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WHEN THE GOING GETS TOUGH, THE TOUGH GET GOING: THE CASE OF GANG RECRUITS SEEKING ASYLUM IN THE UNITED STATES

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I. Introduction

More than 57,000 unaccompanied minors have crossed the United States border since January 2014.² At-risk youth flee gang violence in their home country.³ They come to the United States hoping that the government will consider resistance to joining gangs as

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2. Scott Johnson, *American-Born Gangs Helping Drive Immigrant Crisis at U.S. Border*, NAT'L GEOGRAPHIC, (July 25, 2014), <http://news.nationalgeographic.com/news/2014/07/140723-immigration-minors-honduras-gang-violence-central-america>.

3. UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 6 (2010) [hereinafter GUIDANCE NOTE ON REFUGEE CLAIMS], *available at* <http://www.unhcr.org/refworld/docid/4bb21fa2.html>.

grounds for asylum, and allow them to stay.⁴ For example, seventeen-year-old Ken is an undocumented immigrant from Honduras who has lived in the United States for two years but has recently been issued an order of deportation.⁵ This is his story:

I left my country because it isn't safe and the Maras⁶ were trying to recruit me. Things are so dangerous that you can't even be on the street . . . I am so scared of being deported that I barely leave my home, except for work to save money to pay the lawyer. Hopefully he will be able to help me obtain asylum so that I can stay. I hope I can stay, but I lack confidence in the justice system.⁷

Next, consider the story of Edgar Chocoy. Edgar migrated from Guatemala via Mexico to Los Angeles, California, seeking to leave behind the gang life he had been forced into after his mother abandoned him as an infant.⁸ At sixteen Edgar applied for asylum on the basis of the persecution he feared from the street gang he had turned his back on.⁹ Sadly, Edgar's application for asylum was denied and he was ordered removed to Guatemala.¹⁰ Seventeen days after his removal from the United States, members of Edgar's former gang murdered

4. Bruce Finley, *Deportee's Slaying Spurs Reform Push: Advocates Say Teen's Fear of Gangs Unheeded*, DENV. POST, (Apr. 8, 2004), <http://pards.org/VandelloTheDenverPost08Apr2004.doc>.

5. Norisa Diaz and Marc Wells, *What happens to Obama's deported children and youth?*, WORLD SOCIALIST WEB SITE, (September 9, 2014), <http://www.wsws.org/en/articles/2014/09/09/immi-s09.html> [hereinafter *Children and Youth*].

6. Maras stands for Mara Salvatrucha or MS-13, a major gang operating in Central America.

7. *Children and Youth*, *supra* note 5.

8. JACQUELINE BHABHA, *CHILD MIGRATION & HUMAN RIGHTS IN A GLOBAL AGE* 14, 203 (Princeton Univ. Press 2014) [hereinafter *CHILD MIGRATION*].

9. *Id.* at 203-04.

10. *Id.* at 204 (Upon knowing his fate, Edgar attempted to hang himself with his shoelaces while in detention.). See also *Children and Youth*, *supra* note 5 (Over the past year, the Obama administration has been deporting Central American immigrants in masses.). See also CLARE RIBANDO SEELKE, *GANGS IN CENTRAL AMERICA* 8 (Cong. Research Serv. 2014) [hereinafter *GANGS IN CENTRAL AMERICA*]. Returning deportees are provided with few if any services for reintegration. The limited number of programs that exist in Central America are funded and administered by the Catholic Church, non-governmental organizations, or the International Organization for Migrants.

him.¹¹ The circumstances of Edgar's case call into question why children fleeing persecution have a "weak" claim for protection within a legal framework particularly designed to protect the vulnerable.

At the heart of refugee law is the ideal that remedies such as asylum are for the helpless men, women, and children who are persecuted in their countries on account of their race, religion, nationality, membership in a particular social group, or political opinion. Contrary to this principle, however, victims of gang violence, like Ken and Edgar, have been denied protection because they do not fit neatly into the legal framework of asylum adjudication. Specifically, youth seeking safety within our borders after being targeted for gang recruitment are denied asylum because they are unable to establish refugee status based on their membership in a particular social group, one of the five grounds for which asylum is granted.¹²

Youth who articulate a particular social based on their resistance to gang recruitment have had little success in acquiring asylum in the United States because numerous circuit court and Board of Immigration Appeals ("BIA") decisions have established that this group lacks particularity and social visibility, two of the three requirements applicants must meet in order to articulate an acceptable particular social group.¹³ More recently, in 2014, the BIA

11. CHILD MIGRATION, *supra* note 8 at 204.

12. *See* Adreanna Orlang, Note, *Clearly Amorphous: Finding a Particular Social Group for Children Resisting Gang Recruitment*, 61 CATH. U. L. REV. 621, 625 (2012), <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1018&context=lawreview> [hereinafter *Clearly Amorphous*]. *See also* GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3 at 11 (noting that the protected grounds are not mutually exclusive and may overlap).

13. C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006), *available at* <http://www.justice.gov/eoir/vll/intdec/vol23/3535.pdf> (applicant for asylum seeking relief based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially visible within the society in question).

issued *Matter of M-E-V-G-*, a decision addressing a gang based claim.¹⁴ The decision was meant to provide clarification from the BIA regarding the meaning of “social visibility” and “particularity.”¹⁵ Although the clarification did shed some light on the BIA's particular social group framework, it is unlikely that this decision will improve the asylum prospects of youth fleeing violent gang recruitment.

In light of this recent evolution of the BIA’s analysis of social group claims, this note explores a proposal made by the Department of Homeland Security (DHS) in *Matter of M-E-V-G-* and argues that it would ultimately change the way in which gang-based claims brought by youth fleeing gang violence and forced recruitment are adjudicated. Specifically, the DHS recommended that social visibility and particularity be streamlined into a single requirement.¹⁶ The DHS argued for a such a change due to the close relationship between the two concepts.¹⁷ This note endorses the reform.

Part II of this note will discuss the Central American gang phenomenon including the origin of gangs in Central America, government response to growing gang violence, and youth gang recruitment practices. Part III will provide a brief overview of asylum law under the Refugee Act of 1980. Part IV will describe the evolution of the particular social group framework and summarize the BIA decisions that have established and interpreted the requirements for establishing a cognizable group. Part V will discuss the proposal for reforming the particular social group framework and will explain how this reform will benefit applicants with gang-based claims. Finally, Part VI will conclude that this reform will provide more protection to deserving refugees without "opening the floodgates."

14. *M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014), <http://www.justice.gov/eoir/vll/intdec/vol26/3795.pdf>.

15. *M-E-V-G-*, 26 I. & N. Dec. at 232.

16. *M-E-V-G-*, 26 I. & N. Dec. at 233, 236 n.11 (proposed that this requirement be known as “social distinction”).

17. *M-E-V-G-*, 26 I. & N. Dec. at 236 n.11.

II. The Central American Gang Phenomenon

A. The Origin of Gangs in Central America

The major gangs operating in Central America are the 18th Street Gang (“M-18”) and the Mara Salvatrucha (“MS-13”).¹⁸ Both rival gangs have strong ties to the United States for two main reasons.¹⁹ Both M-18 and MS-13 were born in Los Angeles, California.²⁰ After its formation, M-18 grew quickly in part because it was the first Hispanic gang to accept members of all races and it recruited members from other states.²¹ In contrast, MS-13 was created in the 1980s by Salvadoran nationals who had fled the country’s rampant civil strife.²²

After the passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, the Immigration and Naturalization Service²³ (“INS”) began deporting gang members with criminal records back to Central America.²⁴ Many gang members from MS-13 and M-18 spent time in prisons, which have been described as “finishing schools” where, “rather than being rehabilitated, first-time offenders often deepen[ed] their involvement in illicit gang activities.”²⁵

In addition to remaining strong in Los Angeles, these gangs expanded their operations to Central America and spread to other parts of the United States.²⁶ Estimates of the number of gang members in Central America vary from 54,000 to 85,000.²⁷ According to the United Nations Office on Drugs and Crime, there were roughly 20,000 gang members in

18. M-E-V-G-, 26 I. & N. Dec., *supra* note 10, at 2.

19. Clare Ribando Seelke, GANGS IN CENTRAL AMERICA, *supra* note 10 at 8.

20. *Id.*

21. *Id.*

22. *Id.*

23. The INS is now the United States Citizenship and Immigration Services (USCIS).

24. GANGS IN CENTRAL AMERICA, *supra* note 10 at 8.

25. *Id.* at 6-7.

