Transnational Responses to Transnational Exploitation: A Proposal for Bi-National Migrant Rights Clinics

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1. INTRODUCTION

The occasion of the Journal of International Law’s thirtieth anniversary issue, coming on the heels of the sixtieth anniversary of the Universal Declaration on Human Rights, provides us an opportunity to reflect on how public international law has responded to the civil, political, and socio-economic realities of the past thirty years, and the role the academy can have in its shaping and application over the next thirty years. The core principle of the Universal Declaration—the protection and promotion of human dignity—has remained constant, but where the emphasis has been placed in seeking the realization of human dignity has shifted over the past thirty years with the historical, and some would argue myopic, emphasis on civil and political rights slowly giving way to greater recognition of economic, social, and cultural rights. Bridging the gap between the two categories of rights, embodied in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, respectively, are two interrelated issues gaining prominence as the impact of globalization is felt in communities of all sizes in every part of the world: migration and labor rights. It is at that intersection of migration and labor rights where international law may have the greatest impact over the next thirty years.

Migrant workers can be found laboring in all industries at all socioeconomic levels across the world. But it is migrant workers—both with lawful status and without—who are engaged in low-wage employment defined in the international dialogue by “3 D’s”—dirty, dangerous, and degrading—that occupy the forefront of the debate on rights protection and migrant regulation. Their
stories are of workplace discrimination and harassment on the basis of their national origin, language, race, ethnicity, and gender; work environments that are inherently unsafe and violate state and federal health and safety laws, including violations that result in permanent workplace injuries; unlawful deductions from pay, wage theft, and other wage and hour violations; interference with their right to organize and engage in collective bargaining; and possible termination as a likely consequence of their efforts to work collectively to improve their working conditions. And for all of this, they may have paid exorbitant and possibly illegal recruitment fees and other costs in the course of securing employment in their host country.

In response to the abuses migrants face, migrants and advocates have historically engaged in advocacy on two parallel tracks, with one camp operating in the domestic sphere and the other camp operating in the international arena. In recent history, domestic advocates have begun to cross into the international advocacy field frustrated by the lack of state and federal court remedies. At the same time, international law scholars and advocates increasingly are contributing amicus briefs in state and federal litigation, as part of a growing movement to bring human rights home. But there still remains a divide in both training and practice between the international and the domestic. In this Article, I argue that law schools, which serve as the training ground for future lawyers who will increasingly be called upon to operate within multiple legal systems, are uniquely positioned to begin building those bridges. Therefore, I propose that law school clinical programs engage in cross-border, bi-national collaboration, developing an approach towards legal representation that is truly transnational in its reliance on domestic, comparative, and international law alike.

I will first briefly discuss international law developments relevant to migrant workers in the Americas, as well as inter-State dialogues on migration that provide fora for bringing attention to the need for a rights-based approach to migration. I will then look at the challenges in implementation of both domestic and international legal rights for migrant workers and two programs that have developed to overcome those challenges. Finally, I will outline my proposal for bi-national law school clinical programs that seek to transcend the advocacy divides that currently occur out of both habit and logistical necessity, mindful of the challenges presented in such a model.
2. DEVELOPMENT OF INTERNATIONAL LAW IN AREA OF MIGRANT WORKER RIGHTS AND INCREASED RELIANCE ON INTERNATIONAL NORMS IN ADVOCACY ON BEHALF OF MIGRANTS

International and regional dialogues on migration, and developments in international law as it pertains to migrants in the Americas, are creating opportunities for advocates seeking to cross the divide between the domestic sphere of rights enforcement and the international sphere of rights promotion and protection.\(^1\) At the United Nations ("U.N."), those conversations began in earnest about the time the University of Pennsylvania Law School, recognizing the importance of international law and the academy’s role in its development, founded the Journal of International Law. Seeing a need for an international instrument to govern the rights and responsibilities of individuals who migrate for work, States seeking to regulate their migration began a ten-year process of drafting the International Convention on the Rights of All Migrant Workers and Members of their Families ("Migrant Worker Convention"), that ultimately entered into force in 2003.\(^2\)

