1-1-2016

**Blood Relations: Analyzing Kinship Based, Gang-Related Asylum Claims under the Lens of Understanding Particular Social Groups**

Maria S. Hwang

*Suffolk University Law School*

Follow this and additional works at: [https://dc.suffolk.edu/jtaa-suffolk](https://dc.suffolk.edu/jtaa-suffolk)

Part of the Litigation Commons

**Recommended Citation**


This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.
BLOOD RELATIONS: ANALYZING KINSHIP BASED, GANG-RELATED ASYLUM CLAIMS UNDER THE LENS OF UNDERSTANDING “PARTICULAR SOCIAL GROUPS”

Over the past few decades, the United States has seen a rush of immigrants, searching to escape the devastating effects of gang violence, which include killings, beatings, drug dealings, and intimidation. Meanwhile, the United States has implemented tougher immigration policies in an effort to discourage those with criminal histories from entering the United States. Such efforts have resulted in a surge in gang-related asylum cases in recent years. Individuals claiming gang-related asylum often face threats, beatings, and watch their friends, families, and community members systematically killed. Although some asylum-seekers themselves have never participated in gang activity, or have been victims of gang activity, it remains that most circuits and the Board of Immigration Appeals (B.I.A.) are reluctant to grant kinship-based, gang-related asylum cases.

The severity of Central American street gang presence is

---

1 See Diane Uchimiya, Falling Through the Cracks: Gang Victims As Casualties in Current Asylum Jurisprudence, 23 BERKELEY LA RAZA L.J. 109, 113 (2013) (naming targets of violent street gangs in Central America). “[G]angs threaten, beat, and abuse people for refusing to join a gang, opposing the gang, refusing to be the girlfriend of a gang member, attempting to leave the gang, belonging to a rival gang, or simply being a family member of someone who has resisted a gang.” Id. at 113; see also Mandalit Del Barco, The International Reach of the Mara Salvatrucha, NPR (Mar. 17, 2005, 12:00 AM), http://www.npr.org/2005/03/17/459688/the-international-reach-of-the-mara-salvatrucha (detailing violent crimes committed by gangs like Mara Salvatrucha 13).


5 See infra Part IV (exploring family-based, gang-related asylum).
highlighted by natives fleeing their gang-ridden towns at a rapidly increasing rate, despite the risks and challenges that accompany the path to the U.S.-Mexico border. Specifically, the trek to the United States usually involves paying a hefty fee to smugglers, known as coyotes. These smugglers often times sexually exploit and physically assault their human cargo. Additionally, the route to the United States remains incredibly dangerous due to lack of shelter and water in the desert-like terrain of Mexico. Despite all these dangers, many immigrants still view coming into the United States as their only option and make the long, treacherous trip to the United States.

Asylum and other forms of humanitarian relief are typically out of grasp for gang members or other violent criminals. However, granting asylum to those who have been subject to persecution by gangs appears to fit the overall mission of granting asylum, which is to relieve those who face danger or death due to uncontrollable circumstances in countries where the government is reluctant or unable to help. Although asylum options for gang members have typically not been disputed, those associated with gang members, specifically family members or gang targets, continue to receive inconsistent treatment by the courts.

---

6 See Orlang, supra note 3, at 623-34 (recording diaspora from gang controlled towns and territories).
8 See id. at 798-99 (identifying abuse suffered by migrants at hands of coyotes).
13 Compare Cordova v. Holder, 759 F.3d 332, 340 (4th Cir. 2014) (remanding case due to B.I.A.’s failure to consider persecution based on relation to gang targets), with In re S.E.G., 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (determining kin of youths targeted by gang recruitment was
This note explores the definition of a “member of particular social group” under asylum law and analyzes when, if ever, families of gang members or targets can seek asylum. Part I explains the legislative history of asylum law, focusing on how post-9/11 legislation has impacted asylum and immigration law. Part II will be a history of American gangs and how their power dynamic in Central American communities drive migration patterns. Current trends in asylum law are discussed in Part III, which illustrates how the definition of “particular social group” has morphed and narrowed over time. Part IV analyzes the inconsistencies in defining “particular social group” when determining the eligibility of family members of gang members who are applying for asylum. Lastly, Part V will discuss how advocates should introduce and discuss gang-affiliated asylum cases to immigration judges (“IJs”).

I. LEGISLATIVE HISTORY OF ASYLUM

Asylum was originally created as part of the 1951 United Nations Convention relating to the Status of Refugees Convention (“Convention”) and the 1967 United Nations Protocol (“Protocol”) relating to the Status of Refugees. United States asylum law is unique because it is primarily derived from international law. Current United States asylum law was codified in the Immigration and Alien Act of 1952. An alien qualifies for asylum if he or she is presently in the United States or is arriving to the United States and meets the definition of a refugee. The definition of refugee is as follows:

A refugee means any 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.24

To be a refugee, an alien must have faced past persecution or have a well-founded fear of future persecution based on membership of a class listed in U.S.C. § 1101(a)(42).25 Moreover, the refugee cannot be willing or able to return to her or his country of origin.26

The definition of asylum and asylee has been amended over time in an effort to preclude dangerous aliens from entering or remaining in the United States.27 For example, three laws that narrowed the definition of asylum include: the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), and the Real ID Act of 2005.28 One of the most striking changes was implemented by the IIRIRA.

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A).


25 See id. (naming persecution requirement).

26 See id. (listing five protected classes).


which created a list of exceptions precluding aliens from deportation relief,
even in cases where asylum would typically be granted.\(^{29}\) Congress
enacted the USA PATRIOT Act, which includes a provision aimed at
removing aliens suspected of terrorist activity, as well preventing suspected
terrorists from entering the United States.\(^{30}\) The USA PATRIOT Act also
bars any alien who has participated in unlawful activity or terrorist activity
from entering or remaining in the United States.\(^{31}\) It also broadened
the definition of “terrorist activity” to include a new range of activities.\(^{32}\)
Finally, the REAL ID Act established that, when determining if an asylum
alien is credible, a trier of facts should make a credibility determination
based on six factors.\(^{33}\)

II. A BACKGROUND OF TRANSNATIONALGANNS:
MARASALVATRUCHA 13 AND 18TH STREET

As globalization continues to rise, gangs too have become
increasingly transnational entities.\(^{34}\) Previously, most gangs were small

\(^{29}\) See 8 U.S.C. § 1231(b)(3)(B) (2015) (listing some ways aliens can be denied admission). The Attorney General can deny admission to any alien if “there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States or there are reasonable grounds to believe that the alien is a danger to the security of the United States.” \textit{Id.; see also} GERMAIN, supra note 11, at 12-14 (expounding on Attorney General’s ability to deny admission based on past criminal conduct).

\(^{30}\) See USA PATRIOT Act § 411 (listing what is included in definition of “terrorist activity”); \textit{see also} GERMAIN, supra note 11, at 13-14 (explaining how USA PATRIOT Act affected immigration law).

