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Linda K. Hill
Indiana University Robert H. McKinney School of Law

THE GANGS OF ASYLUM

Linda Kelly Hill[*]

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* M. Dale Palmer Professor of Law & Immigration Clinic Director, Indiana University Robert H. McKinney School of Law, Indianapolis.

I. INTRODUCTION

Consider this hypothetical: At twelve-years-old, Luis sees his sixteen-year-old brother killed by the Mara Salvatrucha 13 (MS-13) street gang. The blood from his brother's chest stains the dry dirt road outside Luis's family home for weeks. "Tú sigues"—"You're next," the passing MS-13 boys say to Luis, rubbing their boots in the red dirt and pointing at the twelve-year-old who silently plays on the front step as his grandmother peers through the window's metal bars.

Six months later, Marco, MS-13's local leader, hands Luis a locked, black backpack on his way home from school and tells him, "Keep it safe and you will be safe." Two days later, another MS-13 boy comes to Luis's home and demands the bag. Luis complies. Over the next year, Marco gives Luis many locked backpacks—some so heavy Luis has to drag them home, others so light Luis forgets he is wearing them as he runs toward home, kicking the soccer ball with his school friends. Each time, another boy picks up the bag several days later. Sometimes Luis recognizes these boys and the "13" tattoos on their chins and necks. One day, Marco gives Luis an unlocked backpack. A gun is inside. Luis is told the boy who comes for the bag must be killed in the street as an example. That night, Luis fills the backpack with food and water and leaves El Salvador, traveling north to the United States.

Should immigrants fleeing gang violence be entitled to refuge in the United States? Today, the response of most U.S. courts is "no." The principal means by which an individual fleeing his home country seeks safety in the United States is by qualifying for either asylum[1] or withholding of removal.[2] Notwithstanding some critical

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[1] *See* 8 U.S.C. § 1158(a)(1) (2006) (allowing "[a]ny alien who is physically present in the United States" to apply for asylum); *see also* § 1158(b)(1)(A) (authorizing the Secretary of Homeland Security to grant asylum to an alien who is determined to be a refugee).

[2] *See id.* § 1231(b)(3)(A) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

The third basis for claiming safety based upon one's fear of return can be made pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 9, 1975). CAT

distinctions between asylum and withholding of removal, each protection requires a claimant to demonstrate his fear of persecution is on account of "race, religion, nationality, *membership in a particular social group*, or political opinion."[3] Yet, rather than evaluating gang-based claims upon existing refugee standards, the courts are manipulating the refugee criterion of "membership in a particular social group" through heightened tests of "particularity," "social visibility," and administrative exclusion. In so doing, virtually all permutations of gang-based claims are being denied. Those refused protection include not only active gang members but also former gang members, perceived gang members, gang resisters, and the families of such groups.

Membership in a particular social group does not possess the almost intuitive definition like those enjoyed by race, religion, nationality, and political opinion. Yet each of the five factors is intended to be fairly and evenly treated. After reviewing the ill-conceived and ill-applied nature of the three developments within the definition of particular social group, this Essay argues for a return to consistency without the danger of a gang insurgency.

II. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

A. THE FUNDAMENTAL TEST

Although basic definitions of asylum and withholding of removal are grounded in international law, all aspects of both definitions—including the "membership in a particular social group" criterion—are controlled by U.S. authority.[4] The Board of Immigration

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was enacted into U.S. law on October 21, 1998, by way of the Foreign Affairs Reform and Restructuring Act of 1998 (FARR), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1988).

One of the key differences between claims for asylum or withholding of removal and a CAT claim is that CAT does not require the fear of harm be "on account of" any particular factor. For further illustration of this point, compare "asylum" and "withholding" definitions under sections 1158(b)(1)(A) and 1231(b)(3)(A), with CAT's definition (FARR § 2242(a)). Consequently, this Essay's criticism of "particular social group" criteria is limited to a discussion of the legal developments relating to asylum and withholding of removal.

[3] 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A) (emphasis added).

[4] United States refugee law is pursuant to the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). The law is a result of U.S. obligations recognized in acceding to the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T.

