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PROTECTING THE 'UNWANTED': HOW AND WHY WE SHOULD DEFEND FORMER GANG MEMBERS IN THEIR PURSUIT OF ASYLUM

Anjani P. Shah

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Anjani P. Shah[*]

> When I meet others like me I recognise the longing, the missing, the memory of ash on their faces. No one leaves home unless home is the mouth of a shark.[1]

This Note discusses the flaws in the tripartite analysis to determine whether an asylum seeker satisfies the protected ground of "membership in a 'particular social group'" ("PSG"). An applicant seeking a PSG determination must prove: (1) "immutability," (2) "social distinction," and (3) "particularity." This Note argues that when PSG asylum claims are denied and appealed to the Board of Immigration Appeals ("BIA"), the BIA has incoherently tangled what is actually required in order to compel an affirmative PSG determination. One group of asylum seekers that has been significantly disadvantaged by this tripartite test is former gang members. This Note argues that when applying the BIA's PSG

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[1] Warsan Shire, *Conversations About Home (at the Deportation Centre)*, POETRY INT'L (2013), https://www.poetryinternational.org/pi/poem/22840/auto/0/0/Warsan-Shire/CONVERSATIONS-ABOUT-HOME-AT-THE-DEPORTATION-CENTRE/en/tile [https://perma.cc/A2AJ-EJQC] (last visited Nov. 20, 2022).

requirements to former gang members seeking asylum protection, these requirements have been unnecessarily complicated and inconsistent. Moreover, the concepts of national identity and public sentiment about who "deserves" a pathway to citizenship have pushed the United States further from its obligations to asylum seekers. This Note proposes a return to the stand-alone standard of "immutability" from Matter of Acosta *in order to provide reviewing courts, immigration judges, asylum officers, and applicants with a precise, predictable, and well-reasoned assessment of asylum claims made by former gang members.*

INTRODUCTION

The stakes in asylum law are high, and hinge on life or death.[2] Asylum is a form of immigration protection offered to non-citizens seeking to remain in the United States because they have experienced persecution or fear they may be persecuted in the future.[3] Those who are granted asylum are awarded the right to remain in the United States, a path to citizenship, and the ability to petition for lawful immigration status for their immediate relatives.[4] However, those who are not granted asylum face the heart-wrenching realities of deportation and persecution in their home country—including serious bodily harm, injury, or near certain

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[2] *See* Kathryn M. Doan, *High Stakes – My Journey Representing a West African Asylum Seeker*, CAP. AREA COAL. (July 16, 2013), https://www.caircoalition.org/2013/07/16/high-stakes-%E2%80%93-my-journey-representing-a-west-african-asylum-seeker [https://perma.cc/F8NZ-Q33R].

[3] *Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Nov. 9, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum [https://perma.cc/9KTE-HKX9].

[4] *What is Asylum?*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, https://help.unhcr.org/usa/applying-for-asylum/what-is-asylum/ [https://perma.cc/7KP3-BK2Y] (last visited Nov. 20, 2022); *Refugees*, UNITED STATES CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees [https://perma.cc/BSS6-WGVQ] (last visited Nov. 20, 2022).

death.[5] Further, many asylum cases are decided without attorney representation.[6] As such, it is absolutely essential that asylum determinations are precise, predictable, and well-reasoned.

However, the asylum process in the United States is far from straightforward. First, an applicant must indicate on which of the five protected grounds they are seeking asylum: (1) race, (2) religion, (3) nationality, (4) political opinion, and (5) membership in a "particular social group" ("PSG").[7] While race, religion, nationality, and political opinion are facially straightforward, assessing whether an individual is a member of a PSG has led to particularly thorny results. Regrettably, the Immigration and Nationality Act ("INA") does not explicitly define PSG or any other asylum ground.[8] As a result, Congress has vested authority in the Board of Immigration Appeals ("BIA") to determine how PSGs should be identified, what PSGs constitute cognizable asylum claims, and who receives the coveted protection of asylum in general.[9] Individual immigration judges and asylum officers determining immigration relief apply the BIA's standards to determine whether a PSG is cognizable.[10]

Additionally, international agreements involving asylum protection—including the 1951 Convention Relating to the Status of Refugees, the 1967 United Nations Protocol Relating to the Status of Refugees, and the United States Refugee Act of 1980—provide little guidance as to how to define these terms. Nonetheless, these

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[5] *Elements of Asylum Law*, IMMIGR. EQUAL. (June 3, 2020), https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law/ [https://perma.cc/5DGE-4ZNL].

[6] *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, TRAC IMMIGR. (Nov. 28, 2017), https://trac.syr.edu/immigration/reports/491/ [https://perma.cc/MWU4-9TUA].

[7] *Asylum*, *supra* note 3.

[8] 8 U.S.C. § 1101(a)(42)(A).

[9] 8 C.F.R. § 1003.1 (2022).

[10] *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGR. SERV. (May 31, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process [https://perma.cc/TQ26-X73D]; *see also RAIO Directorate–Officer Training: Nexus–Particular Social Group*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 20, 2021), https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf [https://perma.cc/LXC5-D5WF].

agreements provide valuable context into the United States immigration system and the goals our immigration policies should work towards. Moreover, the founding and purpose of the BIA, as well as criticisms of this administrative body, shed light on how the United States continues to stray away from its obligations to protect asylum seekers. By analyzing the international and domestic goals of asylum, an understanding of the function of the BIA, and the BIA's own jurisprudence, this Note suggests a solution that better aligns the United States with its intentions of protecting asylum seekers.

As set out in *Matter of Acosta* ("*Acosta*"), where the BIA's initial PSG analysis was born, the BIA used "immutability" alone to determine whether a PSG was cognizable.[11] Currently, however, the BIA employs a tripartite test to determine whether a PSG exists.[12] First, applicants must articulate a PSG under which their claim falls.[13] Then, applicants must prove that their claimed PSG satisfies three factors: (1) "immutability," (2) "social distinction," and (3) "particularity."[14] With the additions of "social distinction" and "particularity," over twenty-one years after *Acosta* was decided, the BIA has repeatedly confused the issue of when former gang members should receive asylum protection under a PSG claim. Additionally, because the BIA has applied this test with shocking inconsistency,[15] reviewing federal courts have expressed frustration

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[11] *See generally* Matter of Acosta, 19 I&N Dec. 211 (B.I.A. 1985).

[12] *See RAIO Directorate–Officer Training: Nexus–Particular Social Group*, *supra* note 10; *see generally* EXEC. OFF. FOR IMMIGR. REV., *Procedures for Asylum and Withholding of Removal. Credible Fear and Reasonable Fear Review* (Dec. 11, 2020), https://www.justice.gov/eoir/page/file/1344386/download [https://perma.cc/HS7N-DSFP].

[13] This articulation alone is burdensome, as PSGs must not run afoul of the "anti-circularity" doctrine established in *Matter of M-E-V-G-*. Matter of M-E-V-G-, 26 I & N Dec. 227, 236 n.11 (BIA 2014).

[14] *Procedures for Asylum and Withholding of Removal. Credible Fear and Reasonable Fear Review*, *supra* note 12, at 80280.

[15] *See* Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 416 (2010); *see* Christopher C. Malwitz, *Particular Social Groups Vague Definitions and an Indeterminate Future for Asylum Seekers*, 83 BROOK. L. REV. 1149, 1173 (2018).

and confusion about what the BIA *actually* requires in order to compel a PSG determination.

Former gang members *would* satisfy the BIA's three-part analysis, if not for the BIA's muddling of these requirements.[16] In *Amaya v. Rosen*, a recent decision by the Fourth Circuit addressing the PSG claims of former gang members, the court held that the applicant's membership in the PSG of "former Salvadoran MS-13 [Mara Salvatrucha] members" was sufficiently particular to warrant immigration relief.[17] Yet, in the past, former gang members have been significantly disadvantaged by this arbitrary tripartite test.[18] When applying the BIA's PSG requirements to former gang members seeking asylum protection, these requirements have been unnecessarily complicated and inconsistent.

While former gang members should satisfy the BIA's tripartite test, broadening asylum protection to individuals who have subjectively "questionable" pasts raises sociopolitical concerns. However, immigration decisions do more harm than good when individuals who otherwise satisfy the requirements for asylum are denied relief simply because grants of asylum are discretionary[19] and relief can be denied for certain unpopular groups.

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[16] Amaya v. Rosen, 986 F.3d 424, 433 (4th Cir. 2021).

[17] *Id.* at 438; according to the United States Department of Justice, "MS-13 was formed by Salvadoran immigrants that came to the United States in order to escape the civil war in their home country. Some of its members were trained in guerilla warfare and the use of military weapons." *MS-13: A Gang Profile*, U.S. DEP'T OF JUST. (2009), https://www.ojp.gov/ncjrs/virtual-library/abstracts/ms-13-gang-profile [https://perma.cc/RWQ2-R2ZQ].

