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Taking on Goliath

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CAUSE LAWYERING

Political Commitments and Professional Responsibilities

Edited by

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In a world where the largest multinational corporations are richer than the vast majority of countries and governments (Gray 1999), who polices the corporations? This essay explores an instance in which a Texas personal injury firm attempted to police the misconduct of a group of multinationals operating in Costa Rica by filing a lawsuit in Texas state courts. According to the allegations in the lawsuit, a group of Costa Rican farm-workers had been left sterile after being exposed to a pesticide while working for an American-owned plantation in Costa Rica. Although the pesticide had allegedly been manufactured in the United States, the plantation grew bananas for shipment back to the United States, the defendants in the lawsuit argued that the lawsuit should not be heard in Texas. In a precedent shattering ruling that sent shockwaves across the international business community, the Texas Supreme Court disagreed.

Declaring that the Costa Rican workers in *Alfaro* had an “absolute right” to sue for their injuries in Texas courts, the court announced that Texas courts could not refuse to hear cases that arose on foreign soil when wrongdoing by Texas-based multinationals was alleged (*Dow Chemical v. Castro Alfaro* [1990]). Although the Texas legislature ultimately overturned the ruling, the *Alfaro* litigation—and the Texas Supreme Court’s ruling in the case—remains significant in several respects. First, the ruling of the Texas Supreme Court was unprecedented in that it extended U.S. legal protection to workers who were not U.S. citizens and who were injured while working outside of the United States. Never before had U.S. courts been willing to hold multinationals accountable in the United States for their conduct overseas. Second, when the Texas Supreme Court held that the Costa Rican workers had an “absolute right” to sue multinationals in the United States, it effectively opened up a whole new space for litigation in a transnational context.
Among other things, this new space for litigation allows for the possibility of legal strategies that seek to hold multinational corporations accountable through the transnational application of U.S. law. Thus, *Alfaro* is suggestive of new possibilities for cause lawyering in the transnational context. Finally, *Alfaro* is of interest because the lawyers who brought the litigation were personal injury lawyers whose status as "cause lawyers" is a matter of some debate (Menkel-Meadow, 1998). As I explain below, because of the unique tools that personal injury lawyers bring to cause lawyering against multinationals, their involvement in transnational cause lawyering deserves greater attention. At the same time, the experience in *Alfaro* also suggests that personal injury lawyers may experience more difficulty than traditional cause lawyers with keeping "cause" at the center of their efforts.

The research for this essay is based primarily upon litigation documents, media reports, and transcripts of the legislative hearings on *Alfaro*. I also conducted interviews of the lawyers, activists, and reporters who were involved in the litigation and legislative proceedings. My findings and analysis are presented in three parts. Part I describes the litigation and the legislative reversal of *Alfaro* in more detail. Part II focuses on the involvement of personal injury lawyers in the *Alfaro* litigation. Finally, in Part III, I draw some tentative conclusions about the potential advantages and drawbacks of personal injury lawyers becoming involved in transnational workers' rights litigation.

Dow Chemical Company and Shell Oil Company
v. Domingo Castro Alfaro et al.

*The Lawsuit*

The *Alfaro* litigation began with a phone call from a Costa Rican scientist to a colleague in the United States. Roberto Chavez, a forensic pathologist, learned about the plight of the Costa Rican farm workers as part of his work for the Costa Rican judiciary. In 1982, he traveled to Rio Frio, a rural Costa Rican community, to interview the workers. What he found disturbed him. The workers in Rio Frio had been employed on a banana plantation owned by a U.S. company at wages of approximately one dollar an hour. As part of their job, they were exposed to the pesticide dibromochloropropane ("DBCP") which they alleged had left them sterile. Upon further investigation, Chavez learned that the pesticide had been banned in the United States after studies linked exposure to the pesticide to sterility in U.S. workers. Outraged that the pesticide had been shipped to Costa Rican for use after it had been banned, and concerned that the Costa Rican legal system provided the workers with little redress against the U.S.-based companies, Chavez called a toxicologist he knew in Houston and asked him to help. The Houston toxicologist, in turn, placed the workers in contact with a well-known Texas personal injury lawyer.
Knowing that the litigation would face an uphill battle, the personal injury lawyers who took on the case searched for an appropriate forum for the litigation. After three unsuccessful attempts to bring the lawsuit in Florida and California, the lawyers turned to their home courts in Texas and met with success. In a case that was entitled Dow v. Castro Alfaro, the lawyers alleged that the manufacturers of DBCP, defendants Dow Chemical Corporation and Shell Oil Company, were liable for the injuries of some eighty-two Costa Rican banana workers, under Texas common law theories of product liability, strict liability, and breach of warranty. Although the lawyers believed that the employer of the banana workers, the Standard Fruit Company, was also partially responsible for the workers’ injuries, they left the employer out of the lawsuit because of fears of retaliation against family members and workers who still worked on the plantation (Hosmer, 1990: 12). A Texas trial court initially dismissed the case, but an intermediate court of appeals and the Texas Supreme Court eventually affirmed what they called “the absolute right” of the Costa Ricans to sue in Texas courts (Alfaro, 786 S.W. 2d at 674).

**The Ruling of the Texas Supreme Court**

Prior to the rulings of the Texas appellate courts in Alfaro, virtually every court in the country had refused to hear similar cases on the ground of *forum non conveniens*, a legal doctrine that enables most of the courts in the United States to decline to exercise jurisdiction over a case when it determines that justice would be better served in a more “convenient” forum. Although the doctrine has been around for centuries, until the 1970s it had rarely been applied in the United States. With the explosion in transnational business, however, U.S. courts began to face more and more requests from citizens from other countries to hear litigation that stemmed from conduct that took place overseas. Looking for a way of dismissing the cases, federal judges and many state courts turned to the doctrine of *forum non conveniens*. What was precedent-setting about Alfaro is that, despite complaints from the multinationals that Texas was an inconvenient forum for adjudicating the case, the Texas Supreme Court allowed the litigation to proceed.

