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Note – Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G-

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Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum *After Matter of S-E-G-*

ALEXANDRA GRAYNER*

After the Board of Immigration Appeals denied asylum to three siblings fleeing forced gang recruitment in Matter of S-E-G-, asylum claims based on forced gang recruitment are almost categorically denied. This Note describes how courts interpret and apply Matter of S-E-G- unfairly to preclude viable asylum claims based on membership in a particular social group. Given the chance to establish the facts in their individual records, certain individuals from Central America who have fled forced gang recruitment should be able to establish their eligibility for asylum. Proving that they are members of particular social groups which are both “socially visible” and “sufficiently particular” will be the most difficult hurdles. Nevertheless, a brief from the Department of Homeland Security provides insight on how to accomplish this task so that deserving individuals may be granted asylum.

* J.D. Candidate, University of California, Hastings College of the Law, 2012. I would like to thank my faculty advisor, Professor Karen Musalo, for introducing me to this topic while we conducted interviews in El Salvador as part of the U.C. Hastings Refugee and Human Rights Clinic. Without input from Professor Musalo and help from the Center for Gender and Refugee Studies, writing this Note would not have been possible. I would also like to thank the editors of the *Hastings Law Journal* for their hard work in the editing process. This Note is dedicated to the victims of gang persecution who seek safe haven in the United States.

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INTRODUCTION

Imagine you are a fourteen-year-old boy from El Salvador living in a poor neighborhood controlled by MS-13, one of the strongest gangs in the country and the world. Your older brother and uncle are both in MS-13. As with half of the schools in El Salvador, there are eight to ten gang members who attend your school.¹ One day, two schoolmates who are members of MS-13 tell you that it is time for you to join the gang. But you watched your mother grieve over your older brother's criminal life

1. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 432 (2011).

and have no desire to follow in his footsteps. You tell the gang members “no” and bear through a beating after school. They reply, “You better be careful, because no one turns down MS-13.” The next day, another boy in your neighborhood is shot and killed by MS-13 gang members. It is rumored that while undergoing initiation into MS-13, the boy refused a gang member’s demand that he shoot a taxi driver. Then your schoolmate-gang members approach you and warn: “You’re next.” Fearing for your life, you run away from your hometown to stay with an aunt in San Salvador.

Soon after arriving in San Salvador, you realize that the gang members have traced your footsteps. You call home and learn that your brother, under pressure from his fellow gang members, told MS-13 members where your aunt lives. The gang contacted other MS-13 members who live nearby and told them to harass you until you join the gang. The next week, the MS-13 members demand that you join, and beat and threaten you when you refuse. You fear for your life and know you must leave the country to be safe. You decide to leave El Salvador and apply for asylum in the United States.

You are caught at the border, and when asked by immigration agents whether you fear persecution in your home country, you explain your reasons for coming to the United States. A pro bono lawyer takes your case. She explains that although you have a well-founded fear of persecution, it will be difficult to prove that you were persecuted on account of one of the five grounds protected by asylum law. In 2008, the Board of Immigration Appeals (“BIA”) denied asylum to three siblings who fled forced gang recruitment in *Matter of S-E-G*.² Ever since, courts have categorically denied asylum claims of individuals who base their claims on resistance to forced gang recruitment.³ Your lawyer tells you, however, that your asylum claim must be adjudicated on the individual facts and circumstances of your case. She will try to distinguish *Matter of S-E-G* to prove your eligibility for asylum. It will be difficult, but she will cite a brief written by the Department of Homeland Security to show how you meet the requirements for asylum.⁴ If she succeeds, you will begin a new life free from gang violence, a life you never knew in El Salvador.

2. 24 I.&N. Dec. 579, 590 (BIA 2008). The same day that the BIA decided *Matter of S-E-G*, it published a similar opinion, *Matter of E-A-G*, 24 I.&N. Dec. 591 (BIA 2008). Although both opinions are relevant to this discussion, this Note refers almost exclusively to *Matter of S-E-G* because that opinion includes more analysis and is cited more frequently.

3. See, e.g., *Bonilla-Morales v. Holder*, 607 F.3d 1132 (6th Cir. 2010); *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010); *Marroquin-Ochoma v. Holder*, 574 F.3d 574 (8th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009).

4. See Dep’t of Homeland Security’s Supplemental Brief, In the Matter of [redacted] [hereinafter DHS Supplemental Brief], available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%2008%20PSG.pdf>.

This Note explains why certain individuals from Central America who have escaped forced gang recruitment should qualify for asylum based on their membership in a particular social group (“PSG”). The Note is divided into four parts. Part I provides a brief overview of forced gang recruitment in El Salvador and explains how certain segments of society are more vulnerable to forced gang recruitment than are members of the general population. Although Part I focuses on El Salvador, similar conditions of forced gang recruitment exist throughout Central America. Part II outlines the BIA’s current criteria for individuals seeking asylum based on their membership in a PSG, and focuses in particular on social visibility and particularity, two relatively new requirements that have been criticized as arbitrary and unworkable. Part III examines *Matter of S-E-G-* and explains how the holding—that the applicant’s proposed PSGs lacked social visibility and particularity—may be limited to the facts of that case. Part IV uses a brief from the Department of Homeland Security to show how segments of Salvadoran society most vulnerable to forced gang recruitment can articulate a cognizable PSG that is both socially visible and sufficiently particular. The Conclusion provides further recommendations for future asylum seekers fleeing forced gang recruitment.

I. PERSECUTION ON ACCOUNT OF RESISTANCE TO FORCED GANG RECRUITMENT

For fifteen years, individuals from Central America have sought asylum in the United States because they fear persecution on account of their resistance to forced gang recruitment.⁵ This Note does not argue that all gang members join involuntarily. Many gang members join to escape a troubled life and to seek support, protection, and financial resources.⁶ Mounting evidence reveals that certain individuals in Central America are more vulnerable than others to gang recruitment.⁷ When these individuals resist recruitment efforts, they are subject to retaliation, which may include threats, beatings, and even death.⁸

The following Subparts describe conditions in El Salvador that should qualify certain individuals for asylum as members of a PSG.

5. See SEBASTIAN AMAR ET AL., CAPITAL AREA IMMIGRANTS’ RIGHTS COAL., SEEKING ASYLUM FROM GANG-BASED VIOLENCE IN CENTRAL AMERICA: A RESOURCE MANUAL 11 (2007); WASH. OFFICE ON LATIN AM., CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 3 (2008).

6. See Fogelbach, *supra* note 1, at 423 (“With limited exceptions, there are no reports indicating that MS-13 and M-18 systematically hand select individuals and force them to become gang members.”).

7. See *id.*; see also INT’L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR 30–31 (2007).

8. See UNITED NATIONS HIGH COMM’R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 7–8, 21 (2010) [hereinafter UNHCR].

Research for this Note includes reports on gangs in Central America⁹ and El Salvador in particular,¹⁰ as well as personal interviews with government officials and NGO workers in El Salvador.¹¹ But Central America's two most notorious gangs—*Mara Salvatrucha* (MS-13) and *Calle Dieciocho* (18th Street Gang)—also wield powerful networks of control in Guatemala and Honduras.¹² To the extent that analogous conditions exist in those countries, similarly situated individuals who have resisted forced gang recruitment should also qualify for asylum.

A. THE RISE OF GANGS: CASE STUDY ON EL SALVADOR

Gangs' ubiquitous rise to power in El Salvador has both domestic and international roots.¹³ El Salvador's twelve-year civil war ended in 1992, but the war's legacy lingered within a society riddled with high levels of violence, poverty, illiteracy, and few opportunities for youth.¹⁴ Amnesty laws, passed one year after the war ended, granted human rights abusers immunity from legal consequences for their war crimes.¹⁵

9. See generally CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., GANGS IN CENTRAL AMERICA (2009); U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT (2006) [hereinafter USAID]; Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO IMMIGR. L.J. 407 (2006); Fogelbach, *supra* note 1.