\(^{31}\) See USA PATRIOT Act § 411 (excluding admission from those whom have engaged in terrorist activity).

\(^{32}\) See 8 U.S.C. § 1182(a)(3)(B)(iii)(V) (2015) (showing broad definition of “terrorist activity”). Terrorist activity now includes use of “explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property” in definition of “terrorist activity”. \textit{Id.; see} USA PATRIOT Act § 411 (changing language of Immigrant and Nationality Act).

\(^{33}\) See GERMAIN, supra note 11, at 92 (listing six factors). The trier of facts should make a credibility determination based on:

- (1) demeanor, candor, or responsiveness of the applicant’s or witness’s account;
- (2) the consistency between the applicant’s or witness’s written and oral statements;
- (3) the internal consistency of each such statement;
- (4) the consistency of such statements with other record evidence . . . ;
- (5) any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant’s claim; and
- (6) any other relevant factor.

\textit{Id.}

street gangs that posed little threat to the overall safety of the community. Two examples of large transnational gangs are Mara Salvatrucha 13 (MS-13) and 18th Street. MS-13 and 18th Street began in the 1980s and 1990s in Los Angeles, California by small enclaves of immigrants. Young Salvadorian immigrants created MS-13 and 18th Street as a strategy to protect them from pre-existing gangs in Los Angeles. However, it is often noted that there were many factors that caused the creation of Latin American gangs in Los Angeles, including poverty and lack of opportunity. Inevitably, these gang members were deported in an effort to control violent crime and deportation became a crime control tool. Although MS-13 and 18th Street were originally local and self-contained, deportation of gang leaders contributed to the spread of gang membership in Central American countries, primarily in El Salvador, Honduras, and Guatemala.

See Papachristos, supra note 34, at 50 (contrasting small, local gangs of past to large, present gangs). “One of the most urgent challenges for policy-makers is distinguishing between the average street gangs and groups that operate as criminal networks. Until recently, gang membership was a common part of city boyhood and not terribly detrimental.” Id. See Arana, supra note 2, at 101-02 (acknowledging powerful presence of MS-13 and 18th Street); Freddy Funes, Note, Removal of Central American Gang Members: How Immigration Laws Fail To Reflect Global Reality, 63 U. MIAMI L. REV. 301, 302 (2008) (noting MS-13 and 18th Street are two largest gangs in Americas).

See Diane Uchimiya, supra note 1 (explaining when and where gangs like MS-13 and 18th Street developed).


See Wash. Off. of Latin Am., supra note 38, at 2 (discussing variety of factors that led to formation of Latin American gangs).


See Papachristos, supra note 34, at 53 (detailing migration of gang members from United States to Latin America). “U.S. immigration policy has amounted to unintentional state-sponsored gang migration. Rather than solving the gang problem, the United States may have only spread it.” Id.; see Funes, supra note 36, at 304-10 (analyzing effect of deportations on spread of American gang violence). “From Los Angeles, these gangs expanded throughout the United States. Now, MS-13 has members in thirty-one states and the District of Columbia. Through the United States’ removal policy, the gangs spread to El Salvador, Guatemala, and Honduras.” Funes, supra note 36, at 304.
judicial and enforcement power to handle the sudden and rapid influx of criminal deportees from the United States; these countries still struggle with gang enforcement today. 42 Some have claimed that the United States’ deportation program lacked foresight and that it is the sole cause of the present gang problem in Central America. 43

Gang violence in Central America is strongly influenced by social and economic problems and it is not just a criminal justice issue. 44 Central American countries lack judicial and enforcement power both in the national and local governments. 45 Many Central American countries have an insufficient number of judges, prosecutors, and programs to protect victims. 46 Perhaps the most problematic consequence of the mass deportation of gang members from the United States was the lack of jobs available to deportees upon arrival to their country of origin. 47 Deportees had little to no specialized skills and many spoke Spanish poorly. 48 Unemployment, paired with pre-existing extreme poverty in Honduras, Guatemala, and El Salvador, created an environment that pushed young people into gang life. 49 Currently, gangs like MS-13 and 18th Street have made their way back to the U.S., cropping up in many large North

42 See Papachristos, supra note 34, at 53 (“The countries that receive the flood of deportees are usually ill-equipped to deal with so many returning gang members.”).
43 See Arana, supra note 2, at 105 (“Some Central American government officials have accused the United States of inflicting the problem on them, comparing Washington’s deportation of gang members to the 1980 Mariel boat lift, when Fidel Castro supposedly emptied his prisons and shipped the inhabitants north to Miami.”).
44 See Papachristos, supra note 34, at 54-55 (depicting social and economic aspects of gang violence).
45 See Orlang, supra note 3, at 623-24 (recording development of gangs in Central America while listing their criminal activity). The civil wars that plagued Central America lead to unstable infrastructures and widespread poverty. Id. at 623.
46 See Corsetti, supra note 12, at 411-14 (marking inability of government to control gang violence). For example, Guatemala faces a number of challenges when fighting gangs. Id. Gang members continuously threaten those who assist in the prosecution of gang members. Id. at 413. There has also been a failure to develop rehabilitation programs or institute judicial reforms. Id. There is no credible witness protection or relocation program to protect witnesses from retribution. Id.
47 See Papachristos, supra note 34, at 51 (describing lack of jobs in Central American cities due to globalization). There has been a mass departure of manufacturing jobs in many parts of the developing world. Id. Simultaneously, gang violence has dramatically increased. Id.
48 See id. (mentioning lack of job training among those who were deported to Central American countries); see also Del Barco, supra note 1 (stating many gang members could not speak fluent Spanish when deported back to Latin America).
49 See Funes, supra note 36, at 310 (characterizing extreme poverty in Central America). In Central America, many people leave on less than two dollars a day. Id. The unemployment rate is about sixty-five percent. Id. “[S]uch levels of underemployment and unemployment among youths causes disharmony. This disharmony manifests itself as gangs and crime.” Id. at 311.
American cities. Globalization, coupled with the impact of violent civil wars, has only served to strengthen gang formation and control in Central American cities and towns. During the civil war in El Salvador, for example, men and boys were recruited, at ages as young as fourteen years old, into combat. Young boys received military training and endured horrific war experiences, which equipped them to become some of the most violent gang members. In addition, gangs continue to be zealous recruiters. Gangs typically recruit young people by employing tactics of threats and physical violence. Both young men and women are targeted by gangs' recruiting tactics. Young women and girls are often victims of gender-based violence such as gang rapes. As a result, Central American gangs have grown into huge entities. Their memberships range in the tens of thousands and they are often well-equipped with weaponry and community influence. Central American gangs maintain their power by filling their communities with fear, using violent and random tactics such as murder and rape to control territory, and sustaining a cash flow from illicit activities such as smuggling, extortion, and drug-dealing.