The court’s reasoning relied on a 1913 statute that required Texas courts to hear the cases of foreign plaintiffs when the home country of the plaintiffs extended similar rights to U.S. citizens. Although the language of the statute seemed to clearly support the court’s holding, the Texas Supreme Court was bitterly divided over the case, and, in the end, nine justices on the court issued seven different opinions on how the case should be decided. Ultimately, by a 5–4 vote, the Texas Supreme Court found that the Texas legislature had statutorily abolished the doctrine of *forum non conveniens*. The lead opinion for the majority relied upon the 1913 statute as controlling legal authority and did not discuss the policy implications of its holding. One of the justices in the majority, however, wrote an extensive concurring opinion which made clear that, in his view, the ruling of the majority was necessary
to ensure that corporations would be "held responsible" for their conduct in other countries in the increasingly global economy (Alfaro, 786 S.W. 2d at 680).

Written by Justice Lloyd Doggett, a well-known friend of personal injury lawyers and a left-wing sympathizer, the opinion emphasized the increasing threat of corporate misconduct in a global economy. Because of "the absence of meaningful tort liability" in other countries, he argued, multinationals were operating "without adequate regard" for the social "costs of their actions" (ibid., at 674). In his view, the majority's holding in Alfaro was necessary because only U.S. courts could provide an "effective" restraint on the misconduct of multinationals that were relocating to countries with less developed legal systems (ibid., at 689). Doggett also argued that changing socioeconomic conditions had rendered the doctrine of forum non conveniens meaningless. "The doctrine of forum non conveniens is obsolete in a world in which markets are global," he wrote. "[I]t ignore[s] the reality that actions of our corporations affecting those abroad will also affect Texans" (ibid.). Along similar lines, Doggett rejected the arguments of the defendants that it was unfair to allow them to be sued in Texas, noting that "[a]dvances in transportation and communications technology" rendered the doctrine of forum non conveniens a "legal fiction" when applied to multinationals (ibid., at 684).

The dissenting justices, in contrast, emphasized that the events giving rise to the Alfaro litigation had "little or no connection to Texas" (Gonzalez dissent, ibid., at 690). As one dissenter put it: "what . . . is Texas' interest in adjudicating a foreign claim by foreign plaintiffs?" (Cook dissent, ibid., at 701). More important, several dissenters argued that allowing the litigation to proceed would have adverse public policy consequences because the litigation would add to "already crowded dockets, forcing [Texas] residents to wait in the corridors of [the] courthouses while foreign causes of action are tried" (Gonzalez dissent, ibid., at 690). Other justices in the minority suggested that, in order for Texas multinationals to remain competitive in the world economy, they needed to be provided with immunity for their actions abroad. As one of the minority justices put it, it seemed "plain" to him that Texas "would want to protect the citizens of this state, its constituents, from greater exposure to liability than they would face in the country in which the alleged wrong was committed" (ibid., at 706). Finally, in the most widely quoted excerpt from the dissenting opinions, one justice implied that Texans would suffer economically as the state became the "courthouse of the world":

Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation? If they do not mind the expense, do they not care that these foreign cases will delay their own cases being heard? As the courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? (Hecht dissent, ibid., at 707)

In his concurring opinion, Doggett took great pains to respond to these charges and, in particular, to the claim that allowing the Costa Ricans to sue would
harm the legal rights of Texans. An expert affidavit that was provided to the court had provided extensive empirical evidence that the abolition of *forum non conveniens* in other jurisdictions like Louisiana had not resulted in courthouses that were uniquely overcrowded and, moreover, that states which had adopted *forum non conveniens* had not experienced a significant drop in the number of filings. Drawing upon this affidavit, Doggett argued that the defendants' insinuations about the effects of the court's ruling on the accessibility of the courts for Texans were "misleading and false" (ibid., at 686). Doggett also noted that a logical extension of the defendants' argument meant that the next step would be to strip Texans of *their* legal rights: "If we begin to refuse to hear lawsuits properly filed in Texas because they are sure to require time [and resources], we set a precedent that can be employed to deny Texans access to these same courts" (ibid).

What is curious about this exchange is that, even as the two sides fiercely debated the proper outcome of the litigation, the justices were in fundamental agreement about what was at stake. For both Doggett and the minority, the assumption was that Texas jobs and legal rights were already threatened by changing socioeconomic conditions. The only question raised by the litigation was whether the legal rights enjoyed by Texans should be extended to Costa Ricans, in light of those threats. For Doggett, expanding access to people outside of the United States was viewed as critical for policing corporate misconduct in a global economy and ensuring that the legal rights of Texans retained some meaning. For the minority of the Texas Supreme Court and the Texas legislature, however, denying access to people outside the United States was deemed necessary to protect the rights of Texans who were facing "already crowded" courthouses and a loss of jobs to the South. Importantly, the views of the minority justices were bolstered by the submission of some thirty *amicus* briefs from organizations representing the interests of business which argued that the case should be dismissed. Thus, when the majority ruled in favor of expanding access to Texas courts to citizens of other countries, they did so in the face of extreme pressure from the multinational business community. This pressure was intensified by media reports on the litigation, which echoed the sense of alarm that was conjured up in the dissenting opinions.

**Media Coverage of the Lawsuit**

A Lexis search turned up nearly seventy articles on the *Alfaro* litigation. The vast majority of these articles focused on the dissent's complaint that the *Alfaro* ruling would result in Texas becoming "the courthouse of the world," raising the specter of workers from all over the world responding to *Alfaro* by clogging Texas courts with their claims against Texas-based multinationals. Many of these articles also expressed fear that *Alfaro* would prompt multinationals to flee Texas for countries or states that shielded them from liability. As in the dissenting opinions of the Texas Supreme Court, in the media articles on the litigation, these concerns were
linked closely with complaints about the Texas tort system and the threat that personal injury litigation in general posed to the competitiveness of the Texas economy. As more than one commentator acknowledged, the problem with the *Alfaro* ruling was not really that Costa Ricans were permitted to sue in the United States but rather the dangers of personal injury litigation generally. A good example of this appears in an oped piece entitled “Milking the Cash Cow”:

[The problem preceded Alfaro. . . . Great numbers of trial lawyers—fortunately, not all—perceive the court system as a cash cow to be milked by the man with the fastest fingers and quickest wits. . . . We could do with a whole new way of thinking about these things. . . .] (Murchison, 1992)

In a similar way, article after article about *Alfaro* conveyed arguments for tort reform. Ultimately, this linkage was so strong that an extraordinary number of news articles about *Alfaro* included coverage of “other” tort reform issues, such as caps on punitive damage awards. With the help of the media, by the time the Texas legislature considered legislation to overturn *Alfaro*, the litigation had become so closely associated with the tort reform movement that one labor activist told me he first heard of this path-breaking transnational rights case as part of his usual monitoring of tort reform legislation.