Appeals (BIA) is the federal office within the Department of Justice that first interprets asylum and withholding standards, leaving the federal circuits with the power to adopt, adapt, or refuse such standards within their jurisdictions.[5] Consequently, any analysis of a particular social group requires returning to the BIA's first particular social group discussion in *In re Acosta*.[6] Citing the principle of *ejusdem generis*, the BIA decision in *Acosta* affirms that the trait of membership in a particular social group is "of the same kind" as the remaining four bases for asylum.[7] Membership in a particular social group requires "a group of persons all of whom share a common, immutable characteristic."[8] The *Acosta* decision imagines this "shared characteristic" may be either "innate" or a "shared past experience."[9] Maintaining the analogy to race, religion, nationality, or political opinion, a particular social group's shared trait—whether internal or external—only becomes immutable if it is proven to be "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[10]

Borrowing a "fundamental" particular social group illustration, the Seventh Circuit acknowledges that both redheads and war

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6223, 606 U.N.T.S. 267 (entered into force with respect to the U.S. Nov. 1, 1968). By acceding to the Protocol, the United States accepted the Protocol's adoption of Articles 2–34 of the U.N. Convention Relating to the Status of Refugees, 19 U.S.T. 6223, July 28, 1951, 189 U.N.T.S. 150, 152 (1951).

For further discussion of U.S. refugee law and its relation to international treaty obligations, see IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 459–62 (12th ed. 2010) (discussing the various domestic and international legal sources that affect refugees) and STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 870–84 (5th ed. 2009).

[5] *See* Gonzales v. Thomas, 547 U.S. 183, 185–87 (2006) (remanding a Ninth Circuit decision for its failure to allow the BIA to determine in the first instance if claimant's family constituted a particular social group within refugee law). Of course, any U.S. Supreme Court disagreement with the BIA becomes the law of the land. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 423–24 (1987) (drawing critical distinction between asylum and withholding of deportation standards).

[6] *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds*, *In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1989).

[7] *Id.* (internal quotation marks omitted).

[8] *Id.*

[9] *Id.*

[10] *Id.*

veterans have characteristics shared by others.[11] Unlike war veterans, however, red hair is not perceived as fundamental to identity, and consequently, while war veterans might qualify as a particular social group, redheads would not.[12]

"So far, so good; if the 'members' have no common characteristics they can't constitute a group, and if they can change those characteristics—that is, cease to belong to the group—without significant hardship, they should be required to do so . . . ."[13] Or so says the Seventh Circuit.

Even at this point, the particular social group test is being manipulated. Notwithstanding these relatively easy examples of redheads and war veterans, the question of whether an internal or external characteristic is so fundamental to identity that one *cannot* or *should not* be required to change requires "a difficult, fact-intensive determination" ripe for normative differences.[14]

In *Acosta*, the BIA easily rejected the petitioner's social group of taxi drivers in San Salvador who refused to participate in guerrilla-sponsored work stoppages.[15] The BIA directed the petitioner to change jobs or cooperate in the work stoppages to avoid future reprisal.[16] The "right to work in the job of [one's] choice" is simply not part of the "internationally accepted concept of a refugee."[17] Nevertheless, the *Acosta* decision does offer "former military leadership or land ownership" as examples.[18] Additionally, the BIA's later decision in *In re Fuentes*[19] confirms former police officers as a particular social group.[20]

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[11] *See* Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

[12] *See id.* (distinguishing what constitutes a particular social group under the statute).

[13] Gatimi v. Holder, 578 F.3d 611, 614 (7th Cir. 2009).

[14] Memorandum from Lynden D. Melmed, Chief Counsel, U.S. Citizenship and Immigration Servs., to Lori Scialabba, Assoc. Dir., Refugee, Asylum, & Int'l Operations (Jan. 12, 2007) (on file with the U.S. Dep't of Homeland Sec.), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Archive%201998-2008/2007/Jan%202007/c_a_guidance011207.pdf.

[15] *See Acosta*, 19 I. & N. at 234 (describing how taxi drivers do not meet required characteristics of a particular social group for determining who constitutes a refugee under the Act).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 233.

[19] *In re* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988).