50 See Wash. Off. of Latin Am., supra note 38, at 2 (observing how MS-13 and 18th Street have spread).
51 See Del Barco, supra note 1 (chronicling cycle of violence in El Salvador). “The cycle seems without end . . . Children of Central America’s bloody wars immigrated to the U.S., where they became violent gang members, then deported back to Central America to begin another generation.” Id. (internal quotation marks omitted).
52 See id. (recounting use of child soldiers during Salvadorean civil war).
53 See id. (narrating veteran’s experience with gangs). A former gang member and civil war veteran describes his experience during the El Salvadorian Civil War: “[W]e were taught to kill our own people, no matter if they were from your own blood. If your father was the enemy, you had to kill him. So the training we got during the war in our country served to make us one of the most violent gangs[.]” Id.
54 See Robles, supra note 10 (observing how gangs recruit children at schools, targeting very young children). In one month, seven children were killed by gang members. Id. Some were as young as seven years old. Id.
55 See Wash. Off. of Latin Am., supra note 38, at 5 (speaking of how gang members are often times victims as well as members).
56 See id. at 3 (explaining both men and women are targeted by gang violence and recruitment tactics).
57 See id. (noting violence taken out on female gang members during initiation).
58 See Arana, supra note 2, at 101 (counting huge gang membership); Corsetti, supra note 12, at 409-10 (describing large gang population in prisons).
59 See Arana, supra note 2, at 101 (estimating number of gang members at 70,000 in El Salvador and Honduras); see also Corsetti, supra note 12, at 409-10 (taking note of large number of incarcerated gang members). In Guatemala alone, there are over 80,000 gang members. See id. at 409 (detailing gang activities in Guatemala). Those who are still active gang member are often well-armed with “sophisticated weaponry.” Id. at 410.
60 See El Salvador 2013 Human Rights Report, U.S. DEP’T OF STATE 1, 7 (March 21, 2014),
Although the governments in Guatemala, El Salvador, and Honduras have all attempted to control gang activity, none have succeeded. Honduras and El Salvador have adopted “mano dura” tactics, literally meaning strong hand tactics. Mano dura is a zero tolerance approach to gang members. Individuals merely suspected of gang membership can face up to twelve years in prison.

Mano dura tactics have been largely detrimental. Prisons have reached record capacity rates and some have argued that it has aided the gang growth. Simultaneously, murder rates have continued to rise. However, while the mass incarceration of gang members was initially effective, it has sparked retaliatory attacks by gang members against local communities and police. In addition, mass incarceration does not reach what many acknowledge to be the root cause of violent street gangs: severe violence and corruption to gang activity); Del Barco, supra note 1 (recording violence and randomness of crimes executed by gangs).


62 See Arana, supra note 2, at 102 (explaining mano dura tactics used by Honduran and El Salvadorian governments).

63 See id. at 102-03 (describing mano dura tactics); see also Funes, supra note 36, at 312-13 (scrutinizing highly repressive laws passed by Central American countries). Tattoos have become a distinctive way for Central American law enforcement to identify gang members. Id. Police arrest those suspected of being involved in gang activity, sometimes solely based on their appearance and tattoos. Id. This has resulted in a mass incarceration of young people who may or may not have been involved in gang activity. Id.

64 See Guatemala 2012 Human Rights Report, supra note 61, at 7 (alleging Guatemalan police forces conducted arbitrary arrests during anti-gang operations); see also Arana, supra note 2, at 102 (describing harsh penalties for suspected gang membership); Funes, supra note 36, at 312 (noting twelve year penalty for “illicit association”).

65 See Wash. Off. of Latin Am., supra note 38, at 4 (writing about negative effects of mano dura policies).

66 See Arana, supra note 2, at 102 (describing Honduran prison systems). “Within a year [of the implementation of the mano dura tactics], the Honduran prison systems had swelled to 200 percent beyond capacity, leading to several prison riots.” Id. “We think of prison as punishment, but in many instances, we’re just reinforcing their loyalty to the gang.” Id. at 106 (internal quotation marks omitted).

67 See id. at 102 (“Honduras today has a murder rate of 154 per 100,000—higher even than Colombia’s, where, despite an ongoing civil war, the murder rate is just 70 per 100,000.”)

68 See Wash. Off. of Latin Am., supra note 38, at 4 (taking note of how manos duras tactics position gangs against police); see also, Guatemala 2012 Human Rights Report, supra note 61, at 7 (recording retaliation against local communities).
Rather than thinking of gang violence as exclusively a criminal justice system issue, it should be thought of as a problem of institutionalized poverty. “Scores of gang members go through the revolving criminal justice door and return to communities that offer no viable employment opportunities.” Incarceration and policies such as the mano dura tactics will never result in a solution to the problem of gang violence.

III. THE DEVELOPMENT OF ASYLUM AND THE DEFINITION OF “PARTICULAR SOCIAL GROUP”

One of the first ways the courts narrowed membership of a particular social group was by the requirement that members must share a “common, immutable characteristic,” a standard which is now known as the Acosta test. The courts have repeatedly reaffirmed the use of the Acosta test. The B.I.A. has determined that a common, immutable

---

69 See Funes, supra note 36, at 312 (concluding mass incarceration of those suspected of gang activity produced few results); Papachristos, supra note 34, at 54-55 (predicting gang violence cannot be remedied solely by law enforcement). After the implementation of anti-gang legislation, there has been no change in the amount of violent crime in Central America. Id. Gang violence is a social problem and not just a criminal justice problem. Id.; see Del Barco, supra note 1 (declaring most everyone agrees that cause of proliferation of gangs is desperate poverty).

70 See Papachristos, supra note 34, at 55 (speaking of gang violence as social problem rather than criminal problem).

71 Id.

72 See Arana, supra note 2, at 102 (“Despite initial sign of success, however, human rights groups bitterly criticized the new hard-line approach, and local [Central American] governments soon began to realize what U.S. officials had learned in the early 1990s: that tough legislation alone cannot fix the gang problem.”); see also Papachristos, supra note 34, at 55 (calling for more than arrests and incarcerations to battle gang violence). Papachristos asks that governments consider “economic structures . . . that breed street gangs” rather than rely solely on law enforcement to solve the gang problem. Id.


[Asylum can be claims based on:] membership in a particular social group . . . persecution on account of race, religion, nationality, and political opinion. Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.

74 See Koudriachova v. Gonzales, 490 F.3d 255, 263 (2d Cir. 2007) (applying Acosta test).
characteristic has two components, particularity and social distinction.  