26. *See id.* at 4.

27. *Id.* at 3.

El Salvador, 12,000 in Honduras, and 22,000 in Guatemala in 2012.²⁸ Notably, Nicaragua does not have a large number of MS-13 and M-18 gang members.²⁹ This may be due in part to the fact that Nicaragua has a significantly lower deportation rate from the United States than El Salvador, Guatemala, and Honduras.³⁰ In fact, after Mexico, these three countries received the highest number of United States deportations for 2010, 2011, and 2012.³¹

A substantial percentage of violence and criminal activity may be attributed to gangs in Central America.³² Gangs are often involved in kidnapping, human and sex trafficking, drug, auto and weapon smuggling and distribution, murder, and extortion of residents including bus drivers and business owners in exchange for protection.³³ Gangs such as MS-13 and M-18, however, have become more highly organized and are known to be “internationally networked and have operating revenues of billions of dollars and large weapons stockpiles.”³⁴ Moreover, the corruption and a lack of effective security within prisons has enabled these gangs to carry out their criminal activities from behind prison bars.³⁵

B. Government Responses to Escalating Violence: Mano Dura Policies, Military Involvement and the Salvadoran Gang Truce

According to a Congressional Research Service, “[g]ang-related violence has been particularly acute in Honduras, El Salvador and Guatemala.”³⁶ These countries, also known

28. GANGS IN CENTRAL AMERICA, *supra* note 10 at 8.

29. *Id.* at 3-4.

30. *Id.*

31. *Id.* at 7.

32. *Id.* at 4.

33. *Id.*

34. Letter from Elizabeth G. Kennedy, MSc, U.S. Fulbright Fellow in El Salvador, to Stephen W Manning, AILA Artesia Defense Project (Oct. 27, 2014) (on file with The Innovation Law Lab), <https://innovationlawlab.org/wp-content/uploads/2014/12/Artesia-El-Salvador-Revised-Oct2014-2.pdf>.

35. GANGS IN CENTRAL AMERICA, *supra* note 10 at 6.

36. *Id.*

as the northern triangle countries, have among the highest rates of homicide in the world.³⁷ Between 2003 and 2005, governments in the northern triangle adopted aggressive law enforcement approaches known as Mano Dura (Heavy-Handed) Anti-Gang Policies which “typically involved incarcerating large numbers of youth . . . for illicit association, and increasing sentences for gang membership and gang-related crimes.”³⁸ These approaches failed to completely thwart rising crime rates and have had several negative unintended consequences.³⁹ For example, most youth arrested were “subsequently released for lack of evidence that they committed any crime[s].”⁴⁰ It is estimated that “more than 10,000 of 14,000 suspected gang members arrested in 2005 were later released.”⁴¹ Furthermore, some youth who were wrongly arrested for gang involvement joined the gang life while serving time in prison.⁴² Roundups⁴³ also exacerbated prison overcrowding, and inter-gang violence resulted in deaths.⁴⁴ Finally, in response to Mano Dura policies and law enforcement roundups, gangs began changing their behavior to avoid being detected.⁴⁵ For example, many gang members began “hiding or removing their tattoos, changing their dress and avoiding the use of hand signals.”⁴⁶

When Mano Dura policies phased out, countries such as El Salvador, Guatemala and Honduras deployed thousands of military troops to help local police forces carry out public

37. *Id.* at 3.

38. *Id.* at 6, 9.

39. *Id.* at 8.

40. *Id.* at 9.

41. *Id.*

42. *Id.*

43. According to the Merriam-Webster online dictionary, a roundup is “the act or process of finding and gathering together people.” Merriam-Webster, *available at* <http://www.merriam-webster.com/dictionary/roundup>.

44. GANGS IN CENTRAL AMERICA, *supra* note 10 at 9.

45. *Id.* at 6.

46. *Id.*

security functions.⁴⁷ For example, in Guatemala the government "developed protocols to coordinate the military's involvement in law enforcement operations."⁴⁸ Similarly, the Honduran government "granted the military broad powers to carry out police functions."⁴⁹ This use of joint military and police patrols led many human rights groups to speak out against the potential for increased human rights abuses committed by military personnel who are not trained to perform police work.⁵⁰ Furthermore, it is questionable whether military involvement in public security functions has effectively reduced crime rates or caused a decrease in gang membership.⁵¹

In 2012, the Salvadoran government took a new approach to combating gang violence by facilitating a truce between MS-13 and M-18.⁵² Although the truce was praised for its role in reducing the homicide rate in El Salvador, it was not without its critics.⁵³ Specifically, "[a]nalysts questioned the lack of transparency and changing narrative regarding the government's role in facilitating the truce."⁵⁴ They also pointed out that "while gang-on-gang homicides declined, the level of extortion and other violent crimes remained high."⁵⁵ Moreover, when the government of President Mauricio Funes withdrew its support, the truce began to unravel.⁵⁶ Today, efforts to reinstate the truce have proved fruitless.⁵⁷ El Salvador's Attorney General Luis Martinez, who sits on the National Council for Citizen

47. *Id.* at 9-10.

48. *Id.* at 10 (*citing* interview with Guatemalan military official on January 20, 2011).

49. *Id.*

50. GANGS IN CENTRAL AMERICA, *supra* note 10 at 10.

51. *Id.*

52. *Id.* at 8.

53. *Id.* at 12.

54. *Id.*

55. *Id.*

56. GANGS IN CENTRAL AMERICA, *supra* note 10 at 12.

57. David Gagne, *El Salvador Squashes Talk of Dialogue with Gangs*, INSIGHT CRIME, (Nov. 6, 2014), <http://www.insightcrime.org/news-briefs/el-salvador-squashes-talk-of-dialogue-with-gangs>.

Security (CNSSC), dismissed the prospect of talks by saying "the council has more important items on its agenda than talking with gangsters."⁵⁸ Similarly, while government representative Franzi Hato Hasbun ruled out any prospect of cutting a new deal with the gangs, Mauricio Navas, the representative from the Evangelical church, also confirmed the issue was not currently up for discussion.⁵⁹

C. Marked for Death: Child Gang Recruitment Practices

Child and adolescent gang recruitment needs to be understood in the broad context of economic and social inequality.⁶⁰ A combination of poverty,⁶¹ social exclusion and lack of educational and job opportunities creates a ready pool of at-risk youth for gang recruitment.⁶² Similarly, in communities impoverished by these conditions, youth are more likely to lack the parental support and family guidance that helps children and adolescents steer away from gang membership.⁶³ Therefore, for many youth, joining a gang is a way of filling the gap left by ineffective or nonexistent family and state support structures.

58. *Id.*

59. *Id.*

60. CHILD MIGRATION, *supra* note 8 at 15.

61. *Children and Youth*, *supra* note 5 at 2 ("[P]overty in the Central American triangle is amongst the highest in Latin America: 52 percent of the population lives on less than \$4 per day in Honduras. That figure is 53.5 percent in Guatemala and 42.7 percent in El Salvador.").