[20] *Id.* at 662. The BIA in *Fuentes* nevertheless denies asylum upon finding that the respondent had failed to evidence that any feared "persecution" would be "on account of his

Internal traits are also subject to mixed evaluations. The BIA's *Acosta* decision uses "kinship ties" as a primary example.[21] In *In re H-*,[22] the BIA later endorses this characteristic on behalf of individuals of the Marehan subclan of Somalia due to the shared ties of kinship and linguistics.[23] Recent decisions are more equivocal. For example, in its recent reassessment of the *H-* opinion, the BIA declared that it "did not rule categorically that membership in any clan would suffice."[24]

What explains the confusion? Today, an immutable characteristic that "cannot" be changed does little to advance a social group claim. For example, past experiences are immutable, by definition, as they "cannot be undone. However, that does not mean that any past experience that may be shared by others suffices to define a particular social group for asylum purposes."[25] Instead, the BIA has twisted the original immutable characteristic test with three critical turns. First, the BIA has renewed its emphasis on the "particular" aspect of the particular social group through the new terminology of "particularity."[26] Second, the BIA now demands (albeit inconsistently) that particular social groups evince "social visibility."[27] Finally, the BIA has administratively extended the statutory bars to asylum and withholding of removal.[28] These three developments negatively impact all gang-based claims and may, at least in part, have been fashioned with a desire to do so. Altogether, the combined force of particularity,

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status as a former policeman." *Id.* (internal quotation marks omitted).

[21] *Acosta*, 19 I. & N. Dec. at 233.

[22] *In re* H-, 21 I. & N. Dec. 337 (B.I.A. 1996).

[23] *Id.* at 343.

[24] *In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1196–97 (11th Cir. 2006).

[25] *Id.* at 958.

[26] *See, e.g.*, *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007) (stating that a group must be "defined with [the] requisite particularity" to fall under the refugee definition and finding that "wealthy Guatemalans" as a group failed to meet this requirement), *aff'd sub nom.* Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

[27] *See, e.g.*, *id.* at 74–75 (stating that social visibility should be considered in determining whether social groups meet the particular social group definition and finding that "wealthy Guatemalans" fail this requirement).

[28] *See, e.g.*, *In re* E-A-G-, 24 I. & N. Dec. 591, 596 (B.I.A. 2008) (refusing to allow "affiliation with a criminal organization" to constitute a particular social group for asylum and withholding of removal purposes).

social visibility, and the per se administrative bar is a gang-proof refugee standard.

B. PARTICULARITY

While the refugee definitions of international and U.S. law have always explicitly required "membership in a *particular* social group,"[29] the term "particularity" is new—originating in a 2007 BIA decision that fails to find a particular social group for a couple fearing persecution on account of being "wealthy Guatemalans."[30] The court found wealth to be "too amorphous to provide an adequate benchmark for determining group membership."[31]

On the one hand, the new, clearly delineated emphasis on particularity is consistent with early case law, which regularly considered the amorphous quality of a proposed particular social group. Consequently, particularity potentially helps articulate a more uniform, objective standard. However, particularity is unevenly applied amongst different social groups. For gang-based claims, the intensified emphasis on this variable proves to be a critical challenge.[32]

Long before particularity, "young men" subject to forcible recruitment were denied particular social group recognition due to the passing nature of age and the consequent loss of the targeted characteristic. Age can, therefore, be readily understood as a temporary or nonfundamental characteristic. To the extent young men facing military recruitment are routinely denied, it arguably follows that young men facing gang recruitment should also be denied. However, in other contexts, age is a legitimate consideration. For example, age is a relevant characteristic for particular social groups of "young women" resisting female genital mutilation.[33]

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[29] *See supra* note 3.

[30] *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76.

[31] *Id.*

[32] *See, e.g., In re* S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (finding that youths who resisted gang recruitment failed to meet the particularity requirement needed to qualify as a particular social group).

