

REDEFINING GENDER: HERNANDEZ-MONTIEL V. INS

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I. INTRODUCTION

At the same time Mexico’s president-elect, Vicente Fox, was at the White House calling for an open border between Mexico and the United States, the Ninth Circuit Court of Appeals was announcing a landmark decision.¹ The court granted asylum to Geovanni Hernandez-Montiel, a gay Mexican national with a female sexual identity who was able to prove he suffered past persecution and had a well-founded fear of future persecution in Mexico.² Political pundits quickly noted the significance of the case and began to debate the effects of the decision on such disparate topics as the upcoming presidential election and the

1. *Mexican Gay Man Wins Asylum in U.S.*, UNITED PRESS INT’L, Aug. 25, 2000.

2. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000); *see also id.* at 1087 (recognizing a homosexual male who wears female clothing as an immutable sexual identity.)

legitimacy of gay civic unions.³ Other commentators voiced fears that the ruling could “open a lot of doors” for people with “alternative lifestyle[s]” to emigrate to the United States with similar claims.⁴ But the decision has a deeper Constitutional significance as well. *Hernandez-Montiel* may signify the beginning of a “graying” of the definition of gender.⁵ In the wake of this ruling, one has to ask if gender is still an immutable characteristic based on biology or if it is a class that one can shift into and out of based on personal preference.

3. See, e.g., *The McLaughlin Group* (PBS television broadcast, Sept. 29, 2000), at <http://www.mclaughlin.com/library/transcript.asp?id=171>. The following exchange occurred during the Sept. 29, 2000, broadcast of *The McLaughlin Group* (emphasis added):

MR. MCLAUGHLIN: On MTV this week, Al Gore was courting the youth vote. Audience questions were put to the presidential aspirant: Who will play at your inauguration? Answer: Lenny Kravitz.

But Gore also tackled some more serious issues, including the status of gays, on which Gore had a kind of “coming out.” The vice president said that while he does not support gay marriage, he does support gay, quote, unquote, “civic unions”—unions that guarantee the gay civic union couple the same legal rights as a heterosexual married couple. He was then asked whether this applied to a gay immigrant alien forming a civic union with a gay U.S. citizen.

MTV AUDIENCE MEMBER: Would you favor the INS relaxing its rules to include same-sex couples?

VICE PRESIDENT GORE: I think that the rights that are afforded an American who gets married to someone from another country should be afforded under a legally protected civic union in the same way.

MR. MCLAUGHLIN: In other words, if a homosexual U.S. citizen enters a civic union with a homosexual non-U.S. citizen, the non-U.S. citizen automatically gains U.S. citizenship eligibility.

This policy contradicts U.S. law; namely, the Defense of Marriage Act, which President Clinton signed in 1996. Gore’s staff said the vice president, notwithstanding his conviction, had no intention of fighting for change in the ‘96 law to make it conform to the Gore view.

Id.

4. See e.g., *The O’Reilly Factor* (Fox News Network Broadcast, Sept. 25, 2000) available at 2000 WL 6331461. Program host Bill O’Reilly interviewed Hernandez-Montiel’s attorney Robert Gerber. Gerber said he felt the ruling put “sexual identity and persecution based on sexual identity on par with political and religious identity.” *Id.*

5. See *Hernandez-Montiel*, 225 F.3d at 1087 (recognizing a class of homosexual males who wear female clothing as having immutable female sexual identities).

II. CASE RECITATION

A. *Facts Underlying Hernandez-Montiel*

At an early age, Geovanni Hernandez-Montiel (“Geovanni”), a Mexican national, understood he was “attracted to people of his same sex” and before he was in his teens, he was dressing and acting like a woman.⁶ Because of his behavior, Geovanni had a difficult home life; his mother tried to correct what she perceived to be his “problem” by enrolling him in a school run by the Mexican government and informing the school officials of his sexual orientation.⁷ However, the school environment was not much better than home. Geovanni was excluded from school activities⁸ and was threatened by the father of a schoolmate who said he would “kill him for perverting his son.”⁹ Eventually, the school expelled Geovanni and blocked his enrollment in another institution until he “agreed to change his sexual orientation.”¹⁰ The day after Geovanni’s expulsion, his parents forced him to leave their home.¹¹

It was not just at home and at school that Geovanni endured harassment; Mexican police officers often arrested and even strip-searched Geovanni because he was in the company of other boys who also appeared to be gay.¹² Geovanni suffered more than petty inconveniences, though. Twice police officers sexually assaulted or raped Geovanni, threatening to beat, imprison or kill him if he ever mentioned the incident.¹³ Ultimately,

6. *Id.* at 1087.

7. *Id.* at 1088.

