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PERDOMO v. HOLDER: THE CONTINUING STRUGGLE TO DEFINE THE CONCEPT OF A PARTICULAR SOCIAL GROUP

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Abstract: Qualifying for asylum requires that an applicant be considered a refugee. In order to qualify, an applicant bears the burden of demonstrating persecution or a well-founded fear of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group. Often, gender-based asylum claims can only proceed under the particular social group category. The Ninth Circuit's recent decision in *Perdomo v. Holder* highlights the court's struggle to identify a coherent and workable definition for a particular social group and the consequent adverse effect on gender-based asylum claims. This Comment explores the Ninth Circuit's definition of a particular social group as well as the Board of Immigration Appeals' conflicting definition. By examining *Perdomo* in light of these divergent definitions, this Comment demonstrates the need for clarification so that confusing and unnecessary language does not continue to create problems for deserving applicants. This Comment ultimately concludes that the Ninth Circuit should adopt the Board of Immigration Appeals' definition in order to provide greater consistency and clarity in asylum law.

INTRODUCTION

Even if a woman can gain the sympathy of an Immigration Judge (IJ) for having been raped, mutilated, and repeatedly beaten, she may not find refuge in the United States.¹ It is often the case that a woman is not targeted for such heinous crimes because of her race, religion,

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¹ See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 908–10, 914, 920 (B.I.A. 1999) (denying the asylum application of a woman because she could not define an acceptable social group, despite the fact that she was repeatedly sodomized, raped, and beaten by her husband). In 2009, roughly fourteen years after the applicant, Rody Alvarado Pena, first filed for asylum, the Department of Homeland Security filed a one-paragraph brief indicating that she was eligible for asylum as a discretionary matter. See Sarah Rogerson, *Waiting for Alvarado: How Administrative Delay Harms Victims of Gender-Based Violence Seeking Asylum*, 55 WAYNE L. REV. 1811, 1812, 1823 (2009). Acquiescing to the Department of Homeland Security, the IJ granted asylum without even issuing an opinion; thus undercutting any precedential value the grant of asylum might have. See *id.* at 1823.

nationality, or political opinion.² Unless she can show her persecution is a result of her membership in a particular social group (PSG), therefore, she will not be granted asylum in the United States and the horrific stories she will be forced to share will, in the end, mean nothing.³ What will satisfy the definition of PSG?⁴ Oftentimes, it is impossible to tell.⁵

Although the United States holds itself out as a beacon of hope and opportunity to those seeking refuge, the country has struggled to provide consistent and uniform standards for the treatment of refugees.⁶ Recognizing this deficiency in asylum law, the United States enacted the Refugee Act of 1980, officially adopting the definition of “refugee” first codified in the 1951 United Nations Convention Relating to the Status of Refugees.⁷ This Convention articulated the five categories—race, re-

² See *id.*

³ See 8 U.S.C. § 1101(a)(42)(A) (2006); see also *Re-A*, 22 I. & N. Dec. at 914, 919–20 (finding that, although the applicant’s injuries proved persecution, the harm inflicted was not on the basis of a statutorily protected ground).

⁴ Compare *Re-A*, 22 I. & N. Dec. at 917 (“‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination’ is not a particular social group.”), with *id.* at 935 (Guendelsberger, J., dissenting) (“Social groups may be defined more or less broadly depending upon the level of generality of the defining characteristics [The IJ] could have legitimately broadened the perspective to include all Guatemalan women or, possibly, all married Guatemalan women as the particular social group.”).

⁵ See B.J. Chisholm, Comment, *Credible Definitions: A Critique of U.S. Asylum Law’s Treatment of Gender-Related Claims*, 44 How. L.J. 427, 432–33 (2001) (“Confusion surrounding the contours of the social group definition has resulted in asylum applicants proposing a broad range of group definitions, as they attempt to assign words and boundaries to their experiences of persecution.”); see also Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 376–78 (2010) (arguing that courts deny asylum when the prior persecution is based solely on applicants’ gender).

⁶ See, e.g., Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102, 102; Refugee and Asylum Procedures, 46 Fed. Reg. 45,116, 45,116 (Sept. 10, 1981) (codified at 8 C.F.R. pts. 207, 209). The Refugee Act of 1980 specifically declared that “the historic policy of the United States [was] to respond to the urgent needs of persons subject to persecution in their homelands” Refugee Act of 1980 § 101(a). Congress further asserted that the purpose of the Refugee Act of 1980 was “to provide a permanent and systematic procedure for the admission to this country of refugees” *Id.* § 101(b). Unfortunately, as recently as 2000, the U.S. Department of Justice, in proposed revisions to regulations governing establishing asylum, continued to stress the need for clearer standards and more systematic procedures because the current system does not “address[] consistently through the administrative adjudication and judicial review process” the interpretation of the refugee definition. Asylum and Withholding Definitions, 46 Fed. Reg. 76,588, 76,589 (Dec. 7, 2000).