10. See INT'L HUMAN RIGHTS CLINIC, *supra* note 7; Juan J. Fogelbach, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order*, 7 SAN DIEGO INT'L L.J. 223 (2005).

11. The three interviews conducted by the Author were: Interview with Edgardo Alberto Amaya Cobar, Ministerio de Justicia y Seguridad Pública (Ministry of Justice and Public Security), in San Salvador (Oct. 22, 2010); Interview with Mario Francisco Mena Méndez, Jefe de la División de Admisión, Evaluación, y Diagnóstico, Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia (Dir. of the Div. of Admission, Evaluation, and Diagnostics, Salvadoran Inst. for Dev. of Youth and Adolescence), in San Salvador (Oct. 20, 2010); Interview with Zaira Navas, Inspector General de la Policía Nacional Civil (Gen. Inspector of the Nat'l Civil Police), in San Salvador (Oct. 20, 2010). Other interviews conducted by the Harvard International Human Rights Clinic's research team are also cited.

12. For more information on gang violence in Guatemala and Honduras, see Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 394–95 (2010).

13. See INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 1–2, 20.

14. See *id.* Although the civil war is cited as one of the domestic causes for the rise of gangs in El Salvador, the United States

funneled billions of dollars in economic and military aid to the Salvadoran government and military throughout the 1980s. Although Congress conditioned military aid to El Salvador on semi-annual reports certifying that the Salvadoran government complied with human rights standards, human rights organizations charged that the U.S. continued to fund the Salvadoran military despite its responsibility for widespread rights abuses.

Id. at 4. See generally COMISION DE LA VERDAD PARA EL SALVADOR, DE LA LOCURA A LA ESPERANZA: LA GUERRA DE 12 AÑOS EN EL SALVADOR (1993).

15. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 8. Many of the alleged human rights abusers were members of or were connected to the Salvadoran government and military. For a detailed discussion of El Salvador's amnesty law, see Margaret Popkin & Nehal Bhuta, *Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?* J. ETHICS & INT'L AFF., Mar. 1999, at 99, 103–08.

Today, impunity persists within El Salvador's weak and often corrupt institutional structure, which essentially sanctions the violence and lawlessness that allows gangs to control many aspects of public life.¹⁶

During the civil war, thousands of Salvadorans fled to the United States, and many settled in Los Angeles.¹⁷ Many of the young male immigrants joined gangs that were already established in Los Angeles: 18th Street, a gang named after 18th Street in Los Angeles and composed primarily of Mexican youth,¹⁸ and MS-13, a gang formed by Salvadoran youth.¹⁹

In 1996, changes in U.S. immigration laws significantly expanded the criminal deportation grounds for both legal and illegal immigrants.²⁰ Over 33,000 Salvadorans were deported between 1998 and 2004; many were gang members.²¹ When gang members arrived in El Salvador, they recruited poor and uneducated local youth, luring them into gang life with money and power.²² Experts believe that the deportation of gang members from the United States was the catalyst for the development of a U.S.-style gang culture in El Salvador.²³

In the last fifteen years, the rise of gangs has been recognized as an international phenomenon.²⁴ Gangs' criminal networks exhaust law enforcement efforts and are gaining numbers, strength, and power. In El Salvador, gangs are very different today than they were ten years ago.²⁵ In the mid to late 1990s, gangs were mostly small and local neighborhood-based.²⁶ Largely in response to government crackdown efforts, gang leaders consolidated their power and formed the MS-13 and 18th Street gangs.²⁷ Both gangs now operate through local subgroups known as *clikas*

16. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 7.

17. *Id.* at 20-21.

18. *Id.* at 21.

19. *Id.*

20. *Id.* at 21 n.77 ("The changes to immigration laws were included in two major pieces of legislation passed in 1996: The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in sections of 8 and 18 U.S.C.) and the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in sections of 8, 18, 22, 28, 40, and 42 U.S.C.))." For more information on the impact of IIRRA on gangs in Central America, see generally Freddy Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U. MIAMI L. REV. 301 (2008).

21. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 22 n.79 (citing DEPARTMENT OF HOMELAND SECURITY YEARBOOK OF IMMIGRATION STATISTICS 2004, tbl.43 (2004)).

22. *Id.* at 22.

23. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 22.

24. *Id.* at 20-24; see *60 Minutes: The Fight Against MS-13* (CBS television broadcast Dec. 4, 2005), available at <http://www.cbsnews.com/stories/2005/12/01/60minutes/main1090941.shtml?tag=mncol;lst;2>.

25. Interview with Edgardo Alberto Amaya Cobar, *supra* note 11. The National Civic Police estimates that there are approximately 10,500 gang members in El Salvador, but the National Council on Public Security estimates that the number is closer to 39,000. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 24.

26. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 25.

27. *Id.*

(cliques) that control the communities in which they operate, and also coordinate with one another throughout El Salvador and surrounding regions.²⁸

The increasingly sophisticated nature of gang networks renders it nearly impossible for a target of gang violence to escape while within the country or region.²⁹ One social worker described it candidly: “One can’t be sure if one is on the list of people to be killed, but one can be sure that if one is on that list, one will be found and killed.”³⁰ Being a target of gang violence can become an inescapable reality for many. Often, the only choice is to run beyond the gang’s sphere of influence.

B. STATE RESPONSE

In 2003, the Salvadoran government began to implement a series of *Mano Dura* (firm hand) laws to show that it was getting tough on gangs.³¹ The first *Mano Dura* law was struck down as unconstitutional because it allowed police to arrest those who they believed to be gang members based on their appearance or “illicit association” with other gang members.³² Because the police did not have to link any crime to the person they were arresting, innocent young men were arrested solely because they lived in gang-controlled neighborhoods.³³ In 2004, the Salvadoran government passed another anti-gang measure, *Super Mano Dura*, which survived constitutional review by making association with gang members an aggravating circumstance, as opposed to a crime.³⁴ This did not change police conduct, however, because authorities continue to harass innocent young men because they look like or associate with suspected gang members.³⁵

Although *Super Mano Dura* survived constitutional review, it failed in its ultimate goal of curtailing gang violence. Homicide levels increased from 33 per 100,000 in 2003 to 56 per 100,000 in 2006.³⁶ Though many gang members were arrested, the vast majority were released for lack of

28. *Id.*

29. *Id.*

30. *Id.* at 91 (quoting Jeanne Ridders, Coordinator of CRISPAZ, San Salvador (Aug. 21, 2006)).

31. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 37–42; see Sala de lo Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice] (Dec. 52-2003/56-2003/57-2003) at Falla 16, IV, 3, B (Apr. 1, 2004).

32. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 39–40.

33. *Id.* at 37–42. Ten days before the law was set to expire, the Supreme Court of El Salvador held that *Ley Anti-Maras* was unconstitutional. *Id.* at 39–40. On the very same day, the President submitted a new bill to the Legislative Assembly to criminalize gangs’ “delinquent activities,” as opposed to gang membership in general. *Id.* at 41. Many judges refused to enforce this second temporary law because it created the same human rights violations that made the first law unconstitutional. *Id.* at 41–42.

34. *Id.* at 42–45.

35. *Id.* at 84–95.

36. WASH. OFFICE ON LATIN AM., *supra* note 5, at 4.

proof that they committed a crime.³⁷ Salvadoran authorities are criticized for the *Mano Dura* laws' ineffective and counterproductive emphasis on massive arrests and for its lack of crime investigation and social programs to address the root causes of gang violence.³⁸ The effect of *Mano Dura* strategies also gave gang leaders an opportune moment to consolidate regionally based gangs, enhance their levels of organization, and wield more power.³⁹ Gangs changed their behavior to avoid arrest and began to discourage tattoos and encourage dressing "like any normal kid."⁴⁰ Gang members became indistinguishable from the innocent people living within gang-controlled areas.

