Falling through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence

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The United Nations High Commissioner for Refugees (UNHCR) perspective is that the interpretation of the 1951 Convention grounds needs to be inclusive and flexible enough to encompass emerging groups and respond to new risks of persecution.

ABSTRACT

With the rise of transnational gangs in recent years, gang-based asylum cases have become both common and the cutting-edge of asylum jurisprudence. U.S. law protects persons fleeing serious human rights abuses inflicted on account of five protected grounds: race, religion, nationality, political opinion, and membership in a particular social group.2 Gangs target and persecute people based on their religion and their family relationships.3 They also persecute people who refuse to join a gang and refuse to date a gang member, as well as those who leave a gang.4 Women additionally face sexual harassment and rape. These victims often share similar socioeconomic backgrounds that make them vulnerable to gangs, and consequently, they face many shared dangers: beatings, threats, and, in some cases, even death. Yet, not

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all victims of gangs qualify for asylum even though they face similar threats of harm and share other socio-economic circumstances that make them vulnerable to gangs. In this article, I set forth five hypothetical cases based on the persecuted groups listed above as a tool to compare and demonstrate the gaps in asylum protection for those who refuse gang recruitment, those who oppose gangs, and, in some cases, former gang members or youth with former gang involvement.

In response to the changing circumstances of refugees, including persecution by gangs, the UNHCR has allowed for flexibility in interpreting the 1967 Refugee Protocol. Although Congress codified provisions of the Refugee Protocol in 1980, the Board of Immigration Appeals (BIA) failed to apply the UNHCR’s flexible approach in interpreting “membership in a particular social group” and “political opinion.” Instead of broadly interpreting the term “membership in a particular social group,” the BIA narrowed its interpretation by adding the criteria of “particularity” and “social visibility” in cases unrelated to gang persecution. Most U.S. circuit courts have adopted the BIA’s narrow interpretation, however, a split between circuits exists.

5. See, e.g., Clare Ribando Seeleke, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 6-7 (2011) (socio-economic circumstances affecting “at-risk youth” such as poverty, social exclusion, and a lack of educational and job opportunities, as well as absence of familial and community support).


7. See, e.g., In re C-A-, 23 I. & N. Dec. 951, 955 (BIA 2006) (The court noted that the rule in Acosta was a starting point in finding a “particular social group” and required social visibility.); In re A-M-E & J-G-U-, 24 I. & N. Dec. 69, 73 (BIA 2007) (where the court applied the rationale in Acosta and found that wealthy Guatemalans was neither immutable, nor sufficiently particular). The BIA’s decision In re S-E-G-, 24 I. & N. Dec. 579 (BIA 2008), included social visibility and particularity—two additional steps to the social group analysis.


9. The First, Second, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal have all afforded Chevron deference to the “particularity” and “social visibility” requirements. See Scatambuli v. Holder, 558 F.3d 53, 58-59 (1st Cir. 2009); Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012); Davila-Mejia v. Mukasey, 531 F.3d 624 (8th Cir 2008); Ramos-Lopez v. Holder, 563 F.3d 855, 858-860 (9th Cir. 2009) (overruling in part Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008), maintaining its adoption of the social visibility and particularity requirements, but replacing its independent rational with Chevron deference to the BIA); Rivera-Barrientos v. Holder, 658 F.3d 1222, 1231-34 (10th Cir. 2011), as corrected on denial of reh’g en banc, 666 F.3d 641 (10th Cir. 2012); and Castillo-Arias v. Att’y Gen., 446 F.3d 1190, 1197-98 (11th Cir. 2006). But see Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582 (3d Cir. 2011) (remanded a second time for the BIA to provide a reasonable rational for social visibility and particularity group social requirements, or reconcile the two competing interpretations coherently); Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (declining to extend Chevron deference to the BIA’s addition of “social visibility” to the “particular social group” analysis). Note that the Ninth Circuit en banc “clarify[ed] the ‘social visibility and ‘particularity’ criteria without reaching the ultimate question of whether the criteria themselves are valid.” Henriquez-Rivas v. Holder, 707 F.3d 1081, 1091 (9th Cir. 2013). Neither the Fourth nor the Sixth Circuits have expressly ruled on deference to the BIA’s interpretation to date, with
Humanitarian relief, however, is restricted by the narrow interpretation of asylum criteria. The inflexibility of U.S. asylum law can become more entrenched when circuit courts give *Chevron* deference to the BIA decisions that narrowly interpret the asylum qualifying provisions, and because circuit courts are bound by *stare decisis* to abide by their previous decisions. Moreover, these decisions do not provide clear guidance and interpretation of the asylum qualifying provisions.

This article builds on a growing recognition that asylum jurisprudence lacks clarity and deviates from the broad and principled protective ethic embodied by the 1967 Protocol. It also draws on scholarship that provides a rational approach to *Chevron* deference analysis in the asylum context. The procedures it sets forth for advocates to raise and preserve legal issues enable the BIA and circuit courts to review and reconsider the interpretations of “particular social group” and “political opinion” in asylum law. Thus, the article supports the notion that the protective ethic, which lies at the root of all asylum law, should guide the analysis and interpretation of “particular social group,” “political opinion,” and the nexus between the persecution and the protected ground in all asylum cases.

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the Fourth Circuit applying particularity and social visibility requirements and the Sixth Circuit refraining. See, e.g., Zelaya v. Holder, 668 F.3d 159, 165 n.4 (4th Cir. 2012); Al-Ghorbani v. Holder, 585 F.3d 980, 995-98 (6th Cir. 2009).
10. See, e.g., DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES, 347-48 (3d ed.) (recognizing that adding “particularity” as a criterion to “particular social group” analysis has rejected potentially large groups defined by age or social class that meet Acosta immutability requirements); *Ramos-Lopez*, 563 F.3d at 858-60 (overruling Santos-Lemus v. Mukasey, 542 F.3d 738, maintaining its adoption of the social visibility and particularity requirements, but replacing its independent rational with *Chevron* deference to the BIA); and *Castillo-Arias*, 446 F.3d at 1198-99. The Second, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have given deference to the “particularity” requirement. See *Ucelo-Gomez*, 509 F.3d at 73-74; *Davila-Mejia*, 531 F.3d at 628-29; *Santos-Lemus*, 542 F.3d at 745-46; *Castillo-Arias*, 446 F.3d at 1198-9. But see *Gatimi* v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009); Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 58, 603-6052 (3d Cir. 2011).
12. In this context, the term “protective ethic” refers to values central to the 1951 Convention and the 1967 Protocol—the protection of refugees from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion. These factors “figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights.” GUY GOODWIN-GILL & JANE McADAM, supra note 6, at 92; see also Parens Patriae and Statutory Vagueness in the Juvenile Court, 82 Yale L.J. 745, 748 (1973) (using the term protective ethic of *parens patriae*, the principle that the court may protect the child from himself and his environment); Ann E. Carlson, Standing for the Environment, 45 UCLA L. Rev. 931, 970 n202 (1998) (refers to an environmentally protective ethic).
13. GUY GOODWIN-GILL & JANE McADAM, supra note 6, at 92-93.
INTRODUCTION

Narrow interpretations of the protected grounds for asylum and withholding of removal unduly restrict humanitarian relief to various groups targeted by gangs.
All over Central America, gangs threaten, beat, and abuse people for refusing to join a gang, opposing the gang, refusing to be the girlfriend of a gang member, attempting to leave the gang, belonging to a rival gang, or simply being a family member of someone who has resisted a gang in these ways. 14 Many gang victims escape persecution by fleeing their country of origin and applying for asylum and withholding of removal in the U.S. 15 Although immigration judges rarely grant asylum or withholding of removal to victims of gang persecution, a review of immigration judge decisions indicates that some have granted asylum or withholding of removal where a gang persecuted the individual on account of religion or membership in a particular social group where the social group is formulated based on female gender or a narrowly defined family. 16 This article examines whether the narrow interpretation of “membership in a particular social group” and “political opinion” sacrifices the protective ethic at the root of asylum and relief from removal. The article does so by comparing a series of five hypothetical scenarios representative of real gang-based asylum cases involving religion, refusal to join a gang, family, gender, and former gang membership.

The following five individuals left the same neighborhood in San Salvador, El Salvador, a poor urban area teeming with Mara Salvatrucha 13 ("MS-13") gang members who recruit relentlessly. With one or more of their parents having left the area to seek work, they have had to either quit school to work or have tried to balance both work and school to make ends meet. 17

**Alberto** fled El Salvador to escape MS-13, a notorious international gang. MS-13 gang members shot at Alberto in two incidents before Alberto fled to the United States. A group of four MS-13 members tried to recruit Alberto on his way to and from his Pentecostal church several times, starting when he was thirteen years old. He refused each time saying, “No. I don’t want to steal and kill people.” The gang members told him that they could give him a better life than the church could, and that God could not save him from MS-13. They threatened to kill Alberto and shot at him one day after he refused again.

Alberto finds himself in a scenario that closely resembles that of the

14. See, e.g., FARÍNA ET AL., supra note 3, at 77-78, & 92-93. Although this article focuses on Central America, this problem may also exist in other areas; see also U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, 4 (March 2010).

15. An asylum application is also considered an application for withholding of removal, a lesser form of relief from deportation. Throughout this introduction, references to applications for asylum should be considered as joint applications for asylum and withholding of removal.


17. Poverty, lack of education, and lack of employment opportunities factor into the growing gang problem in Central America. Seelke, supra note 5, at 6 (also stating that “in the absence of familial and community support, many marginalized youth have turned to gangs for social support, a source of livelihood, and protection.”). See also FARÍNA ET AL., supra note 3, at 73 (calling poverty, marginalization of youth, lack of education, and lack of opportunity to the “less-visible factors” pressuring youth to join gangs) (citing Interview with Howard Augusto Cotto Castaneda, Jefe de la Delegación de La Paz, PNC [Chief of the La Paz Police Unit], in Santa Tecla (Oct. 22, 2008)). If gangs specifically target individuals with those factors, then they should be characteristics of a particular social group. However, social groups based on low socio-economic status usually fail because they are considered overbroad. See ANKER, supra note 10, at 399-400, n3.
stereotypical refugee escaping religious persecution. He would apply for asylum on the basis of past religious persecution by MS-13 and a well-founded fear of future religious persecution by MS-13 if he were compelled to return to El Salvador. Gangs in El Salvador target Pentecostal Christians for recruitment—a religious group known to embrace anti-gang views—because it is considered a prize to attract such a recruit. It is likely that an immigration judge presiding over Alberto’s case would grant asylum based on religious persecution if it could be shown that the gang members targeted Alberto because he was a Pentecostal Christian, although proving that connection often presents the greatest challenge in gang-related religious persecution cases. Others may not be as fortunate. Those who suffer the same type of recruitment and abuse by gangs, but are not targeted because of their religion, are less likely to be entitled to the same protection as Alberto, although they are just as vulnerable.

Consider the cases of brothers Bernardo and Carlos. Bernardo is another teenager, who fled El Salvador to escape from MS-13. Just as MS-13 attempted to recruit Alberto, referenced above, they attempted to recruit Bernardo repeatedly when he was on his way to or from school. When MS-13 first approached Bernardo asking him to join MS-13, he said “No, I don’t want to rob and murder.” The gang members taunted him, and demanded that he join, saying, “Change your mind or you will regret it.” The next time the gang members saw Bernardo, they shouted, “There he is! You’re out of time.” They began shooting as Bernardo ran away. He survived the shooting and a second similar incident by the same gang members. Bernardo fled to the United States and heard from his younger brother Carlos in El Salvador that MS-13 was still looking for him and was planning to kill him.

MS-13 gang members also tried to recruit Carlos; he refused to join the gang, but never stated his reasons. The gang members told him, “Don’t make the same mistake your brother did.” At a later date, the same three MS-13 gang members attacked and shot Carlos. They asked about Bernardo and told him to pass on a message to Bernardo, “We’re going to get him, and if he doesn’t come back, we’re going to get you.” Carlos fled about a year after Bernardo.

Given the similar circumstances of attempted gang recruitment, stated objection, and refusal to join the gang, followed by persecution, it seems reasonable to believe that Bernardo’s asylum application is as strong as Alberto’s. The only

18. A refugee is generally one who has suffered persecution in the past or reasonably fears persecution in the future on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A) (2011); INA § 101(a)(42)(A) (2011).


21. The hypothetical scenarios are loosely based on the combined facts of several cases in order to illustrate adjudications in the area of gang-based asylum applications, the results of which seem illogical and inconsistent with each other and with the spirit of the laws providing refugee protection.
differentiating circumstances between Alberto’s and Bernardo’s applications are that Bernardo’s refusal to join is not based on religion, but on his own ethics, and the gang members targeted Bernardo on his way to school instead of church. Even though his ethical opinion or moral stance is not directly grounded in his religious beliefs, he may assert that the reasons for his refusal to join constitute a political opinion and that MS-13 persecuted him on account of his membership in the social group “young El Salvadoran males of gang recruitment age who have refused to join MS-13.” Bernardo’s asylum application will likely be denied in most jurisdictions because refusal to join a gang alone does not constitute an expression of political opinion and such social groups have been rejected as too amorphous and lacking in social visibility.

Carlos’s application for asylum may appear weaker than his brother Bernardo’s, because he did not stand up to the gang the way Bernardo did. Even though Carlos never told MS-13 why he did not want to join, he may be eligible for asylum based on his family relationship to Bernardo, who did confront the gang by stating his reasons for not joining. The immigration court may grant Carlos’ application for asylum if it is convinced that MS-13 persecuted Carlos because his brother Bernardo stood up to the gang—that the gang persecuted Carlos because of his family relationship to Bernardo.

Whether both Bernardo and Carlos may apply together for asylum based on persecution of the nuclear family remains an open question. The gang has targeted each brother based upon a protected ground, Bernardo based on his outspoken opposition to the gang’s values and activities and “family members of such Salvadoran youth.” The case further states that refusal to join a gang alone does not constitute expression of a political opinion. In re S-E-G-, 24 I. & N. Dec. 579, 586-88 (BIA 2008). In the case of INS v. Elias-Zacarias, the court held that a guerrilla organization’s attempt to force a Guatemalan native into its military did not constitute “persecution on account of political opinion.” 502 U.S. 478, 484 (1992). In June of 2008, the BIA reversed a grant of asylum in In re S-E-G-, rejecting two very similar proposed social groups, “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” and “family members of such Salvadoran youth.” The case further states that refusal to join a gang alone does not constitute expression of a political opinion. In re S-E-G-, 24 I. & N. Dec. 579, 587 (BIA 2008). But see Valdivieso-Galdamez v. Att’y Gen., 663 F.3d 582 (3d Cir. 2011) (remanded to determine whether “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs,” remanded again to choose between social visibility and particularity social group analysis with a reasonable rationale, the immutability analysis, or to reconcile the two competing interpretations coherently).


23. Id.

24. In re S-E-G-, 24 I. & N. Dec. 579, 586-88 (BIA 2008). In the case of INS v. Elias-Zacarias, the court held that a guerilla organization’s attempt to force a Guatemalan native into its military did not constitute “persecution on account of political opinion.” 502 U.S. 478, 484 (1992). In June of 2008, the BIA reversed a grant of asylum in In re S-E-G-, rejecting two very similar proposed social groups, “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” and “family members of such Salvadoran youth.” The case further states that refusal to join a gang alone does not constitute expression of a political opinion. In re S-E-G-, 24 I. & N. Dec. 579, 587 (BIA 2008). But see Valdivieso-Galdamez v. Att’y Gen., 663 F.3d 582 (3d Cir. 2011) (remanded to determine whether “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs,” remanded again to choose between social visibility and particularity social group analysis with a reasonable rationale, the immutability analysis, or to reconcile the two competing interpretations coherently).

25. See, e.g., Molina-Estrada v. INS, 293 F.3d 1089, 1095 (9th Cir. 2002) (stating that family may constitute a particular social group in some circumstances); Sanchez-Trujillo v. INS, 801 F.2d 1572, 1576-77 (9th Cir. 1986) (calling family a “prototypical example” of a social group); see also Santos-Lemus v. Mukasey, 542 F.3d 738, 743 (9th Cir. 2008), abrogated on other grounds by Ramos-Lopez v. Holder, 563 F.3d 855 (9th Cir. 2009) (other family member’s ongoing safety in the claimed country of persecution may be a negative factor where the claimed social group is family). The particular family or subgroup of the family should be identified by the asylum applicant to avoid a social group that is overbroad. See, e.g., In re S-E-G-, 24 I. & N. Dec. 579, 585 (BIA 2008) (rejecting the social group “family members’ of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang” as too amorphous).

refusal to join the gang and Carlos based on his family relationship to Bernardo. Both equally merit asylum protection.27

Moreover, gender can mediate whether or not an immigration judge grants asylum. While most individuals recruited for gangs are adolescents and young men, female family members and other women and young girls may also be affected by gang violence.28

Dolores, a teenager from El Salvador, fled the country because of MS-13 threats. One of the MS-13 members wanted Dolores to "join" the gang as his girlfriend. When she refused his repeated advances, the gang member and his friends began following her on her way to and from school. He grabbed her on several occasions. He threatened to rape and kill her, holding a knife to her neck. The gang member told her that she belonged to him. Although Dolores did not like the way gangs treated women and disapproved of their lawlessness, she never stated her opinions to the gang members for fear of further endangering herself. Dolores came to the United States and applied for asylum.29

Dolores, like Alberto and Carlos above, may be granted asylum. Dolores's situation closely parallels that of the prior examples: she is a target of attempted recruitment (as a girlfriend), she has repeatedly voiced her refusal, and she has experienced ongoing abuse because of her refusal to succumb to the demands of the gang members. Dolores's asylum application may be based on her membership in the particular social group of "El Salvadoran women who refuse to be the victims of violent sexual predation of gang members."30 Whether "El Salvadoran women" may consistently prevail is still an open question where evidence demonstrates that the women in El Salvador are regarded as subordinate to men, with little power to refuse to be in a relationship and less power once in a relationship.31 However, if she

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28. Gang Related Asylum Sources: Immigration Judge Decisions/Briefs and Affidavits, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html (last visited Sept. 4, 2011); Id. (listing a Jan. 14, 2009 Los Angeles, California IJ Decision (In re MU) where asylum was granted to twin sisters from El Salvador who suffered persecution by MS-13 for refusing to join the gang) (on appeal). The case cited is just one example of several listed on the website.