*The Legislative Reversal*

Knowing that they did not have the votes to stop the ruling in *Alfaro*, the dissenting justices (and one member of the majority) called upon the Texas legislature to overturn the ruling. Dire consequences for Texans were predicted if the legislature failed to act. In light of this plea and the subsequent media coverage on the case, it is hardly surprising that the debate over *Alfaro* led to action by the Texas legislature. Indeed, according to the lead lawyer for the *Alfaro* plaintiffs, it was “clear” even while the case was still pending before the Texas Supreme Court that the debate over the litigation would move to the legislature: “Even then we were hearing . . . if we won there would be immediate attempts to pass the statute that would undo [the Court’s ruling].” As predicted, not long after the ruling in *Alfaro*, the multinational defendants in the case and other business interests approached the Texas legislature and asked them to overturn the holding in *Alfaro*. The first attempt to overturn *Alfaro*, however, failed. At the time, the personal injury bar still had a fair amount of influence with the Texas legislature and they were able to kill the bill in committee. By the next session of the legislature, however, the political tides had changed. With the help of the lieutenant governor, negotiations on an “agreed” bill to overturn *Alfaro* began in earnest.

Under ordinary circumstances, an “agreed” bill in the Texas legislature is one that is drafted after extensive negotiations among an array of interested parties. As one local commentator on court politics explained to me, in Texas, this is a com-
mon practice because it is a biennial legislature and the legislators are not "full time." To get everything done in a relatively short time, the legislature uses "agreed bills" as a means of avoiding "bloody floor fights." In something of a departure from the usual practice, however, the "agreed bill" to overturn Alfaro was crafted in secret and only eight negotiators were invited to participate. Among these eight negotiators were representatives of multinationalas, a legal scholar who had argued for adoption of *forum non conveniens* in Texas, the personal injury lawyers who represented the plaintiffs in *Alfaro*, and lobbyists for the Texas Trial Lawyers Association (TTLA) who represent the interests of personal injury lawyers in Texas. Although labor, consumer, and environmental groups had voiced opposition to overturning *Alfaro*, they were not invited to participate in the negotiations. Instead, the only organization invited to participate in the negotiations that had an interest in opposing reversal of the Texas Supreme Court’s decision was the TTLA.¹

In the course of the negotiations, and without consulting with any of the activist groups who were not represented in the negotiations, the TTLA and the personal injury lawyers who represented the *Alfaro* plaintiffs struck a compromise with the business groups, which overturned the most precedent-setting aspects of the *Alfaro* ruling. Under the terms of the compromise, nonresidents of Texas—including foreign nationals—would effectively be precluded from suing in Texas courts, with exceptions carved out for cases brought on behalf of citizens from other states in the United States with claims involving asbestos, airplane crashes, and railroad accidents. In other words, the personal injury lawyers forfeited their interest in representing foreign workers in Texas courts in exchange for being allowed to continue to handle out-of-state asbestos (and other) cases in Texas. As one labor activist later commented, “the TTLA really left us” in the *Alfaro* negotiations.

In subsequent hearings on the agreed bill, activist groups opposed both the process by which the bill was drafted and the substantive impact of the legislation on the rights of foreign plaintiffs to sue in Texas courts. The proposed legislation also drew the ire of other personal injury lawyers, including noted breast implant litigator John O’Quinn, who complained that the bill would preclude breast implant victims from other states from suing breast implant manufacturers in Texas for their injuries (1993). Unlike the testimony of the activists, O’Quinn’s testimony focused mainly on how the legislation would impact domestic personal injury practice and paid little attention to how the legislation would affect the rights of people outside of the United States. In an interesting moment, however, O’Quinn pointed out to the legislators how much easier it was to deny the rights of people in the United States, when the rights of people from other countries to sue had been denied first:

The bill, which is right here, I have it in my hands, says guess what? After discrimination in Section A against nonAmericans . . . Then in Section B, we decide
to start discriminating against Americans. We’re not happy enough that we’re
gonna discriminate against the non-Americans. Let’s start discriminating against
the Americans. (O’Quinn, 1993)

Although he did not pursue the point further, O’Quinn’s comments echoed
the argument of Texas Supreme Court Justice Doggett that Texans could not refuse
to extend legal rights to the Costa Ricans, without experiencing a downward pres-
sure on the legal protections that are provided to Texans. Doggett had pointed out,
for example, that the argument that corporations needed to be exempt from lia-
bility to increase their competitiveness in world markets could just as easily be
invoked to deny Texans the right to hold corporations accountable as people from
outside of Texas (see Alfaro: 686). In other words, by noting how quickly the
legislation turned from discriminating against “non-Americans” to discriminating
against “Americans,” O’Quinn essentially repeated Doggett’s warning that the rights
of the Costa Rican farm workers and the rights of Texans were linked in such a
way that it would not be possible to deny access to Texas courts to the Costa Rican
farm workers without also having the effect of making it easier to curtail the rights
of Texans.

