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Sí, Tengo Miedo--Yes, I Am Afraid: How the Current Interpretation of Asylum Law is Contrary to Legislative Intent and What the Courts Should Do About It

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***SÍ, TENGO MIEDO*—YES, I AM AFRAID: HOW THE CURRENT INTERPRETATION OF ASYLUM LAW IS CONTRARY TO LEGISLATIVE INTENT AND WHAT THE COURTS SHOULD DO ABOUT IT**

CHELSEA MULLARKEY*

ABSTRACT

This Note examines the current interpretation of asylum law and its misapplication when it comes to Central American asylees. Migrants from Central America who are escaping gang violence have long been neglected and overlooked. Thousands of them make the long and arduous journey to the United States borders only to be deported back to the violence they have been trying to escape. This Note first examines the history of refugee law in the United States and the recent actions taken in an attempt to stem the flow of Central American migrants into this country. This Note then demonstrates that Central American asylum seekers qualify as refugees and should therefore be granted asylum. Finally, this Note examines the ways in which Salvadoran migrants are eligible for political asylum and the ways in which the interpretation of the particular social group element of asylum law should be amended to include Honduran and Guatemalan migrants. By implementing the changes suggested in this Note, courts will be able to render consistent decisions that are in line with legislative intent.

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INTRODUCTION

Since 2011, there has been a 600% increase in asylum claims made by people escaping gang violence in Central America.¹ The majority of these claims are denied and the applicants deported—not because the applicant's life is not in danger, or because the government does not believe their fear is real—but because gang violence is an issue too widespread to fall under the relief of asylum.² Although the United States implemented asylum laws with the goal of protecting vulnerable populations,³ the judicial system has interpreted those statutes in such a way that qualifying applicants must be members of small, distinct groups.⁴ Problems affecting large numbers of people, e.g., gang violence and extreme poverty due to social unrest, almost always disqualify an applicant from receiving the amnesty they seek.

Although it is necessary for the United States to limit the number of approved asylum cases each year, the methods of validating asylum applications are inconsistent and heavily related to the personal views of immigration judges.⁵ This Note's primary focus is to show that, regardless of the personal views of judges and precedent set by courts, minors fleeing gang violence in Honduras, Guatemala, and El Salvador qualify as refugees and should have their asylum applications approved upon arrival in the United States.

Part I of this Note begins by examining the history behind international refugee law and the congressional intent when the United States adopted those policies. This Part will also review the current amnesty options within the United States and the process of obtaining asylee status based off of the applicant's qualification as a refugee. Finally, this Part provides a brief explanation of the Obama

¹ This percentage is general and compiled from several sources. 2011 had 10,000 asylum claims and 2014 is estimated at 66,000. *See generally* Sara Campos & Joan Friedland, *Mexican and Central American Asylum and Credible Fear Claims: Background and Context*, 8 IMMIGR. POL'Y CTR. (2014), http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf.

² *See infra* notes 87-99 and accompanying text discussing the specificity of the particular social group category.

³ *See infra* notes 16-18 and accompanying text discussing congressional adoption of U.N. definitions of refugee.

⁴ *See infra* notes 87-99 and accompanying text discussing the specificity of the particular social group category.

⁵ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, JUDGE-BY-JUDGE ASYLUM DECISIONS IN IMMIGRATION COURTS FY 2009-2014 (2014), <http://trac.syr.edu/immigration/reports/361/include/denialrates.html> (for example, Judge Earle Wilson in Atlanta, Ga., denies 93.7% of all asylum claims. However, Judge Glen Bower of Chicago Ill., has a denial rate of only 17.1%).

Administration's recent actions regarding in-country asylum applications and why those measures will prove insufficient unless the courts address the issues discussed in Part II of this Note.

Part II argues that asylum applicants from Central America escaping gang violence qualify as refugees under one of the five enumerated grounds, and as a result should be granted asylum. This conclusion is achieved through a discussion of the inability of Central American countries to protect their citizens from crime and violence and by proving that that migrants from El Salvador, Honduras, and Guatemala have been persecuted either on account of a political opinion, or their membership in a particular social group. By implementing this Note's proposed understanding of the political status of gangs in El Salvador and its expanded interpretation of particular social group relating to applicants from Guatemala and Honduras, the courts will render decisions that are both more inclusive of those seeking amnesty and more in line with legislative intent.

I. ORIGINS OF REFUGEE LEGISLATION AND THE ROAD TO ACHIEVING ASYLUM IN THE UNITED STATES

A. The United Nations' First Steps—1951 Convention Relating to the Status of Refugees and the Subsequent 1967 Protocol Relating to Refugees

In the post-World War II era, assistance for victims of war became an increasingly pressing issue for the international community.⁶ On April 22, 1951, the United Nations adopted the 1951 Convention Relating to the Status of Refugees ("the Convention") in order to provide aid to those "fleeing events occurring before 1 January 1951 and within Europe."⁷ The Convention introduced several revolutionary concepts including non-discrimination in the application of the Convention and prevention of deportation of refugees to countries of origin.⁸ However, it remained limited; although the Convention adopted a broad definition of a "refugee" that was applicable to virtually all victims of World War II, it was relatively useless for new refugees escaping situations unrelated to World War II pre-1951.⁹ Rather than continuously drafting new resolutions for each displaced

⁶ By the end of World War II, there were approximately 40,475,050 displaced Europeans. Just over 33,000,000 were displaced internally and remained in their countries of origin. However, 7,414,650 were reported as being located outside of their country of origin or having fled German- and Soviet-controlled land. MALCOLM J. PROUDFOOT, EUROPEAN REFUGEES: A STUDY IN FORCED POPULATION MOVEMENT 34 (1956); see also U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 1 U.N. Doc. No. HCR/1P/4/ENG/REV. (1992), <http://www1.umn.edu/humanrts/instreet/refugeehandbook.pdf> [hereinafter UNHCR, *Handbook*].

⁷ U.N. High Comm'r for Refugees, *Introductory Note to Convention and Protocol Relating to the Status of Refugees* 2 (2010), <http://www.unhcr.org/3b66c2aa10.pdf> [hereinafter Protocol, *Introductory Note*].

⁸ *Id.* Prevention of deportation is referred to by the French term "*non-refoulement*."