The requisite particularity and social visibility have been accepted by many circuits; however, particularity and social distinction still have no clear definition. One way that the board has refined the definition of particularity is by finding that particular social groups cannot be amorphous, meaning that the membership of the particular social group is subject to change or choice. The definition of social distinction, although it has been litigated more, also remains uncertain. One circuit, the Seventh Circuit has completely rejected the requirement for social distinction. The Seventh Circuit criticized the social visibility requirement, stating that, “Often it is unclear whether the Board is using the term ‘social visibility’ in the literal sense or in the ‘external criterion’ sense, or even whether it understands the difference.”

The Second Circuit rejected the concept that members of a particular social group needed to have an associational relationship and instead applied the Acosta test. Id. at 262-63; see Castillo-Arias v. United States Attorney Gen., 446 F.3d 1190, 1196 (11th Cir. 2006) (implementing Acosta test); Niang v. Gonzales, 422 F.3d 1187, 1200 (10th Cir. 2005) (applying Acosta test); see Ellen v. Ashcroft, 364 F.3d 392, 397 (1st Cir. 2004) (holding Haitians who committed crimes are not member of particular social group under Acosta); Castellano-Chacon v. INS, 341 F.3d 533, 546-49 (6th Cir. 2003) (“Tattooed youth is overbroad and cannot be seen as constituting a collection of people closely affiliated with each other, who share a ‘common, immutable characteristic.’”); Mya Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) (considering Acosta test as best test); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994) (reiterating members of particular social group must have common characteristic); Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (accepting Acosta test).

See In re A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007) (noting particularity requirement); In re C-A-, 23 I. & N. Dec. 951, 959-60 (B.I.A. 2006) (determining that members of particular social group must have social visibility); see also GERMAIN, supra note 11, at 51 (elicitng restrictions surrounding membership of particular social group).

See In re M-E-V-G-, 26 I. & N. 227, 228 (B.I.A. 2014) (renaming social visibility as social distinction). “The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.” Id. at 239. It should be recognized that social visibility and social distinction are synonymous. Id. at 228.


See Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) (analyzing complexity of social distinction); Scatambull v. Holder, 558 F.3d 53, 57 (1st Cir. 2009) (affirming B.I.A.’s findings that aliens lacked social distinction); In re M-E-V-G-, 26 I. & N. Dec. at 234 (emphasizing that ocular visibility is not synonymous with social visibility); In re E-A-G-, 24 I. & N. Dec. 591, 594-95 (B.I.A. 2007) (establishing that members of particular social group must be recognizable by society); In re C-A, 23 I. & N. Dec. at 959-60 (requiring social visibility).

See Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) (rejecting social visibility requirement).

See Ramos, 589 F.3d at 430 (analyzing meaning of visibility). The court explained further:

In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can’t be. “Visibility” in the literal
In Gebremicheal v. I.N.S., the First Circuit held that a family qualifies as a particular social group. Some courts have granted asylum based on kinship if the alien is able to show that a member of his or her family has faced persecution. However, some courts have restricted the approval of family-based asylum claims by necessitating a strong tie between personal persecution and family ties. For example, in Cordova v. Holder, the Fourth Circuit determined that the B.I.A. failed to apply the law correctly when it determined that the alien was not persecuted on account of kinship because his uncle and cousin had not been persecuted due to kinship. The B.I.A.’s application of logic necessitates that in order for someone to be persecuted on the basis of kinship; everyone in their family must be persecuted on the basis of kinship.

The courts have also excluded personal vendettas or disputes from the sense in which the [B.I.A.] has sometimes used the term might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution it will be on the ground of group membership.

Id. 10 F.3d 28 (1st Cir. 1993).

See id. at 36 (“There can, in fact, be no plainer example of a social group based on a common, identifiable and immutable characteristic than that of the nuclear family.”); see also Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (7th Cir. 2004) (joining sister circuits in recognizing family as particular social groups); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (“[A] prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interest for most people.”); In re C-A, 23 I. & N. Dec. at 959 (Social groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups.”); GERMAIN, supra note 11, at 104-05 (supporting families as fitting definition of “particular social group”).

See GERMAIN, supra note 11, at 104 (showcasing case law that granted aliens asylum due to persecution of family members) (citing Abay v. Ashcroft, 368 F.3d 634, 641-42 (6th Cir. 2004)).

See Torres v. Mukasey, 551 F.3d 616, 632 (7th Cir. 2008) (mandating if asylum is granted, it must be based on alien’s relationship to his brothers); Mediouni v. INS, 314 F.3d 24, 28 (1st Cir. 2002) (necessitating strong and narrow link between persecution faced because of family bond). The First Circuit explains “[w]hile this evidence may permit an inference that the son of a deceased colonial-era military police officer could be targeted for attack by terrorists, it does not compel it.” Id. The court states that there is an insufficiency of proof showing that there is present persecution of family members of police officers. Id. In addition, the alien did not produce evidence that his lifestyle was offensive to his persecutors, Islamic radicals. Id.

See id. at 339 (“In other words, because [the alien’s] family members were not targeted based on kinship ties, the B.I.A. reasoned that [the alien] could not have been targeted based on kinship ties.”). The Fourth Circuit found this logic to be faulty and remanded the case back to the B.I.A. with direction to reconsider the family based-asylum claim. Id. at 339-40.

See id. (noting B.I.A.’s asylum refusal because alien’s uncle and cousin were not persecuted due to kinship).
claims of persecution based on family ties. Aliens may not claim asylum based on persecution that is personal or individualized. In two cases, *Amilcar-Orellana v. Mukasey* and *Cordova*, it was determined that the aliens were precluded from receiving asylum because the persecution was determined to be based on personal vendettas and not based on membership of a particular social group. In *Amilcar-Orellana*, the court determined that the threats against the alien were a result of a personal vendetta, not as a result of membership of a particular social group. In *Cordova*, the B.I.A. ruled that the beatings and threats endured by the alien was a part of individualized gang recruitment, not because he was part of a particular social group. However the Fourth Circuit rejected this finding because it refused to acknowledge all the attacks targeted towards the alien, and only conceded to the two instances in the alien’s testimony.

Notwithstanding, when considering gang-related claims, the courts have been hesitant to grant asylum, concluding that gangs are not particular social groups. There have been few petitions that have been granted based on gang-affiliated claims. Consequently, courts have determined

---

88 See GERMAIN, supra note 11, at 105 (contrasting accepted cases with those rejected because persecution was based on personal disputes) (citing Cordero-Trejo v. INS, 40 F.3d 482 (1st Cir. 1994)).

89 See Amilcar-Orellana v. Mukasey, 551 F.3d 86, 89-90 (1st Cir. 2008) (denying asylum where persecution faced by alien was considered individualized). In this case, the alien was an informant against Boston gang members. *Id.* at 87. After the gang members had been deported, the alien suffered attacks and threats from them. *Id.* at 88.

90 551 F.3d 86 (1st Cir. 2008).

91 See id. at 91 (agreeing with B.I.A. that persecution was on account of personal dispute); see also Cordova, 759 F.3d at 339 (explaining persecution on personal reasons precludes asylum).