8. *See id.*

9. *Id.* At one time, Geovanni was stopped from entering a school dance because he was dressed as a girl; this was probably the event that led to Geovanni’s expulsion. *See id.*

10. *Id.*

11. *Id.*

12. *Id.* Geovanni was arrested twice in 1992; the police told him it “was illegal for homosexuals to walk down the street and for men to dress like women.” *Id.*

13. *Hernandez-Montiel*, 225 F.3d at 1088. The beatings of homosexuals at the hands of police also occurs in other countries. *See* Katherine Roth, *Amnesty Says Gay Abuse Rampant*, ASSOCIATED PRESS, June 22, 2001, available at 2001 WL 24028213 (describing a report by Amnesty International detailing torture and abuse of homosexuals, many times at the hands of police, in at least thirty countries, including

Geovanni was hospitalized for a week after being attacked by a group of young men wielding knives who “called him names relating to his sexual orientation.”¹⁴

In October 1993, when he was 15 years old, Geovanni illegally entered the United States and was quickly arrested.¹⁵ Upon his return to Mexico, he moved in with his sister who attempted to “cure his sexual orientation” by enrolling him in a counseling program.¹⁶ The program attempted to correct Geovanni’s “problem” by altering his appearance; the counseling staff cut Geovanni’s hair and fingernails and “forced him to stop taking female hormones.”¹⁷ However, the program seemed to have no effect on Geovanni and he soon went home to live again with his sister.¹⁸ She shortly forced him to leave her house and he again “sought refuge” in the United States.¹⁹ Ultimately, Geovanni was able to enter the United States where he applied for asylum and withholding of deportation.²⁰

At his hearing, Geovanni put on testimony by Professor Thomas M. Davies, Jr., an expert in Latin American history and culture who claimed that passive, “female” acting homosexuals are subjected to higher levels of abuse and ostracization than

the U.S.). In China, gays have been subjected to “aversion therapy” as well as beatings and sexual abuse at the hands of police. *CNN Today* (CNN television broadcast, Sept. 29, 1999).

14. *Hernandez-Montiel*, 225 F.3d at 1088. The Citizen’s Commission Against Homophobic Hate Crimes reported 190 killings of gays in Mexico between 1995 and 1999. Wendy Patterson, *A Life of Fears for Gays; For Homosexual Men in Mexico, Every Day Brings Threat of Danger*, S. F. CHRON., Oct. 12, 2000, at A12; see also Fernando del Collado, *Homofobia y Crímenes: Cuando la Justicia Discrimina*, REFORMA, Nov. 12, 2000, at 10 (stating that the Citizen’s Commission estimates that 631 gays were killed between January 1995 and June 2000). A 1997 report for the U.S. Immigration and Naturalization Service quoted Mexican human rights activist David Fernandez as saying, “there is no location in the country where you can be openly gay without being harassed. Ordinarily, that does not involve a risk to one’s life, but often it involves astonishing degrees of hostility.” Patterson, *supra*, at A12.

15. *See Hernandez-Montiel*, 225 F.3d at 1088.

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.* at 1088–89.

20. *Id.* at 1089.

“male” acting homosexuals.²¹ Davies contended that “gay men with female sexual identities are likely to become scapegoats” for Mexico’s economic and political problems and that Geovanni, if returned to Mexico, would face continued torment.²² Although the immigration judge found Geovanni’s claims truthful, he denied him asylum on statutory and discretionary grounds.²³ The judge found Geovanni’s persona was not “immutable” because he was able to change his appearance from male to female and vice-versa.²⁴ Geovanni appealed this initial decision to the Board of Immigration Appeals, which partially affirmed the immigration judge’s decision, finding Geovanni was not able to establish his “eligibility” for asylum.²⁵ Geovanni appealed to the Ninth Circuit Court of Appeals, which limited its review to the decision of the Board of Immigration Appeals.²⁶

B. The Court’s Analysis and Holding

After establishing its jurisdiction, standard of review, and authority in asylum matters, the court began its discussion by noting “[t]his case turns on the legal question of whether Geovanni was persecuted on account of his membership in a ‘particular social group.’”²⁷ After sifting through precedent, the court defined a ‘particular social group’ as one “united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or

21. See *Hernandez-Montiel*, 225 F.3d at 1089. The higher level of abuse suffered by outwardly female gay men may be due partly to their conspicuousness. The Ninth Circuit later addresses this concern and notes that a defense based on the idea that one brought the abuse upon himself is as repugnant in this instance as it is in rape cases. *Id.* at 1098.

22. *Id.* at 1089.