62. GANGS IN CENTRAL AMERICA, *supra* note 10 at 5 (adolescents are offered between 100 lempiras (4.76 USD) and 500 lempiras (23.81 USD) to join); See also Hay Hasta Ninos De Once Años Operando En Bandas, LA PRENSA (Honduras), Aug. 23, 2010 [hereinafter "LA PRENSA"], <http://www.laprensa.hn/sucesos/489266-97/hay-hasta-ninos-de-once-anos-operando-en-bandas>.

63. CHILD MIGRATION, *supra* note 8 at 13; GANGS IN CENTRAL AMERICA, *supra* note 10 at 5; see also GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3 ("Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance.").

Although gang affiliation is mostly voluntary,⁶⁴ it is well established that gangs rely heavily on forced recruitment to expand and maintain their membership.⁶⁵ However, gangs do not recruit youth in a *general* attempt to increase the gang's numbers.⁶⁶ Rather, gangs such as MS-13 and M-18 specifically target young people for recruitment.⁶⁷ Juan Fogelbach has delineated three exceptions to voluntary gang association that demonstrate this point.⁶⁸ The exceptions include recruitment of vulnerable individuals in gang-controlled neighborhoods, inmates in prison facilities, and at-risk children immune from criminal prosecution.⁶⁹ According to Fogelbach, "[g]ang recruitment has spread from the disillusioned poor to children from good homes [in gang-controlled neighborhoods] who are too afraid to remain unaffiliated."⁷⁰ He adds that in some gang-controlled neighborhoods of El Salvador there is a saying, that "if you're not in a gang, then you're against gangs."⁷¹ Under the second exception to voluntary association, Fogelbach explains that due to prison overcrowding and

64. Alejandro A. Ferrer, *Gang Migration: Patterns and Motives of Migration of Mara Salvatrucha 13 and Other Salvadoran Gangs into the United States* (Aug. 2012) (unpublished M.A. thesis, Sam Houston State University), (on file with Arizona State University), *available at* <https://cvpcs.asu.edu/sites/default/files/content/products/AFerrerThesis.pdf>

65. *See* GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3; *see also* Juan J. Fogelbach, Comment, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 429 (2011) [hereinafter *Gangs, Violence, and Victims*].

66. *See Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (court agreed with Immigration Judge's determination that "if Larios was indeed targeted by gangs, the motivation would not be on account of his membership in a particular social group but would rather be an attempt to increase the gang's numbers.").

67. *Gangs, Violence, and Victims*, *supra* note 65 at 431-32 (explaining that gangs favor the recruitment of children, some as young as eight or nine years old).

68. *Id.* at 429.

69. *Id.*

70. *Id.* (explaining that "[r]ecruitment of 'children from good homes' does not necessarily indicate that gang recruitment has spread to the small middle and upper classes. Rather, it means that good children in gang controlled neighborhoods may be susceptible to repeated harm and recruitment efforts by the gangs.").

71. *Id.* (citing Andrew Glazer, Associated Press, *Summit Seeks to Stop Spread of Gangs*, WASHINGTON POST, (Feb. 7, 2007), <http://www.washingtonpost.com/wpdyn/content/article/2007/02/07/AR2007020700211.html>).

worsening conditions in pre-trial detention centers, many inmates are forced to join a gang in exchange for protection from other prisoners.⁷² Lastly, child recruits may be particularly useful to gangs because they are generally immune from prosecution under the law.⁷³ Fogelbach cites El Salvador's Juvenile Offenders Law, Honduras' Childhood and Adolescence Code and Guatemala's Comprehensive Childhood and Adolescence Protection Law, all of which protect children under the age of twelve or thirteen from facing legal charges for violating the law.⁷⁴ Due to this immunity, overwhelming gang presence in neighborhoods, and prison overcrowding, children and adolescents are being forcibly recruited off the streets or in and around schools.⁷⁵ Through violence and threats, these children are armed, trained and influenced to commit crimes such as illegal drug trafficking, car theft and homicide.⁷⁶ Others are forced to "deliver messages; stand as lookouts; and distribute drugs, weapons, and liquor" for the gang.⁷⁷

Children who oppose gang recruitment face a serious threat of harm that "remains constant and unwavering until the youth acquiesces to recruitment."⁷⁸ Moreover, internal flight or relocation is often not a realistic alternative given that many Central American gangs have country- or even region-wide reach and organization.⁷⁹ Thus, once a gang targets a child

72. *Id.* at 430. As previously mentioned, this also includes youth that were wrongly arrested for gang involvement and joined the gang life while serving time in prison.

73. *Gangs, Violence, and Victims*, *supra* note 65 at 431.

74. *Id.*

75. *Id.* at 429-32; *see also* LA PRENSA, *supra* note 62.

76. LA PRENSA, *supra* note 62.

77. *Gangs, Violence, and Victims*, *supra* note 65 at 432; *see also* LA PRENSA, *supra* note 62 (reporting that in August of 2010, one hundred twenty minors were detained in a re-orientation centre for crimes such as theft, homicide, rape and drug trafficking).

78. *Clearly Amorphous*, *supra* note 12 at 625. *See also* GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3.

79. GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3 at 18-19 (explaining that "gangs can locate an individual in urban as well as in rural areas, appearing at the applicant's home and place of work as well as near the homes of family members. Young people, without

or adolescent, little to nothing can protect him, not even local law enforcement⁸⁰ or the child's family. Rather, family members are often targeted by gangs in retaliation or to exert pressure on gang recruits to succumb to recruitment attempts.⁸¹ In the past, resistance to gang recruitment has inspired gang violence such as breaking into a recruit's home;⁸² stealing money from and beating recruits;⁸³ pointing guns at family members;⁸⁴ threatening to rape family members;⁸⁵ threatening to kill the recruit and his family;⁸⁶ attacking family members;⁸⁷ cutting the recruit's neck with a switchblade;⁸⁸ warning that if the recruits did not join the gang, their bodies might end up in a dumpster or in the street;⁸⁹ and shooting and killing a boy after he refused to join the gang.⁹⁰ Faced with this persecution, each year thousands of children arrive in the United States seeking asylum protection.⁹¹ In order to be granted

adult support, are likely to face even more difficulties relocating without their family's assistance.”).

80. *See* DIANA VILLIERS NEGROPONTEI, THE MERIDA INITIATIVE AND CENTRAL AMERICA: THE CHALLENGES OF CONTAINING PUBLIC INSECURITY AND CRIMINAL VIOLENCE 43-44 (Foreign Policy at Brookings 2009), *available at* http://www.brookings.edu/~media/research/files/papers/2009/5/merida%20initiative%20negroponte/05_merida_initiative_negroponte.pdf (explaining that the police force in Guatemala is “deeply infiltrated by organized crime . . . Guatemala’s Chief of Police, Erwin Sperisen believes that 40% of the force of 91,500 officers is corrupt and 10% should be fired immediately. Since 2005, 1,000 police have been fired in Guatemala and 250 are in jail, but Sperisen admits that ‘it’s almost impossible to clean up the force.’”).

81. GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3 at 6.

82. *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1135 (6th Cir. 2010).

83. S-E-G-, 24 I. & N. Dec. 579, 580 (B.I.A. 2008), *available at* <http://www.justice.gov/eoir/vll/intdec/vol24/3617.pdf>.

84. *Bonilla-Morales*, 607 F.3d at 1135.

85. *Id.*; S-E-G-, 24 I. & N. Dec. at 580.

86. *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 576 (8th Cir. 2009).

87. *Id.*

88. *Barrios v. Holder*, 581 F.3d 849, 853 (9th Cir. 2009).

89. S-E-G-, 24 I. & N. Dec. at 580.

90. S-E-G-, 24 I. & N. Dec. at 580.

91. Scott Johnson, *American-Born Gangs Helping Drive Immigrant Crisis at U.S. Border*, NAT'L GEOGRAPHIC NEWS, (Jul. 25, 2014, 12:00 PM), <http://news.nationalgeographic.com/news/2014/07/140723-immigration-minors-honduras-gang-violence-central-america/>.

asylum, these children must establish that they meet the statutory definition of a refugee.⁹² However, this is no simple task and the current legal framework for asylum adjudication, including the particular social group analysis, does not advance the claims of youth fleeing gang persecution.

