in two cases. Part II provides some background on why the practice styles of cause lawyers may matter for purposes of successful legal mobilization. Part III analyzes how the practice styles of cause lawyers in two strikingly similar cases may have been a factor in the very different outcomes that the cases achieved. Part IV speculates about how practice style may affect the possibilities for successful legal mobilization more broadly.

22. Virtually all of this literature focuses on the plaintiff’s bar. *See, e.g.*, Daniels & Martin, *supra* note 21, at 1795–1808 (describing changes in the market and legal environments for Texas plaintiffs’ lawyers); Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification in the Plaintiff’s Bar in the 21st Century*, 51 DEPAUL L. REV. 219, 228 (1997) (noting the “growth of bureaucratic structures” in the plaintiff’s bar), at 231 (noting the large size, geographical reach, and “extensive resources” at the “top” of the plaintiff’s bar); Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiff’s Personal Injury Lawyers*, 6 INT’L J. LEGAL PROF. 345, 345–46 (1999) (similar findings in Indiana); *cf.* RICHARD L. ABEL, *AMERICAN LAWYERS* 44–47 (1989) (examining the rise of professionalism, a related development).

23. Galanter, *Mega-Law*, *supra* note 5 (two pages); Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5 (twenty-one pages). Galanter has also written related articles about the growth of large law firms. *See, e.g.*, Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747 (1990).

24. Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 173; Galanter, *Mega-Law*, *supra* note 5, at 16.

25. Sarat & Scheingold, *Cause Lawyering*, *supra* note 1, at 3 (contending that cause lawyers take responsibility for the positions they represent and thus “elevate[] the moral posture of the legal profession beyond a crude instrumentalism in which lawyers sell their services without regard to the ends to which those services are put”).

II

CAUSE LAWYERING AND PRACTICE STYLE

Cause lawyers are activist lawyers who use their legal skills to advance a cause.²⁶ Although the prototypical cause lawyer works for organizations like the American Civil Liberties Union (ACLU) or the National Association for the Advancement of Colored People (NAACP),²⁷ a great deal of cause lawyering is also engaged in by lawyers in private practice.²⁸ Moreover, in practice, “[i]ndividual lawyers frequently cross and recross the lines between cause and conventional legal practice.”²⁹ In other words, lawyers sometimes act as cause lawyers in a particular case, only to return to more conventional representation in a different case.

Cause lawyers often engage in as much activism as lawyering.³⁰ Indeed, their success often depends on their ability to subordinate legal strategies to the broader aims of the political movement.³¹ Thus, the most effective cause lawyers spend some energy coordinating litigation with publicity campaigns so that the litigation can act as a tool for raising consciousness.³² Cause lawyers can also encourage more direct activism, such as “rallies, marches, and other efforts” aimed at displaying support for the broader cause.³³

Although cause lawyers share an interest in using the law as a tool for social change, cause lawyering is not associated with a particular practice style. In part, this is because cause lawyers are found in all kinds of practice settings.³⁴ When cause lawyers work for nonprofit organizations like the ACLU and the NAACP, their style of practice tends to more closely resemble the mega-lawyering style of lawyers in corporate practice. Perhaps because of this, Galanter describes the legal style of cause lawyers as “an approximation of mega-law[yring] with less ample funding.”³⁵ When cause lawyering is engaged

26. See discussion *supra* note 1.

27. See SCHEINGOLD, *supra* note 1, at 173.

28. See Scheingold & Bloom, *Transgressive Cause Lawyering*, *supra* note 1, at 210 (describing a study of cause lawyering in different practice settings, including private practice); Sarat & Scheingold, *Cause Lawyering*, *supra* note 1, at 17 (discussing cause lawyers in private practice).

29. Sarat & Scheingold, *State Transformation*, *supra* note 1, at 13.

30. See, e.g., MCCANN, *supra* note 3, at 61 (recounting a cause lawyer’s efforts to educate the public about the cause for which he was litigating); see also Scheingold & Bloom, *Transgressive Cause Lawyering*, *supra* note 1, at 236 (describing the activism of a union lawyer).