23. *Id.*

24. *Id.*

25. *Id.* The Board of Immigration Appeals “found that Geovanni did not meet his burden of ‘establishing that the abuse he suffered was because of his membership in a particular social group,’ which the BIA classified as ‘homosexual males who dress as females.’” *Id.*

26. *Id.* at 1090. The court limited its focus because the Board of Immigration Appeals “conducted an independent review of the record.” *Id.*

27. *Hernandez-Montiel*, 225 F.3d at 1090–91.

should not be required to change it.”²⁸ The court then looked to outside authority as well as case law to find that sexual identity could serve as the basis for a particular social group, noting “sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”²⁹ Narrowing its focus, the court then looked to Geovanni’s particular subgroup, that of gay men in Mexico who have female sexual identities.³⁰ The court reviewed the testimony of Professor Davies, and found that the Board of Immigration Appeals incorrectly defined the ‘particular social group’ to which the evidence pointed Geovanni belonged as “homosexual males who dress as females.”³¹ Geovanni, the court reasoned, had met his burden of proving he was “persecuted on account of his membership in [this] particular social group” because of the wealth of evidence in the original record.³² The court held the Board of Immigration Appeals “legally erred” when it found that Geovanni did not establish “both past persecution and a well-founded fear of future persecution” should he be returned to Mexico.³³ Sexual assault at the hands of the police, the court said, “undoubtedly constitute[s] persecution,”³⁴ and the INS failed to present enough evidence that Mexico had attempted to correct the country’s social climate to the extent that Geovanni would be safe if returned home.³⁵ The court of appeals granted Geovanni asylum holding that “the [Board of Immigration Appeals] decision denying [him] asylum on statutory grounds is fatally flawed as a matter of law and is

28. *Id.* at 1092–93.

29. *Id.* at 1093–94.

30. *Id.* at 1094.

31. *Id.*

32. *Hernandez-Montiel*, 225 F.3d at 1096–97. The court received evidence again from Professor Davies on this point and looked as well to newspaper articles from the New York Times and the San Francisco Bay Times. *Id.* The court also conferred with the U.S. Department of State, who supplied an advisory opinion that noted, “[o]ur Embassy in Mexico advises us that it has no evidence of the systematic persecution of homosexuals there although random violence against homosexuals has occurred (alteration in original).” *Id.*

33. *Id.* at 1097.

34. *Id.*

35. *See id.* at 1099.

not supported by substantial evidence.”³⁶ In a special concurrence, Judge Brunetti affirmed only the result of the case and not what he characterized as the majority’s “broad reasoning.”³⁷ Brunetti felt it was sufficient that Geovanni proved he had a “well-founded fear of persecution should he be returned to Mexico” to gain asylum status.³⁸

III. ANALYSIS

A. *Background and Underlying Case Law*

The United States began granting gay men and women asylum based on their sexual identity in the early 1990’s when Congress revised the immigration laws.³⁹ No longer barred because of their sexual orientation, the United States has come to be “regarded as a relative oasis of tolerance” by gay men and women throughout the world.⁴⁰ U.S. asylum law requires seekers to prove they are members of a particular societal subgroup and that they have either suffered from actual past persecution or that they have a well-founded fear of future persecution because of their membership in that group.⁴¹ The *Hernandez-Montiel* court followed this two-prong analysis, and in crafting their decision examined both relevant immigration

36. *Id.*

37. *Id.*

38. *Hernandez-Montiel*, 225 F.3d at 1100.

39. See John A. Russ IV, *The Gap between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States’ Own Progressive Asylum Standards*, 4 U.C. DAVIS J. INT’L L. & POL’Y 29, 32 (1998).

40. *Id.* at 31. Approximately nine other countries grant asylum on claims of persecution arising from sexual orientation, with Canada second to the United States in admissions. *Id.* at 32.

41. See 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. V 1999) which reads in part:

The term ‘refugee’ means any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country *because of persecution or a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion . . . (emphasis added).

statutes as well as necessary case law.⁴²

1. "Particular Social Group"

In order to qualify for asylum under the Immigration and Naturalization Act, a person must first prove he is a refugee.⁴³ The statutory definition of refugee includes those who constitute a particular social group,⁴⁴ and it was upon this aspect of the immigration regulations that the *Hernandez-Montiel* court focused.⁴⁵ However, the term "particular social group" does not have a common statutory definition,⁴⁶ and this has resulted in courts inconsistently interpreting the term and muddying the understanding of what constitutes a social group.⁴⁷ While there is no distinctly common understanding of the term, courts dealing with the issue have articulated several "defining characteristics" over the years.⁴⁸

In *In re Acosta*, the Board of Immigration Appeals ("BIA") denied asylum to a man⁴⁹ claiming persecution based on his membership in a group "engaged in the transportation industry of El Salvador."⁵⁰ Acosta founded and was general manager of a taxi driver's service in El Salvador called COTAXI;⁵¹ members of the cooperative were threatened by what were believed to be anti-government guerrillas who hoped to damage the country's economy by forcing small businesses to participate in work stoppages.⁵² Acosta's company did not respond to the threats because its members wished to keep working.⁵³ Eventually, five

42. See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091-92 (9th Cir. 2000); see also Peter C. Godfrey, Note, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & Pol'y 257, 259 (1994).

43. See 8 U.S.C. § 1101(a)(42)(A); see Godfrey, *supra* note 42, at 1091-92.

44. 8 U.S.C. § 1101 (a)(42)(A).