29. Id. (listing a Nov. 8, 2006 Baltimore, Maryland IJ Decision (In re Sandra) where asylum was granted where Mara 18, another transnational gang, stalked the respondent, threatening to kill her while holding a knife to her on several occasions after she refused to be his girlfriend or join the gang). Other female gang-based persecution cases are also described on that website. The immigration judge issued the decision in this case before the BIA precedent decisions, but other cases have since been granted, and other precedent decisions addressing women and subgroups of women as a social group have been issued.

30. Id. (listing a Nov. 8, 2006 Baltimore, Maryland IJ Decision (In re Sandra) granting asylum based on the social group "young women who refuse to be the victims of violent sexual predation of gang members," where a gang member persecuted a female because she refused to be his girlfriend or join the gang). But see Menjivar v. Gonzales, 416 F.3d 918 (8th Cir. 2005) (upholding the finding that harm suffered by a Honduran female because of a gang member's sexual advances were personal problems, not persecution).

31. See, e.g., Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (remanding case to BIA for further consideration of whether Guatemalan women could constitute a particular social group under prior BIA precedents); see also Mohammed v. Gonzales, 400 F.3d 785, 796-98 (9th Cir. 2005) (in female genital mutilation cases, gender may constitute a social group); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir.2007) ("Somali females" constitute a particular social group); Fisher v. INS, 79 F.3d 955, 965-66 (9th Cir. 1996) (en banc) (Canby, J., concurring) (recognizing that asylum eligibility based gender as a particular social group was not foreclosed); Fatin v. INS, 12 F.3d 1233 (3rd Cir.1993) (recognizing that
structured her social group like Bernardo’s, it would likely be deemed too amorphous and lacking in social visibility without the added dimension of the gender-based argument.32

Those individuals who do not resist, but instead succumb to gang recruitment, face a different set of issues.

*Enrique is a former MS-13 gang member from El Salvador. He is sixteen years old now, and joined MS-13 when he was only thirteen years old. Both of his parents left El Salvador when he was a child. He lived with his grandmother, but fell into the gang life when he was young. The gang members became his friends, but he decided to leave the gang because he could not stand the violent lifestyle. He just wanted a peaceful life. Once Enrique decided to leave the gang, he rarely left home. He knew that MS-13 killed those who tried to leave the gang. His former associates shot at him once when he left the house. Soon after that, he fled to the United States.*

If reliable information confirms that MS-13 will kill Enrique for leaving the gang, then one might legitimately believe that Enrique could be granted asylum or some lesser status in the U.S. to prevent him from being removed and killed in El Salvador.33 However, he may be denied asylum precisely because of his past gang membership.34 The BIA and some circuit courts have determined that gang membership or former gang membership do not constitute membership in a particular social group.35

Of all five cases, Alberto’s (religious persecution) and Carlos’s (family-based) cases, closely followed by Dolores’s (gender-based) case are the strongest cases based on the statute and case law because the courts seem to favor narrow interpretations of the protected classifications for asylum and withholding of

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32. The case would most likely be denied if the social group is framed like male gang-recruitment cases (like Bernardo’s), and the claim fails to highlight the context of gang violence against women and the larger context of the treatment of women in the country. See, e.g., Mendez-Barrera v. Holder, 602 F.3d 21, 27 (1st Cir. 2010) (rejecting “young women recruited by gang members who resist such recruitment” as a social group); Rivera-Barrientos v. Holder, 658 F.3d 1222, 1234-35 (10th Cir. 2011) as corrected on denial of reh’g en banc, 666 F.3d 641 (10th Cir. 2012) (rejecting “women in El Salvador between the ages of 12 and 25 who resisted gang recruitment” as a social group).


34. As a former gang member, he may be barred from asylum and withholding of removal if he persecuted others on account of one of the five protected grounds, committed a serious nonpolitical crime, constitutes a danger to the security of the United States, or has aided or supported terrorism. INA §§208(b)(1)(i-v); 241(b)(3)(B)(i-iv). Also, even if Enrique satisfies the elements of asylum, the immigration judge may deny asylum in his or her discretion. INA § 208(b)(1).

35. See, e.g., *In re E-A-G-*, 24 I.&N. Dec. 591, 596 (BIA 2008) (“membership in a particular social group cannot constitute a particular social group”); Arteaga v. Mukasey, 511 F.3d 940, 945-46 (9th Cir. 2007) (past and current membership in gang did not constitute membership in a social group); Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir.2003) (tattooed youth too broad a category even though the applicant was a tattooed former gang member). *But see* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (former gang membership is an immutable characteristic if the person cannot leave without being persecuted); Gatimi v. Holder, 578 F.3d 611 (former member of, Mungiki, a violent criminal faction was a member of a “particular social group”).
removal. However, more broadly, all of the hypothetical asylum applicants share socio-economic characteristics that the BIA and circuit courts have failed to recognize as validly defining a "particular social group." Socio-economic characteristics arguably should be recognized as defining characteristics of a "particular social group" where evidence demonstrates their immutability and the nexus between the persecution and those characteristics.

This article critically examines an important and often inconsistent area of the law: adjudications of a variety of gang-related asylum and withholding of removal cases. Recent asylum precedents have narrowed the long-standing interpretation of membership in a particular social group, significantly impacting cases based on gang persecution and calling into question what constitutes membership in a particular social group. Gang persecution cases also raise the question of whether opposition to gangs may constitute a political opinion, and if so, what actions may constitute the expression of a political opinion. BIA and circuit court precedents in this area provide uneven protection by leaving children and young adults who apply for asylum based on gang persecution largely unprotected and at risk of removal to their home countries to be killed by gang members.

To illustrate the danger that gangs present, Section I provides background information about the operation, recruitment, and retention practices of transnational Central American gangs and their growing power and prominence throughout El Salvador, Guatemala, and Honduras, specifically referred to as the "Northern Triangle" of Central America.

Asylum in international law is based on non-discrimination principles, as described in Section II. Section III details U.S. involvement and commitment to the development of international treaties that create refugee protection. These two

36. Although there are no favorable precedent opinions in gang-based asylum cases asserting persecution on account of religion, some immigration judges have granted asylum in such cases. Lisa Frydman & Neha Desai, Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs, 12-10 IMMIGR. BRIEFINGS 1, 22 (2012). Kinship has repeatedly been offered as an example of a prototypical particular social group; see, e.g., Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir.1993) (setting forth the "nuclear family" as a plain example of a particular social group with "common identifiable and immutable characteristics"). Social groups based in part of female gender combined with other characteristics have been recognized. Fatin v. INS, 12 F.3d 1233, 1239-40 (3d Cir. 1993) ("Iranian women who refuse to conform to the government's repressive gender laws" as a social group); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004); Iliev v. INS, 127 F.3d 638, 642 & n.4 (7th Cir.1997).

37. Social groups based on low socio-economic usually fail because they are considered overbroad. See ANKER, supra note 10, at 399-400, n.3.


39. Id. at 386-87.

40. Some cases were granted at the immigration court level based on gang persecution on account of anti-gang political opinion, but that was prior to the BIA’s opinions in E-A-G- and S-E-G-.


sections combined contain the essence of the protective ethic in international refugee law and its existence in U.S. law before the passage of the Refugee Act of 1980 (Refugee Act).

Section IV describes how Congress enacted domestic asylum law in order to bring the U.S. into conformance with international law. Section IV also describes the recent application of domestic asylum law and withholding of removal and their recent application to gang-based asylum cases using the hypotheticals set forth in the introduction. The Section critically examines recent developments of asylum jurisprudence in gang persecution cases, particularly political opinion and membership in a particular social group claims. I argue that these claims have been interpreted narrowly to the detriment of the asylum applicant and are in conflict with the underlying principles of refugee protection. Moreover, this section shows the inflexibility, not of our laws, but of our institutions—the BIA and circuit courts—in interpreting domestic asylum law.

Section V proposes practice and procedural measures to be taken by advocates at the immigration court, BIA, and circuit court levels to enable these institutions to correct the course of domestic asylum law so that it conforms with international law. Recent decisions move further away from the origins of this country’s strong commitment to refugee protection and against congressional intent.

Political opinion and membership in a particular social group must be interpreted in a manner consistent with the principles of refugee protection embodied in domestic asylum law and its international roots. Thus, I propose a more expansive view of political opinion as a basis for membership. In addition, I propose a return to the BIA’s interpretation of membership in a particular social group in In re Acosta—that individuals in the group share an immutable characteristic. Additional measures should also be taken to ensure that all refugees genuinely fleeing gang persecution receive appropriate protection.

Immigration judges, the BIA, and circuit courts should employ a flexible interpretation of persecution and protected grounds, while narrowly applying bars to asylum to allow for greater discretion in asylum decisions. As illustrated by the hypotheticals above, current asylum standards and interpretations leave open the significant possibility that young men and women—some mere teenagers—who are systematically persecuted by transnational gangs will be denied refugee protection. Inevitably, these deportations will result in emotional trauma, physical injuries, and deaths from exactly the kind of persecution they describe in their asylum applications. This approach will protect legitimate refugees and minimize the

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44. 19 I. & N. Dec. 211, 233 (BIA 1985), modified on other grounds (membership in a particular social group defined by immutable characteristic, one that either cannot be changed or should not be required to change because it is fundamental to the identity). Social visibility may be an alternative way of defining a social group, but not an additional requirement of those groups defined by an immutable characteristic. See United Nations High Commissioner 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, ¶¶ 10-13, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at http://www.unhcr.org/3d58de2da.html [hereinafter UNHCR Social Group Guidelines].


46. See, e.g., GREG CAMPBELL & JOEL DYER, Death by Deportation: A Denver Judge Denied
denial of legitimate refugee claims.

The BIA and circuit courts can reverse course in their determinations of gang-based asylum cases to reevaluate whether and which social groups may be recognized under the definition of refugee.\textsuperscript{47} Moreover, they can determine whether opposition to gangs can ever constitute a political opinion if advocates take steps to properly raise these issues at the immigration court, BIA, and circuit courts. Decisions must therefore be consistent with the goal of protecting refugees.\textsuperscript{48}

I. CHARACTERISTICS AND PRACTICES OF GANGS

A. Generally

Transnational gangs like Mara Salvatrucha (MS-13) and 18th Street gangs (Mara 18) create a socio-political climate where they are free to expand and operate with impunity in several Latin American countries, most notably in Central

\textsuperscript{47} See 8 C.F.R. § 1003.1(a)(5) (The BIA may consider in banc or reconsider a decision entered by a three-member panel at the direction of the Chairman of the BIA or “on its own motion by a majority vote of the permanent Board members.”). En banc proceedings are appropriate “to address an issue of particular importance or to secure or maintain consistency of the Board’s decisions.” Id; see also 8 C.F.R. § 1003.1(h)(1)(ii) (authorizing the Chairman of the BIA or a majority of the BIA permanent members to refer BIA decisions to the Attorney General for review); F.R.A.P. Rule 35(a)(1), (2) (by order of a “majority of the circuit judges in regular active service and who are not disqualified,” the court may order en banc hearing or rehearing of an appeal to ensure uniformity of the court’s decisions or to resolve “a question of exceptional importance.”); see, e.g., Henriquez-Rivas v. Holder, 449 Fed. Appx. 626 (9th Cir. 2011) (reh’g granted in banc Henriquez-Rivas v. Holder, 670 F.3d 1033 (9th Cir. 2012)), Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) en banc (holding that the BIA had erred in applying its own precedent, set forth in C-A-P, 23 I & Dec. 951 (BIA 2006), that “visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of [the persecutors].”)

\textsuperscript{48} Despite the negative precedents in gang-based asylum cases, asylum and withholding of removal have not been completely foreclosed in gang persecution cases. Recently, the Third Circuit reversed denial in In re S-E-G-G, 24 I. & N. Dec. 579 (BIA 2008), and In re E-A-G-G, 24 I.&N. Dec. 591 (BIA 2008). The Sixth and Seventh Circuits have held that former gang members can be deemed a “particular social group” under the INA. Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (citing Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009)); Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010). However, without counsel, it is virtually impossible to win asylum, withholding of removal, or CAT relief, and possibly even more so for the young victims of gangs. In recent years, a report compiled by TRAC found that asylum seekers who obtained counsel were more likely to be granted asylum. TRAC Immigration, Asylum Law, Asylum Seekers and Refugees: A Primer, http://trac.syr.edu/immigration/reports/161 (last visited August 4, 2010).
America. These gangs have succeeded in terrorizing government officials and undermining the operational capacity and legitimacy of Central American states and institutions. Those who resist or thwart gangs’ efforts to gain financial, territorial, or political control suffer the consequences: gangs intimidate, coerce, torture, murder, and decapitate in service of these goals.

The history and growth of gangs in Central America are closely tied to U.S. deportations of gang members, essentially exporting gang culture. Mexicans formed Mara 18 in the 1960’s, and Salvadorans formed MS-13 in the 1980’s in Los Angeles, California. These deportees arrived in El Salvador, Guatemala, and Honduras, countries still vulnerable from “insurgency, political revolt, civil war, or other forms of political bloodshed, as well as less ideological—but no less harmful—tumults in the form of rampant banditry, brigandage, and criminal violence.”

For example, in Guatemala, “the internal conflict left social, economic, and political wreckage that has directly abetted the current crisis.” The thirty-six year (1960-1996) Guatemalan civil war left in its wake thousands of uneducated and unskilled young men. Because of the war, they knew how to handle a gun; and

49. Max G. Manwaring, Street Gangs: The New Urban Insurgency, STRATEGIC STUDIES INSTITUTE, March 2005, at 9, 20. There is some disagreement among experts as to whether the gang movement constitutes an insurgency, but they generally agree with the statement that transnational gangs do have some political goals, if only to serve the interests of their criminal enterprises, unfettered by law enforcement and the justice system. Id. Central American gangs are described in articles and studies in a variety of ways, using terms such as pandillas and maras, while others describe generations of gangs (1st, 2nd, and 3rd) moving from local to national, multi-national, or transnational (existing and networked in multiple countries and sometimes having political aims). Seelke, supra note 5, at 4. Unlike the general designation of “gangs” which may include gangs without national presence, the phrase “transnational gangs” is used commonly to describe MS-13 and Mara 18, two of the largest 3rd generation gangs present throughout Central America and in the United States, as well as in other countries, is well established. Id. at 4-5.

50. HAL BRANDS, supra note 38, at 19-21.
52. Seelke, supra note 5, at 4.

54. HAL BRANDS, supra note 38, at 4 (describing civil war and other weaknesses in “virtually all Latin American countries” in years preceding the rise of gangs in Central America).
55. HAL BRANDS, supra note 38, at 12.
many weapons remained readily available throughout the country. Further effects of the war include, "destabiliz[ed] refugee flows, and [the] growth of a predatory military elite skilled in corruption and intimidation. Just as important, the civil war exposed many Guatemalans to horrific bloodshed as a way of life, and fueled lasting disenchantment with often repressive government institutions." Post-war El Salvador was also plagued by the "widespread proliferation of weapons, families torn apart by violence and forced migration, . . . [and] high levels of poverty and unemployment." Honduras suffered through "decades of military rule and civil strife," only restoring democracy in 1981.

The massive deportations into the small and vulnerable Central American nations in the 1990s are credited with helping to "trigger the rapid development of organized gang activity" throughout Central America. The deportation of these gang members caused Central America's gang related crimes to increase from virtual nonexistence to its number one problem. The violent street gangs in Central America have grown rapidly due to socio-economic disparities, weak government institutions, and post-war cultures of violence. Young men and women have limited opportunities in their home countries to lead law-abiding and productive lives because the lack of social services and jobs creates an environment in which gangs thrive. Additionally, in El Salvador, for instance, the deported gang members brought with them gang cultures comprised of clothing, music, and behavior that attracted and influenced youth.

Two of the major gangs, Mara 18 and the MS-13, are at war with each other in El Salvador, Guatemala, and Honduras. While other gangs exist, Mara 18 and MS-13 have emerged as the dominant gangs, having consolidated power and firmly established themselves. Because of the dynamic nature and character of both of these gangs, "their fluid [. . .] organization and complex, clandestine hierarchies, [. . .] it [is] virtually impossible to present a complete picture of their structures and functioning [in El Salvador]."

56. HAL BRANDS, supra note 38, at 11-12.
57. Id.
58. FARIÑA ET AL., supra note 3, at 3.
60. See, e.g., FARIÑA ET AL., supra note 3, at 53.
62. FARIÑA ET AL., supra note 3, at 50.
63. Id. at 54 (faulting El Salvador's post-war difficulties in part on a transformation from an agricultural state to an export economy, with the demise of agriculture outpacing growth in the export sector).
64. Id. at 53 n.143 (citing Interview with Oscar Bonilla, Presidente, Consejo Nacional para Seguridad Pública [President, National Council for Public Security], in San Salvador (Mar. 27, 2006)).
65. Seelke, supra note 5, at 4; see also FARIÑA ET AL., supra note 3; Seelke, supra note 35, at 56 (specifically describing El Salvador).
67. FARIÑA ET AL., supra note 3, at 57.
MS-13 and Mara 18 include networks of hundreds of neighborhood gang cells, known as clikas. These gangs have their own values, rules, and hierarchy containing specific and defined leadership roles. Mara leaders are usually older and more experienced criminals, while other members are usually much younger, between 12 and 24 years old. These gangs have grown into sophisticated organizations; they seek wealth and power locally, nationally, and beyond. They have developed an increased capacity to engage in systematic extortion and punish those who fail to comply. These gangs have also developed ties to other organized criminal networks, infiltrated governments, and increased the climate of insecurity.

Poverty, lack of education, joblessness, as well as weak democratic and legal institutions create an environment in which gangs flourish, not only in El Salvador, but in Guatemala and Honduras as well. Some statistics from Honduras illustrate the magnitude of the problem: with approximately 30 percent of the Honduran population between 15-24 years old; 65 percent of the population has $2 or less a day to survive on; 25 percent of the population were unemployed in 2005; and a large number of youths are neither in school nor employed. Poverty and lack of economic opportunities in these Central American countries compel much of the working-age population to emigrate, many to the U.S., leaving children in one-parent families and sometimes in the care of extended family members. In the absence of familial and community support, many marginalized youth have turned to gangs as a source of social support, livelihood, and protection.

