

C-READ

To: Articles Committee
From: Ronni Sadovsky
Date: March 9, 2013
Re: C-Read 19258: *The New Nexus*

INTRODUCTION

I was optimistic about *The New Nexus* based on the intake screening, but having read it, I don't recommend that it move to Committee Read.

ANALYSIS

Strengths

The project this piece embarks upon has a lot of potential. Its analysis focuses on a narrow legal issue — the nexus requirement in asylum cases — with potentially huge reverberations for legal theory and practice. The asylum law cases always start out as tragic personal stories, and the ethical distinctions that the law must make (between asylum-eligible and asylum-ineligible claimants) are delicate, so that this area of law is inherently interesting even to non-specialists. And the piece does a nice job moving between the small legal details and the big personal consequences of the nexus analysis. I could imagine presenting this argument to a non-lawyer as a way of explaining how and why legal technicalities can be appropriate means of resolving high-stakes disputes, and why getting the legal details right is so important.

I also appreciated the author's grasp of the law as a "seamless web," demonstrated in the argument's deft bridging of two apparently unrelated areas: domestic tort law, on one hand, and the international law of asylum, on the other. I was persuaded that the tort concepts of cause in fact and proximate cause are in fact appropriate means of determining whether asylum law's nexus requirement — that persecution occur "on account of" or "because of" the targeted person's social group or political opinion — has been met. And while the piece did not make this connection, I also found its analysis to be a valuable contribution to domestic discrimination law (as articulated in Title VII, Title IX, Fourteenth Amendment Equal Protection, and elsewhere), which also feature an under-theorized nexus requirement. To me, this unexplored implication contributed to the piece's potential to be generative.

[For the articles committee: I also note that this piece was written by a woman of color, making it desirable from the perspective of our committee's diversity goals.]

Weaknesses

First, the argument is poorly balanced. More than half of the article's pages are spent describing background law and reviewing relevant cases. All of this work is descriptive and uncontroversial, getting the reader up to speed on the subject matter. The author's original contribution begins on page 41 and ends on page 66, leaving too little original argumentation to merit publication.

Second, the sources cited in this piece cast doubt on its originality. I am particularly concerned about the article's overlap with Karen Musalo's published work,

which is cited throughout the article and seems to address the very issues that our piece's author claims have not yet received scholarly attention.¹

Third, the scope of this piece is very limited. Though the author uses tools from tort law to resolve a question in asylum law, s/he does not use the analysis to reflect back on tort law. Nor does s/he develop the implications of this area of law for domestic discrimination law or for other areas of international law. As a result, the piece feels very confined — so much so that it may be inappropriate to publish in a generalist law review.

Finally (and most importantly, in my judgment), the organization of the article seriously disserves its analysis. The author divides up asylum cases based on their substantive “context”: “forced sterilization, female genital mutilation, domestic violence, trafficking, forced marriage, religion, homosexuality, and gangs.” This list itself lacks conceptual unity: forced sterilization and FGM are threatened *acts* of persecution; domestic violence, trafficking, and forced marriage are *ongoing* harms alleged to constitute persecution; religion and homosexuality are alleged *causes* of persecution; gangs are alleged *perpetrators* of persecution. Further, in the section elaborating on each of these “contexts,” several repeating themes emerge that are much more relevant to the nexus analysis: differences in the severity of persecution, in whether the actor directly causing harm is a private individual or a public official, in whether the ethical judgments in play are culturally specific; and in whether the reason for persecution is a status (e.g. homosexual orientation), a behavior (e.g. having gay sex), or an opinion (e.g. that one ought to be free to choose a sex partner of any gender). By carving up the cases by “context,” the author obscures these differences, which should be central to the article’s analysis.

Also, the article’s title is utterly cheesy (enough with “The New X” articles!) and makes it sound like it’s about a phone. Just saying.

CONCLUSION

To me, it is clear that *The New Nexus*’s strengths are outweighed by its shortcomings. I would not send it to Committee.

¹ See, e.g., Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003); Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis Of Recent Trends*, 77 INTERPRETER RELEASES 1533 (2000); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179 (1994).