

Immigration Law. Asylum. Ninth Circuit Holds That Persecuted Homosexual Mexican Man with a Female Sexual Identity Qualifies for Asylum under Particular Social Group Standard. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)

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IMMIGRATION LAW — ASYLUM — NINTH CIRCUIT HOLDS THAT PERSECUTED HOMOSEXUAL MEXICAN MAN WITH A FEMALE SEXUAL IDENTITY QUALIFIES FOR ASYLUM UNDER PARTICULAR SOCIAL GROUP STANDARD. — *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

Asylum jurisprudence has historically presented several substantial obstacles to those seeking refuge in the United States. Chief among these challenges has been the shifting scope of the “particular social group” standard: in order to be eligible for asylum, refugees must belong to a particular social group if they do not qualify under another protected category. As a result of this and other challenges, many applicants have been denied relief only to face violence and abuse at the hands of the persecutors they tried to flee. The 1951 United Nations Convention Relating to the Status of Refugees (Convention)¹ and the 1967 Protocol Relating to the Status of Refugees (Protocol)² supply the basis for the current American asylum regime. According to the Convention, a refugee is someone who, “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.”³ Congress never ratified the Convention, but in 1969 it joined the Convention’s successor, the Protocol.⁴ The United States essentially adopted the definition of a refugee supplied by the Convention and the Protocol when it enacted the Refugee Act of 1980 (Refugee Act),⁵ which amended the Immigration and Nationality Act (INA).⁶ Last August, in *Hernandez-Montiel v. INS*,⁷ the Ninth Circuit, in finding that a homosexual Mexican man with a female sexual identity could qualify for asylum, offered a humanitarian conception of the “particular social group” standard that is

¹ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

² Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter Protocol].

³ Convention, *supra* note 1, 189 U.N.T.S. at 152.

⁴ T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 924 (1992). The Protocol was established because the Convention only applied to those persons who became refugees because of events that occurred before January 1, 1951. See Convention, *supra* note 1, 189 U.N.T.S. at 152. The 1967 Protocol adopted the general provisions of the 1951 Convention without the time limitation. See Protocol, *supra* note 2, 606 U.N.T.S. at 268.

⁵ Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (1980).

⁶ 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. II 1996).

⁷ 225 F.3d 1084 (9th Cir. 2000).

faithful to the standard's origins and comports with the intent of the Convention, the Protocol, and the Refugee Act.⁸

On October 12, 1994, Geovanni Hernandez-Montiel crossed the Mexican border and entered the United States without inspection.⁹ He filed an application for asylum and withholding of deportation¹⁰ on February 22, 1995.¹¹ At his asylum hearing, Hernandez-Montiel testified that he was persecuted in his native Mexico on account of his homosexuality and his female sexual identity.¹² In addition to ostracism at school and rejection by his parents, he also suffered repeated abuse at the hands of Mexican police officers. He was harassed by several officers, often strip-searched, and threatened with false claims that his behavior and his choice to socialize with other men who were perceived to be gay were illegal.¹³ In 1992, when he was only fourteen years old, Hernandez-Montiel was forced to perform oral sex on a police officer¹⁴ and was threatened with imprisonment and a beating if he reported the incident.¹⁵ On another occasion, police officers raped him at gunpoint.¹⁶

The Immigration Judge (IJ) denied Hernandez-Montiel's application for asylum¹⁷ and applied the standard defining membership in a "particular social group" that the Board of Immigration Appeals (BIA) articulated in *Matter of Acosta*:¹⁸ the particular social group must consist of persons who "share a common, immutable characteristic

⁸ This decision comes at a time when persecution against homosexuals abounds. As one commentator notes: "In a time marked by dramatic global change, women and men persecuted because they are lesbian or gay form part of the growing pool of international refugees." Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 605 (1993) (footnote omitted).

⁹ *Hernandez-Montiel*, 225 F.3d at 1089.

¹⁰ Withholding of deportation applies when an alien has been deemed "removable" but the "Attorney General decides that the alien's life or freedom would be threatened in [the country of origin] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (Supp. II 1996).

¹¹ *Hernandez-Montiel*, 225 F.3d at 1089.

¹² Hernandez-Montiel discovered that he was attracted to other males when he was eight years old. *Id.* at 1087. Shortly thereafter he frequently began to assume a stereotypical female role, dressing and behaving as a woman. *Id.* Hernandez-Montiel was eventually expelled from school because he "refused" to behave and dress like other boys his age, and after his expulsion Hernandez-Montiel's parents banned him from their house. *Id.* at 1088.