Despite these protestations, in 1993, a little more than two years after the ruling
in Alfaro, the Texas legislature passed the “agreed bill” to overturn Alfaro and
statutorily abolished the right of injured people from other countries to sue mul-
tinational in Texas courts. Meanwhile, the Costa Rican workers settled their litiga-
tion quietly for a substantial amount of money that was said to be well into the
“eight figures” (Elliott, 1992).²

Aftermath

Despite the passage of the anti-Alfaro legislation, transnational litigation against
multinationals for injuries stemming from their conduct in other countries has
continued to be filed in Texas courts. The bringing of this litigation has been
possible, in part, because of the nature of the forum non conveniens doctrine, which
gives judges great discretion to decide whether or not to hear the case. Under the
document, courts must consider a number of factors in determining whether it would
be more convenient for the case to be heard in a different forum. These factors
include a consideration of whether the suing party has an alternative forum in
which to litigate the case and whether there is a public interest in hearing the case
in the United States. Because there are no clear guidelines on how to assess these
factors, however, a judge has tremendous discretion in deciding whether to allow
the litigation to proceed. In the typical case, the exercise of this discretion usually
results in the case being dismissed because judges in overcrowded courts are anxi-
ous to clear their dockets of any cases that they do not absolutely have to hear.
But this extensive discretion also creates an opening for sympathetic judges to allow
cases by foreign nationals to proceed in their courts and, in recent years, Texas
courts appear to be increasingly willing to do so.

Two cases that have received a significant amount of attention are Mendoza v.
Contico (1997) and Rodriguez-Olvera v. Salant Corporation (1999). In Mendoza, a
personal injury lawyer in a Texas border town filed a case on behalf of a Mexican
maquiladora worker who was murdered while delivering the payroll for her U.S.-
based employer in Mexico. Although the defendant argued that the case should be
dismissed on the ground of forum non conveniens, the judge allowed the litigation
to proceed in Texas. Ultimately, the case ultimately settled for approximately $2
million in damages and a change in the company’s practices. More recent, in
Rodriguez-Olvera v. Salant Corporation (1999), a prominent Texas personal injury
lawyer sued a U.S.-based apparel maker in Texas state court for injuries that oc-
curred to a group of Mexicans employed by the U.S. company’s subsidiary in
Mexico. According to the complaint, fourteen Mexican workers were killed and
several others were injured when a company bus with faulty brakes crashed into a
sewage ditch. Although the accident and the injuries occurred in Mexico, Texas
courts rejected the U.S. company’s attempts to have the case dismissed, without
comment. Shortly before trial, the case settled for $30 million.

Thus, with the help of the trial courts, Texas personal injury lawyers are con-
tinuing to bring and settle lawsuits on behalf of foreign nationals against multi-
nationals based in Texas, despite the legislative action to overturn Alfaro. In the
meantime, however, it has become more difficult for residents of other states in
the United States to sue in Texas courts. In 1997, four years after the compromise
to overturn Alfaro, the Texas legislature passed legislation that effectively closed the
loophole for out-of-state asbestos, airplane, and railroad accident cases that the
lawyers for the Alfaro plaintiffs and the TTLA had won in exchange for forfeiting
the rights of foreign nationals during the secret negotiations over the Alfaro leg-
islation (Elliott, 1997).

Personal Injury Lawyers as Cause Lawyers

As I noted at the outset, one of the more interesting aspects of Alfaro is that the
litigation was brought by personal injury lawyers. Moreover, it is now clear that
Alfaro is not an aberration. As the recently settled Mendoza and Rodriguez-Olvera
reveal, Texas personal injury lawyers continue to be attracted to transnational
workers’ rights cases, despite the fact that the Texas legislature attempted to shut
the door on such cases when it passed the legislation to overturn Alfaro. While
these lawyers are undoubtedly drawn into the litigation by the lure of a poten-
tially large fee, their involvement nevertheless suggests the possibility that it is ap-
propriate to characterize these personal injury lawyers as cause lawyers (cf. Menkel-
Meadow, 1998).
In contrast to other lawyers, cause lawyers are typically distinguished by their willingness to elevate the interests of the cause over the immediate demands of a client (Schein-gold and Bloom, 1998). While some have argued that private, fee-for-service lawyers may have a higher level of commitment to both the client and the cause (Shamir and Chinski, 1998), the prevailing view is that personal injury lawyers are less committed to the "cause" than traditional cause lawyers, because of their pecuniary interest in the litigation. In Alfaro, these concerns were realized when the financial interests of the personal injury lawyers representing the Costa Rican workers came into conflict with the broader cause of the rights of the Costa Ricans workers and others to sue. To dismiss personal injury lawyers as cause lawyers on this basis of the outcome in Alfaro, however, may be unfair. While the Alfaro lawyers may have abandoned the cause when they negotiated the reversal of the Alfaro ruling with the Texas legislature, other personal injury lawyers eventually returned to the cause when they brought new transnational litigation after the legislature attempted to extinguish the issue.

Moreover, as I explain below, for the lead lawyer in the Alfaro litigation, representing the Costa Rican workers was something of a transformative experience. After the compromise was reached in the Texas legislature to overturn the Alfaro ruling, this lawyer left the Alfaro firm and eventually set up his own transnational practice, which he has found to be substantially less remunerative but considerably more "satisfying." Thus, Alfaro appears to provide some evidence for the proposition that personal injury lawyers will, in the process of litigating these transnational workers' rights cases, begin to realize the "possibility of becoming or functioning as a lawyer for a cause" (Shamir and Chinski, 1998).

From Personal Injury Litigator to Cause Lawyer

The lead lawyer for the Alfaro litigation, Charles Siegel, describes his initial involvement in the case as almost accidental. As he tells it, he was sitting in the law library when a senior partner in the firm asked for help in researching cases on forum non conveniens. At the time, Siegel was a summer law clerk and the research project was his first assignment. When he later joined the firm as a first-year associate, Siegel says, he "sort of just became the lead lawyer" on the case. But, despite the somewhat haphazard way in which he became involved in the case, Siegel quickly developed a high degree of commitment to both the clients in the case and the broader issues at stake. According to Siegel, this was in part a result of his first trip to meet the clients in Costa Rica, which he described as having a "very galvanizing" effect.

Siegel characterizes the trip to Costa Rica as "galvanizing" for two reasons. The first reason was that he found his Costa Rican clients to be less "cynical" and more "deserving" than the personal injury victims his firm represented in the
United States. In his words, the Alfaro plaintiffs were “absolutely and totally innocent. . . . they [were] not cynical about lawyers, they [were] not cynical about the legal system, the way a lot of American, personal injury plaintiffs are. . . . I mean every single one of them was a young man, you know, who was sterile.” The second reason his visit to the plantation was so electrifying was that he became convinced that his clients did not “have a prayer of a shot or a hope of any kind of remedy in Costa Rica.” As he put it, the trip made him more sensitive to the “political dimension” of the case and, in particular, to how “utterly ridiculous” it was for multinational defendants to “claim that it is more to convenient to litigate thousands of miles from home than it is to litigate at home.”