III. Asylum Law Under the Refugee Act of 1980

The Attorney General has discretion to grant asylum⁹³ to applicants in the United States who meet the statutory definition of refugee.⁹⁴ Pursuant to the Refugee Act of 1980⁹⁵ (“Act”), a refugee is:

[a]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁶

In order to satisfy this definition, an applicant must first demonstrate that he has been a victim of persecution⁹⁷ at the hands of a government actor or a group of individual the

92. 8 U.S.C. § 1101(a)(42)(A); *see also* 8 U.S.C.S. § 1158(b)(1)(A); 8 C.F.R. § 208.13(a).

93. Upon receiving a grant of asylum, an applicant is entitled to many benefits. For example, the applicant can immediately petition for his spouse and children under the age of twenty-one to be brought to the United States. INA § 208(b)(3)(A). Thereafter, the applicant can apply for a green card. After five years of permanent residency, the applicant can apply for citizenship. *Path to U.S. Citizenship*, United States Citizenship and Immigration Servs., (Jan. 22, 2013), <http://www.uscis.gov/us-citizenship/citizenship-through-naturalization/path-us-citizenship>.

94. 8 C.F.R. § 208.13(b)(1)(i); INA § 208(b)(1)(A).

95. ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* (N.Y.U. Press 2014) [hereinafter *LIVES IN THE BALANCE*] (“In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees. Parties to this treaty agreed that they would not deport refugees to other lands where their lives or freedom would be in danger. Thirteen years later, Congress passed the Refugee Act of 1980 to implement its obligations under the Protocol.”).

96. 8 U.S.C. § 1101(a)(42)(A).

97. 8 C.F.R. § 208.13; INA § 101(a)(42); 8 U.S.C. § 1101(a)(42)(A); persecution is defined as “the infliction of suffering or harm upon those who differ . . . in a way regarded as

government is unable or unwilling to control. If an applicant can demonstrate that he has suffered past persecution, he is entitled to a rebuttable presumption that he has a well-founded fear of future persecution.⁹⁸ The government can rebut this presumption by demonstrating that either country conditions have changed, or that the applicant can relocate within the country safely and that it would be reasonable under all the circumstances to expect the applicant to do so.⁹⁹ If the government rebuts the presumption, the applicant no longer has a well-founded fear of persecution. However, the applicant may still be entitled to a grant asylum under the doctrine of humanitarian asylum.¹⁰⁰ Under this doctrine, the applicant must show compelling reasons for being unable or unwilling to return to his home country “arising out of the severity of the past persecution” or “a reasonable possibility that he or she may suffer other serious harm upon removal.”¹⁰¹ If an applicant is unable to prove past persecution, he may still establish a well-founded fear of future persecution if he shows that the likelihood that he will be persecuted upon return to his home country is greater than ten percent.¹⁰² The applicant must further establish that he has a subjectively genuine fear of being persecuted if returned to the country in question¹⁰³ and that the fear is objectively

offensive.” *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997). Persecution has also been described as, “the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.” *Id.* These definitions of persecution are objective in that they turn on “what a reasonable person would deem offensive.”

98. 8 C.F.R. § 208.13(b)(1) (2008).

99. 8 C.F.R. § 208.13(b)(1)(i)(A), (B). However, it is important to note that if the government is the persecutor, there is an automatic presumption that relocation is unreasonable.

100. 8 C.F.R. § 1208.13(b)(1)(iii)(A), (B).

101. *Id.*

102. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

103. *Mogharrabi*, 19 I. & N. Dec. 439, 444 (B.I.A. 1987), <http://www.justice.gov/eoir/vll/intdec/vol19/3028.pdf>.

reasonable such that a reasonable person in the applicant's circumstances would fear persecution if returned to the country in question.¹⁰⁴

Unfortunately, the Act does not extend protection to all individuals who are victims of persecution or have a well-founded fear of persecution. Unless an applicant has been targeted *on account of* a protected basis, he or she cannot establish a claim for asylum.¹⁰⁵ This is called the nexus requirement.¹⁰⁶ In order to meet the nexus requirement, an applicant must demonstrate that the persecution or fear of persecution is a direct result of the applicant's race, religion, nationality, membership in a particular social group, or political opinion.¹⁰⁷ In other words, the applicant must provide evidence to show that the persecutor's actions are motivated by at least one of the five enumerated grounds.¹⁰⁸

Of the enumerated grounds, political opinion and membership in a particular social group are "the most nebulous and discretionary bases for granting asylum."¹⁰⁹ However, membership in a particular social group has expanded over time to include unions, families targeted for death, homosexuals,¹¹⁰ the educated elite, victims of coercive population control,

104. *Id.* at 444-45.

105. Chang, 20 I. & N. Dec. 38, 42 (B.I.A. 1989).

106. For example, aliens fleeing from general conditions of violence in their countries would not qualify for asylum. Furthermore, if an alien has a well founded fear of retribution over purely personal matters, he too will not meet the nexus requirement. These individuals have a well-founded fear, but their fear is not on account of one of the protected grounds. *Id.*

107. INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13.

108. Chang, 20 I. & N. Dec. at 38-40 (courts often deny asylum claims due to insufficient nexus between the persecutor's actions and one of the five enumerated grounds).

109. Lauren E. Sullivan, Note, *Bad Boys, Whatcha Gonna Do When They Come for You: An Examination of the United States' Denial of Asylum to Young Central American Males Who Refuse Membership in Transnational Criminal Gangs*, 52 DUQ. L. REV. 231, 243 (2014) [hereinafter *Bad Boys*].

110. Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990), *available at* <http://www.justice.gov/eoir/vll/intdec/vol20/3222.pdf>.

victims of forced genital mutilation¹¹¹ and victims of domestic violence.¹¹² Nevertheless, cases based on other social group grounds represent a much smaller percentage¹¹³ of asylum grants because “the law regarding what constitutes a valid social group remains in flux.”¹¹⁴

IV. The Evolution of the Particular Social Group Framework

In order to qualify for asylum on account of membership in a particular social group, an applicant must “(1) identify a group that constitutes a ‘particular social group’ . . . (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.”¹¹⁵ This discussion will primarily address the first prong of the particular social group analysis. Membership in a particular social group has also been difficult to define, as it is not defined in the Act.¹¹⁶ However, several BIA decisions have refined and articulated the requirements for identifying a group that constitutes a particular social group to include: “(1) a shared ‘immutable’ or ‘fundamental’ characteristic;¹¹⁷ (2) ‘social visibility;’¹¹⁸ and (3) ‘particularity.’¹¹⁹

The immutable characteristic requirement was first promulgated by the BIA in *Matter of Acosta*, one of the first decisions interpreting the phrase “persecution on account of

111. Kasinga, 21 I. & N. Dec. 357, 367 (B.I.A. 1996), *available at* <http://www.justice.gov/eoir/vll/intdec/vol21/3278.pdf>.

112. A-R-C-G-, 26 I. & N. Dec. 388, 395 (B.I.A. 2014); LIVES IN THE BALANCE, *supra* note 95 at 33-34.

113. LIVES IN THE BALANCE, *supra* note 95 at 34. According to asylum officers interviewed by the authors, particular social group cases account for ten percent or less of their asylum grants.

114. *Id.*

115. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

116. M-E-V-G-, 26 I. & N. Dec. 227, 230 (B.I.A. 2014), *available at* <http://www.justice.gov/eoir/vll/intdec/vol26/3795.pdf>.

117. *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *available at* <http://www.justice.gov/eoir/vll/intdec/vol19/2986.pdf>.

118. C-A-, 23 I. & N. Dec. at 959 (indicating that the social visibility of the members of a claimed social group is an important consideration in identifying the existence of a particular social group for the purpose of determining whether a person qualifies as a refugee).