[18] *See generally* Malwitz, *supra* note 15, at 1165 ("Following the new standard set by the BIA, particular social group asylum claims related to gangs and gang-related violence have increasingly failed to cross the three-part test threshold and be recognized as cognizable social groups. More specifically, courts have found that these claims do not fulfill the social distinction, visibility, and particularity requirements. Indeed, this is not a new phenomenon; prior to the 2014 BIA standard, gang-related claims regularly failed. The BIA's new consolidated standard, however, has solidified the near impossibility for fleeing victims of gang violence to form a cognizable social group, leaving countless individuals with credible claims of persecution without any form of relief").

[19] *Chapter 8 – Discretionary Analysis*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Oct. 29, 2021), https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8 [https://perma.cc/7CJK-EYW7].

This Note proposes a return to the stand-alone *Acosta* standard of "immutability"[20] to provide reviewing courts, immigration court judges, asylum officers, and applicants with a precise, predictable, and well-reasoned assessment of asylum claims made by former gang members. Part I of this Note discusses the asylum law history of the United States and explores the legislative intent of the United States Congress in entrusting the BIA with appellate jurisdiction for immigration proceedings. Part II explores the current status of asylum regulation in the United States. While "former gang members" as a PSG is likely too broad on its own, this Note focuses primarily on examples of claims made by applicants from "Northern Triangle" countries—Guatemala, El Salvador, and Honduras[21]—to illustrate the arbitrariness of the BIA's tripartite test.[22] Part III proposes that the BIA return to the *Acosta* standard, using the adjudication of asylum claims made by former gang members as an example of how returning to the *Acosta* standard could benefit other PSG determinations. Finally, Part IV addresses the counterpoints and social policy concerns with granting immigration relief to former gang members, discussing the concept of national identity and analyzing the United States' creation of "ingroup" and "outgroup" relationships which have led to sociopolitical polarization about who "deserves" a pathway to citizenship.[23]

I. THE HISTORY OF ASYLUM LAW IN THE UNITED STATES

United States asylum law is premised on the humanitarian purpose of protecting individuals who flee persecution in their home

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[20] *Id.* at 233.

[21] Diane Uchimiya, *Falling Through the Cracks: Gang Victims As Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109, 117–18 (2013).

[22] *See id.* at 118.

[23] *See generally* David A. Butz, *National Symbols as Agents of Psychological and Social Change*, 30 POL. PSYCH. 5, 779–804 (Oct. 2009) (discussing the effects of "national symbols" (e.g., flags, religion, perceived racial identity) on ingroup and outgroup identities).

country.[24] Asylum is awarded to a small class (only thirty-one percent of applicants in FY 2019)[25] of "refugees" who successfully prove that they have been persecuted on account of (1) race, (2) religion, (3) nationality, (4) political opinion, and/or (5) membership in a PSG.[26] These asylum protections are codified in 8 U.S.C § 1158.[27]

Today, the INA governs which applicants may receive immigration relief.[28] The INA's asylum provisions do not exist in a vacuum—they are predicated on historic international agreements that equip the United States with guidelines for protecting migrants' lives.[29] The BIA's current tripartite analysis for PSGs, as applied to former gang members, steers the United States away from its international obligations and its promise to protect those fleeing persecution.

A. The Beating Heart of Asylum Law: The 1951 Convention Relating to the Status of Refugees

In July 1951, a diplomatic conference was held in Geneva, Switzerland to address the millions of forcibly displaced, deported, and/or resettled people after World War II, and ultimately resulted in the 1951 Convention Relating to the Status of Refugees ("the Convention").[30] The Convention provides a definition of "refugee"

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[24] *See Refugees and Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Nov. 12, 2015), https://www.uscis.gov/humanitarian/refugees-asylum [https://perma.cc/RZ78-JXXV].

[25] Jeanne Batalova et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Feb. 11, 2021), https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020 [https://perma.cc/Z6HN-HBUF].

[26] 8 U.S.C. § 1101(a)(42)(A).

[27] 8 U.S.C. § 1158.

[28] 8 U.S.C. §§ 1101–1537.

[29] *See The Legacy of the 1965 Immigration Act*, CTR. FOR IMMIGR. STUD. (Sept. 1, 1995), https://cis.org/Report/Legacy-1965-Immigration-Act [https://perma.cc/WT4R-FA3W].

[30] *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (September 2011),

and the protections such individuals should be afforded.[31] Although the Convention was limited to European refugees, the 1967 United Nations Protocol Relating to the Status of Refugees ("the 1967 Protocol") expanded the scope of the Convention to include displaced persons around the world.[32]

Initially apathetic about international refugee protections, the United States did not sign onto the Convention in 1951[33] because President Truman "felt it infringed on U.S. sovereignty."[34] In his State of the Union Address on January 8, 1951, a few months before the Convention took place, President Truman adopted an isolationist tone, stating that " . . . [Soviet imperialists] stir up class strife and disorder. They encourage sabotage. They put out poisonous propaganda. They deliberately try to prevent economic improvement."[35] Yet, in 1968, President Lyndon B. Johnson took a very different approach. In his Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, President Johnson stated, "[g]iven the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere."[36] Finally, the United States joined the 1967

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https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html [https://perma.cc/TM9L-6YQH].

[31] *Id.*

[32] *Id.*

[33] U.N. Secretary-General, Protocol Relating to the Status of Refugees, No. 8791 (Oct. 4, 1967), https://www.unhcr.org/en-us/5d9ed66a4 [https://perma.cc/B6VV-L7LW].

[34] Mark Krikorian, *Time to Withdraw from the U.N. Refugee Treaty*, CTR. FOR IMMIGR. STUD. (July 28, 2021), https://cis.org/Oped/Time-Withdraw-UN-Refugee-Treaty [https://perma.cc/7ZSN-H9SD].

[35] Harry S. Truman, Annual Message to the Congress on the State of the Union (Jan. 8, 1951), https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-19 [https://perma.cc/2AGM-SP28].

[36] Lyndon B. Johnson, Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, (Aug. 1, 1968), https://www.presidency.ucsb.edu/documents/special-message-the-senate-transmitting-the-protocol-relating-the-status-refugees [https://perma.cc/ZYU6-8ND6].

Protocol, which incorporates all of the operative provisions of the Convention.[37] This is just one example of the United States' fluctuating commitment to migrant protections.

Prior to the Convention, neither the United States nor international law had conceived of systems for evaluating refugee claims or even a definition of "refugee."[38] According to the United States government, no such policy was necessary in the years prior to World War I because "there were few [refugee] barriers placed by this country on immigration in general."[39] However, in the aftermath of World War II, with the widespread humanitarian need to protect persecuted groups, the United States and its international partners acknowledged their moral and legal duty to legitimize the migration protections afforded to individuals seeking refuge from persecution.[40]

At the core of the Convention and the 1967 Protocol is the multinational agreement that individuals have a right to seek asylum and that nations have a responsibility not only to protect at-risk individuals from returning to a country that seeks to persecute them, but also to ensure access to protections that justly consider their immigration claims.[41] After signing the 1967 Protocol, Congress set the United States federal annual ceiling for refugees at just 17,400.[42] As a point of reference, the refugee ceiling in 2021 under the Biden Administration was 62,500.[43] At the time, these refugees were

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[37] U.N. Secretary-General, *supra* note 33.

[38] *See The Final Report and Recommendations of the Select Commission of Immigration and Refugee Policy with Supplemental Views by Commissioners*, U.S. DEP'T. OF EDUC., 153 (Mar. 1, 1981), https://files.eric.ed.gov/fulltext/ED211612.pdf [https://perma.cc/BMY7-C9DX].

[39] *Id.*

[40] *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, *supra* note 30.

[41] *Id.*; *see also* B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 97 (2017).

[42] David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. J. INT'L. L. 91, 93 (1982).

[43] *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL, Figure 1 at 3 (Nov. 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/10.22_overview_of_u.s._refugee_law_and_policy_fact_sheet.pdf [https://perma.cc/2EEH-R5P6] ("The Trump administration set the FY 2021

deemed "conditional entries" and could only originate from communist countries or the Middle East.[44]

B. Solidifying Asylum Protections in the United States: The Refugee Act of 1980

In the aftermath of the Vietnam War, there was a growing humanitarian outcry to protect those impacted by war,[45] pressuring the United States to reform its restrictive immigration protections.[46] As a result, President Jimmy Carter signed the Refugee Act of 1980 ("the Act") into law.[47] The Act made "all refugees in [the United States] equally eligible, regardless of their origin."[48] It increased the annual ceiling for refugees to 50,000 and required the President and Congress to consult annually on the refugee ceiling and to consider changes based on humanitarian or national interest concerns.[49] Further, the Act explicitly created asylum, a status that could lead to lawful permanent residency.[50] Most important to the foundational tenets of immigration law, the Act hinges on "nonrefoulment"—the prohibition on removing an individual to any country where the individual's life or freedom would be threatened based on any five of the protected grounds.[51]

Critics of the Act and of the expansiveness of asylum law generally, may argue that because this protection against removability exists irrespective of other criteria, including the individual's "family ties, other U.S. connections, or employment

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refugee admissions ceiling at 15,000. Initially, the Biden administration maintained that ceiling, but later raised it to 62,500. However, by the end of that fiscal year, only 11,411 refugees had been admitted.").