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1089. The IJ also denied Hernandez-Montiel's request for voluntary departure. *Id.* Voluntary departure occurs when a removable alien is "given the opportunity to leave the country before the issuance of a removal order." THOMAS ALEXANDER ALENIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 758 (4th ed. 1998); *see also* 8 U.S.C. § 1229(c) (Supp. II 1996).

¹⁸ 19 I. & N. Dec. 211, 1985 WL 56042 (B.I.A. 1985).

... that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹⁹ The IJ noted that Hernandez-Montiel’s “decision to dress as a [woman] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that [he] himself may not view his dress as being so fundamental to his identity that he should not have to change it.”²⁰ On the basis of this finding, the IJ concluded that Hernandez-Montiel failed to show that he had been persecuted on account of his membership in a particular social group, as required by the statute.²¹ The BIA upheld the IJ’s ruling.²²

The Ninth Circuit granted Hernandez-Montiel’s petition for review and remanded the case to the BIA, accepting his claim that he had been persecuted in the past and faced a clear probability of persecution if forced to return to Mexico.²³ In so ruling, the Ninth Circuit reconciled two seemingly conflicting standards for defining a “particular social group.” Writing for the court, Judge Tashima²⁴ noted that other circuits had adopted *Acosta*’s immutable characteristic standard.²⁵ The Ninth Circuit had departed from *Acosta*, however, in *Sanchez-Trujillo v. INS*,²⁶ holding that a particular social group:

implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.²⁷

The *Hernandez-Montiel* court reconciled these definitions in one expansive standard, holding that a particular social group “is one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”²⁸

The court found that Hernandez-Montiel had proved that his female sexual identity was an immutable characteristic. Judge Tashima recognized that sexual identity is “inherent to one’s very identity as a

¹⁹ *Id.* at 233.

²⁰ *Hernandez-Montiel*, 225 F.3d at 1089 (quoting the unpublished decision of the IJ).

²¹ *Id.*; see 8 U.S.C. § 1158 (Supp. II 1996).

²² *Hernandez-Montiel*, 225 F.3d at 1089.

²³ See *id.* at 1099.

²⁴ District Judge Schwarzer joined Judge Tashima’s opinion.

²⁵ *Hernandez-Montiel*, 225 F.3d at 1092. See, e.g., *Lwin v. INS*, 144 F.3d 505, 511–12 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233, 1239–40 (3rd Cir. 1993); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

²⁶ 801 F.2d 1571 (9th Cir. 1986).

²⁷ *Id.* at 1576.

²⁸ *Hernandez-Montiel*, 225 F.3d at 1093 (emphasis added). In 1990, the BIA established that homosexuals can comprise a particular social group. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

person,”²⁹ and further outlined how gay men with female sexual identities in Mexico comprise a very “particular” social group subject to targeted persecution.³⁰ He noted that in Mexico, gay men with female sexual identities are treated differently than homosexual men in general.³¹

In order to convince the court to withhold deportation, Hernandez-Montiel first had to show that he was targeted “on account of” his membership in a particular social group. To satisfy this requirement, he had to prove that his sexual identity was “a significant motivation for the violence and abuse he endured.”³² The majority found that Hernandez-Montiel was not assaulted simply because of his clothes, hair, and nails, but rather because these attributes constituted “outward manifestations of his sexual orientation.”³³ Moreover, the fact that other homosexual men had not been similarly persecuted indicated that he was targeted *because* of his particular group membership. Second, Hernandez-Montiel had to show that he was “persecuted.” According to Judge Tashima, persecution³⁴ must be “inflicted either by the government or by persons or organizations which the government is unable or unwilling to control.”³⁵ Judge Tashima noted that the rape and sexual assaults Hernandez-Montiel endured were persecution.³⁶ Because Hernandez-Montiel had been assaulted by police officers, the state-action component of persecution was also met.³⁷

²⁹ *Hernandez-Montiel*, 225 F.3d at 1093. In a similar vein, Suzanne Goldberg argues: [L]ike race, ethnicity, religion, and political opinion, sexual orientation cannot be altered or renounced according to the dictates of a government in power. Regardless of whether sexual orientation has a genetic origin, lesbian women and gay men cannot disassociate themselves from the basis of their persecution. To that extent, sexual orientation is indeed immutable.

Goldberg, *supra* note 8, at 614.