Thus, in the course of meeting his clients and otherwise litigating the case, Siegel began—like many cause lawyers—to feel a relatively higher degree of commitment to both the clients and the cause at stake in the Alfaro litigation. And, like more traditional cause lawyers, Siegel was intrigued by the novelty of the legal issues at stake in the case: “Even then, as a first year lawyer, I could tell . . . [it was] cutting edge stuff and interesting.” For all of these reasons, Siegel found the Alfaro litigation much more “interesting” and “satisfying” than other cases.

But what of the firm’s pecuniary interest in the litigation and the willingness to cut a deal with the Texas legislature that attempted to foreclose the possibility of similar litigation in the future? Significantly, Siegel was not involved in the negotiations over the anti-Alfaro bill. According to him, the negotiations for the firm were handled by a senior partner and some lobbyists. It is also clear that Siegel was unhappy with the compromise. When asked about it, he says simply that he “can’t defend” the deal “on any grounds” except for the fact that the firm was worried about losing the rest of its practice. Ultimately, his unhappiness about the deal, together with the fact that the firm had decided to no longer handle transnational litigation after settling Alfaro, prompted him to leave the firm.

Despite all this, Siegel is sympathetic to the perspective of his old firm and, in particular, to their decision to no longer handle transnational litigation. As he explained to me, when the firm took the case “they never imagined the procedural quagmire that it would become and . . . they never imagined how tenaciously it would be resisted on forum non conveniens grounds.” Moreover, the firm “had a big practice to run,” and the transnational cases were “draining a lot of resources” that could more profitably be put into U.S.-based personal injury litigation. To the extent that the firm was trying to run a profitable business, it simply did not make good economic sense to continue handling these cases.

Siegel, in contrast, viewed himself as “thinking much more idealistically” at the time, and as a result he had a strong “desire to continue” handling transnational litigation, despite the financial risks involved. While Siegel was certainly not averse to the idea of obtaining a large fee for doing transnational workers’ rights cases, his interest in the clients and his broader interest in holding U.S.-based multinationals accountable for their misconduct in other countries had begun to outweigh
the question of whether the litigation would be profitable and, at any rate, he believed he could “make [the cases] work.”

Today, more than a decade after the Alfaro ruling, Siegel is in practice for himself, and a very high percentage of his case load is transnational. Although the transnational cases do not earn him enough to sustain his practice, he continues to handle them because they are “more interesting” and the cases “really deserve to be brought.” But he also acknowledges that his motivation for taking these cases is at least in some small part pecuniary. As he put it, the cases are “seductive, in that there’s sort of the shimmering mirage out there of a potential large fee.”

In sum, Siegel’s experience as the lead lawyer for the Alfaro plaintiffs seems to provide additional evidence to support the contention of Shamir and Chinski (1998) that “lawyers for a cause are not necessarily those who consciously and deliberately orient their professional lives toward promoting that cause.” Instead, “[i]t is in the course of engaging” in the acts of lawyering “that the possibility of becoming or functioning as a lawyer for a cause is realized.” Although he stumbled into the case by “accident,” Siegel’s experience of litigating and especially meeting and seeing the living conditions of his clients “galvanized” him to the point where he eventually left his firm and attempted to pursue transnational cause litigation full time. Although the Alfaro litigation did not turn Siegel into a cause lawyer in the traditional sense of the term, it is fair to say that “in the course of engaging in the acts of lawyering” on behalf of the Alfaro plaintiffs, he began to realize “the possibility of becoming or functioning as a lawyer for a cause” (Shamir and Chinski, 1998).

**The Politics of Cause Lawyering**

Siegel’s motivations aside, a number of aspects of the Alfaro litigation suggest that, even when personal injury lawyers come to identify closely with both their clients and the cause at stake, they may be slower than traditional cause lawyers to recognize the political dimensions of the case. As a result, they may be less willing or able to link the litigation with the broader aims of a political movement. Since some scholars have attempted to measure the political utility of cause lawyering in terms of how closely the efforts of cause lawyers are linked to a broader political strategy (see, e.g., McCann, 1994; Scheingold and Bloom, 1998), whether this is in fact the case has important implications for the cause-lawyering enterprise.

In Alfaro, the lead lawyer for the plaintiffs told me that both he and the firm’s leadership were aware of the political dimension of the Alfaro litigation fairly early on. He also told me that by the time the case was before the Texas Supreme Court, they knew that they “had to win this not only in the court but in the legislature.” Despite this recognition, the firm made virtually no attempt to generate support for their clients’ position among local activists. As a practical matter, this meant that, when the case was before the Texas Supreme Court, not a single amicus brief
was filed by a Texas or Costa Rican organization in support of the Alfaro plaintiffs, even as business interests filed some thirty amicus briefs against them. When I asked why this was, the lead lawyer for the Alfaro plaintiffs told me that it didn’t “really click in his mind to seek” amicus support for his clients.

Similarly, although this lawyer later devised a media strategy in connection with developing his own transnational practice, neither he nor the firm made any attempt to formulate a media strategy in connection with Alfaro. And, in contrast to traditional cause lawyers (see McCann, 1994), the attorney for the Alfaro plaintiffs reported that, even though he knew the battle would eventually reach the Texas legislature, this knowledge had little or no effect on his arguments in court. Although, in retrospect, it is impossible to say whether any of this had any effect on the ultimate outcome in the case, past research suggests that, in order for cause litigation to be politically efficacious, it must be linked closely with political organizing efforts. Moreover, although the Alfaro lawyers obtained the ruling they wanted from the Texas Supreme Court without any assistance from Texas political activists, their failure to generate broader support for the litigation probably meant that the political aims of the Alfaro litigation were much more vulnerable when the lawyers entered into the negotiations with the Texas legislature. As a local civil rights lawyer explained to me, Texas activists were not notified about the litigation until the Alfaro ruling was already under assault in the Texas legislature. And by that time, “everything moved so fast, we didn’t have the time to solidify.”