⁹ UNHCR, *Handbook*, *supra* note 6, at ¶ 5. Although the number of displaced people at the end of World War II shone a spotlight on the need for formalized recognition of refugees, the refugee crisis clearly did not end with World War II. In fact, on June 20, 2014, the United Nations reported that the total number of forcibly displaced persons worldwide had reached 51.2 million—a record high. It became obvious to the heads of state at the time of the writing

population, the international community was looking for a broad classification system that could be applied to future crises as well.¹⁰

In order to remedy this, the United Nations drafted the only existing amendment to the Convention—the Protocol Relating to the Status of Refugees (“the Protocol”).¹¹ For the most part, the Protocol kept the elements of the Convention intact.¹² The key difference is that the Protocol removed the time and space limitations on the definition of refugee and, in doing so, made the definition applicable to anyone in crisis that meets its qualifications.¹³ This final definition of “refugee,” adopted by the United Nations and remaining in effect today, reads:

[A] refugee is someone who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.¹⁴

B. Congressional Adoption of United Nations Standards for Refugees

The classification of refugee used in legislation passed by Congress is in accordance with the definition used by the United Nations.¹⁵ “While the United States never signed the Convention, it acceded in November of 1969 to the United Nations Protocol [and] in doing so, the United States assumed obligations towards those qualifying as refugees under the Protocol’s definition.”¹⁶

Under the U.S. Constitution, ratified treaties, such as the Protocol, become “the supreme law of the land”¹⁷ and so the United Nations’ definition of refugee should have immediately become part of the domestic law in the United States. However, according to U.S. courts, the Protocol did not grant “direct rights” and as a result it

of the Protocol Relating to the Status of Refugees that a wider solution was necessary. *See* United Nations Protocol Relating to the Status of Refugees, art. 1, § 2, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol]; *see also War’s Human Cost: UNHCR Global Trends 2013*, U.N. HUM. RTS. COMM. 2 (June 20, 2014), <http://www.unhcr.org/5399a14f9.html>.

¹⁰ UNHCR, *Handbook*, *supra* note 6, at ¶ 5.

¹¹ Protocol, Introductory Note, *supra* note 7, at 2 (Although the United States is not a signatory to the original Convention Relating to the Status of Refugees, they are a party to the Protocol and as such have adopted the Convention).

¹² Protocol, *supra* note 9, art. 1., § 2.

¹³ *Id.*

¹⁴ *Refugees*, U.N. HUM. RTS. COMM., <http://www.unhcr.org/pages/49c3646c125.html> (last visited Mar. 13, 2016); *see also* Protocol, Introductory Note, *supra* note 7, at 3.

¹⁵ T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 924 (1992).

¹⁶ *Id.*

¹⁷ U.S. CONST. art. VI, cl. 2.

became necessary to codify the Protocol's definition of refugee in domestic law.¹⁸ The Refugee Act of 1980 ("1980 Act") was passed with the stated objectives: "[T]o provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."¹⁹ The 1980 Act used a definition of refugee that "is based directly upon the language of the Protocol and is intended to be construed consistent with the Protocol."²⁰ The 1980 Act also raised the number of admitted refugees from 17,400 to 50,000, provided a way to deal with special humanitarian concerns, and for the first time established an explicit asylum provision in immigration law.²¹ Congress's final definition of refugee reads:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²²

C. How Refugee Status Relates to Asylum and a Summary of Additional Amnesty Options in the United States

The United States has created four major ways in which persons seeking refuge in the United States can live here legally while the United States remains compliant with its duties under the Convention and the Protocol. The United States has achieved this by (1) granting of refugee status, (2) withholding of removal, (3) protection under the Convention Against Torture (CAT), and (4) the granting of asylum.²³

Refugees and asylees meet virtually all of the same qualifications. The primary difference between a refugee and an asylee is the individual's location when

¹⁸ See, e.g., *INS v. Stevic*, 467 U.S. 407, 429 n.22 (1984) (describing language of Convention's Article 34—incorporated by reference in Article I of Protocol—as "precatory"); *Haitian Refugee Ctr. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (holding Article 33 of Convention, as incorporated in Article I of Protocol, does not give rise to enforceable claim of right); *United States v. Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) (asserting in dictum that "the Protocol is not a self-executing treaty having the force of law"); see also Parish, *supra* note 15, at 924 n.8.

¹⁹ Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143 (1983).

²⁰ Parish, *supra* note 15, at 925 (citing H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19, 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 161).

²¹ Kennedy, *supra* note 19, at 143.

²² 8 U.S.C. § 1101(a)(42) (2012); see also *INS v. Elias Zacarias*, 502 U.S. 478, 481 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

²³ See generally U.S. DEPT. OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS: RELIEF AND PROTECTIONS BASED ON FEAR OF PERSECUTION OR TORTURE (2009), <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf>.

initiating his or her claim.²⁴ A refugee is a person outside of his or her country of origin and outside of the United States, and who is suffering persecution based off of one of the five enumerated grounds.²⁵ An asylee is a refugee whose claim for residence in the United States is made either from within the United States or upon arrival at the border.²⁶ Both international and domestic laws relating to the status of refugees are of utmost importance when examining the validity of asylee status because in order to achieve asylum in the United States, the applicant must first qualify as a refugee.²⁷

The most commonly sought-after form of relief once an applicant is within the United States is the granting of asylum. This has a lower burden of proof than both withholding of removal and protection under CAT, because rather than showing that the applicant is more likely than not to have life or freedom threatened, the applicant need only show that they are present in the United States at the time of application and meet the qualifications necessary to be labeled a refugee as defined under U.S. law.²⁸

Although the United States is not bound by the Convention to admit asylees, it does have a duty not to deport victims of persecution back to the place of their persecutors.²⁹ In order to comply with the Protocol's policy of *non-refoulement*,³⁰ the United States has implemented withholding of removal.³¹ An alien will be eligible for withholding of removal if "the alien establishes that it is more likely than not that his 'life or freedom would be threatened in [the] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion.'" ³² If the applicant is able to satisfy this requirement, then withholding of removal is mandatory and the applicant cannot be returned to his or her country of persecution.³³

²⁴ *Refugees & Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/refugees-asylum> (last visited Jan. 16, 2015).

²⁵ *Id.* (The five enumerated grounds are race, religion, nationality, membership in a particular social group, and political opinion).

²⁶ *Id.*

²⁷ *Id.*

²⁸ 8 U.S.C. § 1158(b)(1)(A) (2012); *see also supra* note 17 and accompanying text. This qualification includes having suffered past persecution or having a well-founded fear of future persecution based on one of the five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group.

²⁹ Convention Relating to the Status of Refugees, art. 33, § 1, Jul. 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention] ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

³⁰ Translates to "Non-deportation."

³¹ 8 U.S.C. § 1231(b)(3) (2012).

³² *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d. Cir. 2004) (quoting 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(1)).

³³ 8 C.F.R. § 1208.16(f) (2016).

Protection under the Convention Against Torture has a similar burden of proof to implement the withholding of removal in that the applicant must show “the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture”³⁴ and will not be removed to his home country.³⁵

In 1996 Congress revised the 1980 Act under the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”).³⁶ These revisions moved away from the stated objectives of the 1980 Act, which were to help people escape persecution, and instead focused primarily on making sure that candidates for asylum were not taking advantage of the system to gain entry into the United States.³⁷ This shift in policy was related to an increased fear of terrorism after the 1993 World Trade Center bombings and an influx of Latin-American immigrants fleeing civil wars, poverty, and an embargoed Cuba.³⁸ Although the 1996 revisions did not cut the number of asylee slots per year, they did make the qualifications stricter by adding time limits for applications and limiting judicial review.³⁹ Additionally, IIRAIRA increased the number of deportable offenses for those refugees and asylees already in the country.⁴⁰ Because of the increased restrictions, refugee and asylee law in the United States has gone from an objective of inclusion to one of alienation and increased restrictions.