119. C-A-, 23 I. & N. Dec. at 957.

membership in a particular social group.”¹²⁰ An immutable characteristic is a “characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.”¹²¹ “The shared characteristic may 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.”¹²²

At the time the BIA issued its decision in *Matter of Acosta*, “only five years had passed since the enactment of the Refugee Act of 1980.”¹²³ Thus, “relatively few social group claims had been presented to the BIA.”¹²⁴ Moreover, because the BIA found no immutable characteristic in *Matter of Acosta*,¹²⁵ it did not reach the question of whether there should be additional requirements on group composition.¹²⁶ The *Acosta* standard “provided flexibility in the adjudication of asylum claims[;] [h]owever, it also led to confusion and a lack of

120. *Acosta*, 19 I. & N. Dec. at 233 (stating that persecution on account of membership in a particular social group was interpreted 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”). The doctrine of “*eiusdem generis*” was used by the BIA in defining the phrase. “*Eiusdem generis*” means “of the same kind.” See also *CSX Transp., Inc. v. Alabama Dep’t of Revenue*, 131 S. Ct. 1101, 1113 (2011).

121. *Acosta*, 19 I. & N. Dec. at 212.

122. *C-A-*, 23 I. & N. Dec. at 951. See also *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (family is the perfect social group because a family focuses on “fundamental affiliation concerns and common interests” and is a “small, readily identifiable group”).

123. *M-E-V-G-*, 26 I. & N. Dec. at 231.

124. *M-E-V-G-*, 26 I. & N. Dec. at 231.

125. *Acosta*, 19 I. & N. Dec. at 216, 217, 234. In *Matter of Acosta*, the applicant, a member and manager of a cooperative organization of taxi drivers, faced persecution by antigovernment guerrillas who had targeted small businesses in the transportation industry. The applicant received anonymous notes threatening his life and was beaten in his cab by three men who took his taxi and warned him not to call the police. The BIA determined that the proposed social group of taxi drivers in San Salvador that refused to participate in guerilla-sponsored work stoppages was invalid because neither of the characteristics defining the group were immutable as “the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in the work stoppages.” The BIA added, “the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.”

126. *M-E-V-G-*, 26 I. & N. Dec. at 231.

consistency as adjudicators struggled with various possible social groups”¹²⁷ Thus, twenty-one years after the *Acosta* decision, the BIA narrowed the coverage of the particular social group definition by introducing the concept of social visibility and particularity.¹²⁸

Specifically, in *Matter of C-A-*, the BIA defined social visibility as “the extent to which members of a society perceive those with the characteristic in question as members of the social group.”¹²⁹ Two years later, in 2008, the BIA issued two companion cases, *Matter of S-*

127. M-E-V-G-, 26 I. & N. Dec. at 231. The different approaches to the particular social group analysis are evident in cases that followed *Matter of Acosta*. For example, in *Sanchez Trujillo v. INS* the Ninth Circuit held that “the phrase ‘particular social group’ implies a collection of people closely affiliated with each other who are actuated by some common impulse or interest. 801 F.2d at 1576. 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.” *Id.* In *Lwin v. INS*, the Seventh Circuit noted that this requirement “read literally, conflicts with *Acosta*’s immutability requirement.” *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998). A claim based on sexual orientation eventually caused the Ninth Circuit to modify this “voluntary association approach” to particular social group claims. *Id.* In *Hernandez-Montiel v. INS*, the court 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.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000).

128. C-A-, 23 I. & N. Dec. at 957-61.

129. C-A-, 23 I. & N. Dec. at 952, 957. In this case, A-D-, the chief of security for the Cali cartel would visit the applicant’s bakery on weekends and talk openly about his involvement with the Cartel, identifying people, places, and events related to the cartel’s exportation of narcotics from Colombia to United States and Europe. A-D- also informed the applicant of his close ties with others involved in running the Cali drug cartel. The applicant passed the information he learned from A-D- along to V-M-M-. Thereafter the applicant and his son had an encounter with three men armed with pistols and an automatic weapon who attempted to force the applicant into a car. When the applicant resisted he was forced to the ground and beaten. One of the men hit the applicant’s son in the face with a pistol causing disfigurement to his mouth and jaw. As the assailants departed, they warned the applicant that things would get worse for him and his family and that they would also get V-M-M-. In addressing the social visibility of the proposed social group of noncriminal drug informants working against the Cali drug cartel the BIA concluded “that the proffered trait of being noncriminal informants was not sufficiently distinct or recognizable in Colombian society to constitute a particular social group According to the Board, the record reflected that noncriminal informants and noncriminal informants who act out of some sense of civic duty rather than for compensation were not distinguished by this characteristic in Colombian society.” Memorandum from Lynden D. Melmed, Chief Counsel, U.S. Citizenship and Immigration Serv., to Lori Scialabba, Assoc. Dir., Refugee, Asylum and Int’l

*E-G*¹³⁰ and *Matter of E-A-G*¹³¹ addressing gang based claims by persons resisting recruitment. In these decisions, the BIA again applied the social visibility criterion applied in *Matter of C-A*, and it also elaborated on the requirement of particularity mentioned in *Matter of C-A*.¹³² In determining that neither of the social groups proposed¹³³ by the respondents satisfied the standards of particularity or social visibility, the BIA explained that the essence of the particularity requirement was “whether the proposed group [could] accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”¹³⁴ The BIA added that “[w]hile the size of the proposed group [could] be an important factor in determining whether the group [could] be so recognized, the key question is whether the proposed description is sufficiently

Operations (Jan. 12, 2007), *available at*

http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Archive%201998-2008/2007/Jan%202007/c_a_guidance011207.pdf. *See also* *C-A*, 23 I. & N. Dec. at 960-61.

130. *S-E-G*, 24 I. & N. Dec. 579, 589-90 (B.I.A. 2008).

131. *E-A-G*, 24 I. & N. Dec. 591, 594-96 (B.I.A. 2007).

132. *E-A-G*, 24 I. & N. Dec. at 594-96; *S-E-G*, 24 I. & N. Dec. at 589-90. In *Matter of C-A*, the BIA briefly addressed the particularity prong when it concluded that the proposed particular social group of noncriminal informants was “too loosely defined to meet the requirement of particularity.” *C-A*, 23 I. & N. Dec. at 957. The group of “noncriminal informants” could potentially include persons who passed along information concerning any of the numerous guerrilla factions or narco-trafficking cartels currently active in Colombia to the Government or to a competing faction or cartel. *C-A*, 23 I. & N. Dec. at 957.

133. Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities; and family members of such Salvadoran youth. *S-E-G*, 24 I. & N. Dec. at 581.

134. *S-E-G*, 24 I. & N. Dec. at 584 (citing *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008)). In addressing the particularity of the proposed group of Salvadoran youth, the BIA concluded that the characteristics of the group were amorphous because “people’s ideas of what those terms mean can vary.” Moreover, in analyzing a group that included the family members of the Salvadoran youth, the BIA reasoned that because the proposed group could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins and others, it also was “too amorphous a category.”