The U.N. undertook discussions of the creation of a Migrant Worker Convention to fill a gap in protection left by the Refugee Convention. The Refugee Convention was crafted to protect a carefully defined class of individuals fleeing State-sponsored persecution on account of race, religion, nationality, political opinion, or membership in a social group. Outside the ambit of protection were all migrants compelled to leave their homes because of humanitarian disasters such as drought and famine, lack of adequate earning opportunities, and other economic, social, and cultural factors contributing to an individual’s decision to leave home. The Migrant Worker Convention, while not creating obligations on States Parties to grant admission or status to

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migrant workers, does create obligations on States Parties to recognize labor and related socioeconomic rights as fundamental rights, applicable to all migrant workers regardless of their migration status. As migrants move due to labor shortages and labor demands, in search of sustainable incomes to support themselves and their families, the Migrant Worker Convention serves an important function in recognizing migrants as not merely fungible labor commodities, but rather human beings who—as such—are possessors of fundamental human rights, the most basic of which are the right to dignity and the right to be free from discrimination. Unfortunately, the impact of the Migrant Worker Convention remains limited due to the fact that not a single major receiving nation of migrants has ratified it. Nonetheless, it provides a framework for engaged and ongoing debate at the international level on the rights and responsibilities of States in managing transnational migration.

As the ongoing dialogues on the regulation of labor migration and the rights that should be afforded migrant laborers take place at the international level, the subject of those debates—the migrant workers themselves—remain far removed in their experiences and realities, even when they have physical proximity to the discussion. This disconnect between the work to develop international standards and best practices with regard to labor migration and the realities of the workers was brought home for me a few years ago, when I was in Geneva for the U.N. Committee on Migrant Workers' Day of General Discussion on “Protecting the Rights of Migrant Workers as a Tool to Enhance Development.” The night before I was to present on the need for a rights-based approach to migration both as a matter of international law and as a means to benefit development in both sending and receiving countries, I was invited together with my colleagues to participate in a meeting just a few miles away from the U.N. headquarters with some of Geneva’s undocumented migrant laborers, most of whom were from South America. The very laborers working to feed, clothe, and otherwise serve the diplomats engaged in the human rights discussions at the U.N. and the staff supporting the lofty goals of the different U.N. agencies based in Geneva, were not even aware of the Committee on Migrant Workers’ meeting for the Day of General Discussion—or the existence of the normative rights contained in the dialogue.

Unfortunately, this disconnect between the rights discussion and development of legal standards and best practices that is
occurring at the level of the U.N. is being replayed at the regional level in the Americas. Even before the U.N. held its first High Level Dialogue on Migration and Development, the Organization of American States had undertaken the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families. Included in the Program’s mandate is the convening of an annual meeting where States and the different actors charged with carrying out different aspects of the Program report on their progress towards achieving the goals set out in the Program of Action, and to share best practices. As with the meeting in Geneva, the annual meetings sponsored by the Organization of American States occur in the same cities where domestic workers are held in conditions of servitude, yet have no legal recourse because their employers use diplomatic immunity to shield themselves from liability.

This mention of the disconnect between theory and practice is not meant to disparage the work taking place at the international level to establish and further develop international legal standards vis-à-vis the rights of migrant workers. Instead, it is intended to highlight the need for more cross-fertilization between the international and local, between the theory and practice.

In a first step towards achieving those linkages, the government of Mexico requested an Advisory Opinion from the Inter-American Court on Human Rights on the rights of undocumented migrants. The request came just weeks after the U.S. Supreme Court ruled in Hoffman Plastics Compound, Inc. v. NLRB that undocumented migrants are not entitled to the remedy of backpay, the only individualized remedy available to a worker who has been unlawfully terminated for engaging in concerted protected activities under the National Labor Relations Act. In its Advisory Opinion, the Inter-American Court on Human Rights emphatically recognized the principles of equality and non-discrimination in the application of worker rights to all migrants. In so doing, it elaborated upon what it deemed the fundamental rights of all workers, which unauthorized migrants should—under the principles of equality and non-discrimination—enjoy equally with nationals.