[44] Martin, *supra* note 42.

[45] Abby Seiff, *How the Vietnam War Shaped U.S. Immigration Policy*, JSTOR DAILY (Jan. 22, 2020), https://daily.jstor.org/how-the-vietnam-war-shaped-u-s-immigration-policy/ [https://perma.cc/2VL5-52M8].

[46] Martin, *supra* note 42, at 92.

[47] David A. Martin, *The Refugee Act of 1980: A Forlorn Anniversary*, LAWFARE (Mar. 19, 2020, 2:30 PM), https://www.lawfareblog.com/refugee-act-1980-forlorn-anniversary [https://perma.cc/TUA5-N3X6].

[48] Martin, *supra* note 42, at 97.

[49] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103.

[50] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 105.

[51] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107.

skills,"[52] it limits the United States' ability to determine whether an individual *deserves* to remain or pursue a pathway to citizenship. However, the Act explicitly states that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands" and "to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible."[53] In March 2021, while commemorating his signing of the Act, then-President Carter reflected on the dire situation that led to the Act, stating:

> [d]esperate refugees were drowning and dying from exposure at our doorstep, yet the United States lacked a legal structure to receive them in an orderly way [. . .] we as Americans can reflect on our decision as a nation to welcome the stranger and renew our commitment to remaining a beacon of hope for freedom-loving people everywhere.[54]

Although the Act put the United States on course to fulfill its international refugee obligations, the legal framework for former gang members fleeing persecution in their home countries forty-two years later is far from "a beacon of hope."[55]

C. The (Absent) Legislative History of the PSG Requirement

Regrettably, neither the Act,[56] the INA,[57] nor congressional legislative history[58] define PSGs. Courts have found that membership in a PSG when "[r]ead in its broadest literal sense . . . is

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[52] Martin, *supra* note 42, at 112.

[53] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

[54] *Statement from President Carter Commemorating the Anniversary of the Refugee Act of 1980,* THE CARTER CTR. (Mar. 17, 2021), https://www.cartercenter.org/news/pr/2021/president-carter-statement-031821.html [https://perma.cc/TTF9-A2QV].

[55] *Id.*

[56] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102-118.

[57] 8 U.S.C. § 1101(a)(42)(A).

[58] *See* T. Alexander Aleinikoff, *"Membership in a Particular Social Group": Analysis and Proposed Conclusions*, 3 n.6, https://www.unhcr.org/en-ie/3b83b1c54.pdf [https://perma.cc/5XV7-TTCK].

almost completely open-ended" with no "clear evidence of legislative intent."[59] Without statutory or regulatory definitions of PSGs, reviewing federal courts have found some of the BIA's PSG determinations to be arbitrary.[60] Yet, because of administrative law constraints these courts have little power to overturn BIA decisions.[61] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the United States Supreme Court made clear that courts should defer to administrative agencies where Congress "is silent or ambiguous with respect to the specific issue."[62] Without legislative history to guide the meaning of a PSG, the role of the Court "is limited to reviewing the BIA's interpretation [of a PSG], using *Chevron* deference to determine if it is a 'permissible construction of the statute.'"[63] Federal courts are to give deference to BIA decisions, "unless they are arbitrary, capricious, or manifestly contrary to the statute."[64] In accordance with *Chevron* deference and the limitations of the INA, federal courts can only decide the narrow issues considered by the BIA in each case.[65]

D. A Brief Overview and History of the BIA

Created in 1940, the BIA has the authority to decide immigration case appeals.[66] It is an "independent adjudicatory body" answering only to the Attorney General of the United States.[67] According to the Department of Justice ("DOJ"), "the BIA is directed to exercise its independent judgment in hearing appeals for the Attorney

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[59] Fatin v. I.N.S., 12 F.3d 1233, 1238–39 (3d Cir. 1993).

[60] *See* Amaya v. Rosen, 986 F.3d 424, 433 (4th Cir. 2021).

[61] Claudia B. Quintero, *Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard - Former Gang Members and Their Need for Asylum Protections*, 13 U. MASS. L. REV. 192, 225–26 (2018).

[62] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[63] Quintero, *supra* note 61, at 225–26 (citation omitted).

[64] *Chevron, U.S.A., Inc.*, 467 U.S. at 844.

[65] *Amaya*, 986 F.3d at 429–30.

[66] Aliens and Citizenship, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940).

[67] *Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUST. (Apr. 30, 2015), https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/Q7J7-2PHR].

General."[68] The BIA is the highest administrative body for reviewing and interpreting U.S. immigration law.[69] With nationwide jurisdiction, its decisions are binding unless modified or overruled by the Attorney General or a federal court.[70]

The BIA is composed of twenty-three Appellate Immigration Judges appointed by the Deputy Attorney General.[71] Typically, the BIA only conducts a "paper review" of appeal cases.[72] In limited circumstances, decisions by the BIA are made up of panels with just three members.[73] Such proceedings "are not favored" and are "ordered only where necessary to address an issue of particular importance or to secure or maintain consistency in the Board's decisions."[74] As such, the majority of BIA appeals are decided on-paper by a single BIA member.[75] Furthermore, BIA members "affirm without opinions," thereby allowing a single BIA member to affirm a case with zero insight into their reasoning, factors for consideration, or potential biases.[76]

In the past, information about the BIA's hiring process has cast doubt on the intentions of both the BIA and its individual members.[77] For example, in 2019, a Freedom of Information Act request to the DOJ made by Muckrock, a nonprofit advocating for government transparency, revealed that three immigration court

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[68] *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/YY6M-5KKW].

[69] *Id.*

[70] *See id.*

[71] 8 C.F.R. § 1003.1 (2022).

[72] *Board of Immigration Appeals*, *supra* note 68.

[73] *Board of Immigration Appeals Practice Manual*, U.S. DEP'T OF JUST., 5 (Sept. 23, 2019), https://www.justice.gov/eoir/file/1205211/download [https://perma.cc/K8AW-VXWJ].

[74] 8 C.F.R. § 1003.1 (2022).

[75] *Id.*

[76] Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 442 (2011) (citation omitted).

[77] Ben Schaefer, *NYCLU Seeks Information on the Trump Administration Fast-Track of Immigration Judges*, ACLU OF N.Y. (Jan. 15, 2021), https://www.nyclu.org/en/press-releases/nyclu-seeks-information-trump-administration-fast-track-immigration-judges [https://perma.cc/Z9X4-KYB6].

judges were fast-tracked to positions on the BIA.[78] These three judges in particular did not serve the standard two-year probationary period on the BIA and were instead appointed immediately to serve permanent roles on the BIA.[79] Hiring immigration court judges to the BIA creates the potential for conflicts of interest where "the chief prosecutor is also the chief judge."[80] Several of the immigration court judges who were most recently hired to the BIA denied over ninety percent of the asylum requests before them at the trial level.[81] Others have had formal complaints of bias lodged against them.[82] Even former immigration court judges have questioned the opacity of the BIA's hiring process, noting that the judges appointed to the BIA may not reflect the diversity of the hiring pool.[83]

Additionally, in 2020, existing members of the BIA were "reassigned" after rejecting buyout offers from the Trump administration that were cloaked as "voluntary separation incentive payments."[84] The goal of these payments was to fill BIA seats with individuals who would "strategically restructure [the Executive Office of Immigration Review] to accommodate skills, technology, and labor markets."[85] In other words, the DOJ hoped to make room

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[78] Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, ROLL CALL (Oct. 29, 2019, 2:51 PM), https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/ [https://perma.cc/6TWR-HZYY].

[79] *Id.*

[80] Tanvi Misra, *DOJ 'Reassigned' Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020, 4:55 PM), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/ [https://perma.cc/W6PS-PYPJ].

[81] *Id.*

[82] *Id.*

[83] *Id.* Former immigration judge MaryBeth Keller remarked on the opaqueness of this particular hiring process, stating that immigration court judges are "generally eminently qualified to be board members, but to bring in [several] from the immigration court? I'd like to think that the pool of applicants was more diverse than that." *Id.*

[84] Misra, *supra* note 80 (citation omitted).