[33] *See In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (holding that "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation] . . . and who oppose the practice" qualified for particular social group status); *cf.* Sanchez-Trujillo v. INS,

Gang-based asylum seekers cannot define their social groups tightly enough to satisfy the particularity test of the BIA. Despite their multi-layering efforts, gang resisters are deemed too amorphous. The BIA finds no particularity in a proposed particular social group 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."[34]

"Family members" of gang resisters who become retaliatory targets are similarly denied.[35] Their group, "which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is also too amorphous a category."[36] Again, in other contexts, family-based claims are recognized without any particularity misgivings. After the BIA's acknowledgment in *Acosta* of "kinship ties" as a plausible shared characteristic for a particular social group, the BIA repeatedly recognizes clans[37] and the circuit courts commonly accept family as a particular social group.[38]

Summarizing the inability of gang resisters and their family members to demonstrate particularity, the *In re S-E-G-* court

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801 F.2d 1571, 1576–77 (9th Cir. 1986) (denying particular social group claim of "young, working class, urban males of military age").

[34] *S-E-G-*, 24 I. & N. Dec. at 585.

[35] *Id.* (quotation marks omitted).

[36] *Id.*

[37] *See, e.g.*, *Kasinga*, 21 I. & N. Dec. at 365–66 (holding that young women of a particular African tribe subject to, but opposed to, female genital mutilation constituted a particular social group); *In re* H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996) (holding that a Somali clan identifiable by its lingual characteristics constituted a particular social group).

[38] *See, e.g.*, Konan v. Att'y Gen. of the U.S., 432 F.3d 497, 502 (3d Cir. 2005) (remanding to the BIA to consider the plaintiff's claim of persecution based on his status as an immediate family member and noting the possibility that immediate family members could constitute a particular social group); Bhasin v. Gonzales, 423 F.3d 977, 983–85 (9th Cir. 2005) (holding that an Indian mother was part of a family, which potentially constituted a social group); Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993) (finding nuclear family to be "no plainer example of a social group"); *Sanchez-Trujillo*, 801 F.2d at 1576 ("[A] prototypical example of a 'particular social group' would consist of the immediate members of a certain family . . . .").

Family can constitute a social group even without recognition of the underlying group. *See, e.g.*, Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (recognizing particular social group status for family members of individuals who serve as prosecutorial witnesses against gang members but not for prosecutorial witnesses themselves).

remarked: "They make up a potentially large and diffuse segment of society, and the motivation of gang members in recruiting and targeting young males could arise from motivations quite apart from any perception that the males in question were members of a class."[39] This finding succinctly reveals the misapplication and over extension of the "particularity" requirement in gang-based cases. A particular social group can be "potentially large" while maintaining a "sufficiently distinct" characteristic. Directing the BIA to consider whether "women in Guatemala" might qualify as a particular social group, the Ninth Circuit reminded the BIA that "the size and breadth of a group alone does not preclude a group from qualifying."[40]

The Ninth Circuit's comment also reveals that the BIA is improperly folding the "on account of" element into the social group definition for gang-based claims. What motivates a potential persecutor to target an individual is a relevant consideration. However, it is relevant to demonstrating the nexus between the feared persecution and the particular social group, not to determining the "unifying relationship or characteristic" of a particular social group. Conflating these concepts risks putting the particular social group standard into a pattern of circular reasoning. Circular reasoning assures confusion and negative outcomes. As such, precautions against circularity are otherwise taken by the BIA. For example, a particular social group cannot be defined by the act of being persecuted.[41] Nevertheless, for gang-based claims, circular reasoning is condoned.

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[39] *S-E-G-*, 24 I. & N. Dec. at 585.

[40] Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010). The Ninth Circuit also noted:

> [N]either the drafting language of the 1951 Convention relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150, nor the United Nations High Commissioner for Refugees' ("UNHCR") *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992) requires that a particular social group be narrowly defined.

Id. at 668 n.7. Again, in other contexts, age and family relations are accepted terms in defining particular social groups, notwithstanding the potentially large effects.

[41] *See, e.g.*, *S-E-G-*, 24 I. & N. Dec. at 584 ("[A] social group may not be circularly defined by the fact that it suffers persecution." (quoting Rreshpja v. Gonzales, 420 F.3d 551, 556 (6th Cir. 2005)) (internal quotation marks omitted)).