It is possible, however, that greater involvement by local activists in the litigation would have made little difference. As both the dissenting opinions in Alfaro and the subsequent media coverage demonstrate, the Alfaro litigation was brought in a political climate that was highly favorable to tort reform. And, while the attack on lawyers that has characterized tort reform has placed pressure on all cause lawyers (Engel 1994), personal injury lawyers are particularly vulnerable to these pressures. Notably, one of the key supporters of personal injury lawyers at this time was the Texas Supreme Court. As one activist reported, the “conventional wisdom” was that the Alfaro court was “bought and paid for” by the personal injury bar. Certainly Justice Lloyd Doggett, who wrote the most widely cited opinion in support of the ruling, was well known as a friend of the personal injury bar. Whether and how much the relationship between the personal injury bar and the Texas Supreme Court influenced the strategies of the plaintiffs’ lawyers is difficult to say. The lead attorney for the Alfaro plaintiffs, however, did tell me that, despite the widespread perception of the Texas Supreme Court at that time, he thought that they “were going to lose” and was “somewhat surprised” when they won.

At any rate, between 1990, when the Texas Supreme Court decided Alfaro, and 1993, when the legislature passed the bill to overturn Alfaro, Texas began to undergo a political transformation. According to studies of the Texas Supreme Court by Texas Citizen Action, at the time that Alfaro was decided, the Texas Supreme Court
was splitting “about evenly” between rulings for plaintiffs and rulings for defendants. By 1996, however, more than two-thirds of the civil rulings of the Texas Supreme Court held in favor of defendants (Press Release of Texas Citizen Action, July 23, 1998). In the meantime, the Texas legislature was also becoming more Republican and pro-tort reform. As one political observer commented, when the legislative battle over Alfaro was fought, Texas was effectively in the midst of “a transition to becoming a Republican state”.

According to the lead lawyer for the Costa Rican farm workers, an awareness of this changing political situation was one factor that prompted the lawyers for the Alfaro plaintiffs and the TTILA to agree to the legislation to overturn Alfaro. The firm’s senior partner, who gave the go-ahead for the deal to overturn Alfaro, “believed that the political tide was turning,” and, as a result, he had “clearly legitimate” concerns about the potential threat that these political changes posed for the firm’s bread-and-butter asbestos practice. For all of these reasons, the TTILA and the firm that represented the Costa Rican workers had a powerful incentive to walk away from the cause during the legislative negotiations, regardless of whether doing so would damage its ties with local activists.

In the end, both the willingness of the lawyers who brought the Alfaro litigation to abandon the cause in favor of a compromise that served the pecuniary interests of the rest of their practice and the seeming reluctance of these lawyers to consider (or even contemplate) political organizing and media strategies in connection with the litigation raises serious questions about whether the involvement of personal injury lawyers in transnational cause litigation may do more harm than good. What seems clear from Alfaro is that personal injury lawyers will be both slower to recognize the political dimensions of the case and less willing or able to link the litigation with the broader aims of a political movement than traditional cause lawyers. Under these circumstances, their effectiveness as cause lawyers may be significantly compromised.

What the Personal Injury Bar Offers to Cause Lawyering

So far in this essay, I have emphasized the limitations of having personal injury lawyers involved in transnational cause litigation and, to some extent, the possibilities for such litigation to have a cause-orienting effect on personal injury lawyers. But Alfaro also teaches that personal injury lawyers have much to offer the cause-lawyering enterprise. Indeed, it is quite likely that, without the involvement of personal injury lawyers, transnational workers’ rights litigation like Alfaro might never have been brought in Texas. This is true for three reasons.

The first reason is that transnational litigation is extremely expensive to prosecute. Because of this, as the lead lawyer for the Alfaro plaintiffs commented, “it takes lawyers who’ve got the money to litigate them.” The added expense of transnational litigation is due largely to the fact that the litigation involves extraordinary
logistical challenges. In Alfaro, for example, the Costa Rican farm-workers that they represented live in rural communities where telephones and even paved roads are scarce. To communicate with their clients, the Alfaro lawyers had to, among other things, hire local interpreters to make radio broadcasts. And, in order to win case, the lawyers needed the means to hire paid experts on both the causation issues in the case and on Costa Rican law.

Because of the availability of the contingency fee arrangement, and because of other resource advantages, personal injury lawyers are both more willing and able than traditional cause lawyers to litigate successfully under these conditions. Unlike personal injury lawyers, traditional cause lawyers typically have much fewer resources at their disposal and are usually unable to enter into contingency fee arrangements with their clients because of the tax code restrictions on the not-for-profit organizations with which they are affiliated. In short, in light of the extraordinary expense of bringing transnational litigation, it is unlikely that Alfaro would have been litigated at all, had personal injury lawyers not been willing to advance the costs.

A second reason why personal injury lawyers may be key to bringing transnational workers’ rights litigation has to do with their unique areas of expertise. Cases like Alfaro involve difficult issues of causation and are, in the words of the lead lawyer for the Alfaro plaintiffs, “tenaciously defended” by the multinational defendants. As compared to traditional cause lawyers, personal injury lawyers are much more likely to have expertise in developing and proving difficult issues of causation and they are also much more experienced in litigating against multinationals. For all of these reasons, personal injury lawyers bring a wealth of resources and expertise to transnational cause litigation against multinationals that is otherwise unavailable within the cause-lawyering bar.

A final reason why personal injury lawyers may have an important contribution to make to transnational cause lawyering has to do with what Shamir and Chinksy (1998) have referred to as the ability of private lawyers to “survive longer in the field.” In their study of lawyers representing the cause of Bedouins in Israel, Shamir and Chinksy (1998) found that fee-for-service lawyers tended to display greater resilience and stamina for the litigation than the more traditional cause lawyers who started out with a greater level of commitment to the cause. Similarly, the experience in Texas after the legislative reversal of the Alfaro ruling indicates that personal injury lawyers may have a higher degree of resilience in battling the multinationals in transnational litigation than traditional cause lawyers in Texas.