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In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation.\(^5\)

Advocates have celebrated the Inter-American Court’s Advisory Opinion as an important standard-bearer for the rights to which all migrants are entitled, and particularly the Court’s deft incorporation of economic, social, and cultural rights—historically ignored in the Inter-American Human Rights system—through the civil right of equality and non-discrimination. But because OC-18 is an Advisory Opinion rather than a decision on a specific case, it is void of the fact-specific analysis that might suggest how the standard will play out in practice. In a nutshell, it is academic until applied to the realities of the migrant workers that are its subject.

In an effort to make the standards established in the Inter-American Court’s Advisory Opinion on the Juridical Condition of Undocumented Migrants effective in the United States, the Transnational Legal Clinic at Penn Law, together with the Human Rights Program, Immigrants’ Rights Project, Woman’s Rights Project of the American Civil Liberties Union, and the National Employment Law Project, filed a Petition before the Inter-American Commission on Human Rights (“IACHR”) alleging Violations of the Rights of Undocumented Migrant Workers in the

United States. The Petition was filed on behalf of several individual named plaintiffs as well as several organizational clients in response to employer abuses at the local level tolerated and judicially-sanctioned by the United States through the stripping of remedies and other protections by state and federal courts following the Supreme Court's decision in *Hoffman*. The Petition remains pending at the IACHR, but the struggles of the named plaintiffs who submitted affidavits in support of the petition continue. Despite the recognition of migrant workers as covered employees under U.S. state and federal labor and employment laws, lack of access to the judicial and administrative bodies to enforce those rights, and lack of effective remedies, leave those rights hollow promises of what should be but is not. Advocates working alongside and on behalf of migrant workers are increasingly looking for advocacy alternatives to supplement traditional litigation strategies to right the wrongs and to reclaim dignity in work for the migrant population, but those efforts need

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7 See *Hoffman Plastic Compounds*, 535 U.S. at 137 (holding an unauthorized worker unlawfully terminated in violation of his rights under the National Labor Relations Act was not entitled, by virtue of his immigration status, to the remedy of backpay). The *Hoffman* decision has resulted in a series of subsequent cases at the state level limiting, and in some cases foreclosing, remedies available to undocumented migrants when employers violate their labor and employment rights. See, e.g., Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004), cert. denied, 849 A.2d 184 (N.J. 2004) (holding that an undocumented worker suing for discriminatory termination could not recover either economic or non-economic damages absent egregious circumstances during the period of employment such as extreme sexual harassment). See also Sanchez v. Eagle Alloy Inc., 658 N.W. 2d 510 (Mich. Ct. App. 2003), *leave to appeal granted, 671 N.W. 2d 874* (Mich. 2003), *leave to appeal denied, 684 N.W.2d 392* (Mich. 2004) (finding that undocumented workers are covered by Michigan workers compensation law and are entitled to full medical benefits if injured on the job but that their right to wage-loss benefits ends at the time that the employer "discovers" they are unauthorized to work); Reinforced Earth Co. v. Workers' Compensation Appeal Board (Astudillo), 810 A.2d 99 (Pa. 2002) (holding that although undocumented worker is entitled to medical benefits after experiencing a workplace injury, illegal immigration status might justify terminating workers' compensation benefits for temporary total disability); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (holding that undocumented worker asserting tort claim for workplace injury could only recover lost wages at the wage level of his country of origin unless he could prove his employer knew about his irregular immigration status at the time of hiring); Balbuena v. IDR Realty L.L.C., 845 N.E.2d 1246 (N.Y. 2006) (holding that immigration status can be a factor to reduce benefits received by an undocumented worker's family in a wrongful workplace death claim).
to be undertaken in close cooperation and collaboration with domestic advocacy.  