C. SOCIAL VISIBILITY

Concededly, recognition of the "difficult, fact-intensive determination[s]"[42] associated with particular social group determinations justifies redoubling the emphasis on particularity. Alone, particularity could be viewed as a legitimate effort to achieve more consistent, objective determinations despite its current inconsistent application. However, the misuse of particularity combined with the BIA's elaboration of social visibility and an administrative bar prevent such optimism, especially when it comes to the fair evaluation of gang-based claims.

In re C-A- involved the refugee claims of a Colombian baker and his family.[43] In his home country, the respondent became privy to information concerning the Cali cartel's activities due to regular conversations with a chatty cartel member who patronized his Cali bakery.[44] Respondent voluntarily became an informant to the city's General Counsel and, predictably, a cartel target.[45] The BIA and Eleventh Circuit agreed that the respondent and his family were attacked and threatened on account of respondent's service as an informant.[46] The administrative court, however, was unclear as to whether such harms are simply acts of revenge or could be linked to a legally recognizable social group.[47] The Eleventh Circuit's request for clarification produced the social visibility test.[48]

On remand from the Eleventh Circuit, the BIA rejected respondent's identified social group—"noncriminal drug informants working against the Cali cartel"—for its lack of social visibility.[49] Despite the noncriminal and civic-minded nature of respondent's service, the typically secretive quality of informant work did not give the respondent the social visibility the BIA

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[42] Melmed, *supra* note 14.

[43] 23 I. & N. Dec. 951, 951–52 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1196–97 (11th Cir. 2006).

[44] *Id.* at 952.

[45] *Id.*

[46] *Id.* at 953–54.

[47] *See, e.g., id.* (noting that revenge and membership in a group of noncriminal informants constituted two possible bases for persecution of the respondent).

[48] *Id.* at 954, 959–61.

[49] *Id.* at 961.

decided is now necessary for a particular social group.[50] The Cali and other drug cartels' willingness to direct violence against "anyone and everyone" seen to be a threat further weakened any argument that noncriminal informants could be perceived as a group by the cartel.[51]

Like the BIA's use of particularity in *S-E-G-*,[52] the application of social visibility in *C-A-* allows the BIA to summarily reject an entire group simply upon the assertion that their alleged persecutors are also targeting others. Such sweeping decisions improperly conflate motive and particular social group.[53] Social visibility also adds a troubling new dimension to defining what constitutes a particular social group.

The BIA argues that particular social group claims involving either innate characteristics or past experiences are routinely based on traits that are "highly visible and recognizable by others in the country in question."[54] Such argument is made notwithstanding the previous nonexistence of social visibility. The claim becomes more suspect upon review of critical particular social group cases, including those cited in *C-A-*. The BIA decision in *C-A-* relies on *Kasinga*[55]—despite the intimate nature of female genital mutilation making the social visibility of women fearing such practice

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[50] *Id.* at 960. While the noncriminal aspect of C-A-'s identified particular social group may not have furthered his claim, it also prevented the rejection of his claimed group due to criminal affiliation. For further discussion of the per se bar against particular social groups linked with criminal activity, see *infra* Part II.D.

[51] *C-A-*, 23 I. & N. Dec. at 960–61.

[52] 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (noting that respondents failed to limit their proposed social group to male children who resisted gang recruitment because no evidence showed that gangs limited recruitment to this particular social group of young males).

[53] For a discussion of the conflation of motivation and particular social group in the particularity context, see *supra* Part II.B.

[54] *C-A-*, 23 I. & N. Dec. at 960; *see also In re* V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (recognizing Filipinos of mixed Filipino-Chinese ancestry as a particular social group); *In re* Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996) (recognizing young women of a particular tribe who were opposed to female genital mutilation as a particular social group); *In re* H-, 21 I. & N. Dec. 337, 342–43 (B.I.A. 1996) (finding a particular social group where there was evidence of "the presence of distinct and recognizable clans and subclans in Somalia" based on linguistic commonalities); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (recognizing persons listed by the government as having the status of homosexuals as a particular social group); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (recognizing former members of the national police as a particular social group).