‘particular,’ or is too ‘amorphous’ . . . to create a benchmark for determining group membership.”¹³⁵

The BIA’s articulation of these requirements was met with both approval¹³⁶ and disapproval.¹³⁷

The BIA’s articulation of these requirements was met with both approval¹³⁸ and disapproval.¹³⁹ Significantly, a split arose between the Third and Seventh Circuit and the First, Second, Fourth, Sixth, Eighth, Tenth and Eleventh Circuits. For example, in *Gatimi v.*

135. S-E-G-, 24 I. & N. Dec. at 584, 587 (citing *Davila-Mejia*, 531 F.3d at 628-29). In its social visibility analysis, the BIA concluded that there was little evidence to support the conclusion that the purported group of Salvadoran youth “would be perceived as a group by society, or that these individuals suffer[ed] from a higher incidence of crime than the rest of the population. Given the magnitude of gang violence and territorial power in El Salvador, the BIA further reasoned that the applicants were not “in a substantially different situation from anyone who [had] crossed the gang, or who [was] perceived to be a threat to the gang’s interests.” *Id.*

136. *See e.g.*, *Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1100 (9th Cir. 2013); *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012); *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012); *Zelaya v. Holder*, 668 F.3d 159, 165–66 (4th Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649–53 (10th Cir. 2012); *Scatambuli v. Holder*, 558 F.3d 53, 59–61 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1197-98 (11th Cir. 2006). *But see* DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 370 (2007) (“even in the circuits that [] accepted the doctrine, questions [were] mounted about its foundation and its application”).

137. *See e.g.* *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

138. *See Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013); *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013); *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012); *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012); *Zelaya v. Holder*, 668 F.3d 159, 165–66 (4th Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649–53 (10th Cir. 2012); *Scatambuli v. Holder*, 558 F.3d 53, 59–61 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006). However, “even in the circuits that [] accepted the doctrine, questions [were] mounted about its foundation and its application.” DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 370 (2007).

139. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012); *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

*Holder*¹⁴⁰ and *Valdiviezo-Galdamez v. Att'y Gen. of the United States*,¹⁴¹ the Seventh and Third Circuits sharply criticized the BIA's particularity and social visibility doctrines. In *Gatimi v. Holder*, the Seventh Circuit stated that the social visibility requirement "made no sense."¹⁴² Moreover, the court further critiqued the BIA for failing to explain the reasoning behind the criterion of social visibility.¹⁴³ According to the *Gatimi* court,

[w]omen who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being social visible; and to the extent that members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'¹⁴⁴

Given the BIA's lack of clarity as to whether the social visibility requirement referred to literal visibility versus cognitive visibility, the Seventh Circuit concluded that the BIA's application of the social visibility requirement was both unreasonable and inconsistent.¹⁴⁵

Similarly, in *Valdiviezo-Galdamez*, the Third Circuit highlighted the BIA's lack of consistency in applying the social visibility requirement.¹⁴⁶ According to the *Valdiviezo-Galdamez* court, since first interpreting the statutory phrase particular social group in *Matter*

140. *Gatimi*, 578 F.3d at 615.

141. *See generally* *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011).

142. *Gatimi*, 578 F.3d at 615, 616 (citing *AT & T Inc. v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006)). Judge Posner further reasoned that "when an administrative agency's decisions are inconsistent, a court cannot just pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate." *See also Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002)).

143. *Gatimi*, 578 F.3d at 615.

144. *Id.* Similarly, in *Benitez Ramos v. Holder*, the court stated that the social visibility criterion is a "misunderstanding of the use of "external" criteria to identify a social group." *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

145. *See also Benitez Ramos*, 578 F.3d at 615-16 (Seventh Circuit criticized the social visibility requirement, noting that, "[v]isibility in the literal sense is which the Board has sometimes used the term might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution it will be on the ground of group membership."

146. *Valdiviezo-Galdamez*, 663 F.3d at 608.

of *Acosta*, the BIA had "recognized a number of groups as 'particular social groups' where there was no indication that the group's members possessed 'characteristics that were highly visible and recognizable by others in the country in question' or possessed characteristics that were otherwise 'socially visible' or recognizable."¹⁴⁷ Specifically, the Third Circuit stated:

the BIA has found each of the following groups to constitute a particular social group for purposes of refugee status: women who are opposed to female genital mutilation (Matter of Kasinga), homosexuals required to register in Cuba, (Matter of Toboso-Alfonso), and former members of the El Salvador national police (Matter of Fuentes). Yet, neither anything in the Board's opinions in those cases nor a general understanding of any of those groups, suggests that the members of the groups are socially visible. The members of each of these groups have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question or even other members of the group unless and until the individual member chooses to make that characteristic known.¹⁴⁸

Therefore, the court's conclusion that the social visibility requirement was an "unreasonable addition"¹⁴⁹ to the requirements for establishing a particular social group turned on the fact that "the above-cited particular social groups would not be cognizable if the BIA were to impose the 'social visibility' requirement today."¹⁵⁰ Moreover, the court also found that the BIA's particularity requirement was equally inconsistent with prior decisions.¹⁵¹ It stated that it was "hard-pressed to discern any difference between the requirement of particularity and the discredited requirement of social visibility."¹⁵² Ultimately the court refused to afford Chevron deference¹⁵³ to the BIA's conclusion that a grant of asylum under the particular

147. *Id.* at 604.

148. *Id.*

149. *Id.*

150. *Rojas-Pérez v. Holder*, 699 F.3d 74, 80 (1st Cir. 2012) (summarizing the views of the Third Circuit).

151. *Valdiviezo-Galdamez*, 663 F.3d at 608.

152. *Id.*

153. In *INS v. Cardoza-Fonseca*, the Supreme Court held that the BIA's interpretation of the Refugee Act is entitled to deference pursuant to the standards set out in *Chevron*. *Cardoza-Fonseca*, 480 U.S. at 445-50 (*citing* *Chevron U.S.A., Inc. v. Natural Resources*

social group ground of persecution required the applicant to establish the elements of particularity and social visibility.¹⁵⁴

On the other hand, even courts such as the First Circuit that applied Chevron deference and accepted the BIA's particular social group analysis, nevertheless believed that the new requirements of social visibility and particularity "merited additional examination by and clarification from the BIA."¹⁵⁵ In response to this ongoing controversy the BIA issued its decision in *Matter of M-E-V-G*,¹⁵⁶ clarifying its interpretation of the phrase membership in a particular social group.¹⁵⁷

In *Matter of M-E-V-G*, the BIA first addressed the social visibility prong of its particular social group framework. Noting that this requirement was a "primary source of disagreement [and] confusion" that "lead some to [wrongfully] believe that literal, . . . ocular or on-sight visibility¹⁵⁸ [was] required to make a particular social group cognizable under the Act[.]" the BIA renamed the "social visibility" requirement as "social distinction."¹⁵⁹ According to the BIA, "[s]ocial distinction refers to social recognition."¹⁶⁰ It added that "[t]o be socially distinct, a group need not be seen by society; rather, it must be perceived as a

Defense Council, Inc., 467 U.S. 837 (1984)). In *Chevron U.S.A., Inc.*, the Supreme Court held that courts should defer to agency interpretations of statutes that mandate an administrative agency to enforce the same, unless the interpretation is unreasonable.

154. *Valdiviezo-Galdamez*, 663 F.3d at 608.

155. *Rojas-Pérez*, 699 F.3d at 81.

156. It is important to note that this case was before the BIA on its second remand from the Third Circuit in *Valdiviezo-Galdamez v. Holder*, for further consideration of the respondent's applications for asylum and withholding of removal. *M-E-V-G*, 26 I. & N. Dec. at 229.

157. *M-E-V-G*, 26 I. & N. Dec. at 232.

158. The BIA reasoned that while an immutable characteristic "may be visible to the naked eye, and . . . a particular social group could be set apart within a given society based on such visible characteristics [its] use of the term social visibility was not intended to limit relief solely to those with outwardly observable characteristics." *M-E-V-G*, 26 I. & N. Dec. at 238.

159. *M-E-V-G*, 26 I. & N. Dec. at 236.

