

2011]

Notes

OPENING THE FLOODGATES OR FILLING THE GAP?: *PERDOMO V. HOLDER* ADVANCES THE NINTH CIRCUIT ONE STEP CLOSER TO RECOGNIZING GENDER-BASED ASYLUM CLAIMS

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I. INTRODUCTION

After growing up in a society where she is the property of the men in her life and having suffered decades of extreme cruelty and debilitating abuse, a woman finally gathers the strength to flee.¹ Upon arriving in the United States, she is told that she is not entitled to protection and is returned to her aggressor and a country that will not protect her.² Asylum is contemporary society's promise that those seeking safe haven will find it; however, complex implementation has meant that many individuals with legitimate, court-recognized fear of persecution are left without recourse and forcibly returned to the domain of their persecutors.³ The Ninth Circuit's recent precedential opinion in *Perdomo v. Holder*⁴ implicitly signified the final step in a trend towards permitting greater access to asylum relief for victims of gender-based persecution.⁵

* This article was inspired by and is dedicated to M. and R., two of my earliest clients, who are too familiar with the refusal by Immigration Courts to recognize gender-based particular social groups for asylum claims.

1. *See, e.g.*, In re R-A-, 22 I. & N. Dec. 906, 927-28 (B.I.A. 1999) (denying asylum relief to victim of extreme and frequent physical and sexual abuse). For a discussion of the victim's complex and lengthy asylum battle, see *infra* notes 46-65 and accompanying text.

2. *See, e.g.*, In re Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (recounting order by immigration judge denying asylum and ordering deportation). For a discussion of the applicant's asylum case in *Kasinga*, see *infra* notes 40-45 and accompanying text.

3. *See, e.g.*, *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009) (affirming Board of Immigration Appeals's (BIA) denial of asylum, withholding of removal, and relief under Convention Against Torture because applicant did not meet statutory requirements).

4. 611 F.3d 662 (9th Cir. 2010). This Note addresses the Ninth Circuit's recent holding after an immigration judge found the petitioner, a Guatemalan national and asylum applicant, to be "credible and truthful" in her fear of persecution if forcibly returned to Guatemala—a finding that was not contradicted on appeal—but nonetheless ineligible for asylum and thus deportable. *See id.* at 664-65 (remanding case to BIA for further consideration as to whether "Guatemalan women" can constitute particular social group).

5. *See id.* at 666 (discussing absence of precedential decision on whether gender can constitute particular social group but acknowledging that "[o]ur case law examining asylum claims based on membership in a particular social group continues to evolve"); *see also* Deborah Anker, *Membership in a Particular Social Group: De-*

A successful asylum application requires more than a showing that the applicant suffered persecution or that there exists a likelihood of future persecution if the applicant is forcibly returned to their home country.⁶ Amongst other requirements, the applicant must show that the persecution is on account of one of five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group.⁷

velopments in U.S. Law, in 1556 PLI/CORP 195, 202 (2006) (arguing that recent decisions by courts of appeals, especially in Ninth Circuit, demonstrate trend towards greater willingness to recognize gender as basis of particular social group); *Fed. Court Opens Door for Guatemalan Asylum Claim*, DAILY J. (San Mateo), July 13, 2010 (noting that *Perdomo* continues expansion of eligibility for asylum beyond traditional beneficiaries); *Ruling on Women May Spur Asylum Claims*, N.Y. TIMES, July 16, 2010, at A10 (suggesting that *Perdomo* may allow many others in similar circumstances to argue for grant of asylum).

6. See Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. 2010) (establishing requirements for asylum). The INA establishes that an individual either physically present in the United States or upon arrival at a United States border may seek recognition as an asylee regardless of the individual's current status as long as certain exceptions do not apply. See INA § 208(a)(1) (discussing process for asylum application). The Act does not uniquely define "asylum" but instead requires that the applicant apply for asylum and meet the requirements for status as a refugee as defined by INA § 101(a)(42)(A). See INA § 208(b)(1) (defining refugee). The Act, in referring to asylees, does not repeat the five enumerated categories for protection, but it does explicitly list as the first bar to being granted asylum a history of participating in persecution of another on account of membership in one of the five enumerated groups. See INA § 208(b)(2)(A)(i) (barring certain persecutors from seeking asylum).

Gender is not explicitly mentioned as one of the protected grounds for asylum, so claims for asylum by women are to be adjudicated through the same lens as claims brought by men, but some have argued that the entire asylum adjudication process is biased towards a popular understanding of the paradigmatic male asylee. See Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1216-17 (2009) (proposing that certain crimes uniquely affect women and are result of societal status of women). Thus, persecution directed at women as women and forms of violence more common to women, such as rape, have been seen as forms of private persecution and have been assumed to be outside the bounds of ordinary asylum law. See *id.* (suggesting institutionalized distinction between "public" persecution that affects male asylees and "private" persecution that affects female asylees).

7. See 8 U.S.C. § 1101(a)(42)(A) (defining refugee and including requirement of persecution "on account of" enumerated grounds). The first three grounds of persecution that qualify for asylum relief—race, nationality, and religion—are relatively straight-forward, although novel claims can be made. See, e.g., *Sinha v. Holder*, 564 F.3d 1015, 1018 (9th Cir. 2009) (referencing history of ethnic-based tensions leading to coups in Fiji and previous acknowledgement by court of racial tensions in Fiji for claim brought by Indo-Fijian applicant); *Kumar v. Gonzales*, 204 F. App'x 714, 715 (9th Cir. 2007) (noting that record showed that Indo-Fijian applicant's assailants had made racially offensive statements during attack).

The fourth ground, political opinion, allows greater opportunity for unique definition and wide interpretation. See Donald W. Yoo, *Exploring the Doctrine of Imputed Political Opinion and Its Application in the Ninth Circuit*, 19 GEO. IMMIGR. L.J. 391, 395 (2005) (noting that "political opinion" is not statutorily defined by INA yet INA directs adjudicators to interpret term broadly). The lack of a definition combined with the statutory directive to interpret broadly has lead to asylum pro-

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 329

The meaning of the fifth enumerated ground for protection, membership in a particular social group, has been the subject of varying opinions by the courts and has caused considerable debate.⁸

The term “particular social group” was coined by the United Nations Protocol on the Status of Refugees in 1951 and adopted into United States law both by the ratification of the protocol in 1968 and the passage of the Refugee Act in 1980.⁹ The Immigration and Nationality Act (INA) recognized asylees by reference to the international definition of refugees but

tection for unconventional victims of political-based persecution and has also left unsettled the question of who qualifies for relief on the grounds of political opinion. *See id.* (noting contrary trends). Like the other enumerated grounds for asylum relief, it is necessary to prove not only that the applicant fits within the enumerated group (in this case, that the applicant holds the political belief), but also that the applicant has been persecuted or has a well-founded fear of persecution and that this persecution is “on account of” that political belief. *See id.* (emphasizing requirements for asylum beyond holding unpopular beliefs).

Several circuits, most frequently the Ninth Circuit, have also adopted a doctrine of imputed political opinion, recognizing eligibility for an applicant when the applicant has been persecuted on account of political opinion that the applicant does not in fact hold but is believed to hold, although this premise was qualified after a subsequent decision by the Supreme Court. *See id.* at 397, 403 (distinguishing holding of political opinion from assumption by others that individual holds opinion). Subsequently, General Counsel for the Immigration and Naturalization Service (INS) opined not only that the doctrine of imputed political opinion is valid but that imputed membership in a particular social group, may create eligibility for asylum if the other requirements are met. *See* Memorandum from U.S. Office of the Gen. Counsel to Jan Ting, Acting Dir. of Office of Int’l Affairs, and Bayer, Dir. of Asylum Branch, *Legal Opinion on Continued Viability of the Doctrine of Imputed Political Opinion* (Jan. 19, 1993), available at <http://www.unhcr.org/refworld/docid/428b4b182.html> (recognizing validity of imputed political opinion, specifically, and potential validity of imputed characteristics of other four enumerated grounds).

8. *See* Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 *YALE L. & POL’Y REV.* 47, 48 (2008) (discussing current debate in American courts between two possible bases for defining “particular social group” and varying approaches throughout major common law countries); *see also infra* notes 82-122 (discussing three tests developed by courts for evaluating proposed social groups). *But see* Anker, *supra* note 5, at 197-98 (suggesting that while “membership in particular social group” appears to be least clear of enumerated grounds for asylum, it is actually most transparent because other four grounds are merely specifically defined types of particular social groups).

9. *See* Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1575-76 (9th Cir. 1986) (acknowledging influence of international protocol on adoption of United States law and thus recognizing HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS promulgated by United Nations High Commissioner for Refugees (UNHCR) as authoritative source for interpretation of term (citing 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, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979) [hereinafter UNHCR HANDBOOK])). Before being codified in United States law, the five enumerated categories were defined by the international community in direct response to the events in Europe prior to 1951. *See* U.N. High Comm’r for Refugees, *Convention and Protocol Relating to the Status of Refugees* 14-15 (2007), available at

did not define what constituted a particular social group.¹⁰ Although the Board of Immigration Appeals (BIA) seemed to establish unequivocally that gender is one of the paradigmatic social groups, the BIA and circuit courts have been consistently reluctant to accept gender as the basis of a social group without some other qualifying characteristic.¹¹ Claims combining gender and nationality, such as a claim asserted by all women from a specific country, have also met opposition.¹²

<http://www.unhcr.org/3b66c2aa10.html> (defining refugee). Participants at the United Nations Convention defined “refugee” as a person who

[a]s a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. at 14.

10. *See Sanchez-Trujillo*, 801 F.2d at 1576 (finding that because promulgated international guidelines do not provide substantial specificity for delimiting particular social groups, court must look closely at statutory language, particularly terms “particular” and “social” as modifying “group,” allowing category to be applied broadly and flexibly but not without limit). The court suggested a four-step process for asylum claims based on membership in a particular social group: determining whether a cognizable social group exists; determining that the applicant is a member of the group; determining that the group has been persecuted for the characteristics of its members; and, determining if there are special circumstances permitting mere membership in the group to be sufficient for a claim of asylum. *See id.* at 1574-75 (suggesting this process to address unique claim of young men as particular social group). The threshold question, however, is whether the claimed group justifies “refugee status under the applicable immigration laws.” *See id.* at 1575 (emphasizing primary importance of cognizable particular social group); *see also Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1091 (9th Cir. 2000) (acknowledging lack of definition for particular social group in INA and therefore seeking to use United Nations Protocol), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2009). In 2010, Senator Leahy introduced legislation entitled the Refugee Protection Act, which, among other changes to the INA, would define as a particular social group “any groups whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it.” *See Refugee Protection Act*, S. 3113, 111th Cong. § 5(a)(42)(D) (2010) (defining particular social group).

11. *See Reimann*, *supra* note 6, at 1234-35 (discussing apparent contradictions in precedential asylum law by juxtaposing *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), a frequently cited case that explicitly recognized gender as particular social group, with *Gomez v. I.N.S.*, 947 F.2d 660 (2d Cir. 1991), which held that groups defined solely by age or gender are too broad, and *Safaie v. I.N.S.*, 25 F.3d 636 (8th Cir. 1994), which held that gender-based particular social group was insufficient because it would mean all women in nation are potentially subject to persecution).

12. *See Reimann*, *supra* note 6, at 1234-35 (discussing attempts to qualify claims of gender-based persecution by expanding definition of group to include nationality or other secondary factors).

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 331

Immigration law is a form of administrative law, and certain enumerated decisions by immigration judges, including asylum decisions, can be appealed to the BIA.¹³ An asylum applicant may seek review of a BIA decision by the federal circuit court with jurisdiction over the geographical area where the case was originally brought, but a published decision by the circuit court overruling the BIA will only have precedential effect within the respective circuit court's jurisdiction.¹⁴ Because review by both the

13. See 8 C.F.R. § 1003.1(a) (2011) (creating BIA within Executive Office for Immigration Review (EOIR) and delineating its makeup); *id.* § 1003.1(b) (specifying situations in which BIA has appellate jurisdiction). The United States Immigration Courts are organized under the EOIR under the direction of the Attorney General. See 6 U.S.C. § 521(a) (2006) (establishing EOIR within Department of Justice under direct supervision of Attorney General); 8 C.F.R. § 1003.0(a) (same).