In 2003 and 2004, there were many prison riots associated with intra-gang violence.⁴¹ Prison authorities sought to mitigate this violence by segregating prisoners according to gang affiliation,⁴² but segregation brought gang members together and enabled them to operate more effectively and clandestinely.⁴³

C. FORCED GANG RECRUITMENT

As gangs have become more sophisticated and powerful, their methods of recruiting new members have become more coercive and violent.⁴⁴ Gang mentality is centered on reputation and respect, and gangs retaliate against individuals who refuse recruitment efforts because resistance is perceived as an act of disrespect.⁴⁵ Some former gang members attest to the use of coercive recruitment tactics. One stated,

37. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 49. From 2003 to 2004, over 19,000 people were arrested for belonging to a gang, but 84% were released because there were no grounds for their arrests. *Id.*

38. SEELKE, *supra* note 9, at 10–11; INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 48; WASH. OFFICE ON LATIN AM., *supra* note 5, at 4; Interview with Edgardo Alberto Amaya Cobar, *supra* note 11; Interview with Zaira Navas, *supra* note 11.

39. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 26; WASH. OFFICE ON LATIN AM., *supra* note 5, at 4; Interview with Edgardo Alberto Amaya Cobar, *supra* note 11.

40. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 27 (quoting B.F., staff member at a youth center).

41. *Id.* at 12–13; *see* Interview with Edgardo Alberto Amaya Cobar, *supra* note 11.

42. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 12–13; *see* Interview with Edgardo Alberto Amaya Cobar, *supra* note 11.

43. WASH. OFFICE ON LATIN AM., *supra* note 5, 3–5.

44. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 30–32; *see* UNHCR, *supra* note 8, at 2–3.

45. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 30; UNHCR, *supra* note 8, at 2; Thomas Boerman, *Central American Gang Related Asylum Cases: Background, Leverage Points and the Use of Expert Witnesses*, IMMIG. DAILY (Dec. 15, 2009), <http://www.ilw.com/articles/2009,1215-boerman.shtm>. In addition to resisting gang recruitment, the UN High Commissioner for Refugees has identified broad categories of persons who are opposed to gangs and are targeted for retaliation as a result. These categories include individuals who refuse recruitment, women who refuse sexual demands, business owners who are unable or unwilling to meet extortion demands, witnesses of crimes, law enforcement agents, ethnic and sexual minorities, and community activists such as NGO workers, lawyers, and church-based groups that outspokenly oppose gangs. UNHCR, *supra* note 8, at 2. This Note focuses on those who resist recruitment.

“We killed several [people in the neighborhood] for not wanting to join us.”⁴⁶ Another said, “Today if you’re not part of the gang, they kill you; joining a gang is the only way of surviving in the environment. Before the gang was like your family; now you have to join or they kill you.”⁴⁷ People who morally oppose gangs but who cannot escape their ambit of control are perceived by gang members as disrespectful and deserving of punishment.⁴⁸

Within El Salvador, certain segments of society are more vulnerable to forced recruitment. A former asylum officer has identified at least three categories of individuals who may be more susceptible to forced recruitment: (1) individuals from gang-controlled neighborhoods, (2) young men who spend time in prison, and (3) at-risk children.⁴⁹ Because the individuals in these groups are more likely to be recruited by a gang, they face a greater risk of harm for refusing a gang’s recruitment efforts.

Gangs recruit young males from the territories they control.⁵⁰ Edgardo Amaya Cobar from El Salvador’s Ministry of Justice and Security explains: “Gangs have strong control over certain territories. Young people in a particular community who want an undisturbed, normal life will have to become a member of the gang that controls that community”⁵¹ In some neighborhoods, gangs wield so much control that police officers must ask permission from the gang’s leader to enter.⁵² Well-intentioned youth raised in gang-controlled neighborhoods are more susceptible to repeated harm and recruitment efforts.⁵³ “There is a saying in some El Salvadoran neighborhoods . . . if you’re not in a gang, then you’re against gangs.”⁵⁴ This commonplace notion coerces innocent youth from gang-controlled communities into joining a gang, either to save their own lives or those of their loved ones.⁵⁵

Young men in detention centers and prisons are also more susceptible to forced gang recruitment.⁵⁶ Current and former gang members explain that they “joined a gang in prison in exchange for protection from other

46. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 78 (alteration in original) (quoting an interview with a former gang member).

47. *Id.* at 76–77 (quoting an interview with a former gang member).

48. UNHCR, *supra* note 8, at 2.

49. Fogelbach, *supra* note 1, at 429–33.

50. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 61–63.

51. Interview with Edgardo Alberto Amaya Cobar, *supra* note 11.

52. *Id.*

53. Fogelbach, *supra* note 1, at 429.

54. *Id.*

55. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 30 (citing Interview with José Miguel Cruz, former Dir., Instituto Universitario de Opinión Pública (Univ. Inst. for Pub. Op. Research), San Salvador (Mar. 31, 2006)).

56. Fogelbach, *supra* note 1, at 430.

prisoners.”⁵⁷ An unfortunate effect of El Salvador’s *Mano Dura* laws was a dramatic increase in the prison population.⁵⁸ El Salvador has nineteen penitentiaries with a total inmate population of 24,051, but the country’s prison capacity is only 8000.⁵⁹ Crowded prisons provide ample opportunities for gangs to recruit other prisoners and expand their networks.

Gangs are increasingly recruiting younger members, meaning that certain segments of the Salvadoran youth population are the targets of gang violence at an early age.⁶⁰ Several sources indicate that gangs target children less than twelve years old because they are too young to face legal charges.⁶¹ Street children are particularly vulnerable. Social workers who work with street children attribute the decline in the number of street children, from 5000 in 2007 to 800 in 2008, to gang recruitment.⁶² El Salvador’s new administration under President Mauricio Funes⁶³ has developed promising programs to prevent street children from joining gangs.⁶⁴ But Mario Mena Mendez, the Director of Diagnostics and Evaluation for El Salvador’s Institute for Development, believes these programs will likely suffer from inadequate funding.⁶⁵

Schoolchildren are also vulnerable. Gang members frequently demand payments from schools, and threaten and harass the students.⁶⁶ There are an estimated eight to ten gang members at each of over half of the schools in El Salvador.⁶⁷ Many children are forced to deliver messages, distribute contraband, or stand as lookouts before they are incorporated into complete gang life.⁶⁸ Experts believe that gangs are increasingly approaching younger children, sometimes even children who are eight or nine years old.⁶⁹

All of these groups are at great risk of gang violence. Individuals in these groups are likely to live in constant fear of persecution from gangs,

57. *Id.*

58. *Id.*

59. *Id.*

60. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 31.

61. Fogelbach, *supra* note 1, at 431 n.81.

62. *Id.* at 432.

63. President Carlos Mauricio Funes Cartagena, representing the *Frente Farabundo Martí para la Liberación Nacional*, or FMLN, was elected in 2009. The FMLN is critical of past administrations’ strategies of massive gang arrests without the emphasis on social programs. The last *Mano Dura* law, however, is still in effect. See WASH. OFFICE ON LATIN AM., *supra* note 5, at 3. Notably, FMLN is a leftist political party in El Salvador, and used to be the umbrella organization of guerrilla groups during the civil war.

64. Interview with Mario Francisco Mena Mendez, *supra* note 11.

65. *Id.*

66. Fogelbach, *supra* note 1, at 432.

67. *Id.*

68. INT’L HUMAN RIGHTS CLINIC, *supra* note 7, at 31.

69. *Id.*

and sometimes have no other choice but to flee their home country and seek asylum in the United States.