El Salvador, Honduras, and Guatemala suffer endemic gang problems. Groups like MS-13 “significantly expanded their influence amid the disarray following [Guatemala’s over] three-decade civil war. They are now well-armed, well-funded, and their actions have become increasingly detrimental to public order.” The U.S. Southern Command and the United Nations estimate that there are

68. Id. at 57-58 (stating that in 2002 there were approximately 300 clikas operating in El Salvador). Although the local gangs operated independently just a decade ago, they have transformed into organized local branches of larger in regular contact with each other. Id. at 58 (containing a detailed description of organizational hierarchy of gangs like MS-13 and Mara 18).
69. Id. at 58; see also HAL BRANDS, supra note 38, at 23-25 (describing the characteristics of MS-13 and Mara 18 in Guatemala).
70. Id. at 25.
71. FARIÑA ET AL., supra note 3, at 68.
72. Id. at 69 (describing a system of charging renta from bus drivers and business operators, citing a study showing over 2,000 non-public transportation operators subject to extortion and over 100 killed).
73. Id. at 217-18.
74. Clare Ribando Seelke, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 6 (2011); FARIÑA ET AL., supra note 3, at 55; see also HAL BRANDS, supra note 38, at 3-4.
75. Seelke, supra note 5, at 6 (citing SARA MICHEL, ELIZABETH UTTING, & BOB MOQUIN, HONDURAS: A RISK ASSESSMENT, WORLD BANK, (2007)). The same conditions and circumstances exist in El Salvador and in Guatemala. See, e.g., HAL BRANDS, supra note 38, at 8; FARIÑA ET AL., supra note 3, at 50.
77. Seelke, supra note 5, at 6-7.
around 70,000 gang members in Central America. The United Nations Office on Drugs and Crime ("UNODC") estimates gang membership totals of approximately "10,500 in El Salvador, 36,000 in Honduras, and 14,000 in Guatemala," in contrast to much lower figures in Nicaragua, Panama, and Costa Rica.

In some areas, with an absence of government authorities, the gangs have become the de facto social order and act in place of the government. Gangs "have blatantly bribed and intimidated government officials to the point that the police, the judiciary, and entire local and departmental governments are rife with criminal collaborators and infiltrators." The gangs extort "taxes" and provide protection, food, clothing, and money to members and "loyal" residents. Gang members harass and threaten those who do not pay. In such areas, failure to follow the gang's orders may lead to extreme retribution and even organized response. In 2009, "gangs reportedly killed 146 Guatemalan bus drivers. In early September 2010, the MS-13 and Mara 18 in El Salvador jointly organized a three-day strike in response to new anti-gang legislation that paralyzed the country's transport system." Central American governments consequently lack credibility and authority. For example, in Guatemala, this lack of credibility is "apparent in purely territorial terms, as the influence of non-state criminal actors rivals or exceeds that of the government in up to 40 percent of the country. In institutional terms, criminal groups have colonized sectors of the government and turned the state to their own purposes."

According to Max Manwaring, Professor at U.S. Army War College, the long established presence of gangs and "successful third generation gang activity can lead to [gangs'] control of parts of targeted countries or sub-regions within a country."

MS-13 has taken control of parts of Guatemala City, acting as the government—"taxing" both individuals and businesses in exchange for "protection"—and killing those who will not cooperate. Additionally, organized crime has infiltrated other state institutions in Guatemala, making them nearly

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81. See, supra note 5, at 5.
82. HAL BRANDS, supra note 38, at 6.
83. Id. at 2.
84. See, supra note 5, at 6.
85. Id.
86. Id. at 6 (citing "Governments Unite Against Maras; Maras Against Governments," Latin American Regional Report: Caribbean & Central America, October 2010).
88. HAL BRANDS, supra note 38, at 2-3.
89. MANWARING, supra note 47, at 12.
90. Steven C. Boraz & Thomas C. Bruneau, Are the Maras Overwhelming Governments in Central America?, 2006-NOV. MILITARY REV. 36,39, http://dodreports.com/pdf/ada483853.pdf; see also Billy Briggs, In Guatemala, Culture of Violence is Legacy of Civil War, WORLD POLITICS REVIEW (March 13, 2007), http://www.worldpoliticsreview.com/articles/624/in-guatemala-culture-of-violence-is-legacy-of-civil-war ("Antonio... had been shot three times by the maras for refusing to pay protection money... Velvet died for refusing to pay protection tax.").
worthless; even Guatemalan Vice President Eduardo Stein admitted that “criminal elements controlled six of Guatemala’s 22 departments (the largest geographical and political subdivisions of the country) and had a strong presence in at least three others.” Guatemala does not face these problems alone; these problems are present throughout Latin America.

The transnational gangs operate as criminal organizations with significant political interests in weakening state governments so that their criminal enterprises will thrive. While youth gangs “lack the coherent ideological or political program often associated with an insurgency, they have weakened the state, established a form of dominance over parts of the population, and thus ha[ve] many of the same effects as an insurgency.” The chaos, violence, and corruption wrought by youth gangs, among others, constitute a “new urban insurgency,” one that aims, not to overthrow established governments, but to take control of a city, one neighborhood—or even one block—at a time. The gangs bribe police and judicial officials, aiming to gain territorial control of neighborhoods rather than to overthrow the national government.

Thus, while gangs may not be waging war directly against Central American governments, they weaken existing government institutions through disruption and destabilization. MS-13 and other transnational gangs “destabilize, challenge, and destroy targeted societies and states.” The gangs’ power, combined with their success at attacking public institutions, such as the police and the judiciary, has succeeded in eroding public confidence in the government.

B. Description of the Violent Recruitment Practices

Gangs in El Salvador forcibly recruit members, often threatening those who resist or refuse to join with physical abuse or even death. Gangs like MS-13 and Mara 18 expand and maintain their membership through forced recruitment of the young, poor, and homeless. They typically recruit from marginalized segments of society and in particular neighborhoods. Violent and abhorrent acts characterize

91. HAL BRANDS, supra note 38, at 2-3.
92. Id. at 10.
93. HAL BRANDS, supra note 38, at 3.
94. See, e.g., HAL BRANDS, supra note 37, at 5.
95. Id. at 7.
96. Id.
97. Id. at 6. “[I]n 2007, Guatemalan police chief Erwin Sperisen estimated that 40 percent of the PNC was tarnished. This corruption goes all the way to the top.” Id. at 29. The gangs and other criminal organizations, through bribery and threats, diminish both the presence of law enforcement in territories and the effectiveness of the justice systems. Id. at 7. By eroding public confidence in such government institutions, the gang creates a power vacuum for themselves to fill, becoming both the oppressor and protector. Some experts characterize El Salvador, Honduras, and Guatemala’s struggle against international criminal elements as irregular warfare—“a violent struggle among state and nonstate actors for legitimacy and influence over the relevant populations.” Id. at 7.
98. MANWARING, supra note 47, at 28-32.
99. Id. at 32.
100. HAL BRANDS, supra note 38, at 32.
101. Farina et al., supra note 3, at 72.
103. Id. at 2.
initiation rituals, including requiring recruits to endure physical and sexual violence, and to commit serious crimes, including murder.  

Even if young people do not want to join a gang, they may feel they have to as a matter of survival, even though "[i]n the past, youth had the luxury of joining voluntarily." Gang membership today may seem like the only way for marginalized youth to forge a social identity and gain status and money. One Catholic community worker who has worked near San Salvador for years, reported that, "There are youth in this country who simply have no choice... This is something that the police, churches, NGOs have found nothing to do about. It happens at 9 PM, when [these other institutions] are not there." Judge Aida Luz de Escobar, a Juvenile Sentencing Judge in San Salvador, has observed that gangs use aggressive recruitment tactics and will kill those who refuse to join. Today gangs coerce youth into joining; they do not join voluntarily.

Gangs pressure young men and women to join, with their threats often escalating into violence. Gang members commonly threaten recruits verbally, display knives and guns to demonstrate their power, as well as threaten to harm family members if the prospective recruit refuses to join. Additionally, those who are gang members experience coercive pressure to remain in the gang. Gang members also recruit new members when the clika becomes too small; "the gang's own internal code of conduct mandates [it]." They offer enticements, such as cell

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105. FARINA ET AL., supra note 3, at 72 (citing interview with Matthew Eisen, human rights activist and former youth organizer in San Salvador (Mar. 30, 2006)).

106. Id.

107. Id.

108. Id. (citing interview with Matthew Eisen, human rights activist and former youth organizer in San Salvador (Mar. 30, 2006)).

109. FARINA ET AL., supra note 3, at 72–73 (citing interview with Aida Luz Santos de Escobar, Jueza Primera de Ejecución de Medidas al Menor de San Salvador [San Salvador Juvenile Sentencing Judge], in San Salvador (Oct. 22, 2008)).

110. See id. at 73.

111. See, e.g., Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008) abrogated on other grounds by Ramos-Lopez v. Holder, 563 F.3d 855 (9th Cir. 2009).


113. U.N. High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 22 (March 2010); see also Convention on the Rights of the Child, arts. 6, 19, 20, 32, opened for signing Nov. 20, 1989; U.N. Committee on the Rights of the Child (CRC), *CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 19 (July 2003) (noting that "[v]iolence results from a complex interplay of individual, family, community and societal factors. Vulnerable adolescents such as those who are homeless or who live in institutions, who belong to gangs or who have been recruited as child soldiers are especially exposed to both institutional and interpersonal violence"); LAURA PEDRAZA FARINA ET AL., *NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR* 79 (2010), available at http://www.law.harvard.edu/programs/hrp/documents/NoPlaceToHide (Jan_2010).pdf (Lorena Cuemo Clavel, a social anthropologist, explains a gang member may only leave the gang by becoming an evangelical Christian, forming a family, or by migrating).

114. See FARINA ET AL., supra note 3, at 73 (The author refers to a gang's "internal code of conduct" when describing the terms of entry into the gang, punishment for attempts to leave the gang, and required recruitment effort, citing to interviews of gang members.).
phones, athletic shoes, and clothing to kids they try to recruit.\textsuperscript{115}

Moreover, gang associations with children often begin informally, with gang members asking children as young as seven to eleven years old to run errands and do other favors for them.\textsuperscript{116} While the association between the gang and the children does not constitute gang membership, it builds an informal association with a particular gang.\textsuperscript{117} In addition to these informal associations, identification and affiliation with a gang may be made merely by the neighborhood in which the person lives.\textsuperscript{118} According to a former gang member J.T., "When you start hanging out with a gang member, the gang already considers you part of their structure, you are like their brother, initiation rites serve only to consolidate that bond."\textsuperscript{119} Consequently, "[s]oon after such informal links are established," the gang uses new recruits "to collect extortion money or to attack or kill specific individuals."\textsuperscript{120} There can be grave repercussions for those who decide to sever these ties.\textsuperscript{121} Gang members may beat or even kill uninitiated members who refuse to follow orders.\textsuperscript{122} Once in the gang, it is nearly impossible to leave without being killed.\textsuperscript{123}

C. Description of Those Targeted by Gangs

The conflict between MS-13 and Mara 18 is a war—membership in one gang obligates the member to kill rival gang members and those associated with the rival gang.\textsuperscript{124} In addition, gangs like MS-13 and Mara 18 violently target the following particular groups: those they try to recruit but refuse to join the gang, those who joined the gang but try to leave the gang, females who they wish to possess and control, those who oppose the gang in any way, and suspected rival gang members.\textsuperscript{125} These gangs use threats, physical abuse, extortion, theft, and murder as means of recruiting and punishing those who refuse to join.\textsuperscript{126} One former gang member said, "We killed several [people in the neighborhood] for not wanting to join us."\textsuperscript{127}

Gang threats to former gang members are real, despite the misconception that gang members can easily leave gangs if, for example, the former gang member

\textsuperscript{115} See id. at 73.


\textsuperscript{117} FARIÑA ET AL., supra note 3, at 74.

\textsuperscript{118} See id.

\textsuperscript{119} Id. at 73.

\textsuperscript{120} Id.

\textsuperscript{121} See id. at 74.

\textsuperscript{122} See id.

\textsuperscript{123} See id. at 80 (based on interviews with gang members). Police protection is not available and gang members stake out locations frequented by former gang members, such as tattoo removal clinics.

\textsuperscript{124} Id. at 78 (stating that membership or imputed affiliation marks the individual as a lifelong target).

\textsuperscript{125} See id. at 81-99; Boerman, supra note 19.

\textsuperscript{126} FARIÑA ET AL., supra note 3, at 89.

\textsuperscript{127} Id. at 90.
becomes Christian, decides to start a family, or for other reasons. Whether a gang member can safely leave the gang depends on particular factors, such as the practices of the clika, the individual’s status in the gang, and the significance of his departure, including the “threat they would pose to the gang if interrogated by police and coerced for information.”

Gang members demand respect and punish those who disrespect them since such respect is critical to developing a gang’s reputation and maintaining its power. Once established, the gang works to maintain and defend its power and reputation. Within the gang culture, failure to carry out a gang’s demands or any perceived challenge to the gang’s authority constitutes disrespect to the gang, often triggering a violent response. In one case, a civilian refused to continue to collect la renta, extortion money, for a gang after his conviction and release under court-ordered supervision. Gang members “ambushed him, cut off his tongue, gouged out his eyes, and killed him.” Moreover, evading punishment by a gang cannot provide long-term protection, as gangs often retaliate “even over the course of years.”

Thus, gang-based asylum applications should be well-supported by reports and articles about specific gangs, their recruitment and retribution practices, as well as other important gang-specific information. Nevertheless, the immigration judge or the BIA could cite to one statement that supports denial of asylum, despite a plethora of thorough and persuasive gang-specific information supporting asylum. The asylum applicant must therefore draw the court’s attention to the specific and relevant information that supports his or her eligibility for asylum relief, as well as the information regarding the specific government’s ineffective response to gangs.

D. How States Have Responded to Gangs

Governments in Latin American developing countries, as aforementioned,

128. Id. at 79; Boerman, supra note 19.
129. Boerman, supra note 19.
131. Id.
132. Id.
133. FARIŅA ET AL., supra note 3, at 71.
134. Id.
135. U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 6 (March 2010); see also Boerman, supra note 3.
136. See, e.g., FARIŅA ET AL., supra note 3, at 71 (about gangs in El Salvador); HAL BRANDS, supra note 38 (about gangs in Guatemala).
137. See, e.g., Rivera Barrientos, 666 F.3d at 647 (MS-13 gang members attempted to recruit the petitioner, a young female, for several months, despite her repeated refusal and her vocal opposition to gang values and practices; the brutal gang rape by three gang members resulted in affirmance of the BIA denial of asylum. See id. The court acknowledged that some evidence supported her account that the gang persecuted her on account of her vocal opposition to the gang and her refusal to join. Id. However, the circuit court cited one statement supporting the BIA finding that the abuse was part of the gang’s recruitment effort: “MS–13 has been known to use force and threats to coerce youths into joining the gang quite apart from any political or ideological point of view.” Agency R. at 403 (INTERNATIONAL RIGHTS CLINIC, HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR (2007)).” Id.
grapple with the spread of gangs in addition to other problems stemming from organized crime. The state response to gang violence has been harsh but ineffective with the development of *mano dura* or heavy hand, policies in El Salvador and Honduras, and Guatemala (to a lesser degree), with portions of such laws and policies ultimately deemed unconstitutional. The tactics governments have focused on are arbitrary stops and profiling, rather than on actual criminal investigation; for instance, being a U.S. deportee, having tattoos, wearing baggy clothing (associated with dressing like a gang member) and even being a young male in a public space constitute suspect characteristics. The Supreme Court in El Salvador deemed unconstitutional those provisions of laws and policies that disregard the presumption of innocence by authorizing punishment based on physical appearance, personal characteristics, and lifestyle. Rather than controlling the gang problem and making the public safer, the *mano dura* policies undercut human rights and due process protections and do not reduce levels of violence. Reportedly, people were sometimes “wrongly arrested for gang involvement [only to be] recruited into the gang life while in prison.”

Moreover, the weaknesses that are common among developing countries, including corruption, weak government institutions, lack of public confidence in law enforcement and the judiciary, poor educational systems, and weak economies, significantly interfere with each government’s ability to gain control over the growing gang problem. For example:

[T]he Guatemalan government lacks the resources to address persistent social strains that make crime such an attractive option for many youths. Because the state is starved of funding, it has long been unable to provide decent public education, offer basic services in poor neighborhoods, or otherwise combat the effects of extreme poverty . . . . Funding for prevention and rehabilitation programs remains inadequate, and while privately and foreign-funded pilot projects have shown promise, they have not yet been replicated on a wide enough scale to have a nationwide impact.

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140. *See, e.g., Fariña et al., supra note 3; see also United States Agency for International Development, Central America and Mexico Gang Assessment: Annex 1: El Salvador Profile 49–50 (2006) [hereinafter Central America and Mexico Gang Assessment] (“The prevention and intervention policies of Mano Extendida and Mano Amiga are fairly new, and the impact is difficult to measure to date. However, the percentage allocated to prevention and intervention approaches to gangs makes up only 20% of the available government funding, while a larger percentage goes toward law enforcement (Súper Mano Dura).”); Seelke, supra note 5, at 10-11 (Guatemala has not formally enacted *mano dura* laws, but uses police to round-up suspected gang members.).

141. *See, e.g., Fariña et al., supra note 3, at 45-50. (“The results were disturbing: between July 2003 and August 2004, police detained 19,275 people on grounds that they belonged to gangs . . . . Police released 84% of those arrested because there were no cognizable grounds for their arrest, and prosecutors dropped charges against another 7% . . . due to a lack of evidence.”).

142. *Id.* at 111-113.


144. Seelke, *supra* note 5, at 11.


146. *Id.* at 33-34. In Guatemala, “[i]mperatures increased by more than 120 percent from 1999 to
Corruption may be the greatest inhibiting factor to Central American governments’ effective response to the gang crisis.\textsuperscript{147} Government corruption reflects the inadequacy of state salaries, harms the effectiveness and morale of the government workforce, and contributes to the climate of insecurity in the country.\textsuperscript{148} The intransigence of these problems threatens democratic institutions, which need to work so nations avoid becoming failed states.\textsuperscript{149} Corruption, specifically, has largely eroded people’s confidence in public security.\textsuperscript{150} Since states cannot provide security and justice, whether due to corruption or other causes, security becomes a commodity.\textsuperscript{151} The wealthy hire private security, while others feel compelled to yield to gang demands and pay \textit{la renta} to avoid physical violence and targeting from gangs.