³⁰ *Hernandez-Montiel*, 225 F.3d at 1094. The court relied heavily on the testimony of Thomas M. Davies, Jr., a professor at San Diego State University who had testified as an expert witness on Latin American history and culture in Hernandez-Montiel’s hearing before the IJ. *Id.*

³¹ *See id.* (“[G]ay men with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical ‘female,’ *i.e.*, passive, role in gay relationships.”).

³² *Id.* at 1096.

³³ *Id.*

³⁴ Persecution is defined as the “infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” *Id.* at 1097 (quoting *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)) (internal quotation marks omitted).

³⁵ *Id.* at 1097 (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)) (internal quotation marks omitted).

³⁶ *See id.* at 1097–98. Judge Tashima referred to studies documenting the severe and long-term psychological effects of rape. *See id.* (citing *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996)).

³⁷ The majority also noted that this pattern of past persecution created a presumption of future persecution, and as the INS failed to present evidence that the government of Mexico had taken any steps to “curb sexual orientation-based violence,” Hernandez-Montiel faced a “clear probability” of persecution if removed to Mexico. *See id.* at 1099. Judge Tashima concluded that

Hernandez-Montiel constitutes an important legal development because it defines "particular social group" in a way that embraces individuals who are actually persecuted — even if they fail to qualify for asylum under the statute's other enumerated categories. The standard presented in *Hernandez-Montiel* provides a mechanism that meets the needs of those who do not fit neatly into a particular racial or religious group, but who are nevertheless persecuted because of something immutable or fundamental to their persons.

The *Hernandez-Montiel* holding is consistent with the intent of both Congress when it enacted the Refugee Act and the parties responsible for the 1951 Convention and the 1967 Protocol.³⁸ A review

Hernandez-Montiel was entitled to asylum and withholding of deportation, and remanded the case to the BIA with instructions to act accordingly.

Judge Brunetti filed a short concurrence, agreeing with the majority's result that *Hernandez-Montiel* was entitled to asylum and withholding of deportation but disagreeing with the broad reasoning of the court. *Id.* at 1099 (Brunetti, J., specially concurring). Judge Brunetti would have ruled in favor of *Hernandez-Montiel*'s petition based on his testimony regarding his physical and mental state and his well founded fear of persecution were he compelled to return to Mexico. *Id.* at 1099–1100.

³⁸ Recent international cases have acknowledged that a broad reading of the immutable characteristic component is critical to protecting members of particular social groups for whom the law was intended. *See, e.g., A v. Minister for Immigration & Ethnic Affairs*, (1997) 142 A.L.R. 331, 341 (Austl.) (finding nothing that "would suggest that the uniting particular must be voluntary"); *Ward v. Attorney Gen.*, [1993] 2 S.C.R. 689, 733–39 (Can.) (criticizing the limited voluntary association standard); *Regina v. Immigration Appeal Tribunal ex parte Shah*, [1999] 2 All E.R. 545 (H.L.) (Eng.) (discussing the inadequacy of the limited standard). The Supreme Court of Canada arrived at a definition of "particular social group" similar to that of the *Hernandez-Montiel* court:

(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

Ward, 2 S.C.R. at 739.

One commentator notes the breadth of Canada's approach, now echoed in *Hernandez-Montiel*: "*Acosta* searches only for immutable characteristics or concerns fundamental to identity; in Canada the analysis extends further . . ." 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, 562 (1993). Others claim that the definition of "particular social group" is still too narrow: "It is this idea of the social group as a group *in* society and therefore defined by that society which requires greater emphasis [P]erception of the group by others, especially by other dominant groups, is particularly important." Guy S. Goodwin-Gill, *Judicial Reasoning and 'Social Group' After Islam and Shah*, 11 INT'L J. REFUGEE L. 537, 542 (1999); *see also* Carolyn Patty Blum, *Refugee Status Based on Membership in a Particular Social Group: A North American Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 81, 91 (Geoffrey Coll & Jacqueline Bhabha eds., 1992) (protesting the focus "on the internal characteristics of the group at issue, exclusive of consideration of any perceptions of the group"). Blum would broaden "particular social group" qualifications to include shared past experience. Blum, *supra*, at 91. In evaluating *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991), which involved an asylum claim by women who had been victims of rape and brutality by guerillas in El Salvador, Blum notes that the "court fail[ed] to grasp that it is the applicant's prior brutal victimization that places her in a situation of continuing vulnerability, based not just on her gender and age but also on her experience as a victim." *Id.*

of the Convention's development indicates that the Convention was intended to include "particular social group" as a catch-all category for persecution not tied directly to race, religion, or even political opinion.³⁹ "The Conference of Plenipotentiaries, which finalized the draft Convention, recognized that persecutors had sometimes victimized groups other than those identifiable by race, nationality, religion, or political conviction. [The signatories] sought to protect victims of persecution regardless of the persecutors' motives"⁴⁰ Though clearly a victim of persecution, Hernandez-Montiel would not have been protected under a restrictive reading of the "particular social group" standard governing asylum.