II. ASYLUM AND MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Individuals seeking asylum in the United States may qualify if they have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷⁰ Although asylum applicants who have resisted gang recruitment may apply for asylum based on their political opinion and religion,⁷¹ such claims are beyond the scope of this Note.⁷² Here, the focus is on explaining why certain individuals who have resisted gang recruitment should be eligible for asylum based on their membership in a PSG.

Membership in a PSG is the most ambiguous of the five grounds for asylum. For this reason, it is also the most contentious ground. Since the asylum statute does not define a PSG, circuit courts usually defer to the BIA, the highest administrative body for interpreting and applying immigration laws.⁷³ In 1985, the BIA in *Matter of Acosta* defined a PSG

70. 8 U.S.C. § 1101(a)(42)(A) (2010). Once an individual establishes statutory eligibility for asylum, the Attorney General of the United States has the discretion to grant her asylum. *Id.* § 1158(b)(1)(A). Applicants who have suffered persecution in the past enjoy a presumption of a well-founded fear of persecution in the future. 8 C.F.R. § 1208.13(b)(1) (2012).

71. *See, e.g.,* Bonilla-Morales v. Holder, 607 F.3d 1132, 1137 (6th Cir. 2010) (denying asylum for lack of nexus to the PSG “family members of youth who have been subjected to recruitment efforts by the [gangs] and who have rejected such membership”); Mendez-Barrera v. Holder, 602 F.3d 21, 27 (1st Cir. 2010) (denying an asylum claim based on political opinion, religion, and membership in the PSG “young women recruited by gang members who resist such recruitment”); Marroquin-Ochoma v. Holder, 574 F.3d 574, 579 (8th Cir. 2009) (denying an asylum claim based on anti-gang political opinion); Ramos-Lopez v. Holder, 563 F.3d 855, 861–62 (9th Cir. 2009) (denying an asylum claim based on membership in the PSG “young Honduran men who have been recruited by the MS-13, but who refuse to join”); *Matter of S-E-G-*, 24 I.&N. Dec. 579, 581 (BIA 2008) (denying an asylum claim based on anti-gang political opinion and membership in the PSGs “(1) Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral and religious opposition to the gang’s values and activities; and (2) family members of such Salvadoran youth”); *Matter of E-A-G-*, 24 I.&N. Dec. 591, 593 (BIA 2008) (denying an asylum claim based on anti-gang political opinion and membership in the PSGs “persons resistant to gang membership” and “young persons who are perceived to be affiliated with gangs”). Gang-persecution claims also include applicants who did not resist gang recruitment, but rather were opposed to gang rule in general. *See, e.g.,* Santos-Lemus v. Mukasey, 542 F.3d 738, 744–45 (9th Cir. 2008) (denying an asylum claim based on anti-gang political opinion and membership in the PSG “the class of young men in El Salvador who share the immutable characteristic of resistance to violence and intimidation of gang rule”); Soriano v. Holder, 569 F.3d 1162, 1165 (9th Cir. 2009) (denying an asylum claim based on anti-gang political opinion and membership in the PSG “criminal government informant[s]”).

72. For scholarly articles discussing the possibilities of seeking asylum under the political opinion and religion theories, see generally Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827 (2008); Michele A. Voss, *Young and Marked for Death: Expanding the Definition of “Particular Social Group” in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235 (2005).

73. *See Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/>

as a social group where members share 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.”⁷⁴ One judge lauded the *Acosta* definition for striking “an acceptable balance between (1) rendering ‘particular social group’ a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering ‘particular social group’ a nullity by making its requirements too stringent or too specific.”⁷⁵ The *Acosta* definition makes sense because it captures the essence of the other four grounds of asylum—race, religion, nationality, and political opinion—all of which concern characteristics that individuals either cannot change or should not have to change because they are so fundamental to the applicant’s identity or conscience.

Recently, however, the BIA added two additional requirements for PSGs: social visibility and particularity.⁷⁶ Although the social visibility and particularity requirements are widely criticized as vague and unreasonable, they are the primary reason why courts deny asylum to applicants who resist gang recruitment and assert PSG claims. The following Subparts explain the prevailing interpretations of social visibility and particularity, at least to the extent possible based on contradictory case law.

A. SOCIAL VISIBILITY

In 2006, the BIA for the first time in *In re C-A-* denied an asylum claim because the applicant’s proposed PSG was not socially visible.⁷⁷ The BIA explained that social visibility is the “extent to which members of a society perceive those with the characteristic in question as members of a social group.”⁷⁸ The asserted PSG in *In re C-A-* was “noncriminal drug informants working against the Cali drug cartel.”⁷⁹ The BIA explained that “[w]hen considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view.”⁸⁰ Subsequent cases clarified that social visibility is a new requirement.⁸¹

biainfo.htm (last visited May 1, 2012).

74. 19 I.&N. Dec. 211, 233–34 (BIA 1985).

75. *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006).

76. *See Matter of S-E-G-*, 24 I.&N. Dec. 579, 582 (BIA 2008).

77. 23 I.&N. Dec. 951, 959–61 (BIA 2006), *aff’d*, *Castillo-Arias*, 446 F.3d 1190, *cert. denied sub nom. Castillo-Arias v. Gonzales*, 549 U.S. 977 (2007).

78. *Id.* at 957.

79. *Id.* at 961.

80. *Id.* at 960.

81. *See, e.g., Matter of S-E-G-*, 24 I.&N. Dec. at 58 (denying an asylum claim based on membership in a PSG for failing to meet the social visibility and particularity requirements).

Since its inception, the social visibility requirement has been criticized as illogical and arbitrary.⁸² The BIA had meager support when it created the social visibility requirement.⁸³ In an effort to show some foundational basis for its departure from the *Acosta* standard, the BIA cited the United Nations' Social Group Guidelines' definition of a PSG.⁸⁴ But in citing the Guidelines, the BIA misconstrued the Guidelines' two-tiered approach to defining a PSG. The Guidelines suggest defining a PSG through two *alternative* approaches: the "protected characteristic" approach and the "social perception" approach.⁸⁵ In *In re C-A-*, the BIA cited the Guidelines for support in requiring *both* a common, immutable characteristic (the "protected characteristic" approach) *and* social visibility (the "social perception" approach).⁸⁶ The UN Refugee Agency maintains that the BIA incorrectly interpreted the Guidelines and that a PSG need be identifiable through only one of the approaches, not both.⁸⁷

Moreover, application of the social visibility requirement has caused confusion and inconsistent decisions, prompting frustrated judges to question its validity. Judge Posner of the Court of Appeals for the Seventh Circuit has criticized the social visibility requirement because "a member of a group that has been targeted for assassination or torture or some other mode of persecution . . . will take pains to avoid being socially visible."⁸⁸ Judge Kleinfeld of the Ninth Circuit has noted that unless the PSG involves a tribe or clan, the social visibility requirement "is not very helpful to deciding cases because the abstractness allows most disputes to be decided either way."⁸⁹ And in an unpublished decision, Judge Bea of the Ninth Circuit pointed to the many questions left unanswered by the prevailing definition of social visibility:

82. 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); Eugenia Pyntikova, *Seventh Circuit Decision in Gatimi v. Holder Rejects Social Visibility as Necessary Criterion for Membership in a "Particular Social Group."*, 24 GEO. IMMIGR. L.J. 101 (2009); Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387 (2010); Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, *In re Thomas* (BIA 2007) (No. A-75-597-033/-034/-035/-036), available at <http://www.unhcr.org/refworld/docid/45c34c244.html>.

83. *In re C-A-*, 23 I.&N. Dec. 951, 961 (BIA 2006).

84. *Id.* at 956.

85. UNITED NATIONS HIGH COMM'R FOR REFUGEES, ELIGIBILITY GUIDELINES FOR ASSESSING THE INTERNATIONAL PROTECTION NEEDS OF ASYLUM-SEEKERS FROM AFGHANISTAN 17, 30 (2009).