⁷ See Refugee Act of 1980 § 201(a) (codified at 8 U.S.C. § 1101(a)(42) (2006)); Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

ligion, nationality, political opinion, and particular social group—under which an applicant can qualify as a refugee.⁸ If an applicant cannot show that persecution or a well-founded fear of persecution is based on his or her inclusion in one of the five statutorily protected categories, he or she is not considered a refugee and does not qualify for asylum.⁹ The Refugee Act’s main objective was to create a workable test to determine who qualifies as a refugee; however, thirty years later that objective is far from accomplished.¹⁰

The failure to achieve a workable test is especially apparent in the struggle to define the concept of PSG.¹¹ Without guidance from either international or domestic law, courts have struggled to find a consistent and manageable definition of what constitutes a PSG.¹² Although this lack of clarity presents obstacles to all petitioners who file PSG-based asylum applications, those bringing gender-based asylum claims have been particularly burdened.¹³ Women, for example, are frequently persecuted simply because they are women.¹⁴ Because gender is not a sta-

⁸ See Refugee Convention, *supra* note 7, art. 1(A)(2); see also 8 U.S.C. § 1101(a)(42) (transposing the protected categories in the Refugee Convention into United States federal law).

⁹ See 8 U.S.C. § 1101(a)(42)(A); Refugee Convention, *supra* note 7, art. 1(A)(2).

¹⁰ See Refugee and Asylum Procedures, 46 Fed. Reg. at 45,116, 45,116; Leonard Birdsong, “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .”: *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357, 368–69 (2008) (“Problems and inconsistencies prevail in asylum adjudication for a number of reasons, including lack of definitions for certain statutory words.”).

¹¹ See *Fatin v. INS*, 12 F.3d 1233, 1238–39 (3d Cir. 1993) (“[N]either the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase ‘particular social group.’”).

¹² See *id.*; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575–76 (9th Cir. 1986) (conceding the general lack of guidance from both legislative history and international law on the issue of PSG, making it difficult for the court to define the concept); *In re Acosta*, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985) (relying on a purely linguistic analysis because both Congress and the 1967 United Nations Protocol Relating to the Status of Refugees provide little clarity with respect to the definition of a PSG); Chisholm, *supra* note 5, at 432; Zsaleh E. Harivandi, Note, *Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum*, 95 CORNELL L. REV. 599, 606 (2010) (noting that the courts have been “largely responsible” for developing a definition of PSG but that the definition differs between circuits); see also Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol to the Refugee Convention] (removing some language from the definition of refugee, which alluded to the events that occurred during and leading up to World War II in Europe, but providing no additional insight into applying the definition).

¹³ See Chisholm, *supra* note 5, at 432–34.

¹⁴ See *id.* at 429; see also Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–82 (2003) (noting that “women are often persecuted for their gender” and arguing that gender not

tutorily protected category, however, persecuted female applicants must find a way to define themselves as part of a PSG.¹⁵ Without consistent standards, they have little guidance to prepare an optimal case.¹⁶

The development of two divergent definitions of PSG has been particularly problematic for gender-based asylum claims.¹⁷ In *In re Acosta*, the Board of Immigration Appeals (BIA) established a workable definition of PSG.¹⁸ In *Sanchez-Trujillo v. INS*, however, the Ninth Circuit undermined the clarity *Acosta* provided, resulting in over ten years of inconsistent application of the PSG concept.¹⁹ The court's recent decision in *Perdomo v. Holder* demonstrates the continuing impact of *Sanchez-Trujillo* on gender-based asylum claims in the Ninth Circuit.²⁰

Despite the lingering effects of the language in *Sanchez-Trujillo*, *Perdomo* may finally provide clear guidance to the Ninth Circuit, the BIA, and ultimately, prospective applicants with respect to PSG-based asylum claims.²¹ This Comment argues that *Perdomo* may cause the Ninth Circuit to abandon its two-prong definition of PSG and instead adopt the definition articulated by the BIA in *Acosta*. Part I discusses the background of asylum law in the United States, including the policy

being one of the five protected categories creates a significant barrier for female asylum applicants).

¹⁵ See Chisholm, *supra* note 5, at 429; see also Harivandi, *supra* note 12, at 606; Musalo, *supra* note 14, at 781–82.

¹⁶ See Chisholm, *supra* note 5, at 432.

¹⁷ See James H. Martin, Case Note, *The Ninth Circuit's Review of Administrative Questions of Law in the Immigration Context: How the Court in Hernandez-Montiel v. INS Ignored Chevron and Failed to Bring Harmony to "Particular Social Group" Analysis*, 10 GEO. MASON L. REV. 159, 165–66, 180–82 (2001) (arguing that the Ninth Circuit's failure to adhere to the analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and refusal to accept the definition of a PSG promulgated by the Board of Immigration Appeals (BIA) would result in "disparate treatment" of asylum seekers).

¹⁸ See *Acosta*, 19 I. & N. Dec. at 233–34.

¹⁹ See *Sanchez-Trujillo*, 801 F.2d at 1576; Martin, *supra* note 17, at 173, 177, 181; see also 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, 638–39, 658 (2003) ("[*Acosta* and *Sanchez-Trujillo*] represent alternative and conflicting definitions of the same legal standard. As a result, Ninth Circuit asylum claims based on membership in a particular social group have been measured by a different standard often resulting in unfavorable outcomes.").

²⁰ See *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010); Martin, *supra* note 17, at 181–82.