D. President Obama’s Recent Actions Relating to Central Americans and Refugee Status

The Obama Administration has recently taken several steps in an effort to stem the flow of unaccompanied minors requesting asylum in the United States. The most relevant executive action undertaken by the Obama Administration is a recent program, enacted December 1, 2014, titled *In-Country Refugee/Parole Program for Children in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the United States*. This program allows persons otherwise qualified for refugee status to apply for admission to the United States from within their home country.⁴¹

³⁴ *Id.*

³⁵ *Id.*

³⁶ Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

³⁷ RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 5 (2005).

³⁸ *Id.* at 4.

³⁹ *Id.* at 5 (those seeking asylum must do so within their first year in the United States. After the first year, the applicant loses their eligibility for asylum and must attempt to qualify under the stricter parameters of withholding of removal or CAT applications.).

⁴⁰ Jessie Duncan, *U.S. Culpability in the Worldwide Expansion of MS 13*, IMMIGR. PROF BLOG (Mar. 24, 2014), <http://lawprofessors.typepad.com/immigration/2014/03/us-culpability-in-the-worldwide-expansion-of-ms-13.html>; see also *U.S. Ousting More Gang Members*, S.F. CHRON., Apr. 12, 1989, at A-15; *infra* Part II.A.

⁴¹ See Media Note, Dep’t of State, Launch of In-Country Refugee/Parole Program for Children in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the

This program was instituted to attempt to stem the flow of unaccompanied minors across the U.S.-Mexico border and to make asylum claims safer to pursue.⁴² By completing an application for refugee status from their home country⁴³ as opposed to attempting an illegal crossing of the U.S. border, immigrants avoid human smugglers that funnel migrants across the border, train hopping, and long stretches of desert, all of which present grave dangers to immigrants.⁴⁴

Under the program, a parent who is present in the United States and holds legal status may request refugee resettlement for unmarried children under the age of twenty-one by filing the DS-7699 form with the Department of State.⁴⁵ This request must be made in conjunction with a resettlement agency in the United States and as a result, the applications are not made available to the general public.⁴⁶ Assuming that the parents of a child in Honduras, Guatemala, or El Salvador live in proximity to, and are able to successfully partner with, a resettlement agency, and that the required DNA, medical, and security tests are all approved, the child still needs to qualify independently as a refugee.⁴⁷ The form under which this application will be filed is an affidavit of relationship (“AOR”).⁴⁸

The program also allows for the possibility of parole for a two-year period with opportunity for renewal for children who do not qualify as refugees.⁴⁹ This aspect of

United States (Dec. 3, 2014), <http://www.state.gov/r/pa/prs/ps/2014/12/234655.htm>; *In-Country Refugee/Parole Program for Children in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the United States*, DEP'T OF STATE (Nov. 14, 2014), <http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm> [hereinafter *Refugee/Parole Program*].

⁴² Michael Shear, *Obama Approves Plan to Let Children in Central America Apply for Refugee Status*, N.Y. TIMES (Sept. 30, 2014), <http://www.nytimes.com/2014/10/01/us/obama-approves-plan-to-let-children-apply-for-refugee-status-in-central-america.html?r=0>.

⁴³ Note that refugees would not apply for asylum, although the qualifications are virtually identical, because they are applying from outside of the United States.

⁴⁴ On average, 198 people die each year along the desert border between Mexico and the United States while attempting to cross the border. Since 2000 there have been 2,771 reported deaths. See *Coalicion de Derechos Humanos*, MISSING MIGRANT PROJECT, <http://derechoshumanosaz.net/projects/arizona-recovered-bodies-project/> (last visited Jan. 23, 2015).

⁴⁵ *Refugee/Parole Program*, *supra* note 41.

⁴⁶ *Id.*

⁴⁷ *Id.* This means that the child will have to qualify based on past or fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. These children will face the same difficulties discussed in this Note as those applying for asylum from within the United States.

⁴⁸ See *id.* The Department of State is confident that very few applicants will be able to take advantage of this new program by the end of 2015, due to lengthy processing times. *Id.*

⁴⁹ *Id.* Being granted parole into the United States means that you are permitted to enter for a short period of time, usually due to extenuating circumstances such as earthquakes or other environmental disaster. After your specified time period is over, the United States government will reassess the situation and determine whether you are able to return home, or whether you warrant an extension of status.

the program is not a problem for the applicants; in fact it provides another avenue for admission to the United States, albeit one that does not provide a pathway to permanent residence.⁵⁰ However, allowing for the possibility of parole into the United States highlights the discrepancies between the intent of both the legislature and the executive in protecting these victims of violence, and the judiciary's application of the law through the courts. The possibility of being paroled into the United States by the Department of Homeland Security is an admission that a child in one of these three countries can be at risk of serious harm, and yet fail to qualify as a refugee.⁵¹ The only difference between a child paroled into the United States and another child who is not is that the former child has a parent in the United States and the latter does not. It is unclear why a parent residing in the United States would make an applicant's plea for amnesty any more or less compelling.

Although the program is a welcome step, and although the options for parole might provide assistance to persons otherwise unable to enter the United States legally, applicants still must qualify as refugees.⁵² This is a task that has proven to be very difficult for these populations. The number of people this program is able to help will only expand once the courts address the related issues surrounding qualification as a refugee through a protected ground. These issues, and suggested remedies, are discussed in the following section.

II. ANALYSIS: THE IMMIGRANTS FROM CENTRAL AMERICA REQUESTING ASYLUM FROM GANG VIOLENCE QUALIFY AS REFUGEES

A. Step One: Central American Migrants are Unable to Avail Themselves of the Protection of Their Home Country

Part one of the test under both the U.S. and the U.N. definition of a refugee is, “[a]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country.”⁵³ Given the strength of the gangs, or *maras*, in Central America, Central American governments have proven they are unable to protect their citizens from gang violence and, as a result, the asylum seekers in the United States have satisfied this requirement.

The political and societal influences exerted by a criminal organization depends on a variety of factors, including its geographical reach, number of members, centralization of leadership, and the overall purpose of the organization.⁵⁴ J. P.

⁵⁰ *Id.*

⁵¹ *Id.* (“An individual considered for parole may be eligible for parole if DHS finds that the individual is at risk of harm, he/she clears all background vetting, there is no serious derogatory information, and someone has committed to financially support the individual while he/she is in the United States.”).

⁵² *Id.*

⁵³ 8 U.S.C. § 1101 (a)(42) (2012); *Refugees: Flowing Across Borders*, U.N. HIGH COMM’N REFUGEES, <http://www.unhcr.org/pages/49c3646c125.html> (last visited Mar. 13, 2016).