[55] *C-A-*, 23 I. & N. Dec. at 960.

impossible.[56] In *C-A-* the BIA also finds that social groups based on homosexuality readily meet the new social visibility demand.[57] However, the circuit courts soundly and harshly reverse immigration judges who deny asylum claims that are based on homosexuality when respondents are deemed not "overtly gay" or not "effeminate" enough to meet these "impermissible stereotypes."[58]

In the gang-based asylum context, gang resisters and families of gang members are hit hard by the social visibility requirement. For instance, despite recognizing that the MS-13 retaliates against Salvadoran youth who refuse to join their gang, the BIA held that these resisters and their families could not meet the social visibility component.[59] The BIA reached this result due to the perceived inability of such individuals to demonstrate that they were " 'perceived as a group' by society, or that [they] suffer[ed] from a higher incidence of crime than the rest of the population."[60]

As Judge Posner critically observed in the Seventh Circuit, social visibility requires that "you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait,

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[56] The BIA defined Kasinga's social group as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Kasinga*, 21 I. & N. Dec. at 365. The Seventh Circuit criticizes the BIA's inconsistent standards for social visibility, noting that Kasinga's social group was found "without reference to social visibility." For further criticism of the convoluted nature of Kasinga's social group, see Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 587–92 (2000).

[57] *C-A-*, 23 I. & N. Dec. at 960 (relying on *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23).

[58] Todorovic v. U.S. Att'y Gen., 621 F.3d 1318, 1326 (11th Cir. 2010); *see also* Razkane v. Holder, 562 F.3d 1283, 1286, 1288–89 (10th Cir. 2009) (remanding BIA decision denying a Morocco citizen's request for restriction on removal because the court found the decision was based on inappropriate stereotypes of homosexuals). For other examples of immigration agency decisions remanded for their reliance on homosexual prejudices, see *Ali v. Mukasey*, 529 F.3d 478, 491–93 (2d Cir. 2008) (noting that the immigration judge stated "no one would perceive [the applicant] as a homosexual unless he had a 'partner or cooperating person' "), and *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (remanding because immigration judge stated that the applicant "did not dress or speak like or exhibit the mannerisms of a homosexual").

[59] *In re* S-E-G-, 24 I. & N. Dec. 579, 587–88 (B.I.A. 2008).

[60] *Id.* at 587; *see also In re* E-A-G-, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (discussing the failure of a boy resisting a Honduran gang to "allege that he possesse[d] any characteristics that would cause others in Honduran society to recognize him as one who ha[d] refused gang recruitment").

speech pattern, behavior or other discernible characteristic."[61] Yet the ability of a particular social group trait to be experiential or external does not necessitate that the trait also be literally visible. The BIA does not seem to know the difference between externally and literally visible.[62] The difference also seems lost in the many circuits that accept the social visibility test.[63]

D. PER SE ADMINISTRATIVE BAR

While particularity and social visibility prevent recognition of gang resisters and their families as particular social groups, the criteria do not eliminate individuals with actual, perceived, or former gang membership. The BIA concedes that gang membership entails social visibility: "Gang affiliation or membership is a recognized evil . . . and members of gangs are

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[61] Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

[62] As Judge Posner noted, "[o]ften it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even—[sic]whether it understands the difference." *Id.*

[63] Currently, the Seventh Circuit is the only circuit to openly reject the social visibility test. *See, e.g.*, Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) (acknowledging the Seventh Circuit's split with its sister circuits in rejecting the social visibility criterion).

The First, Second, Sixth, Eighth, Ninth, and Eleventh Circuits have, at minimum, recognized the legitimacy of the social visibility requirement. *See, e.g.*, Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010) (denying claim of youth who resisted gang recruitment due to a lack of social visibility and particularity); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007) (applying the social visibility test to deny particular social group recognition to "affluent Guatemalans"), *aff'g*, *In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007); Bonilla-Morales v. Holder, 607 F.3d 1132, 1137 (6th Cir. 2010) (recognizing the social visibility requirement but denying the claim that family members of youth resisting gang recruitment constitute a particular social group because the family members failed to demonstrate that the harm was "on account of" membership in the proposed social group); Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008) (denying " 'competing family business owners' " as a particular social group for a lack of social visibility); Ramos-Lopez v. Holder, 563 F.3d 855, 858–59 (9th Cir. 2009) (recognizing particular social group as an "amorphous" term and deferring to the BIA's use of social visibility and particularity to deny the claim of a Honduran gang resister); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1197–98 (11th Cir. 2006) (affirming the BIA's use of the social visibility test), *cert. denied sub nom.* Castillo-Arias v. Gonzales, 549 U.S. 1115 (2007).