3. CHALLENGES TO LEGAL REPRESENTATION OF MIGRANTS AT THE DOMESTIC LEVEL AND THE NEED FOR TRANSNATIONAL ADVOCACY AND REPRESENTATION

As alluded to above, advocates working on behalf of migrant workers are increasingly looking to international human rights standards to provide a new and more comprehensive rights paradigm for migrant workers than that which exists under domestic law. In the United States, even before the Supreme Court ruled in *Hoffman* that an undocumented worker is not eligible for the remedy of backpay when his legal rights have been violated, specific industries with high concentrations of migrants were already excluded from certain labor and employment rights. For example, agricultural workers and domestic workers are explicitly excluded from protection under the National Labor Relations Act and certain provisions of the Fair Labor Standards Act. Numerical thresholds in our anti-discrimination statutes also leave many agricultural workers, domestic workers, and day laborers outside the jurisdiction of the Equal Employment Opportunity Commission. But acting as an even greater barrier to achieving justice for migrant workers are logistical problems created by the fact that migrant workers, by definition, migrate; they lack access to legal services; and they are fearful.

The pervasiveness and power of fear among the migrant population cannot be underestimated. Further, it is important to recognize that fear is just as prevalent among workers here legally as temporary workers under an H-2A or an H-2B visa as it is among the undocumented population. Workers are afraid of being fired, afraid of being deported, and are afraid of being blacklisted for asking questions or speaking up about their rights because their families and their communities depend on their earnings. It often

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takes termination of employment for a migrant worker to step forward and complain. There are also the logistical barriers to pursuit of legal claims—the biggest barrier being the lack of access to legal services. Migrant workers migrate—and leave their place of employment, often times returning to their home country, particularly if they have been injured on the job or otherwise are unable to immediately find new employment. Workers who enter the United States as "guestworkers" are required to return to their home country upon termination of their visa, which happens immediately upon termination of their employment relationship. Once workers return home, it not only hinders communication with lawyers in the U.S., it may also foreclose opportunities to pursue claims in the U.S. in cases where the worker's physical appearance is required by the adjudicatory body, as in many workers' compensation cases.9

In an attempt to overcome the barriers workers face in accessing justice when their rights have been violated, Rachel Micah-Jones founded Centro de los Derechos del Migrante, Inc. ("Center for Migrant Rights" or "CDM") based in Zacatecas, Mexico. Ms. Micah-Jones had been a legal services attorney in Florida representing migrant farmworkers, and was inspired to create CDM when she was in Mexico and saw how much more readily workers spoke up, asked questions, and volunteered information than they did when she would visit them in the labor camps in Florida. CDM provides pre-departure know-your-rights trainings to workers leaving Mexico to work in the U.S., educating them both about their rights under U.S. labor and employment law, and about practical things to do to preserve those rights, such as keeping copies of all pay stubs, contracts, etc. When workers return to Mexico, they provide the link between the workers in Mexico and the lawyers in the U.S. pursuing claims against their employers, making referrals, conducting interviews with the workers, conducting depositions, etc.10 In addition, teaming up with Proyecto de los Derechos Economicos, Sociales y Culturales

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("ProDESC"), CDM has launched a Binational Labor Justice Initiative. As explained in materials related to the Initiative:

The current immigration situation and the growing interconnectedness of bi-national labor markets demand a new paradigm to view and defend migrant rights, and labor rights more generally. In this binational context, advocates are encountering U.S. guestworker contracts that violate local Mexican laws, U.S. owned corporations violating Mexican labor law, and migrant workers who file labor violations claims from outside the U.S. Working on both sides of the border provides new legal tools and safe spaces for workers to demand justice.¹¹

In addition to the work of CDM, Global Workers Justice Alliance ("Global Workers") was founded with the same goals—to ensure that migrants do not have to abandon their legal claims when they return home, and to create binational and multinational advocacy networks on behalf of migrant workers. Global Workers operates on a slightly different model—based in New York, they provide training to advocates in the sending countries to create a network of workers' rights defenders.¹² Both CDM and Global Workers have already seen great successes in their work on behalf of migrants who might otherwise have had to forego their legal rights, but they are just two very small organizations and the numbers of migrants who could benefit from transnational legal services far exceed their capacity. Increased collaboration among law school clinical programs in sending and receiving countries of migrant workers could both serve to increase the network of rights defenders through the immediate services provided through the clinical programs, but also longer term, through the training of truly transnational lawyers.