92 See Amilcar-Orellana, 551 F.3d at 91 (“The B.I.A.’s determination is supported by the evidence. The record supports the conclusion that Amilcar-Orellana’s fear of persecution stems from a personal dispute with X and Y, not his membership in a particular social group.”).

93 See Cordova, 759 F.3d at 339-40 (analyzing B.I.A.’s finding that being subject to gang recruitment would not qualify alien for asylum).

94 See id. (rejecting the decision of B.I.A.).

95 See In re E-A-G-, 24 I. & N. Dec. at 595 (agreeing that gangs have social visibility, but still rejecting them as particular social group). The court found that gangs have social visibility because they are a “recognized evil” in their respective communities. *Id.* The court determined that Congress never intended to allow “violent street gangs who assault people and who traffic in drugs and commit theft” to qualify as a members of a particular social group. *Id.* at 596 (quoting Arteaga v. Mukasey, 511 F.3d 940, 945-46 (9th Cir. 2007)).

96 See Ramos v. Holder, 589 F.3d 426, 431-32 (7th Cir. 2009) (granting withholding of removal to former gang member). The alien was a born-again Christian who was formerly a MS-13 member in El Salvador. *Id.* at 428. After his religious conversion, he felt that he could no longer rejoin the gang, but was being harassed by current MS-13 gang members. *Id.* The alien claimed that he was recognizable due to his gang tattoos and successfully attained withholding of removal and was considered as part of a particular social group, “tattooed, former Salvadoran
that family members of gangs or those affiliated with gangs cannot be part of particular social groups. Individuals persecuted by gangs, whether through recruitment efforts or other means, have been unable to receive asylum. On the other hand, families of gang members and gang targets have received inconsistent treatment when granting asylum. Past cases have shown that courts have judged gang-related asylum cases under a stricter scrutiny. Critics claim that refusing relief to those persecuted by gangs fails to work within the original intent of the 1951 United Nations Convention relating to the Status of Refugees (“1951 Convention”). Although aliens associated with gangs have faced stricter scrutiny in asylum proceedings, the courts should not construe any gang affiliation to be mutually exclusive with a valid asylum claim.

97 See Paiz-Morales v. Lynch, 795 F.3d 238, 245 (1st Cir. 2015) (denying judicial review of asylum petition based on opposition to gangs); In re S-E-G-, 24 I. & N. Dec. 579, 588-89 (B.I.A. 2008) (refusing asylum to victims of violent gang recruitment tactics). The aliens alleged that they were harassed and beaten because of their refusal to join MS-13. Id. at 579-80. The B.I.A. found that they could not be members of a particular social group because they are not “perceived as a group.” Id. at 587. In addition, the court alleged that the aliens had failed to prove “that these individuals suffer from a higher incidence of crime than the rest of the population.” Id.; see Linda Kelly Hill, Immigration: The Gangs of Asylum, 46 GA. L. REV. 639, 646 (2012) (recognizing families of gang resisters are often denied asylum).

98 See Santos-Lemus v. Mukasey, 542 F.3d 738, 745 (9th Cir. 2008) (stating targets of gang recruitment have neither social visibility nor particularity); In re S-E-G-, 24 I. & N. Dec. at 588 (concluding refusal to join gangs on religious or moral grounds does not have social visibility); In re E-A-G-, 24 I. & N. Dec. at 595 (admitting gangs have social visibility, but rejecting asylum claim on other grounds); see also Uchimiya, supra note 1, at 113 (observing successful gang-related asylum claims have sometimes been based on narrowly-tailored family ties).

99 See Cordova v. Holder, 759 F.3d 332, 340 (4th Cir. 2014) (remanding alien’s case, where alien claimed kinship to gang members). The alien alleged that he was being persecuted due to his family ties to his brother and his uncle, who were members of the 18th street gang, a rival gang to MS-13. Id. at 338. The Fourth Circuit held that the Immigration Judge (IJ) and B.I.A. incorrectly found that the alien was not being persecuted due to kinship. Id. at 339. “[B]ecause [the alien’s] family members were not targeted based on kinship ties, the B.I.A. reasoned that [the alien] could not have been targeted based on kinship ties.” Id.; see Crespin-Valladares v. Holder, 632 F.3d 117, 125-26 (4th Cir. 2011) (determining that families do have requisite social visibility).

100 See In re E-A-G-, 24 I. & N. Dec. at 595-96 (finding that gangs should not receive reprieve through asylum); see also Brief of the United Nations High Comm’r for Refugees as Amici Curiae Supporting Petitioner, Valdivieza-Galdamez v. Holder, 663 F.3d 582 (3rd Cir. 2011) (No 08-4564) (discussing how particularity and social visibility requirements act in contrary to 1951 Convention).

101 See Brief of the United Nations High Comm’r for Refugees as Amici Curiae Supporting Petitioner, supra note 100, at 7-17 (determining S-E-G- was inconsistent with intent of Convention Against Torture (CAT)). The application of social visibility and particularity as applied in S-E-G- were not aligned with the humanitarian nature of the CAT. Id.

102 See In re M-E-V-G-, 26 I. & N. Dec. 228, 251 (B.I.A. 2014) (explaining there should not be “a blanket rejection of all factual scenarios involving gangs.”).
Advocates are able to show that the alien’s particular social group has faced persecution through corroborating evidence such as country condition documents.\footnote{See also Wash. Off. of Latin Am., supra note 38, at 2 (offering explanation of country conditions documents).} If asylum is properly denied, then an alien may be asked to supply additional country condition documents.\footnote{See generally Kurtis A. Kemper, Necessity and Sufficiency of Evidence Corroborating Alien’s Testimony to Establish Basis for Asylum or Withholding of Removal, 179 A.L.R. FED. 357 (2002) (explaining when additional documents may be required by reviewing courts).} However, if the IJ or B.I.A. improperly denied the alien asylum and the IJ’s or B.I.A.’s decision was based on unsubstantial evidence, then additional evidence may not be necessary.\footnote{See id. (expounding on when additional evidence may not be needed).}