86. 23 I.&N. Dec. at 956.

87. Brief for the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, *In re Thomas* (No. A-75-597-033/-034/-035/-036), available at <http://www.unhcr.org/refworld/docid/45c34c244.html>.

88. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

89. *Donchev v. Mukasey*, 553 F.3d 1206, 1216 (9th Cir. 2009).

Our opinions note that “social visibility requires that the shared characteristic of the group should generally be recognizable by others in the community.” But we have not specified the relevant community for this analysis (Petitioner’s social circle? Petitioner’s native country as a whole? The United States? The global community?). Nor have we specified whether “social visibility” requires that the immutable characteristic particular to the group be readily identifiable to a stranger on the street, or must simply be “recognizable” in some more general sense to the community at-large.⁹⁰

Prior cases may not consistently identify the “relevant community,” but courts can look to other BIA decisions to answer Judge Bea’s second inquiry. Interpreting social visibility to require that shared characteristics be readily identifiable to a stranger on the street would be inconsistent with established case law.⁹¹ The BIA has recognized a PSG of women who fear being subject to genital mutilation⁹² and a PSG of homosexual men.⁹³ The shared characteristics in these PSGs are not literally visible to the naked eye.⁹⁴ Although it is nearly impossible to articulate a straightforward definition of social visibility, the most reasonable interpretation is that the asylum applicant’s community perceives that members with shared characteristics are a group within society.

B. PARTICULARITY

In *In re C-A-*, the BIA also mentioned that a group of “noncriminal informants” was “too loosely defined to meet the requirement of particularity,” but offered no further elaboration on what this particularity requirement entailed.⁹⁵ In *Matter of S-E-G-*, the BIA elaborated:

The essence of the “particularity” requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently “particular,” or is “too amorphous . . . to create a benchmark for determining group membership.”⁹⁶

90. *Henriquez-Rivas v. Holder*, No. 09-71571, 2011 U.S. App. LEXIS 18661, at *9 (9th Cir. Sept. 7, 2011) (Bea, J., concurring) (citation omitted) (quoting *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009)), *vacated en banc*, 2012 U.S. App. LEXIS 1773 (9th Cir. Jan. 31, 2012).

91. Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q. 46, 60–61 (2010).

92. *In re Kasinga*, 21 I.&N. Dec. 357, 357 (BIA 1996).

93. *Matter of Toboso-Alfonso*, 20 I.&N. Dec. 819, 819 (BIA 1990).

94. Musalo, *supra* note 91, at 61.

95. *See* 23 I.&N. Dec. 951, 957 (BIA 2006).

96. 24 I.&N. Dec. 579, 584 (BIA 2008) (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

Like social visibility, the particularity requirement has been criticized for merely “compound[ing] the confusion.”⁹⁷ Judge Bea points to Ninth Circuit cases that apply the particularity requirement inconsistently.⁹⁸ Sometimes, asylum is denied for lack of particularity when the PSG members do not share the same unity of origin or some other demographic tie.⁹⁹ Other times, unity of origin is irrelevant and asylum is granted.¹⁰⁰ “There is no discernible basis for these divergent outcomes—other than, perhaps, a given panel’s sympathy for the characteristics of the group at issue.”¹⁰¹ Judge Bea finds the particularity requirement disturbing because an asylum applicant “avoid[ing] 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.”¹⁰²

III. ASYLUM CLAIMS BASED ON RESISTING GANG RECRUITMENT: IMPLICATIONS OF *MATTER OF S-E-G-*

In *Matter of S-E-G-*, the BIA pointed to the lack of social visibility and particularity in the applicant’s proposed PSGs when it denied asylum to three siblings who feared persecution in El Salvador after resisting gang recruitment.¹⁰³ *Matter of S-E-G-* is important because it is one of the BIA’s published decisions, and the Courts of Appeals are required to defer to the BIA’s definition of a PSG if the BIA’s analysis is reasonable.¹⁰⁴ But *Matter of S-E-G-* does not render all PSGs based on resisting gang recruitment per se invalid for lacking social visibility and particularity. Depending on the facts and record in a given case, future asylum applicants could articulate a PSG that is both socially visible and sufficiently particular to meet the new BIA standard. First, however, it is necessary to understand why PSGs based on resisting gang recruitment should not be precluded by established precedent.

97. *Henriquez-Rivas v. Holder*, No. 09-71571, 2011 U.S. App. LEXIS 18661, at *9 (9th Cir. Sept. 7, 2011) (Bea, J., concurring).

98. *Id.*

99. *See Soriano v. Holder*, 569 F.3d 1162, 1163 (9th Cir. 2009) (denying an asylum claim based on membership in the PSG “government informants in the Philippines targeted by gangs”).

100. In *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000), the Ninth Circuit granted an asylum claim based on membership in a PSG of homosexuals with female sexual identities, “despite the fact that members of the proposed group: (1) could come from any origin or bloodline, and (2) did not necessarily share any beliefs or interests other than their sexual identity.” *Henriquez-Rivas*, 2011 U.S. App. LEXIS 18661, at *14.

101. *Henriquez-Rivas*, 2011 U.S. App. LEXIS 18661, at *14.

102. *Id.* at *15.

103. The same day that the BIA decided *Matter of S-E-G-*, it published a similar opinion that denied asylum to an applicant who applied as a member of two PSGs: “persons resistant to gang membership” and “young persons who are perceived to be affiliated with gangs.” *See Matter of E-A-G-*, 24 I.&N. Dec. 591, 591 (BIA 2008).

104. *Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984).

A. ASYLUM DETERMINATIONS ARE BASED ON THE FACTUAL RECORD OF EACH INDIVIDUAL CASE

Asylum cases must be decided on the facts and evidence set forth in the record of each individual case. One of the most important Supreme Court asylum cases, *INS v. Elias-Zacarias*, instructs courts to consider each case by the “reasonable, substantial, and probative evidence *on the record*.”¹⁰⁵ In *Elias-Zacarias*, the Supreme Court denied asylum to a man who fled forced recruitment from a guerilla group in Guatemala because evidence in the record did not compel the conclusion that he was persecuted on account of his political opinion (the protected ground he asserted).¹⁰⁶ But the Supreme Court’s decision in *Elias-Zacarias* did not prevent other asylum applicants who fled guerrilla recruitment from proving that they were persecuted on account of their political opinions. In *Martinez-Buendia v. Holder*, the Eleventh Circuit explained:

Elias-Zacarias does not stand for the proposition that attempted recruitment by a guerrilla group *will never* constitute persecution on account of the asylum seeker’s political beliefs. Rather, *Elias-Zacarias* instructs courts to carefully consider *the factual record of each case* when determining whether the petitioner’s fear of future persecution due to his refusing recruitment attempts constitutes persecution on account of political beliefs.¹⁰⁷

The Eleventh Circuit granted asylum to Martinez-Buendia because “[u]nlike the record in *Elias-Zacarias*, the specific facts of this case make it clear that Martinez-Buendia politically opposed the FARC and that her political beliefs were the reason for her refusal to cooperate with the FARC.”¹⁰⁸ The court based its decision on a well-established principle in asylum law: that each applicant has a chance to prove eligibility for asylum based on the facts of her own case.

The Ninth Circuit hears more asylum appeals in any given year than does any other circuit, and it also has long-standing precedent that asylum cases must be decided on the individual facts and evidence in the record of any given case.¹⁰⁹ In 1969, the Ninth Circuit held in *Kovac v. INS* that the “petitioner was entitled to a determination based upon the probability of persecution of himself, not of others.”¹¹⁰ The BIA had denied asylum to Kovac because it assumed there was not a high probability of persecution in Kovac’s case, but the BIA had based this assumption on the record of another, similar case. The Ninth Circuit reversed the BIA’s decision, reasoning that every asylum applicant is

105. 502 U.S. 478, 481 (1992) (emphasis added) (quoting 8 U.S.C. § 1105a(a)(4) (2006)).