160. *M-E-V-G*, 26 I. & N. Dec. at 240.

group by society."¹⁶¹ The BIA further explained that the social distinction requirement considers:

whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.¹⁶²

Thus, the BIA concluded that in order to identify a group that constitutes a particular social group, an applicant must now establish that the group is "socially distinct within the society in question" in addition to meeting the requirements of immutability and particularity.¹⁶³

Next the BIA addressed the particularity prong of its particular social group framework. Although the BIA adhered to its prior particularity analysis,¹⁶⁴ it further explained that

a particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group . . . [i]t is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. The group must also be discrete and have definable boundaries - it must not be amorphous, overbroad, diffuse, or subjective.¹⁶⁵

The BIA concluded that "not every immutable characteristic is sufficiently precise to define a particular social group."¹⁶⁶

Despite the BIA's clarification of the particular social group analysis, identifying a particular social group that meets the particularity and social distinction criteria promulgated by the BIA continues to be a significant barrier for youth with gang-related claims.¹⁶⁷

161. M-E-V-G-, 26 I. & N. Dec. at 240.

162. M-E-V-G-, 26 I. & N. Dec. at 238.

163. M-E-V-G-, 26 I. & N. Dec. at 237, 251-52.

164. See S-E-G-, 24 I. & N. Dec. 579; see also E-A-G-, 24 I. & N. Dec. 591.

165. M-E-V-G- 26 I. & N. Dec. at 239.

166. M-E-V-G- 26 I. & N. Dec. at 239, 252.

167. The BIA ultimately remanded *Matter of M-E-V-G-* to an Immigration Judge. M-E-V-G- 26 I. & N. Dec. at 252. The BIA determined that a remand was appropriate because "the

Moreover, nothing in the *Matter of M-E-V-G-* decision suggests that moving forward, the BIA, circuit courts or immigration judges will apply a broader construction of the "membership in a particular social group" protected ground. Thus, if asylum protection is going to be extended to youth with bona fide claims of gang persecution and forced recruitment, reform is needed. However, such change is not only necessary, but it is also possible. For example, in *In re Chang*, the BIA held that individual opponents of China's "One Couple, One Child" birth control policy did not comprise a particular social group because the governmental action they opposed was meant for general population control and could not specifically target any particular social group.¹⁶⁸ In response to this decision, Congress approved the One-Child Policy amendment of 1996 which established that "(1) forced abortions and sterilizations qualify as persecution, and (2) all forced abortions and sterilizations will be deemed to have occurred 'on account of' a political opinion."¹⁶⁹

Due to the increased presence of gang violence and crime that affects both the United States and our neighbors in Central America, Congress should legislate with the goal of protecting victims of forced gang recruitment that do not wish to join the ranks of these criminal organizations. In doing so, the United States will better fulfill its obligation under the Refugee Act and also prevent further escalation of gang control.

I. Proposal for Reforming the Particular Social Group Framework

respondent's proposed particular social group has evolved during the pendency of his appeal, our guidance on particular social group claims has been clarified since this case was last before the Immigration Judge, and the Third Circuit has indicated that a remand may be appropriate"

168. *Chang*, 20 I. & N. Dec. 38.

169. Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 Yale L. J. 2512, 2544-2545 (2014) [hereinafter *Domestic Violence Asylum After Matter of L-R-*]; see also INA § 101(a)(42).

Some, including the United Nations High Commissioner for Refugees ("UNHCR") argue that the BIA should disavow the requirements of "social visibility" and "particularity" and should restore *Matter of Acosta* as the sole standard for determining a particular social group.¹⁷⁰ The UNHCR also maintains that the BIA's social visibility requirement departs from the UNHCR Guidelines¹⁷¹ in two material respects.¹⁷²

[F]irst, under the Guidelines, an applicant may establish membership in a social group by showing the relevant trait is a fundamental characteristic, in accordance with the BIA's formulation in *Matter of Acosta*, or that society perceives a group to exist.¹⁷³ The BIA, in contrast, requires that the applicant show a social group by identifying a fundamental characteristic *and* social visibility.¹⁷⁴ And second, the requirement that the relevant trait be 'recognizable' in some way is completely absent from the Guidelines.¹⁷⁵

On the other hand, the DHS argued that social visibility and particularity are valid refinements to the particular social group interpretation but that the two concepts should be clarified and streamlined into a single requirement.¹⁷⁶ This is a sound approach that would diminish confusion and increase consistency in asylum adjudications. While it is true that "particularity" is essential to the interpretation of the phrase "particular social group" because it is included in the plain language of the Act,¹⁷⁷ it is uncertain that the "social

170. M-E-V-G- 26 I. & N. Dec. at 233.

171. UNITED NATIONS 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, (May 7, 2002), *available at* <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

172. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 652 (10th Cir. 2012).

173. *Id.*

174. *Id.*

175. *Id.*

176. M-E-V-G- 26 I. & N. Dec. at 233. As mentioned above, the DHS proposed that the single requirement be called "social distinction." M-E-V-G- 26 I. & N. Dec. at 236 n.11. Although the BIA rejected the DHS's proposal, it adopted the term "social distinction." The DHS also proposed a separate requirement that "the social group must exist independently of the fact of persecution." In refusing to adopt the test, the BIA reasoned that this criterion was already a part of the social group analysis.

177. M-E-V-G- 26 I. & N. Dec. at 239.

distinction" and "particularity" requirements each emphasize a different aspect of a particular social group. Rather, as recognized by the BIA and other federal courts, there is considerable overlap between the "social distinction" and "particularity requirements."¹⁷⁸ This has resulted in unnecessary confusion.

Indeed, a close examination of the particularity prong analysis of different courts demonstrates that the social distinction requirement is already embedded within the particularity definition. In other words, particularity is mutually dependent on social distinction. For example, in *Matter of S-E-G*, the BIA explained that "[t]he essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the *group would be recognized, in the society in question*, as a discrete class of persons."¹⁷⁹ The embedded requirement that the "*group . . . be recognized in the society in question*" is essentially identical to the social distinction requirement established by the Tenth Circuit in *Rivera-Barrientos v. Holder*, that "citizens of the applicant's country *consider individuals with a pertinent trait to constitute a distinct social group*" and that the "community [be] capable of identifying [the applicant] as belonging to the group."¹⁸⁰ Moreover, in order for an applicant to meet either of these conditions, he must demonstrate that the society in which he lived could distinguish him and persons similarly situated based on the very characteristics that define the group's particularity. Thus, in practical terms there is no need to fashion two separate requirements where in fact the two requirements are interconnected.

Furthermore, requiring an applicant to prove that others in his society and community recognize that a distinguishing trait makes a group of people, to which the

178. M-E-V-G- 26 I. & N. Dec. at 236 n.11, 240-41. The BIA also cites *Henriquez-Rivas v. Holder*, where the court admits that its own precedent has "blended the 'social visibility' and 'particularity' analysis." *Henriquez-Rivas*, 707 F.3d at 1090.

179. S-E-G, 24 I. & N. Dec. at 584.

180. *Rivera-Barrientos*, 666 F.3d at 651.

applicant belongs, more vulnerable to persecution is a much higher burden to meet than that which is imposed on applicants fearing persecution on account of the other four protected grounds. For example, under the current social distinction analysis, youth from countries that do not protect potential gang recruits at all will have a harder time proving asylum eligibility than similar victims from countries that make a greater effort to protect victims.¹⁸¹ This result is counterintuitive.¹⁸² Moreover, expecting applicants to meet the social distinction burden is based on an unreasonable assumption that citizens of other countries will view the applicant's affliction as persecution in the same way that our society might. For example, in China, couples are denied the opportunity to have more than one child.¹⁸³ Although Americans believe that the right to procreate is fundamental to all human beings, in China this is a measure the government has taken to enforce population control.¹⁸⁴ Similarly, in assuming that a community would recognize individuals with a pertinent trait, the BIA is also assuming that the same social values inform how and when a person is determined to be a member of a group. Often times, individuals are victims of persecution precisely because they are members of oppressed or marginalized minority groups. Therefore, if a member of such a group is ostracized, forgotten and living in the shadows of society, how can the same individual make a valid argument that they are "socially visible" or "distinct" in their community. Moreover, culture differences may prevent citizens of a country from understanding or identifying a person as a victim of persecution and as a member of a group that is persecuted. In some cultures, someone we may view as a potential asylee may be considered an instigator, a provoker, someone in the wrong place at the wrong

181. *Domestic Violence Asylum After Matter of L-R*, *supra* note 169 at 2533 (comparing domestic violence). Protecting a group of individuals is considered a form of social recognition.