IV. THE INCONSISTENT TREATMENT OF “PARTICULAR SOCIAL GROUP” WHEN APPROACHING GANG-RELATED CASES

Courts should not reject valid asylum cases simply because the aliens are related to or have had affiliations with gang members.\footnote{See In re M-E-V-G-, 26 I. & N. Dec. at 251 (finding that gang affiliation should not preclude aliens from receiving asylum).} Many asylum seekers have been denied due to their affiliation with gangs.\footnote{See In re E-A-G-, 24 I. & N. Dec. at 596 (claiming that permitting gang-affiliated aliens to receive asylum is against public policy).} Two reasons that the B.I.A. and courts have cited for denying these asylum claims are (1) the persecution faced is individualized and not targeted towards a particular social group and (2) the alleged particular social group lacks the requisite social visibility and particularity.\footnote{See Santos-Lemus v. Mukasey, 542 F.3d 738, 745 (9th Cir. 2008) (stating targets of gang recruitment have neither social visibility nor particularity); In re S-E-G-, 24 I. & N. Dec. at 588 (denying asylum on grounds that attacks were individualized).} Despite the acceptance of families as particular social groups, there is still a hesitation to accept families of gang affiliates as particular social groups.\footnote{See supra notes 95-97 and accompanying text (noting cases where gang-related asylum have been denied).} However, so long as the basis of persecution is the family tie and is congruent with other immigration standards, the reason that the family is persecuted is not pertinent.\footnote{See Gonzales v. Thomas, 547 U.S. 183, 186-87 (2006) (ordering consideration of family as particular social group).} When an alien makes an asylum claim based on kinship ties to a gang affiliate, the IJ should make a determination of validity of the persecution based on kinship ties, not based on the fact that kinship ties are based on gang affiliation.\footnote{See id. (remanding case due to lack of analysis of family ties claim).}
Courts claim that those who are persecuted by gangs fail to fall under the requisite definition of “particular members of a social group” because the problems faced by gang targets are individualized attacks.\footnote{See Santo-Lemus v. Mukasey, 542 F.3d 738, 745 (9th Cir. 2008) (analyzing whether targets of gang members have social visibility or particularity); S-E-G-, 24 I. & N. Dec. at 588 (finding that persecution based on individualized attacks do not qualify for asylum); see also In re E-A-G-, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (admitting gangs have social visibility, but rejecting asylum claim on other grounds).} However, this view naively treats gang violence as a series of individualized attacks and fails to see the broader, global, and systemic issue of international gang violence.\footnote{See supra Part III.} Gang violence in Central America has been a longstanding problem and its causes include devastating unemployment, a long history of civil war, and a lack of government infrastructure to control the problem.\footnote{See Del Barco, supra note 1 (observing effects of civil war on El Salvador); Funes, supra note 36, at 304 (detailing lack of infrastructure in Latin American countries); Papachristos, supra note 34, at 51 (connecting gang activity with severe unemployment rates).} Furthermore, there is evidence to show that gang intimidation and violence has resulted in corrupt government action by government agents.\footnote{See El Salvador 2014 Human Rights Report, U.S. DEP’T OF STATE 1, 1-2, 11-12 (2015), http://www.justice.gov/sites/default/files/pages/attachments/2015/06/26/dos-hrr_2014_el-salvador.pdf (discussing connections between gang influence, government, and political corruption).} The courts should instead acknowledge that confronting the systemic problem of gang violence is aligned with the goals of granting asylum.\footnote{See Lister, supra note 12, at 852 (remarking how gang-based asylum claims align with goals of granting asylum).}

In addition, it appears that courts and the B.I.A. are themselves contradictory when determining if attacks from gangs are individualized or widespread acts of violence; it is difficult to imagine that attacks are both widespread and individualized in every instance.\footnote{Compare Amilcar-Orellana v. Mukasey, 551 F.3d 86, 89-90 (1st Cir. 2008) (denying asylum because attacks were individualized), with In re S-E-G-, 24 I. & N. Dec. at 584 (supporting concept that gang violence is not targeted towards individuals but to all inhabitants.).} Although, in some cases, actions and attacks carried out may be based on individual vendettas, and treating all gang actions as personal vendettas fails to acknowledge the
detrimental recruitment styles of gangs. In addition, it ignores the ruthless use of threats, bribery and coercion used by gangs. Claiming that these attacks are all fueled by individual vendettas also is contradictory to the claims the B.I.A.’s determination that generalized attacks also cannot allow aliens to make a valid asylum claim. These cases show that persecution cannot be individualized, or too generalized. This is a substantial burden to those petitioning for asylum because it necessitates they not only prove persecution, but also requires that violence is not generally experienced by those in their native country.

The dismissal of families of gang members or gang targets as a particular social group because it is too generalized creates another unnecessary hurdle to claiming asylum. It essentially states that if a group is too large, then the group cannot attain relief. The disqualification of a social group merely because it is too large is not required by any asylum law. In addition, disqualifying a petition because many or all inhabitants of the alien’s country of origin suffer persecution refuses relief to nationals from the most violent and troubled countries.

Some have claimed that the requirement of particularity is poorly defined and does not align with the intent of the 1951 Convention. Instead, the particularity requirement creates a size restriction, which

---

118 See Robles, supra note 10 (taking note of recruitment of children in schools by gangs).
119 See id. ("In some cities, blocks are empty because gangs demanding extortion payments have forced out homeowners. Many people have had to move within the country in a displacement pattern that experts liken to the one seen in Colombia’s civil war."). These tactics are emptying communities, leaving gangs in power over a lot of territory. Id.
120 See In re S-E-G-, 24 I. & N. Dec. at 587 (claiming that persecution is too widespread that no one group can suffer persecution). "Gang violence and crime in El Salvador appear to be widespread, and the risk of harm is not limited to young males who have resisted recruitment, or their family members, but affects all segments of the population." Id.
121 See id. (discussing qualifications for persecution based on protected classes).
122 See id. (determining violence in El Salvador means young El Salvadorian men cannot experience specific persecution).
123 See id. at 587-88 (noting difficulty in narrowing group affected by gang violence from general population in El Salvador).
124 See Brief of the United Nations High Comm’r for Refugees as Amici Curiae Supporting Petitioner, supra note 100, at 14 (quoting In re S-E-G-, 24 I. & N. Dec. at 584) ("First, the Board’s ‘particularity’ discussion refers to factors of size. In this case the Board said the group was too ‘broad.’ Id. In S-E-G-, the Board stated that ‘the size of the proposed group may be an important factor in determining whether the group can be recognized.’").
125 See id. at 15 ("Moreover, size is not a relevant criterion in establishing whether a particular social group is established under the refugee definition.").
126 See id. ("[T]he fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.").
127 See id. at 14-16. (criticizing particularity requirement).
deviates from the definition of refugee. Meanwhile, the addition of the requirement of particularity does little work to clarify the understanding of the definition of a particular social group. Instead, courts have treated the requirement of particularity as a matter of whether actual persecution has been experienced, not as an analysis of the definition of a particular social group.