Prior to the creation of the Department of Homeland Security in 2003, the INS was an agency within the Department of Justice responsible for the execution of immigration law and immigration adjudicators were part of the INS. See ANNA MARIE GALLAGHER, *IMMIGRATION LAW SERVICE* § 1-176 (2d ed. Supp. 2010) (discussing administrative organization of immigration law). The EOIR was created in 1983 and a reorganization of the Department of Justice separated immigration judges from the INS. See *id.* (noting department reorganization). The Homeland Security Act of 2003 replaced the INS with three new administrative agencies within the Department of Homeland Security for the enforcement of immigration law but kept the EOIR within the Department of Justice and, therefore, further differentiated between enforcement agents of the Department of Homeland Security and neutral adjudicators of the Department of Justice for the purposes of immigration. See *id.* (describing effects of creation of Department of Homeland Security on immigration); see also 6 U.S.C. § 291 (abolishing INS); 6 U.S.C. § 521(a) (acknowledging role of EOIR).

Like all appellate courts, the BIA is limited in the scope of its review authority: questions of fact can be reviewed under the clearly erroneous standard and questions of law or discretion may be reviewed *de novo*. See 67 Fed. Reg. 54878, 54880 (Aug. 26, 2002) (explaining reforms in management of BIA cases generally). Under Attorney General John Ashcroft, the BIA's membership and processes were reorganized to address a considerable backlog in cases and to streamline the processing of new cases, but the new policies, in some instances, permitted single BIA members to affirm opinions by an immigration judge (instead of review by three-member panels) and permitted the BIA to dispose of an increased number of cases without opinion. See DAVID NGARURI KENNEY & PHILIP G. SCHRAG, *ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA* 169-71 (2008) (criticizing Ashcroft reforms for lessening quality and impact of BIA review).

14. See GALLAGHER, *supra* note 13, § 1-183 (describing limits of BIA jurisdiction and effect of circuit court holding); see also 8 U.S.C. § 1252 (establishing and limiting role of circuit court in reviewing appeals). When considering BIA decisions, circuit courts have jurisdiction to review questions of law *de novo* but questions of fact only for substantial error. See *Morales v. Gonzales*, 478 F.3d 972, 977 (9th Cir. 2007) (considering court's authority for reviewing BIA decision).

Because immigration law is administrative law, if the circuit court disagrees with the BIA, the court will generally remand the case to the BIA for reconsideration consistent with the court's opinion. See *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (reversing Ninth Circuit for failing to remand case to BIA for further review); *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003) (recognizing BIA's expertise in adjudicating asylum claims and thus remanding after noting such policy set forth in *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1338 (9th Cir. 1986)). In the *Perdomo* case, the Ninth Circuit disagreed with the BIA's evaluation of gender as a particular social group but, recognizing the precedent in *Gonzales v. Thomas*, re-

BIA and the appropriate circuit court is available, the Supreme Court infrequently grants certiorari for immigration cases.¹⁵ Thus, an immigration issue is often settled through a trend amongst the circuit courts rather than by a single decision of the Supreme Court.¹⁶ The Ninth Circuit's decision in *Sanchez-Trujillo v. I.N.S.*¹⁷ has been cited widely for its interpretation of membership in a particular social group, but that court's holding in *Perdomo* may set a new standard throughout the United States.¹⁸

In light of the Ninth Circuit's apparent break from its own precedent established in *Sanchez-Trujillo*, this Note considers the implication of *Perdomo* through the expanded role of gender in defining a particular social group for asylum eligibility.¹⁹ Part II considers the origins of the particular social group requirement in United States asylum law and the progression of how this term has been interpreted through seminal court decisions.²⁰ Part III analyzes three distinct possible frameworks for accepting a particular social group: the immutable characteristic test, the voluntary association test, and the social visibility test.²¹ Part IV suggests that an unprincipled fear of "opening the floodgates" has confused the

manded the case for additional consideration. *See Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (recognizing agency's entitlement to first instance review under ordinary remand rule).

15. *See* KENNEY & SCHRAG, *supra* note 13, at 255 (discussing unlikelihood that asylum applicant's case would be granted certiorari).

16. *See* Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 561-62 (1993) (suggesting that, because final decisions on United States immigration issues are generally issued by various circuit courts, there has been greater variation in immigration jurisprudence and understanding of what constitutes membership in particular social group).

17. 801 F.2d 1571 (9th Cir. 1986).

18. *See Perdomo*, 611 F.3d at 669 (referencing BIA's reliance on Ninth Circuit ruling in *Sanchez-Trujillo* as seminal case); *see, e.g., Yusif v. Holder*, 361 F. App'x 667, 671 (6th Cir. 2010) (citing *Sanchez-Trujillo*); *Deokaran v. Holder*, 317 F. App'x 87, 89 (2d Cir. 2009) (same); *Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 344 (3d Cir. 2008) (same); *Abuali v. Att'y Gen.*, 281 F. App'x 145, 148 (3d Cir. 2008) (same); *Blanco-Salvador v. Gonzales*, 207 F. App'x 61, 63 (2d Cir. 2006) (same); *Serat-Ajanel v. Gonzales*, 207 F. App'x 468, 470 (5th Cir. 2006) (same); *Perez-Molina v. Gonzales*, 193 F. App'x 313, 315 (5th Cir. 2006) (same); *Gamez v. Gonzales*, 126 F. App'x 318, 322 (7th Cir. 2005) (same); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) (same); *Laurent-Pareja v. I.N.S.*, 139 F.3d 890, 890 (4th Cir. 1998) (same); *Iliev v. I.N.S.*, 127 F.3d 638, 642 (7th Cir. 1997) (same); *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993) (same); *see also* Anker, *supra* note 5, at 202 (implying Ninth Circuit's role in setting trends among circuit courts).

19. *See Perdomo*, 611 F.3d at 666-67 (referencing *Sanchez-Trujillo* without negative comment but holding that interpretation of "membership in a particular social group" is evolving term).

20. For a discussion of the history of gender as the basis of membership in a particular social group, *see infra* notes 24-80 and accompanying text and Fullerton, *supra* note 16, at 523-31 (chronicling crucial decisions in history of United States immigration jurisprudence).

21. For a discussion of the conflict between the immutable characteristic test and the social visibility and voluntary association tests, *see infra* notes 81-121 and

issues involved while a more honest application of the law permits—even demands—the recognition of gender to fill a gap in the current application of the existing legal framework.²² Finally, Part V considers *Perdomo's* approach to gender and membership in a particular social group, while Part VI considers the likely impact of this precedent.²³

II. GENDER AS A PARTICULAR SOCIAL GROUP: RECOGNIZED, REJECTED, AND GRADUALLY READOPTED

Gender was noticeably absent from the list of protected classes in the refugee definition promulgated in 1951.²⁴ Because gender was not an enumerated basis for protection, women were expected to seek refugee status within the same categories available to men.²⁵ The absence of gender as a specifically mentioned basis does not necessarily mean that gender cannot constitute a particular social group.²⁶ The dominant view in the international community, as specified by the United Nations High Commissioner for Refugees (UNHCR), is that a particular social group may be defined by a shared innate characteristic alone.²⁷ Gender, arguably, is the quintessential example of such an innate characteristic.²⁸

accompanying text and Marouf, *supra* note 8, at 51-60 (discussing two approaches in relation to international law).

22. For analysis of the popular “floodgates” argument and its limitations, see *infra* notes 122-48 and accompanying text.

23. For a discussion of *Perdomo v. Holder* and a suggestion of its potential impact, see *infra* notes 149-212 and accompanying text.

24. See Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 169-71 (2001) (suggesting that refugee definition was drafted to protect political (masculine) victims rather than social or economic (feminine) victims).

25. See Reimann, *supra* note 6, at 1217 (noting that women were expected to fit within general refugee definition but that definition was inherently biased towards conception of male refugee). Distinguishing between persecution of women who happen to be women and persecution of women on account of their status as women, the United Nations Convention more clearly protects those women who happen to be persecuted for the same reasons as male refugees than those women who are persecuted because they are women. See Binder, *supra* note 24, at 167-68 (arguing that refugee definition adopted public/private sphere division that failed to protect crimes against women that arise solely on account of womanhood, such as rape and female genital mutilation).

26. See Fullerton, *supra* note 16, at 509-10 (noting that membership in particular social group was added to definition of refugee to allow yet unforeseen groups who might be subject to persecution to seek protection); see also Binder, *supra* note 24, at 171 (citing Canadian case in emphasizing that failure to specify gender does not preclude applicability of definition to gender (citing *Canada (Att’y Gen.) v. Ward*, [1993] 103 D.L.R. (4th) 1, 33 (Can.))).

27. See Marouf, *supra* note 8, at 48, 90 (referencing judicial interpretation by most other common law countries, based upon *Acosta* decision in United States, that particular social group is defined by innate characteristic).

28. See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (suggesting, by invoking *ejusdem generis*, that inherent characteristic is appropriate test and would thus include “sex, color, or kinship ties”), *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

In *Matter of Acosta*,²⁹ the BIA seemed to establish a substantive role for gender.³⁰ Rejecting the asylum seeker's claim that taxi drivers and "persons engaged in the transportation industry in El Salvador" comprise a particular social group, the BIA "interpret[ed] the phrase . . . to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, *immutable characteristic* . . . such as sex, color, or kinship ties."³¹ This seemingly clear statement appeared to definitively answer the question of whether gender could constitute a particular social group.³² Yet, despite frequent citations to *Acosta*, neither the BIA nor the circuit courts have adopted the plain meaning of this holding.³³

29. 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

30. *See* Marouf, *supra* note 8, at 48, 52-54, 90 (noting that many common law countries have followed *Acosta* and that most United States jurisdictions claim to follow *Acosta* in adjudicating gender-based claims); *see also* *Perdomo v. Holder*, 611 F.3d 662, 665-66 (9th Cir. 2010) (citing *Acosta* as starting point of analysis of gender-based claim for particular social group). In addition to stating the test to be used for defining a particular social group, the *Acosta* board carefully considered the legal sources for adjudicating asylum claims and qualified the use of international sources. *See Acosta*, 19 I. & N. Dec. at 211, 220 (holding that international interpretations of agreement can be informative but are not binding on United States courts). In *Acosta*, the BIA also carefully considered each of the elements of both asylum and withholding of removal claims and established the tests for each element. *See id.* at 219-37 (evaluating each element individually).

31. *See Acosta*, 19 I. & N. Dec. at 232-33 (emphasis added) (affirming finding by immigration judge). The asylum applicant, a taxi driver in El Salvador, joined a cooperative of taxi drivers and became an administrator of the cooperative. *See id.* at 216 (considering basis for asylum). The applicant and other members of the cooperative were solicited to take part in anti-government demonstrations by unknown sources but refused. *See id.* (considering basis for asylum). After continued threats, members of the cooperative were attacked and some were killed. *See id.* at 217 (considering claim of persecution). After receiving personal threats, the applicant fled to the United States, sought asylum, and testified that he would not return to El Salvador to work as a taxi driver and would not find work there. *See id.* (considering willingness to return and continued threat of persecution). In addition to finding that applicant did not qualify for asylum based on failure to establish persecution on account of membership in a qualifying particular social group, and despite finding that the applicant did establish fear of persecution, the BIA found that the fear was not well-founded, the applicant was not unable to return to El Salvador, and the applicant did not qualify for withholding of deportation. *See id.* at 236 (considering all elements of asylum claim and withholding of deportation relief and finding no basis for either relief sought).

32. *See* Marouf, *supra* note 8, at 51-52 (claiming definitive implication of *Acosta*).

33. *See* Binder, *supra* note 24, at 179-80 (suggesting that while *Acosta* holding seemed to clearly recognize gender as particular social group, United States jurisprudence has been inconsistent and contradictory in applying this standard and some courts have made impossible application of gender as basis of particular social group).

An early case that broke from *Acosta's* evaluation of gender and became foundational for such analysis is *Sanchez-Trujillo*.³⁴ In this case, decided the year following *Acosta*, the Ninth Circuit had to determine whether “young, working class, urban males” could constitute a cognizable particular social group.³⁵ The court did not rely solely on *Acosta's* “immutable characteristic” test but instead looked for an associational relationship leading to a shared characteristic amongst group members.³⁶ Like *Acosta*, the *Sanchez-Trujillo* court mentioned a family group as the paradigmatic particular social group but failed to mention gender in the same context.³⁷ Citing the lack of clear instruction in the international protocol and the Congressional record in promulgating the governing statute, the court sought to approximate the intention of the legislature.³⁸ The court held that the statute protected cohesive, homogenous groups and that groups that comprise large segments of the society not only defy the intent of the legislature but also leave the requirements of the statute meaningless.³⁹

In an apparent move away from *Sanchez-Trujillo* and towards recognizing gender-based claims, the BIA granted asylum to the applicant in *In re*

34. See *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986); see also *Perdomo*, 611 F.2d at 668 (noting test Ninth Circuit established in *Sanchez-Trujillo* and adoption of test more broadly by BIA); Michael G. Daugherty, Note, *The Ninth Circuit, the BIA, and the INS: The Shifting State of the Particular Social Group Definition in the Ninth Circuit and Its Impact on Pending and Future Cases*, 41 BRANDEIS L.J. 631, 638-40 (2003) (suggesting that two cases, *Acosta* and *Sanchez-Trujillo*, are seminal in Ninth Circuit jurisprudence but that they provide contrasting tests).