31. See SCHEINGOLD, *supra* note 1, at 203–19 (arguing that legal tactics must be subordinate to a broader strategy of political mobilization to succeed).

32. See, e.g., MCCANN, *supra* note 3, at 58–63 (discussing the impact of media coverage on legal mobilization in the equal-pay movement).

33. See *id.* at 81.

34. See Scheingold & Bloom, *Transgressive Cause Lawyering*, *supra* note 1, at 210 (noting that cause lawyering takes place in corporate, salaried, and small-firm practices).

35. Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 171.

in by smaller-firm lawyers who represent individual clients, however, their practice style may more closely resemble that of “ordinary” lawyers.³⁶

There is also some evidence that lawyers in different practices approach their cause-lawyering activities differently. Corporate lawyers, for example, are less likely to engage in political activities such as organizing protests or publicity campaigns around the broader issues at stake.³⁷ In contrast, small-firm lawyers who routinely represent individual clients tend to exhibit greater willingness to engage in overtly political tactics.³⁸ Because of this, some studies suggest that the type of client a lawyer usually represents (corporate versus individual) reveals much about how the lawyer will approach her cause-lawyering activities.³⁹

Galanter suggests, however, that differences in how lawyers approach cause lawyering may have less to do with the type of client a lawyer normally represents and more with practice style. This is because even those lawyers who do not engage in cause lawyering full-time are likely to use the same practice style in cause lawyering as they do in their everyday legal activities. In other words, while lawyers move in and out of cause-lawyering activities,⁴⁰ it is unlikely that they change practice styles when doing so. A lawyer who employs a mega-lawyering practice style is likely to operate as a mega-lawyer in all cases, regardless of the type of client she represents.

The growing dominance of mega-lawyering, however, poses its own set of challenges to cause lawyering. This is because the increasing visibility and influence of mega-lawyering, both within and without the cause-lawyering enterprise, may undermine our faith in the legitimacy of the legal system.⁴¹ As Galanter has documented extensively, criticism of lawyers—and of the legal system—has been growing in the last few decades.⁴² Galanter traced these increasingly negative perceptions of the legal profession directly to the growth of mega-lawyering.⁴³

36. See Scheingold & Bloom, *Transgressive Cause Lawyering*, *supra* note 1, at 229–44 (describing the challenges associated with cause lawyering in salaried and small-firm practice settings, in terms characteristic of an “ordinary” practice style).

37. See *id.* at 220–29, 245 (observing that pressure on billable hours and conflict-of-interest rules impose some restrictions on corporate lawyers’ ability to engage in cause lawyering).

38. See *id.* at 236–44 (observing that small-firm lawyers tend to be described as political activists).

39. See Scheingold & Bloom, *Transgressive Cause Lawyering*, *supra* note 1, at 210 (describing the study’s conclusion that “professionally transgressive”—overtly political lawyering—“can be traced to . . . the conditions at the [corporate, salaried, or small firm] practice site”).

40. See *supra* text accompanying note 29.

41. See Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 173 (associating mega-lawyering with “disenchantment” and perceptions that the legal system is “manipulable and political”).

42. See, e.g., Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 814–15 (1998) (noting that lawyers are no longer portrayed in fiction and on television as “unalloyed hero[es]” but instead occupy a “morally ambiguous and precarious role”).

43. See Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 173 (arguing that mega-lawyering has been stereotyped and that mega-law is “intimately connected with a dual movement of legislation and disenchantment”).

The world of mega-lawyering is a world of “bargaining, deals and settlements,” where law is both “omnipresent” and “indeterminate.”⁴⁴ It is also a world where lawyers who know how to play the game well, and where so-called “repeat players,” enjoy significant advantages.⁴⁵ Under these circumstances, many Americans understandably believe lawyers have “unwarranted and unaccountable power in American society.”⁴⁶

Put differently, the work of legal practitioners has become associated more with the manipulation of legal outcomes than with obtaining justice.⁴⁷ Somewhat perversely, this is partly because mega-lawyering generates more opportunities for legal engagement. As more people invoke the law, Galanter argues, a sense that the law is “manipulable and political” becomes more widespread.⁴⁸ It is this “catch-22” that led Galanter to conclude that mega-lawyering ultimately teaches us to feel “despair” about the possibilities for “legal vindication.”⁴⁹