[85] Tanvi Misra, *DOJ Memo Offered to Buy Out Immigration Board Members*, ROLL CALL (May 27, 2020, 5:04 PM), https://www.rollcall.com/2020/05/27/doj-memo-offered-to-buy-out-immigration-board-members/ [https://perma.cc/G4XW-GTHT].

for judges who would carry out then-President Trump's restrictive immigration agenda. This internal manipulation, led by the Executive branch, diluted the BIA's independence as an adjudicatory body vested with the authority to rule on immigration matters. [86] The politicization of the BIA threatens migrants with the extraordinary whims of any given presidential administration. All the while, an individual's life hangs in the balance.

II. THE CURRENT STATUS OF ASYLUM REGULATION FOR FORMER GANG MEMBERS

A. Examining the BIA's Tripartite Analysis

The BIA's initial PSG analysis was born in its 1985 opinion, *Matter of Acosta*. There, the BIA held that a PSG must share "common, immutable" or fundamental characteristics such as "sex, color, or kinship ties, or in some circumstances it might be a shared past experience."[87] Further, the BIA held that the common characteristic of individuals within a PSG "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[88] For two decades, the BIA solely used "immutability" to determine whether an individual belonged to a PSG.[89] However, in 2006 and 2007, the BIA expanded its analysis of PSGs by adding two new requirements: "social visibility" (later named "social distinction") and "particularity."

In June 2006, the BIA introduced the requirement that PSGs be "socially visible."[90] In *Matter of C-A-*, the BIA equated "visibility" with "recognizability" to determine "the extent to which members of the purported group would be recognizable to others" in the applicant's country of origin or in the specific locality from which

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[86] Misra, *supra* note 80.

[87] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

[88] *Id.*

[89] *BIA Requires Asylum Seekers to Identify Particular Social Group*, CATH. LEGAL IMMIGR. NETWORK, INC., https://cliniclegal.org/resources/humanitarian-relief/asylum-and-refugee-law/bia-requires-asylum-seekers-identify [https://perma.cc/TV48-HLN8] (last visited Nov. 20, 2022).

[90] Matter of C-A-, 23 I&N Dec. 951, 959 (B.I.A. 2006).

the applicant fled.[91] Because this prong was not limited to "literal or 'ocular' visibility,"[92] "social visibility" was later renamed "social distinction."[93] The BIA affirmed the *Acosta* standard while determining whether "noncriminal drug informants working against the Cali drug cartel" constituted a PSG.[94] The BIA stated that "[a] past experience is, by its very nature, immutable, as it has already occurred and cannot be undone."[95]

However, the BIA went further. The BIA cast its own judgment on the applicant's choices, stating that "a person who agrees to work as a government informant in return for compensation takes a calculated risk and is not in a position to claim refugee status should such risks materialize." [96] In doing so, the BIA misapplied its own understanding of *Acosta*. Instead of assessing whether the shared characteristic was "one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience,"[97] the BIA declared that "immutability" did not exist based on the applicant's motives for entering into this group.[98] Therefore, the BIA declined to find that "noncriminal drug informants working against the Cali drug cartel" satisfied the "immutability" requirement for a PSG.[99]

This decision is legally significant not only because it applied the new "social visibility" prong, but also because of the BIA's emphasis on the "voluntary nature" of becoming a member of a PSG.[100] The BIA's reasoning here is that if someone engages in business that they know is risky, then they should not be protected

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[91] Malwitz, *supra* note 15, at 1154.

[92] Matter of M-E-V-G, 26 I&N Dec. 227, 228 (B.I.A. 2014).

[93] *Id.*

[94] *Matter of C-A-,* 23 I&N Dec. at 957.

[95] *Id.* at 958.

[96] *See id.*

[97] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

[98] *See Matter of C-A-,* 23 I&N Dec. at 959 ("The question in this case becomes whether the respondent's civic motives for working as a government informant distinguish his situation from that of informants employed by the government.").

[99] *Id.* at 958–59, 961.

[100] *Id.* at 961.

from the consequences of those risks.[101] This reasoning is a slippery slope—assigning risk value to a person's decisions ignores the difficult choices that individuals must make in order to survive.

The BIA declined to classify this group as a PSG because it also failed the new requirement of "social visibility."[102] In explaining the "social visibility" requirement in *Matter of C-A-*, the BIA considered "the extent to which members of the purported group would be recognizable to others" in their home country or area.[103] Ultimately, the BIA held that "noncriminal drug informants working against the Cali drug cartel" were not "socially visible."[104] In *Matter of C-A-*, the BIA explained that "the very nature of the conduct at issue is such that it is generally out of the public view" and that "[r]ecognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[105] One year later, in *Matter of A-M-E & J-G-U-*, the BIA clarified that while "social visibility" will "be considered in the context of the country" of the applicant, an applicant may satisfy this requirement if their PSG is sufficiently recognizable by the persecutor, instead of society at large.[106]

Although the BIA stated that its "decisions involving social groups have considered the recognizability"[107] of social groups in the past, "social visibility" was not officially announced until *Matter of C-A-*'s opinion was published. By announcing a new factor required to succeed in C-A-'s asylum claim concurrently with the decision of C-A-'s appeal, C-A- was effectively deprived of the opportunity to produce an argument or corroborating evidence to satisfy the "social visibility" requirement. Essentially, the BIA changed the rules of the game without notice to the applicant—deciding whether the applicant would face life or death by a roll of the dice.

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[101] *See id.*

[102] *Id.* at 959–61.

[103] Matter of C-A-, 23 I&N Dec. 951, 959 (B.I.A. 2006).

[104] *Id.* at 961.

[105] *Id.* at 960.

[106] Matter of A-M-E & J-G-U-, 24 I&N. Dec. 69, 74 (B.I.A. 2007).

[107] *Id.* at 959.

In *Matter of C-A-*, the BIA very well could have dismissed the appeal in favor of asylum if it had correctly applied the "immutability" analysis under *Acosta*.[108] Further, the BIA failed to provide any substantive guidance as to why "social visibility" as a new prong of the PSG analysis was necessary in the first place.[109] Three years after this decision, the Seventh Circuit chastised the BIA, stating that, "the Board [has not] attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility."[110]

The BIA first introduced "particularity" as a PSG requirement in the 2007 case *Matter of A-M-E- & J-G-U-*[111] and confirmed its status seven years later as a third factor to be considered alongside "immutability" and "social visibility" in two simultaneously decided cases, *Matter of M-E-V-G* and *Matter of W-G-R*.[112] The BIA stated that this "requirement relates to . . . the need to put 'outer limits' on the definition of a 'particular social group.'"[113] Unsurprisingly, the BIA provided "little guidance of what would be critically relevant in positively establishing particularity," instead vaguely stating that "particularity" would be satisfied as long as the group was "not [] amorphous, overbroad, diffuse, or subjective."[114] While a PSG determination is made on a case-by-case basis, the BIA has not provided any guidance as to the "outer limits"[115] of the "particularity" requirement.[116] Critics of the "particularity" factor

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[108] Malwitz, *supra* note 15, at 1155.

[109] *See Matter of C-A-,* 23 I&N Dec. at 959.

[110] Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

[111] *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 69; *Practice Advisory: Applying for Asylum Based On Membership In A Particular Social Group*, NAT'L IMMIGRANT JUST. CTR. (Jul. 2021), https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular [https://perma.cc/5Y4Q-S84D].

[112] Malwitz, *supra* note 15, at 1157, n. 69.

[113] Matter of M-E-V-G, 26 I&N Dec. 227, 238 (B.I.A. 2014).

[114] Malwitz, *supra* note 15, at 1159; *see also Matter of M-E-V-G-*, 26 I&N Dec. at 239.

[115] *Matter of M-E-V-G-*, 26 I&N Dec. at 238.

[116] Amaya v. Rosen, 986 F.3d 424, 435–36 (4th Cir. 2021) ("Whether an applicant is a member of the group is a factual question for the fact-finder to determine on a case-by-case basis. That decision may sometimes be difficult based on the available evidence.").

have speculated that this additional third burden was imagined as a tool for the BIA to "reduce the administrative burden [that] an increased amount of social group approvals would incur, [and] to carve out and trim such groups out of the larger sections of society."[117] Simply put, this requirement is an easy-out for the BIA to deny PSG status to groups with no precedent of immigration relief.

Despite the confusing results that it produces, the BIA continues to adhere to this unclear tripartite framework.[118] According to this analysis, former gang members should satisfy the BIA's three prongs. However, because of the BIA's muddling of these requirements and the sociopolitical implications of extending asylum protection to former gang members, this group has struggled to achieve PSG status.

B. Applying the BIA's Tripartite Analysis to Former Gang Members

i. "Immutability"

BIA decisions have indicated that "immutability" turns on whether a particular social group shares a "characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not to be required [or] to be changed."[119]

First, former gang members are unable to alter their former affiliations with a gang, making their identity as a former gang member immutable. These affiliations are carved into individuals at an early age.[120] Criminal groups become de facto state actors who focus recruitment on young, at-risk community members who may look to gangs as a source of financial support and protection.[121] For example, in "Northern Triangle" countries—Guatemala, El

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[117] Malwitz, *supra* note 15, at 1159.