35. See *Sanchez-Trujillo*, 801 F.2d at 1576-77 (considering proposed particular social group). The applicant further defined the proposed particular social group as those males who had not served in the military and opposed military service. See *id.* at 1574 (considering distinction from previous, similar claims).

36. See *id.* at 1576 (emphasizing close affiliation element of particular social group, failing to cite *Acosta*, and conceding that groups may be unconventional).

37. See *id.* at 1576 (citing family as appropriate particular social group because most families share common interests and concerns); Lindsay A. Franke, Note, *Not Meeting the Standard: U.S. Asylum Law and Gender-Related Claims*, 17 ARIZ. J. INT'L. & COMP. L. 605, 610-11 (2000) (suggesting that *Sanchez-Trujillo* is in direct opposition to *Acosta* and that application of new voluntary association test to family groups proves its logical inconsistency).

38. See *Sanchez-Trujillo*, 801 F.2d at 1576 (noting lack of clarity and “dearth of judicial authority” and, therefore, focusing directly on statutory language). The court held that a particular social group must not include every broadly defined segment of society, must be a collection of people closely affiliated with one another who share some common interest or impulse, and must have as a central concern the existence of a voluntary associational relationship. See *id.* (interpreting statutory language).

39. See *id.* at 1577 (suggesting that applicant's interpretation of particular social group would allow universal eligibility for asylum). The court also held that the applicant failed to demonstrate that persecution suffered was on account of the membership in the particular social group. See *id.* (discussing additional requirements for successful asylum claim).

Kasinga.⁴⁰ The asylum applicant fled Togo to avoid being forcibly subjected to female genital mutilation (FGM).⁴¹ The BIA recognized not only that FGM constituted persecution, but also that the applicant qualified for asylum based on her membership in the particular social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁴² The BIA relied on the immutable characteristic test without any indication of the need for cohesiveness or homogeneity within the group.⁴³ The applicant met the nexus requirement by establishing that FGM is used to control the sexual characteristics of women.⁴⁴ Thus, a woman in that society could seek asylum because she was persecuted as a woman.⁴⁵

The BIA, however, re-established its reluctance to recognize gender-based particular social groups in its decision in *In re R-A*,⁴⁶ which fueled

40. 21 I. & N. Dec. 357, 357 (B.I.A. 1996); see Richard C. Reuben, *New Ground for Asylum: Threatened Female Genital Mutilation Is Persecution*, 82 A.B.A. J. 36, 36 (1996) (quoting applicant’s lawyer, who viewed holding as indicative of trend towards recognizing persecution of women).

41. See *Kasinga*, 21 I. & N. Dec. at 358-59 (discussing applicant’s testimony). The applicant was protected from FGM as a child by her father, but when the applicant’s father died, her aunt assumed authority over the family, arranged a polygamous marriage for the applicant against her will, and planned to have the applicant circumcised before the marriage was consummated. See *id.* (considering claim of persecution). The applicant fled Togo, passing through Ghana and Germany and eventually arriving in the United States where she immediately sought asylum. See *id.* (discussing applicant’s escape from persecution); see also Franke, *supra* note 37, at 617 (suggesting BIA’s acknowledgement of FGM as society-endorsed practice).

42. See *Kasinga*, 21 I. & N. Dec. at 365 (recognizing FGM as persecution claimed by particular social group); see also *Bah v. Mukasey*, 529 F.3d 99, 113 n.20 (2d Cir. 2008) (considering BIA decision to include opposition to FGM in definition of eligible particular social group). But see *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010) (suggesting that *Kasinga* holding did not answer question of whether gender and specific country of origin are together sufficient to show particular social group).

43. See *Kasinga*, 21 I. & N. Dec. at 365-66 (analyzing particular social group (citing *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987))). But see *Donchev v. Mukasey*, 553 F.3d 1206, 1216 n.33, 1216-17 (9th Cir. 2009) (citing and claiming deference to *Kasinga* while insisting that immutable characteristic test is necessary but not independently sufficient).

44. See *Kasinga*, 21 I. & N. Dec. at 366-67 (accepting nexus based on use of FGM to control female sexual identity); see also *In re R-A*, 22 I. & N. Dec. 906, 912 (B.I.A. 2001) (holding that basis of nexus is connection between immutable characteristic and group member’s identity).

45. See *Kasinga*, 21 I. & N. Dec. at 357-58 (noting parties’ agreement on applicant’s qualification for asylum but disagreement over general eligibility of FGM victims for asylum and declining to rule more broadly than present case). But see Franke, *supra* note 37, at 612 (arguing that women’s success in seeking asylum on account of gender has been inconsistent).

46. 22 I. & N. Dec. 906, 912 (B.I.A. 2001).

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 337

both significant scholarly response and heated public outcry.⁴⁷ The asylum applicant, a Guatemalan woman, was severely beaten by her husband over the course of many years before she fled to the United States.⁴⁸ The immigration judge granted asylum based on the applicant's membership in the group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."⁴⁹ Although the BIA acknowledged that the applicant was persecuted and that the Guatemalan government was unable or unwilling to protect her, it nonetheless reversed, finding her claim of a particular social group insufficient to demonstrate asylum eligibility.⁵⁰

Citing Ninth Circuit precedent, including *Sanchez-Trujillo*, the BIA rejected the applicant's claimed group.⁵¹ Focusing on two alternative crite-

47. *See id.* at 908 (describing factual basis of claim); *see also* Bryn D. Powell, *Domestic Violence, Gender-Related Asylum and In re R-A-*, 13 BUFF. WOMEN'S L.J. 1, 6-7 (2006) (suggesting that public support for applicant has forced government to take action towards recognizing victims of domestic violence as qualifying for asylum).

48. *See R-A-*, 22 I. & N. Dec. at 908 (noting abuse suffered by applicant). Throughout their marriage, the applicant's husband indicated his understanding of the applicant's role as his wife by escorting the applicant to work, refusing to allow her to be alone, scaring her into submission by telling stories of killing babies and the elderly during military service, insisting that she accompany him to cantinas and striking her for trying to leave, assaulting her and dislocating her jaw when her menstrual period was late, kicking her in the spine when she refused to abort a pregnancy, raping her almost daily and striking her before and during unwanted sex, kicking her in the genitalia and forcibly sodomizing her, and physically and verbally abusing her in both public and private settings for any or no reason. *See id.* (considering basis for persecution element of asylum claim). Justifying these attacks, the applicant's husband responded, "[y]ou're my woman, you do what I say." *See id.* (internal quotation omitted) (recounting applicant's testimony regarding persecution). The police issued several summonses when the applicant sought their protection, but took no further action when her husband failed to appear, considering this a domestic issue. *See id.* at 909 (discussing attempts to end persecution).

49. *See id.* at 911 (considering holding by immigration judge). Specifically, the immigration judge accepted as a cognizable and cohesive particular social group "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" and whose persecuted members are victimized on account of their membership. *See id.* (assessing immigration judge's basis for granting asylum); *see also* Daugherty, *supra* note 34, at 644 (suggesting that immigration judge's finding was consistent with emerging trends towards accepting gender-based claims).

50. *See R-A-*, 22 I. & N. Dec. at 914, 919 (expressing sympathy for applicant's persecution but finding it insufficient to demonstrate eligible particular social group). The BIA also considered the applicant's claim that she was persecuted on account of imputed political opinion that women ought not be dominated by men. *See id.* at 916-17 (discussing claim of imputed political opinion as grounds for relief). Despite conceding that the general proposition that the persecuted do not want to be persecuted, the BIA did not accept this construction as an eligible ground for asylum relief. *See id.* (rejecting claim). For a discussion of the doctrine of imputed political opinion and its application, see Yoo, *supra* note 7.

51. *See R-A-*, 22 I. & N. Dec. at 917-18 (considering Ninth Circuit precedent but holding that outcome of case would apply beyond Ninth Circuit as well).

ria—voluntary association and social perception—the BIA found that the group was not a particular social group but rather a listing of characteristics that a certain group of individuals happened to share.⁵² Implying a floodgates argument, the BIA suggested that such a liberal construction of the particular social group requirement would render the requirement meaningless.⁵³ Moving beyond whether a cognizable particular group existed, the BIA held that the facts of *R-A* provided insufficient evidence that the applicant's husband persecuted her on account of her membership in that group.⁵⁴ Thus, the BIA denied asylum.⁵⁵

Recognizing similarities between *Kasinga* and *R-A*, the BIA sought to distinguish the cases without adopting a different standard.⁵⁶ The court cited *Kasinga* for the uncontroversial premise that an immutable characteristic is necessary to form a particular social group and that the persecution must be on account of membership in the group.⁵⁷ The BIA also considered *Kasinga* at the outset of its discussion of whether a cognizable particular social group was present, but immediately criticized the poten-

52. *See id.* at 918-19 (focusing on lack of recognition by Guatemalan society of proposed group). Qualifying its rhetoric, the BIA acknowledged that the immutable characteristic must be the starting point of the particular social group analysis but that an immutable characteristic alone is insufficient. *See id.* at 919 (setting forth particular social group analysis (citing *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987))); *see also* Shanyn Gillespie, Note, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of In re R-A*, 71 GEO. WASH. L. REV. 131, 144 (2003) (noting BIA's acknowledgement of *Acosta* precedent and failure to offer justification for new test in *R-A*). For a discussion of social visibility and voluntary association, *see infra* notes 81-121 and accompanying text.

53. *See R-A*, 22 I. & N. Dec. at 919 (arguing that too broad interpretation would "swallow" refugee definition); Gillespie, *supra* note 52, at 144 (suggesting that BIA mentions risk of diluting refugee definition as justification for new, unjustified test); *see also* Binder, *supra* note 24, at 184 (suggesting BIA distinguished *R-A* because domestic violence is so prevalent).

54. *See R-A*, 22 I. & N. Dec. at 920-21 (noting that applicant's husband only persecuted applicant, not other members of claimed group). In analyzing the nexus requirement for asylum, the BIA found that the applicant's husband had abused her as an individual, not because of anything she believed or because she was a woman. *See* Reimann, *supra* note 6, at 1203 (discussing nexus analysis by BIA); *see also* Megan Annitto, Comment, *Asylum for Victims of Domestic Violence: Is Protection Possible After In re R-A?*, 49 CATH. U. L. REV. 785, 806 (2000) (suggesting analysis skewed court from engaging persecution correctly); Franke, *supra* note 37, at 615 (suggesting that Ninth Circuit precedent from *Sanchez-Trujillo* permitted *R-A* to be decided more quickly through substantial discussion but indicating movement away from this precedent).

55. *See R-A*, 22 I. & N. at 927-28 (denying asylum).

56. *See id.* at 925 (referencing apparent tension with *Kasinga*); *see also* Binder, *supra* note 24, at 184-85 (noting broad effect of *R-A* in narrowing *Kasinga* applicability). *But see* Annitto, *supra* note 54, at 810 (arguing that BIA used same factors in both decisions).

57. *See R-A*, 22 I. & N. Dec. at 912, 920 (citing *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996), and other cases for basic premise).

tial result.⁵⁸ Defending its holding, the BIA insisted that *Kasinga* did “not prescribe a different result.”⁵⁹ The common characteristic of not having suffered FGM and resisting FGM was an identifiable attribute causing animosity and therefore created a cognizable social group.⁶⁰ On the other hand, suffering domestic violence was not an attribute that could create a particular social group.⁶¹ Thus, even where female asylum seekers could show persecution solely on account of being women, no relief was available under the BIA’s *R-A*- holding.⁶²

In response to the public outcry over the BIA’s rejection of the applicant’s asylum claim in *R-A*-, Attorney General Janet Reno granted a stay of removal to the applicant and remanded the case to the BIA for reconsideration.⁶³ This stay was eventually lifted, however, and no conclusive action was taken to change the law or to adopt new proposals to avoid this situa-

58. *See id.* at 919 (construing *Kasinga* narrowly to avoid undermining definition of refugee).

59. *See id.* at 924 (distinguishing *Kasinga* by arguing that persecution through FGM was more prevalent, directed, and clearly government-endorsed than persecution through domestic violence).

60. *See id.* at 924 (emphasizing pervasiveness of FGM in society, expectation of compliance with practice, and government knowledge of and tacit support for practice).

61. *See id.* at 925 (suggesting that, despite apparent similarities because harm was inflicted by close family members, attribute causing domestic violence against women “is a factor to be overcome if the group is to be accepted”); *see also* Daugherty, *supra* note 34, at 644 (noting attempt to distinguish cases by focusing upon societal recognition of attribute).