²¹ See *Perdomo*, 611 F.3d at 668 (responding to the BIA's decision that "all women in Guatemala" was "overly broad" and a "mere demographic division" that could not constitute a PSG, and clarifying that a group is not too broad if it has an innate characteristic); *Re A-*, 22 I. & N. Dec. at 919 ("But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful harm, were all that need be shown.").

reasoning for its implementation, the applicable statutes, and the agencies involved in defining and applying asylum law. Part II analyzes the courts' varying interpretations of PSG and the manner in which these interpretive inconsistencies have left gender-based claims especially vulnerable. In discussing the two landmark cases—*Acosta* and *Sanchez-Trujillo*—which have attempted to create a coherent definition for a PSG, Part II also demonstrates why the definition in *Acosta* should prevail. Finally, Part III uses *Perdomo* to exhibit the dramatic effects of the Ninth Circuit's conflicting definitions on asylum cases, particularly gender-based claims. More importantly, it argues this case should and will finally reduce the influence of *Sanchez-Trujillo*.

I. BACKGROUND OF ASYLUM LAW: TO WHOM DOES THE UNITED STATES GRANT ASYLUM AND FOR WHAT REASONS?

Immigration is a controversial topic in a post-September 11th world where immigrants are perceived as threats to the security and economy of their host countries.²² Right or wrong, a direct consequence of this perception has been a diminution of the United States' willingness to accept the world's huddled masses.²³ Yet, in the Refugee Act of 1980, Congress declared that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands"²⁴ The struggle to balance "providing humanitarian assistance under international agreements and domestic law" with limiting abuse and providing for national security continues in the application of asylum law in the United States.²⁵

The Refugee Act of 1980 amended the Immigration and Nationality Act in order "to provide a permanent and systematic procedure for

²² See ANDORRA BRUNO, CONG. RESEARCH SERV., RL 31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 2 (2010) ("In the aftermath of [the September 11, 2001] attacks, a review of refugee-related security procedures was undertaken, refugee admissions were briefly suspended, and enhanced security measures were implemented. As a result of these and other factors, actual refugee admissions plunged"); Karen Musalo, *Protecting Victims of Gender Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 130–31 (2007) ("[T]he terrorist attacks of September 11, 2001 have hardened attitudes and increased xenophobia. All of this has translated into measures for greater militarization of the border, and expanded authority to deport or remove undocumented immigrants while affording them with a minimum of procedural rights."); Daugherty, *supra* note 19, at 633, 656–58.

²³ See BRUNO, *supra* note 22, at 2; Musalo, *supra* note 22, at 130–31; Daugherty, *supra* note 19, at 633, 656–58; *All Things Considered: Emma Lazarus, Poet of the Huddled Masses* (NPR radio broadcast Oct. 21, 2006).

²⁴ Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102.

²⁵ Daugherty, *supra* note 19, at 632–33.

the admission to this country of refugees of special humanitarian concern to the United States”²⁶ The Refugee Act defines a refugee as a person who, owing to “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,” cannot or will not return to or avail himself or herself of the protections of his or her country of nationality or country in which he or she last resided.²⁷ In order to qualify for asylum, a refugee must show the following: (1) the harm inflicted constituted persecution; (2) the incident was on the basis of “one of the statutorily protected grounds;” and (3) the persecution was carried out “by the government or forces the government is either ‘unable or unwilling’ to control.”²⁸

Applicants are heard before an IJ for the Department of Justice’s Executive Office for Immigration Review (EOIR).²⁹ If the application is denied, the case can be appealed to the BIA.³⁰ As part of the EOIR, the BIA has appellate jurisdiction over all asylum cases nationwide.³¹ After an adverse ruling by the BIA, the applicant can then appeal the BIA’s decision to the federal circuit courts of appeals.³² The circuit court with jurisdiction over the location in which the original application was filed hears the appeal.³³

²⁶ Refugee Act of 1980 § 101(b); see BRUNO, *supra* note 22, at 1.

²⁷ Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A) (2006).

²⁸ Mohammed v. Gonzales, 400 F.3d 785, 795 (9th Cir. 2005) (quoting Navas v. INS, 217 F.3d 646, 655–56 (9th Cir. 2000)).

²⁹ RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS I (2010). Aliens in the United States can apply for asylum with the United States Citizenship and Immigration Services Bureau in the Department of Homeland Security; however, if an alien is in the process of removal proceedings, then the alien would be required to seek asylum before an IJ. *Id.* Under the first path, which is considered an affirmative application, asylum officers evaluate applicants in non-adversarial interviews. See *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIG. SERVICES (Aug. 12, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=e3f26138f898d010VgnVCM10000048f3d6a1RCRD>. The asylum officers either grant asylum to successful applicants or refer those who fail to the IJs. See WASEM, *supra*, at 8. Under the second path, where applicants are applying on the defensive during removal proceedings, IJs hear the applicants exclusively. *Id.*

³⁰ See WASEM, *supra*, at 8.

³¹ Birdsong, *supra* note 10, at 365–66. Regulations promulgated by the Attorney General created the BIA; it was not formed directly by statute. See *id.*; see also 8 C.F.R. § 1003.1(d)(1) (2010).