Central American Governments have not been able to protect gang victims, or potential gang victims.\textsuperscript{152} They lack adequate witness protection, manpower, equipment, and the will to properly investigate crimes, especially those involving intra-gang violence.\textsuperscript{153} Additional challenges arise where “extra-judicial killings [are] linked to state actors.”\textsuperscript{154} In such cases, law enforcement authorities’ indifference to unlawful acts committed by the state further fuels government impunity and public insecurity.\textsuperscript{155} Moreover, police absence in some areas allows gang members to control the streets through extortion and violence.\textsuperscript{156} In this way, police fail to protect victims of gang violence, including “deportees formerly associated with gangs,” as well as witnesses and victims.\textsuperscript{157} Experts consider the gangs “irregular adversaries” that are difficult to overcome; irregular adversaries require a multi-tiered approach, including law enforcement efforts, economic

\textsuperscript{147} See, e.g., HAL BRANDS, supra note 38, at 32 (describing the situation in Guatemala).
\textsuperscript{148} HAL BRANDS, supra note 38, at 32.
\textsuperscript{149} See id. at 35.
\textsuperscript{150} HAL BRANDS, supra note 38, at 34-35 (In Guatemala, 73% of urban and suburban residents believe “police are directly involved in crime.”).
\textsuperscript{151} Id. at 36. “[T]he chief enabler of continuing insecurity in Guatemala is the fundamental weakness of the state . . . [T]he Guatemalan government is still incapable of raising revenue, administering justice, or providing basic public goods. Because tax rates on individuals and businesses are low, and tax collection is inefficient, tax revenue remains remarkably low at 10-12% of gross domestic product (GDP) (the average in Latin America is 18%, and developed countries generally collect tax revenues equivalent to 30-45% of GDP). As a result, government institutions are immature and underdeveloped—shortcomings that are crippling to even well-intentioned law and order programs.” Id. at 31.

\textsuperscript{152} Id. at 35; see also, FARIÑA ET AL., supra note 3, at 68 (There is an increasing and widespread practice of extortion carried out against businesses and individuals and it is commonly referred to as “collecting renta.”).
\textsuperscript{153} See, e.g., FARIÑA ET AL., supra note 3, at 160-64; HAL BRANDS, supra note 38, at 34-35 (describing Salvadoran state’s inability to protect victims of gangs and ineffectiveness of law enforcement efforts at controlling gang violence and crime).

\textsuperscript{154} FARIÑA ET AL., supra note 3, at 121-22.
\textsuperscript{155} Id. at 158.
\textsuperscript{156} See, e.g., id. at 166.
\textsuperscript{157} Id. at 158.
\textsuperscript{158} Id. at 160.
development, and economic and government reform.\textsuperscript{159} For instance, anti-gang efforts in Nicaragua, Panama, and Costa Rica include gang-prevention measures such as job training and rehabilitation for former gang members.

II. PROTECTING REFUGEES INTERNATIONALLY

In reviewing the modern history and development of refugee protection, an analysis of current asylum jurisprudence hinges on nondiscrimination principles—principles that should always be at the forefront of the legal analysis in an asylum case, since the U.S. played an integral role in establishing the Universal Declaration of Human Rights (UDHR) in 1948.\textsuperscript{161} Eleanor Roosevelt chaired the commission that drafted the UDHR, which the U.N. General Assembly adopted in December of 1948.\textsuperscript{162} The UDHR provides a statement of basic rights and fundamental freedoms owed to all human beings.\textsuperscript{163} Article 13(2) of the UDHR states that “Everyone has the right to leave any country, including his own, and to return to his country.”\textsuperscript{164} Article 14(1) establishes the foundation for refugee rights, stating, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”\textsuperscript{165} These two rights were the foundation for the 1951 UN Convention Relating to the Status of Refugees (Refugee Convention), and the 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol).

The U.S. committed to protect refugees by acceding to the 1967 United Nations Protocol Relating to the Status of Refugees in 1968, agreeing to abide by articles 2-34 of the Refugee Convention.\textsuperscript{166} The Protocol governs the treatment of

\textsuperscript{159} HAL BRANDS, \textit{supra} note 38, at 8.
\textsuperscript{160} Seelke, \textit{supra} note 5, at 11.
\textsuperscript{161} United Nations, \textit{History of the United Nations,} http://www.un.org/aboutun/unhistory/ (In 1945, the United Nations Conference on International Organization was held in San Francisco. At the closing of the conference, on October 24, 1945, the fifty (50) member nations signed the Charter of the United Nations, officially establishing the United Nations.).
\textsuperscript{162} See MARY ANN GLENDON, \textit{A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS} (Random House 2002) (The United States strategically supported a declaration to be voted on by the U.N. General Assembly rather than beginning with a treaty or convention, as both of the latter would require ratification by the U.S. Senate. A vote in the U.N. General Assembly does not require Senate ratification.).
\textsuperscript{164} Id. at Art.13 (2).
\textsuperscript{165} Id. at Art.14 (1).
\textsuperscript{167} 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968); Protocol, \textit{supra} note 166 (Opened for signature January 31, 1967). Parties to the Refugee Convention and 1967 Protocol agree to treat refugees according to the Convention standards, as well as provide a legal status. Although the United States did not sign the U.N. Convention on the Status of Refugees, it did admit refugees from Europe and communist
people fleeing persecution, defines "refugee" and by incorporation of the Refugee Convention, prohibits the "[expulsion] or return ("refouler") [of] a refugee... to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." However, bars to asylum and withholding of removal claims apply to those who are a danger to the security of the U.S.; have been convicted by a final judgment of a particularly serious crime; have ties to terrorism; have persecuted others on account of race, religion, nationality, political opinion, or membership in a particular social group; or can safely relocate in his or her home country.\(^\text{169}\)

The 1951 UN Refugee Convention and its 1967 Protocol are legally binding treaties which the majority of UN member states have accepted, taking responsibility to protect persons obliged to flee their country because of persecution.\(^\text{170}\) Under Article 33, States shall not return a refugee to the territory where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."\(^\text{171}\) State parties to the 1951 UN Refugee Convention and 1967 Protocol agree to provide legal status to refugees and minimum standards of treatment as provided in the text of the Convention.\(^\text{172}\)

Signatory states must execute their commitments faithfully, as no official organization exists to monitor and enforce a state’s obligations under the Convention.\(^\text{173}\) UNHCR issued its' Handbook on Procedures and Criteria for Determining Refugee Status (Handbook), and additional guidance on asylum topics, including guidance on gang-based asylum claims.\(^\text{174}\) From UNHCR’s perspective, the interpretation of the 1951 Convention necessitates an inclusive and flexible analysis that encompasses emerging groups and responds to new risks of persecution.\(^\text{175}\) Keeping in mind refugee protection as the Convention’s objective, “a liberal interpretation of the criteria and a strict application of the limited exceptions are called for.”\(^\text{176}\) As represented in the introduction, a new group of refugees has emerged from the rising violence and power of transnational gangs and similar organizations, and this new group merits the same protection afforded to prior countries in the 1950s and 1960s under other laws enacted by Congress. Convention and Protocol Relating to the Status of Refugees, UNITED NATIONS HIGH COMM’R FOR REFUGEES, 2 (Dec. 2010), http://www.unhcr.org/3b66c2aa10.html. President Lyndon B. Johnson signed and the Senate ratified the Protocol on the Status of Refugees in 1968. Protocol, supra note 166; Refugee Convention, supra note 166.

168. Refugee Convention, supra note 166, at Art. 33.
169. INA § 208(b)(2)(A)(i-v).
170. Protocol, supra note 166; Refugee Convention, supra note 166, at Art. 33.
171. Refugee Convention, supra note 166, at Art. 33.
172. Refugee Convention, supra note 166; Protocol, supra note 166.
173. Id.
refugees.

III. EMBODYING A PROTECTIVE ETHIC FOR REFUGEES DOMESTICALLY

The Refugee Act reflects the U.S.'s commitment to address the plight of persecuted and displaced people. Congress passed the Refugee Act in 1980 to "respond to the urgent needs of persons subject to persecution in their homelands" and to increase uniformity of assistance provided to "refugees of special humanitarian concern to the United States." By passing the Refugee Act, Congress codified the provisions of the International Protocol on the Status of Refugees and even expanded it to include protection for those who suffered persecution in the past.

A. Asylum and Withholding of Removal - non refoulement

A non-citizen who arrives in the U.S. or is already in the U.S. may apply for asylum. A non-citizen may be barred from applying for asylum if he or she failed to apply within one year after entering the U.S. or previously applied for asylum in the U.S. Furthermore, an applicant must qualify as a refugee to be granted asylum. The Immigration and Nationality Act defines a refugee as:

[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 . . .

However, even when an applicant qualifies for asylum as a refugee, he or she may be denied under the discretion of the Secretary of the Department of Homeland Security or the Attorney General. In the five hypothetical scenarios previously presented, the five asylum applicants would argue they qualify as refugees. They either would have applied for asylum within one year of the date of entry, or would have submitted an application defensively in the immigration court if in removal proceedings.

The Asylum Office of the Department of Homeland Security adjudicates affirmative asylum applications filed by individuals who are not in removal proceedings. Immigration and Customs Enforcement (ICE) prosecutes removal cases before immigration courts, the BIA, and administrative courts within the U.S. Department of Justice. In a third scenario, if these individuals are detained at the U.S. border after being caught attempting to enter, ICE may refer them to United States Citizenship and Immigration Services (USCIS) after each state their fear of returning to El Salvador. The USCIS would then conduct a “credible fear interview” to assess whether the fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group is credible. Finally, once in the U.S., a noncitizen may be detained, caught and removed in an expedited manner, or, if a minor, placed in removal proceedings, and transferred to the custody of the Office of Refugee Resettlement (ORR), a part of the Department of Health and Human Services.

The asylum applicant must prove every element of asylum: (1) past persecution or a well-founded fear of persecution (subjective fear and objectively reasonable fear); (2) on the basis of race, religion, nationality, political opinion, or membership in a particular social group; and (3) nexus from the protected ground to the persecution. The evidence must show that he or she will either be singled out

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183. INA § 208(b)(1)(A).
184. INA § 208(a)(2)(B). Minors are exempted from the rule requiring that the asylum application be filed within one year of the date of entry into the United States until the minor turns 18.
185. INA § 208; 8 CFR §§ 2084(b), 1208.4(b).
186. 8 CFR § 1003.1(b)(9).
187. 8 CFR §§ 208.30(f) and 235.3(b)(4). Potential asylum applicants who fail to prove a credible fear of persecution to the asylum office may request review of the interview by an immigration judge. Id. § 208.30(g)(1)-(2). If the potential asylum applicant waives review or the immigration judge determines that the applicant’s fear is not credible, the applicant may be removed from the United States. Id. § 208.30(g)(1)(ii). Those found to have a credible fear of persecution are referred to an Immigration Judge for an asylum hearing.
188. States may detain non-nationals pending removal or decisions. GUY GOODWIN-GILL & JANE MCADAM, supra note 6, at 462.
190. Often the victims of gangs who come to the United States are minors, separated from parents and other relatives. Once apprehended, children are given a list of free legal service providers and are expected to find their own attorneys. JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE, U.S. REPORT 101 (June 2006), http://www.wrapsnet.org/LinkClick.aspx?fileticket=P9RmapLMDAU%3D&tabid=180&mid=605. In 1996, an expedited removal law was implemented giving immigration inspectors the power to immediately remove those deemed ineligible to enter into or remain in the U.S. at the time of interception. Immigration and Nationality Act (INA), Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing. § 235(c)(1), § 235 [8 U.S.C. §1225] (1951).
or show the pattern and practice of persecution of others who are similarly situated.\footnote{192} Country reports often provide context, helpful in evaluating credibility.\footnote{193} Applicants have a statutory right to present evidence and to cross-examine witnesses.\footnote{194} The immigration courts permit evaluations by experts such as doctors, psychologists, and country condition experts at no expense to the government.\footnote{195} The testimony may be weighed along with other corroborating evidence in the record.\footnote{196} The judge must fairly consider all of the evidence presented.\footnote{197}

An asylum applicant must also prove that he or she is not barred from applying for asylum, and is not subject to any of the mandatory bars to asylum relief. These include being a persecutor of others on account of race, religion, nationality, membership in a particular social group, or political opinion.\footnote{198} Mandatory bars to asylum also apply: if the applicant was convicted of a particularly serious crime in the U.S. such that he or she is a danger to the U.S.; there is probable cause to believe that the applicant committed a serious, nonpolitical crime outside the U.S.; poses a danger to the security of the U.S. (terrorism or national security threat); has engaged in, incited or, is likely to engage in any terrorist activity; or was firmly resettled in another country.\footnote{199} The qualifications for asylum and withholding of removal are the same; however, there are more bars to asylum than there are to withholding of removal.\footnote{200}

In the previously introduced hypothetical scenarios, the characters were all under 18 years old at the time they arrived, came to the U.S. alone, and were placed in ORR custody (assuming they were all caught at the border), and have also been


\footnote{193. Zahedi v. INS, 222 F.3d 1157, 1163 (9th Cir. 2000).}

\footnote{194. INA § 240(b)(1), (b)(4)(B); 8 U.S.C. §§ 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4) (2007).}

\footnote{195. Ira J. Kurzban, KURZBAN'S IMMIGRATION LAW SOURCEBOOK, 401 (9th ed. 2004). See, e.g., Dia v. Ashcroft, 353 F.3d 228, 258-59 (3d Cir. 2003).}

\footnote{196. INA § 240(b)(1), (b)(4)(B); 8 U.S.C. §§ 1229a(b)(1), (b)(4)(B); 8 C.F.R. § 1240.10(a)(4) (2007). Other evidence in the record may include the Department of State (“DOS”) cables/memos about fraud, unless their admission would violate the asylum applicant’s due process rights. The REAL ID Act of 2005 requires that evidence “of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available.” Public Law 109-13 109th Congress. “Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.” INA §§ 240(b)(1), (b)(4)(B); 8 U.S.C. § 1229a(c)(4)(B) (2007) (emphasis added). An asylum applicant may fail to meet the burden of proof where the evidence is unavailable, unless the asylum applicant can “explain its unavailability,” to the satisfaction of the court. Ahmed v. Gonzales, 398 F.3d 722, 725 (6th Cir. 2005); see also Amadou v. INS, 226 F.3d 724, 727 (6th Cir. 2000) (e.g., evidence of place of birth, large demonstrations, publicly held office, and medical treatment).

\footnote{197. Ahmed v. Gonzales, 398 F.3d 722, 725 (6th Cir. 2005); see also Amadou v. INS, 226 F.3d 724, 727 (6th Cir. 2000); Ench v. Holder, 601 F.3d 943, 948-49 (9th Cir. 2010); Cole v. Holder, 659 F. 3d 762, 772 (9th Cir. 2011).

\footnote{198. INA § 101(a)(42)(B), 8 U.S.C. 1101(a)(42)(B). See also 8 C.F.R. 208.13(c) (applicant must prove by a preponderance of the evidence that he or she did not commit such an act if evidence indicated he or she did).

\footnote{199. INA § 208 precludes asylum for a person involved in the terrorism- and national security-related inadmissibility grounds at INA § 212(a)(3)(B) or (F) INA § 237(a)(4)(B).

\footnote{200. See INA § 208 and 241(3)(b).}
placed in removal proceedings. As unaccompanied children, the law entitles them to apply for asylum with the Asylum Office; if the Asylum Office does not grant asylum, it refers the applicant to the immigration court to apply for asylum before an immigration judge.

The 1980 Refugee Act codified the 1951 Convention relating to the Status of Refugees (Refugee Convention) and includes the concept of non-refoulement, called withholding of removal under the INA, which protects against return. Essentially, an application for asylum is also an application for withholding of removal. If an applicant misses the filing deadline, was denied asylum on discretionary grounds, was safely resettled before arriving to the U.S., or could be removed to a safe-third country, that applicant may not be granted asylum, but may still qualify for withholding of removal if he or she establishes eligibility by a preponderance of the evidence. A person qualifies for withholding of removal if he or she does not meet one of the bars to asylum, and will not be removed to a country if his or her "life or freedom would be threatened in that country on account of [his or her] race, religion, nationality, membership in a particular social group, or political opinion." The applicant must therefore prove eligibility for asylum and withholding of removal. The evidence must "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."

The standard of proof is higher to qualify for withholding of removal than to qualify for asylum even though withholding of removal is a lesser form of relief. An asylum applicant must prove that there is at least a ten percent chance that he or she will be persecuted on account of one of the five protected grounds.

201. "Unaccompanied child" refers to those described as "unaccompanied alien children in the Homeland Security Act of 2002 (HSA); persons under the age of 18 without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is able to provide care and physical custody. See 6 U.S.C. §279(g)(2). The Immigration and Nationality Act, the terms “minor,” “juvenile,” and "child" are used on an inconsistent basis. For example, "minor" describes people under age 14, 18, and 21. See David B. Thronson, "Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law," 63 OHIO ST. L.J. 979-1016 (2002).


204. See Form I-589 and INA § 241(b)(3).

205. INA § 208(a)(2)and Form I-589.

206. INA § 241(b)(3)(B).

207. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (restriction on removal to a country where non-citizen's life or freedom would be threatened).

208. INA § 208 (b)(B)(i). The applicant must also prove by clear and convincing evidence that the asylum application was filed within one year of arriving in the United States. INA § 208(a)(2)(B).

209. 8 U.S.C. § 1158(b)(1)(B); see also 8 C.F.R. §§ 208.13(a), 208.16(b), 1208.13a, 1208.16(b), 1240.11(c)(3)(iii), 1240.33(c)(3), 1240.49(c)(4)(iii) (2007).

210. See INA § 208 (b)(B)(i) and INA § 241 (b)(3).

211. Divine Memo, supra at note 43 (indicating that the more likely than not standard of proof is interpreted as having a more than fifty-percent probability) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 447, 107 S. Ct. 1207, 1213 (1987)).
Someone applying for withholding of removal, however, must establish that he or she will more likely than not suffer persecution on the basis of race, religion, nationality, political opinion or membership in a particular social group if compelled to return to his or her country of origin. The exceptions to withholding of removal are almost exactly the same as the mandatory bars to granting asylum relief. These exceptions include being a persecutor of others, being convicted of a particularly serious crime in the U.S., probable cause to believe the alien committed a serious nonpolitical crime in another country, and/or is a danger to the community of the United States.