Such despair is particularly problematic for cause lawyers, because they draw upon the perceived legitimacy of the law to advance the aims of their cause.⁵⁰ As Scheingold argued in *The Politics of Rights*, “[i]nsofar as court decisions can legitimate claims and cue expectations,” the law can successfully contribute to political mobilization.⁵¹ Thus, when the legitimacy of the law is threatened, so is the political efficacy of cause lawyering.

But is the picture really all that gloomy? As even Galanter notes, mega-lawyering also creates important new opportunities for cause lawyers to re-organize their efforts in ways that may increase their legal and political efficacy.⁵² From this point of view, mega-lawyering may pose no greater problems for the cause-lawyering enterprise than ordinary lawyering, which faces its own set of challenges.⁵³ Is mega-lawyering really any more antithetical

44. *Id.*

45. *See id.* at 172 (noting that the legal system in the United States “amplifies the powers of competent players of the law game, accentuating the advantages of those able to invest in continuous service, advance planning, long term strategy and large maneuvers”).

46. *Id.*

47. *See Galanter, Mega-Law and Mega-Lawyering, supra* note 5, at 172 (arguing that the American legal profession is a game that amplifies rewards to those—usually corporations—able to invest in long-range planning while withholding such benefits from individuals).

48. *Id.* at 173.

49. *Id.*

50. *See generally* SCHEINGOLD, *supra* note 1, at 131–32, 162–63 (arguing that legal culture and rights help determine when people decide to turn to the government).

51. *Id.* at 132. Many subsequent studies have confirmed Scheingold’s claim. *See, e.g.,* SUSAN M. OLSON, *CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS* (1984) (the role of law in the disability-rights movement); HELENA SILVERSTEIN, *UNLEASHING RIGHTS: LAW, MEANING AND THE ANIMAL RIGHTS MOVEMENT* (1996) (analyzing the role of law in the animal-rights movement); Neal Milner, *The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation*, 8 *LAW & POL’Y* 105 (1986) (the role of law in mental-health activism).

52. *See Galanter, Mega-Law and Mega-Lawyering, supra* note 5, at 170 (discussing attempts to put mega-law at the service of public interest and how mega-law creates long-run legal strategies for the new clientele).

53. *See Scheingold & Bloom, Transgressive Cause Lawyering, supra* note 1, at 236–44 (noting the challenges associated with cause lawyering in small-firm practice—a type of legal representation commonly associated with “ordinary” lawyering).

to justice than ordinary lawyering? And if so, is there something about ordinary lawyering that makes it better? One way to answer these questions is to compare the practice styles of those who lawyer for a cause.

III

TWO CASE STUDIES

Over the last several decades, there has been a steady increase in attempts by foreign workers employed outside the United States by U.S.-based multinational employers to sue their employers in U.S. courts.⁵⁴ These cases are politically significant because in each of the lawsuits filed, the foreign workers asserted that they had both the right to sue in the United States and the right to the same or similar employment-related protections as workers in the United States. Thus, the lawsuits presented an important opportunity for political mobilization around the issue of workers' rights in the global economy.⁵⁵

Two of those cases are described below, with an emphasis on the background and practice style of the lawyers representing the workers. Although there are important differences in the way the cases were litigated, the legal and political challenges raised by the two cases were nearly identical. The lawsuits were brought in the state courts of the same state, at approximately the same time. And they raised the same legal issue: whether U.S. courts could *or should* hear the claims of foreign workers injured outside the United States.

The workers in both cases were also represented by lawyers who, at least superficially, were more similar than different. In both instances, the litigation was handled by personal-injury lawyers who viewed the cases as opportunities to use the law as a tool for advancing a broader cause. However, the lawyers approached the litigation with different practice styles. In one case, the lawyers representing the workers had adopted a mega-lawyering practice style relatively recently. In the other, the lawyers employed more of an "ordinary" practice style.