³² See Birdsong, *supra* note 10, at 366.

³³ *Id.* If a circuit court of appeals adopts a new rule, the BIA is expected to apply the rule in cases filed in that circuit. *Id.* Courts of appeals, however, are also expected to show deference to BIA standards when interpreting federal legislation. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron* counsels,

II. DEFINING A PARTICULAR SOCIAL GROUP

A. *The Basic Problem*

Courts have experienced great difficulty developing a consistent and manageable interpretation of a PSG that grants asylum to those that deserve it without being over inclusive.³⁴ The definitional problems are partly due to the lack of domestic or international input on the contours of the PSG concept.³⁵ The 1967 Protocol Relating to the Status of Refugees did not define the term, nor did the Refugee Act of 1980.³⁶

The confusion surrounding the definition of PSG has produced devastating consequences for potential applicants.³⁷ If an applicant cannot fit into one of the statutorily protected categories, the extent of his or her persecution is irrelevant and he or she does not qualify for asylum.³⁸ The risk of misconstruing a group of which the applicant is a

If the intent of Congress is clear, that is the end of the matter If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. In *INS v. Aguirre-Aguirre*, the Supreme Court held that the decision in *Chevron* applied to the interpretation of the INA. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); Martín, *supra* note 17, at 171. The expectation of deference provides further support for the argument that the Ninth Circuit should explicitly overrule its two-prong definition of PSG and adopt the BIA's definition from *Acosta*. See *infra* Part III.

³⁴ See *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006); see also Chisholm, *supra* note 5, at 432–35; Daugherty, *supra* note 19, at 638.

³⁵ See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575–76 (9th Cir. 1986) (“[T]he ‘social group’ category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion. Still, the scope of the term cannot be without some outer limit.”); *In re Acosta*, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985) (noting that the PSG category was included in the definition of refugee “in order to stop a possible gap in the coverage of the U.N. Convention”).

³⁶ See *Sanchez-Trujillo*, 801 F.2d at 1575–76; *Acosta*, 19 I. & N. Dec. at 232; see also Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102 (codifying PSG as a protected category in United States asylum law but failing to define it); Protocol to Refugee Convention, *supra* note 12, art. I. (failing to provide clarification on the definition of PSG).

³⁷ Chisholm, *supra* note 5, at 432 (“Confusion surrounding the contours of the social group definition has resulted in asylum applicants proposing a broad range of group definitions, as they attempt to assign words and boundaries to their experiences of persecution.”).

³⁸ See *Harivandi*, *supra* note 12, at 604; see also *In re R-A-*, 22 I. & N. Dec. 906, 914, 919–20 (B.I.A. 1999) (finding that, although the applicant's injuries proved persecution, the harm inflicted was not on the basis of a statutorily protected ground).

member can be the difference between life and death.³⁹ As a result, applicants deploy various formulations of their PSG in an attempt to “hit the bull’s-eye” with a narrow and specific enough definition.⁴⁰ Over time, the many and varied attempts to frame a proper definition have made it even more difficult for advocates and asylum-seekers to understand what is necessary to define a PSG.⁴¹

Such confusion has especially affected gender-based claims.⁴² Female victims of persecution have submitted applications for asylum only to be denied because they cannot articulate an acceptable PSG.⁴³ They possess an immutable characteristic in that they are female; however, for United States asylum law, that is currently insufficient.⁴⁴ Conse-

³⁹ See *Juarez-Lopez v. Gonzales*, 235 F. App’x 361, 362–63, 369 (7th Cir. 2007) (remanding a case due to an inability or refusal to determine if “young, poor Guatemalan women” constituted a PSG, even after hearing a woman’s testimony about being raped repeatedly, impregnated twice, beaten, and receiving numerous death threats by a neighbor fifteen years her senior.); Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, U. PA. L. REV. 1199, 1261–62 (2007) (arguing that regulatory changes supporting the notion that gender alone constitutes a PSG is necessary to protect female asylum seekers from persecution).

⁴⁰ See Chisholm, *supra* note 5, at 432.

⁴¹ See *id.* at 432–33, 435.

⁴² See *id.* at 433–34.

⁴³ See *Perdomo v. Holder*, 611 F.3d 662, 664–66 (9th Cir. 2010); *R-A-*, 22 I. & N. Dec. at 914, 919–20; Reimann, *supra* note 39, at 1201–02.

⁴⁴ See *Perdomo*, 611 F.3d at 666–67. The courts have been reluctant to recognize women, without additional defining characteristics, as a PSG in large part because of the fear of opening the floodgates to female asylum seekers. See *id.*; Reimann, *supra* note 39, at 1201. This floodgate argument has been expressly rejected by the United Nations; it is also unsupported by empirical data from Canada, a country that has allowed gender to constitute a PSG for over ten years. See U.N. HIGH COMM’R FOR REFUGEES, SEXUAL AND GENDER-BASED VIOLENCE AGAINST REFUGEES, RETURNEES AND INTERNALLY DISPLACED PERSONS: GUIDELINES FOR PREVENTION AND RESPONSE 118 (2003) [hereinafter UNHCR GUIDELINES], available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ecd0661>; Monica Boyd, *Gender Aspects of International Migration to Canada and the United States* 4 (presented at the International Symposium on International Migration and Development, Turin, Italy, June 28–30, 2006), http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P08_Boyd.pdf. In response to reasoning that the size of a group can be used as a basis for refusing to recognize women as a PSG, the U.N. High Commissioner for Refugees explicitly states that “the argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate.” UNHCR GUIDELINES, *supra*, at 118. In addition, Canada has recognized claims based on gender since 1993. Boyd, *supra*, at 4. As of December 31, 2002, the Immigration and Refugee Board of Canada heard a total of 2331 gender-related claims and only accepted 1345. *Id.* From 1997 to 2002, the total worldwide population of refugees and persons “of concern” to the U.N. High Commissioner for Refugees hovered around twenty million, with females accounting for roughly half of that figure. 2003 *Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers and Other Per-*