4. CREATION OF BI-NATIONAL MIGRANT RIGHTS CLINICS

The legal academy is increasingly looking to internationalize and to create opportunities for students and faculty alike through participation in exchange programs, summer fellowships, and other curricular and programmatic developments. The list of American Association of Law School’s Sections and Committees is telling in itself, including: Committee on International Cooperation; Section on International Law; Section on International Human Rights; Section on International Legal Exchange; and a Section on Comparative Law. This list is by no means an exhaustive demonstration of the legal academy’s engagement in international and comparative law, in that it does not reflect those activities being undertaken through the other Sections. While notable in number, it is important to recognize that these programs are: (1) faculty-centric; (2) more often focused on the role U.S. law professors and lawyers can have in promoting law reform and democratization in other countries; and (3) oftentimes short-term engagements. My proposal for bi-national legal clinical programs seeks to engage the law students more directly and consciously in the cross-cultural and transnational legal exchanges, and it seeks to do so in a more reflective, self-conscious manner in which all participants benefit equally from the exchange, while at the same time providing needed services.

The internationalization of clinical legal education should be seen as inevitable if it maintains as its core principle preparing our students for practice in a legal profession in which there is not a single practice area untouched by globalization. Professor Scott Cummings provides a comprehensive review and analysis of the changes in the legal profession highlighting the ways in which lawyering has changed in light of this new internationalization.13

13 Scott L. Cummings, The Internationalization of Public International Law, 57 Duke L.J. 891, 897-98 (2008).

Efforts to promote public participation are channeled into attempts to correct the ‘democracy deficit’ in international institutions. And, in perhaps the most striking turn, some public interest lawyers are moving away from the old civil rights model of enlisting federal power to protect minority rights toward a new human rights model of resisting federal power—particularly after 9/11—through the domestic application of international standards. Tactically, these shifts have been associated with an approach that both encompasses and moves beyond court-centered litigation strategies. Lawyering within the international arena is thus notable for its tactical pluralism, embracing a broad range of
If law school clinical programs are going to fulfill their mission to prepare students for practice, they must adapt and develop in ways that prepare students to be as comfortable in international law and procedure and in the law and practices of multiple countries, as they are with the U.S. legal system.

Clinical legal education has been responding. The past two decades have seen a dramatic increase in the number of international human rights clinics—some of which engage in more project-based advocacy and others engaged more directly in one-on-one client representation such as the representation of individuals seeking political asylum in the United States.\textsuperscript{14} At the same time, clinical programs representing clients in domestic employment law or other proceedings are increasingly working with clients who originate from outside of the United States, for whom English might be a second language, and they have developed skills in working cross-culturally and across language divides.

But, as with the domestic and international divide seen in practice, few clinics collaborate to employ the full range of legal strategies—domestic, international, and comparative—in their work on behalf of their client population.\textsuperscript{15} Although international


\textsuperscript{15} There are a few exceptions to this generalization. For example, the Transnational Workers Rights Clinic at the University of Texas Law School, directed by Bill Beardall, has participated in NAFTA Complaints as well as direct representation in state courts of day laborers. The International Human Rights Law Clinic at American University Washington College of Law has recently begun supporting the work of CDM and Global Workers, traveling to Guatemala.
human rights clinics often partner with organizations and civil
society in the countries in which they are working, those
partnerships more closely mirror an attorney-client relationship,
with the clinics providing the legal work sought by the clients.
And while they provide opportunities for the students to learn
from advocates and practitioners in other countries, the learning
may not be as rich as that of law students working in collaboration
across legal systems on behalf of the same client or same group of
clients. Instead, their work may fall victim to the same critique of
western hegemony that one could say plagues the faculty-driven
law reform projects and clinical legal education training programs
highlighted above.

I recognize the tremendous contributions existing programs
have made both to their students' learning and also to the benefit
of their clients and partner organizations. The rich discussions
arising out of these exchanges force us to reflect on what it is we
do, why we do it, and the many ways in which we can improve on
existing models of legal advocacy. Within the clinical context, they
provide us with an invigorating exchange of ideas, ideals, and
methodologies that help us improve our teaching, our students'
lawyering, and the fulfillment of our larger social justice goals.