45. *Hernandez-Montiel*, 225 F.3d at 1091.

46. Godfrey, *supra* note 42, at 258.

47. See *id.*

48. See *id.* at 261.

49. *In re Acosta*, 19 I & N Dec. 211, 237 (1985).

50. *Id.* at 232.

51. *Id.* at 216.

52. See *id.*

53. *Id.*

of COTAXI's drivers were killed and a number of taxis were destroyed.⁵⁴ Acosta himself was physically assaulted before fleeing El Salvador for the United States.⁵⁵ The BIA ultimately refused Acosta's claim holding the characteristics that defined his group were not "immutable" because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages.⁵⁶ The BIA articulated a working definition for the term "particular social group":

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.⁵⁷

Sometimes referred to as the "*Acosta* test," the BIA focused on immutable characteristics as the definitive element of a 'particular social group.'⁵⁸

Coupled with *Acosta*, the First Circuit's ruling in *Ananeh-Firempong v. INS*⁵⁹ elaborated on the definition of "particular social group."⁶⁰ Combining the *Acosta* test with standards borrowed from international sources,⁶¹ the court broadened the

54. *See id.*

55. *See id.*

56. *Id.* at 234.

57. *Acosta*, 19 I & N Dec. at 233.

58. *See* Godfrey, *supra* note 42, at 263.

59. *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

60. *See* Godfrey, *supra* note 42, at 263.

61. *See id.*; *Ananeh-Firempong*, 766 F.2d at 626. The First Circuit coupled *Acosta* with the "Handbook test." The Handbook test, derived from the United Nations'

definition of “particular social group”⁶² to include those affiliated with a former government administration, tribe members (the case concerned a Ghanaian woman seeking asylum), and “professionals, businesspeople and those who are highly educated.”⁶³ The court noted these characteristics were both beyond a person’s ability to change and so integral to a person’s identity that they should not be required to change.⁶⁴ Commentators seized on this language and argued that a person’s sexual orientation fits squarely within the court’s definition.⁶⁵ However, the *Ananeh-Firempong* ruling did not limit the size of recognizable groups because it was “possible that a group of any size could have the same background, habits, or social status.”⁶⁶

Soon after these rulings, courts moved to limit the scope of the definition.⁶⁷ In *Sanchez-Trujillo v. INS*,⁶⁸ the Ninth Circuit (which would later hear *Hernandez-Montiel*) articulated new guidelines for assessing asylum claims based on membership in social groups.⁶⁹ Stricter and more extensive, the new regulations

Handbook on Procedures and Criteria for determining the Status of Refugees, noted “[a] second characteristic of a particular social group is that ‘members have ‘similar background, habits or social status.’” *Id.* (quoting U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES at ¶ 77, U.N. Doc. HCR/IP/Eng/Rev.1 (1992) available at <http://www.unhcr.ch>).

62. See Godfrey, *supra* note 42, at 263.

63. *Ananeh-Firempong*, 766 F.2d at 623.

64. *Id.* at 626.

65. See Jin S. Park, Comment, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1126 (1995). The author notes there is “an exhaustive listing of material” on the topic of the immutability of sexual orientation and quotes commentators as saying there is a general belief that “sexual orientation is set in place at an early age” and that “short of lobotomy or death, neither homosexual nor heterosexual desire—both of which are ubiquitous, lurking in all of us—can be prevented.” *Id.* at 1132 n.91 (quoting Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT’L L.J. 605, 613–614 n.55, 605 (1993) and Darrell Yates Rist, *Global Gay Bashing: Homosexuals and Human Rights*, THE NATION, Apr. 9, 1990, at 482).

66. See Godfrey, *supra* note 42, at 264.

67. See *id.*

68. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

69. See *id.* at 1574–75.

pared the definition of a social group (for immigration purposes) to a minimum.⁷⁰ The court found that “the class of young, working class, urban [El Salvadoran] males of military age does not exemplify the type of ‘social group’ for which the immigration laws provide protection from persecution.”⁷¹ Indeed, the court noted that defining a group in such a way would be so expansive as to render the definition meaningless.⁷² The court defined “particular social group” stating that the term:

does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.⁷³

Commentators have boiled this definition down to two requirements.⁷⁴ First, the group must be comprised of members who are “cohesive [and] homogenous . . . closely affiliated with each other [and] united by some common impulse or interest.”⁷⁵ Additionally, the relationship among the members should be voluntary and based on a shared trait that is key to the group’s separate, communal identity.⁷⁶ The *Sanchez-Trujillo* test is criticized as being “unduly restrictive” in its application.⁷⁷ If the group displays too many outward differences (such as sex, education, social class), it may fail the test’s homogeneity prong.⁷⁸ For example, groups “defined by gender or sexual orientation . . . cannot realistically be considered closely

70. *See id.* at 1577.

71. *Id.* at 1576–77.