To date, the Fourth Circuit has specifically declined to evaluate social visibility. *See, e.g.*, Lizama v. Holder, 629 F.3d 440, 446–48 (4th Cir. 2011) (denying particular social group status to "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs" for lack of an immutable characteristic (quotation marks omitted)).

Finally, the Third, Fifth, and Tenth Circuits have yet to publish opinions discussing the social visibility criterion. No immigration courts are within the D.C. Circuit.

viewed with hostility by society at large."[64] Yet, while conceding that past, present, or perceived gang members can meet the particularity and social visibility components, courts are otherwise denying these particular social groups recognition. Moved by the spirit of refugee law, the BIA reasons that Congress's intent cannot be to protect "violent street gangs who assault people and who traffic in drugs and commit theft" through the particular social group designation.[65] By extension, the BIA reasons, if an actual gang member cannot be recognized, neither can former or perceived gang members.[66] For perceived gang members and resisters, the BIA accepts that its denial creates "genuine human dilemmas."[67] Without legal protection at home or in the United States, a gang resister's "only hope of survival" is gang membership.[68] Nevertheless, the BIA stands firm: "Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances."[69]

The new administrative per se bar in particular social group claims could arguably be explained as a desire to maintain a defined scope for asylum and withholding of removal while ensuring criminals are denied these sacred forms of relief. Yet these basic and entirely legitimate interests have never been in jeopardy. Asylum and withholding of removal standards have always provided checks against undesirable individuals. As an initial matter, asylum is discretionary in nature.[70] Additionally, mandatory language in asylum and withholding statutes specifically bars those who commit "a serious nonpolitical crime."[71]

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[64] *E-A-G-*, 24 I. & N. Dec. at 595.

[65] *Id.* at 596 (citing Arteaga v. Mukasey, 511 F.3d 940, 945–46 (9th Cir. 2007)); *see also* Elien v. Ashcroft, 364 F.3d 392, 395–97 (1st Cir. 2004) ("[D]eported Haitian nationals with criminal records in the United States" are not recognized "as a 'social group' safeguarded by the asylum statute"); Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country . . . .").

[66] *E-A-G-*, 24 I. & N. Dec. at 596.

[67] *Id.*

[68] Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

[69] *E-A-G-*, 24 I. & N. Dec. at 598 (quoting Campos-Guardado v. INS, 809 F.2d 285, 290 (5th Cir. 1987)) (quotation marks omitted).

[70] *See* 8 U.S.C. § 1158(b)(1)(A) (2006) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum . . . ." (emphasis added)).

[71] *Id.* §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii).

These discretionary and mandatory aspects of our refugee law have always allowed the denial of gang-based claims upon a finding that an applicant engaged in individual wrongdoing.[72] The BIA also contends that its per se gang bar furthers such congressional principles. However, as Judge Richard Posner remarked regarding the BIA's per se bar: "That is not Congress's view."[73] Congress has no statutory bar against gang members, "perhaps because of ambiguity about what constitutes a 'gang'; or because of the variety of activities, not all criminal, that some 'gangs' engage in; or because of the different levels of participation, some innocuous, of members of some gangs."[74] Gang-based claims are to be reviewed individually. Due process, not guilt by association, is the law.

III. THE "WORK" BEING DONE: DUPLICATIVE OR DUPLICITOUS?

Viewed in totality, the response to particularity, social visibility, and the per se bar might simply be, "So what?" These new provisions are doing "no work"—they duplicate existing standards and are, at worst, redundant.[75] Duplication may produce judicial inefficiency, but that is not the problem. When the gang provisions come together, they not only operate to deny all gang-based asylum claims but also to deny the opportunity for fair adjudication.

At the outset, the skewed use of particularity excludes gang resisters and family-related gang claims—their proposed groups rejected as "potentially large"[76] or "amorphous."[77] Social visibility mars gang resisters and their families as well as perceived gang members through its expectation that a particular social group is

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[72] *See, e.g.*, *Ramos*, 589 F.3d at 429 (noting that the individual nature of these crimes prevents group protection).