⁵⁴ See generally Robert Bunker & John Sullivan, *Cartel Evolution Revisited: Third Phase Cartel Potentials and Alternative Futures in Mexico*, 21 SMALL WARS & INSURGENCIES 30 (2010); Robert Bunker & John Sullivan, *Integrating Feral Cities and Third Phase Cartels/Third Generation Gangs Research: The Rise of Criminal (Narco) City Networks and*

Sullivan, a lieutenant with the Los Angeles Sheriff's Department and member of the California Gang Investigator's Association, is widely published for his analysis of the stages of growth in a street gang.⁵⁵ According to Sullivan, there are three generations of street gangs, with ascending levels of societal power.⁵⁶ The first generation is "localized and not highly sophisticated."⁵⁷ The second generation is,

[M]ore cohesive, with greater centralization of leadership Drug gangs use violence to control their competition and assume a market rather than a turf orientation. They may embrace a broader political agenda (albeit market- focused), operate in a broader (sometimes multi-State) context, and conduct more sophisticated operations.⁵⁸

Finally, there is the third generation of street gangs. These are "a mercenary-type group with goals of power or financial acquisition and a set of fully evolved political aims."⁵⁹ The gangs in Central America have either become or are close to becoming third-generation gangs.

From 1979 to 1992, El Salvador was engaged in a horrific civil war.⁶⁰ Thousands of men, women, and children fled to the United States to escape the violence.⁶¹ A significant number of them ended up in the poorer neighborhoods of Los Angeles.⁶² Growing up as Salvadoran refugees on the streets of Los Angeles, the children escaping the civil war in El Salvador banded together to form street gangs in order to protect themselves from existing Los Angeles gangs.⁶³ Over time, these Salvadoran

BlackFor, 22 *SMALL WARS & INSURGENCIES* 765 (2011); John P. Sullivan, *Third Generation Street Gangs: Turf, Cartels, and Net Warriors*, 3 *TRANSNAT'L ORGANIZED CRIME* 95 (1997) [hereinafter Sullivan, *Third Generation*]; John P. Sullivan, *Transnational Gangs: The Impact of Third Generation Gangs in Central America*, *AIR & SPACE POWER J.* (2008) [hereinafter Sullivan, *Transnational Gangs*].

⁵⁵ See *supra* note 54 and articles cited therein.

⁵⁶ See *supra* note 54 and articles cited therein.

⁵⁷ Sullivan, *Third Generation*, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The Civil War in El Salvador lasted from 1979 to 1992. See generally ELIZABETH WOOD, *INSURGENT COLLECTIVE ACTION AND CIVIL WAR IN EL SALVADOR* (2003).

⁶¹ Approximately one million Salvadorans and Guatemalans fled to the United States from 1981-1990. Because of foreign policy considerations, the United States government refused to grant legal status to these migrants until 1990 when Congress passed legislation granting the migrants fleeing the Salvadoran war temporary protected status ("TPS"). These immigrants remained unable to apply for permanent residence until the passage of the 1997 Nicaraguan Adjustment and Central American Relief Act. Susan Gzech, *Central Americans and Asylum Policy in the Reagan Era*, *MIGRATION POL'Y INST.* (Apr. 1, 2006), <http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.

⁶² *Mara Salvatrucha 13 (MS-13)*, *HIGH INTENSITY DRUG TRAFFICKING AREA*, <http://gangs.umd.edu/gangs/MS13.aspx> (last visited Mar. 13, 2016).

⁶³ *Id.*

street gangs became known as Mara Salvatrucha (MS-13) and Barrio 18, today considered two of the world's most prolific gangs.⁶⁴

The revisions made to the 1980 Act expanded deportable offenses for immigrants with a criminal history.⁶⁵ The definition of “aggravated felony” was expanded from crimes with a five-year sentence or fines over \$100,000 to encompass crimes with a one-year sentence or fines over \$10,000.⁶⁶ “This resulted in more petty crimes being treated as deportable offenses. For example, a long-term resident caught shoplifting could now be deported.”⁶⁷ Between 2000 and 2004, approximately 20,000 young members of MS-13 and Barrio 18 found themselves back on the streets of Central America with no family or connections and without any network of support.⁶⁸ These young adults provided a kind of criminal globalization to these Central American countries⁶⁹ and “by 1999, terms such as ‘crack babies’ and ‘crack dens’ had become as common to Salvadoran newspaper readers as they were to readers in Los Angeles. The same trend, meanwhile, occurred in Honduras and Guatemala”⁷⁰ as former refugees from those countries also fell victim to the stringent new deportation regulations.⁷¹

Once established in El Salvador, Honduras, and Guatemala, it became easy for MS-13 and Barrio 18 to expand recruitment. By 1996, eighty-four percent of gangs in El Salvador were connected to either MS-13 or Barrio 18.⁷² For the next several decades, gang violence in Central America continued to grow and gangs expanded across borders to encompass primarily Honduras, El Salvador, and Guatemala.⁷³ The *maras* have been able to grow at such astonishing rates because they have incredible recruitment opportunities in El Salvador, Honduras, and Guatemala as a result of the expansive numbers of disenfranchised youth.⁷⁴ As of 2005, forty-five percent of Central Americans were fifteen years old or younger,⁷⁵ and both MS-13 and Barrio

⁶⁴ For example, by 2012, the Obama Administration declared MS-13 an international criminal organization. Alicia Caldwell, *U.S. Names Violent Street Gang MS-13 as International Criminal Group*, DENV. POST (Oct. 12, 2012), http://www.denverpost.com/ci_21753249/u-s-names-violent-street-gang-ms-13.

⁶⁵ See Duncan, *supra* note 40; see also *U.S. Ousting More Gang Members*, *supra* note 40.

⁶⁶ Duncan, *supra* note 40.

⁶⁷ *Id.*

⁶⁸ Ana Arana, *How the Street Gangs Took Central America*, 84 FOREIGN AFF. 98, 100 (2005).

⁶⁹ Jose Miguel Cruz, *Global Gangs in El Salvador: Maras and the Politics of Violence 5* (May 14, 2009) (unpublished manuscript), http://www.academia.edu/1451010/Global_Gangs_in_El_Salvador_Maras_and_the_Politics_of_Violence.

⁷⁰ Arana, *supra* note 68, at 101.

⁷¹ *Id.*

⁷² Cruz, *supra* note 69, at 5.

⁷³ Arana, *supra* note 68, at 101.