As I noted above, personal injury lawyers are continuing to bring transnational rights cases, even after the Texas legislature tried to shut the door. Traditional cause lawyers in Texas, on the other hand, reported to me that they have concluded that the anti-Alfaro legislation has made transnational litigation too difficult to pursue in Texas. Significantly, cause lawyers in Texas continued to reach this conclusion even after the Mendoza case—which obtained relief for the maquiladora worker
murdered in Mexico after the legislative reversal of Alfaro—was successfully litigated. In my interviews with local activists, I learned that the lawyers for the Mendoza plaintiffs made a presentation on the case to a group of Texas cause lawyers during a regional meeting of the National Lawyers Guild. After the presentation, the cause lawyers discussed "at length" whether there was any way that they could become involved in future litigation of this type. According to one cause lawyer who attended this meeting, however, the traditional cause lawyers simply "drew a blank" when it came to thinking about transnational legal strategies.

Although it is too soon to draw conclusions about the relative roles of personal injury lawyers and traditional cause lawyers in the development of transnational cause litigation in Texas, it is clear that personal injury lawyers are currently in the vanguard of this legal movement. It is also clear that, despite their pecuniary interests in the litigation, they have much to offer the cause-lawyering enterprise. Among other things, the contingent fee arrangements that are typical of personal injury practice may provide an important means of expanding opportunities for cause lawyering, particularly as funding for legal services and other cause-lawyering activities is increasingly limited (Scheingold and Bloom, 1998). At the same time, it is important to recognize that personal injury lawyers face some of the same economic pressures as legal services lawyers and other traditional cause lawyers (ibid., 1998). In Alfaro, this pressure was exacerbated by a political climate that was especially hostile to personal injury lawyers and that, ultimately, appears to have prompted them to abandon the cause in order to preserve their own economic interests.

In sum, despite the ultimate outcome, the involvement of personal injury attorneys in the Alfaro litigation and the continuing involvement of personal injury lawyers in transnational workers' rights litigation holds a great deal of promise for the cause-lawyering enterprise, particularly in light of the challenges to cause lawyering that are posed by the increasingly global economy. As multinationals grow in power and dominant states are under increasing pressure to cut funding for legal services (see Sarat, this volume), some have argued that cause lawyers may never have the resources or the numbers they need to successfully challenge the "battalions" of corporate lawyers in transnational practice (Trubek, et al., 1994: 426, n. 22). The involvement of personal injury lawyers in the Alfaro litigation, however, suggests one way in which the cause-lawyering enterprise may reshape itself so as to better combat the growing influence of multinationals.

Conclusions

It is difficult to draw conclusions from a single case study. What we can say from the experience of Alfaro and its aftermath, however, is that personal injury lawyers may play a critical role in transnational cause lawyering against multinationals. Despite the fact that the personal injury lawyers representing the Alfaro plaintiffs
ultimately abandoned the cause, their involvement in the litigation was crucial to the early success of the litigation. Moreover, the involvement of personal injury lawyers in subsequent transnational workers' rights litigation suggests that they will continue to play an important role in transnational cause litigation in the future. Whether and how this involvement of personal injury lawyers in transnational cause litigation influences the possibilities for cause lawyering is not entirely clear. On the one hand, the experience of the lead lawyer for the Alfaro plaintiffs suggests that when personal injury lawyers become involved in transnational rights litigation, they may be prompted to act more like "lawyers for a cause" (Shamir and Chinksi, 1998). On the other hand, Alfaro also suggests that personal injury lawyers are also more likely to privilege their own pecuniary interests over concern for the cause. How these two, somewhat paradoxical, possibilities will play out in future transnational workers' rights litigation by personal injury lawyers remains to be seen.

One interesting question that is raised (but not answered) by Alfaro is what role local courts may play in influencing these developments. Past research indicates that states have "few incentives to cooperate" in recognizing transnational legal rights (Keck and Sikkink, 1998: 203). In Alfaro, however, the conduct of the local courts suggests that, for at least some institutions, this is not always the case. Why is it that, even after the Texas legislature passed legislation to overturn Alfaro, some Texas courts have been willing to hear the transnational claims of foreign workers? Although there are many potential reasons why a court may choose to disobey the will of its local legislature, one explanation for the willingness of Texas courts to allow these cases to go forward may lie in the increasingly threatened position of local courts in the global economy.

As several scholars have noted, the neoliberal characteristics of the increasingly global, free-market economy are placing pressure on legal rights, particularly in economically dominant countries like the United States (Sarat this volume; Greider, 1997; Held, 1995). Because of this pressure, liberal, democratic states are said to be experiencing a "crisis of legitimacy" (see Sarat this volume; see also Garland, 1996). The state's inability to regulate multinational conduct overseas, at least arguably, exacerbates this crisis because it exposes the state as unable, or unwilling, to hold multinational corporations accountable under law. As the protectors of rights in liberal societies (if only in myth) and the institutions responsible for holding all equally accountable under the law, the courts—at least arguably—have the most to lose if the crisis is not addressed.

In Alfaro, the opinions of the court reveal that justices on both sides of the debate were concerned about the legitimacy of the courts in the increasingly global economy. As I noted above in my description of the court's opinion, the Alfaro justices were in agreement that, more than anything else, what was at stake in Alfaro was whether Texas courts would be able to continue to provide access to legal rights for Texans. For the minority justices, Alfaro posed a threat to access
for Texans because they feared that allowing foreign nationals to sue would lead to further delays in courts that were perceived by many Texas citizens to be already overcrowded. For Doggett, on the other hand, Texas could not refuse to extend legal rights to the Costa Ricans without experiencing a downward pressure on the legal protections that are provided to them. Thus, for both sides of the debate, the continuing ability of Texas courts to provide legal protection—and the closely related question of the legitimacy of Texas courts—appears to have been very much at issue.