182. *Id.*

183. *See* Chang, 20 I. & N. Dec. 38.

184. *Id.*

time or simply collateral damage. For example, although rape has long been recognized as a form of persecution,¹⁸⁵ in many countries victims of rape are scrutinized and judged by how their behavior or appearance may have provoked the rape.

Following the recommendation set forth by the DHS in *Matter of M-E-V-G-*, this Note's proposal that the particularity and social distinction requirements be streamlined into a single requirement would benefit applicants making gang-based claims. By minimizing the burden of meeting two distinct requirements that are arguably one in the same, it is more likely that applicants will be able to successfully articulate a particular social group that supports a grant of asylum. However, in order for this proposal to truly advance the interests of applicants with gang based claims, it is necessary for the BIA and the circuit courts to more broadly interpret the particularity prong of the particular social group analysis.¹⁸⁶

As mentioned earlier, the BIA and circuit courts have rejected particular social groups proposed by applicants fleeing from gang persecution due in part to their purported lack of particularity. For example, in *Matter of S-E-G-* the court found that "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" made up a "potentially large and diffuse segment of society," and that the respondent's proposed particular social group was "too numerous or inchoate" to qualify under the Act.¹⁸⁷ However, a less stringent analysis of the particularity of this and other similarly articulated social groups reveals that the groups encompass a limited portion of society and their formulations allow for a clear delineation of who is in the group. More importantly, the groups' characteristics "accurately identif[y] the

185. FORCED MIGRATION LAW AND POLICY, *supra* note 138 at 384.

186. This is assuming that once the particularity and social distinction requirements are streamlined, the requirement of particularity alone will remain.

187. *S-E-G-*, 24 I. & N. Dec. at 585-86.

reasons why a persecutor seeks to harm the victims."¹⁸⁸ In other words, gangs *specifically* target these particular social groups due to the groups' immutable characteristic of age¹⁸⁹ or past refusal to join a gang.¹⁹⁰ For purposes of this analysis, only the latter immutable characteristic will be discussed.

The primary reason why youth refusing gang recruitment do not represent a large and diffuse segment of society stems from their very act of having refused gang recruitment. Because those living in gang-controlled areas generally comply with gang demands for fear of jeopardizing their personal safety or that of their loved ones,¹⁹¹ youth who resist recruitment stand out from the rest of the community. As explained by the UNHCR, "[r]efusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response."¹⁹² Thus, when youth are persecuted for their refusal, it is because they have

188. Brief for United Nations High Comm'r for Refugees as Amicus Curiae Supporting Petitioner, *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011), *available at* <http://www.refworld.org/pdfid/49ef25102.pdf>.

189. In *S-E-G-*, the B.I.A. recognized age as an immutable characteristic when it stated: "we acknowledge that the mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable." *S-E-G-*, 24 I. & N. Dec. at 583-84.

190. In *S-E-G-*, the B.I.A. also recognized that past refusal to join a gang may be considered an immutable trait that cannot be changed, stating that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed." *Id.* at 584.

191. *Clearly Amorphous*, *supra* note 12 at 646. *See also* Joe Tuckman, *Flee or Die: Violence Drives Central America's Child Migrants to U.S. Border*, *The Guardian*, July 9, 2014, [hereinafter *Flee or Die*], <http://www.theguardian.com/world/2014/jul/09/central-america-child-migrants-us-border-crisis> (reporting that victims of gang violence say, [t]here is no choice . . . but to accept the "war taxes" the gangs extort from businesses, or the "protection taxes" they levy on family homes. If there is a murder, it is better not to go to the funeral. Church organisations and some NGOs do have a presence, but some will admit they have to obtain permission from the gangs and stay away from controversial topics.").

192. GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 3, para. 6 (stating that respect and reputation play [] an important role in gang culture, [therefore]members and entire gangs go to great lengths to establish and defend both).

disrespected or insulted the gang. More importantly, these youth are also persecuted because they are perceived as having thwarted the gang's goal of increasing their numbers and maintaining their influence in an area. Therefore, young who have refused gang recruitment are persecuted for different reasons than for which the general population is persecuted.¹⁹³

II. Conclusion

Although the BIA may be trying to avoid "opening the floodgates" to an unmanageable number of immigrants within the United States, requiring an applicant to formulate a social group that is both particular and socially distinct, places an excessive and unfair burden on applicants that may have bona fide claims of human rights violations.¹⁹⁴ Moreover, various other protections are still in place to prevent this basis for asylum from sweeping very broadly. For example, even if applicants can articulate a cognizable social group, they must still prove actual membership in the group and show that they would be

193. The following examples demonstrate (1) the distinct reasons why gangs persecute different members of a community as compared to youth who refuse recruitment and (2) the different ways gangs persecute different members of the community as opposed to youth who refuse gang recruitment. For example, a small business owner, taxi driver or bus company who refuses or fails to pay extortion taxes or "renta" to a local gang may be persecuted for hurting the gang's economic prospects. *See also* Quentin Delpech, *Guate-Mara: the Extortion Economy in Guatemala*, AMERICAS QUARTERLY, (2013), <http://www.americasquarterly.org/content/guate-mara-extortion-economy-guatemala>; *Flee or Die*, *supra* note 191 (in retribution, the gang may burn down a business, shoot up a bus with or without passengers inside, or kidnap taxi drivers); David Boeri, *Gang Violence Is Why Most Children Flee El Salvador*, *Survey Finds*, WBUR NEWS, (Dec. 17, 2014), <http://www.wbur.org/2014/12/17/el-salvador-gangs-extortion-police>; Miriam Wells, *'Rising Extortion' Signals Trouble For El Salvador's Gang Truce*, INSIGHT CRIME, (Mar. 18, 2013), <http://www.insightcrime.org/news-briefs/rising-extortions-trouble-salvador-gang-truce> (On the other hand, women, who are raped by gang members or who refuse to engage in intimate relationships with gang members are persecuted because they are "generally devalued in gang culture" or because they are seen as having become "the sexual property of the gang." Unlike youth who resist recruitment or business who fail to pay "renta," these women are further persecuted when they are followed in the streets, physically and sexually assaulted, or subjected to multiple abductions and rapes).

194. *Bad Boys*, *supra* note 110 at 246.

persecuted or have a well-founded fear of persecution based on that membership.¹⁹⁵ On the other hand, claims of forced gang recruitment are unlikely to spring out of proportion given that membership in a gang is still largely voluntary. Thus, children that resist recruitment are likely to be few in number.

Based on the foregoing, children and adolescents should no longer be denied protection due to the ambivalence and confusion courts and judges have experienced in applying the BIA's particular social group framework. Although past BIA decisions have held that youth who resist gang recruitment do not constitute a particular social group, this does not mean that reform is not possible. If this note's proposal is adopted, applicants with gang based claims will have a better chance of identifying a legally cognizable social group and obtaining the protection of asylum.

195. Similarly, previous asylum reforms promulgated by Congress have already proved effective in reducing a significant influx of migrants claiming refugee status. They include: enactment of the one year filing deadline for asylum applications INA § 208(a)(2)(B); ratification of the Real ID Act of 2005 which gave asylum officers the authority to require corroborating evidence beyond the testimony of the asylum seeker INA § 208 (b)(1)(B)(ii); and implementation of new regulations in 1995 preventing applicants from obtaining work authorization until at least one-hundred eighty days had elapsed, unless asylum was granted before then or unless the government unduly delayed decisions on their applications. FORCED MIGRATION LAW AND POLICY, *supra* note 138 at 101; *see also* INA § 208(d)(2).