72. *See id.* at 1577.

73. *Sanchez-Trujillo*, 801 F.2d at 1576.

74. *See Godfrey, supra* note 42, at 265.

75. *Id.*

76. *Id.*

77. *Park, supra* note 65, at 1129.

78. *See id.*

affiliated because their members naturally have different lifestyles, varying interests, diverse cultures and contrary political leanings.”⁷⁹ Others found *Sanchez-Trujillo*’s “voluntary associational relationship” prong troublesome as well.⁸⁰ By requiring a group to cohere around a voluntary associational relationship, the court limited asylum to small groups.⁸¹ While decrying the ‘voluntariness’ of sexual orientation, critics also noted only openly gay men and women would qualify under the *Sanchez-Trujillo* standard.⁸² Part of the resistance to the *Sanchez-Trujillo* test appears to stem, at least in part, from the court’s use of a family as an example of a protected social group.⁸³ The court explained, “[p]erhaps a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.”⁸⁴ The family, the court found, is a “small, readily identifiable group” that could be contrasted with larger, statistically defined groups.⁸⁵ This definitional treatment seems to be at loggerheads with the court’s previously articulated

79. Godfrey, *supra* note 42, at 266.

80. *See id.* at 267–68.

81. *See id.* at 267.

82. *See Park, supra* note 65, at 1132 (noting that “openly gay men and lesbians are ‘closely affiliated,’ as they generally tend to form tightly knit communities, sharing many similar interests and socializing with one another”). The “voluntary association” requirement is particularly onerous for those who wish to keep their sexual orientation hidden. The author notes:

many lesbians and gay men attempt to avoid publicly associating with other gay men or lesbians to avoid persecution and discrimination. Privately, they may not reveal their sexual orientation even to family members or close friends, fearing isolation, rejection, and abandonment. A claim based on sexual preference alone would, therefore, be unsuccessful because factors such as close affiliation, cohesiveness and homogeneity, or ready identification may be very difficult to prove.

Id. at 1131.

83. *See Sanchez-Trujillo*, 801 F.2d at 1576.

84. *Id.*

85. *Id.* 1576–77. The court submitted as a contrasting example “a statistical group of males taller than six feet would not constitute a ‘particular social group’ under any reasonable construction of the statutory term, even if individuals with such characteristics could be shown to be at greater risk of persecution than the general population.” *Id.* at 1576.

requirement of a voluntary association, because ties between family members tend to be biological and involuntary rather than chosen.⁸⁶ The line of cases following the *Sanchez-Trujillo* treatment appears to bear out this criticism with courts providing “very little in the way of practical guidance for claims that fall somewhere in between a claim involving a sweeping statistical division and a tightly-knit unit, usually requiring some form of kinship.”⁸⁷

The Ninth Circuit attempted in *Hernandez-Montiel* to unravel some of the knotty definitional problems it created in *Sanchez-Trujillo*.⁸⁸ The court began its discussion by noting the inconsistency with which courts have defined social groups through case law.⁸⁹ After a brief review of relevant asylum cases, the court addressed its ruling in *Sanchez-Trujillo*.⁹⁰ Commenting “[w]e are the only circuit to suggest a ‘voluntary associational requirement,’” the court acknowledged that this guideline conflicted with precepts of immutability outlined in *Acosta*.⁹¹ The court revisited its illustration of family as a protected social group, this time expanding on the example and furnishing an updated definition for particular social groups:

[I]n *Sanchez-Trujillo*, we recognized a group of family members as a ‘prototypical example’ of a ‘particular social group.’ Yet, biological family relationships are far from ‘voluntary.’ We cannot, therefore, interpret *Sanchez-Trujillo*’s ‘central concern’ of a voluntary associational relationship strictly as applying to every qualifying ‘particular social group.’ For, as *Sanchez-Trujillo* itself recognizes, in some particular social groups, members of the group are not voluntarily associated by choice We thus hold that a ‘particular social group’ is one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be

86. See Godfrey, *supra* note 42, at 267.

87. Park, *supra* note 65, at 1130.

88. See *Hernandez-Montiel*, 225 F.3d at 1092–93.

89. *Id.* at 1091.

90. *Id.* at 1091–92.

91. *Id.* at 1092.

required to change it.⁹²

Perhaps to avoid having to revisit this issue in the future, the court proceeded to decree “[s]exual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them.”⁹³ To cement this notion, the court cited experts ranging from Alfred Kinsey (a noted but controversial expert in the field of human sexuality)⁹⁴ to the American Psychological Association.⁹⁵ In addition, the court maintained it found “persuasive” the ruling in *In re Tenorio*,⁹⁶ an immigration ruling granting asylum to a gay man whose sexuality left him susceptible to brutal treatment in his native Brazil.⁹⁷

But the court did not stop there. After broadening the definition of a ‘group’ to include those “united by voluntary association,” the court acted to restrict the limits of the group at issue.⁹⁸ The court concluded the group Geovanni belonged to was comprised of “gay men with female sexual identities in Mexico,” a far less inclusive subgroup of gay men and women.⁹⁹ This distinction seemed to square the instant case with the court’s previous ruling in *Sanchez-Trujillo* because such a subgroup is readily cognizable (or “small” and “readily identifiable,” in the

92. *Id.* at 1092–93.