The cases illustrate how lawyers for a cause may adopt different practice styles, even when they are litigating very similar cases. The cases also show how differences in practice style may have some effect on the possibilities for

54. See Winston Anderson, *Forum Non Conveniens Checkmated?—The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 183–85 (2001) (discussing failed attempts by Indian and Caribbean workers to bring actions against American multinational corporations in U.S. courts); Malcom J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEXAS INT'L L.J. 299, 300 (2001) (noting that in recent years, plaintiffs from poor nations have attempted to bring class-action lawsuits in U.S. courts against transnational corporations).

55. In other areas of activism, such as the human-rights and environmental movements, litigation has played an important role in the development of transnational networks. See MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 24–25 (1998) (observing that diffuse interests have been permitted representation in American courts and that this explains why so many American advocacy groups devote substantial resources to litigation).

political mobilization in conjunction with the legal strategy. If these cases are any indication, cause lawyers who employ an “ordinary” practice style may be more, or at least equally, effective advocates for workers’ rights than “mega-lawyers,” at least in the global or transnational context.

A. The Stories

*Chavez v. Global Chemical Company*⁵⁶ was brought on behalf of several dozen Central American farmworkers who alleged that they had been left sterile by their workplace exposure to pesticides in Central America. The pesticides had been banned in the United States after farmworkers working in the United States complained of similar injuries. After winning a precedent-setting ruling, which established the right of the workers to sue in the United States, the workers settled for an undisclosed amount said to be in the range of tens of millions of dollars.

The case was handled by Allen & Adams, one of the nation’s largest and most successful personal-injury firms, with over seventy-five lawyers, a staff numbering in the hundreds, and offices in seven states. Both the size of the firm and the expansive geographic reach of its operations are consistent with a “mega-lawyering” style of practice.⁵⁷ Like other firms operating with a mega-lawyering style, Allen & Adams’s recruiting practices have become increasingly elite as it grew in size.⁵⁸ Once comprised primarily of lawyers from local law schools, today the firm recruits from the most competitive law schools in the country.

Although primarily oriented toward litigation for profit, Allen & Adams has a history of handling and funding cause litigation. Rick Allen, the founding and dominant shareholder of the firm, worked for a well-known political activist and philanthropist in his early years as a lawyer. Since opening his practice, he has provided substantial financial support to a variety of public-interest legal organizations. Allen has also served on the board of a number of activist groups.

Firm insiders cite a variety of reasons for Allen & Adams’s taking the *Chavez* case, including that they thought it might be “a huge money-maker” and that it sounded “interesting and exotic.”⁵⁹ At the same time, the firm also maintains that it brought the case because “it sounded like a case that really needed to be brought whether or not it was going to make any money.”⁶⁰

56. Although the stories presented here are based on real cases, the dates, names, locations, and identifying details have been changed to protect the privacy of the parties involved. The information provided here was gathered from a variety of sources, including interviews with the lawyers, court files, media reports, and correspondence about the litigation, all of which is on file with the author.

57. See Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 154.

58. *Id.* at 158 (noting that “[m]ega-law draws recruits from higher social strata, from higher status ethnic groups, and from elite educational institutions”).

59. Interview with Counsel for the Plaintiffs, in Dallas, Tex. (Feb. 22, 2000).

60. *Id.*

After an initial investigation, Allen & Adams assigned primary responsibility for the case to Richard Wheeler, a first-year associate with almost no litigation experience. Prior to joining the firm, Wheeler had been a highly sought-after, top-ranked student at an elite law school. His initial involvement with the case had been as a summer associate and, though the opportunity to work more on the case was not a primary consideration in his decision to join the firm, he actively sought to be involved in the case after he became an associate.