62. *See* Daugherty, *supra* note 34, at 647 (discussing proposed amendments arising from *R-A*-). The amendments to 8 C.F.R. part 208 that were proposed as a direct backlash to the BIA’s holding in *R-A*- included explicit language such that domestic violence victims could create a gender-based particular social group on account of which they had been persecuted. *See id.* (arguing that amendments were intended to create gender-based particular social group).

63. *See R-A*-, 22 I. & N. Dec. at 906 (staying deportation and remanding case to BIA for reconsideration); Reimann, *supra* note 6, at 1204-05 (discussing unusual trajectory this case followed because of public outcry and involvement of advocacy groups).

The BIA exercises the discretionary authority given to the Attorney General and, therefore, though unusual, a case may be certified to the Attorney General for a final decision. *See id.* (discussing subsequent case history). After the BIA’s ruling in *R-A*-, considerable advocacy led the INS to propose amendments to the law governing asylum so that seekers of asylum based on gender-based persecution would be more successful in their applications. *See id.* (considering proposed resolution). Attorney General Janet Reno exercised her authority to review *R-A*- and ordered a temporary stay until such amendments could be finalized. *See id.* at 1205 (suggesting proposed amendments would benefit victimized women). *But see* Gillespie, *supra* note 52, at 146-47 (suggesting that proposed amendments would not benefit domestic violence victims).

tion in the future.⁶⁴ Finally, in 2009, an immigration judge granted asylum to the applicant in *R-A*.⁶⁵

R-A notwithstanding, the Ninth Circuit significantly altered its approach to adjudicating particular social groups in 2000 with its opinion in *Hernandez-Montiel v. I.N.S.*⁶⁶ In this case, the Ninth Circuit considered an appeal of the BIA's denial of asylum based on membership in the particular social group of "gay men in Mexico with female sexual identities."⁶⁷ The court considered *Sanchez-Trujillo*, which required a voluntary associational relationship, and yet suggested the family as the prototypical example of a particular social group.⁶⁸ Noting that these two holdings are at least in tension with one another, if not in direct contrast, the Ninth Circuit held that a particular social group "is 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 should not be required to change it."⁶⁹ Applying

64. See *Matter of R-A*, 24 I. & N. Dec 629, 629-30 (A.G. 2008) (acknowledging that no decision directly answering issue for which stay was granted had been promulgated but that BIA should reconsider case in light of other interceding rules and decisions). No action was taken by the subsequent Administration to finalize the proposed INS amendments so the state of gender-based claims, and the future of the applicant in *R-A*, remained uncertain. See Reimann, *supra* note 6, at 1205 (considering government response to case).

65. See *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgts.uchastings.edu/campaigns/alvarado.php> (last visited Oct. 8, 2010) (announcing grant of asylum to applicant on December 10, 2009).

66. 225 F.3d 1084 (9th Cir. 2000), *overruled on other grounds by* *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2009); see *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005) (holding that, in light of *Hernandez-Montiel*, Attorney General cannot argue that homosexuals do not constitute particular social group); Amy R. Bowles, Recent Case, *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000), 9 AM. U.J. GENDER SOC. POL'Y & L. 717, 722-23 (2001) (noting importance of case for future asylum applicants). *But see* Daugherty, *supra* note 34, at 632 (noting that effect of *Hernandez-Montiel* is unclear).

67. See *Hernandez-Montiel*, 225 F.3d at 1087 (considering basis of appeal). This case involved a gay man who recognized his attraction to men at a young age and identified himself as having a female identity and was thus expelled from school, sexually assaulted by police officers on two occasions because of his sexual identity, and, for the same reason, attacked by strangers. See *id.* at 1097-98 (discussing basis of persecution element). The BIA affirmed the immigration judge's finding that the applicant did not prove his claim for asylum. See *id.* at 1089-90 (affirming immigration judge).

68. See *id.* at 1092 (noting that only Ninth Circuit has adopted voluntary association requirement, that First, Third, and Seventh Circuits have adopted *Acosta* immutability test, and admitting that family relationships are inherently involuntary); see also Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 514 (2010) (noting admission by Ninth Circuit that family relationships are not voluntary and thus seem to conflict with voluntary associational requirement).

69. *Hernandez-Montiel*, 225 F.3d at 1092-93 (citing *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998)) (holding that Ninth Circuit test is inherently contradictory and thus finding that two tests are alternatives); see *Arteaga v. Mukasey*, 511 F.3d

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 341

this test to the group of homosexual men with female sexual identities, the court found that sexual identity was fundamental to the individuals' identities and that the group members were united by this shared identity.⁷⁰

The next significant step taken by the Ninth Circuit in the trend towards recognizing gender-based particular social groups was in *Mohammed v. Gonzales*.⁷¹ Here, the Ninth Circuit considered whether a Somali victim of FGM was eligible for asylum or other humanitarian relief.⁷² Recognizing the similarity to *Kasinga*, the court held that the applicant could have claimed persecution based on membership in a narrowly defined group:

940, 944 (9th Cir. 2007) (emphasizing that disjunctive definition alleviates tension from *Sanchez-Trujillo*).

70. See *Hernandez-Montiel*, 225 F.3d at 1094 (holding that *Sanchez-Trujillo* test is met and that, as matter of law, "gay men with female sexual identities in Mexico" are eligible particular social group for asylum law); see also Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 393-94 (2010) (suggesting that Ninth Circuit went beyond ordinarily recognized groups in American society and that gender and sexual identity are inherently linked in defining groups).

The court additionally held that the applicant needed to prove that his sexual identity was merely a significant factor motivating persecution, not the only factor. See *Hernandez-Montiel*, 225 F.3d at 1096 (finding that applicant had sufficiently shown that persecution was on account of his sexual identity). The government argued that the applicant was persecuted because he dressed like a woman (a characteristic he was free to change), not because of his sexual identity. See *id.* at 1089-90, 1096 (considering BIA's finding against applicant because persecution arose based on his voluntary dressing as female). The Ninth Circuit rejected this argument, holding that dressing as a female is merely an outward manifestation of the applicant's sexual identity and thus persecution was on account of the sexual identity being displayed. See *id.* at 1096 (rejecting BIA's conclusion on nexus requirement and clarifying particular social group definition to specify female identity rather than female fashion); see also *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 n.1 (9th Cir. 2004) (acknowledging connection between identity and outward appearance in society (citing *Hernandez-Montiel*, 225 F.3d 1084)).

71. 400 F.3d 785 (9th Cir. 2005); see Anker, *supra* note 5, at 202 (noting that *Mohammed* moved asylum jurisprudence toward acceptance of gender claims generally, but reminding adjudicators that establishment of applicable particular social group does not alone qualify individual member of that group for asylum relief).

72. See *Mohammed*, 400 F.3d at 789 (summarizing basis for claim and issues to be considered by court). In addition to considering the merits of the applicant's claim, the Ninth Circuit had to consider whether to permit reopening of the case. See *id.* (noting first issue on appeal). The BIA denied her previous application for asylum. See *id.* (describing case history). The applicant had not, however, originally included in her application that she had been the victim of FGM or that her past persecution was upon this harm suffered. See *id.* (discussing applicant's first asylum application). She subsequently hired a new lawyer and claimed ineffective assistance of counsel in her original application. See *id.* (discussing complication in that documents by applicant were actually contradictory as to whether or not she had suffered FGM). After discussing the merits of her asylum claim, the Ninth Circuit directed the BIA to grant her motion to reopen. See *id.* at 802-03 (finding that applicant had in fact been prejudiced in her application by ineffective assistance of counsel).

“young girls in the Benadiri clan.”⁷³ The court, however, proposed the alternative idea that Somali females may constitute the particular social group because FGM is widespread in Somalia and is forced upon women of many clans.⁷⁴

The court mentioned no precedential bar to recognizing the group of all Somali women.⁷⁵ In suggesting this broader particular group as a possibility, the court noted that the Ninth Circuit had not previously decided whether women of a particular nationality or clan, or women generally, could constitute a particular social group.⁷⁶ The court concluded, however, that recognizing such a broad particular social group was “simply a logical application of our law.”⁷⁷

By considering *Acosta*'s immutable characteristic test and *Hernandez-Montiel*'s disjunctive language, the court avoided discussion of the tension of its holding with *Sanchez-Trujillo*.⁷⁸ The court further justified its new approach to gender-based claims by citing international guidelines to asylum and refugee adjudication that recognize the potential for women to constitute particular social groups.⁷⁹ Thus, the Ninth Circuit seemed to

73. *Id.* at 796-97 (citing *In re Kasinga*, 21 I. & N. Dec. 357, 367-78 (B.I.A. 1996)). The court noted, however, that the *Kasinga* board's emphasis on the applicant's opposition to FGM was not required; the persecution occurs not because a woman opposes FGM but because she is a woman. *See id.* at 797 n.16 (rejecting *Kasinga* board's emphasis on opposition); *see also* Carrie Acus Love, Note, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV. 173, 192-93 (2008) (noting Ninth Circuit's rejection of persecution in form of FGM in *Mohammed* broadened accessibility to asylum relief).

74. *See Mohammed*, 400 F.3d at 797 (noting that FGM is deeply embedded in Somali culture and affects ninety-eight percent of Somali women); *see also* Aubra Fletcher, Note, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 116 (2006) (suggesting that *Mohammed* is significant break from tendency towards restrictive recognition of broad gender-based groups).

75. *See Mohammed*, 400 F.3d at 797 (citing *Hernandez-Montiel* as permitting extension of particular social group status to all Somali women).

76. *See id.* at 797 n.17 (omitting any contrary precedent but citing *Fisher v. I.N.S.*, 79 F.3d 955, 965-66 (9th Cir. 1996) (en banc), for holding that issue had not yet been decided).

77. *See id.* at 797 (extending recognition to gender-based claims); *see also* Hinger, *supra* note 70, at 375-76 (noting that, despite apparently simple distinction between men and women, more dynamic understanding of gender is necessary to show that persecution against women actually occurs on account of their gender).

78. *See Mohammed*, 400 F.3d at 797 (supporting holding by citing only to *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), and *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000), *overruled on other grounds* by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2009), but not *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986)); *see also* Anker, *supra* note 5, at 205-06 (suggesting that *Mohammed* decision attempted to correct Ninth Circuit's opinion in *Sanchez-Trujillo*).

79. *See Mohammed*, 400 F.3d at 798 (referencing guidelines promulgated by UNHCR).

allow the possibility of women constituting a particular social group without definitively closing the discussion.⁸⁰

III. WHAT COUNTS? THREE POSSIBILITIES FOR DEFINING A COGNIZABLE PARTICULAR SOCIAL GROUP

By fundamentally changing the basis for refugee and asylee status, twentieth century international law left ambiguous the question of who qualifies for relief.⁸¹ The 1951 United Nations Convention, through its 1967 Protocol, intentionally linked an individual's eligibility for refugee status to the individual's identity, as opposed to a specific conflict, as was previously the case in international law.⁸² Candidates for asylum had to prove more than mere persecution.⁸³ The five protected grounds, including membership in a particular group, reserved asylum protection for those suffering persecution because of their identity.⁸⁴ Each participant in the Convention was responsible for defining, through legislation, how the particular social group category would be applied.⁸⁵

80. See *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (noting that *Mohammed* recognized young girls of certain clan as eligible particular social group without expressly recognizing women generally).

81. See Fullerton, *supra* note 16, at 561-62 (comparing varying applications of international definition in Germany, Canada, and United States).

82. See Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 42-45 (1983) (noting that inclusion of particular social group was intended to protect previously unprotected groups but that these groups still had to share some qualifying identity); see also Fullerton, *supra* note 16, at 506-07, 506 nn.5-7 (discussing early international attempts to protect refugees focusing on specific national or ethnic groups). The 1951 Convention is generally seen as having adopted a universal definition of refugee that would apply beyond contemporary conflicts, but parties to the Convention were unwilling to extend protection to refugees worldwide and were thus permitted to geographically limit their domestic application of the new refugee definition to Europe. See Daniel Compton, Recent Case, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar—Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 924-26 (1987) (discussing controversy over geographic limitation versus universal application of definition and Convention-saving compromise that allowed each state to adopt optional geographic limitation).

83. See U.N. High Comm'r for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 14, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *Protection Guidelines*] (emphasizing that fact that individual or group of individuals has been persecuted does not establish that individual or group as particular social group).

84. See *id.* ¶¶ 3-4 (insisting that particular social group cannot be understood to be "catchall" such that other four categories are superfluous but conceding that term can and should evolve).

85. See *Matter of Acosta*, 19 I. & N. Dec. 211, 211 (B.I.A. 1985) (noting that United States law is based upon international protocol but that it is responsibility of each state to define application of protocol), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see also Fullerton, *supra* note 16, at 510-11 (discussing varied approaches to domestic codification of international agreement).