93. *Id.* at 1093.

94. *Id.*; see Kinsey, Alfred Charles, in 6 ENCYCLOPEDIA BRITANNICA 880 (15th ed. 1989); see also The Kinsey Institute for Research in Sex, Gender, and Reproduction, available at <http://www.indiana.edu/~kinsey/>.

95. *Id.* at 1093.

96. *Id.* at 1094; *In re Tenorio*, No. A72-093-558 (EOIR Immigration Court, Jul. 26, 1993). In *Tenorio*, a gay Brazilian man was repeatedly beaten, stabbed and subjected to anti-gay epithets by a group targeting such people. *Hernandez-Montiel*, 225 F.3d at 1094. *Tenorio* represented the “first widely publicized instance” in which the United States granted asylum to a person based on persecution arising from one’s sexual orientation. Stuart Grider, *Sexual Orientation as Grounds for Asylum in the United States—In re Tenorio*, No. A72 093 558 (EOIR Immigration Court, July 26, 1993), 35 HARV. INT’L L. J. 213 (1994). The judge in the case took the unprecedented step of grafting concepts of immutability to sexual orientation, thus hurdling previous “cognizability” obstacles. *Id.* at 219.

97. See *Hernandez-Montiel*, 225 F.3d at 1094.

98. See *id.* at 1093–94.

99. See *id.* at 1094.

court's words).¹⁰⁰ Possibly anticipating criticism regarding immutability standards enunciated in *Acosta*, the court distinguished the social group as those gay men with female sexual identities rather than "homosexual males who dress as females."¹⁰¹ The court offers little help, however, to immigration officials charged with determining whether an asylum applicant is truly aligned with an opposite sexual identity. Presumably, asylum applicants could attire themselves in clothes of the opposite sex and make plausible claims of 'group' membership. The court noted "[g]ay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails."¹⁰² These characteristics hardly seem immutable. However, the court saw these attributes as part and parcel of a sexual identity that a person either could not or should not be required to change.¹⁰³

The court enlarged and constricted the definition of a "particular social group" in the same breath. Reluctant to accept "gay men and women" as a valid social group, the court simply refined the definition to include an obscure subset.¹⁰⁴ By doing so, it appeared to send the signal that cases of this kind will be considered individually, doing little to clear up the problem of inconsistency that has plagued the "social group" definition. However, it is significant that the court even recognizes the possibility that gay men and women can form an identifiable group at all.¹⁰⁵ Although this was hardly a case of first impression,¹⁰⁶ the *Hernandez-Montiel* court took an important

100. *Id.*; *Sanchez-Trujillo*, 801 F.2d at 1576.

101. *Hernandez-Montiel*, 225 F.3d at 1094. By making this distinction, the court specifically overturned the BIA's earlier ruling. *See id.* The court takes pains to note "this case is about sexual identity, not fashion. Geovanni is not simply a transvestite 'who dresses in clothing of the opposite sex for psychological reasons.' . . . Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women." *Id.* at 1096.

102. *Id.* at 1094.

103. *See id.*

104. *Id.* at 1094–95.

105. *See id.* (observing that sexual orientation can be the basis for establishing a "particular social group" for asylum purpose).

106. *Accord In re Acosta*, 19 I & N Dec. 211; *See* discussion of *Sanchez-Trujillo*,

initial step by focusing unflinchingly on the underlying issues of a politically charged case.¹⁰⁷ Perhaps future courts will be willing to further define identifiable elements of this particular group and provide more guidance as similar cases continue to arise.

2. Past Persecution

Besides proving membership in a protected social group, an asylum seeker must demonstrate he has suffered from past persecution and fears future persecution if he is returned to his native country.¹⁰⁸ What constitutes persecution is not always clear. The *Hernandez-Montiel* court required Geovanni to prove the persecution he suffered involved “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.”¹⁰⁹ In addition, the court found Geovanni had to prove the persecution was “inflicted either by the government or by persons or organizations which the government is unable or unwilling to control.”¹¹⁰ Unlike the analysis involved in proving membership in a particular social group, the analysis of persecution requires examination of a third party, namely the persecutor.¹¹¹ Indeed, here it is the “characteristics and qualities of the persecutor”¹¹² that are at issue. Like the previously described problems regarding the definition of a “particular social group,” the concept of “persecution” suffers from ambiguity.¹¹³ Although there is no statutory standard for persecution,¹¹⁴ courts have denied asylum to applicants who they felt claimed persecution from sources incapable of carrying out “repression” or “oppression.”¹¹⁵ Thus, one seeking asylum is charged with proving the purported oppressor actually has the

supra note 68.