Wheeler said he was initially intrigued by the case because of the intellectual challenge it offered. As he explained, “[e]ven then, as a first-year lawyer, I could tell . . . [it was] cutting-edge stuff and interesting.”⁶¹ Wheeler also liked working on the case because of what he called the “political dimension” of the litigation.⁶²

The first challenge that Wheeler and his firm faced was to find a U.S. court that would agree to hear the lawsuit. Drawing upon its extensive resources around the country, Allen & Adams engaged in a strategy often referred to as “forum shopping.”⁶³ The strategy entailed separating the workers into several different groups and bringing lawsuits on behalf of the different groups in different courts, the idea being that all the cases would be joined together once they found a court that agreed to hear the case. After two unsuccessful attempts to bring the lawsuit in two other states, Allen & Adams convinced a court to hear the case.

The lawsuit named Global Chemical Company, as well as a large oil company, Universal Oil Corporation, as defendants. Although neither company had been involved in employing the workers, nor in exposing them to the chemical, both had been involved in the chemical’s manufacturing process and had allegedly agreed to its shipment for use overseas. The farmworkers’ employer was left out of the lawsuit. Ostensibly, this was because the workers feared that, if named as a defendant, the employer would retaliate against family members and workers who still worked on the plantation. It is likely, however, that legal strategy (that is, jurisdictional) considerations also played a part in this decision.

Somewhat to the firm’s surprise, the case turned out to be extremely expensive to litigate. In addition to the trips to the workers’ home country, the firm had to pay for various experts on foreign law, plus the usual experts needed to prove the workers’ claims. In retrospect, it is also likely that Allen & Adams underestimated the legal challenges the case presented. As Wheeler explained, until they were in the middle of it, “[we] never imagined the procedural quagmire that it would become.”⁶⁴

61. *Id.*

62. *Id.*

63. Mary Garvey Algero, *In Defense of Forum Shopping*, 78 NEB. L. REV. 79, 82–83 (1979) (describing forum shopping’s place in the American legal system).

64. Interview with Counsel for the Plaintiffs, in Dallas, Tex. (Feb. 22, 2000).

The firm's leadership was well aware, however, of the political dimensions of the lawsuit. This awareness was facilitated in part by the legal support provided to the defendants by other corporations. Despite this recognition, the firm made virtually no attempt to generate support for their clients' position among local activists or among others in the personal-injury bar who might have had a pecuniary interest in a ruling establishing the right of foreign workers to sue in the United States. When asked why this was so, Wheeler said that it did not "really click[] in his mind" to seek political support for his clients.⁶⁵

Wheeler also did not attempt to frame his arguments in a way that acknowledged the political dimensions of the case. Instead, his focus remained highly legalistic, even after the litigation became a subject of debate in the local legislature. To the surprise of many, the firm shunned its traditional allies in these legislative debates and agreed to engage in secret, closed-door negotiations that ultimately resulted in the legislative reversal of the workers' legal victory.

The second case, *Espinoza v. Montego*, was brought in the same state on behalf of the family of a foreign worker who was murdered while delivering payroll for a U.S. multinational corporation. The lawsuit focused on the company's refusal to provide the worker with an armored truck, even though the roads in the area were known to be dangerous and frequented by thieves. After six days of trial, the employer agreed to an extraordinary settlement that included building a monument to workers' rights and that paid more than \$1 million in damages.

The Espinoza family was represented by the southwestern firm of Barrow & Burns. Brad Barrow, the lead partner of the firm, is a left-wing general practitioner who, prior to litigating the *Espinoza* case, had served on the local city council. Barrow's partner, Mike Burns, is a self-described "hell-raiser" who speaks Spanish fluently and has traveled extensively outside the United States. Like Barrow, his politics are decidedly left of center.⁶⁶

At the time it litigated the *Espinoza* lawsuit, Barrow & Burns was typical of a law firm adopting an "ordinary" practice style. It had only a handful of lawyers and a relatively small support staff.⁶⁷ Although well-regarded in their local community, the firm was relatively unknown elsewhere and had relatively little experience with major litigation.⁶⁸ Its caseload included a variety of litigation matters, including personal-injury claims and commercial cases drawn almost exclusively from the local community.

Both Barrow and Burns knew from the outset that the *Espinoza* case would be extremely difficult to litigate. Nevertheless, they were attracted to the

65. *Id.*

66. Interview with Counsel for the Plaintiff, in El Paso, Tex. (Sept. 13, 1998).

67. See Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 154 (noting that firms with an "ordinary" practice style tend to run on smaller organizational units).