[118] *See BIA Requires Asylum Seekers to Identify Particular Social Group*, *supra* note 89.

[119] Matter of Acosta, 19 I&N Dec. 211, 212 (B.I.A. 1985).

[120] Uchimiya, *supra* note 21, at 123.

[121] *Id.* at 123–24.

Salvador, and Honduras[122]—gangs "have blatantly bribed and intimidated government officials to the point that the police, the judiciary, and [the] entire local and departmental governments are rife with criminal collaborators and infiltrators."[123] Gangs offer valuable items such as shoes, cellphones, and clothes to members in order to retain membership in the gang.[124] Gang recruitment in "Northern Triangle" countries involves "pressure, threats, and intimidation," including harassment by physical abuse, bothering a prospective member's family, extortion, theft, violence, and murder.[125] Ultimately, "gangs coerce youth into joining; they do not join voluntarily."[126] Individuals who later decide to leave the gang put their lives at risk because the gang may attempt to beat or kill members who leave.[127]

Members who make the difficult choice to leave a gang find it "nearly impossible" to get out alive.[128] Such is the case with individuals like Edgar Chocoy, who "migrated from Guatemala . . . to Los Angeles, California."[129] Chocoy applied for asylum based on the persecution he believed he would face by his former gang who had recruited him after he was abandoned by his mother as an infant.[130] His asylum application was denied, and he was removed to Guatemala.[131] Just seventeen days after Chocoy was removed from the United States, "members of [his] former gang

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[122] *Id.* at 118.

[123] *Id.* at 124 (quoting HAL BRANDS, CRIME, VIOLENCE, AND THE CRISIS IN GUATEMALA: A CASE STUDY IN THE EROSION OF THE STATE 11 (2020)).

[124] *Id.* at 126–27.

[125] *No Place to Hide: Gang, State and Clandestine Violence in El Salvador*, INTL. HUMAN RTS. CLINIC, 79 (Feb. 2007), https://static1.squarespace.com/static/5b3538249d5abb21360e858f/t/5cabca6ce4966bf580ea3471/1554762350561/No+Place+to+Hide+Cavallaro+2007.pdf [https://perma.cc/Q7CK-ZSPX].

[126] Uchimiya, *supra* note 21, at 126.

[127] *Id.* at 127.

[128] *Id.*

[129] Melody Mendoza, *When the Going Gets Tough, the Tough Get Going: The Case of Gang Recruits Seeking Asylum in the United States*, 43 RUTGERS L. REC. 1, 2 (2015).

[130] *Id.*

[131] *Id.*

murdered him."[132] Simply put, a former gang member's prior affiliation with a gang makes their membership in such a PSG "immutable."

Second, the shared characteristics of former gang membership are foundational to the identities of former gang members. *Acosta*'s discussion of identity speaks to an individual's sense of self.[133] "However absurd it may seem to a court," an individual's former affiliation with a group—criminal or not—is so central to an individual's identity that "[they] should not be required to change [it]."[134] Former gang members have often experienced "conditions of poverty, family disintegration or separation, neglect, violent domestic environments, unemployment, scarcity of education and developmental opportunities, and family membership in gangs" which led to their involvement in a gang.[135] Circumstances of gang recruitment may unite these individuals.[136] Joining a gang may further feelings of family belonging and provide companionship.[137] One former member of MS-13, Susan Cruz, recalls that gang members "would commiserate about . . . what it was like. And when we were together as a group, we felt like we were home even though we were far away from home."[138] Applying this context, it is clear that former gang members achieve the "immutability" standard because their prior affiliation with a gang is foundational to their identities. Therefore, the "immutability" standard for former gang members should be satisfied.

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[132] *Id.*

[133] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985); *see also* Bernardo M. Velasco, *Who Are the Real Refugees? Labels As Evidence of A "Particular Social Group"*, 59 ARIZ. L. REV. 235, 238 (2017).

[134] Velasco, *supra* note 133 at 246.

[135] Quintero, *supra* note 61, at 198.

[136] *Id.*

[137] Mendoza, *supra* note 129, at 9.

[138] *Former Gang Member Details Life Inside MS-13*, NAT'L PUB. RADIO (Apr. 22, 2008, 10:00 AM), https://www.npr.org/transcripts/89845725 [https://perma.cc/E3ZU-4YQT].

ii. "Social Distinction"

Former gang members are distinct in the contexts of their communities, such that they satisfy the "social distinction" prong. The BIA has not provided a solid definition of "social distinction" beyond stating that a PSG's shared characteristics "should generally be recognizable by others in the community."[139] In order to determine "social distinction," the BIA emphasizes the perception of outsiders upon the individual claiming to be part of a PSG.[140] For example, in *Matter of A-R-C-G-*, the BIA found that the PSG "married women in Guatemala who are unable to leave their relationship" is socially distinct because of evidence in the record pointing to Guatemala's culture of "machismo and family violence" as well as problems in enforcing protection for domestic violence survivors.[141] There, the BIA found that Guatemalan society considered people sharing these characteristics to be a distinct group.[142]

This prong is flawed because it implies that members in a PSG must aim to be socially visible or distinct. [143] Yet, an individual fleeing from persecution, such as a former gang member, could reasonably seek to make themselves socially *invisible* in order to protect themselves from significant harm.[144] Former gang members are aware that their lives may be at risk if it were discovered that they defected from a gang.[145] For example, former gang members who are deported from the United States back to their home country have attempted to make themselves socially *invisible* by removing their tattoos to better blend in with their community.[146] Current gang

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[139] Matter of S-E-G-, 24 I&N Dec. 579, 586 (BIA 2008).

[140] Kathleen Kersh, *An Insurmountable Obstacle: Denying Deference to the Bia's Social Visibility Requirement*, 19 MICH. J. RACE & L. 153, 162 (2013).

[141] Matter of A-R-C-G-, 26 I&N Dec. 388, 389, 394 (BIA 2014).

[142] *Id.*

[143] Kersh, *supra* note 140, at 161–62.

[144] *Id.*

[145] Mendoza, *supra* note 129, at 10–13.

[146] Uchimiya, *supra* note 21, at n.123.

members may still have the "green light" to kill these individuals, because they are known to the gang as traitors.[147]

Although this standard is inherently flawed, former gang members still satisfy the "social distinction" requirement as long as current gang members are able to recognize them as defected members. This identification may stem from tattoos. Former gang members in "Northern Triangle" countries[148] sometimes have tattoos that signal membership in their former gang.[149] Such tattoos "outwardly demonstrate" allegiance to a particular gang and, unless removed, will serve as permanent markers of this affiliation.[150] However, social distinction is "considered in the context of the country" of the applicant.[151] An applicant may satisfy this requirement if their PSG is sufficiently recognizable by the persecutor and society at large.[152] A former gang member's persecutor is current gang members, and defected individuals are known and recognizable to current gang members, with or without visible symbols like tattoos.[153]

iii. "Particularity"

Finally, the very nature of a former gang members' experiences is likely sufficiently "particular" to articulate a cognizable PSG. The general requirement of "particularity" is that the group is not "amorphous, overbroad, diffuse, or subjective."[154] The use of "particularity" as a requirement for the BIA's PSG analysis is one way the BIA attempts to limit PSG-based claims.[155] Again, *Matter*

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[147] Quintero, *supra* note 61, at 200 (quoting Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 436 (2011)).

[148] Uchimiya, *supra* note 21, at 118.

[149] Scott M. Henry, *Hey, Hey, the Gang's All Here! The Fourth Circuit Fights for Former Gang Members in Martinez v. Holder*, 24 B.U. PUB. INT. L.J. 285, 297 (2015).

[150] *Id.* at 304.

[151] Matter of A-M-E & J-G-U-, 24 I&N. Dec. 69, 74 (BIA 2007).

[152] *Id.*

[153] Mendoza, *supra* note 129, at 2.

[154] Matter of M-E-V-G, 26 I&N Dec. 227, 238 (B.I.A. 2014).

[155] *See* Velasco, *supra* note 133, at 247.

of A-R-C-G- is instructive in illustrating what satisfies "particularity."[156] There, the BIA found that the PSG "married women in Guatemala who are unable to leave their relationship" was sufficiently particular because each of these terms—"married," "women," and "unable to leave the relationship,"—has been accepted in Guatemalan society as widely recognized definitions.[157] Based on the BIA's reasoning in *Matter of A-R-C-G-*, it appears that "particularity" stems from an issue of subdivision—if the claimed PSG is too diffuse such that it can be divided into further subgroups, it may not meet the "particularity" requirement.