106. *Id.*

107. 616 F.3d 711, 716 (7th Cir. 2010) (emphasis added).

108. *Id.*

109. *Kovac v. INS*, 407 F.2d 102, 105 (9th Cir. 1969).

110. *Id.*

entitled to an individualized analysis based on her own record.¹¹¹ The Ninth Circuit recently reaffirmed this position in *Taslimi v. Holder* when it stated that each case “must” be decided on “its individual facts.”¹¹²

B. *MATTER OF S-E-G-* WAS DECIDED ON THE FACTS IN THE RECORD

Although *Elias-Zacarias* involved an applicant’s political opinion and *Kovac* involved the probability of persecution, the validity of an applicant’s PSG should also be based on the unique facts of the applicant’s case. In asylum cases, the stakes are high. Denial of an otherwise valid claim can result in death. The requirement that each case be decided on its own facts is indispensable if asylum claims are to be decided accurately. Every asylum applicant should be afforded a fair opportunity to prove her eligibility for asylum.

Matter of S-E-G- involved three siblings who fled El Salvador because they feared gang persecution after resisting recruitment efforts.¹¹³ MS-13 gang members tried to recruit the two brothers to join their gang and beat them when they refused.¹¹⁴ The gang members threatened to kill the brothers if they did not join the gang and threatened to rape or harm their sister.¹¹⁵ The siblings did not report these incidents to the police because they feared retaliation and believed the police could not help.¹¹⁶ After MS-13 members killed a young boy in their neighborhood for not joining the gang, the three siblings fled and came to the United States.¹¹⁷ They applied for asylum as members of two PSGs: “(1) Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral and religious opposition to the gang’s values and activities; and (2) family members of such Salvadoran youth.”¹¹⁸

An immigration judge found the siblings’ testimony credible, but denied them asylum.¹¹⁹ The BIA affirmed, holding that the siblings’ proposed PSGs lacked social visibility and particularity.¹²⁰ But the BIA’s holding in *Matter of S-E-G-* was based on the specific facts in the record of that case. The BIA held that the PSGs lacked social visibility because “[t]here [was] little in *the background evidence of record* to indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their

111. *Id.*

112. 590 F.3d 981, 987 (9th Cir. 2010).

113. 24 I.&N. Dec. 579, 581 (BIA 2008).

114. *Id.* at 580.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 581.

119. *Id.*

120. *Id.* at 585.

family members) would be ‘perceived as a group’ by society.”¹²¹ Similarly, the BIA held that “the purported social groups *in this case* lack particularity,” explaining that the PSGs’ defining “characteristics remain amorphous because people’s ideas of what those terms mean can vary.”¹²² Because the BIA adjudicated *Matter of S-E-G-* based on the record of that case, there is room for future asylum applicants to distinguish *Matter of S-E-G-* and build a record proving the social visibility and particularity of their asserted PSGs.

C. CIRCUIT COURT INTERPRETATIONS OF *MATTER OF S-E-G-* ARE OVERBROAD

Although the holding in *Matter of S-E-G-* was based on the facts and evidence in the record of that case, the Courts of Appeals often interpret *Matter of S-E-G-* too broadly, precluding all asylum applicants fleeing forced gang recruitment from asylum.¹²³ For example, in *Ramos-Lopez v. Holder*, the Ninth Circuit cited *Matter of S-E-G-* when it denied asylum to an applicant whose proposed social group was “young Honduran men who have been recruited by the MS-13 but who refuse to join.”¹²⁴ The Ninth Circuit claimed that “the BIA concluded [in *Matter of S-E-G-*] that *those who have resisted recruitment* are not in a substantially different situation from anyone who has crossed the gang.”¹²⁵ This statement exemplifies an interpretation of *Matter of S-E-G-* that is broad and incorrect. The BIA did not mention “those who have resisted recruitment” in *Matter of S-E-G-*.¹²⁶ The BIA first made reference to the record and then stated that “[t]he respondents are . . . not in a substantially different situation from anyone who has crossed the

121. *Id.* at 587 (emphasis added).

122. *Id.* at 585 (emphasis added) (internal quotation marks omitted).

123. *See, e.g.,* *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (denying an asylum claim based on political opinion, religion, and membership in the PSG “young women recruited by gang members who resist such recruitment”); *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1136 (6th Cir. 2010) (denying asylum for lack of nexus to the PSG “family members of youth who have been subjected to recruitment efforts by the gangs and who have rejected membership”); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 576 (8th Cir. 2009) (denying an asylum claim based on anti-gang political opinion); *Ramos-Lopez v. Holder*, 563 F.3d 855, 858 (9th Cir. 2009) (denying an asylum claim based on membership in the PSG “young Honduran men who have been recruited by MS-13 but who refuse to join”).

124. *Ramos-Lopez*, 563 F.3d at 858. *Ramos-Lopez* is discussed in this Note because it was the Ninth Circuit’s first published decision after its en banc decision in *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc), which granted *Chevron* deference to the BIA’s interpretation of an ambiguous statute—what crimes constitute an act of moral turpitude. In *Ramos-Lopez*, the court interpreted *Marmolejo-Campos* as binding the court to give *Chevron* deference to the BIA’s precedential decisions of which social groups qualify as cognizable PSGs. *Id.*; *see* *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009) (denying asylum to a Guatemalan who resisted gang recruitment because his argument was “indistinguishable from the argument made in *Ramos-Lopez*”).

125. *Ramos-Lopez*, 563 F.3d at 860 (emphasis added) (internal quotation marks omitted).

126. *See* 24 I.&N. Dec. at 581.

gang.”¹²⁷ Because the decision in *Matter of S-E-G-* was based on the facts in that case, the BIA did not impose a per se rule that every PSG defined in part by “resisting gang recruitment” is invalid.

Interpreting *Matter of S-E-G-* to preclude granting asylum to all applicants who have resisted forced gang recruitment is incorrect and goes against the well-established principle that every asylum case be decided on its own facts. Even if the Ninth Circuit in *Ramos-Lopez* and other circuit courts in analogous cases¹²⁸ make overbroad statements that seemingly indicate a categorical rule, the holdings in such cases are still based on their particular facts and do not categorically foreclose future cases. For example, the Ninth Circuit held in *Ramos-Lopez* that “[t]here [was] no evidence in the record that young men who have been recruited by the MS-13 in Honduras are generally visible to society.”¹²⁹ Similarly, the court found “no evidence” to establish sufficient particularity.¹³⁰ Because *Ramos-Lopez* was decided on the evidence and facts in the record, there is no binding precedent foreclosing a grant of asylum to all applicants who resisted forced gang recruitment.¹³¹

Every asylum applicant has a chance to prove her eligibility for asylum. After *Matter of S-E-G-*, asylum applicants who resisted gang recruitment fight an uphill battle, especially in proving social visibility and particularity. But every asylum applicant has the opportunity to describe the individual facts and circumstances in her case. These cases are not foreclosed until the courts adjudicate them on their individual merits.

IV. A DEPARTMENT OF HOMELAND SECURITY BRIEF REVEALS STRATEGIES FOR ESTABLISHING SOCIAL VISIBILITY AND PARTICULARITY

Even though *Matter of S-E-G-* does not foreclose the possibility of future asylum applicants articulating a PSG that is socially visible and particular, distinguishing *Matter of S-E-G-* and succeeding on the facts of

127. *Id.* (emphasis added).

128. *See, e.g., Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010); *Bonilla-Morales*, 607 F.3d at 1136.

129. *Ramos-Lopez*, 563 F.3d at 862 (emphasis added).