68. See *id.* (associating "ordinary" lawyering with smaller cases and a "local" scope of operations).

litigation by the broader political issues at stake. As Burns put it, “this was the kind of case that I had gone to law school for.”⁶⁹

Knowing that they faced an uphill battle to even get the case to trial, Barrow & Burns recruited a nationally recognized legal expert, who usually represented corporate defendants, to handle the legal arguments. The expert’s arguments featured long lectures on the history and case law of technical legal issues, reflecting extensive research. In short, unlike Barrow & Burns, the legal expert they recruited operated with a “mega-lawyering” practice style.⁷⁰

Barrow & Burns, meanwhile, spent significant energy getting to know their clients—the family of the murdered worker—and understanding what they hoped to achieve with the litigation. During the course of the lawsuit, Barrow & Burns developed a deep emotional connection with the family. During interviews with the lawyers several years after the case was litigated, they showed a video that featured photos of the worker before her murder and cried when talking about the case.⁷¹

Barrow & Burns also worked to obtain political support for the lawsuit from activists in the United States. To some extent, this was a matter of simply calling upon old friends. Despite their extensive personal contacts, however, they did not take this support for granted. To convince activists to become involved, Barrow & Burns wrote lengthy letters to several activist organizations, urging them to get involved in the case. In most instances, it was this contact that pushed the activists to become involved.

Once activists agreed to support the case, Barrow & Burns also gave them substantive roles in the litigation. One activist, for example, helped to recruit and prepare witnesses for trial. Others tracked media coverage and kept copious notes during the trial. As a measure of how much Barrow & Burns valued this input, both attorneys later described the activists’ support as “absolutely critical” to the success of the case.⁷²

This broader, more political perspective on the case also influenced Barrow & Burns’s strategy at trial, where Barrow placed great emphasis on the broader issue of the working conditions of workers overseas. During his questioning of the defendants, for example, Barrow repeatedly asked whether the defendants valued the lives of their workers in the United States more than the lives of other workers. He also questioned them about their refusal to raise wages, despite strikes and walkouts for higher wages.

After six days of trial, the defendants approached Barrow & Burns and asked them what it would take to settle. Barrow & Burns described the subsequent negotiations as an “extraordinary experience,” in which the

69. Interview with Counsel for the Plaintiff, in El Paso, Tex. (Sept. 13, 1998).

70. See *infra* text accompanying note 74.

71. Interview with Counsel for the Plaintiff, in El Paso, Tex. (Sept. 13, 1998).

72. *Id.*

defendants readily agreed to virtually all of their terms, including building a monument to the slain worker.⁷³

B. “Mega-lawyering” v. “Ordinary” Lawyering

In some respects, the experiences of the workers’ lawyers in these two cases were quite similar. For each of the lawyers, the litigation represented an important moment in their careers when they were motivated by the opportunity the litigation presented to engage in cutting-edge, challenging, and politically significant legal work. Thus, each clearly understood that taking on the cases involved lawyering for a cause. At the same time, however, the lawyers employed very different practice styles.

Richard Wheeler of Allen & Adams approached the *Chavez* case with a style of practice that most closely resembles mega-lawyering. “Mega-lawyering,” recall, features intense specialization and coordination. In contrast to “ordinary” lawyering, it involves “meticulous and exhaustive research, painstaking assembly of data, and generous use of experts.”⁷⁴ As a large law firm, Allen & Adams employs these techniques in their everyday cases. Not surprisingly, Wheeler and the firm employed a similar approach in the course of litigating the *Chavez* case. From Allen & Adams’s own reports and from reviewing the pleadings filed in the lawsuit, it is clear that the firm expended a great deal of energy on legal research and factual investigation. It also spent a great deal of money on experts for the case. These features characterize the practice style as mega-lawyering in the cause-lawyering context.