107. *See Hernandez-Montiel*, 225 F.3d at 1084.

108. *See* 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. V 1999).

109. *Hernandez-Montiel*, 225 F.3d at 1097 (quoting *Desir v. Ilchert*, 840 F.2d 723, 726–27 (9th Cir. 1988)).

110. *Id.* (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)).

111. *See Park*, *supra* note 65, at 1136.

112. *Id.*

113. *See id.* at 1137; *supra* note 46 and accompanying text.

114. *Id.*

115. *Park*, *supra* note 65, at 1137.

power or inclination to carry out the persecution.¹¹⁶ Mere threats alone may not be enough to prove persecution absent will or ability on the part of the persecutor.¹¹⁷ In addition, sporadic hate crimes may lack an element of constancy upon which the persecution definition hinges.¹¹⁸ Persecution claims in asylum cases generally fall into one or more of the following three categories: 1) claims based on the ineffectiveness of the government in protecting the applicant; 2) “official persecution” where the persecutors are government officials; and 3) “prosecutions that rise to the level of persecution.”¹¹⁹ In Geovanni’s case, the persecutors were the police.¹²⁰ It was not that the police simply failed to protect him from brutalization by others, as the BIA maintained; the police themselves were the actors.¹²¹ As an arm of the government, Geovanni was “at risk of persecution at the hand of the very agency which purports to protect him by law.”¹²² In a scathing assessment of the BIA’s decision to deport Geovanni, the court noted their reasoning was “convoluted, inapposite and irrelevant.”¹²³ The court questioned whether the BIA was attempting to explain the Mexican police’s behavior as an appropriate reaction to Geovanni’s “effeminate dress or his sexual orientation as a gay man”¹²⁴ and noted the “‘you asked for it’ excuse for rape [was] offensive to [the] court and has been discounted by courts and commentators alike.”¹²⁵ For the court, the question of whether Geovanni suffered persecution was clear—rape and torture were unequivocal examples of past persecution.¹²⁶

116. *See id.*

117. *See Bolanos-Hernandez v. INS*, 767 F. 2d 1277, 1285 (9th Cir. 1984).

118. *See Park*, *supra* note 65, at 1137–1138.

119. *See id.*

120. *See Hernandez-Montiel*, 225 F.2d at 1088.

121. *Id.*

122. *Id.* at 1097.

123. *Id.* at 1098.

124. *Id.*

125. *Id.*

126. *See id.* at 1097.

3. "Well-Founded Fear"

Unlike the terms "social group" and "persecution," the definition of "well-founded fear" is more "precise and consistent"¹²⁷ thanks to review by the U.S. Supreme Court in *INS v. Cardoza-Fonseca*.¹²⁸ Both the Ninth Circuit and the Supreme Court agree on the elements of a 'well-founded fear.'¹²⁹ According to both courts, the test has two prongs and considers both the applicant's subjective belief as well as that belief's objective foundation in credible evidence.¹³⁰ An applicant's testimony will often suffice to satisfy the subjective belief prong if it is not questioned by the trier of fact.¹³¹ The Court in *Cardoza-Fonseca* explained "[t]hat the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a 'more likely than not' one."¹³² One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."¹³³ The *Cardoza-Fonseca* test has had a liberal application in the cases following the decision.¹³⁴ Because the applicant's testimony is often readily accepted as credible, the test's first prong is easily overcome.¹³⁵ In addition, "numerous specific incidents' of abuse" are "more than sufficient" to meet the second requirement.¹³⁶ The court in *Hernandez-Montiel* seized upon the spirit of this test and charged the INS with rebutting a presumption that Geovanni had a well-founded fear of persecution by virtue of the fact that he suffered similar treatment in the past.¹³⁷ In order to overcome

127. See Park, *supra* note 65, at 1149.

128. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

129. See *id.* at 431; see *Hernandez-Montiel*, 225 F.3d at 1099; see Park, *supra* note 65, at 1149-50.

130. See Park, *supra* note 65, at 1149-50.

131. See *id.* at 1150; see *Hernandez-Montiel*, 225 F.3d at 1099.

132. *Cardoza-Fonseca*, 480 U.S. at 431.

133. *Id.*

134. See Park, *supra* note 65, at 1151.

135. See *id.*

136. *Id.* (quoting *Corado Rodriguez v. INS*, 828 F.2d 622, 629 (9th Cir. 1987), *am'd and superseded* 841 F.2d 865).