Despite the BIA's desire to limit PSG claims,[158] former gang members should satisfy this requirement as well. Although the BIA's standards for "particularity" are ambiguous, applying the BIA's reasoning in *Matter of A-R-C-G-*, it does not appear to be a confusing requirement—either you are an active or former gang member.[159] There is little subdivision that can occur from these two membership statuses. Therefore, former gang members could satisfy the "particularity" requirement, as long as an applicant's PSG is articulated with enough specificity to avoid any further subdivision.

III. RETURNING TO AN *ACOSTA* STANDARD IN ORDER TO DEFEND FORMER GANG MEMBERS

Although former gang members can pass the current tripartite framework, returning to the *Acosta* "immutability" standard would provide reviewing courts (as well as immigration judges and asylum officers) with clearer guidelines to assess asylum claims made by former gang members.[160]

A. Rejecting "Social Distinction" and "Particularity"

The Third and Seventh Circuits have rightfully rejected the BIA's "social distinction" prong. In *Gatimi v. Holder*, the Seventh

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[156] Matter of A-R-C-G-, 26 I&N Dec. 388, 393 (BIA 2014).

[157] *Id.*

[158] Velasco, *supra* note 133, at 247.

[159] Quintero, *supra* note 61, at 221.

[160] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

Circuit reversed the BIA's ruling that former members of a Kenyan gang (Mungiki) did not constitute a PSG.[161] There, the BIA claimed that members of Kenyan society would not be able to perceive that the applicant was a former gang member, nor that Kenyan society sees the gang as a segment of the population.[162] The Seventh Circuit responded that this conclusion "[made] no sense."[163] The court stated that "[i]f you are a member of a group that has been targeted . . . you will take pains to avoid being socially visible; [if] members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'"[164]

The Seventh Circuit noted that "the BIA's inconsistent application of the social visibility requirement led to arbitrary decision making and thus did not merit a grant of [*Chevron*] deference."[165] Further, the court recalled that the BIA had found many groups to be cognizable PSGs without reference to "social visibility."[166] Based on the principles of administrative law, "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one . . . Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities."[167]

Similarly, the Third Circuit rejected the "social visibility" requirement in *Valdiviezo-Galdamez v. Attorney General of the United States*.[168] There, the BIA found that Honduran youth who were recruited by gangs but refused to join did not constitute a PSG.[169] A PSG focused on "youth gang recruitment" and a PSG focused on "former gang members" have notable differences; however, they may overlap and stem from the same persecution experience. In *Valdiviezo-Galdamez*, the Third Circuit held that the

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[161] Gatimi v. Holder, 578 F.3d 611, 614, 618 (7th Cir. 2009).

[162] Kersh, *supra* note 140, at 164–65.

[163] *Gatimi*, 578 F.3d at 615.

[164] *Id.*

[165] Kersh, *supra* note 140, at 165.

[166] *Gatimi*, 578 F.3d at 615.

[167] *Id.* at 616.

[168] Valdiviezo-Galdamez v. Att'y Gen. of the U.S., 663 F.3d 582, 603–4 (3d Cir. 2011).

[169] *Id.* at 589.

BIA's "social visibility" requirement contradicted the "immutability" requirement created by *Acosta*.[170] The court stated that members of PSGs who have satisfied the *Acosta* "immutability" standard, such as "women who are opposed to female genital mutilation[], homosexuals required to register in Cuba, [] and former members of the El Salvador national police[]," have "characteristics which are completely internal to the individual and cannot be observed or known by other members of the society . . . unless and until the individual member chooses to make that characteristic known."[171] The court reasoned that the "social visibility" requirement worked against asylum applicants who purposefully attempted to be socially *invisible* in order to protect themselves against persecution.[172]

Finally, the BIA's "particularity" prong has also been rejected by the Fourth Circuit. In *Amaya v. Rosen*, the court found that the BIA had conflated the "particularity" inquiry with the "social distinction" inquiry.[173]

In 2009, Juan Carlos Amaya arrived in the United States seeking protection from MS-13 in El Salvador.[174] Amaya's case is similar to many gang violence victims who flee El Salvador and seek relief in the United States.[175] However, in the eyes of the law, his options for immigration relief in the United States are limited. This is because Amaya is a former member of MS-13.[176] Almost eighteen years ago in 2003, Amaya was forced to join MS-13.[177] He paid the gang $25 weekly and attended meetings, but never committed any crimes for

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[170] *Id.* at 608.

[171] *Id.* at 604.

[172] *Id.*

[173] Amaya v. Rosen, 986 F.3d 424, 437 (4th Cir. 2021). It bears repeating that while "former gang members" as a PSG is likely too broad on its own, this Note focuses primarily on examples of claims made by applicants from "Northern Triangle" countries.

[174] *Amaya*, 986 F.3d at 426.

[175] HILLEL R. SMITH, CONG. RSCH. SERV., LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE (2020), https://sgp.fas.org/crs/homesec/LSB10207.pdf [https://perma.cc/YF96-U8YF].

[176] *Amaya*, 986 F.3d at 427.

[177] *Id.*

them.[178] Amaya had MS-13 tattoos on his arms and chest, some of which he later covered.[179] In 2004, one year after being recruited to MS-13 and following the birth of his daughter, Amaya left the gang.[180] Soon thereafter, gang members began threatening him. [181] They said they would kill him if they got the chance; if he went to the police, they threatened to kill his family too.[182] In 2009, Amaya made the decision to flee to the United States.[183] In 2012, Amaya was convicted of assault in the United States and deported to El Salvador.[184] Amaya claims that it took only a few days for gang members to identify him.[185] He learned from a friend that gang members were again plotting to kill him because he left the gang.[186] Amaya fled to the United States once again.[187] After Immigration and Customs Enforcement ("ICE") agents arrested him, Amaya was placed in removal proceedings.[188]

When individuals like Amaya are placed in removal proceedings, they may request asylum and withholding of removal.[189] During these proceedings, Amaya argued for withholding of removal because of his well-founded fear of

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[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 427–28.

[184] *Id.* at 428.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 427.

[189] *Withholding of Removal*, IMMIGR. EQUAL. (June 3, 2020), https://immigrationequality.org/asylum/asylum-manual/immigration-basics-withholding-of-removal/ [https://perma.cc/X4WR-HYJX]. The BIA does not explicitly state why Amaya was ineligible for asylum. Withholding of removal is a more burdensome standard—requiring individuals to show that there is at least a fifty-one percent chance of future persecution, as compared to a likelihood of persecution at least ten percent for asylum relief. *Id.* Withholding of removal does not come with the same benefits as asylum, such as a pathway to citizenship and asylum status for derivative family members. *Id.* It is a grant from an immigration judge preventing the government from removing someone to their home country where their life would be threatened. *Id.*

persecution by MS-13 members if he returned to El Salvador.[190] The immigration judge dismissed his petition.[191] Amaya then appealed to the BIA, which dismissed the appeal, stating that "former Salvadoran MS-13 members" was not a particular enough group to constitute a PSG.[192] In other words, MS-13 was "too diffuse" to satisfy the particularity requirement.[193] Amaya then appealed to the Fourth Circuit for a final determination of his removal.[194] Upon federal review, the Fourth Circuit remanded the case in favor of Amaya, holding that the PSG "former Salvadoran MS-13 members" was in fact particular enough to withhold removal.[195]

To justify the remand, the court held that the BIA's requirements of "particularity" and "social distinction" had been conflated in the BIA's own decision, constituting a legally reversible error.[196] The court points out that Amaya's PSG, "former Salvadoran MS-13 members," includes "several self-limiting features that provide clear benchmarks for the boundaries of the group."[197] The court stated that there was no ambiguity as to how his PSG could be defined—it specifies "Salvadoran" MS-13 members and "former members," thus excluding individuals outside of El Salvador as well as individuals who have no affiliation with MS-13 at all.[198] The court held that it is abundantly clear who is part of this group – "someone who (1) joined the group and (2) is no longer in the group."[199]

While courts have previously rejected amorphous PSGs that do not share adequate similarities to determine group membership, in the case of Amaya, the BIA did not properly apply its own concepts of "particularity" and "social distinction" as separate

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[190] *Amaya*, 986 F.3d at 427–28.

[191] *Id.* at 428.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 438.

[196] *Id.* at 433, 438 ("This conflation of the particularity requirement with the social distinction requirement not only creates an analytical muddle but also renders the BIA's third part of the PSG test—social distinction—surplusage.").

[197] *Id.* at 434.

[198] *Id.*

[199] *Id.* at 435.

requirements.[200] Instead, it used them interchangeably without any analytical distinction.[201]

B. Why "Fix" an Unbroken Standard?

Given that some federal courts have rejected the "particularity" and "social distinction" requirements, it is curious why the BIA broadened the PSG analysis past the original *Acosta* "immutability" standard in the first place. Importantly, the current tripartite test was deployed twenty-one years after the *Acosta* standard.[202] Once again, history is instructive.