130. *Id.*

131. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (“There is obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication.”); *Mendez-Barrera*, 602 F.3d at 26 (“This argument fails because substantial evidence supports the BIA’s determination that the putative social group was not legally cognizable.”); *Bonilla-Morales*, 607 F.3d at 1138 (“Substantial evidence therefore supports the conclusion that Bonilla-Morales has not carried her burden to show that she is eligible for asylum based on a well-founded fear of future persecution.”); *Kaczmarczyk v. INS*, 933 F.2d 588, 595, (7th Cir. 1991) (“The petitioners are therefore right to demand that the BIA engage in a careful, individualized review of the evidence presented in their applications and hearings.”); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1488 n.11 (11th Cir. 1985) (“Decisions regarding parole, asylum, and withholding of deportation must be made only after considering the particular circumstances of each individual’s case.”).

one's individual case will prove difficult. Courts' inconsistent application of the social visibility and particularity requirements demonstrate that "instead of clarifying the 'particular social group' analysis, identification of these two factors has only compounded the confusion."¹³² Here, instead of applying the BIA's unworkable definitions of social visibility and particularity, litigants can attempt to utilize the Department of Homeland Security's ("DHS") interpretation of the new requirements.

The DHS represents the federal government against asylum applicants in removal (deportation) proceedings, so its interpretation of social visibility and particularity should be persuasive.¹³³ In 2009, the DHS filed a supplemental brief in *Matter of L-R-*, where it provided a template for a Mexican woman and victim of domestic violence to articulate a PSG with social visibility and particularity.¹³⁴ The brief sets forth a framework for a domestic violence case, but the arguments and reasoning are illuminating for all PSG cases, including those of individuals who resisted a gang's recruitment efforts. Although the brief's interpretation of social visibility and particularity is not binding on immigration judges or the BIA, it should be persuasive because the arguments come directly from an immigrant's adversary in asylum hearings.¹³⁵

A. SOCIAL VISIBILITY

The DHS brief suggested that Ms. L-R- establish "social visibility" by presenting evidence to reflect a "*societal view* . . . that the status of a woman in a domestic relationship places women into a *segment of society* that will not be accorded protection from harm inflicted by a domestic partner."¹³⁶ This interpretation of social visibility diverges from the BIA's definition—the "extent to which members of society perceive those with the characteristic in question as members of a social group"¹³⁷—and helps to clarify the analysis by giving a tangible idea of the "societal view" of members of the PSG. The DHS's interpretation of social visibility requires evidence that the government does not provide protection to the applicant's PSG.

Ms. L-R- succeeded in establishing the social visibility of her PSG by testifying that the police refused to help her and by submitting country-conditions evidence that cultural norms in Mexico condone

132. *Henriquez-Rivas v. Holder*, No. 09-71571, 2011 U.S. App. LEXIS 18661, at *5.

133. Asylum officers also work for the U.S. Citizens and Immigration Services, which is part of the Department of Homeland Security. See *Asylum Officer Position Summary*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov> (last visited May 1, 2012).

134. See DHS Supplemental Brief, *supra* note 4, at 7–21.

135. Ctr. for Gender & Refugee Studies, *Matter of L.R., What the DHS Brief and IJ Decision in L.R. Mean for Domestic Violence Asylum Claims and Gender-Based Claims More Broadly*, U. CAL. HASTINGS C.L., <http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php> (last visited May 1, 2012).

136. DHS Supplemental Brief, *supra* note 4, at 18 (emphasis added).

137. *In re C-A-*, 23 I.&N. Dec. 951, 960 (BIA 2006).

domestic abuse.¹³⁸ Likewise, certain individuals in El Salvador should be able to prove they fit within a segment of society that is not accorded protection from gang violence. Country-conditions evidence can demonstrate that groups more vulnerable to gangs' forced recruitment tactics comprise PSGs that are not provided protection from gangs' forceful recruitment tactics.

1. Gang-Controlled Neighborhoods

Individuals from gang-controlled communities receive considerably less protection from gangs' forceful recruitment tactics than average members of Salvadoran society. The police do not patrol many of the gang-controlled communities, rendering youth from these neighborhoods more susceptible to repeated harm and recruitment efforts.¹³⁹ In some neighborhoods, the police must even ask for permission to enter.¹⁴⁰ After *Mano Dura* laws came into effect, gang members have become indistinguishable from non-gang members.¹⁴¹ Police in El Salvador are often criticized for imputing gang membership to innocent youth and incarcerating young men for looking like or associating with a gang member.¹⁴² A Harvard report on gangs in El Salvador reports that young men from gang-controlled neighborhoods "face intimidation, threats, and physical harm from the gang recruiting them, while their residence in a certain neighborhood signals gang affiliation to outsiders and leaves them vulnerable to police violence and to violence from other gangs."¹⁴³ The report demonstrates that there is a societal view that this segment of society receives considerably less protection from gangs and fits the DHS's interpretation of social visibility.

2. Prisons and Detention Centers

Statutory bars prohibit granting asylum to persons who have committed serious crimes,¹⁴⁴ but many young men in El Salvador are arrested arbitrarily. One non-gang member reported being placed into custody every time the police saw him, at least ten or eleven times.¹⁴⁵ Another non-gang member reported that the police arrested him various times, imprisoning him without any proof that he committed a crime.¹⁴⁶

138. Brief of Respondents-Appellants, Matter of L-R-.

139. Fogelbach, *supra* note 1, at 429.

140. Interview with Edgardo Alberto Amaya Cobar, *supra* note 11.

141. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 27 (quoting B.F., staff member at a youth center).

142. *Id.* at 84-95.

143. *Id.* at 77 (emphasis added) (quoting Interview with Jose Miguel Cruz, Dir. of the Instituto Universitario de Opinión Pública (Univ. Inst. for Pub. Op. Research), San Salvador (Mar. 31 2006)).

144. 8 U.S.C. § 1158 (2010).

145. INT'L HUMAN RIGHTS CLINIC, *supra* note 7, at 89.

146. *Id.*

Although such individuals are usually released or acquitted for lack of evidence,¹⁴⁷ “pre-trial detention centers are often in worse conditions than the prisons.”¹⁴⁸ While awaiting trial, these individuals face extreme risk of forced recruitment by gang members, without any protection from the police.

Prisoners and individuals temporarily detained before trial could establish social visibility by showing they are not accorded adequate protection from a gang’s forceful recruitment tactics. Anti-gang legislation made prisons overcrowded and difficult to control.¹⁴⁹ Many prisoners had no choice but to join a gang: Former gang members report having joined in prison in exchange for protection from other prisoners.¹⁵⁰ These prisoners compose a segment of society that is not accorded police protection from gang violence. Pursuant to the DHS brief’s definition of social visibility, prisoners should be able to assert a PSG that is socially visible.

3. *At-Risk Youth*

There is also a societal view that at-risk youth are not accorded protection from gang violence. This can be seen in the various laws and initiatives that address the problem of youth joining gangs.¹⁵¹ Opposing political parties have also proposed amendments to the penal code that would make the use of minors an aggravating circumstance of a crime, or would make recruitment of children into criminal organizations punishable by ten to fifteen years in prison.¹⁵² These measures prove that society views at-risk children as a segment of society not accorded adequate protection from gangs.

Although these measures are a step in the right direction, at-risk youth will remain vulnerable to gang recruitment until the initiatives are meaningfully applied. The current administration has implemented programs to help vulnerable youth, but at least one government director implementing the programs believes they will suffer from inadequate funding.¹⁵³ Children are likely to remain a segment of society that is not accorded police protection from gang violence. PSGs comprising at-risk youth should fall squarely within the DHS’s definition of social visibility.

147. *Id.* at 49; *see supra* note 37.

148. *See* Fogelbach, *supra* note 1, at 430.