⁷⁴ *Id.*

⁷⁵ *Id.*

18 recruit children as young as nine with initiation rituals that include extensive beatings and forced criminal behavior.⁷⁶

El Salvador, Guatemala, and Honduras have been fighting gang violence in their countries since the deportations in the 1990s. All three countries have employed a policy of *mano dura*, or “strong hand,” to combat these gangs.⁷⁷ Starting in Honduras around 2002 with the election of President Ricardo Maduro,⁷⁸ the *mano dura* policy continued to gain in popularity in the region for several years.⁷⁹ The policy consisted of a zero tolerance attitude towards membership and participation in gangs. It “outlawed gang membership, enhanced police power to search and arrest suspected gang members, and stiffened penalties for convicted gang members.”⁸⁰ In Honduras, *mano dura* allowed the government to imprison suspected gang members for up to twelve years—a suspicion generally based solely on visible tattoos.⁸¹ Within one year of implementation, prisons were operating at 200% capacity.⁸² In El Salvador, *mano dura* resulted in the unjustified arrests of more than 10,000 juveniles in 2005 alone.⁸³ Despite the fact that Guatemala never officially adopted a complete *mano dura* policy, it has periodically conducted mass round-ups of suspected gang members.⁸⁴

Although the governments in these three countries have made valiant efforts to curb the gang violence within their borders, they have largely been ineffective. In 2013, Honduras ranked number one in annual rates of homicide globally with El Salvador and Guatemala coming in fourth and fifth respectively.⁸⁵ The percentage of deaths related to gang violence continues to rise, particularly in El Salvador and Honduras.⁸⁶ Additionally, after the implementation of these policies, many gangs began to retaliate against the government by killing innocent victims with little or no connections to the gangs: “they began killing and beheading young victims; at least a

⁷⁶ Arana, *supra* note 68, at 102; *see also* BUREAU FOR LATIN AM. & CARIBBEAN AFFAIRS OFFICE OF REGIONAL SUSTAINABLE DEV., USAID CENTRAL AMERICA AND MEXICO GANG ASSESSMENT (2006), http://pdf.usaid.gov/pdf_docs/PNADG834.pdf [hereinafter USAID] (“[Y]outh within the age range of 8-18 years may be particularly vulnerable to recruitment.”).

⁷⁷ CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 9 (2014).

⁷⁸ Arana, *supra* note 68, at 102.

⁷⁹ SEELKE, *supra* note 77, at 9.

⁸⁰ CLARE RIBANDO SEELKE, ANTI-GANG EFFORTS IN CENTRAL AMERICA: MOVING BEYOND MANO DURA? 3 (2007).

⁸¹ Arana, *supra* note 68, at 102.

⁸² *Id.*

⁸³ SEELKE, *supra* note 77, at 9.

⁸⁴ SEELKE, *supra* note 80, at 3.

⁸⁵ U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2013, at 43 (2013), http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf; *see also* Which Countries Have the World's Highest Murder Rates? Honduras Tops the List, CNN WORLD (Apr. 11, 2014), <http://www.cnn.com/2014/04/10/world/un-world-murder-rates/>.

⁸⁶ U.N. OFFICE ON DRUGS & CRIME, *supra* note 85, at 43.

dozen decapitated bodies were found in Honduras and Guatemala.⁸⁷ As leaders were arrested, the governments did nothing to prevent new gang members from taking their place.⁸⁸ The overcrowding of prisons, the lack of evidence against the youth arrested during round-ups, the ability of gangs to change their operations to avoid visual detection, and the recruitment opportunities provided to gang leaders when non-affiliated youth are placed into gang-controlled cells, have been problems associated with the *mano dura* policy throughout Central America.⁸⁹

Because the governments of Honduras, Guatemala, and El Salvador have been unable to protect their youth populations from the violence caused by the gangs, migrants fleeing gang violence in those countries are unable to avail themselves of the protection of their home country and, as a result, the first element of refugee qualification is satisfied.

B. Step Two: Applicants Qualify as Members of One of the Five Protected Groups

The next big step in proving eligibility for asylee status in the United States is proving the migrant falls into one of the protected categories. This section examines the likelihood that migrants, escaping gang violence, will fall into one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁹⁰ However, fleeing from gang violence is not in and of itself a reason to grant asylum status. The applicant must show, (1) that she either holds or is believed to hold an anti-gang opinion or is a member of a particular social group, and (2) that she was either persecuted because of her membership in a protected group or that her fears future persecution should she be forced to return to her country of origin.⁹¹

The strongest argument for Salvadoran applicants is that they should be awarded asylee status based on gang persecution due to the applicant's anti-gang political opinion. For Guatemalans and Hondurans, the political opinion argument falls just short, and as a result they need to qualify as a refugee due to persecution resulting from membership in a particular social group, which is much harder to prove.

1. El Salvadoran Migrants' Membership in a Political Group

Political opinion is one of the five categories under which an alien who is seeking asylum in the United States can plead refugee status.⁹² Part of proving that an immigrant was persecuted on account of his or her political opinion is that he "must show (1) that he held, or his persecutors believed that he held, a political opinion; and (2) that he was harmed because of that political opinion."⁹³

⁸⁷ Arana, *supra* note 68, at 103.

⁸⁸ *Id.*; see also SEELKE, *supra* note 80, at 3.

⁸⁹ SEELKE, *supra* note 80, at 3; see also Arana, *supra* note 68, at 103; SEELKE, *supra* note 77.

⁹⁰ 8 U.S.C. § 1158(b)(1)(A) (2012).

⁹¹ *Id.* § 1101(a)(42) (2012).

⁹² *Id.*

⁹³ *Hu v. Holder*, 652 F.3d 1011, 1017 (9th Cir. 2011) (quoting *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)); see also *Ernesto Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000); *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007).

Unfortunately, political opinion is not defined in the Immigration and Nationality Act⁹⁴ and, as a result, immigration courts have had to create a definition based on the individual facts of each case presented before them.⁹⁵ According to the United Nations' Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, "[p]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged."⁹⁶ The United Nations notes that in order to satisfy a claim on this ground, the political opinion in question must be one that goes against authorities or society and that the authorities or society are either aware of these views or have credited the immigrant with holding those views.⁹⁷

The difficulty for Salvadoran asylees in the United States is proving that the *maras* are an agent of the State or a "matter in which the machinery of State, government, society, or policy may be engaged."⁹⁸ However, because MS-13 and Barrio 18 have recently risen to the level of political actor in El Salvador,⁹⁹ being "anti-gang" should now be understood as having a political opinion. As a result, persons fleeing gang violence in El Salvador should qualify for political asylum in the United States provided that they can show they possessed anti-gang sentiment or had it attributed to them, and that they were persecuted on account of those views.¹⁰⁰

Maras in El Salvador achieved third generation gang status, and thus political influence, in 2011 with the implementation of "*La Tregua*," or "the Truce."¹⁰¹ From

⁹⁴ The Immigration and Nationality Act, or INA, is the basic body of immigration law in the United States. It is contained in Title 8 of the United States Code.

⁹⁵ Jillian Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 YALE J. INT'L L. ONLINE 31, 36 (2012).

⁹⁶ UNHCR, *Handbook, supra* note 6, at ¶ 32 (In order to give countries some guidance in the implementation of the Convention and Protocol—and particularly the interpretation of the five protected grounds—the United Nations introduced The Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. This handbook outlines qualifications for the different categories of refugees mentioned in the Protocol and explains how they can be narrowed).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See generally Douglas Farah, *The Transformation of El Salvador's Gangs into Political Actors*, CTR. STRATEGIC & INT'L STUDIES (June 21, 2012), <http://csis.org/publication/transformation-el-salvadors-gangs-political-actors>.