In 2006 and 2007, as the BIA revised its PSG analysis, widespread protests[203] against the Border Protection, Anti-terrorism and Illegal Immigration Control Act of 2005 were taking place.[204] Passed in December 2005, this Act increased penalties for unauthorized immigration and deemed individuals who entered unlawfully as felons. [205] These changes ignited the 2006 United States immigration reform protests across the nation. In an address to the nation in May 2006, following "la gran marcha"[206] of undocumented people and allies across the United States, President Bush stated:

> [o]nce here, illegal immigrants live in the shadows of our society. Many use forged documents to get jobs, and that makes it difficult for employers to verify that the workers they hire are legal. Illegal immigration puts pressure on public schools and hospitals, it strains state and local budgets, and brings crime to our communities. These are real problems. Yet we must remember that the vast majority of illegal

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[200] *Id.* at 438.

[201] *Id.*

[202] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

[203] Angel Tenez, *La Gran Marcha*, MEXICAN AM. NEWS (Mar. 25, 2022), https://mexican-american.org/history/21st-century/2006/la-gran-marcha_largest-march-in-us-history.html [https://perma.cc/H83E-5DTE].

[204] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

[205] *Id.* at §§ 201, 203.

[206] Tenez, *supra* note 203.

> immigrants are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are a part of American life, but they are beyond the reach and protection of American law.[207]

Just one month later on June 15, 2006, the DOJ introduced the "social visibility" standard, and eight months later on January 31, 2007, "particularity" was adopted.[208] Policy advocates argue that "there was never any reason to tamper with *Acosta*'s immutability test, for it makes perfect sense."[209]

Just as President Truman and President Johnson swung the pendulum back-and-forth when it came to the United States' commitment to migrants in 1951 and 1968, the pendulum swung backwards when President Bush adopted this xenophobic rhetoric in 2006. In the wake of the mobilization and activist power harnessed by undocumented people and allies,[210] the United States government unnecessarily heightened the burden for immigrants seeking immigration relief, drifting further from its international obligations of providing refuge to individuals facing harm.

C. Evidentiary Hurdles Faced by Former Gang Members in Establishing a Case for Immigration Relief

In addition to the obstacles posed by the inconsistent PSG standards, the BIA's current tripartite analysis creates significant evidentiary hurdles for former gang members seeking asylum relief.[211] Information about how gangs operate is difficult to obtain

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[207] *President Bush Addresses the Nation on Immigration Reform*, THE WHITE HOUSE (May 15, 2006, 8:01 PM), https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html [https://perma.cc/HGY5-3YCX].

[208] Matter of C-A-, 23 I&N Dec. 951, 959 (B.I.A. 2006); *see also* Matter of A-M-E & J-G-U-, 24 I&N. Dec. 69, 76 (B.I.A. 2007).

[209] Stephen Legomsky & Karen Musalo, *Asylum and the Three Little Words that Can Spell Life or Death*, JUST SECURITY (May 28, 2021), https://www.justsecurity.org/76671/asylum-and-the-three-little-words-that-can-spell-life-or-death/ [https://perma.cc/UD7H-JLCA].

[210] *See* Tenez, *supra* note 203.

[211] *See* Wilkinson, *supra* note 15, at 393, 413.

because criminal groups purposefully try to keep their activities secret.[212] This information is collected, if at all, through the use of newspaper reports and interviews with victims, government representatives, and others.[213] While hearsay is generally admissible in immigration court proceedings, such accounts of gang activity can readily be attacked or scrutinized in immigration court for its reliability based on the level of detail, bias, motivation to lie, and more.[214] The likelihood for conflicting statements from such witnesses is high due to the stealth of gang operations which may cast doubt on an applicant's claim.[215] The lack of information about how gang members communicate with each other, and how vast this communication sprawls across a given country or region, makes it difficult for former gang members to prove the "outer limits"[216] of a gang's operations, leading to difficulty exhibiting strong evidence for both "social distinction"[217] and "particularity." The evidentiary standard in asylum cases is already high, and former gang members have insufficient resources to prove where they may be safe, since criminal organizations operate widely.[218]

If the BIA solely raised issues of "immutability" when reviewing asylum applications of former gang members, federal courts would be armed with a clearer standard to determine whether the BIA has abused its discretion, rather than wading through the murky waters of "social distinction" and "particularity." Further, returning to the *Acosta* standard would present a clearer application of law for immigration judges and asylum officers.

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[212] *See id.* at 393.

[213] *Id.*

[214] *Practice Advisory, Rules of Evidence in Immigration Court Proceedings*, CATH. LEGAL IMMIGR. NETWORK, INC. (Mar. 13, 2020), https://cliniclegal.org/file-download/download/public/2309 [https://perma.cc/FGP7-7E9A].

[215] *Id.*; *see also* Wilkinson, *supra* note 15.

[216] Matter of M-E-V-G-, 26 I&N Dec. 227, 238 (B.I.A. 2014).

[217] Wilkinson, *supra* note 15, at 393; *see also* Murcia v. Garland, No. 15-73735, 2022 WL 1599237 (9th Cir. May 20, 2022) (finding that even a U.S. State Department Human Rights Report on El Salvador could not shed light on the way former gang members in El Salvador are perceived by their society).

[218] Wilkinson, *supra* note 15, at 393.

In the end, failing to provide former gang members with immigration relief further perpetuates narratives about immigrants that are ultimately more harmful than they are helpful. For example, "as ideas about citizenship regress to a very restrictive mean, and citizenship becomes a good to be parceled out among the 'worthy,' we trade a problem of under-inclusion for a problematic flexibility in defining citizens *out* of our polity as well."[219] The "good immigrant" or the "model minority" myths have been extremely harmful to immigrants seeking relief.[220] By implying that certain individuals have made the "right" choices and are worthy of relief, minorities and immigrant groups are pitted against each other.[221] This perpetuates a system of stigmatization, where the winner is always white supremacy.[222]

Moreover, asylum is a pathway to citizenship, and the very concept of citizenship is exclusionary: you are a United States citizen, or you are not. As a result, "ingroup" relationships (those who belong) and "outgroup" relationships (those who do not belong) are formed among the United States populace to determine who is "one of us," leading to unfair discrimination.[223] While federal law prohibits discrimination based on national origin or citizenship status, it only does so in the context of employment, such as hiring, recruitment, referring for a fee, or firing employees.[224] Despite this federal protection, discrimination may persist through employer's actions, workplace harassment, or abusive requests for paperwork related to an employee's immigration status.[225]

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[219] Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 104 (2013).

[220] *See generally Maeve Higgins: Why is the "Good Immigrant" Narrative Dangerous?*, NAT'L. PUB. RADIO (Apr. 30, 2021, 8:17 AM), https://www.npr.org/transcripts/992043675 [https://perma.cc/GV7P-RT58].

[221] *See* Maria Cohut, *The 'Model Minority' Myth: Its Impact on Well-Being and Mental Health*, MED. NEWS TODAY (Jul. 31, 2020), https://www.medicalnewstoday.com/articles/the-model-minority-myth-its-impact-on-well-being-and-mental-health [https://perma.cc/DY3T-U7K6].

[222] *Id.*

[223] Butz, *supra* note 23, at 799.

[224] 8 U.S.C. § 1324(b).

[225] *See* Josselyn Andrea Garcia Quijano, *Workplace Discrimination and Undocumented First-Generation Latinx Immigrants*, ADVOCATES' FORUM

Furthermore, employers may use an employee's immigration status to justify exploitation and coercion.[226] "Research shows that immigrant workers experience 300 more workplace fatalities and 61,000 more workplace injuries annually than native-born workers, and undocumented immigrants are more likely to experience dangerous working conditions than legal immigrants."[227] Unfortunately, this discrimination is not limited to the workplace. Although it is illegal, discrimination based on citizenship status or national origin may occur in a variety of settings, including but not limited to, buying or renting a home, obtaining a loan, steering prospective buyers or renters away because of an individual's ancestry, and more.[228] The creation of "ingroups" and "outgroups" is at the core of citizenship-based discrimination.[229]

As a result of the creation of "ingroup" and "outgroup" relationships, individuals will "strive to maintain the integrity and safety of the groups to which they belong, because without such security their own existence and the existence of close others is threatened."[230] National attachment, "one of the most significant forces of nature and a powerful component of human motivation," [231] provides context as to why Americans cling to the concept of the "good immigrant."

By granting former gang members immigration relief, some may argue that the illusion of the "good immigrant" as a part of the United States' national identity falls apart. Former President Donald Trump has referred to the members of gang organizations, like MS-13, as "animals."[232] Popular right-wing news media outlets, like Fox

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(2020), https://crownschool.uchicago.edu/advocates-forum-2020-workplace-discrimination-undocumented-immigrants [https://perma.cc/9YR2-6F6J].