The *Hernandez-Montiel* court's definition also more closely reflects Congress's intent in adopting the Refugee Act than did previous standards. The legislative history of the Refugee Act states that Congress's definition was "based directly upon the language of the Protocol and is intended [to be] construed [broadly, as is] consistent with the Protocol."⁴¹ Some scholars argue that "particular social group" was left intentionally undefined, "to allow for situations that had been overlooked and to retain flexibility in dealing with future exigencies."⁴² Throughout the legislative debates surrounding the Act, "[t]here was consistent agreement . . . on certain principles: to strengthen and emphasize the humanitarian and nondiscriminatory underpinnings of the legislation."⁴³ As one scholar explains, the "derivation of the social group concept, as well as international and domestic practice and understanding, show that the concept is a flexible one, designed to anticipate varied forms of invidious persecution against aggregations of humanity."⁴⁴ The *Hernandez-Montiel* court's incorporation of both immutable characteristics and voluntary associations is not all-encompassing, but it helps "compensate for the narrower categories'

³⁹ In providing guidance to governments on the practice and procedures for determining refugee status, the UN High Commissioner for Refugees writes that a particular social group "normally comprises persons of similar background, habits or social status" — a remarkably broad standard. OFFICE OF THE UNITED NATIONS 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 7 (1988).

⁴⁰ Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 740, 748 (1989).

⁴¹ H.R. CONF. REP. NO. 96-781, at 20 (1980).

⁴² Parish, *supra* note 4, at 928.

⁴³ Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 50 (1981).

⁴⁴ 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, 67 (1983); see Graves, *supra* note 40, at 751 ("The Refugee Act was viewed as a matter of urgent humanitarian concern and an international obligation, not as just another category of immigration.").

inability to encompass the full range of persecution," as Congress and basic human rights norms demand.⁴⁵

Many persons similarly situated to Hernandez-Montiel would likely not qualify as refugees because their personal identities might not constitute "voluntary associational relationships."⁴⁶ Judge Tashima recognized the value of an associational test, but only as an adjunct to the immutable standard of *Acosta*.⁴⁷ The resulting test of *Hernandez-Montiel* provides guidance for future immigration judges in evaluating asylum claims under the expansive definition of "particular social group."⁴⁸ Courts should not shy from applying this definition liberally, particularly because it respects Congress's intent to protect those not easily categorized by race, religion, nationality, or political opinion. The Ninth Circuit, in enumerating a permissive standard and granting asylum to Hernandez-Montiel, has moved one step closer to freeing people from persecution of all kinds.

⁴⁵ Graves, *supra* note 40, at 771. The *Sanchez-Trujillo* "ruling [contradicted] Congress'[s] stated purpose to 'respond to the urgent needs of persons subject to persecution in their homelands, . . . [and] to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.'" John Hans Thomas, Note, *Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in Lwin v. INS*, 1999 BYU L. REV. 799, 806-07 (quoting Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102).

⁴⁶ The *Sanchez-Trujillo* definition is also problematic because "the words 'social group' imply a recognized grouping within a society, a group that shares some common experience. A voluntary associational relationship is not necessarily a factor in the makeup of such a group. Examples of this kind of social group could include students, gay people, bricklayers, or the bourgeoisie." Daniel Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar* — *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 923 (1987).

⁴⁷ In *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1175, 1177 (9th Cir. 2001), the Ninth Circuit recently reaffirmed *Hernandez-Montiel*, but explained that the *Sanchez-Trujillo* voluntariness component is not eliminated simply because an immutable characteristic is also relevant.

⁴⁸ On December 7, 2000, the Department of Justice's Immigration and Naturalization Service (INS) responded to the need for clarification of asylum standards by proposing regulations to amend section 208 of the INA, 8 U.S.C. § 1158 (Supp. II 1996) (governing asylum). In these regulations, the INS presents a definition of "particular social group" that encompasses the concepts articulated in *Hernandez-Montiel*. See *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). The proposed regulations note that "[t]o ensure uniform and fair administrative adjudications of particular social group asylum claims, this rule clarifies that the Department views the *Sanchez-Trujillo* factors as considerations that may be relevant in some cases, but not as requirements for a particular social group." *Id.* at 76,594.