¹⁰⁰ For examples of successful claims of asylum facts similar to those likely to be claimed by Central American immigrants, see *Sangha v. INS*, 103 F.3d, 1482, 1487 (9th Cir. 1997); *In re Orozco-Polanco*, No. A75-244-012, at 14 (Dec. 18, 1997 Exec. Office Immigration Review), <http://www.refworld.org/docid/4b6beec42.html>. It is important to remember that the mere fact that an applicant holds a political opinion that goes against his home government, or in these cases the powerful gangs, does not mean that he meets the requirements of asylum. He must show that the group he opposes both knows that he holds that view and has harmed him or threatened to harm him as a result. Therefore, it is important that the applicant have some kind of proof or anecdote to present to the court proving that the gang knew he was against them.

¹⁰¹ Katie M. Sizemore, *The Possibilities and Challenges of Transformative Peacemaking with "Criminal" Actors: El Salvador's Gang Truce* (2014) (unpublished manuscript),

November 2011 to March 2012 in El Salvador, former guerilla and current congressman Raul Mijango and chaplain of the military and police bishop Fabio Colindres arranged and led truce-meetings with fifteen incarcerated leaders of MS-13 and fifteen incarcerated leaders of Barrio 18.¹⁰² On March 9, 2012, MS-13, Barrio 18, and the Salvadoran government reached an agreement (the “Truce”), in which MS-13 and Barrio 18 agreed to stop inter-gang killings.¹⁰³ Although the Salvadoran government has been very hesitant to admit involvement with the Truce, some of the tangible effects of it clearly implicate the government.¹⁰⁴ These include “transferr[ing] the leaders [of MS-13 and Barrio 18] to minimum security prisons, admit[ing] cell phone communication and allow[ing] conjugal visits.”¹⁰⁵ The gangs also agreed to minimize the killings of police officers and the government agreed to assist with creation of programs for impoverished youth.¹⁰⁶

The results of the Truce were broad and immediate. From 2012 to 2013 there was a forty-one percent reduction in homicide as a result of the Truce’s stipulations, ending (at least for a time) inter-gang violence and violence against police officers.¹⁰⁷ This reduction in violence served to increase the political power of the *maras* because it became obvious to the government and the citizens of El Salvador, the extent to which the *maras* controlled the nation’s crime rate.¹⁰⁸ The Truce also reaffirmed the power of the gang leaders who, due to isolation from the younger and non-imprisoned members of the gang, had been steadily losing their authority within the gangs.¹⁰⁹ The Truce showed the younger members of the gangs that the Salvadoran government viewed older imprisoned leaders as authoritative and powerful.¹¹⁰ “A representative of the FMLN [leading] party, Mauricio, described during his interview how ‘the Truce was managed poorly, it permitted the gangs to organize better, it did not move us toward a conflict resolution.’”¹¹¹ This Truce has

https://www.umb.edu/editor_uploads/images/mgs/mgs_conflictres/66_The_Possibilities_and_Challenges.pdf.

¹⁰² *Id.*; see also, Farah, *supra* note 99; Diana Negroponte, *MS-13 and Barrio 18 Truce: Can This Be Successfully Replicated in Honduras and Guatemala?*, BROOKINGS INST. (June 5, 2013), <http://www.brookings.edu/blogs/up-front/posts/2013/06/05-el-salvador-gang-truce-negroponte>.

¹⁰³ Negroponte, *supra* note 102.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Sizemore, *supra* note 101, at 5. *But see El Salvador Gangs Announce re-Launch of Truce*, BBC NEWS (Aug. 30, 2014), <http://www.bbc.com/news/world-latin-america-29000158> (“The 2012 truce initially reduced murder rates by 40%, but killings have doubled since 2013 to around 11 killings a day.”).

¹⁰⁸ Sizemore, *supra* note 101, at 5.

¹⁰⁹ *Id.* at 5-6.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 9.

solidified the *maras*' position as a third-generation street gang and propelled these violent criminals onto the political stage.¹¹²

In addition to the Truce, there have been several interesting allegations made regarding El Salvador's new President, Sanchez Ceren. Although Ceren has claimed that he is not in favor of furthering the *maras*' political agendas by engaging them in discussions,¹¹³ Roger Noriega, Ambassador to the Organization of American States and former Assistant Secretary of State for the Western Hemisphere, claims that Ceren "admit[ed] that he elicited the support of MS-13 for his get-out-the-vote effort."¹¹⁴

The gangs have, through the Truce and the current presidential actions, become agents of the state. According to the United Nations,

The activities of gangs and certain state agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities. Such cases, thus, may under certain circumstances be properly analyzed within the political opinion Convention ground.¹¹⁵

The situation in El Salvador fits squarely within the United Nations' interpretation of the requirements of the protected ground of political opinion and so the Salvadoran applicants for asylum should be considered political asylees.

Asylee status on the basis of anti-gang political opinion is not completely new to United States courts, despite its rare application to Central American asylees. For example, a refusal to join a gang by an applicant for asylum who believes in non-violence and upholding the rule of law can be considered an expression of a political opinion.¹¹⁶ Salvadorans who refuse recruitment to gang membership do not necessarily need to demonstrate that they hold some alternative political view; merely opposing the gang can be enough.¹¹⁷ For example, in *Sangha v. INS* the Ninth Circuit found:

In these cases the victim was recruited by a political group. The victim refused, and the political group threatened death if he did not comply. We

¹¹² Sullivan, *Transnational Gangs*, *supra* note 54; *see also* Negropte, *supra* note 102.

¹¹³ Michael Lohmuller, *Salvadoran President Rejects Gang Truce, Security Policy Remains Unclear*, COUNCIL ON HEMISPHERIC AFF. (June 13, 2014), <http://www.coha.org/salvadoran-president-rejects-gang-truce-security-policy-remains-unclear/>; *see also* *El Salvador Gangs Announce re-Launch of Truce*, BBC NEWS (Aug. 30, 2014), <http://www.bbc.com/news/world-latin-america-29000158>.

¹¹⁴ P.J. Tobia, *No Country for Lost Kids*, PBS NEWS HOUR (June 20, 2014), <http://www.pbs.org/newshour/updates/country-lost-kids/>.

¹¹⁵ UNHCR DIV. OF INT'L PROTECTION, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 16 (Mar. 2010), <http://www.refworld.org/pdfid/4bb21fa02.pdf>.

¹¹⁶ *In re Orozco-Polanzo*, No. A75-244-012, at 14 (Dec. 18, 1997 Exec. Office Immigration Review), <http://www.refworld.org/docid/4b6beec42.html>.