B. Membership in a Particular Social Group Based on the Hypotheticals Presented

Using a broad interpretation of asylum criteria and a narrow interpretation of asylum and withholding of removal bars would indicate a strong protective ethic; however, that is currently not the case in the U.S. The Convention affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. The BIA's In re Acosta decision interpreting "membership in a particular social group" in 1985, "embodies the non-discrimination principle underlying international and domestic law." The BIA defined "particular social group" in In re Acosta, requiring members of the group to have "a common immutable characteristic" that they "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Since Acosta, the BIA has interpreted qualifying provisions more narrowly and bars more broadly, thereby restricting the availability of refugee protection.

212. INS v. Stevic, 467 U.S. 407, 408 (1984). By regulation, once an applicant establishes past persecution of the applicant on account of one of the enumerated grounds, creates a presumption of a well-founded fear of persecution. The government may rebut the presumption, proving by a preponderance of the evidence that country conditions have changed. 8 C.F.R. § 208.13(b)(1)(ii); see also 8 C.F.R. § 1208.13(b)(1)(ii) (2007). If evidence indicates that one of the exceptions applies, then the applicant prove that the exception does not apply by a preponderance of the evidence. 8 C.F.R. 208.13(c)(2)(i), 1208.13(c)(2)(i). Chay-Velasquez v. Ashcroft, 367 F.3d 751, 755 (8th Cir. 2004) [asylum applicant failed to meet burden of proof to establish that he did not commit a serious nonpolitical crime.

213. INA § 241(b)(3)(B).

214. See Grahl-Madsen, Status of Refugees, vol. 1, (1966); Arthur C. Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status, 15 Col. Hum. Rts. L. R. 39 (1983)." See also ANker, supra note 10, at 377. See also Guy Goodwin-Gill & Jane McAdam, Status of Refugees, vol. 1, (1966); supra note 6, at 75 ("an essential element in any description would be a combination of matters of choice with other matters over which members of the group have no control.").

215. See, e.g., In re C-A-, 23 I. & N. Dec. 951, 955 (BIA 2006) (the court noted that the rule in Acosta was a starting point in finding a "particular social group" and required social visibility); In re A-M-E & J-G-U-, 24 I. & N. Dec. 69, 73 (BIA 2007) (where the court applied the rationale in Acosta and found that wealthy Guatemalans was neither immutable, nor sufficiently particular). See also Supra note 6, at 75 ("an essential element in any description would be a combination of matters of choice with other matters over which members of the group have no control.").


217. See ANker, supra note 10, at 377. See also Supra note 6, at 75 ("an essential element in any description would be a combination of matters of choice with other matters over which members of the group have no control.").

218. In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (explaining that "membership in a particular social group" must be interpreted to have characteristics consistent with the other protected grounds for asylum—applying ejusdem generis).

Thus, in recent years, the BIA imposed additional requirements on all social group cases. The BIA requires "that the group[s] have particular and well-defined boundaries [sufficient particularity], and possess a recognized level of social visibility." The BIA stated that "‘particularity’ and ‘social visibility’ give greater specificity to the definition of a social group . . . ." The way that government and society treats the proposed social group is relevant to the social group analysis, reflecting the State’s policies towards a particular social group or class.

Courts in gang-based asylum cases have largely rejected claims of persecution based on varying formulations of particular social groups. Moreover, immigration courts have often decided gang-based prosecution cases without guidance from the BIA or circuit courts. In In re E-A-G-., the BIA defined social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group." The BIA explicitly narrowed the scope of qualifying social groups, stating that, "[t]he focus is not with statistical or actuarial groups, or with artificial group definitions."

Although several circuit courts have explicitly adopted and applied the BIA’s restrictive social group interpretation, the Third and Seventh Circuits

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220. See In re C-A-, 23 I. & N. Dec. 951, 955 (BIA 2006) (adding "social visibility" criteria to Acosta immutability analysis of membership in a particular social group); In re A-M-E & J-G-U-, 24 I. & N. Dec. 69, 73 (BIA 2007) (adding “sufficient particularity” criteria to Acosta immutability analysis). See also Bassina Farbenblum, Executive Defeference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron, 60 DUKE L.J. 1059, 1082-1085 (explaining the expansion of asylum exceptions, such as "particularly serious crime") (2011). The additional requirements of particularity and social visibility are not limited to gang-based cases.


223. GUY GOODWIN-GILL & JANE MCDADAM, supra note 6, at 80.


225. Gang Related Asylum Sources: Immigration Judge Decisions/Briefs and Affidavits, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html (last visited Sept. 4, 2011) (see, e.g., (listing a Nov. 8, 2006 Baltimore, Maryland IJ Decision (In re Sandra) granting asylum where a gang member persecuted a female because she refused to be his girlfriend or join the gang; July 17, 2007 Arlington, Virginia IJ Decision granting asylum where Respondent was a "member of a social group" consisting of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses without compensation; May 3, 2007 Arlington, Virginia IJ Decision granting asylum to a male and a female based on a well-founded fear of future persecution on account of (1) "membership in a particular social group" of "young Salvadoran students who expressly oppose gang values and wish to protect their family against such practices" and (2) "political opinion", as a sibling of a person who openly opposes the practices and values of MS-13 in El Salvador").


227. Id. (sustaining Chief Counsel’s appeal where the immigration judge had granted asylum based on the particular social group "young persons who are affiliated or are perceived to be affiliated with gang, as well as his imputed political opinion). See In re S-E-G-, 24 I&N Dec. 579, 594(BIA 2008) (holding that neither Salvadoran youth who refused recruitment into the MS-13 criminal gang nor their family members constitute a particular social group).

228. Mendez-Barrera v. Holder, 602 F.3d 21, 26-27 (1st Cir. 2010) (holding that "young Salvadoran women recruited by gang members who resist such recruitment" was not socially visible or sufficiently particular); Larios v. Holder, 608 F.3d 105 (1st Cir. 2010) (relaying on Mendez-Barrerra, rejecting social group of youth resistant to gang recruitment); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007); Lizama v. Holder, 629 F.3d 440 (4th Cir. 2011) (holding that "young, Americanized, well-off, Salvadoran male deportees, with criminal histories, who opposed gangs was not narrow enough);s Constanza v. Holder, 647 F.3d 749, 753-754 (8th Cir. 2011) (holding that the proposed social group
rejected the social visibility doctrine, and the other circuits have not yet issued precedent decisions accepting the social visibility requirement; it is not a requirement envisioned by the 1951 Convention. The 1951 Convention merely posed social visibility as an alternative factor in defining a particular social group. UNHCR defines membership in a particular social group based on whether the group “is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it,” or by examining whether or not a group shares a common characteristic which makes them a cognizable group, setting them apart from society.

Under the Convention and Protocol in March of 2010, the UNHCR issued guidelines on assessing the availability of asylum protection for individuals who face gang persecution and related violence, continuing to interpret asylum criteria broadly. The contrast between the restrictive approaches to gang-persecution cases, even where the facts support alternative legally established legal theories, versus the UNHCR’s anti-discriminatory and flexible human rights approach becomes starkly apparent as we revisit Alberto, Bernardo, Carlos, Dolores, and Enrique to analyze their cases briefly.

1. Religious Young Men and Women—Alberto

Alberto’s claim for asylum may be based both on religion and “membership in a particular social group”, possibly asserting the same social groups as Bernardo, below. Proving that the gang persecuted Alberto on account of his religion, rather than on account of his refusal to join the gang, will likely be the greatest challenge. Although there are no precedent opinions in religion-based, gang

“family that experienced gang violence” was too broad and not socially visible; and “persons resistant to gang violence” was too diffuse to qualify as a particular social group) Arteaga v. Mukasey, 511 F.3d 940, 944-45 (9th Cir. 2007) (holding that tattooed gang members and former gang members did not qualify as a particular social group; even though tattoos make them visible to police and gang members; the voluntary gang association was not fundamental and did not merit humanitarian protection. Former gang members analytically qualified, but the court rejected the group as too amorphous); Barrios v. Holder, 581 F.3d 849 (9th Cir. 2009) (“young men in Guatemala who resist gang recruitment” are not a particular social group); Ramos-Lopez v. Holder, 563 F.3d 855 (9th Cir. 2009) (holds that “young Honduran men who have been recruited by the MS-13 but who refuse to join” is not sufficiently particular and socially visible); Rivera-Barrientos v. Holder, 658 F.3d 1222 (10th Cir. 2011), 2011 WL 3907119 (“El Salvadoran women between ages of 12 and 25 who resisted gang recruitment” is sufficiently particular, but fails because it lacks social visibility); Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190, 1197 (11th Cir. 2006).

229. Urbina-Mejia v. Holder, 597 F.3d 360, 366-67 (6th Cir. 2010) (holding that former gang members constitutes a particular social group, as it is impossible to change the fact of past membership); Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) (in a case regarding withholding of removal, held that “a gang is a group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group.”).

230. Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008).


232. Id.


235. See Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009); Bueso-Avila v. Holder, 663 F.3d 934, 935-36 (7th Cir. 2011).
persecution cases, immigration judges have granted asylum in such cases.236

2. Young Salvadoran Males Who Have Been Recruited But Refuse to Join Mara Salvatrucha (MS-13) — Bernardo

Under U.S. law, Bernardo is the least likely among the group to be granted asylum. He has never been in a gang, and he stood up for himself by refusing to join MS-13 and telling gang members that he disapproved of their criminal lifestyle. In the hypothetical, Bernardo would apply for asylum based on his membership in the following three social groups: 1) "young males who resisted recruitment by MS-13;" 2) "young, Salvadoran males, who resisted recruitment by gangs;" and 3) "young, Salvadoran males who resisted recruitment by gangs because of moral, religious, or ethical grounds." Every element in these proposed social groups is immutable.237 However, the BIA and circuit courts have rejected "particular social groups" formulated by combinations of "youth-nationality-gender-past-action" as formulations of a social group.238 Here, the court would likely rule that Bernardo's groups are too amorphous, since the group is not bounded by age, and that those who resisted recruitment are not socially visible.239 However, the Third Circuit in Valdiviezo-Galdamez v. Attorney General of U.S., recently declined to give Chevron deference to the BIA's interpretation of particular social group, noting that the BIA failed to provide a principled reason for the social visibility and particularity requirements.240

236. See, e.g., Gang Related Asylum Sources: Immigration Judge Decisions/Briefs and Affidavits, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, http://www.refugees.org/resources/for-lawyers/asylum-research/gang-related-asylum-resources/immigration-judge.html (last visited Jan. 30, 2013) (listing a May 13, 2008 Newark, New Jersey IJ Decision where asylum was granted to a sixteen-year-old female by an Immigration Judge based on a well-founded fear of persecution by gang members who persecuted similarly situated Evangelical Christians; also listing a March 20, 2008 Arlington, Virginia IJ Decision where asylum was granted to a seventeen-year old male Honduran by an Immigration Judge based on past persecution by MS gang members on account of his religion).

237. "Young males who resisted recruitment by MS-13" as a social group meets the immutability requirement, as all three characteristics are unchangeable. The recruitment may be by MS-13 or another national or transnational gang, but refusal to join a purely local gang would most likely not qualify. In the second proposed social group, the only addition is the nationality, which is unnecessary. If the country does not have significant struggles with transnational gangs, then the applicant's claim will fail on other grounds, such as well-founded fear, that the danger is not country-wide, or that the government cannot or will not control the persecutor. In the last proposed social group, the reason for refusing to join, while immutable, again should not be necessary. If the gang persecutes on account of the reason for refusing rather than the refusal itself, then the applicant may qualify for asylum based on both membership in a particular social group, as well as political opinion or religion.

238. See, e.g., Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007); Lizama v. Holder, 629 F.3d 440 (4th Cir. 2011) (holding that "young, Americanized, well-off, Salvadoran male deportees, with criminal histories, who opposed gangs was not narrow enough); Ramos-Lopez v. Holder, 563 F.3d 855, 858-62 (9th Cir. 2009) (according deference to BIA decision rejecting "young Honduran men who have been recruited by, but who refused to join MS-13" as a social group); Rivera-Barrientos v. Holder, 666 F.3d 641, 653, (10th Cir. 2012) (rejecting "El Salvadoran women between 12 and 25 who resisted gang recruitment" for lack of social visibility); In re E-A-G-G-, 24 I. & N. Dec. 591, 596-97 (BIA 2008); and In re S-E-G-G-, 24 I. & N. Dec. 579, 582-83 BIA 2008).

239. In re C-A-, 23 I. & N. Dec. 951 (BIA 2006). However, two consolidated gang recruitment cases, Valdiviezo-Galdamez v. Holderand Mejia Fuentes v. Holder, are pending before the Third Circuit; and Granados-Gaitain v. Holderalso remains pending before the Eighth Circuit.

240. Valdiviezo-Galdamez v. Atty. Gen. of the U.S, 663 F.3d 582 (3d Cir. 2011) (granted the petition in part, remanded to the BIA perused on account that he belonged to the "particular social
Once his brother, Carlos, suffered persecution by the same gang members, either in his own right or because of his relationship as brothers, Bernardo could assert that he belongs to a subgroup of his nuclear family that includes his brother and himself as a particular social group. While a family-based social group may be viable, Bernardo would struggle to prove that the nexus between his persecution and the protected ground is family rather than his refusal to join the gang and his explicit disapproval of their activities.

The UNHCR, however, recognizes age, gender, and social status as immutable characteristics. Although the UNHCR’s interpretation of membership in a particular social group does not require social visibility, it notes that “a person expressing opposition to gangs will often stand out from the rest of the community.” By refusing to join the gang, Bernardo made an express decision to disassociate himself from the gang and to live his life as a law-abiding member of his community. Under the UNHCR’s interpretation, Bernardo may merit asylum, just as Alberto does.

3. The Nuclear Family or a Subset of Family—Carlos (Bernardo’s brother)

Carlos’s application for asylum may have a different outcome. Although Carlos refused to join the MS-13 gang, just like Bernardo, he did not provide a rationale for his refusal to join. Specifically, he said nothing to draw the gang’s ire. Carlos could apply based on the social group, “brothers of Bernardo” or immediate group” of “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs.” With the Valdiviezo decision and remand to the BIA, the circuit split on the validity of the social visibility and particularity requirements grows, as the Third Circuit joins the Seventh Circuit, declining Chevron deference to the BIA’s interpretation. See Ramos v. Helder, 589 F.3d 426 (7th Cir. 2009).

241. See In re Acosta, 191 & N. Dec. 211, 233 (BIA 1985) (family as quintessential social group). But see In re S-E-G-, 24 I&N Dec. 579, 594 (BIA 2008) (rejecting family as a social group in this case because it was not specific enough). Bernardo could also assert that the persecution of his brother Carlos constitutes persecution to himself. See, e.g., Mashiri v. Ashcroft, 383 F.3d 1112, 1120-21 (9th Cir. 2004) (applicant’s son was beaten up by neo-Nazis and her husband had been violently attacked when combined with other harm, cumulatively amounted to persecution). The difficulty for Bernardo lies in demonstrating that the gang persecuted Bernardo on account of his family relationship rather than as retribution for his own refusal to join the gang.


243. In furtherance of its erroneous analysis, the BIA mischaracterized the UNHCR Guidelines as supporting a requirement that the group characteristic(s) be immutable and “socially visible,” whereas the UNHCR Guidelines states them in the alternative. See S-E-G-, 24 I&N Dec. at 585; and UNHCR Guidelines, paragraph 11 (emphasis added). The social visibility and particularity tests are also inconsistent with the canon of statutory interpretation ejusdem generis that the BIA originally applied in In re Acosta to defined “particular social group.” 19 I&N Dec. 211 (BIA 1985). Neither social visibility nor particularity is a requirement imposed on those claiming asylum based on race, religion, nationality, or political opinion.

244. UNHCR’s Guidance Note on Refugee Claims Relating to Victims of Organized Gangs 6 (2010).

family members of Bernardo. Since kinship ties have long been identified as the quintessential social group, the court may recognize family as a social group that is immutable and sufficiently particular. When gang members threaten Carlos, his connection to his brother Bernardo may constitute a credible death threat and satisfy the nexus requirement between the persecution and the social group.

UNHCR guidelines expressly state that the relatives of former gang members and individuals who dissociate from gangs may suffer threats, violence, extortion, and other harm at the hands of current gang members even though they did not interact with the gang. Under the UNHCR guidelines, Carlos may have an independent claim for asylum based on his own refusal to join the gang, and another claim based on a subgroup of the nuclear family as a particular social group. He may apply based on both legal theories simultaneously.

4. Young Salvadoran Females Who Have Refused to Be In An Intimate Relationship With A Gang Member — Dolores

The outcome of Dolores’s asylum application will likely vary by jurisdiction and by judge, but not necessarily in a predictable way rooted in sound legal analysis. Dolores’s experience with MS-13 may be similar to gang recruitment in some ways, but the sexual overtone and threat posed by such recruitment within a hyper-masculine society raises questions similar to those in gender-based asylum cases.
In a case in which gang members attempted to recruit a Salvadoran female, threatened to sexually abuse her if she refused, and attacked her brother, the immigration judge denied all relief because of a lack of evidence.253 The BIA affirmed the decision because the social group, “young women recruited by gang members who resist such recruitment” was too amorphous and lacked social visibility.254 An alternative legal theory in Dolores’s circumstances would be more akin to the domestic violence type asylum cases such as “young women who have turned down relationships with a transnational gang member.”255

UNHCR recognizes that gangs target “young women and adolescent girls, who refuse sexual demands by gangs, including prostitution and trafficking purposes, or to become sexual property of gangs.”256 According to the UNHCR, age and gender should be considered, as well as impressionability, dependence, poverty, lack of parental guidance, and the lack of state protection.257 These considerations and a more thorough understanding of female gang recruitment, female gang activities, treatment of women as girlfriends of gang members, and other similar factors support the recognition of broad social groups defined by common

position could form a particular social group.”); Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005) (holding that “Somali females” are a “particular social group”); Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993). See also Phyllis Coven, INS Office of International Affairs, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines), Memorandum to INS Asylum Officers, Coordinators (Washington, DC, May 26, 1995), available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf.

253. Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010).

254. Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010). See also Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012) (found “El Salvadoran women between 12 and 25 years old who resisted gang recruitment” sufficiently particular, but lacking social visibility. The court also found that the gang’s central reason for attacking her was her resistance to recruitment, not her anti-gang political agenda).