One way for courts to respond to concerns about legitimacy is to expand access to legal rights (Keck and Sikkink, 1998). As others have noted in the domestic context, in doing so, courts substantiate the claim of the state that all are treated equally under the law (Halliday and Karpik, 1999). When the crisis in legitimacy stems in part from a perception that multinationals are beyond the law, however, another way to respond might be to increase the capacity of the state to regulate the conduct of multinationals operating outside their borders. Alfaro presented the Texas Supreme Court with an opportunity to pursue both of these legitimating strategies at once. And, in Justice Doggett’s opinion, there is substantial evidence that these considerations were, at least in part, driving the court’s reasoning. Recall, for example, Doggett’s argument that Texans could not deny Costa Ricans the right to sue, without experiencing a downward pressure on their own legal rights. This argument clearly links expanding legal access to the continuing capacity of local courts to provide legal protection for Texans and, as a result, ties the court’s legitimacy to the expansion of the legal rights to Costa Ricans. Similarly, the Alfaro court’s decision to expand its jurisdiction extraterritorially to cover multinational conduct in other countries, Doggett argued, was necessary to ensure that the right to sue them in Texas was not rendered meaningless.

This last argument is of particular significance because it goes to the question of the continuing relevance of local courts in a global economy. As I noted at the beginning of this essay, the Texas Supreme Court’s ruling in Alfaro sent shockwaves across the multinational business community. While perhaps overdramatized in the media reports on the litigation, the fear, quite literally, was that Texas had just declared itself “the courthouse of the world.” As a result, for a moment at least, Texas courts became major players in the global regulatory arena. Thus, whether intentional or not, one effect of decisions like Alfaro, which recognize a transnational right to sue on the part of the foreign nationals in Texas, is to significantly increase the global stature of Texas courts.

In sum, Alfaro suggests that, to the extent that the neoliberal pressures of globalization are prompting dominant states to experience a “crisis in legitimacy,” local courts in those states may be motivated to expand access to local legal systems for two reasons. First, local courts—like Justice Doggett—may perceive the litigation as a means of bolstering perceptions of the court’s legitimacy at home by, among other things, demonstrating that the courts are still capable of holding even
powerful, multinational corporations accountable to its legal norms. Second, and
less obviously, by expanding their jurisdiction in this way, local courts may help
to ensure that they will continue to play a regulatory role in the global arena. For
both of these reasons, Texas courts—at least arguably—had an incentive to work
with the cause lawyers to obtain broader institutional support for the expansion
of transnational legal rights.

This development, in turn, may have important implications for the cause-
lawyer enterprise. According to some observers, the political utility of cause
lawyering may depend in part upon the extent to which the cause lawyers maintain
something of a "dissident" relationship with state institutions (Menkel-Meadow,
1998; but cf. Michalowski, 1998). Under the circumstances presented in Alfaro,
however, cause lawyers operate less in opposition to state institutions and more
like double-agents. On the one hand, they oppose the state, insofar as they push
the state to make good on its liberal claims by expanding the parameters of who
has access to the courts. On the other hand, in the transnational context, this
expansion of access increases the stature and regulatory power of the state—and
local courts, in particular—at a time when both are increasingly in question. In
Alfaro, the double-agent role of the cause lawyers was compounded by the fact that
the litigation was handled by personal injury lawyers who, particularly at the time
the Alfaro litigation was brought, were in an extremely vulnerable position vis-à-
vis local institutions because of the changing political climate within the state. As
one activist pointed out to me, the hostile political climate clearly had an important
effect on the political strategies of personal injury lawyers:

The new legislation and the new judges on the courts, the Republicans on the
courts, have severely diminished trial lawyer power. ... You see a lot of trial lawyers
now actually supporting the Republican judges as a way of trying to cut their
losses. They understand that the Republican judges are going to win and so they
want to be on the winning side ... so they'll be supporting the Republicans.

Thus, given the relative "outsider" status of personal injury lawyers in Texas
politics at the time, one wonders if the willingness of the Alfaro lawyers and the
TTLA to compromise in the legislative negotiations was motivated, in part, by the
desire to position themselves as legislative "insiders" in a hostile political climate.
From the comments of the lead lawyer for the Alfaro plaintiffs, we do know that
concern about the changing political tide was an important factor that affected the
negotiations and the willingness of his firm to continue to handle transnational
litigation. Whether this translated into active desire on the part of the firm to
attempt to seek a more cooperative relationship with the state is a question that
cannot be answered by this case study. What is clear, however, is that the "outsider"
status of personal injury lawyers may have made it more difficult for the Alfaro
lawyers to keep "cause" at the center of their efforts.
Perhaps more than anything else, however, the experience in Alfaro suggests that
the line between cause lawyering and traditional lawyering is not particularly
clear or stable (Shamir and Chinksy, 1998). As noted in the introduction to this
volume, in practice, “[i]ndividual lawyers frequently cross and re-cross the lines
between traditional and cause lawyering” (Sarat and Scheingold). While the Alfaro
lawyers may have stepped out of their cause-lawyering role when they negotiated
the reversal of the Alfaro ruling with the Texas legislature, they had good reasons
for doing so, and, at any rate, other personal injury lawyers eventually “re-crossed”
the line when they opposed the legislation to overturn Alfaro and, later, when they
brought new litigation to expand access to Texas courts transnationally after the
legislature attempted to extinguish the issue. Finally, because traditional cause law-
yers have neither the resources nor the ability to enter into the contingency fee
arrangements that may be key to allowing such litigation to go forward, and be-
cause of the financial incentives presented by transnational litigation, the involve-
ment of personal injury lawyers in transnational workers’ rights litigation is prob-
bly both necessary and inevitable. The challenge for cause lawyering will be to
find ways of helping these lawyers to keep “cause” at the center of their efforts.

Notes

1. As one of the participants later acknowledged, the process by which the legislation
to overturn Alfaro was drafted “raises significant issues concerning the democratic process”
(Weintraub, 1994: 344).

2. It is somewhat misleading to refer to the Alfaro litigation as is if it were a single
case. In fact, numerous cases with similar factual circumstances were filed and settled by the
firm at this time. Alfaro was simply the name of the lead case that was argued before the
Texas Supreme Court.

3. In an odd twist of circumstances, the legal scholar who is credited as the author of
the legislation to overturn Alfaro (and who helped to represent one of the Alfaro defendants
before the Texas Supreme Court) switched sides in the Mendoza litigation and argued to the
court that the Mexican plaintiffs’ case should be heard in the United States. When I asked
this lawyer what prompted him to do this, he cited what he considered to be the relatively
more egregious conduct of the Mendoza defendants as influential.

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