But, as more clinical programs develop across the globe, we
have an opportunity to develop richer, more comprehensive
exchanges through clinic to clinic collaborations. Under this
model, students in one clinic in the United States would partner
with students in a clinic in Mexico, for example. This form of
direct collaboration among students can contribute to the richness
of opportunities for students and professors in a number of
different ways, both self-serving and altruistic. The apparent
altruistic reasoning is simple: North-South clinic collaborations
allows for clinics in the northern hemisphere to provide direct
support to the work of emerging clinics that may be operating in
more difficult political environments and with fewer resources.
From a self-serving perspective, bi-national clinical collaborations
provide our students with access to client populations and first-
hand accounts of legal systems and how they operate that they
may not otherwise be privy to. In addition, it provides our
students with a more comprehensive set of experiences from which
to draw upon in discussions of cross-cultural lawyering,
recognizing that the cross-cultural lawyering of today does not just refer to the lawyer-client relationship, but also the relationships between lawyers, between lawyer and client, between lawyer and decision-maker, and between legal systems.

To borrow from a case in the Transnational Legal Clinic at Penn Law mentioned above, our Petition to the Inter-American Commission on Human Rights on the Rights of Undocumented Migrants would benefit greatly from a law school clinical partner in Mexico. As discussed, migrant workers often return to their country of origin before they have had a chance to assert their rights. Litigating the rights of a worker who has not been paid for work performed, or who was injured on the job and is entitled to workers compensation benefits or has otherwise had his or her labor rights violated, becomes a logistical near impossibility without regular, reliable, and protected communication with the client. Understanding the environment from which that worker came and to which he or she will return, and the realities of the post-return (in some cases, post-deportation), becomes essential to the narrative put forth to the Inter-American Commission.

Furthermore, we will want to develop strategies for advancing the rights and protections sought should we receive favorable findings from the Commission. Those strategies may involve public engagement, advocacy with government officials from both sending and receiving countries, local legislatures, and international human rights organizations. Having law students on both sides of the border, able to interact with clients on both sides of border, working together to develop these strategies, would provide abundant learning opportunities for the students as they collaborate to bridge the divide between norms and practice.

Bi-national migrant rights clinics also provide additional opportunities for inter-disciplinary clinical work, beyond the more obvious human rights models I have discussed here. Hometown Associations now exist in multiple migrant communities, whereby members of a community working in the United States will pool their earnings and send their remittances collectively to their hometown community for use in different development projects. Transactional clinics and business schools could engage with the client population working in the United States and while partner clinical programs can engage with the organization in the home community to facilitate the objectives of the Hometown Associations. Provision of health care and access to health care for migrants who return to their home country after suffering from
pesticide exposure or other work-related health complications or injuries provides another area for interdisciplinary bi-national clinical collaboration.

The creation and implementation of bi-national clinical programs are not without challenges. Among the factors that must be taken into consideration in developing such programs are identification of the respective resources of each clinical program and the expectations arising out of the partnership. Specifically, it is important to know not just the financial limitations of the partner program, but also how many course credits the students are receiving for their time in the clinic, what is the compensation of the supervising faculty member (is she a full-time faculty member, or does she have to supplement her law school salary with other employment), how many students are in each clinic, what are their other obligations, and how is supervision conducted in each respective program. Paying heed to these factors upfront will help in identifying and establishing roles and responsibilities, which is critical to effective collaboration. Furthermore, it is important to understand the political environment in which our colleagues work. We take for granted the protection that academic freedom affords us in our work in universities in the United States, but our colleagues in other countries do not necessarily share that luxury.

5. CONCLUSION

While not without its challenges, the development of bi-national clinical programs and collaboration will foster the development of the global lawyer while seeking a holistic client-centered approach to developing solutions to addressing migrant exploitation. Law school clinical programs from the United States to China have emerged to address some of the rights violations faced by migrants. In many ways, law school clinical programs have been innovative in responding to the needs of the diverse client populations and in training their students to respond to those needs—and have at times been at the forefront of social justice movements. It is time once again for law schools to step out in front in devising new and innovative responses to the challenges posed by human migration and to ensure that remedies and restitution are available to migrants whose rights are violated in transit or in the receiving countries, inspired by the successes of organizations like Centro de los Derechos del Migrante, Inc.