[73] *Id.*

[74] *Id.* at 430.

[75] *See* Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) ("We just don't see what work 'social visibility' does; the candidate groups flunked the basic 'social group' test, quoted earlier, declared in cases like *Lwin*, *Kasinga*, and *Acosta* . . . .").

[76] Ramos-Lopez v. Holder, 563 F.3d 855, 861 (9th Cir. 2009) (quoting *In re* S-E-G-, 24 I. & N. Dec. 579, 585 (B.I.A. 2008)).

[77] *Ramos*, 589 F.3d at 431 (quoting Arteaga v. Mukasey, 511 F.3d 940, 946 (9th Cir. 2007)).

"highly visible and recognizable."[78] And for past, current, or perceived gang members, who potentially meet the particularity and social visibility criteria, the administrative extension of per se bars completes the lockdown.

In unfolding all the heightened criteria of a particular social group, the BIA "never give[s] a reasoned explanation."[79] It also never answers a basic question: What is a "gang?" The BIA simply refers to gangs as "criminal organization[s]."[80] It does not consider the nature of the particular gang in which the asylum applicant is affiliated or the applicant's individual activities. The BIA ignores the shared, immutable trait evaluation otherwise considered in cases of race, religion, nationality, and political opinion. It abandons the *Acosta* decision's aspiration of "*ejusdem generis*"[81] in favor of a "*sui generis*" aberration for particular social groups.

To paraphrase asylum standards, the BIA seems "unable or unwilling"[82] to make uniform law for gang-based claims. Yet, while the shift from *ejusdem generis* (of the same kind) to *sui generis* (of its own kind) is clear, the courts' motives are not. The shift is not directed solely at gang-based claims. All particular social groups with a criminal affiliation can now be barred per se.[83] To the extent "good victims" with no criminal activities are also being excluded, the new particular social group standard is not directed solely at an undesirable population, which may be perceived as unworthy of refugee recognition. Instead, the criteria's appeal may be their simplicity and ability to prevent a potentially large and amorphous group of individuals with various types of new and complicated claims from seeking protection.[84]

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[78] *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006).

[79] *Ramos*, 589 F.3d at 430.

[80] *In re* E-A-G-, 24 I. & N. Dec. 591, 596 (B.I.A. 2008).

[81] *See supra* notes 6–10 and accompanying text.

[82] 8 U.S.C. § 1101(42)(A) (2006).

[83] *See, e.g.*, *C-A-*, 23 I. & N. Dec. at 952 (finding that a noncriminal informant who reported criminal activity to the government did not belong to a "particular social group" within the meaning of the statute).

[84] The State Department considers criminal gangs to be a "transnational phenomenon" creating a "serious and pervasive socio-economic challenge" for the United States, Mexico, and Central America. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, ISSUE PAPER: YOUTH GANG ORGANIZATIONS IN EL SALVADOR (June 2007). In 2007, the State Department estimated the number of gang members throughout Central America

Despite a layering of new, outwardly objective standards, the particular social group definition seems no better at avoiding the subjective criticism of the *Acosta* decision. Yet, perhaps awareness of the bias—whether manifested objectively or subjectively—serves as a reminder. Asylum tests the well-founded fear of asylum applicants, not the fears of the courts.

IV. CONCLUSION

Gang-based cases can be individually adjudicated without the need for sweeping exclusions or fear. Consider again the hypothetical case of Luis.[85] Are there questions about his ability to meet the standards? Certainly. Why was his brother killed? What was in those bags? What would have happened if Luis had refused the gang's demands? Who knew what Luis was doing? Why could Luis not seek the protection of police or his family? Like all individuals seeking safety in the United States, Luis must answer questions. A lot of questions. Luis's claim may fail or succeed. But assuring fair adjudication of Luis's claim is what ensures the protection of refugee law.[86]

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to be between 100,000 and 200,000. *See id.*; *see also* Jeffrey D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 408 (2006) (recognizing the "floodgate" concern related to gang-based asylum claims).

[85] *See supra* Part I.

[86] *See* Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 335 (2001) (noting that safeguarded adjudication for asylum seekers is the "minimum foundation" for fairness).