255. The actual formulation of the social group should define the characteristics of the vulnerable population such as young female or a more specific age range, as well as the actual refusal to join or rejection of sexual advances, depending on the specific advances of the gang members. When compared to male recruitment cases, the analysis may show that the cases of female counterparts must also be denied. However, women’s recruitment cases may also present a different dimension—that of sexual domination of the female, both in the recruitment stage and as a female gang member. See Rivera-Barrientos v. Holder, 666 F.3d 641, 641 (10th Cir. 2012), (appellant resisted gang recruitment, and gang members kissed her, smashed her face with a beer bottle, gang-raped her, and threatened to kill her mother and her if she told the police). “Gangs employ the same mechanisms of marginalization and abuse against women present in civil society: machismo, violence, abuse, sexual objectification.” Laura Pedraza FARISA ET AL., NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR 81-82 (2010), available at http://www.law.harvard.edu/programs/hrp/documents/No%20Place%20to%20Hide(Jan_2010).pdf. See In re R-A, 22 L.&N. Dec. 906 (BIA 1999), vacated and remanded, 22 L.&N. Dec. 906 (A.G. 2001), remanded, 23 L.&N. Dec. 694 (A.G. 2005), remanded, 24 L &N Dec. 629 (A.G. 2008) (available at http://cgrs.uchastings.edu), Government’s Brief in re L-R-available at http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php. The legal theories for domestic violence cases may be successful in gang persecution cases of females where the gangs sexually assaulted the applicant, threatened to rape her, actually raped her, and when the male gang member refused to accept the female’s rejection, emphasizing the similarities. Gang studies and detailed country conditions information may corroborate her testimony that it is an abusive relationship that she has no choice over. Much like domestic violence victims are in abusive relationships that they cannot leave, she is trying to resist becoming a part of an abusive relationship, but the gang member will not accept her refusal.


257. UNHCR’s Guidance Note on Refugee Claims Relating to Victims of Organized Gangs 6-7 (2010).
characteristics that render them vulnerable targets.

5. Former and Current Gang Members Enrique

Enrique’s chances of remaining in the United States will depend on the jurisdiction in which his case arises. Enrique could base his asylum application under two different social groups. The first would be under the category “former MS-13 gang members” who are vulnerable to MS-13 and rival gang members. The second social group is based on imputed gang membership, which is comprised of “young persons who are mistakenly perceived to have a current affiliation with gangs,” and would make him vulnerable to the depredations of law enforcement, vigilantes, and rival gang members. In In re E-A-G-, the BIA reversed the immigration judge’s grant of asylum which had been based in part on imputed gang membership. Without analyzing the immutability of the group, the BIA acknowledged that there was some social visibility, but held that imputed membership in a gang does not constitute membership in a particular social group because gangs are not considered to be a particular social group.

In the Seventh Circuit, “former gang members” constitute a particular social group for asylum and withholding of removal because their past membership in a gang is considered an immutable trait. In the Sixth Circuit, “former gang members” also constitute a “particular social group” based on immutability, social visibility, and particularity of the group. Even though Enrique may qualify for asylum in both circuits, the question of whether he is granted asylum or withholding

258. Only the Sixth and Seventh Circuits have recognized that former gang membership may constitute membership in a particular social group. Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); INA § 208(b)(2).

259. See, e.g., Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); INA § 208(b)(2).

260. Analysis of membership in the social group of those with an imputed social group issue.


262. In re E-A-G-, 24 L.&N. Dec. 591, 596 (BIA 2008) (citing Arteaga v. Mukasey, 511 F.3d 940, 945-46 (9th Cir. 2007)). The BIA’s rationale for rejecting imputed gang member in E-A-G- is objectionable because it denies protection to a group of vulnerable innocents due to the actual groups’ immoral and criminal purpose. There is also no guarantee that describing the social group in a different way, based on the physical or other characteristics that make gangs, government, and society mistakenly identify them as gang members, would lead to protection. They are likely the same characteristics that make them targets for gang recruitment—groups that have been denied asylum protection. See In re S-E-G-, 24 I. & N. Dec. 579, 582-83 BIA 2008). See also Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003) (rejecting the alien’s claim that, as a tattooed former gang member, he was entitled to withholding of removal as a member of a social group). In Castellano-Chacon v. INS, the court stated that it was “possible to conceive of the members of MS 13 as a particular social group under the INA, sharing for example the common immutable characteristic of their past experiences together, their initiation rites, and their status as Spanish-speaking immigrants in the United States,” the evidence in the case only demonstrated that “tattooed youth”, not a particular social group, were persecuted. 341 F.3d 533, 549 (6th Cir. 2003).

263. Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (rejecting particularity and social visibility requirements, while holding a former member of a gang constituted a particular social group because of immutability). See also Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).

264. Urbina-Mejia v. Holder, 597 F.3d 360, 366, 369 (6th Cir. 2010) (finding that the applicant, a former gang member, was socially visible to former gang associates, gang rivals, and even to the public because of his tattoos, and was sufficiently particular, but was statutorily ineligible for withholding because it was reasonable to believe that he had committed serious nonpolitical crimes in Honduras as a gang member).
of removal may turn on the existence of a criminal record, if any. Depending on the criminal conviction(s), a criminal record could subject Enrique to mandatory bars to asylum and withholding of removal, or a discretionary denial of asylum.265

The Ninth Circuit in Arteaga v. Mukasey,266 ruled that a gang is not a particular social group for the purposes of asylum and withholding of removal:

In light of the Ninth Circuit’s definition and the manifest purpose of the statute, we would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to “human dignity” that he should not be forced to forsake the association. See Hernandez-Montiel, 225 F.3d at 1093 n.6. Again, Arteaga’s affiliation with [the gang] New Hall 13 included continuing violent acts against rival gang members, trading in drugs, and theft. We cannot imagine holding that a voluntary association that includes such activities is fundamental to human dignity, and that an individual who joins such an association should not be forced to forsake it.267

The court in Arteaga relies on Castellano-Chacon v. I.N.S.,268 a decision in which the Court held that “tattooed youth” was an overly broad category to qualify a group of individuals as a “particular social group”.269 The Sixth Circuit, however, was willing to consider the non-criminal purposes and characteristics of the gang, had evidence of persecution based on membership in that particular social group been presented.270

C. Opposition to Gangs as Political Opinion

Bernardo, Carlos, Dolores, and Enrique may all argue that their applications are based on political opinion. All four applications could be based on anti-gang opinion, while Enrique’s could also be based on imputed anti-government opinion (if he is mistaken to be a current gang member).271 Neither the Immigration and Nationality Act, nor the regulations expressly define political opinion. In addition to membership or participation in political parties, U.S. courts have recognized many other less overtly political activities as political.272 The UNHCR interprets political

265. Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); INA § 208(b)(2).
266. 511 F.3d 940 (9th Cir. 2007).
267. Arteaga v. Mukasey, 511 F.3d 940, 946 (9th Cir. 2007).
268. 341 F.3d 533 (6th Cir. 2003).
269. Castellano-Chacon v. I.N.S., 341 F.3d 533, 549 (6th Cir. 2003).
270. Castellano-Chacon v. I.N.S., 341 F.3d 533, 549 (6th Cir. 2003). The court distinguished Bastanipour v. INS, a case where the proposed social group was “drug traffickers”, stating that gang membership could not be equated to a criminal activity such as drug trafficking, unless criminal activity was the gang’s only purpose. Id.
272. See Fedanyak v. Gonzales,477 F.3d 1126, 1129-30 (9th Cir. 2007) (Ninth Circuit found political opinion where a Ukrainian man complained about local police extortion and corruption to higher government officials); Hasan v. Ashcroft, 380 F.3d 1114, 1120 (9th Cir. 2004) (which held that an article published by the respondent criticizing a politician’s corruption and the indifference exhibited by local
opinion broadly to encompass "any opinion on any matter in which the machinery of State, government, society, or policy may be engaged." 273

If an applicant for asylum presents evidence that demonstrates a nexus between the harm or threatened harm and the expression of their political opinion, then their cases would be expected to move forward like any other typical asylum case. 274 This, however, is not always the case due to the persistence of gang violence and persecution. The asylum applicant may face persecution in his or her country of origin based on imputed political opinion by the police, vigilante group, or rival gang who mistakenly believe that they are a gang member, which is defined as being pro-gang and anti-government. 275

Bernardo, Carlos and Dolores could all argue that their repeated refusal to join the gang constituted political actions against the gang; however, the BIA and circuit courts have rejected the notion that refusal to join a gang "on its own" constitutes the expression of a political opinion. 276 Nonetheless, those decisions still leave open the possibility for viable claims of political action by Bernardo and Enrique. In Bernardo’s case, he verbally expressed his disapproval of the gang’s activities by announcing his anti-gang opinion to the gang. The existing case law, however, does not make clear whether an anti-gang opinion is, on its own political, or whether the gang itself has a political dimension that is relevant to determining whether an anti-gang opinion constitutes a political opinion. 277 When the BIA reversed the immigration judge’s grant of asylum in E-A-G-, the question of whether or not MS-13 held an anti-government stance did not matter because it was the political opinion of the victim, rather than the gang, that was dispositive. 278 As one

law enforcement constituted a political statement); Chang v. INS, 119 F.3d 1055, 1062 n.4 (3d Cir. 1997) (finding that failure to report persons to Chinese authorities for fear of punishment is political opinion) and Ramos-Lopez v. Holder, 563 F.3d 855, 862 (9th Cir. 2009) (resistance to gang recruitment alone is not political opinion).


274. See, e.g., Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman’s resistance to rape and beating through flight constituted assertion of a political opinion opposing forced sexual subjugation), overruled in part on judicial notice grounds by Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (en banc).

275. See, e.g., In re E-A-G-, 24 I. & N. Dec. 591, 596-97 (BIA 2008) (holding an applicant cannot be granted asylum based a well-founded fear of future persecution by the government and rival gangs based on imputed political opinion because the BIA does not recognize gangs as particular social groups for asylum purposes); see also Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003) (rejecting the alien’s claim that, as a tattooed former gang member, he was entitled to withholding of removal as a member of a social group).

276. In re E-A-G-, 24 I. & N. Dec. 591, 596-97 (BIA 2008) (refusal to join Mara Salvatrucha, without more does not constitute political opinion); Marroquin-Ochoma v. Holder, 574 F.3d 574, 578 (8th Cir. 2009); Ramos Barrios v. Holder, 567 F.3d 451, 455-57 (9th Cir. 2009); Ramos-Lopez v. Holder, 563 F.3d 855, 862 (9th Cir. 2009) (treated BIA’s determination of “political opinion” with Chevron deference, finding “political opinion” ambiguous—court would not overturn the BIA’s decision that resistance to gang recruitment alone does not constitute a political opinion); Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012) (evidence showed she expressed anti-gang opinions when she refused to join MS-13, the gang attacked her, but the court found that her political opinion was not “one central reason” for the persecution).


court has suggested, though, the persecutor might be more likely to attribute resistance to an opposing political opinion if the persecutor is politically minded.\textsuperscript{279}

To qualify for asylum due to persecution on account of political opinion, an asylum applicant must show that he or she held a political opinion and was persecuted because of it.\textsuperscript{280} An individual can meet this standard through actions that are indicative of an assertion of a political opinion.\textsuperscript{281} The UNHCR specifically states in its guidance on gang-based asylum cases that “in certain contexts, expressing objections to the activities of gangs... may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a ‘political opinion’ within the meaning of the refugee definition.”\textsuperscript{282} Under this interpretation, a number of an individual’s actions, including their refusal to comply with a gang’s demands, openly disapproving of the gang’s activities, physically defending their property against MS-13, repeated refusals to join the gang, and efforts to report crimes to the police, may all constitute sufficient political expressions.\textsuperscript{283} The actions and statements of those resisting gang recruitment and other forms of gang oppression function to put the gang on notice of the applicants’ political opinions.

Opposition to the gang and its activities constitutes a political opinion, not merely opposition to a criminal organization. When gangs control large areas and provide security, they take on some government functions, such as security, in areas where they “directly control society and de facto exercise of power in the areas where they operate.”\textsuperscript{284} MS-13, as a transnational gang, seeks to achieve its political agenda using whatever means are available.\textsuperscript{285} Transnational gangs take over whole neighborhoods and, in some instances, act as a de facto government by using their system of \textit{la renta} to control the local transportation system and key businesses.\textsuperscript{286} Like the guerrilla organizations in \textit{Borja v. INS}, MS-13 is an anti-government group acting in direct opposition to the elected government in order to gain political control, so that it may pursue its objectives to control the state and unfettered travel.\textsuperscript{287} MS-13 has the capability to challenge government sovereignty through “internal disruption and destabilization efforts.”\textsuperscript{288} Transnational gangs act as despotic, de facto governments with commercial and criminal motives, with a

\textsuperscript{279}. Marroquin-Ochoma v. Holder, 574 F.3d 574, 578 (8th Cir. 2009) (politically minded persecutor might attribute political opinion to resister, but evidence did not support that conclusion).
\textsuperscript{280}. See INS v. Elias-Zacarias, 502 U.S.478, 482-84.
\textsuperscript{281}. See Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled on other grounds, Fisher v. INS 79 F.3d 955, 961 (9th Cir. 1996)) (where a military officer persecuted a Salvadoran woman on account of her political opinion, resistance to rape and beating through flight, and on account of her husband’s political opinion as a subversive which the officer imputed to her).
\textsuperscript{282}. UNHCR “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs”, March 2010, ¶ 46.
\textsuperscript{283}. Bernardo’s hypothetical on p. 2.
\textsuperscript{285}. HAL BRANDS, supra note 38, at 27-28.
\textsuperscript{286}. Id.
\textsuperscript{287}. 175 F.3d 732 (9th Cir. 1999) (en banc), superseded by statute on other grounds as stated by Parussimova v. Mukasey, 555 F.3d 734, 739-40 (9th Cir. 2009). See MANWARING, supra note 46, at 10.
\textsuperscript{288}. Id. at 11.
\textsuperscript{289}. Id. at20-21.
“political agenda [to] control [] state governing and security institutions” and “an agenda to control [] people and territory.”  

MS-13 and other transnational gangs are “now powerful enough to destabilize, challenge, and destroy targeted societies and states.”

Even if Bernardo can convince the immigration judge that his verbal objection to illegal gang activity constituted a legitimate expression of a political opinion, he must still be able to convince an immigration judge that one of the primary reasons gang members shot him was because of his political opinion, and not as a byproduct of the recruitment process. Proving this is the case, however, is difficult for asylum applicants due to courts’ perceptions of transnational gangs’ coercive recruitment tactics.  

A court could classify the persecution an applicant experiences as the product of an ongoing recruitment process rather than retaliation for his or her political beliefs. Expert witnesses and studies on the politicization of gang affiliation may be helpful for potential applicants in proving the mixed motivations behind the persecution of those who stand up to gangs, and whether an applicant’s political beliefs should be recognized as a central cause of the persecution. Under the UNHCR Guidelines, if an applicant has refused gang recruitment because of his or her opposition to the gang’s activities and “the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion.”

Moreover, Enrique, a former gang member, may argue that in choosing to leave the gang, he expressed his political opposition to the gang. If he did not leave the gang, Enrique could have a valid claim that government authorities and rival gang members could attribute to him the anti-government political beliefs of MS-13.

Immigration courts should interpret the notion of political opinion broadly to include “any opinion on any matter in which the machinery of State, government, and policy may be engaged.” Even where asylum applicants have not explicitly participated in politics, courts have still found that asylum applicants expressed political beliefs through their actions. Within the context of highly politicized civil wars between government forces and guerillas, an individual could manifest a

290. Id. at 15.  
291. Id. at 20-21.  
292. The REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 2131, 302-23 (requiring that one of the enumerated grounds for asylum and withholding be “at least one central reason” for the persecution). See, e.g., RiveraBarrientos v. Holder, 666 F.3d 641 (10th Cir. 2012) (where asylum applicant was gang-raped a few months after refusing to join MS-13 and stating her opposition to the gang, found “equally likely that she was attacked for her refusal to join as for her criticism of gang practices).  
293. See generally FARINÁ ET AL., supra note 3.  
297. See, e.g., Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (where belief that the Armed Forces are responsible for lawlessness, rape, torture, and murder constituted a political opinion); Ahmed v. Keisler, 504 F.3d 1183, 1193 (9th Cir. 2007) (belief that Biharis were poorly treated in Bangladesh constituted a political opinion, and protesting Bengali treatment of the Biharis expressed his political opinion).
political opinion by simply refusing to join or support an organization that belonged to either side. But courts have failed to apply this logic to the circumstances that asylum applicants often find themselves in with respect to the “war” between the government and the gangs in their home countries. Applicants in gang-based asylum cases who allege persecution on the account of political opinion have generally been denied asylum for lack of supporting evidence.

Bernardo, by standing up to MS-13, and Enrique, by leaving MS-13, each stood up to a quasi-political organization that acted as a de facto government in some areas. The Supreme Court stated that “In order to satisfy [INA § 101(a)(42), the persecution must be on account of the victim’s political opinion, not the persecutor’s.” However, demonstrating opposition to political aspects of an organization that has both political and criminal motives may arguably make a stronger case for asylum, as long as the evidence supports the nexus between the persecution and the applicant’s anti-gang political opinion.

Refusing to join a transnational gang may also be a political expression of neutrality. A display of “political neutrality in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-government forces constitutes the expression of a political belief. An applicant must establish that he or she has an affirmative political belief and has consciously decided to remain politically neutral.

298. See, e.g., Borja v. INS, 175 F.3d 732 (9th Cir. 1999) (en banc), superseded by statute on other grounds as stated by Parussimova v. Mukasey, 555 F.3d 734, 739-40 (9th Cir. 2009). In Borja, the petitioner established persecution on account of her political opinion because she resisted recruitment attempts by an anti-government force, the New People’s Army (NPA). Borja told the New People’s Army, that she was pro-government. Borja v. INS, 175 F.3d at 734. The NPA would have killed her if she had not submitted to pay the “revolutionary taxes.” Id. When she resisted an increase in the “taxes,” the NPA cut her neck with a knife. Id. at 735. The court held that “Ms. Borja did not waver from her political refusal to join the NPA, remaining in their eyes their political adversary. Once Ms. Borja drew a political line in the sand, her every contact with the NPA became a life or death situation and the probability of death became almost certain . . . when she could not and did not pay her ‘taxes.’” Id. at 736.