At first glance, this characterization of Wheeler’s practice style may seem somewhat unexpected. Allen & Adams is a personal-injury law firm, and most personal-injury law firms are small firms, associated with an ordinary practice style that places less emphasis on legal research and investigation.⁷⁵ On the other hand, with more than seventy-five lawyers and recruiting practices that favor making new hires from only the top ranks of highly rated law schools, Allen & Adams looks and operates much like an elite firm in corporate practice.⁷⁶ Under these circumstances, it makes sense that their lawyers would approach litigation with a mega-lawyering style.

In contrast, Barrow & Burns, the lead lawyers for the Espinoza family, exhibited a practice style that more closely resembles “ordinary” lawyering, which “involves little consultation or legal learning, more perfunctory investigation and a fair amount of ‘winging it.’”⁷⁷ Barrow & Burns were small-firm lawyers who paid relatively little attention to the legal research that the case required. Instead, they hired someone else—a corporate defense lawyer with highly specialized legal expertise—to research and argue the key legal

73. *Id.*

74. Galanter, *Mega-Law and Mega-Lawyering*, *supra* note 5, at 157.

75. *See supra* text accompanying note 10.

76. *See supra* text accompanying note 58.

77. *See Galanter, Mega-Law and Mega-Lawyering*, *supra* note 5, at 157.

issues for them. And, unlike Allen & Adams, Barrow & Burns relied on assistance from the activist community in identifying and preparing their expert witnesses. In short, Barrow & Burns's style of practice represents the antithesis of the mega-lawyering approach, if not a pure embrace of the "ordinary" lawyering style of "winging it."

Barrow & Burns also engaged more with local activists throughout the litigation and otherwise capitalized on the political opportunities the litigation presented. More so than Allen & Adams, Barrow & Burns encouraged activist involvement and worked with activists throughout the litigation to maximize the political impact of the case. This was done in part by framing their legal arguments in terms of the broader issue of workers' rights and by structuring the settlement along lines that recognized the broader cause at stake. The mega-lawyering practitioners at Allen & Adams, in contrast, made virtually no effort to either notify activists of the litigation or involve them in litigation strategy.

Is the *Espinoza* case an anomaly, or are there reasons why lawyers with an ordinary practice style might be more effective at identifying and capitalizing on the political opportunities in this type of litigation? One possibility is that the relatively less legalistic approach of the ordinary practice style may allow lawyers to take a more pragmatic and, ultimately, more political approach to framing the arguments in the case. During the *Espinoza* trial, for example, Barrow & Burns made multiple arguments about the low wages and poor working conditions of other foreign workers. From a legal standpoint, these issues had no place in the litigation because general working conditions were not on trial. But from a political perspective, it was quite astute for these arguments to be made, and Barrow & Burns did not hesitate to "wing it" and make them.

Barrow & Burns also took a very pragmatic and political, as opposed to legalistic, approach to settlement. Had a judge or a jury decided the case, the family would have been limited to the recovery of monetary damages because the claims only involved personal injury.⁷⁸ Instead of feeling confined by these limitations, Barrow & Burns asked for, and received in settlement, concessions that a court of law would not have been able to award, such as a statue for the workers and a scholarship fund, in addition to monetary compensation for their clients. The lead lawyer in the *Chavez* case, in contrast, took a highly legalistic approach to the case. In the lawyer's words, it simply "never occurred" to him to litigate the case in any other way.⁷⁹ Because of this, he did not reach out to activists, even though he was politically attuned to the broader political dimension of the case.

78. See DAN B. DOBBS, *THE LAW OF TORTS* § 377 (2000) (noting that in personal-injury cases, "the normal remedy is compensatory damages").

79. Interview with Counsel for the Plaintiffs, in Dallas, Tex. (Feb. 22, 2000).

There is no evidence, however, that “ordinary” lawyers are more committed to the cause than mega-lawyers. On the contrary, there is some evidence that the lawyers for the Espinoza family were less committed than the lawyers at Allen & Adams. The lead lawyer for the *Chavez* workers is still handling lawsuits on behalf of foreign workers. Barrow & Burns, in contrast, has not handled any foreign workers’ cases since *Espinoza* and expresses relative indifference about accepting such cases in the future.⁸⁰

IV

CONCLUSION

These case studies suggest that the making of a great cause lawyer depends, in part, on practice style. Put differently, how a lawyer approaches legal practice seems to matter for purposes of legal mobilization. In these cases, cause lawyers were more effective at using the law to advance a political agenda when they adopted a more flexible practice style that may more closely resemble that of an “ordinary” lawyer.