149. Interview with Edgardo Alberto Amaya Cobar, *supra* note 11.

150. Fogelbach, *supra* note 1, at 430 (citing U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, ISSUE PAPER: YOUTH GANG ORGANIZATIONS IN HONDURAS 4 (2006)).

151. Interview with Mario Francisco Mena Mendez, *supra* note 11; *see supra* notes 31–43, 63–64 and accompanying text.

152. *See* Fogelbach, *supra* note 1, at 430. *See generally* Código Penal art. 30 (El Sal.).

153. Interview with Mario Francisco Mena Mendez, *supra* note 11.

B. PARTICULARITY

The prevailing definition of particularity requires the defining characteristics of a PSG to enable an adjudicator to determine who falls within the ambit of the PSG and who does not.¹⁵⁴ In *Matter of S-E-G-*, the BIA stated that the “key question is whether the proposed description is sufficiently ‘particular,’ or is ‘too amorphous . . . to create a benchmark for determining group membership.’”¹⁵⁵ The BIA offered little guidance or coherent application in *Matter of S-E-G-* beyond stating that the proposed PSGs failed the particularity requirement because “people’s ideas of what those terms mean can vary.”¹⁵⁶

Similar to its interpretation of social visibility, the DHS brief offers an interpretation of particularity that is easier to apply when PSG members come from seemingly dispersed segments of society. The DHS noted two characteristics of Ms. L-R-’s social group—Mexican women in domestic relationships who are unable to leave¹⁵⁷—that might be considered “too amorphous,” but maintained that a fact finder could still “determine with clarity whether an applicant is or is not a member of the group.”¹⁵⁸ First, the DHS stated that the term “domestic relationship” may raise concerns, but suggested that an adjudicator look to a definition of a “domestic relationship” in U.S. immigration law to see if an applicant satisfies that definition.¹⁵⁹ Second, the DHS stated that although a “victim’s inability to leave” may seem amorphous, whether the applicant fits into the PSG can be determined on a “case-by-case, fact-specific” basis.¹⁶⁰ The DHS essentially condoned an interpretation of particularity that, when the terms of the PSG fail to convey a concrete benchmark, encourages judges to determine whether the applicant fits into the PSG in each individual case.

Individuals from gang-controlled neighborhoods might be able to articulate a PSG with terms that make the PSG sufficiently particular. Mounting evidence shows which neighborhoods in El Salvador are controlled by gangs. Research compiled by the Comisión Salvadoreña Antidrogas—the Salvadoran Antidrug Commission—provides information on gang controlled neighborhoods by municipality.¹⁶¹ For example, in the Aguilares municipality in San Salvador, the 18th Street

154. *Matter of S-E-G-*, 24 I.&N. Dec. 579, 584 (BIA 2008).

155. *Id.* (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

156. *Id.* (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008)).

157. DHS Supplemental Brief, *supra* note 4, at 4–6.

158. *Id.* at 19.

159. *Id.*

160. *Id.* at 20. The DHS specifically compared the “particularity” assessment to the adjudicator’s “case-by-case, fact-specific examinations of whether it would be reasonable to expect the victim to [relocate within her country] under all circumstances.” *Id.*

161. See Fogelbach *supra* note 1, at 430.

gang wields substantial control in the neighborhoods San José, Las Pampas, Las Tres Campanas, and Los Palacios;¹⁶² MS-13 is present in the neighborhoods Las Pampitas, Mangos, Santa Eugenia, Girón, Barrio El Calvario, Cantón El Piñalito, and Caserío El Chorizo.¹⁶³ An asylum applicant could present proof of residence and other documentation that they are from an area controlled by gangs and articulate a PSG comprising members from that neighborhood.

Similarly, individuals who confront forced recruitment in prisons might be able to prove that they fit within a PSG which is sufficiently particular. The applicant could include evidence of his incarceration and evidence regarding the jail to establish particularity. Newspaper articles documenting prison riots could also help prove that this individual was in a prison where virtually no one was protected from the gangs.

Of the segments of society most vulnerable to forced gang recruitment, at-risk youth might have the most difficulty establishing PSGs which are sufficiently particular. “Youth” is an amorphous term by its nature, but articulating a discrete age group might yield more success. Moreover, at-risk youth who have fled forced gang recruitment could show evidence that they go to a school or live on a street especially dominated by gangs. Current programs seeking to help youth could provide documentation on areas and groups of children most vulnerable to gang recruitment.¹⁶⁴

A PSG such as “fourteen-year-old children unable to escape gang recruitment” is no more amorphous than “women who are unable to leave an abusive domestic relationship.” The DHS brief proposed that whether a woman was unable to leave could be assessed on a “case-by-case, fact-specific examination[.]”¹⁶⁵ Using this same reasoning, whether a child is unable to escape a gang’s forceful recruitment tactics should be assessed on the individual facts of each case.

The DHS brief’s liberal definitions of social visibility and particularity are difficult to deny because they come from an asylum seeker’s adversary. “Social visibility” does not require a group to be literally visible to the naked eye; it can be satisfied with a societal view of a segment of society that is not accorded protection from harm. Likewise, when a term in a proposed PSG’s definition fails to convey a benchmark for group membership adequate to establish “particularity,” an adjudicator can apply the term to the facts of each individual case to see whether the applicant fits within the PSG.¹⁶⁶ These definitions benefit individuals from the segments of society most vulnerable to gang

162. *Id.* at 429–30.

163. *Id.* at 430.

164. Interview with Mario Francisco Mena Mendez, *supra* note 11.

165. DHS Supplemental Brief, *supra* note 4, at 20.

166. Interview with Mario Francisco Mena Mendez, *supra* note 11.

recruitment, and will help them establish cognizable PSGs and eligibility for asylum.

CONCLUSION

Until recently, the BIA defined a particular social group as a group whose members share a “common, immutable characteristic” that “members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹⁶⁷ Individuals fleeing forced gang recruitment fit within the scope of this definition. The PSG in *Matter of S-E-G-* either described characteristics the siblings could not change (“Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang”), or characteristics they should not have to change because the characteristics are fundamental to their individual identities or consciences (refusal to join was “based on their own personal, moral, and religious opposition to the gang’s values and activities”).¹⁶⁸ If the *Acosta* standard were still the relevant threshold, the siblings in *Matter of S-E-G-* likely would have been granted asylum.

A return to the *Acosta* standard is unlikely, and the new social visibility and particularity requirements are the true hurdles for asylum seekers fleeing forced gang recruitment. Yet when applying the DHS’s interpretation of these two terms, segments of society most vulnerable to forced recruitment—including those from gang-controlled neighborhoods, former prisoners, and at-risk youth—might be able to prove that their PSG is socially visible and sufficiently particular.

Individuals fleeing forced gang recruitment are deserving of asylum. *Matter of S-E-G-* is a difficult hurdle to their eligibility, but advocates and judges can apply *Matter of S-E-G-* and the cases interpreting it and conclude that well-documented cases qualify for asylum under a PSG that includes those subject to forced gang recruitment. Future applicants should seek out skilled experts who can individually assess the risks of each applicant based on factors including age, neighborhood, school, socioeconomic status, laws passed to protect the group and the success of those laws, and the individual’s past experiences with gang members. The DHS supplemental brief from the *Matter of L-R-* provides important guidance on how attorneys can prove that their clients fit into a cognizable PSG that is both socially visible and particular. Immigration judges, the BIA, and the Courts of Appeals should not feel constrained by precedent. They should interpret the narrow holding in *Matter of S-E-G-* as limited to the facts in that case and grant asylum to future applicants who are eligible and deserving of protection.

167. *Matter of Acosta*, 19 I.&N. Dec. 211, 233–34 (BIA 1985).

168. 24 I.&N. Dec. 579, 584 (BIA 2008).