137. *Hernandez-Montiel*, 225 F.3d at 1099.

the presumption, the INS had to prove by a preponderance of the evidence that conditions in Mexico had changed to the extent that Geovanni could return with his safety assured.¹³⁸ Because “[t]he INS presented no evidence that Mexico has taken effective steps to curb sexual orientation- based violence, including that perpetrated by the police . . . the presumption must be given its full force.”¹³⁹ The court reiterated the fact that Geovanni’s persecutors were the police.¹⁴⁰ Undoubtedly, this strengthened Geovanni’s claim of fear of future persecution because those enforcing the rule of law were at the core of the problem.¹⁴¹

B. Impact of Hernandez-Montiel

Fear the *Hernandez-Montiel* ruling would open the floodgates to asylum applicants with lifestyles outside the mainstream appears as yet to be unfounded.¹⁴² Commentators cite three factors militating against the ‘floodgate’ assertion: 1) in other countries, asylum claims based on gender or sexual orientation represent only a small percentage of total claims; 2) the requirement of “real fear” guarantees that not every member of a particular protected social group can win asylum; and 3) in practice, only subgroups generally obtain asylum because they are distinguished from larger groups by “the application of additional defining characteristics.”¹⁴³ In addition, other requirements listed in the Refugee Act of 1980 will further limit the success of asylum applicants.¹⁴⁴ Indeed, the Ninth Circuit briefly revisited *Hernandez-Montiel* in *Gafoor v. INS*, only to underscore the proposition that asylum could be granted if persecution was motivated by a protected ground.¹⁴⁵

138. *See id.*

139. *Id.*

140. *See id.*

141. *See id.* at 1097.

142. *See* Godfrey, *supra* note 42, at 282.

143. *See id.* at 283–84.

144. Ellen Vagelos, Comment, *The Social Group that Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on Re: Inaudi*, 17 *FORDHAM INT’L L. J.* 229, 276 (1993).

145. *Gafoor v. INS*, 231 F.3d 645, 652 (9th Cir. 2000). This is not to say the Ninth Circuit in any way abandoned the reasoning of *Hernandez-Montiel*. In fact, the court recently reiterated its holding in *Aguirre-Cervantes v. I.N.S.*, 242 F.3d 1169 (9th

However, the case could have domestic consequences as well. By viewing Geovanni's sexual orientation as an integrated and inseparable part of his personality, the court nearly affords him protected status based on gender.¹⁴⁶ It is not inconceivable that future plaintiffs could make claims based on Constitutional principals that were forged specifically with women in mind. Gender, to this court, becomes less a question of biology and more a determination for the finder of fact.¹⁴⁷ Concurrent passage of hate crime legislation that recognizes the persecution gay men and women suffer because of their "biology," in concert with the *Hernandez-Montiel* decision, may well herald the beginning a new era of Constitutional interpretation with the creation or expansion of a new protected class.

IV. CONCLUSION

Geovanni Hernandez-Montiel's legacy may lie within the country he sought to escape. In December 2000, lawmakers in Mexico City began drafting a bill recognizing gay unions and allowing gay couples to adopt.¹⁴⁸ Lawmakers worked with gay and lesbian rights groups in an unprecedented step toward advancing what they called "human and civil rights" for gay people.¹⁴⁹ Cases like *Hernandez-Montiel* spotlight the negative treatment of a country's minorities. For countries like Mexico that wish to distance themselves from their discriminatory past and enter the world stage, such attention is often unwanted.

Cir. 2001). Noting that groups can be comprised of members united by "an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it," the court held an immigration applicant's family could constitute a "particular social group" within the court's proscribed meaning. *Id.* at 1175. And in more recent circuit decisions, the spectre of *Hernandez-Montiel* appears to loom large as well. *See, e.g.,* Noguiera v. Reno, No. C-00-3603 VRW, 2001 WL 58972, at *1 (N.D. Cal. 2001); Lumio v. I.N.S., No. 99-71270, 2001 WL 312431, at *1 (9th Cir. 2001); Pondoc Hernaez v. I.N.S., 244 F.3d 752, 757 (9th Cir. 2001); Valerio-Ochoa v. I.N.S., 241 F.3d 1092 (9th Cir. 2001); Gafoor v. I.N.S., 231 F.3d 645, 651 (9th Cir. 2001).

146. *See Hernandez-Montiel*, 225 F.3d at 1093.

147. *Id.* at 1091.

148. *See* Blanca Estela Botello, *Union Solidaria: Pelean Trato de Iguales*, REFORMA, Dec. 17, 2000, at 4 (stating that the proposed legislation was introduced by Mexico City representative Armando Quintero on December 12, 2000).

149. *See id.*

Mexico and other countries have much work ahead of them regarding gay rights.¹⁵⁰ The United States, however, in cases like *Hernandez-Montiel*, continues to earn its reputation as an oasis of compassion for those seeking refuge from persecution.¹⁵¹

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150. See *supra* note 12. Vicente Fox, Mexico's president, has a history of making homophobic remarks. While campaigning for election, he referred to his opponent as a "little fag" and "transvestite." Patterson, *supra* note 14, at A12.

151. See John A. Russ IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 U.C. Davis J. Int'l L. & Pol'y 29, 31 (1998).

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