Perhaps more important, as Galanter predicted, the mega-lawyering strategies of the *Chavez* lawyers ultimately conveyed a message of despair: although the workers won an important legal ruling, the victory was overturned by a state legislature, and many view the case as a failed opportunity to advance the broader cause of workers’ rights. *Espinoza*, on the other hand, nourishes our fondest hopes about the possibilities for legal mobilization. It was, as Burns described it, “the kind of case that [he] had gone to law school for.”⁸¹

That “ordinary” lawyering could rejuvenate our faith in the law seems almost counter-intuitive. But this hypothesis would also seem to be at the heart of a legal movement spearheaded by trial lawyer Gerry Spence (whose fame grew exponentially when he served as a television commentator during the O.J. Simpson trial). In *The Making of a Country Lawyer*, Spence chronicles his personal path, which culminated in the moment when he decided to stop representing established interests and start representing individuals.⁸² For Spence, this move was not simply about representing a different type of client; it was also about adopting a different practice style.

Although Spence uses different language, the practice style of a “country lawyer” has much in common with the “ordinary” practice style described by Galanter. For Spence, winning a case is less about intensive research—characteristic of mega-lawyering—and more about developing an emotional connection with the client.⁸³ Spence and the many lawyers who follow his

80. Interview with Counsel for the Plaintiff, in El Paso, Tex. (Sept. 13, 1998).

81. *Id.*

82. GERRY SPENCE, *THE MAKING OF A COUNTRY LAWYER* (1996).

83. See Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 22 (2001) (describing Spence’s “psychodrama” technique, which permits intense client identification); see also GERRY SPENCE, *GIVE ME LIBERTY! FREEING OURSELVES IN THE*

principles⁸⁴ believe that a return to “country” lawyering is as much about reclaiming a lawyer’s role in advocating for justice as it is about winning cases.⁸⁵ According to Spence, “the principal reason people hold lawyers in such disdain” is that lawyers have failed to “hear” the “anguish of a people seeking justice.”⁸⁶ At his trial lawyer college, small-firm lawyers with very limited resources learn to listen to their clients and, in doing so, to free themselves from the limitations of their legal education and become true “warriors” for “justice.”⁸⁷

There was something of Spence’s philosophy in Barrow & Burns’s approach to the *Espinoza* litigation. Although not all lawyers employing an “ordinary” practice style embrace Spence’s techniques, Barrow & Burns’s relationship with the Espinoza family suggested a very high degree of client identification. Both Barrow & Burns exhibited a great deal of compassion for the Espinoza family and their fate. As compared to the other lawyers, for example, Barrow & Burns were more eager to share details about Espinoza’s life. Perhaps more telling, in the course of the interviews that took place several years after the case’s conclusion, both Barrow and Burns wiped away tears while discussing the case.⁸⁸

From this perspective, the distinction that Galanter drew between mega-lawyering and “ordinary” lawyering reveals itself as much more than simply a useful construct for understanding a rapidly changing profession; it is also a window into how our faith in the law is also undergoing change, both within and outside the profession.

TWENTY-FIRST CENTURY 302–03 (1998) (criticizing formal legal education for teaching the “science” of law, rather than the “experience” of law in human lives).

84. Spence teaches these principles in seminars that he offers around the country and at a college for trial lawyers in Wyoming. *See* SPENCE, *supra* note 83, at 303–05.

85. *See id.* at 302, 305 (describing how the lawyers who attend his trial lawyers’ college become “warriors” for “justice”).

86. *Id.* at 302–03.

87. *Id.* at 299–305.

88. Interview with Counsel for the Plaintiff, in El Paso, Tex. (Sept. 13, 1998).