Although lagging behind many other nations in adopting the international protocol, the United States codified the international language in 1980.⁸⁶ During the intervening years a number of scholars opined on how particular social group eligibility would be applied, but the United States Congress provided no clarification when passing the legislation that adopted the international definition.⁸⁷ Because United States immigration law is often decided by the BIA or the circuit courts rather than the Supreme Court, various and conflicting tests have developed.⁸⁸

A. *Who You Are: Identity & Immutable Characteristics*

The immutable characteristic test, the standard adopted by *Acosta* and the dominant test in United States asylum law, is a logical and disciplined application of the law and recognizes gender-based groups.⁸⁹ As defined by *Acosta*, this test takes a middle-ground approach, acknowledging that the particular social group category was meant to expand relief beyond the four enumerated grounds but not to allow application so broad that the requirement becomes inconsequential.⁹⁰ Fundamentally, this test re-

86. See *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1575 (9th Cir. 1986) (noting United States ratification of international protocol in 1968 and subsequent codification within United States law in 1980); Helton, *supra* note 82, at 39 (discussing adoption by United States of international refugee definition in 1980 so as to provide flexible access to refuge).

87. See *Sanchez-Trujillo*, 801 F.2d at 1575-76 (noting that “legislative history is generally uninformative on this point” and, therefore, courts have “looked to sources of international law for guidance”); see also Fullerton, *supra* note 16, at 515-20 (considering scholarly discussions of social group concept published between adoption of international protocol and acceptance of international definition in United States law); Helton, *supra* note 82, at 51 (noting, in 1983, “substantial body of material discussing” new social group concept adopted by international protocol).

88. See Fullerton, *supra* note 16, at 562 (discussing different approaches across United States circuit courts of appeals); see, e.g., *Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993) (holding that, in absence of clear legislative direction, circuit court must defer to administrative agency and, therefore, must adopt immutable characteristic test specified in *Acosta*); *Sanchez-Trujillo*, 801 F.2d at 1576 (requiring voluntary association amongst members of proposed group); *Ananeh-Firempong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985) (requiring that members of proposed group share common background, habits, or social status).

89. See Marouf, *supra* note 8, at 48-49, 52 (noting that *Acosta* defined seminal test in United States jurisprudence after careful consideration of international protocol and that similar approaches have been adopted throughout common law states). The *Acosta* test holds that members of a group share a common, immutable characteristic that they cannot change or should not be expected to change. See *Acosta*, 19 I. & N. Dec. at 212 (establishing test for determining existence of particular social group). The BIA in *Acosta* acknowledged that Congress did not indicate what exactly constitutes membership in a particular social group, but that the understanding of a refugee described by the UNHCR is illustrative. See *id.* at 232-33 (considering international commentary on refugee definition). For a further discussion of *Acosta*, see *supra* notes 30-33.

90. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 159-60 (1991) (noting BIA’s reliance upon median understanding of particular social group in *Acosta*

lies upon the premise that the groups accepted as particular social groups should be naturally similar to the other protected grounds.⁹¹ Nonetheless, the test is broad enough to encompass natural-born characteristics, shared identity based on common and unchangeable history, and voluntary identity that the possessor should not be forced or expected to change.⁹² Applying this test without further qualification, gender-based groups easily qualify as particular social groups.⁹³

The United Nations has endorsed both the immutable characteristic test and the implication that it permits gender-based groups, and many nations have agreed.⁹⁴ In providing guidelines on how the refugee definition should be interpreted, the UNHCR has been explicit that the immutable characteristic test is the first test and is sufficient on its own.⁹⁵ In concurrently published, gender-focused guidelines, gender was specifically acknowledged as a qualifying basis for a particular social group.⁹⁶ As a

but insisting that drafters only intended definition to address known harm, not future harm, and, therefore, intentionally limited understanding of this term).

91. See Marouf, *supra* note 8, at 52 (arguing that, because particular social group appears alongside other defined groups (race, religion, nationality, political opinion), term must be similarly construed). The textualist analysis for understanding particular social group in this way is the doctrine of *ejusdem generis*: listed as a group, the included categories must be fundamentally of the same kind. See Acosta, 19 I. & N. at 233 (insisting that interpretation of particular social group must be parallel to that of other enumerated grounds for protection); HATHAWAY, *supra* note 90, at 161 (suggesting that, in addition to respecting drafters' intent, this doctrine inherently connects refugee definition, including persecution, with more widely understood concept of basic human rights); Marouf, *supra* note 8, at 52-53 (suggesting that application of this interpretive doctrine respects intention of drafters by considering term in light of contemporary understanding of refugee).

92. See HATHAWAY, *supra* note 90, at 161 (suggesting that this understanding of particular social group allows three different types of characteristics to qualify but excludes "a characteristic which is changeable or from which dissociation is possible").

93. See *id.* at 162 (displaying qualification of gender-based groups by citing United Nations documents recognizing gender-based groups).

94. See *Protection Guidelines*, *supra* note 83, ¶ 6 (noting appropriateness of widely accepted immutable characteristic test); see also Binder, *supra* note 24, at 175-76 (noting United Nations support for gender-based claims but previous ambivalence by United Nations and other international organizations in protecting women from unique gender-based harm); Amanda Blanck, Note, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN'S RTS. L. REP. 47, 58 (2000) (highlighting various international protocols that seek to end discrimination against women and protect various rights for victims of gender-based violence).

95. See *Protection Guidelines*, *supra* note 83, ¶ 13 (noting that additional test of social visibility should only be invoked when immutable characteristic test is not met).

96. See U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 28-30, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter *Gender Guidelines*] (instructing that gender undoubtedly fulfills immutable characteristic test).

result, the immutable characteristic test has become a norm in many common law countries and beyond.⁹⁷

Protection for members of particular social groups is often seen as a gap filler, but it does not soften the requirements for asylum.⁹⁸ A group recognized as a particular social group might overlap in some instances with the other enumerated categories of protection.⁹⁹ Characteristics that merely join members of a proposed group, however, may not meet the statutory requirements because they do not rise to the level of identity-defining characteristics.¹⁰⁰

B. *Who You Say You Are: Voluntary Association*

The voluntary association test was created first as a limitation to the immutable characteristic test, then became an alternative test, and now has little, if any, role in asylum law.¹⁰¹ The Ninth Circuit created the vol-

97. See Marouf, *supra* note 8, at 48-49 (noting adoption of immutable characteristic test by major common law countries). Canadian law has adopted the immutable characteristic test and allowed gender-based groups to qualify as particular social groups. See, e.g., HATHAWAY, *supra* note 90, at 162 (citing Incirciyan, Zeyiye v. M.E.I., IAB No. M87-1541X, M87-1248 (Aug. 10, 1987) (Can.)). But see Fullerton, *supra* note 16, at 535 (noting that German courts have been inconsistent in which test to use in evaluating claimed social group).

98. See *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (noting that social group was understood to be broader than other four grounds to avoid gap in coverage of persecuted persons), *overruled on other grounds* by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see also Fullerton, *supra* note 16, at 509 (noting that inclusion of particular social group within refugee definition was addition suggested by Swedish delegation to cover those who deserve protection but would otherwise go unprotected).

99. See *Protection Guidelines*, *supra* note 83, ¶ 4 (stating that protected grounds need not be mutually exclusive).

100. See *id.* (noting that application of particular social group protection cannot leave other requirements of refugee definition superfluous); see, e.g., *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (relying on Ninth Circuit precedent in rejecting claim of persecuted El Salvadoran woman based on particular social group of young women). In *Gomez*, the applicant had fled El Salvador after being raped as a young teenager by guerilla combatants. See *id.* at 662 (discussing basis of asylum claim). Citing primarily precedent from the Ninth Circuit, including *Sanchez-Trujillo*, the Second Circuit affirmed the BIA's rejection of the applicant's claim on the basis that "broadly-based characteristics such as youth and gender will not" constitute a particular social group. See *id.* at 664 (qualifying immutable characteristic test). The court here did not add an additional social visibility or voluntary associational test as the Ninth Circuit had done but instead held that the indistinguishable characteristic must distinguish the group members in the eye of the persecutor. See *id.* (referring to nature of characteristics in other four protected groups). The Second Circuit, while acknowledging that the applicant had been persecuted, found that she had failed to show that the claimed particular social group was integrally related to the persecution she suffered. See *id.* (discussing failed asylum claim).

101. See *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (adopting disjunctive language when referring to voluntary association test and recognizing immutable characteristic as independently sufficient), *overruled on other grounds* by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2009); *Sanchez-Trujillo v.*

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 347

untary association test in *Sanchez-Trujillo* to prevent a group of otherwise unconnected individuals who happened to share unchangeable characteristics from claiming membership in a particular social group.¹⁰² The court created a two-tiered test requiring the recognition of a qualifying characteristic followed by an association of the possessors of that characteristic.¹⁰³ The same court rejected this two-tiered system in *Hernandez-Montiel*.¹⁰⁴ Rather than overrule precedent, however, the court held that voluntary association could replace the required characteristic.¹⁰⁵

Requiring voluntary association both directly and intentionally undermines gender-based claims.¹⁰⁶ Women who are victimized because they are women have not necessarily associated with any other women, victimized or not (and some abuse includes preventing association with other women).¹⁰⁷ After gradually broadening the application of particular social groups to encompass groups based on sexual identity or victims of

I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986) (establishing voluntary association requirement); Siddiqui, *supra* note 68, at 514 (noting that application of voluntary association test changed from *Sanchez-Trujillo* to *Hernandez-Montiel*).

102. See Siobhan M. Kelly, Comment, *Social Group-Based Asylum Claims Under the Refugee Act of 1980*, 68 U. CIN. L. REV. 895, 913 (2000) (focusing on tension between voluntary association requirement and former emphasis on immutable characteristic and arguing that result contradicts precedent by logically excluding family groups from social group definition); see also Anjana Bahl, *Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 33, 49 (1997) (criticizing Ninth Circuit for adopting voluntary association test to intentionally restrict application of definition of refugee and then failing to appropriately apply newly created definition).

103. See *Sanchez-Trujillo*, 801 F.2d at 1576-77 (recognizing that suggested members of claimed particular social group share certain characteristics but finding that group is too heterogeneous to constitute cognizable group as contemplated by refugee definition).

104. See *Hernandez-Montiel*, 225 F.3d at 1093 (replacing previous, two-tiered requirement with disjunctive test).

105. See *id.* at 1093 n.6 (acknowledging former tension between *Acosta* and *Sanchez-Trujillo* and seeking to reconcile two decisions by creating alternative tests); see also Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 243-44 (2002) (considering "plain language" of opinion). The author notes that the UNHCR endorsed the Ninth Circuit's holding that the two tests are alternatives to recognizing a particular social group and explicitly acknowledged that a social group might exist "even if its members do not share an immutable characteristic." See *id.* at 244 (discussing alternative tests).

106. See Condon, *supra* note 105, at 243 (acknowledging that gender is explicitly recognized as grounds for particular social group but that this recognition has been qualified by six-factor test evaluating immutable characteristic and proposed particular social group for cohesiveness and social visibility once it has been established); see also Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 745 (1997) (arguing that requiring that women show gender plus additional element to establish particular social group raises equal protection concerns).

107. See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 2001) (finding that abusive husband insisted that victim "accompany him wherever he went" and would "wait to direct her home"); see also Anker, *supra* note 106, at 743 (arguing that, in societies where violence against women is tolerated, women are subjected

FGM, the incongruence of a voluntary association requirement becomes clear.¹⁰⁸ In addition, the UNHCR has explicitly rejected such a requirement.¹⁰⁹

C. *Who They Say You Are: Social Visibility*

In a pair of recent cases, the BIA added a new test to the particular social group analysis that, while only properly understood as an alternative, was used by the BIA as an additional requirement.¹¹⁰ As applied by the BIA, the social visibility test looks not only for an immutable characteristic but also asks whether society “perceives” the proposed group to be a social group.¹¹¹ The BIA implemented this analysis under the guise of an extension of the *Acosta* inquiry without acknowledging it as a break from

to violence simply because they are women and, therefore, meet social group requirement through isolated victimization).

108. See Fullerton, *supra* note 16, at 555-57 (discussing *Sanchez-Trujillo*'s voluntary association requirement and arguing that it creates tension with immutable characteristic requirement, especially in relation to stated paradigmatic group example of family).

109. See *Protection Guidelines*, *supra* note 83, ¶ 6 (clarifying that immutable characteristic test alone is sufficient to recognize social group and that recognition of gender-based groups under this application is appropriate); see also Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 804 (2003) (referencing explicit rejection of *Sanchez-Trujillo* voluntary association requirement).