300. Elias-Zacarias, 502 U.S. 478, 482 (1992). However, asylum and withholding of removal based on political opinion requires examination of the persecutor’s view of the asylum seeker’s statements, actions, or lack of actions. Id. See Martinez-Benidva v. Holder, 616 F.3d 711 (7th Cir. 2010). The court rejected the BIA’s ruling that S-E-G- precluded Martinez-Benidva’s political opinion claim regarding persecution by FARC in Colombia. The BIA failed to carefully analyze circumstantial evidence proving the persecutor’s political motives, misapplying INS v. Elias-Zacarias, 502 U.S. 478 (1992). The Board must analyze political persecution claims (including those involving gangs) consistent with Elias-Zacarias. See also Marroquin-Ochoma v. Holder, 574 F.3d 574, 578 (8th Cir. 2009) (“Opposition to a gang such as Mara Salvatrucha may have a political dimension”). The 1951 Convention ground of “political opinion” should be interpreted to reflect the reality of the specific geographical, historical, political, legal, judicial, and socio-cultural context of the country of origin. In certain contexts, expressing objections to the activities of gangs or to the State’s gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and, thus, constitute a ‘political opinion’ within the meaning of the refugee definition. UNHCR’s Guidance Note on Refugee Claims Relating to Victims of Organized Gangs 16 (2010).

301. See UNHCR’s Guidance Note on Refugee Claims Relating to Victims of Organized Gangs 17-18 (2010). See also Sangha v. INS, 103 F.3d 1482, 1488 (9th Cir. 1997).

302. Sangha v. INS, 103 F.3d at 1488 (9th Cir. 1997).

303. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984) (a person exercises
Legal research regarding political opinion and political action should not be restricted to the immigration context. Of course immigration precedent opinions establish what is or is not political opinion in certain contexts. However, the decisions in this area are not all-inclusive. The Supreme Court has held many times that acts are methods of communication. Additionally, the act of running away may be an expression of a political opinion.

Asylum is a discretionary form of relief. Even if the applicant qualifies as a refugee and is not subject to any of the exceptions to asylum, the asylum officer or immigration judge may still deny asylum. They may take into account discretionary factors, such as ties to the U.S., hardship to the noncitizen and family if deported, character, community service, age, health, and severe past or well-founded fear of persecution would weigh against the nature and circumstances of the exclusion grounds, serious immigration law violations, recency and seriousness of any criminal record, lack of candor to immigration tribunals, and evidence of bad character. Furthermore, once asylum is granted, it provides an applicant with a path to lawful permanent residence and citizenship.

To fulfill some of the elements of asylum, the applicants in the above hypotheticals can demonstrate their unwillingness to return to their country of origin, past harm constituting persecution, and a well-founded fear of future persecution. Generally, it has not been difficult for asylum applicants to prove to an asylum officer or immigration judge that they were unable or unwilling to return to the country of origin through their own credible testimony. Persecution, while political neutrality when, aware of contending forces, he or she actively chooses not to join either side.)

304. See, e.g., West Virginia State Board of Education v. Barnette, 319 U.S. 624, 629 (1943), (holding that students saluting the flag would have been indicative of their bowing down to a graven image); Spence v. Washington, 418 U.S. 405, 410 (1974) (held that taping a peace sign onto an American flag following the killings at Kent State was an expression of anguish about the domestic affairs of the government). In cases where encounters with the gang members includes verbal and physical exchanges, the applicant should present and the court should examine each part of the exchange, and to the degree possible, determine what motivated each parties' statements and actions. For example, when a person being robbed by a gang member fights back and a gang member shoots, the court may question whether the shooting really constitutes persecution on account of a protected ground. However, one could assert that the victim/asylum applicant’s actions were conducted in self-defense or in defense of property. Whether defense of person or personal property are legitimate defenses in the country of origin are beside the point. See also UNHCR “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs”, March 2010 ¶ 19, p. 16 (stating that the issue of defense of property still remains an issue that the “machinery of State, government, society, or policy may be engaged.”) UNHCR “Guidance Note on Refugee Claims Relating to Victims of Organized Gangs”, March 2010 ¶ 19, p. 16 (emphasis added).

305. Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987). Lazo-Majano’s persecutor believed that a man has the right to dominate a woman. Lazo-Majano, however, could not express a contrary opinion without endangering herself, but the court held that “[w]hen by flight she asserted one, she became exposed to persecution for her assertion.” Id.

306. INA § 208(b)(2).

307. Huang v. INS, 436 F.3d 89, 96-102 (2d Cir. 2006); and INA § 208 (b)(1)(A) (statutory language indicates that the decision is discretionary. “The Secretary of Homeland Security or the Attorney general may grant asylum” if it is determined that the applicant is a refugee under INA § 101 (a)(42)(A) [8 U.S.C.A. § 1101(a)(42)(A)]. See, e.g. The Asylum Officer Training Manual list of positive and negative discretionary factors.

308. INA § 209 (this section allows an asylee to apply for adjustment of status after one year of legal permanent resident [LPR] status). A lawful permanent may apply to become a naturalized citizen of the United States. INA § 318.

309. See 8 C.F.R. § 208.13(a) The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.
undefined by immigration statutes and regulations, has been defined by the courts as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”\(^\text{310}\) Being shot at, beaten, receiving credible death threats,\(^\text{312}\) suffering emotional or psychological trauma,\(^\text{313}\) among other types of abuse, are considered forms of persecution. The cumulative harm suffered by an applicant over a period of time may also qualify as persecution.\(^\text{314}\) Ultimately, as mentioned above, an applicant’s greatest challenge in a gang-based asylum case still lies in proving that the persecution is on account of their “membership in a particular social group” or “political opinion.”

IV. EXPLORING THE LEGACY OF GANG-BASED ASYLUM DECISIONS

Asylum and withholding of removal precedents may be evaluated based on whether: 1) courts have interpreted the law consistently with Congress’ intent to bring the United States asylum law into compliance with the 1967 Protocol (within international law); 2) case law provides clear guidance leading to predictable and consistent outcomes; and 3) U.S. interpretations of asylum law have demonstrated the flexibility to respond to new refugee situations. However, the U.S. fails on all three counts in the context of gang persecution cases.

The hypothetical cases of Alberto, Bernardo, Carlos, Dolores, and Enrique, reveal significant gaps in asylum protection given to a segment of asylum applicants vulnerable to gang persecution. Such gaps would not exist if the BIA and circuit courts interpreted and applied U.S. asylum law consistently with the 1967 Protocol, as called for by Congress when it passed the 1980 Refugee Act.\(^\text{315}\) Sharing nationality, general age range, socio-economic status, and lack of education and opportunities, many gang victims face coercive gang recruitment and persecution for refusing to join a gang;\(^\text{316}\) yet, they do not all share the same chances of being granted asylum.\(^\text{317}\) The BIA and federal courts apply asylum protection


\(^{311}\) See, e.g., Montoya-Ulloa v. INS, 79 F.3d 930, 931 (9th Cir. 1996) (held that beatings by Sandanista youth constituted persecution).

\(^{312}\) See, e.g., Andriasian v. INS, 180 F.3d 1033, 1042 (9th Cir. 1998) (held that persistent assaults and death threats against family constitute persecution).

\(^{313}\) See Kovac v. INS, 407 F.2d 102, 106-07 (9th Cir. 1969) (mental and physical suffering constitutes persecution); and Mashiri v. Ashcroft, 383 F.3d 1112, 1120-21 (9th Cir. 2004).

\(^{314}\) See, e.g., Edimo Doualla v. Gonzales, 464 F.3d 276, 283-84 (2nd Cir. 2006) (Reversed the BIA’s decision to deny asylum to a Cameroonian applicant because the immigration judge considered incidents of persecution separately instead of cumulatively); and Tchemkou v. Gonzales, 495 F.3d 785, 790-92 (7th Cir. 2007) (Cameroonian woman suffered serious bodily harm twice, suffered threats of additional retaliation, and had freedom curtailed).

\(^{315}\) The conclusion that protection gaps exist from BIA and circuit court opinions is based on comparisons to the guidance on gang-based asylum issues UNHCR. U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 7 (March 2010).

\(^{316}\) U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 7 (March 2010).

\(^{317}\) U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 7 (March 2010).
inconsistently considering the significant similarities in the applicants’ characteristics and circumstances. Given the shared characteristics and the persecution by the gang that this segment of applicants suffer for refusing to join (and refusing to stay in Enrique’s case), the courts should have a consistent standard for granting asylum.

Thus, the analysis and brief characterization of Alberto’s case based on religious persecution is the closest to a prototypical refugee case, as he is fleeing religious persecution. He should merit asylum, but faces challenges because some judges will see the case predominantly as a gang recruitment case, not a religious persecution case. He may qualify for asylum as long as the evidence demonstrates the nexus between the persecution, the shootings, and his Pentecostal Christian religion. That Alberto should be eligible for asylum, but not Bernardo, who expressed his ethical and moral opposition to the gang lacks a logical basis given the protective ethic embodied in the Refugee Convention and the Protocol. Moreover, that Carlos might be eligible for asylum based on his familial relationship with his brother, who stood up to a gang, but his brother Bernardo would remain ineligible for asylum, is also an inconsistent application of the protective ethic of asylum. In Dolores’ case, she will be denied asylum if her application is based solely on recruitment, but might be otherwise eligible if she bases her application on her treatment as a woman. Although at first glance, such an approach appears to be consistent with the anti-discrimination principles embodied in refugee protection, when compared to male gang-persecution cases, the rationale comes across as more ad hoc than principled protection. While Dolores does merit protection based on the treatment and position of women in that society, she and all of the other hypothetical applicants are arguably equally disadvantaged within their society by the overarching socioeconomic factors and their youth. Finally, there appears to be little consistency in Enrique’s case. The former gang member, while barred from asylum in most jurisdictions, might qualify for asylum or withholding of removal in the Sixth and Seventh Circuits, while others who resisted affiliation with the gang would not qualify. Former gang members will still need to prove that they are not barred from asylum and withholding of removal under the exceptions set forth in the INA. However, these hypotheticals illustrate the uneven protection that results

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320. See Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (remanding to consider whether Guatemalan women could constitute a particular social group under prior BIA precedents). See also Mohammed v. Gonzales, 400 F.3d 785, 796-98 (9th Cir. 2005) (gender may constitute a social group in female genital mutilation cases); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir.2007) (“Somali females” are a particular social group); Fisher v. INS, 79 F.3d 955, 965-66 (9th Cir. 1996) (en banc) (Canby, J., concurring) (asylum eligibility based on gender as a particular social group was not foreclosed); Fatin v. INS, 12 F.3d 1233 (3rd Cir.1993) (recognizing that gender can be the basis for a particular social group).
322. Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010) (holding that former gang members constituted a particular social group for asylum and withholding of removal); and Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (holding that former MS 13 gang members constituted a particular social group).
323. INA §§ 208(b)(2) and 241(b)(3)(B).
when courts detach their asylum decision-making from the Refugee Act’s central purpose—protecting those who suffer persecution.

The UNHCR specifically indicates that “age and gender aspects of a claim will be particularly important in applications made by children, youth and women.”324 Marginalized youth who are targeted by gangs are vulnerable to recruitment.325 The UNHCR further indicates that political opinion should be interpreted broadly, and defines membership in a particular social group as follows:

[A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.326

UNHCR interprets political opinion and membership in a particular social group more broadly than U.S. law, following a principled and flexible approach that does not unnecessarily limit refugee protection to vulnerable populations.327 Congress indicated its intent to bring the U.S. into compliance with international law when it passed the Refugee Act in 1980.328 However, the BIA requires that the characteristics of the group be socially visible without defining the term, what its scope should be, and to whom the characteristics should be visible.329 By including an additional requirement rather than providing an alternative to the Acosta requirement, which stipulates that the characteristics of the “particular social group” be immutable, the BIA has restricted the number and types of groups that can qualify for asylum protection.330 The BIA further limited the scope of what constitutes particular social group by imposing a particularity requirement in 2007.331 Thus, rather than clarify the meaning of membership in a particular social group for the

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329. Henriquez-Rivas, ----F.3d----, pp. 5-7 (discussing whether the term “social visibility” requires that the proposed social group be “understood by others to constitute [a] social group,” C-A-, 23 I&N Dec. at 959, or whether it means on-sight visibility that a bystander can see the difference that makes the person a member of the social group.).


circuit courts or the applicants, the BIA has convoluted the long-standing "immutability" definition.\textsuperscript{332}

In an unpublished opinion, \textit{Henriquez-Rivas v. Holder}, a three-member-panel of the Ninth Circuit described the confusion that asylum precedents had created.\textsuperscript{333} The panel affirmed the BIA’s decision which had rejected “individuals who testified against [MS-13] gang members in court” as a particular social group because it lacked social visibility.\textsuperscript{334} Two of the three judges on the panel agreed to the outcome of the case based on precedent, but felt that Ninth Circuit and BIA precedents had not clearly defined social visibility and particularity, despite having accorded \textit{Chevron} deference to the BIA’s interpretations.\textsuperscript{335} In contrast, the Fourth, Sixth, and Seventh Circuits legally recognize social groups, including family members of witnesses who testified and former gang members.\textsuperscript{336} Addressing the confusion in the law and inexplicably divergent outcomes, Judge Bea, in a concurring opinion, stated that:

[S]ome of our cases take as a touchstone for the ‘particularity’ requirement, some aspect of identity (birth location, sexual orientation, kinship), which may be immutable, but reject others (such as voluntary inclusion in an informant group) that, once accomplished, are similarly immutable. . . . Somalian women threatened with female genital mutilation are a particular social group, \textit{Mohammed v. Gonzales}, 400 F.3d 785 (9th Cir. 2005), while government witnesses threatened with death for their testimony against violent gang members are not, \textit{Soriano [v. Holder}, 569 F.3d 1162 (9\textsuperscript{th} Cir. 2009)]. Mexican men with female sexual identities are a particular social group, \textit{Hernandez-Montiel [v. INS}, 225 F.3d 1084 (9\textsuperscript{th} Cir. 2000)], while teenage boys in Honduras threatened with death for resisting MS-13 recruitment are not. \textit{Ramos-Lopez v. Holder}, 563 F.3d 855, 861 (9\textsuperscript{th} Cir. 2009). A petitioner fighting for her right to remain in this country and avoid persecution in her native land deserves a legal system governed not by the vagaries and policy preferences of a given panel, but by well-defined and consistently-applied rules.\textsuperscript{337}

\textsuperscript{332} \textit{In re Acosta}, 19 I. & N. Dec. 211, 222 (BIA 1985).
\textsuperscript{333} Henriquez-Rivas v. Holder, 2011 WL 3915529, at *5 (9\textsuperscript{th} Cir. 2011) (unpublished) (Bea, J., concurring), rev’d en banc, —F.3d—— (9th Cir. 2013) (Asylum applicant feared persecution by MS-13 because she testified against MS-13 gang members who murdered her father). N-A-M- v. Holder, 587 F.3d 1052 (10\textsuperscript{th} Cir. 2009) (although addressing one of the exceptions to withholding of removal, not a gang-based persecution case, concurrence addresses similar issues of being bound by circuit court precedent which had accorded \textit{Chevron} deference to the BIA’s interpretation of the “particularly serious crime” exception to withholding of removal).
\textsuperscript{334} Henriquez-Rivas, 2011 WL 3915529, at *1.
\textsuperscript{335} Id.
\textsuperscript{336} Crespin-Valladares v. Holder, 632 F.3d 117 (4\textsuperscript{th} Cir. 2011) (holding that “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” constituted a social group, reversed the BIA); Urbina-Mejia v. Holder, 597 F.3d 360 (6\textsuperscript{th} Cir. 2010) (holding that former gang members constituted a particular social group for asylum and withholding of removal); and Ramos v. Holder, 589 F.3d 426 (7\textsuperscript{th} Cir. 2009) (holding that former MS gang members constituted a particular social group).
\textsuperscript{337} Henriquez-Rivas v. Holder, 2011 WL 3915529, at *5.
In Henriquez-Rivas v. Holder, the Ninth Circuit Judge Carlos T. Bea, in his concurring opinion, interpreted the qualifications for asylum according to the BIA's language in Acosta and C-A, and following the Fourth and Sixth Circuits' approach which accepted the social visibility requirement. En banc, Judge Bea wrote for the majority and "clarifie[d] the 'social visibility' and 'particularity' without reaching the ultimate question of whether the criteria themselves are valid." The Seventh Circuit, on the other hand, rejected the BIA's newly imposed requirements of social visibility and sufficient particularity. However, perhaps other circuit court judges or the Supreme Court may be persuaded by evidence of the comity between the Refugee Act and the Protocol, recognize ambiguities in the Refugee Act as issues of statutory construction to be resolved by referring to the Convention and its underlying principles. BIA's interpretation of the term "particular social group" does not merit Chevron deference.

The BIA's narrow interpretation of membership in a particular social group and circuit courts' deference to the BIA's statutory interpretations limits

338. In Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840-41 (1984), the Environmental Protection Agency (EPA) had promulgated a regulation interpreting the term "stationary source," a category of industrial plants subject to environmental restrictions under the Clean Air Act Amendments of 2007, Pub. L. No. 95-95, § 309, 91 Stat. 685, 781 (codified as amended at 42 U.S.C. § 7619 (2005)). "Stationary source" was undefined in the statute, and the EPA's interpretation defined the term narrowly, such that fewer plants were subject to the Clean Air Act restrictions. The Court held that the EPA narrow interpretation was entitled to deference. Id. at 866. The Court instituted a two-part test in reviewing agency interpretations of Congressional Acts: 1) "employing traditional tools of statutory construction" to determine whether Congress expressed clear intent as to the meaning of a statutory term. Id. at 843, footnote 9. If Congress was clear, then "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Id. If the statute is "silent or ambiguous with respect to the specific issue," the reviewing court proceeds to the second step, in which "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 483.

339. Henriquez-Rivas, ---F.3d---, p. 9 (the BIA can find that the proposed social group "is cognizable under either the Acosta immutability standard or the newer standard that considers 'social visibility' and 'particularity'.") When the circuit court had previously considered Henriquez-Rivas, it had been bound by another panel's decision in Soriano v. Holder, a case in which the particular social group "former government informants" failed for lack of particularity. Id. at 11. En banc, the Ninth Circuit overruled Soriano and Velasco-Cervantes to the extent that they considered "diversity of lifestyle and origin the sine qua non of 'particularity' analysis." Id. Regarding interpretation of the "social visibility" requirement, the majority concluded that "requirement of 'on-sight' visibility would be inconsistent with previous BIA decisions and likely [be] impermissible under the statute." After determining that "'social visibility' refers to 'perception' . . . does not fully clarify the requirement." Id. The court leaves the question of whose perception to for the BIA to determine, but provides some guidance — indicating that the "the perception of the persecutors may matter the most." Id. However, Judge McKeown in her concurrence and Chief Judge Kozinski in his dissent, strongly disagree with the suggested interpretation. Id. at 11-12.

340. Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) (rejecting "social visibility" requirement of "particular social group" because of BIA's inconsistency, having found groups to be "particular social groups" without regard to social visibility and later requiring social visibility without repudiating the other line of cases).


343. See, e.g., Gonzales v. Thomas, 547 U.S. 183, (2006) (per curiam) (remanding to the BIA
the U.S.'s responsiveness to changing circumstances that create new refugee populations.344 This reflexive deference to BIA interpretations of the asylum and withholding of removal provision on the part of the circuit courts functions to further entrench mistakes in interpretation.345 Stare decisis then constrains the circuit courts from correcting themselves, even when they believe that the decision and its rationale are incorrect and will result in a miscarriage of justice.346 The resulting gaps in refugee protection carry a high cost and risk to human lives.

V. REFORMING REFUGEE PROTECTION IN AN ERA OF EMERGING GROUPS AND NEW RISKS

Several changes must be made to bring U.S. refugee law back into alignment with the 1967 Protocol: 1) litigants must raise arguments regarding interpretations of particular social groups and political opinions at the immigration court in order to preserve arguments for appeal;348 2) advocates should solicit amicus briefs and submit scholarly articles to support legal theory and more effective interpretations by the BIA; and 3) advocates should advance the arguments that circuit courts do not owe Chevron deference to the BIA's interpretations of the Refugee Act. The BIA and circuit courts' restrictive interpretations of "particular social group" and "political opinion" must be challenged by arguing first, that Congress intended comity between the Refugee Act and the Protocol, and second, that broad interpretive principles such as the rule of lenity apply to asylum and related relief from removal.349

for determination of whether family qualified as a particular social group and requiring deference to BIA's definition of "particular social group"). The agency's construction of the statutory provision, where an implicit gap is present must be reasonable. Where a gap is implicit, however, a court may not substitute its own construction of a statutory provision insofar as the construction is a "reasonable" policy choice for the agency to make. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984).

An agency's interpretation merits Chevron deference even if inconsistent with prior interpretations, if explained by the agency. National Cable & Telecommunications Ass'n. v. Brand X Internet Services, 545 U.S. 967, 981 (2005) [hereinafter Brand X]. In the Chevron analysis, whether the asylum or withholding of removal provision is considered in the context of Congress' intent in passing the Refugee Act or not affects evaluation of the reasonableness of BIA interpretations and construction.


346. See e.g. N-A-M- v. Holder, 587 F.3d 1052, 1057 (10th Cir. 2009) (per curiam) (despite acknowledging strong arguments that BIA inaccurately interpreted statute and "treaty-based underpinnings," but were constrained by precedent).


348. This may be accomplished by submitting a short memorandum of law or a law review article on point for the record. One may address these issues in an opening or closing statement as well.

FALLING THROUGH THE CRACKS

A. Advocacy at the Immigration Court and Board of Immigration Appeal

1. Litigants must present all arguments to the Immigration Court that they wish to raise on appeal

By addressing the erroneous interpretations of the statutory terms “membership in a particular social group” and “political opinion” at the immigration court level, an applicant preserves the argument as a basis for appeal. Even though the BIA and many circuit courts have interpreted “membership in a particular social group” narrowly, advocates should still advance legal arguments that the Refugee Act needs to be interpreted consistently with the Protocol’s language in order to keep U.S. asylum and withholding of removal laws in line with international law. Respondents applying for asylum in the immigration court may challenge the validity of the social visibility and particularity requirements in the “particular social group” analysis and still argue, in the alternative, that their “particular social group” satisfies the social visibility and particularity requirements. By reminding immigration judges, the BIA, and circuit courts of Congress’ intent to bring refugee law into compliance with the Protocol, reliance on the UNHCR Refugee Handbook and other UNHCR guidelines should be standard practice in order to help maintain congruity between U.S. law and the 1967 Protocol. Respondents and their counsel should also argue that the immigration rule of lenity, allowing ambiguities in deportation statutes to be interpreted in favor of the alien, as asylum and withholding of removal constitute relief from removal. This will likely lead to a broader interpretation of the qualifications for asylum.

(citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).


352. See generally Fatma E. Marouf, The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender, 27 YALE L. & POL’Y REV. 47 (2008) (explains the flaws in the BIA and circuit courts’ adoption of the social visibility requirement and emphasizes the broader interpretations of the Convention provision). The BIA’s interpretation of membership in a particular social group is not binding because the introduction of particularity and social visibility requirements “represent sudden, unexplained and incoherent departures from precedents—particularly Acosta . . . .” Id. at 68. However, the Third and Seventh Circuits do not require “social visibility”. Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).

353. While not every attorney has the time to draft a brief for each asylum and withholding of removal case, an attorney can use a prepared memorandum of law that frames the legal analysis of these standard issues and will still preserve the issue for appeal.
2. Advocates must formulate “particular social groups” based on fundamental characteristics that are the basis of discriminatory treatment

“Particular social groups” should be based on the fundamental characteristics at the root of the discriminatory treatment, and the Immigration Court, Board of Immigration Appeals, and circuit courts should evaluate and address the evidence of proposed social groups. Noted scholar, Deborah Anker, advises against “opportunistic, ad hoc theorizing” when formulating “particular social groups [PSG’s]”. Instead, she suggests “embracing fundamental aspects of ‘Membership in a Particular Social Group [. . .] MPSG law, including the breadth of many PSGs.” Analogize to other broad “particular social groups” that have already been recognized and accepted, like women. Females and female subgroups may constitute a particular social group. At the same time, continue to advance the argument that young men disadvantaged by their youth and social status, like women in many cultures, could also constitute a protected social group. Low socio-economic status under the prevailing political and economic conditions in a developing country are arguably immutable, as these conditions often require youths to forego their education in favor of working in low-wage and unskilled jobs, continuing in a cycle of poverty. Attorneys for applicants in gang recruitment cases, citing persuasive UNHCR interpretations of social group, must continue to make the argument that courts should disaggregate social visibility and particularity from immutability.


355. Id.

356. Id.


358. Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir.2005) (young girls in the Benadir clan may constitute a particular social group based on gender whether or not they associate with each other).

359. In re S-E-G., 24 I&N Dec. 579, 589 (BIA 2008) (male asylum applicants argued that “particular social group” was “comprised of male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment” but actually proposed the following: “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” and “family members of such Salvadoran youth”).


will result in greater protection from this risk of persecution that has arisen in the past decade.\footnote{FALLING THROUGH THE CRACKS, supra 159.}{362}

3. Litigants must use information creatively to support the existence of the social groups, political opinion, and the nexus to the persecution

Establishing a viable “particular social group” and the nexus between the persecution and the protected ground (race, religion, nationality, political opinion, and membership in a particular social group) requires creativity, and looking at existing information in new ways. Social visibility and sufficient particularity have been difficult to establish in cases where the particular social group proposed is “young Central American males who have been recruited by a gang, but refused to join,” or some other variation of this group based on risk factors such as marginalized youth.\footnote{FALLING THROUGH THE CRACKS, supra 159.}{363} However, several reports mention the existence of government programs or community-based programs designed to attract young males vulnerable to gang recruitment.\footnote{FALLING THROUGH THE CRACKS, supra 159.}{364} In addition, evidence of U.S. government assistance for gang prevention programs in the asylum applicant’s country of origin may establish implicit recognition of the existence of the “particular social group” by the persecuting gang, community-based organizations and the government in the country of origin. An asylum applicant may submit documentary evidence to the immigration court regarding the U.S. government’s efforts to “[a]ssist community-based organizations and local authorities [in providing] youth with productive alternatives to criminal gang activity or encourag[ing] them to leave gangs (e.g., job placement, vocational skills training /alternative education, drug rehabilitation).”\footnote{FALLING THROUGH THE CRACKS, supra 159.}{365}

Evidence of recruitment for gang prevention programs on the basis of appearance, location, and visible signs of a particular socio-economic status may show that the at-risk youth targeted by gang prevention programs are the same youth that gangs target.\footnote{FALLING THROUGH THE CRACKS, supra 159.}{366} If this information is contained in U.S. government reports and asylum applicants file them as evidence in their immigration court case, counsel may request the court to take judicial notice of those particular facts under Federal Rule of Evidence 201(b)(2).\footnote{FALLING THROUGH THE CRACKS, supra 159.}{367} It would be disingenuous for a U.S. federal court to deny

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\footnote{See In re E-A-G-, 24 I & N. Dec. 591,594 (BIA 2008)(the evidence in the record did not establish that proposed social group was socially visible); In re S-E-G-, 24 I & N Dec. 579, 587 (BIA 2008) (background evidence did not indicate that “Salvadoran youth who are recruited by gangs but refuse to join” (or their family members) would be “perceived as a group” by society). From the BIA’s statements regarding the lack of supporting evidence, an inference can be drawn that additional evidence will help to establish the social visibility of the proposed group’s characteristics.}{362}


\footnote{See, e.g., General Accounting Office, COMBATING GANGS: Federal Agencies Have Implemented a Central American Gang Strategy, but Could Strengthen Oversight and Measurement of Efforts 13-14, (April 2010). Additionally, the United States Agency for International Development (USAID) officials reported starting their gang prevention programs before Mérida Initiative funding became available and have used non-initiative resources to promote anti-gang and rule-of-law programs in Central America. Id. at 30.}{364}

\footnote{General Accounting Office, COMBATING GANGS: Federal Agencies Have Implemented a Central American Gang Strategy, but Could Strengthen Oversight and Measurement of Efforts 16 (April 2010).}{365}

\footnote{FARIÑA ET AL., supra note 3, at 217-18.}{366}

\footnote{See, e.g., Seelke, supra note 5, at 6; FARIÑA ET AL., supra note 3, at 55, 115-16.}{367}
the existence of a particular social group because it is not socially visible, and when another U.S. government agency or entity identifies the same at-risk group for a gang prevention program through the same "socially visible" cues.  

4. Litigants must factually distinguish the applicant's case from adverse precedents

_Stare decisis_ binds the circuit court to rulings based on the limited facts presented before the court but not the rationale.  

Rulings on questions of law will naturally apply more broadly to future cases than rulings on mixed questions of law and fact. Questions of whether a proposed group constitutes membership in a particular social group or whether a particular situation satisfies expression of a political opinion to qualify for asylum are fact intensive determinations. In cases such as these, factually distinguishing an applicant's asylum case from adverse precedents at the immigration court level, and at the BIA, will preserve the issue for appeal. While many of the factual scenarios will be similar, where precedent states that the evidence did not support that the particular social group existed, an applicant is not precluded from filing under the previously unrecognized social group (if viable) with stronger evidence of the protected ground and arguments demonstrating that the persecution was on account of that protected ground.  

5. Counsel for the asylum applicant must file a brief, legal memoranda, or written closing argument to establish a clear record of the legal argument in support of asylum and withholding of removal

Steps 1-4 recommended above are all best accomplished by filing a pre-hearing brief in support of the asylum. Immigration judges often render an oral decision immediately at the conclusion of proceedings; during the hearing, there is little or no opportunity to present the detailed arguments necessary to establish the particular social group, especially when the evidence is presented through reports (identifying socio-economic challenges faced by youth in El Salvador, and briefly mentioning some gang prevention programs that are underfunded). See also HAL BRANDS, supra note 38, at 46-47 (describing briefly some gang prevention and rehabilitation programs funded by the United States government in Guatemala).

368. Federal Rule of Evidence 201(b)(2). These reports "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." _Id_. While the fact may not be generally known in immigration courts, it is known once the reports are filed, and are from U.S. government reports if they are from USAID, the U.S. Government Accounting Office, or other U.S. government agencies.  

369. Where the asylum applicant is or was previously a gang member, socially visibility may be able to prove due to the manner of dress, tattoos, scars, and other characteristics. FARĨNA ET AL., supra note 3, at 66-67 (although gangs have also attempted to be more discreet in response to harsh anti-gang laws).

370. See In re Osborne, 76 F.3d 306, 309 (9th Cir.1996) The court explains that "under the doctrine of _stare decisis_ a case is important only for what it decides-for the "what," not for the 'why,' and not for the 'how.'" It further states that "[i]nsofar as precedent is concerned, _stare decisis_ is important only for the decision, for the detailed legal consequence following a detailed set of facts." _Id_.  


and studies rather than through testimony. Submitting a written brief in advance of the hearing is the best opportunity to set forth all of the arguments regarding the legal theories, presenting the evidence, distinguishing from adverse precedents.

B. Strategies for Reshaping BIA Precedents and Preserving Issues for Circuit Courts

By following recommendations 1-5 in section A above, the BIA will have a more comprehensive record to review and rule on in gang-based asylum cases. In strong cases with well-developed records, the BIA may be responsive to amicus briefs that discuss statutory interpretation of membership in a particular social group and political opinion that more closely reflect Congress' intent and UNHCR guidelines. The BIA is not bound by stare decisis like the circuit courts, and may reverse itself if convinced that it should interpret the Refugee Act provisions consistent with the 1967 Protocol.

C. Circuit Court Strategies to Correct Erroneous Interpretations of Asylum Provisions—Addressing Chevron Deference and Stare Decisis

Until the BIA reverses itself, advocates should follow the three arguments recommended by Bassina Farbenblum in Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron. In cases of first impression before circuit courts, asylum advocates should submit scholarly articles and solicit amicus briefs by respected scholars to provide insight and analysis as to why the BIA's interpretations of asylum law and withholding of removal do not merit deference and to interpret the Refugee Act consistent with the Refugee Convention and 1967 Protocol. Because of stare decisis, cases with the same legal issue and

373. Id. at 77, sec. 4.16 (g).
374. See N-A-M- v. Holder, 587 F.3d 1052, 1057 (10th Cir. 2009) (per curiam) (amici convinced judges that the BIA inaccurately interpreted statute and "treaty-based under-pinnings," but had to follow precedent). It can be inferred that the arguments needed to be made earlier, either at the time the circuit court decided the precedent case that now binds them, or at earlier stages of litigation, namely at the immigration court to preserve the argument for appeal, and then at the BIA with the assistance of distinguished amici. Id. at 3.
376. 60 DUKE L.J. 1059, 1083-1085 (2011). Counsel for the asylum applicant may argue that there is no gap in interpretation of the statute for the administrative agency that is adjudicating the asylum application (the BIA) to fill. Textual ambiguities in the Refugee Act may be treated as issues of statutory construction. Id. at 1096-97. See INS v. Cardoza-Fonseca, 480 U.S. 421, 429, 432, 437 (1987). Rather than Congress delegating interpretation of ambiguous statutory provisions to the Attorney General (and the Attorney General delegating that authority to the BIA), it may be possible for circuit courts to treat ambiguities in the Refugee Act as issues of statutory construction to be resolved by referring to the Convention. Farbenblum, at 1096-97. See Negusie v Holder, 129 S.Ct. 1159, 1164-65 (2009) (Congress delegated authority to interpret the INA to the Attorney General, and the Attorney General delegated that authority to the BIA). Farbenblum raises another cogent concern about asylum treaty interpretations under Chevron, that delegating interpretation of ambiguous asylum provisions to the BIA and deferring to its decision improperly allows the BIA to redefine the boundaries of U.S. treaty obligations. Farbenblum, at 1104. "Congress intended for the INA's asylum provisions to be interpreted in light of the Convention from which they are derived, not to be informed by a particular administration's political preferences." Id.
indistinguishable facts are predetermined by prior precedent. The circuit court may \textit{sua sponte} hear an appeal en banc, or the parties may petition for a hearing en banc.\footnote{377. See Bassina Farbenblum, \textit{Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron}, 60 DUKE L.J. 1059, 1096-97, 1105 (2011). An asylum applicant may argue that \textit{Chevron} deference does not apply to the BIA's interpretations if ambiguous provisions of the asylum and withholding of removal statutory provisions because “Congress expressed clear intent that INA asylum provisions be interpreted consistently with U.S. obligations under the Protocol and thus left no gap for the agency to fill.” \textit{Id.} at 1096 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 432 \\& n.12, 433 (1987)).} Prior circuit court precedent may only be overruled if the case is heard en banc.\footnote{378. 28 U.S.C. § 46(c). See Henriquez-Rivas v. Holder, 449 Fed.Appx. 626, 628, 632-33, 2011 WL 391552, 2, 4 (9th Cir. 2011) (unpublished) (concurrency). Accepted for en banc review January 31, 2012 (concurring opinion states that the circuit court is bound by its prior published opinions issued by three-judge panels unless an en banc court or the Supreme Court overrule the prior decision). Decision \textit{en banc} issued Henriquez-Rivas v. Holder, — F.3d —, 2013 WL 518048, 9 (9th Cir. 2013) \textit{en banc}.} Thus, asylum advocates should petition for en banc review where necessary to overturn prior circuit court precedent.

CONCLUSION

Gang victims, like Alberto, Bernardo, Carlos, Dolores, and Enrique merit protection under the 1967 Protocol and the Refugee Act of 1980. Victims like these hypothetical’s characters have been persecuted by gangs and face serious risks if compelled to return to their countries of origin because the BIA and circuit courts have interpreted U.S. asylum laws too narrowly. These victims together represent a viable social group targeted by gangs, and sometimes the police and vigilantes, on account of their youth, socio-economic status, and related factors; NGOs and U.S. government-sponsored gang prevention programs utilize risk factors, the socio-economic status and related characteristics to identify and target the same group members. In addition, actions and words that indicate asylum applicants’ desire to distance and to protect themselves from gangs should be taken as expressions of political opinion. The implementation of the advocacy measures described above, coupled with asylum officers, BIA, and circuit court judges who are well versed in interpreting U.S. asylum law and the underlying international agreements could go a long way toward restoring the protective ethic at the heart of the Refugee Convention, 1967 Protocol, and the Refugee Act of 1980. The U.S. should be a human rights leader and set an example for the rest of the world by demonstrating its ongoing commitment to the anti-discrimination principles underlying refugee protection, thereby protecting the rights of refugees who seek asylum in the U.S.