¹¹⁷ *See Sangha v. INS*, 103 F.3d. 1482, 1487 (9th Cir. 1997).

reasoned in those cases that the victim's refusal showed his political neutrality, which was the equivalent of a political opinion, and the persecutor's threats were persecution on account of that political opinion.¹¹⁸

In El Salvador, MS-13 and Barrio 18 are political actors and as a result, a Salvadoran who refuses gang membership or holds anti-gang and pro-rule of law sentiments can be persecuted on account of his or her political opinion. Provided that the applicant is able to demonstrate past persecution or well-founded fear of future persecution, U.S. courts should find these applicants eligible for asylee status in the United States.

2. Guatemalan and Honduran Youth Migrants' Membership in a Particular Social Group

The *maras* in Honduras and Guatemala, although being on the cusp of achieving third-generation gang status, remain in the second generation. There is no convincing evidence to demonstrate that the governments of Guatemala and Honduras have legitimized the leaders of the *maras* nor have the *maras* in these two countries demonstrated a high level of control over the criminal and violent elements in these countries, in the way they have in El Salvador.¹¹⁹ Therefore, migrants fleeing from Honduras and Guatemala cannot claim asylum based on political opinion at this stage and should instead attempt to qualify under the particular social group category.

Unlike those able to claim political asylum, it is necessary to show that the applicant belongs to a very specific societal group in order to qualify under the protected ground of membership in a particular social group.¹²⁰ The current interpretation in the United States of membership in a particular social group is specific and confining. There are two definite interpretations of particular social group in the United States: First, is the interpretation outlined in *In re of Acosta* and subsequently expanded upon in *In re S-E-G* and *In re E-A-G*, and second, is the Ninth Circuit Court of Appeals definition.

In *In re Acosta*, the Board of Immigration Appeals ("BIA") defined the social group category as:

[P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience.¹²¹

Additionally, the group must have clear boundaries and be socially visible.¹²² After the *In re Acosta* decision, the BIA added the requirements of social visibility and

¹¹⁸ *Id.* at 1490.

¹¹⁹ Negroponte, *supra* note 102.

¹²⁰ *In re W-G-R*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

¹²¹ *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

¹²² *In re S-E-G et al.*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008); see also Ashley Hubner & Lisa Koop, *New BIA Decisions Undermine U.S. Obligations to Protect Asylum Seekers*, NAT'L

particularity to the definition.¹²³ For a group to be socially visible and distinct, “there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the characteristic to be a group.”¹²⁴ The particularity requirement refers to the definition of the group, which must “provide a clear benchmark for determining who falls within the group”¹²⁵ and use terms “that have commonly accepted definitions in the society in which the group is a part.”¹²⁶ All of the federal circuit courts of appeals, except the Ninth Circuit, have interpreted and defined “particular social group” in accord with the BIA’s definition and interpretation.¹²⁷

The Ninth Circuit Court of Appeals has defined membership in a particular social group as “a collection of people closely affiliated with each other who are actuated by some common impulses or interest.”¹²⁸ There must be “a voluntary associational relationship among purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”¹²⁹ Although this standard is more concrete than the BIA definition, it is still difficult for applicants to comply with its restrictive requirements. As has been pointed out in the past, the Ninth Circuit Court of Appeals requirement of voluntary association appears to be in direct conflict with the immutability requirement created in *In re Acosta*.¹³⁰ However, if voluntary association is understood to mean a past association that cannot in the present be changed, the two definitions are reconcilable.¹³¹ As it stands in most U.S. courts, the particular social group within which the applicant seeks affiliation must possess a common, immutable characteristic with clear boundaries and social visibility.¹³² This is far from a concrete definition and the

IMMIGRANT JUST. CTR. (Feb. 2014), <https://www.immigrantjustice.org/litigation/blog/new-bia-decisions-undermine-us-obligations-protect-asylum-seekers#Vw75PpMrLJw>. See generally *In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re W-G-R*, 26 I. & N. Dec. at 208 (saying that “socially visible” really means that the particular social group is one that is recognized by society as a “distinct entity”).

¹²³ See *In re of S-E-G*, 24 I. & N. Dec. at 582; *In re E-A-G*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008).

¹²⁴ *In re W-G-R*, 26 I. & N. Dec. at 217.

¹²⁵ *Id.* at 214.

¹²⁶ *Id.*

¹²⁷ See *In re S-E-G*, 24 I. & N. Dec. 579, 583 (B.I.A. 2008); see also *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73-74 (2d Cir. 2007); *Makatengkeng v. Gonzales*, 495 F.3d 876, 881 (8th Cir. 2007); *Mwembie v. Gonzales*, 443 F.3d 405, 414-15 (5th Cir. 2006); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Rreshpja v. Gonzales*, 420 F.3d 551, 555-56 (6th Cir. 2005); *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672-73 (7th Cir. 2005); *Elien v. Ashcroft*, 364 F.3d 392, 396-97 (1st Cir. 2004); *Lukwago v. Ashcroft*, 329 F.3d 157, 170-71 (3d Cir. 2003); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233, 1240-42 (3d Cir. 1993).

¹²⁸ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

¹²⁹ *Id.*

¹³⁰ *Parish*, *supra* note 15, at 942.

¹³¹ *Id.*

¹³² See *supra* notes 99-102.

types of groups covered under the particular social group category vary widely from state to state.

Conflicting and confusing circuit court decisions highlight the absurdity of the current application of this protected category. For example, on one hand, courts claim that in gang asylum cases, “poverty, homelessness, and youth are far too vague and all-encompassing to be characteristics that set perimeters for protected group within scope of Immigration and Naturalization Act.”¹³³ On the other, it has been said that, “size and breadth of group alone does not preclude a group from qualifying as particular social group.”¹³⁴ Some courts say that the “[s]pecific trait of having resisted recruitment is not so vague; [a] discrete class of young persons sharing past experience of having resisted gang recruitment can be [a] particularly defined trait.”¹³⁵ Others feel that, “[o]pposition to gangs is an amorphous characteristic providing neither an adequate benchmark for determining group membership nor embodying a concrete trait that would readily identify a person as possessing such a characteristic.”¹³⁶

Additionally, the requirement of immutability is one that is often cited as a reason to exclude any category with “youth” at its basis because one eventually grows older.¹³⁷ “Furthermore, youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum purposes.”¹³⁸ It hardly seems to make sense to claim that a child of eight cannot have his youth taken into consideration merely because he will become an adult ten years from the date of his application.

The United Nations’ intent in creating the definition of refugee and congressional intent upon enacting the statute,¹³⁹ however, shows much broader delineations for this category than the U.S. courts’ application. In order to give countries some guidance in the implementation of the Convention and Protocol, the United Nations introduced *The Handbook*.¹⁴⁰ *The Handbook* outlines qualifications for the different categories of refugees mentioned in the Protocol and explains how they can be narrowed.¹⁴¹ Based on the guidance of the United Nations High Commissioner for Refugees (“UNHCR”), “particular social group” was defined as a “group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is

¹³³ Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005).

¹³⁴ Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010).

¹³⁵ Rivera-Barrientos v Holder, 658 F.3d 1222, 1231 (10th Cir. 2011).