110. See Marouf, *supra* note 8, at 63 (discussing application by BIA of social visibility test in cases of *In re C-A*, 23 I. & N. Dec. 951, 951-52 (B.I.A. 2006), and *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69, 73 (B.I.A. 2007)). In *C-A*, on remand from the Eleventh Circuit, which had found that the respondents were persecuted on account of their identity as noncriminal informants, the BIA determined whether “noncriminal informants” could constitute a particular social group. See *C-A*, 23 I. & N. Dec. at 951-52 (explaining basis of decision). In considering the case, the BIA held that requirements beyond the *Acosta* test, such as voluntary association or cohesiveness, are generally not necessary but that social perception is a factor in recognizing a social group. See *id.* at 957 (reviewing various approaches taken by circuits and by international community). The BIA conceded that a shared history, which was claimed by the respondents, is an unchangeable characteristic, but the BIA then considered social visibility and rejected the claim, finding that the cited group was not socially visible. See *id.* at 959-60 (finding that no qualifying particular social group had been shown).

In *A-M-E- & J-G-U*, on remand from the Second Circuit, the BIA addressed the question of why “affluent Guatemalans” could not constitute a particular social group eligible for asylum relief. See *A-M-E- & J-G-U*, 24 I. & N. Dec. at 73 (discussing basis for remand from Second Circuit). Although the BIA initially asserted that affluence is not an immutable characteristic, the BIA admitted that divestiture would not be expected and immediately turned to the issue of social visibility. See *id.* at 73-74 (affirming finding of immigration judge that affluence is not immutable characteristic). Citing *C-A*, the BIA insisted that social visibility is an essential element of social group analysis and that social perception is important in recognizing the group as eligible for asylum relief. See *id.* at 74 (quoting *C-A* as unequivocal on issue of social visibility as essential).

111. See Siddiqui, *supra* note 68, at 513 (citing BIA's decision in *C-A* and its application of new social visibility test).

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 349

precedent.¹¹² In reality, however, this test contradicts two decades of immigration jurisprudence without either statutory justification or interpretive analysis.¹¹³ Requiring that a particular social group be perceived by society generally would invalidate many groups already recognized by the BIA as eligible for asylum protection, such as FGM victims.¹¹⁴

The international community accepts the social visibility test with very limited application.¹¹⁵ Although initially focused on the immutable characteristic test, the UNHCR recognized that some persecuted social groups might face persecution based on a shared changeable characteristic and, therefore, allowed social visibility as an alternative.¹¹⁶ Thus, social visibility is understood not to be a limiting requirement but an additional qualifying ground.¹¹⁷

As applied to gender-based claims, the social visibility test would prevent many eligible victims from receiving asylum relief.¹¹⁸ Where violence against women as women is tolerated, authorities generally view this violence as a private matter with which they will not interfere.¹¹⁹ The vio-

112. See *A-M-E- & J-G-U*, 24 I. & N. Dec. at 73-74 (applying social visibility test as extension of *Acosta*); *C-A-*, 23 I. & N. Dec. at 957 (applying social visibility test as continuation of *Acosta* test because *Acosta* test was not determinative).

113. See Marouf, *supra* note 8, at 68 (arguing not only that social visibility is unprincipled break from precedent, but also that, because this test is contrary to standing precedent, courts ought not apply social visibility test). *But see* Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 783-84 (2003) (arguing that, in fact, social perception is—and should be—consequential for asylum law because analysis through eyes of persecutor is indicative of who is truly persecuted).

114. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (applying *Acosta* and recognizing gender and tribal membership as independently sufficient without looking to social perception of members of proposed group); *see also* Hinger, *supra* note 70, at 379-80 (suggesting unique recognition of FGM as grounds for asylum even though social group is unclear).

115. See *Protection Guidelines*, *supra* note 83, ¶ 13 (permitting investigation into social perception of suggested social group only after determination that characteristic uniting social group is changeable and, therefore, insufficient to meet *Acosta* standard).

116. See *id.* (noting that even though defining characteristics of social group may not be immutable, social perception may still allow recognition of that group despite lack of independently qualifying characteristic).

117. See *id.* (providing example of how social perception test could widen possibility of eligibility for relief); *see also* Marouf, *supra* note 8, at 103-04 (claiming that social visibility test as applied by BIA is sharp break from precedent and muddles international community's understanding of role that social visibility is to play).

118. See Marouf, *supra* note 8, at 89, 91 (stating that gender is inherently immutable and should qualify for asylum relief but noting asylum adjudicators' tendency to find opportunities to reject gender-based claims and that social visibility test will provide officials with new, unprincipled basis for rejecting gender-based asylum claims).

119. See Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 28 (1998) (acknowledging hesitance by international community to recognize gender-based claims because of breadth of potential social group but noting that women around world are subject to violence that is ignored

lence is veiled by socially accepted silence.¹²⁰ Thus, it may be impossible to show that society perceives the persecuted to be a social group because society intentionally ignores them.¹²¹

IV. OPENING THE FLOODGATES OR FILLING THE GAP?

A. *An Unprincipled Rejection: Gender as the Floodgate*

Reluctance by the United States to recognize gender-based asylum claims is largely a result of the unfounded fear that allowing eligibility for women persecuted as women will immediately inundate the United States with asylees.¹²² Ideologically, courts have claimed concern that the intentionally narrow definition of a refugee will be lost if gender is recognized as a basis for a particular social group because everyone will qualify.¹²³ More pragmatically, judges and policy makers have argued that there would simply be too many women who qualify for asylum if such recognition were permitted.¹²⁴

Emphasis on the size of the social group is misplaced.¹²⁵ Appropriate interpretation of the refugee definition does not require that a particular social group be a small category but actually suggests that it is a very large

by authorities and that recognition of such groups is women's opportunity for relief).

120. See Heyman, *supra* note 113, at 804 (suggesting that domestic violence is generally misunderstood and that, because domestic violence is considered by society to be private concern limited to private sphere, attempts at legal intervention have been limited or unsuccessful).

121. See *In re R-A-*, 22 I. & N. Dec. 906, 918-19 (B.I.A. 1999) (recognizing that "respondent has shown that women living with abusive partners face a variety of legal and practical problems in obtaining protection or in leaving the abusive relationship" but finding that respondent has not proven her eligibility for asylum relief because "respondent has not shown that 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination' is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala").

122. See Mary M. Sheridan, Comment, *In re Fauziya Kasinga: The United States Has Opened Its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433, 457 (1997) (noting floodgates claim seems to be empirically unfounded and, therefore, arguing that concerns about overwhelming asylum claims has served as pretext for rejecting gender-based claims).

123. See *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1577 (B.I.A. 1986) (quoting immigration judge's concern over recognizing overly large group); 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, 280-81 (1994) (citing *Sanchez-Trujillo* and addressing concern that narrowly construed class of refugees will be replaced by wide applicability for those dissatisfied with conditions of home country).

124. See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (rejecting BIA's apparent suggestion that percentage of population was sufficient justification for rejecting social group).

125. See Bahl, *supra* note 102, at 67 (rejecting appropriateness of consideration of group size in determining if group member qualifies for relief).

category parallel to race, religion, and nationality.¹²⁶ Additionally, concern for the size of the group ignores the importance of other requirements for protection under asylum law.¹²⁷ Recognition of a gender-based particular social group does not grant blanket asylum to all women in the cited country.¹²⁸ Female victims of random criminal activity, for example, would not be eligible for asylum.¹²⁹ If an immigration judge finds that a female asylum applicant was victimized through an individualized attack, unrelated to her identity as a woman, the judge will not approve her claim for asylum.¹³⁰

Even if recognition of gender-based grounds would result in a significant increase in asylum claims, adjudicators should nonetheless consider only the individual claim.¹³¹ The merits of each case must be evaluated individually and not upon the basis of the asylum system as a whole.¹³² The pragmatic concern that there will be an influx of asylees is inappropriate because asylees comprise only a small portion of immigrants to the United States.¹³³ After *Kasinga*, the Immigration and Nationality Service

126. See HATHAWAY, *supra* note 90, at 163 (noting that other enumerated grounds for protection under refugee definition are very large groups).

127. See Bahl, *supra* note 102, at 70 (noting that once particular group has been established, further inquiry into whether group has been persecuted and whether individual asylum seeker has been or likely will be persecuted are appropriate and necessary inquiries before asylum will be granted).

128. See Reimann, *supra* note 6, at 1258-59 (noting that asylum seekers must not simply prove sexual abuse but “severe sexual abuse” (thus rape might qualify for asylum but unwanted sexual touching might not) and that each individual will still have to prove, to satisfaction of asylum officer or immigration judge, that she has experienced past harm or has well-founded fear of future harm).

129. See Condon, *supra* note 105, at 237 (emphasizing that other requirements for asylum, specifically that harm suffered (or feared) rise to level of “persecution” and that harm is suffered “on account of” membership in particular social group, must still be met in order for applicant claiming asylum to prevail).

130. See *id.* at 240 (recognizing that other grounds for asylum—e.g., persecution based on race, nationality, religion, and political opinion—can similarly allow asylum adjudicators to differentiate between persecution on account of protected grounds and random victimization of member of protected class).

131. See David L. Neal, Comment, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 241 (1988) (emphasizing congressional intent in recognizing international refugee definition in asylum law to permit individual adjudication and equity when considering asylum applications).

132. See Bahl, *supra* note 102, at 70 (arguing that floodgates argument inappropriately shifts emphasis away from merits of case and defeats spirit of asylum law); John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 985 (1997) (noting that large number of males fleeing communist regimes were quickly granted asylum during Cold War); Condon, *supra* note 105, at 232 (arguing that if asylum adjudicators are permitted to consider, when approving individual applicant for asylum, number of similarly situated additional potential applicants eligible for asylum, adjudicator’s focus would be inappropriately shifted away from honest interpretation of governing statute).

133. See Linarelli, *supra* note 132, at 984 (noting lack of increase in Canada and small percentage of immigrants that are asylees); Sheridan, *supra* note 122, at 457 (noting that France and Canada, amongst others, recognize gender-based

(INS) explicitly noted that the feared deluge of female asylum seekers did not occur.¹³⁴ If there is a problem, however, a statutory revision by Congress should address it rather than incorrect interpretation by the courts.¹³⁵

B. *An Honest Application: Gender as the Gap*

The continued refusal to permit gender-based claims has created a gap in United States asylum law that must be filled.¹³⁶ While appearing gender-neutral, the refugee definition has been applied more liberally to persecution commonly affecting men than to persecution unique to, or concentrated against, women.¹³⁷ Adjudicators have been unwilling to recognize rape and other sexual assaults as persecution even when used explicitly to subjugate women, instead referring to them as personal attacks.¹³⁸ The international community has sought to rectify this gender-biased application by acknowledgement of gender-specific issues.¹³⁹ Nonetheless, the diverging interpretations by the United States courts and the international community perpetuate this failure to protect women.¹⁴⁰

Recognizing gender as a particular social group because it is an innate characteristic that cannot be changed fits comfortably within the constructionist approach of *Acosta* and other precedent.¹⁴¹ Using the

claims and have not experienced overwhelming increases in asylees entering country).

134. See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132-33 (2007) (noting empirical evidence disproving floodgates argument).

135. See Neal, *supra* note 131, at 242 (arguing that, if too many qualify for asylum under correct interpretation of definition, Congress—not courts—must change statute).

136. See Musalo, *supra* note 134, at 143 (arguing that recognizing asylum for women who suffer human rights violations is philosophically consistent and legally necessary to meet commitments made by United States after World War II); Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221, 238 (2000) (concluding, after considering trends in international law towards recognition of gender-based claims, that promulgated guidelines do not go far enough in protecting women who are persecuted solely on account of gender).

137. See Binder, *supra* note 24, at 169-71 (arguing that asylum law developed split between masculine and feminine persecution, allowing men to be protected but preventing women from seeking relief).

138. See Bahl, *supra* note 102, at 54-55 (noting inconsistency in application of asylum law, especially considering apparent qualification for asylum based on political opinion if persecuted woman expresses her opposition to male domination).

139. See *Gender Guidelines*, *supra* note 96, ¶¶ 2, 7 (considering as uncontroversial that awareness of gender dimensions of persecution is necessary and insisting that gender must be considered holistically in its application to refugees).

140. See Thiele, *supra* note 136, at 228 (noting different tests established by United Nations, in its *UNHCR Handbook*, *supra* note 9, and *Gender Guidelines*, *supra* note 96, and by United States courts).