Families of gang members and gang targets fall within definition of “particular social group.” As previously stated, members of a particular social group must have a common, immutable characteristic. This characteristic must have social visibility and particularity. Families of gang members and gang targets are groups that have a common, immutable characteristic—their family ties. However, it has been argued that being able to show an immutable characteristic does little to advance an asylum claim. As previously stated, the family has long been accepted as a particular social group. Courts that have refused asylum based on membership of a family that is persecuted by gangs have claimed that these families lack social visibility and particularity; therefore, they cannot be a particular social group. However, this logic contradicts the precedent

---

128 See Brief of the United Nations High Comm’r for Refugees as Amici Curiae Supporting Petitioner, supra note 100, at 14-16 (reframing particularity requirement as size requirement).
129 See id. at 16 (noticing lack of analysis of definition of particular social group in cases).
130 See In re S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (analyzing particularity). The B.I.A. determined that the aliens did not have particularity because there was no evidence to show that the aliens had been truly targeted by gangs’ recruitment efforts. See United Nations High Comm’r for Refugees, supra note 100, at 16. (criticizing the B.I.A.’s incorrect analysis of particularity).
131 See 8 U.S.C. § 1101(a)(42) (requiring either past “persecution or a well-founded fear of persecution” to claim asylum).
132 See In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (necessitating member of particular social group to have a common, immutable characteristic).
134 See Gebremicheal v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (recognizing families are particular social groups).
135 See Hill, supra note 97, at 644 (noting weakness of immutable characteristic requirement). For example, past experiences are an immutable characteristic but rarely assist an alien in attaining asylum or qualifying as a member of a particular social group. Id.
136 See Gebremicheal, 10 F.3d at 36 (acknowledging families as qualifying particular social groups).
137 See In re S-E-G-, 24 I. & N. Dec. at 582 (determining that families of gang targets are not particular social group). The B.I.A. found that “Salvadoran [sic] youths who have resisted gang recruitment, or family members of such Salvadoran [sic] youth” fail to have social visibility or particularity. Id. The B.I.A. primarily focused on the lack of an immutable characteristic, stating that youth is “by its very nature, a temporary state that changes over time.” Id. at 583. In
from the Supreme Court in finding that families can constitute a particular social group.\textsuperscript{138}

Decisions that do not to recognize that families being persecuted due to their ties to gang affiliates fail to consider the systematic killing of families by gangs, and instead focus primarily on the gang relation between individuals.\textsuperscript{139} This is misguided because it has already been established that families do constitute particular social groups; courts and the B.I.A. revisit this premise, ruling in contrast with what precedent has already decided.\textsuperscript{140} By re-examining whether families are particular social groups, one not only fails to follow precedence, but also mandates that social groups must be persecuted for an isolated reason.\textsuperscript{141} This circular logic was rejected by the Fourth Circuit, who found that the alien’s cause of fear of persecution due to kinship should be analyzed based on his own experiences and not fused with his family’s, simply because he is asserting persecution based on family membership.\textsuperscript{142}

V. HOW ADVOCATES SHOULD INTRODUCE AND DISCUSS GANG-AFFILIATED ASYLUM CASES TO IMMIGRATION JUDGES (IJS)

If courts accepted that families are persecuted based on gang affiliation, this would provide relief for gang victims.\textsuperscript{143} Families often times, are targeted by gangs.\textsuperscript{144} One reason why those affiliated with gangs

---

\textsuperscript{138} See Gonzales v. Thomas, 547 U.S. 183, 186-87 (2006) (finding families are particular social groups).

\textsuperscript{139} See In re S-E-G-, 24 I. & N. Dec. at 587 (stating gangs target everyone and anyone who interfere with their operations, not specific groups).

\textsuperscript{140} Compare Gonzales, 547 U.S. at 186-87 (determining family is particular social group) with In re S-E-G-, 24 I. & N. Dec. at 585 (“The proposed group of ‘family members,’ which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is also too amorphous a category.”).

\textsuperscript{141} See Cordova v. Holder, 759 F.3d 332, 339 (4th Cir. 2014) (discussing logic of B.I.A. when deciding whether alien’s family relation qualified as particular social group).

\textsuperscript{142} See id. (“The B.I.A. certainly did not err in holding that [alien’s] cousin and uncle were targeted because of their membership in a rival gang and not because of their kinship ties. But that holding does not provide a basis for concluding that MS-13 did not target [alien] on account of his kinship ties to his cousin and uncle.”).

\textsuperscript{143} See Wash. Off. of Latin Am., supra note 38, at 5 (speaking of how gang members are often times victims as well as members).

\textsuperscript{144} See id. at 5-6 (declaring there is substantial evidence to show that gangs do target families and individuals).
have been denied asylum is due to their reputation for violence.\textsuperscript{145} Granting asylum is largely discretionary.\textsuperscript{146} “Even if an advocate successfully presents arguments proving eligibility for asylum, the adjudicator has discretion to evaluate if an individual merits asylum.”\textsuperscript{147} Similarly, it has been often times viewed as against American public policy to give relief to those affiliated with gangs.\textsuperscript{148} However, it is difficult to see the reasoning to associating gang victims as partners or affiliates of their persecutors.\textsuperscript{149}

Rather than associate victims of gangs with their persecutors, judges could instead find that aliens should be precluded from receiving asylum if there is evidence that the alien was involved in any violent crime, her or himself.\textsuperscript{150} Removable asylum aliens could be removed by the provisions of the IIRIRA and the USA PATRIOT Act.\textsuperscript{151} The IIRIRA and USA PATRIOT Act contain language that could be used to prevent dangerous criminals from being admitted to the United States.\textsuperscript{152}

Rather than contorting the definition of particular social group to align with the public policy of removing dangerous or criminal immigrants, the courts should instead conduct a two part-analysis: 1) determine whether the alien belongs to a particular social group, and 2) analyze whether any

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145} See \textit{In re S-E-G-}, 24 I. & N. Dec. at 587-88 (exemplifying harsh and critical analysis that gangs and gang affiliates receive in asylum proceedings); \textit{In re E-A-G-}, 24 I. & N. Dec. 591, 595 (B.I.A. 2007) (proclaiming that gangs are “evil”); \textit{see also Wash. Off. of Latin Am., supra note 38, at 6 (“Language about Central American gangs does circulate in the justice system, eventually reaching the ears of powerful policymakers.”)).
\item \textsuperscript{146} See \textit{GERMAIN}, supra note 11, at 116 (noting asylum can be denied at judge’s discretion); \textit{see also Wash. Off. of Latin Am., supra note 38, at 2 (explaining judge’s discretion when granting asylum).}
\item \textsuperscript{147} \textit{Wash. Off. of Latin Am., supra note 38, at 2.}
\item \textsuperscript{148} See \textit{In re E-A-G-}, 24 I. & N. Dec. at 596 (“Treating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior.”); \textit{see also} Benjamin H. Harville, \textit{Ensuring Protection or Opening the Floodgates?: Refugee Law and its Application to Those Feeling Drug Violence in Mexico}, 27 GEO. IMMIGR. L.J. 135, 140-41 (2012) (discussing United States’ reluctance to provide asylum to victims of criminal violence). Some have argued that “because asylum was designed to protect people from repressive governments, the United States should not extend protection to those fleeing criminal violence, no matter how brutal.” Harville, \textit{supra.}
\item \textsuperscript{149} See \textit{Wash. Off. of Latin Am., supra note 38, at 5 (illustrating how gang members and former gang members are often victims themselves).}
\item \textsuperscript{150} See 8 U.S.C. § 1231(b)(3) (listing violent activity that can make aliens removable); USA PATRIOT Act § 411 (detailing when an alien may be inadmissible).
\item \textsuperscript{151} See 8 U.S.C. § 1231(b)(3) (“Restriction on removal to a country where alien’s life or freedom would be threatened[,]”); \textit{see also USA PATRIOT Act § 411 (detailing when an alien may be inadmissible).}
\item \textsuperscript{152} See 8 U.S.C. § 1231(b)(3); \textit{see also USA PATRIOT Act § 411 (detailing grounds for inadmissibility).}
\end{itemize}
\end{footnotesize}
past criminal or violent conduct would preclude the alien from being granted asylum. When determining if an alien should be precluded based on past criminal or violent activity, IJs could rely on legislation such as the IIRIRA and the USA PATRIOT Act. By utilizing language from the IIRIRA and the USA PATRIOT Act, the IJs would be able to effectively remove or deny admission to aliens, whom have an alarming criminal past. The broad language from the IIRIRA effectively precludes those with criminal pasts from asylum. Asylum aliens can be removed due to participating in persecution of an individual, being convicted of a serious crime, or if there is reason to believe that the alien committed a "serious nonpolitical crime outside the United States" or is a danger to the United States.