¹³⁶ Zelaya v. Holder, 668 F.3d 159, 164 (4th Cir. 2012).

¹³⁷ *In re S-E-G*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (“We agree with the Immigration Judge that ‘youth’ is not an entirely immutable characteristic but is, instead, by its very nature, a temporary state that changes over time.”).

¹³⁸ *Id.*

¹³⁹ 8 U.S.C. § 1101(a)(42) (2012).

¹⁴⁰ Parish, *supra* note 15, at 929.

¹⁴¹ *See generally* UNHCR, *Handbook*, *supra* note 6.

innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of one's human rights"¹⁴² and interpreted broadly to mean "persons of similar background, habits or social status."¹⁴³

The 1980 Act was passed with the intent to mirror the United Nations' definition of refugee.¹⁴⁴ Upon passage of the 1980 Act, Congress must have been aware of the potential for broad interpretation of the particular social group given the fact that every other protected category was specific and narrow, and this category has the flavor of a catchall.¹⁴⁵ Congress had both international law with broad interpretations of particular social group and scholarly commentaries regarding the potential for this category to turn into a stopgap for all refugee claims not falling within the parameters of the more specific categories.¹⁴⁶ Given Congress's express intention to follow the United Nations' definition of particular social group, and given the literature available to Congress at the time of enactment, it seems clear that Congress intended a broad applicability to be read into this category.

According to the UNHCR, the immutability requirement is satisfied by "age" or "youth," because those factors are beyond an individual's power to control.¹⁴⁷ The fact that someone refused to join a gang is by nature a past action and is an immutable characteristic.¹⁴⁸ Opposing a life of gang violence is also a clear argument for inclusion under the "fundamental to conscious" element of particular social group.¹⁴⁹ These children have characteristics in common beyond fear of persecution; they are from similar economic and educational backgrounds, from similar if not the same neighborhoods, and are all resisting membership in violent criminal organizations because of their desire to live violence free. They are also a group that has social visibility in that youth within the ages of eight through eighteen are the most vulnerable to recruitment.¹⁵⁰

A category consisting of "youth living in poverty and in neighborhoods with some gang presence" is, of course, far too broad of a category to apply to the membership in a particular social group requirement of qualifying as a refugee even within the broad parameters of the United Nations' interpretation. However, according to the U.S. Department of Justice, there are clear categories that can be

¹⁴² U.N. HIGH COMM'R ON REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION NO. 2: "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP" WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 11-13 (2002), <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

¹⁴³ *Id.* at ¶ 77.

¹⁴⁴ *Refugees*, *supra* note 14.

¹⁴⁵ Parish, *supra* note 15, at 928.

¹⁴⁶ *Id.*

¹⁴⁷ DIV. OF INT'L PROTECTION, UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 36 (2010).

¹⁴⁸ *Id.* at 37.

¹⁴⁹ *Id.* at 38.

¹⁵⁰ U.S. AGENCY INT'L DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT 93 (2006), http://pdf.usaid.gov/pdf_docs/PNADG834.pdf.

defined under vulnerable youths at risk of joining a gang.¹⁵¹ These categories should be helpful to the courts when attempting to constrict the social group into which these asylum-seeking children should be placed. Although the categories were designed to determine which youth were most at risk of joining a gang, the characteristics can be applied to children with a credible fear of gangs and those that are most at risk of suffering harm for refusal to join a gang.¹⁵² The most at risk group, according to the DOJ, are called “simpatizantes.”¹⁵³

This group includes at-risk youth who are exposed to gang activity, may have a relative who is in a gang, are somewhat familiar with certain aspects of gang culture (e.g., gang symbols, graffiti), and often display allegiance to one gang over another; that is, they are sympathetic to one particular gang, but have not been officially inducted, or “jumped into” a gang. This group is perceived to be the group of youth most at risk of making the decision to join a gang.¹⁵⁴

Putting this into the context of youth refusing to join a gang, the category for membership in a particular social group should be defined as Honduran and Guatemalan youth living in poverty with significant exposure to gang activity and who have actively refused gang membership.¹⁵⁵ Based on the interpretation of the particular social group category by the United Nations,¹⁵⁶ and based on congressional intent when enacting legislation ensuring the existence of a category designed to catch people in need of sanctuary who might not otherwise qualify as refugees,¹⁵⁷ any applicant who can show membership in that group and can prove persecution as a result, should qualify for asylum in the United States. The BIA and the federal circuit courts of appeals have been imposing arbitrary and strict requirements on these applicants and now is the ideal time to rectify this mistake.

CONCLUSION

The United States is a country based on providing safe-harbor to the persecuted. Beginning with the Protocol in 1967 and the subsequent codification of asylum into United States domestic law with the 1980 Act, allowing people fleeing violence and persecution to find a home in the United States has held a special place in the immigration laws of this country.

¹⁵¹ U.S. AGENCY INT’L DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT ANNEX 2: GUATEMALA PROFILE 15 (2006), http://www.justice.gov/eoir/vll/country/gangs/country_profiles/usaid_guatemala_profile.pdf.

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ It is important to note that a social group’s defining characteristic cannot be that they have suffered persecution. *In re A-M-E*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007). In this case, the particular social group is based on factors such as the location, age, economic status, and refusal of gang membership by the children, rather than whether or not they have been persecuted.

¹⁵⁶ *Sangha v. INS*, 103 F.3d, 1482, 1487 (9th Cir. 1997).

¹⁵⁷ *See supra* notes 118-120.

Migrants from Central America have been neglected since the 1990s. Thousands of migrants make the long and arduous journey to our borders only to be deported back to the violence they have been trying to escape. Salvadorans, Guatemalans, and Hondurans all have legitimate claims for asylum, and yet most of them are not allowed to remain in the United States. The arguments made in this Note show that needs to change. Salvadorans should be considered political asylees. The *maras* have become strong political actors in El Salvador, and the government in that country is unable to protect its citizens from the widespread violence that comes with living near gang territory. The governments of Guatemala and Honduras have done their best to reduce gang violence, but they too have been unsuccessful. Although MS-13 and Barrio 18 have not yet reached the level of political actors in those countries, these gangs are still the leading cause of violence to Honduran and Guatemalan youth. The interpretation of the qualification as a member in a particular social group by the United States courts have made achieving status as an asylee prohibitively difficult. Rather than attempting to exclude applicants because of their age, or the widespread nature of their problems, the United States courts should embrace a more inclusive interpretation of particular social group; one that is in line with the original congressional intent as well as with the United Nations' definition.

Immigrants that have been brave enough to refuse gang membership in Central America are now the same people requesting a chance to live a life without violence and to be given an opportunity to learn and work. Although there has been some executive action aimed at resolving these issues, there remains significant need for a widespread solution. Allowing Salvadoran migrants to qualify as political refugees, and acknowledging that Honduran and Guatemalan youth living in poverty with significant exposure to gang activity and who have actively refused gang membership comprise a legitimate social group are the most effective ways to standardize asylum adjudications and provide sanctuary to at risk youth.