141. See Marouf, *supra* note 8, at 49-50 (arguing that immutable characteristic is principled application of definition while social visibility test is not).

interpretive methods upon which *Acosta* was founded, if qualifying asylum applicants are eligible because of membership in broadly defined groups (identity as a member of a particular race, religion, or nationality), an eligible particular social group should be similarly broad.¹⁴² Instead, women have been forced to create narrowly defined social groups using many characteristics; thus, the current understanding of a successful particular social group claim is not akin to the other enumerated grounds.¹⁴³ The concern should not be whether the particular social group is too broad but rather whether the group is eligible under the correct application of *Acosta*.¹⁴⁴

The United States has taken some steps towards recognizing the unique claims by women for asylum.¹⁴⁵ In a 1995 internal, unpublished memorandum, the INS acknowledged that, “enhancing understanding of and sensitivity to gender-related issues will improve U.S. asylum adjudication while keeping pace with these international concerns.”¹⁴⁶ Asylum adjudicators were informed of the different approaches taken by the circuit courts towards gender-based claims but were instructed that the Third Circuit pronouncement that women can constitute a particular social group is consistent with *Acosta*.¹⁴⁷ Nonetheless, there has been general reluctance by United States officials to recognize women as a particular social group, leaving women fewer options to access asylum relief.¹⁴⁸

142. See Macklin, *supra* note 119, at 64-65 (applying this understanding to gender by suggesting that gender is unchangeable characteristic by which individuals identify and that it is parallel to distinguishing racial or ethnic characteristic).

143. See Reimann, *supra* note 6, at 1202 (arguing that actions by officials in United States rejecting gender alone as sufficient to establish particular social group has caused paradoxical tendency, because women persecuted only because they are women have had to propose increasingly narrow particular social groups such that causal nexus required can no longer be proven).

144. See Anker, *supra* note 5, at 202 (suggesting that *Mohammed* indicates correct move by Ninth Circuit to return to careful application of *Acosta* standard).

145. See Linarelli, *supra* note 132, at 980 (suggesting that legitimate grounds for asylum sought by women in hopes of eliminating gender bias contributed to amendments to asylum law).

146. See Memorandum from Phyllis Coven, Office of Int'l Affairs, U.S. Dep't of Justice, to All INS Asylum Officers and HQASM Coordinators 1 (May 26, 1995), reprinted in 72 INTERPRETER RELEASES 771 app. I (1995) (reflecting upon recent developments in domestic and international understandings of gender-based asylum claims).

147. See *id.* at 787 (recounting diverging approaches taken by circuit courts in recent cases when confronted with claims for gender-based particular social groups).

148. See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 665 (9th Cir. 2010) (recounting immigration judge's reasoning for rejecting petitioner's request for asylum relief and BIA affirmation thereof).

V. TAKING THE NEXT STEP: *Perdomo v. Holder*

By publishing its decision in *Perdomo*, the Ninth Circuit added one more crucial precedent to the analysis of gender-based asylum claims.¹⁴⁹ The court directly considered whether women from a particular country—Guatemala—can constitute a particular social group.¹⁵⁰ The court did not definitively answer the question, but after recounting three decades of jurisprudence, it insisted upon the importance of the immutable characteristic test.¹⁵¹ The implication of this holding is a new opportunity for victims of gender-based persecution.¹⁵²

A. *Who Is Lesly Perdomo?*

Lesly Perdomo is Guatemalan by birth, but American by experience.¹⁵³ Born in Guatemala, she moved to the United States in 1991 at age fifteen to join her mother.¹⁵⁴ She entered the United States without inspection and without legal status.¹⁵⁵ She has lived in the United States since 1991, completing high school and building a life here.¹⁵⁶ She no longer has any family in Guatemala.¹⁵⁷

149. *See id.* at 666 (noting that court's understanding of particular social group "continues to evolve"); *see also* Gerald Seipp, *A Year in Review: Social Visibility Doctrine Still Alive, but Questioned*, 87 INTERPRETER RELEASES 1417, 1423 (2010) (characterizing *Perdomo* holding as "remarkable").

150. *See Ninth Circuit Finds Guatemalan Women May Constitute a Particular Social Group Eligible for Asylum*, 87 INTERPRETER RELEASES 1427, 1427 (2010) [hereinafter *Ninth Circuit Finds*] (concluding Ninth Circuit's holding that BIA decision was inconsistent with BIA and Ninth Circuit precedent and thus remand is appropriate).

151. *See Perdomo*, 611 F.3d at 666 (reviewing BIA and Ninth Circuit precedent but noting that whether women in particular country can constitute particular social group "remains an unresolved question for the BIA").

152. *See* Seipp, *supra* note 149, at 1423 (noting expectation of developments over whether *Perdomo* holding will be "extended to embrace women in other countries which can be accused of relegating women to an inferior status"); *see also Ruling on Women May Spur Asylum Claims*, *supra* note 5, at A10 (suggesting that *Perdomo* holding may allow many other individuals in similar circumstances to argue for asylum status).

153. *See Perdomo*, 611 F.3d at 664 (considering Perdomo's history and experiences in United States).

154. *See id.* (recounting facts as found by BIA). Perdomo's mother had previously applied for and been denied asylum. *See id.* at 664 n.1 (discussing petitioner's mother's application for asylum based on fear of being killed if forcibly returned to Guatemala).

155. *See id.* at 664 (noting that Perdomo entered United States without inspection and without parole).

156. *See id.* (mentioning Perdomo's U.S. high school education, professional employment as Medicaid account executive, and active participation in local Pentecostal church).

157. *See id.* (considering Perdomo's family ties and noting that she is unmarried and has no children, that her parents are deceased, and that she lives with her stepfather and sister).

In 2003, the INS ordered Perdomo to appear and charged her as removable.¹⁵⁸ Perdomo conceded that she was removable but immediately sought asylum.¹⁵⁹ Before the immigration court, Perdomo argued that, if returned to Guatemala, she would be persecuted because of her extended stay in the United States, her financial success, and her religious affiliation, but primarily because she is a member of the social group of “women between the ages fourteen and forty who are Guatemalan and live in the United States.”¹⁶⁰ Perdomo admittedly had not suffered persecution, but she presented evidence of the high rate of violence against and homicides of Guatemalan women.¹⁶¹

B. *Who the Courts Saw*

The immigration judge found Perdomo to be credible and truthful.¹⁶² The judge nonetheless rejected Perdomo’s request for asylum, withholding of removal, and relief under the Convention Against Tor-

158. *See id.* (discussing start of Perdomo’s immigration proceedings). The INS charged Perdomo as removable under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2006). *See id.* (noting basis for initiating immigration proceedings).

According to United States law, “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General is inadmissible.” 8 U.S.C. § 1182(a)(6)(A)(i). Removal proceedings are initiated when the Department of Homeland Security files the Notice to Appear with the Immigration Judge. *See* INA § 239(a), 8 U.S.C. § 1229 (establishing means of beginning removal proceedings against alien illegally present in United States).

159. *See Perdomo*, 611 F.3d at 664 (acknowledging Perdomo’s concession to removability but fear of being forcibly returned to Guatemala). If an alien in removal proceedings expresses fear of persecution upon return to the alien’s country of origin, the immigration judge must explain to the alien the opportunity to apply for asylum and provide the necessary forms. *See* 8 C.F.R. § 1240.11(c)(1) (2011) (discussing opportunity to apply for asylum at outset of removal proceedings).

160. *See Perdomo*, 611 F.3d at 664 (discussing Perdomo’s basis for asylum claim).

161. *See id.* (acknowledging that petitioner’s claim for asylum is based not on past persecution but fear of future persecution); *see also* Seipp, *supra* note 149, at 1423 (noting introduction of evidence of high rates of “femicide” in Guatemala).

The petitioner provided the immigration court with reports by the Guatemalan Human Rights Commission to demonstrate the attacks on and killings of women in Guatemala, the brutality of these atrocities, their pervasiveness, and the lack of government response to them. *See Ninth Circuit Finds, supra* note 150, at 1427 (discussing documentation provided by petitioner to immigration court to support her fear of future persecution). According to the U. S. Department of State, violence against women remains a serious and widespread problem in Guatemala and many women do not report such violence for fear that the police will not act. *See* U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: GUATEMALA (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm> (finding pervasive violence against women still present in Guatemala).

162. *See Perdomo*, 611 F.3d at 664-65 (considering immigration judge’s evaluation of Perdomo’s testimony).

ture.¹⁶³ The judge based the denial on the belief that Perdomo did not qualify as being a member of a particular social group according to asylum law.¹⁶⁴

On appeal, the BIA considered and rejected the proposed particular social group as too broad to qualify under asylum law.¹⁶⁵ The BIA also rejected the respondent's revised particular social group of "all women in Guatemala."¹⁶⁶ The BIA held that this group was even broader—a "demographic division rather than a cognizable social group under the INA"—and upheld the immigration judge's denial of relief.¹⁶⁷

C. *The Ninth Circuit Clarifies the View*

In its published decision granting the petition for review and remanding the case to the BIA, the Ninth Circuit focused exclusively on women as a particular social group.¹⁶⁸ Following its own formulaic approach to such questions, the court began by acknowledging the lack of clarity in the asylum statute and ultimately looked to the oft-cited *Acosta* decision.¹⁶⁹ Citing to the BIA application of *Acosta*, the court noted that a particular social group should be understood as similar to the other protected grounds and that "sex" was listed by the BIA as an example of a particular social group.¹⁷⁰ Acknowledging that the analysis is not so simply concluded, the court noted the BIA's caveats that a group must have social visibility and particularity, but not voluntary association, cohesiveness, or strict homoge-

163. *See id.* (mentioning immigration judge's claimed sympathy with Perdomo because of legitimate but ineligible fear of future persecution).

164. *See id.* at 665 (recognizing immigration judge's belief that women cannot constitute particular social group for asylum relief).

165. *See id.* (reviewing BIA holding on appeal).

166. *See id.* (considering basis of BIA affirmation of immigration judge's ruling). For a discussion of the persecution faced by women generally in Guatemala, see Reimann, *supra* note 6, at 1207-15.

167. *See Ninth Circuit Finds, supra* note 150, at 1427 (reviewing BIA opinion and basis for denial of relief sought by petitioner).

168. *See Perdomo*, 611 F.3d at 665, 669 (acknowledging that whether proposed social group is eligible for asylum relief is question of law to be reviewed de novo but also that, according to agency rules, case should be remanded in first instance to agency to make legal determination entrusted to it).

169. *See id.* at 665-66 (citing lack of clear direction given by statute for interpretation of term); *see, e.g., Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1091 (9th Cir. 2000) (finding insufficient explanation in statute and thus looking to *Acosta*), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2009); *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1575-76 (9th Cir. 1986) (emphasizing attempt to look to international protocol for guidance and, finding insufficient explanation, applying statutory interpretation); *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (looking beyond statute for definition of particular social group), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

170. *See Perdomo*, 611 F.3d at 666 (emphasizing immutable characteristic test coined by *Acosta*).

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 357

neity.¹⁷¹ *Kasinga*, the court noted, showed the BIA's willingness to recognize women of a particular tribe as a particular social group.¹⁷² Whether women of a particular country alone constitute a particular social group remained an open question for the BIA.¹⁷³

The court then turned to its own case law.¹⁷⁴ The court acknowledged the exacting standard established by *Sanchez-Trujillo*, but also recognized that this requirement was softened by *Hernandez-Montiel*.¹⁷⁵ When it applied this new standard in *Mohammed*, the court did not definitively hold that women could constitute a particular social group; however, the court noted that in *Mohammed*, recognizing women as a social group was the only plausible result.¹⁷⁶

Turning to Perdomo's request for review, the Ninth Circuit considered only whether the BIA erred in finding that "Guatemalan women" could not constitute a particular social group.¹⁷⁷ The court criticized the BIA for relying on *Sanchez-Trujillo* without applying the *Hernandez-Montiel* alternative.¹⁷⁸ Characterizing *Hernandez-Montiel* as based upon *Acosta*, the court reasoned that *Hernandez-Montiel* allowed broad and diverse groups to qualify.¹⁷⁹ Groups that were deemed ineligible because of breadth were rejected not because of their size, but because of the insufficient unifying characteristic.¹⁸⁰ The court explicitly rejected a holding that a group

171. *See id.* (citing *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69 (B.I.A. 2007), as recognizing certain caveats on particular social groups but not others).

172. *See id.* (implying that *Kasinga* was demonstrative application of how limits on particular social groups should and should not be used).

173. *See id.* (noting that question of whether women in particular country "could constitute a protected social group remains an unresolved question for the BIA").

174. *See* Seipp, *supra* note 149, at 1423 (noting court's review of Ninth Circuit precedent and its recognition that females of particular clan had previously been seen as particular social group).

175. *See Perdomo*, 611 F.3d at 666 (admitting that Ninth Circuit was only circuit requiring voluntary association required by *Sanchez-Trujillo* and implying that *Hernandez-Montiel* signified retreat from this position).