[226] *Id.*

[227] *Id.*

[228] *Immigration Status and Housing Discrimination Frequently Asked Questions*, U.S. DEP'T. OF HOUS. AND URB. DEV. https://www.equalhousing.org/wp-content/uploads/2014/09/2012-Immigration-Status-FAQ.pdf [https://perma.cc/UR57-RJS4] (last visited Nov. 20, 2022).

[229] Butz, *supra* note 23, at 783–85.

[230] *Id.* at 784.

[231] *Id.* at 779; *see also* Higgins, *supra* note 220.

[232] *Immigrants Fleeing Gangs Prefer Taking Chance for US Asylum*, ASSOCIATED PRESS (Jun. 16, 2018, 11:17 PM),

News, point to the fact that MS-13's motto is "mata, viola, controla," directly translating into, "kill, rape, control."[233] As one commenter puts it, "MS-13 is not a social club. I live in an area where MS-13 activity is rampant. These gangs make the old-style Mafia look like choir boys. They mean business."[234] According to another commenter, "We have enough criminals of our own; we don't need someone else's."[235] In general, these comments indicate who some Americans believe should be invited to the "citizenship club." Erika Lee, Chair and Director of the Immigration History Research Center at the University of Minnesota and award-winning non-fiction writer,[236] notes that "one of the most important things about xenophobia is that it's a shapeshifting, wily thing, just like racism. You think it's gone away, and it comes back. It evolves so

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https://www.foxnews.com/us/immigrants-fleeing-gangs-prefer-taking-chance-for-us-asylum [https://perma.cc/8BMP-K8NQ].

[233] Greg Norman, *MS-13 Crackdown Severely Reduces Gang's Violent Criminal Activity in New York Stronghold*, FOX NEWS (Dec. 31, 2018, 12:03 PM), https://www.foxnews.com/us/ms-13-crackdown-nearly-halts-violent-gangs-spree-of-murders-in-new-york-stronghold-data-shows [https://perma.cc/6X6R-J8GM].

[234] Ladynat, Comment to *Border Agents in Texas Pick Up MS-13 Gang Members, Sex Offender,* FOX NEWS (Aug. 7, 2021, 2:38 PM), https://www.foxnews.com/politics/border-agents-texas-ms-13-gang-sex-offender [https://perma.cc/TWX2-5Q58]; *see also* Adam Shaw, *Border Agents in Texas Pick Up MS-13 Gang Members, Sex Offender,* FOX NEWS (Aug. 7, 2021, 2:38 PM), https://www.foxnews.com/politics/border-agents-texas-ms-13-gang-sex-offender [https://perma.cc/TWX2-5Q58].

[235] Clint_banned_and_back_again, Comment to *Trump Administration Moves to Bar Convicted Felons, Gang Members From Asylum,* FOX NEWS (Oct. 20, 2020, 5:19 PM), https://www.foxnews.com/politics/trump-administration-bar-convicted-felons-gang-members-asylum [https://perma.cc/WLB2-KGSV]; *see also* Adam Shaw, *Trump Administration Moves to Bar Convicted Felons, Gang Members From Asylum,* FOX NEWS (Oct. 20, 2020, 5:19 PM), https://www.foxnews.com/politics/trump-administration-bar-convicted-felons-gang-members-asylum [https://perma.cc/WLB2-KGSV].

[236] Erika Lee, *About Erika*, http://www.erikalee.org/about-erika/ [https://perma.cc/MWP7-LKBQ] (last visited Nov. 20, 2022).

that even though one immigrant group finally gains acceptance, it can easily be applied to another."[237]

Our immigration legal system holds up a mirror to this public sentiment. United States asylum law has repeatedly failed immigrants, including those who deserve protection because of their prior involvement in gangs. For example, the immigration struggles of child soldiers bear resemblance to that of former gang members. Child soldiers are "recruited into military units or militias [and] face powerful and devastating conditions that leave them only with the choice of joining and pledging their allegiance to their warlord, risking imminent death or serious injury, or trying to flee."[238] They have been "abducted, orphaned, or otherwise separated from [their] family."[239] Child soldiers do not voluntarily join militias—they do so out of a necessity for food and security.[240] Child soldiers "endure torture, physical abuse, and threats of death for disobedience."[241] These tactics mirror gang recruitment tactics in "Northern Triangle" countries.[242] However, despite the United States' purported humanitarian endeavor to protect the lives of those fleeing violence, child soldiers continue to be denied immigration relief.[243]

Unfortunately, many of these public sentiments and tropes about immigrants are not rooted in facts. Contrary to right-wing misinformation, our asylum laws already enforce strict bars[244]

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[237] Taylor McNeil, *The Long History of Xenophobia in America*, TUFTS NOW (Sept. 24, 2020), https://now.tufts.edu/articles/long-history-xenophobia-america [https://perma.cc/UJ4X-RJC4].

[238] Raio G. Krishnayya, *No Way Out: Representing Child Soldiers in Asylum Cases and Alternate Solutions to the Strict Liability Exclusion Under the "Persecution of Others" Clause*, CTR FOR VICTIM & HUM. RTS. (2009), http://www.cvhr.org/Immigration-Law-Asylum-of-Child-Soldiers.pdf [https://perma.cc/N4SG-QDMF].

[239] Tessa Davis, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653, 656 (2011).

[240] *Id.*

[241] *Id.* at 658.

[242] Uchimiya, *supra* note 21, at 118, 123.

[243] *See generally* Davis, *supra* note 239.

[244] *Asylum Bars*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Apr. 1, 2001), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-bars [https://perma.cc/H6BL-JVW3].

against those who may have "questionable" pasts. Individuals may be barred from receiving asylum if: (1) they participated in the persecution of any person, (2) were convicted of a "particularly serious crime" making them a danger in the United States, (3) they have committed a "serious nonpolitical crime" in another country, (4) they pose a danger to the security of the United States, and (5) they have been firmly resettled in another country before arriving in the United States.[245] These protections are upheld alongside the inadmissibility grounds that USCIS maintains on the bases of health, criminal, national security, public charge, labor, fraud, misrepresentation, and prior unlawful presence in the United States.[246]

Bars to asylum and inadmissibility grounds specifically exist to ensure that individuals who pose serious risks to the United States are not admitted.[247] Former gang members will still have to pass these hurdles before ever reaching an asylum or withholding of removal determination.[248] As such, former gang members, like any other immigrant, encounter multiple background investigations into their past.

Today, "[MS-13] is as strong as ever, and will remain an immense source of citizen insecurity and a potent force."[249] However, the contention that United States asylum obligations do not extend to former gang members is far from the truth, regardless of public sentiment or political convenience. The United States' international obligations are wide and far-reaching when it comes to immigration relief. Our international agreements should be honored and not thrown aside based on the United States' judgment of morality and value.

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[245] *Id.*

[246] *Instructions for Application for Waiver of Grounds of Inadmissibility*, U.S. CITIZENSHIP AND IMMIGR. SERV., https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf [https://perma.cc/5ZSG-TW22] (last visited Nov. 20, 2022).

[247] *See* 8 U.S.C. §§ 1182(a)(1)–(4)(e)(iii).

[248] *Asylum Bars*, *supra* note 244.

[249] *MS13*, INSIGHT CRIME (last updated Sept. 22, 2021), https://insightcrime.org/el-salvador-organized-crime-news/mara-salvatrucha-ms-13-profile/ [https://perma.cc/CYJ2-V7V6].

IV. CONCLUSION

Federal courts have found that the BIA conflates and arbitrarily applies the "social distinction" and "particularity" requirements for asylum claims.[250] The product of such confusion has serious implications on the lives of former gang members who are seeking protection from persecution in their home countries. [251] To avoid drastic consequences for former gang members, including the near certainty of death upon return to their home countries, the BIA should abandon its current three-pronged approach of "immutability, particularity and social distinction"[252] and return to the *Acosta* standard of "immutability"[253] to adjudicate claims of asylum made by former gang members. By addressing the chronic conflation of the BIA's requirements under the PSG standard, the United States will better align itself with its international obligations to provide refuge for individuals fleeing persecution and ensure that asylum determinations are precise, predictable, and well-reasoned, because the stakes in asylum law are high, and hinge on life or death.[254]

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[250] *See* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009); *see also* Amaya v. Rosen 986 F.3d 424, 437 (4th Cir. 2021); *see generally* Valdiviezo-Galdamez v. Att'y Gen. of the U.S., 663 F.3d 582 (3d Cir. 2011).

[251] Uchimiya, *supra* note 21, at 123, 127.

[252] *BIA Requires Asylum Seekers to Identify Particular Social Group*, *supra* note 89.

[253] Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

[254] Doan, *supra* note 2.