quently, women are forced to make attempt after attempt to define themselves into a PSG in order to receive asylum protection from gender-based persecution.⁴⁵

B. BIA and Ninth Circuit Attempts to Create a Workable Definition

Both the Ninth Circuit and the BIA have been vocal contributors in judicial attempts to define a PSG.⁴⁶ Unfortunately, both have failed to generate a consensus that is a workable construct.⁴⁷ The field remains riddled with “a plethora of definitions, tests, and factors for establishing a social group, [creating] an uncertain backdrop for applicants with gender-based claims.”⁴⁸

Two landmark cases, *Sanchez-Trujillo v. INS*, decided by the Ninth Circuit, and *In re Acosta*, decided by the BIA, created definitions that remain pertinent in the Ninth Circuit.⁴⁹ Whereas *Acosta* brought clarity and precision to the matter, *Sanchez-Trujillo* created an unnecessary and confusing barrier for legitimate asylum applicants.⁵⁰ Consequently, the Ninth Circuit should overrule its definition of a PSG and adhere to the BIA’s definition from *Acosta*.⁵¹

In *Acosta*, decided prior to *Sanchez-Trujillo*, the BIA thoroughly addressed the grounds for obtaining asylum.⁵² In so doing, it defined a PSG as a “group of persons[,] all of whom share a common, immutable

sons of Concern to the UNHCR, U.N. HIGH COMM’R FOR REFUGEES, 2, 5 (June 15, 2004), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=40d015fb4&query=refugees%20by%20numbers%202003.pdf>. Despite its recognition of gender-based asylum claims, Canada certainly was not flooded with the approximately ten million potential female refugees during that period. *See id.*

⁴⁵ *See* Chisholm, *supra* note 5, at 432–33, 435.

⁴⁶ *See id.* at 435.

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ *See Sanchez-Trujillo*, 801 F.2d at 1576; *Acosta*, 19 I. & N. Dec. at 233; Daugherty, *supra* note 19, at 658.

⁵⁰ *See* Martin, *supra* note 17, at 173, 181–82 (“Unfortunately, regardless of the basis for its decision, the Ninth Circuit made substantive legal changes to the policy of the BIA where such changes were neither necessary nor warranted. The perverse result of this decision is that it will likely increase the potential for disparate treatment of asylum seekers.”); *see, e.g.,* Ochoa v. Gonzalez, 406 F.3d 1166, 1170–71 (9th Cir. 2005) (denying asylum based on language from *Sanchez-Trujillo* by stating that the social group was “too broad” instead of applying the definition in *Acosta*).

⁵¹ *See Castillo-Arias*, 446 F.3d at 1196–97; Martin, *supra* note 17, at 181; *see also* UNHCR GUIDELINES, *supra* note 44, at 118 (“There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate . . .”).

⁵² *See Acosta*, 19 I. & N. Dec. at 218–35.

characteristic.”⁵³ The immutable trait is one “that either is beyond the power of an individual to change or that is so fundamental to his [or her] identity or conscience that it ought not be required to be changed.”⁵⁴ The BIA stressed that the PSG is determined on a case-by-case basis; however, “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”⁵⁵

In *Sanchez-Trujillo*, however, the Ninth Circuit stated that a PSG was “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”⁵⁶ The court further declared, “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.”⁵⁷

Furthermore, the court articulated certain circumstances in which an applicant would fall beyond the purview of a PSG.⁵⁸ The court decided that the group, distinguished as “young, working class, urban males who have failed to serve in the military or actively support the government” of El Salvador, was outside the boundaries of a PSG.⁵⁹ The Ninth Circuit denied the applicant’s PSG formulation because “such an all-encompassing grouping . . . simply is not that type of cohesive, homogeneous group to which . . . the term ‘particular social group’ was intended to apply.”⁶⁰ The court elaborated that the consequence of allowing such a broad formulation “would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.”⁶¹ The Ninth Circuit agreed with the IJ that including such a “sweeping demographic division [that] naturally manifest[s] a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings . . . would render the definition of ‘refugee’ meaningless.”⁶²

⁵³ *Id.* at 233.

⁵⁴ *Id.* at 234.

⁵⁵ *Id.* at 233.

⁵⁶ *Sanchez-Trujillo*, 801 F.2d at 1576.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1576–77.

⁵⁹ *Id.* at 1577.

⁶⁰ *Id.*

⁶¹ *Sanchez-Trujillo*, 801 F.2d at 1577.