176. *See id.* (noting that Eighth Circuit agreed with and adopted approach taken by Ninth Circuit in recognizing Somali females as particular social group).

177. *See id.* at 667-68 (referring to precedent in agency law that reviewing court will only review grounds relied upon by agency and remand case to agency for reconsideration in light of court's holding).

178. *See id.* at 668 (acknowledging that BIA applied *Sanchez-Trujillo* precedent but insisting that new, two-pronged test under *Hernandez-Montiel* permits recognition of broad groups).

179. *See id.* (referencing previous Ninth Circuit decisions, in light of *Hernandez-Montiel*, as permitting groups such as homosexuals and gypsies).

180. *See id.* (distinguishing between Ninth Circuit's rejection of certain broadly defined groups as failing to have qualifying immutable characteristic and BIA's rejection of petitioner's claimed social group despite possession of potentially qualifying immutable characteristic).

might not qualify on percentage of the foreign population alone.¹⁸¹ Thus, the court remanded the case to the BIA to determine whether women can constitute a particular social group.¹⁸²

D. *An Even Clearer View*

Asylum status was not meant to protect every person fleeing persecution, but those who qualify for protection cannot and should not be stagnant.¹⁸³ The international community has recognized that many individuals, particularly women, who were not cognizable refugees in 1951, must be seen as such today.¹⁸⁴ While respecting this delicate legal balance, the Ninth Circuit stopped short of reaching a conclusion in the debate over gender-based particular social groups, but the only “plausible” outcome is that women should qualify for protection.¹⁸⁵

The Ninth Circuit recognized that, for two decades, its own precedent inappropriately limited eligibility for asylum relief.¹⁸⁶ Other circuits have similarly adopted their own varying and contradictory tests for determining what particular social groups can qualify.¹⁸⁷ In light of the international consensus and United States jurisprudence, however, the most appropriate test is the undiluted immutable characteristic test established

181. *See id.* at 669 (citing previous Ninth Circuit reversal of BIA decision for holding that proposed social group constituted too large percentage of foreign country).

182. *See Seipp, supra* note 149, at 1423 (reviewing remand to BIA to determine first whether women in Guatemala can constitute particular social group and second whether petitioner demonstrated fear on account of membership in that group).

183. *See Perdomo*, 611 F.3d at 666 (considering past precedent in evaluation of gender-based claims and noting continued evolution of understanding of criteria); *Matter of Acosta*, 19 I. & N. Dec. 211, 211, 232 (B.I.A. 1985) (recounting requirements for asylum and noting that asylum applicant must show both persecution according to established burden of proof and statutory requirement of persecution on account of enumerated grounds), *overruled on other grounds by Matter of Mogharabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

184. *See Gender Guidelines, supra* note 96, ¶ 1 (identifying directives as providing means for adjudicators to understand 1951 Convention with sensitivity to needs of women).

185. *See Perdomo*, 611 F.3d at 667-68 (reasoning that *Mohammed's* recognition of women of particular tribe as legitimate particular social group was only “plausible” holding when considering whether women can constitute particular social group but acknowledging that agency rules require that case be remanded to BIA first so that BIA has opportunity to review case in light of court’s holding).

186. *See id.* at 666 (considering how Ninth Circuit’s holding in *Hernandez-Montiel* had softened test created by *Sanchez-Trujillo* in part because Ninth Circuit was only circuit with voluntary association requirement).

187. *See id.* (mentioning that Ninth Circuit is only circuit to require voluntary association); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1092 (9th Cir. 2000) (noting that Seventh Circuit has rejected voluntary association test as inconsistent with *Acosta*), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2009); *see, e.g., Ananeh-Firempong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985) (requiring that members of proposed group share common background, habits, or social status).

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 359

by *Acosta*.¹⁸⁸ The Ninth Circuit correctly recognized the preeminence of this test but must now permit its application.¹⁸⁹

When gender-based persecution is found, women must be recognized as a particular social group as envisioned by asylum law.¹⁹⁰ The combined influence of implicit and explicit discrimination against women among political and legal systems and a culture of impunity for men who commit gender-based crimes perpetuate violence against women, an ongoing problem in Guatemala and many other countries.¹⁹¹ As a result, women are victimized solely because, as women, they have been delegated to a subordinate role that the male-dominated society has determined to be unworthy of protection.¹⁹² The victims here share an immutable characteristic fundamental to their identity that they cannot change—femaleness—and they are persecuted on account of their membership in the particular social group of women.¹⁹³

Although the Ninth Circuit rhetorically deferred to the BIA's expertise to determine whether women of a particular nationality can constitute a particular social group, the court left the BIA very little to decide.¹⁹⁴ The BIA must apply the immutable characteristic test and must consider gender an immutable characteristic.¹⁹⁵ The BIA cannot dilute this test

188. See *Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993) (holding that, in absence of clear legislative direction, circuit court must defer to administrative agency and thus adopt immutable characteristic test specified in *Acosta*).

189. See *Hernandez-Montiel*, 225 F.3d at 1093, 1093 n.6 (adopting disjunctive test allowing either immutable characteristic or voluntary association tests to be applied but specifically acknowledging intentional harmonization between Ninth Circuit precedent and *Acosta* analysis).

190. See *Binder*, *supra* note 24, at 194 (concluding that violence against women has been found to be pervasive violation of human rights and that, where such violence continues to occur, states must adapt refugee laws to provide relief to these women).

191. See *Reimann*, *supra* note 6, at 1200 (discussing endemic situation of violence against women in Mexico and resulting claims made by many of these women for asylum in United States); see also U.S. DEP'T OF STATE, *supra* note 161 (discussing violence against women and lack of reporting and government response in Guatemala).

192. See *Reimann*, *supra* note 6, at 1202, 1215 (implying that this situation means that gender constitutes exactly kind of social group intended by asylum law because Guatemalan women are persecuted because they are Guatemalan women, thus nexus between group and persecution helps define group).

193. See *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (asserting that women suffering victimization unique to women suffer such persecution on account of their identity as women).

194. See *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010) (citing precedent that circuit court is obligated to remand case to be reviewed by BIA in light of circuit court's holding (citing *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam))).

195. See *id.* at 666-67 (indicating that preeminent test must be immutable characteristic test, citing as support *Hernandez-Montiel* and past reliance in *Mohammed* on U.S. Citizenship and Immigration Service (USCIS) "Gender Guidelines" and UNHCR guidelines (citing *Mohammed*, 400 F.3d at 797-98; *Hernandez-Montiel*

with additional requirements.¹⁹⁶ Finally, the BIA cannot reject gender on pragmatic or ideological grounds.¹⁹⁷ Implying only one possible outcome, the remand order seems little more than a procedural necessity.¹⁹⁸

VI. TAKING THE PLUNGE

The current administration has signaled a new, supportive position towards gender-based claims through its response to the ongoing *Matter of L-R*.¹⁹⁹ In *L-R*, the victim of two decades of domestic violence was denied asylum based on a failure to establish membership in a statutorily protected group.²⁰⁰ Under President Obama's administration, the Department of Homeland Security (DHS) filed a brief arguing that, while a particular social group that is defined by the persecution suffered is impermissibly circular, a group defined by gender-status and societal subordination may be a cognizable social group.²⁰¹ Thus, the government joined with the asylum applicant in arguing that the case should be remanded to the immigration court for reconsideration of her proposed social

v. I.N.S., 225 F.3d 1084, 1092 (9th Cir. 2000), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2009)).

196. *See id.* at 669 (noting that BIA failed to appropriately apply two-pronged test created by *Hernandez-Montiel* and that BIA contradicted its own precedent as established by *Acosta*).

197. *See id.* (rejecting any inclusion of numerosity argument in basis for denying application of particular social group).

198. *See id.* (remanding case to BIA for consideration of this question after impliedly holding that precedent from *Hernandez-Montiel* and *Mohammed* show that women can constitute particular social group).

199. *See Matter of L.R.*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php>, (last visited Oct. 8, 2010) (discussing background of *Matter of L-R* and effect of outcome on gender-based asylum claims generally).

200. *See id.* (chronicling abuse suffered by victim in case but noting that immigration judge accepted argument by opposing counsel that proposed social group did not permit asylum protection). The victim, a Mexican woman, suffered continual sexual, physical, and emotional abuse at the hands of her common-law husband. *See id.* (describing abuse suffered). She sought protection from the police and courts but found none. *See id.* (noting that official sought to exploit victim's suffering by demanding sex in return for protection). After being denied asylum by the immigration judge, the victim appealed to the BIA, which requested supplementary briefs addressing recent decision by the Attorney General to grant asylum in *R-A*. *See* Brief for Respondent at 2, *Matter of L-R* (B.I.A. Mar. 10, 2010) (on file with author) (noting request by BIA for supplemental filing to address impact of *R-A*).

201. *See* Dep't of Homeland Sec.'s Supplemental Br. at 11-16, *Matter of L-R* (B.I.A. Apr. 13, 2009) (on file with author) (arguing that social group originally proposed by respondent relied upon persecution for definition of group, which is impermissibly circular, but that in certain situations victims of domestic violence may share immutable characteristic because of status in society and thus may form qualifying particular social group), *available at* <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>.

2011] OPENING THE FLOODGATES OR FILLING THE GAP? 361

group.²⁰² The applicant was subsequently granted asylum.²⁰³ While the willingness to recognize gender-based social groups is not binding on immigration courts, the agency's position is binding on asylum officers and should be followed by other DHS attorneys in future proceedings.²⁰⁴

There are still questions that must be answered before Ms. Perdomo will be permitted to stay in the United States.²⁰⁵ Even if Guatemalan women can constitute a particular social group, the BIA may find that her fear of future persecution is not on account of her membership in that group.²⁰⁶ Her case provides hope, however, for women suffering persecution around the world on account of their identity as women.²⁰⁷

There is a general trend throughout the circuit courts towards affirming the pure *Acosta* framework and making way to allow gender alone to define a particular social group.²⁰⁸ The Ninth Circuit's recent rulings prior to *Perdomo* had already seemed to silently overrule the precedent of *Sanchez-Trujillo*.²⁰⁹ The Ninth Circuit has now directly ordered the BIA to answer the question of whether gender-based social groups are cognizable for asylum law.²¹⁰ Of course, the BIA could seek to sidestep the court's reasoning or allow petitioner's request to slip by in an unpublished decision.²¹¹ Nonetheless, *Perdomo* has taken the Ninth Circuit, and all circuits

202. See *id.* at 29 (concluding that while suggested particular social group proposed before immigration judge was not eligible for protection, "unique complexities in this area of law" justify remand for further consideration).

203. See Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14 (noting "favorable recommendation" by officials from Department of Homeland Security and novel claims brought by attorneys to show likelihood of continued persecution).

204. See *Matter of L.R.*, *supra* note 199 (discussing impact of *L-R* on other domestic violence claims and on gender-based claims generally).

205. See Seipp, *supra* note 149, at 1423 (referencing questions that Ninth Circuit directed BIA to answer on remand).

206. See *id.* (remanding case "for the BIA to determine in the first instance whether women in Guatemala constitute a particular social group, and, if so, whether Perdomo has demonstrated a fear of persecution *on account of* her membership in such a group" (emphasis added)).

207. See *Ruling on Women May Spur Asylum Claims*, *supra* note 5, at A10 (suggesting that *L-R* may allow many others in similar circumstances to argue for asylum status).

208. See Anker, *supra* note 5, at 202 (suggesting that reluctance by circuit courts to recognize gender-based particular social groups is ending based on recent, gradual changes by courts).

209. See *id.* (referencing *Mohammed* as important recent case that, while not formally permitting women to constitute independent particular social groups, applied Ninth Circuit and BIA precedent to show that there was no alternative than to recognize such groups).

210. See *Ninth Circuit Finds*, *supra* note 150, at 1428 (reviewing case and considering basis for remand to BIA in light of cited precedent).

211. See GALLAGHER, *supra* note 13, § 13-208 (noting that even though unpublished decisions by BIA are not binding on other parties these decisions are considered demonstrative of BIA's position on issues).

that follow, to the brink of allowing gender alone to constitute a particular social group; the BIA must take the plunge.²¹²

212. See *Fed. Court Opens Door for Guatemalan Asylum Claim*, *supra* note 5 (noting optimism by counsel that BIA will adopt reasoning followed by Ninth Circuit and grant asylum). In October 2010, the Ninth Circuit implicitly affirmed its holding in *Perdomo* stating, "We recently held that the BIA's determination that a social group consisting of all women in Guatemala was not cognizable conflicted with its own precedent and remanded the case for further proceedings." *Rosario-Lopez v. Holder*, 401 F. App'x 276, 277 (9th Cir. 2010) (citing *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010)).