⁶² *Id.*

In comparison to the BIA's definition of PSG in *Acosta*, which is relatively clear and appropriately broad, the *Sanchez-Trujillo* formulation is vague and complicated.⁶³ Under *Acosta*, an applicant can define a PSG by showing he or she “share[s] a common, immutable characteristic” with others.⁶⁴ Gender seems to fall easily within this definition.⁶⁵ As *Perdomo v. Holder* demonstrates, however, language from *Sanchez-Trujillo* can be used to prevent asylum seekers, who experience gender-related persecution, from making out a cognizable claim for asylum in the Ninth Circuit.⁶⁶ Furthermore, in Ninth Circuit cases, the BIA has taken language from *Sanchez-Trujillo* even when it purports to rely on its own definition of a PSG from *Acosta*.⁶⁷

⁶³ See *id.* at 1575–77; *Acosta*, 19 I. & N. Dec. at 233; Martin, *supra* note 17, at 173, 181–82 (“The definition of a ‘particular social group’ established by the BIA set reasonable requirements for individuals seeking asylum in the United States.”). The language in *Sanchez-Trujillo* evaluating the limits of a PSG in part based on the size of the group, the cohesiveness of its members, and the voluntary relationship among its members is in direct conflict with the U.N. High Commissioner for Refugees’ understanding of the PSG concept, which expressly rejects of all three notions as a basis for evaluating PSGs. UNHCR GUIDELINES, *supra* note 44, at 118. Ironically, the Ninth Circuit looked to international law for guidance when originally defining a PSG in *Sanchez-Trujillo* and noted the unfortunate lack of insight. See *Sanchez-Trujillo*, 801 F.2d at 1575–76. Now that such guidance exists, the court continues to adhere to its language in conflict with not only the BIA definition, but also current international guidelines. See *Acosta*, 19 I. & N. Dec. at 233; UNHCR GUIDELINES, *supra* note 44, at 118.

⁶⁴ *Acosta*, 19 I. & N. Dec. at 233. Currently, however, gender alone is not an acceptable PSG. See *Perdomo*, 611 F.3d at 666 (“Whether females in a particular country, without any other defining characteristics, could constitute a protected social group remains an unresolved question for the BIA.”).

⁶⁵ See *Acosta*, 19 I. & N. Dec. at 233; UNHCR GUIDELINES, *supra* note 44, at 118 (“It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics . . .”).

⁶⁶ See *Perdomo*, 611 F.3d at 668; see also *R-A*, 22 I. & N. Dec. at 919. Indeed, the *Sanchez-Trujillo* language has repeatedly been used when arguing that an applicant is outside the boundary of a PSG. See, e.g., *Perdomo*, 611 F.3d at 668; *Ochoa*, 406 F.3d at 1170–71 (“Business persons targeted by drug traffickers are analogous to the young, working class men of military age that this court found were not a social group in *Sanchez-Trujillo*.”); *Kripalani v. Gonzales*, 128 F. App’x 653, 655 (9th Cir. 2005) (“While persons who become informants may share some common impulse or interest, the differences among informants far outweigh the similarities.”); *De Valle v. INS*, 901 F.3d 787, 793 (9th Cir. 1990) (“The social group in which De Valle claims membership—families of deserters—is by no means closely affiliated or discrete.”)

⁶⁷ See *R-A*, 22 I. & N. Dec. at 918; see also Daugherty, *supra* note 19, at 651 (noting that the BIA will cite its definition of a PSG to *Acosta*, but will rely on the standard from *Sanchez-Trujillo* to reject the group as being outside of a PSG); Martin, *supra* note 17, at 173, 175–81 (noting generally how the Ninth Circuit “effected a change in the asylum policy” that will “likely increase the potential for disparate treatment of asylum seekers”). The BIA decision in *R-A* “marked a low point in . . . recognition of gender-based persecution claims

Ironically, while the BIA continues to shy away from the broader definition in *Acosta* by using language from *Sanchez-Trujillo*, the Ninth Circuit has shifted away from its definition in *Sanchez-Trujillo* and toward an interpretation more in line with *Acosta*.⁶⁸ In the 2000 case of *Hernandez-Montiel v. INS*, the Ninth Circuit attempted to harmonize the two definitions from *Sanchez-Trujillo* and *Acosta*.⁶⁹ The resulting definition was that a PSG “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.”⁷⁰ This definition appears to be broader than the *Acosta* formulation in that it has an extra prong; however, the impact of the second prong has not brought clarity.⁷¹ Rather than overruling the decision in *Sanchez-Trujillo* and accepting the BIA’s definition of a PSG, the court definitively embraced the holding in *Sanchez-Trujillo*.⁷² As a result, the Ninth Circuit struggles to reconcile a broader interpretation of PSG with its own precedent in *Sanchez-Trujillo*.⁷³

III. *PERDOMO V. HOLDER*: MORE OF THE SAME OR A BIT OF CLARITY?

Perdomo v. Holder is a perfect example of the difficulties the Ninth Circuit continues to face when attempting to distinguish *Sanchez-Trujillo*

under the category of membership in a particular social group.” Daugherty, *supra* note 19, at 643. Although it did not directly cite *Sanchez-Trujillo*, it is worth noting that the decision arose in the Ninth Circuit and the section discussing societal visibility as a requirement was labeled “[c]ognizableness.” See *R-A*, 22 I. & N. Dec. at 917–18; Daugherty, *supra* note 19, at 654. In *Sanchez-Trujillo*, the first prong of the four-part test to establish eligibility for a particular social group was “whether the class of people identified by the petitioners is cognizable as a ‘particular social group’” *Sanchez-Trujillo*, 801 F.2d at 1574. Furthermore, in *R-A*, the reasoning behind requiring applicants to show some threshold level of “cognizableness” as a group was that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.” *R-A*, 22 I. & N. Dec. at 919. This rationale was extremely similar to the reasoning for limiting the PSG decision in *Sanchez-Trujillo*. See *Sanchez-Trujillo*, 801 F.2d at 1577. Lastly, the dissenting opinion in *R-A* distinguished *Sanchez-Trujillo*. See *R-A*, 22 I. & N. Dec. at 933–35 (Guendelsberger, J., dissenting).

⁶⁸ See Daugherty, *supra* note 19, at 649–50; see also *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“[A]ll alien homosexuals are members of a ‘particular social group’”); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093, 1094 (9th Cir. 2000); *supra* notes 66–67 and accompanying text.

⁶⁹ See *Hernandez-Montiel*, 225 F.3d at 1093; Daugherty, *supra* note 19, at 649–50.

⁷⁰ *Hernandez-Montiel*, 225 F.3d at 1093.

⁷¹ See *id.*; *supra* notes 46–48 and accompanying text; see also Martin, *supra* note 17, at 181–82.

⁷² See *Hernandez-Montiel*, 225 F.3d at 1092; Martin, *supra* note 17, at 179–82.

⁷³ See *Perdomo*, 611 F.3d at 666–68.

from other cases with respect to the concept of PSG.⁷⁴ It also demonstrates the manner in which the court's decision in *Sanchez-Trujillo* negatively impacts gender-based claims.⁷⁵

Lesly Yajayra Perdomo requested asylum in 2004 based on membership in a particular social group.⁷⁶ Perdomo searched for appropriate terminology to establish membership in a PSG.⁷⁷ She first articulated her group as "women between the ages of fourteen and forty."⁷⁸ The IJ changed her group to "women between the ages of fourteen and forty who are Guatemalan and live in the United States"⁷⁹ Although the court deemed credible her testimony about the atrocities that occur in Guatemala, the IJ declined to qualify the group as a PSG.⁸⁰ On appeal, the BIA agreed that the group was "too broad to qualify as a protected social group."⁸¹ When Perdomo attempted to revise her group to "all women in Guatemala," the BIA concluded that it was a mere "demographic rather than a cognizable social group"⁸² The language the court used to analyze a PSG came straight from *Sanchez-Trujillo*.⁸³

The Ninth Circuit reviewed de novo whether "women in Guatemala" constituted a PSG.⁸⁴ The court began with a very loaded caveat: "Whether females in a particular country, without any other defining characteristics, could constitute a protected social group remains an unresolved question for the BIA."⁸⁵ The court admitted that the case law examining asylum claims continues to evolve; it nevertheless maintained the two-prong test from *Hernandez-Montiel* combining the definition from *Sanchez-Trujillo* with the definition from *Acosta*.⁸⁶ The court then remanded the case because of the BIA's failure to apply the *Hernandez-Montiel* two-prong approach properly.⁸⁷ Consequently, the lan-

⁷⁴ See *Perdomo v. Holder*, 611 F.3d 662, 666–68 (9th Cir. 2010); Chisholm, *supra* note 5, at 480; Martin, *supra* note 17, at 181–82.

⁷⁵ See *Perdomo*, 611 F.3d at 666–68; Chisholm, *supra* note 5, at 480; Martin, *supra* note 17, at 181–82.

⁷⁶ See *Perdomo*, 611 F.3d at 664.

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 665.

⁸⁰ See *id.*

⁸¹ *Perdomo*, 611 F.3d at 665.

⁸² *Id.*

⁸³ See *id.* at 668; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1574, 1577 (9th Cir. 1986).

⁸⁴ *Perdomo*, 611 F.3d at 668.

⁸⁵ *Id.* at 666.

⁸⁶ See *id.*

⁸⁷ See *id.* at 669.

guage from *Sanchez-Trujillo* continues to be misconstrued and inconsistently applied.⁸⁸

Despite failing to give direct insight into whether gender qualifies as a PSG, the analysis in *Perdomo* may nevertheless minimize the debilitating impact of the *Sanchez-Trujillo* language on potential applicants.⁸⁹ The Ninth Circuit stated in *Perdomo*, “To the extent we have rejected certain social groups as too broad, we have done so where ‘[t]here is no unifying relationship or *characteristic* to narrow th[e] diverse and disconnected group.’”⁹⁰ The court then highlighted that it has recognized “innate characteristics of such broad and internally diverse social groups as homosexuals and Gypsies”⁹¹ The effect of this distinction is that the language from *Sanchez-Trujillo*, which attempted to prevent over-inclusiveness, should no longer apply to groups with an innate characteristic.⁹² Consequently, the BIA can no longer end the analysis

⁸⁸ See *id.* at 668–69; Daugherty, *supra* note 19, at 639, 651.

⁸⁹ See *Perdomo*, 611 F.3d at 668–69 (clarifying that the court rejects groups for being too broad when there is not an innate characteristic “to narrow the diverse and disconnected group”); *In re R-A-*, 22 I. & N. Dec. 906, 917–20 (B.I.A. 1999); Daugherty, *supra* note 19, at 651. Compare *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (“[W]e conclude that Mohamed’s claim that she was persecuted ‘on account of’ her membership in a social group, whether it be defined as the social group comprised of Somalian females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan, not only reflects a plausible construction of our asylum law, but the only plausible construction.”), with *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“Though the issue presented in *Hernandez-Montiel* was narrowly cast to encompass only ‘gay men with female sexual identities in Mexico,’ . . . *Hernandez-Montiel* clearly suggests that *all* alien homosexuals are members of a ‘particular social group’ Thus, to the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a ‘particular social group’”), and *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094–95 (9th Cir. 2000) (“[W]e conclude that the ‘particular social group’ in this case is comprised of gay men with female sexual identities in Mexico.”). The Ninth Circuit’s avoidance of its own language in *Mohammed v. Gonzales* seems to demonstrate its continued hesitancy to place gender under the rubric of PSG. See *Mohammed*, 400 F.3d at 798.

⁹⁰ *Perdomo*, 611 F.3d at 668 (quoting *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005)).

⁹¹ *Id.*

⁹² See *id.* The Ninth Circuit reasoned as follows:

To the extent we have rejected certain social groups as too broad, we have done so where ‘[t]here is no unifying relationship or characteristic to narrow th[e] diverse and disconnected group.’ In *Ochoa*, the court determined that ‘business owners in Colombia who rejected demands by narco-traffickers to participate in illegal activity’ was too broad because such a group had neither a voluntary relationship nor an innate characteristic to bond its members. Most recently, in *Delgado-Ortiz v. Holder* . . . we noted that the proposed social group, ‘returning Mexicans from the United States,’ was similar to the types of large and diverse social groups we considered in *Ochoa* and *Sanchez-Trujillo*, which we concluded were too broad to qualify as cognizable social groups be-

by stating that gender is merely a demographic rather than a PSG.⁹³ Because gender is an innate characteristic, it sufficiently narrows a “diverse and disconnected group.”⁹⁴

Finally, the *Perdomo* court reiterated its rejection of “the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum.”⁹⁵ In *Singh v. INS*, the court noted that the IJ determined that Singh and his family were not persecuted because “a majority of the Indian population remaining in Fiji” had endured the same treatment.⁹⁶ On appeal, the Ninth Circuit “reject[ed] the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might be eligible for asylum.”⁹⁷ Just as Indo-Fijians being half of the population in Fiji did not disqualify Singh from asylum, similarly *Perdomo* cannot be disqualified based on the “the size and breadth of a group alone”⁹⁸

CONCLUSION

The Ninth Circuit is hindering the asylum process by maintaining its two-prong analysis of a PSG rather than adopting the *Acosta* definition. Despite many opportunities to decide otherwise, the Ninth Circuit continues to support a definition of a PSG that harmonizes its *Sanchez-Trujillo* decision with the BIA’s formulation in *Acosta*. Unfortunately, the language from *Sanchez-Trujillo* has been repeatedly used to disqualify applicants by placing them outside the boundaries of any protected category. This language has been particularly burdensome on applicants attempting to assert gender-based claims for asylum because gender does not fit within the definition of PSG.

Despite failing to give direct insight into whether gender is a PSG, the principles announced in *Perdomo* should assist gender-based asylum claims. First, *Perdomo* indicates that the language often used by the BIA from *Sanchez-Trujillo* no longer applies to groups with an innate charac-

cause they shared neither a voluntary relationship nor an innate characteristic.

Id. Thus, *Perdomo* stands for the proposition that the language of *Sanchez-Trujillo* does not come into play if there is an innate characteristic to “bond [a group’s] members.” *See id.*

⁹³ *See Perdomo*, 611 F.3d at 668; *R-A*, 22 I. & N. Dec. at 933–35 (Guendelsberger, J., dissenting).

⁹⁴ *See Perdomo*, 611 F.3d at 668; *R-A*, 22 I. & N. Dec. at 906, 919 (majority opinion).

⁹⁵ *Perdomo*, 611 F.3d at 669.

⁹⁶ *See Singh v. INS*, 94 F.3d 1353, 1356 (9th Cir. 1996).

⁹⁷ *Id.* at 1359.

⁹⁸ *See Perdomo*, 611 F.3d at 669.

teristic. Second, the court applied the holding in *Singh*, where the statutorily protected category was race, to its PSG analysis in *Perdomo*, potentially allowing gender-based claims as well.

The conclusions drawn in *Perdomo* will assist applicants with innate characteristics in avoiding disqualification due to the potential size of the group of asylum-seekers. Furthermore, *Perdomo* could ultimately and rightfully push the BIA to accept that gender, without any distinguishing factors, is a legitimate particular social group.