The USA PATRIOT Act expands the groups of people who are prohibited from claiming asylum by broadening the definition of terrorist activity, and making it clear that participation in terrorist activity will preclude anyone from claiming asylum. The USA PATRIOT Act makes a number of changes to the Immigration and Alien Act that redefines terrorist activity. This broad language, enacted by Congress, should be utilized by IJs if the IJ is removing the alien or denying an asylum claim due to gang-related violence.

Aliens should not be prohibited from receiving asylum based on gang-affiliated kinship claims. If the courts choose to remove an alien based on past criminal activity, they should do so explicitly by citing language from legislation that explicitly precludes violent individuals.

---

153 See Ramos v. Holder, 589 F.3d 426, 428-30 (7th Cir. 2009) (exemplifying Court analyzing particular social group and criminal activity separately). The Court first determines whether “tattooed, former Salvadoran gang members” have social visibility. Id. at 429. Afterwards, the Court then considers how the alien’s criminal past should affect the validity of his petition. Id. at 430-32.

154 See 8 U.S.C. § 1231(b)(3) (exceptions for asylum); see also USA PATRIOT ACT § 411 (defining grounds for inadmissibility).

155 See 8 U.S.C. § 1231(b)(3)(B) (exceptions for asylum); see also USA PATRIOT ACT § 411 (defining grounds for inadmissibility).


157 See 8 U.S.C. § 1231(b)(3)(B) (listing ways aliens can be proscribed from receiving asylum).

158 See § 411, 115 Stat. at 345-51 (defining grounds for inadmissibility).

159 See 8 U.S.C. § 1182(a)(3)(B) (providing asylum exceptions); see also USA PATRIOT ACT § 411 (defining grounds for inadmissibility).

160 See 8 U.S.C. § 1182(a)(3)(B) (providing asylum exceptions); see also USA PATRIOT ACT § 411 (defining grounds for inadmissibility).

161 See Hill, supra 97, at 653 (noticing lack of explicit statutory bar against gang members or affiliates).

162 See id. at 652 (writing that legislation has always made effort to keep out violent
IJs are able to center the analysis surrounding criminal activity on the IIRIRA and the USA PATRIOT Act, then the past criminal activity can be removed from the analysis of the term “particular social group”.165 There has always been language in the Immigration and Alien Act that bars the entry of those who have criminal pasts.164 Utilizing this language during litigation could result in a much less politicized view of the term, “particular social group.”165 IJs could safely consider gang members, targets, and families of gangs to be members of particular social groups, but then deny asylum based on past criminal behavior or terrorist activity under the IIRIRA or the USA PATRIOT Act.166 The benefit of this approach is that it allows IJs to analyze the term “particular social group” in a vacuum and without the burden of considering policy.167 However, IJs can then consider the public policy of keeping criminals out of the United States when applying the language of the IIRIRA and the USA PATRIOT Act.168 This would allow IJs to deliver a narrower and concrete analysis of what it means to be a member of a “particular social group.” 169 This would also allow family-based gang-affiliated claims to be analyzed under a less prejudiced lens and would allow family members of a gang member or target to successfully claim that they are a member of a particular social individuals). There is no necessity to construe the definition of a “particular social group” in an effort to bar dangerous or violent people. Id. There is explicit legislation that already precludes violent individuals. Id.

163 See 8 U.S.C. § 1182(a)(3)(B) (creating exclusions for asylum). It is important to note that IIRIRA does not redefine asylum, but instead creates a separate exclusion. Id.


165 See Harville, supra note 148, at 179-81 (giving examples of politically-fueled asylum case decisions).

166 See 8 U.S.C. § 1182(a)(3)(B) (creating exclusions for asylum); see also USA PATRIOT ACT § 411 (defining grounds for inadmissibility).

167 See Hill, supra note 97, at 653 (remarking on Congress’s intent when writing asylum laws). Congress did not write laws barring everyone who is associated with gangs. Id. Instead, Congress relied on the discretionary nature of immigration courts and the B.I.A. to prevent dangerous criminals from entering the country. Id. “Congress has no statutory bar against gang members, perhaps because of ambiguity about what constitutes a gang; or because of the variety of activities, not all criminal, that some gangs engage in; or because of the different levels of participation, some innocuous, of members of some gangs.” Id. (quoting Ramos, 589 F.3d at 430).

168 See 8 U.S.C. § 1182(a)(3)(B) (creating exclusions for asylum); see also USA PATRIOT ACT § 411 (defining grounds for inadmissibility); Hill, supra note 97, at 652 (critiquing use of particular social group requirement as way to keep gangs out). “Asylum and withholding of removal standards have always provided checks against undesirable individuals.” Hill, supra note 97, at 652. There has always been language in the Immigration and Alien Act that makes violent, criminal, or terrorist activity grounds for removal. Id. at 652-53

169 See Hill, supra note 97, at 651-52 (noting confusion created by B.I.A.’s unwillingness with consider gang-affiliates “particular of social group”).
V. EXPLAINING THE CONDITIONS OF GANG-AFFILIATED FAMILY-BASED ASYLUM CASES

When representing clients who have faced persecution based on family ties to gang members or targets, it is important to accurately represent current country conditions, as well as a precise portrayal of gangs in the alien’s country of origin.172 “IJs are not experts on country conditions and are prohibited from relying on their own views on how foreign regimes conduct themselves.”173 However, there is a stigma associated with gang members, which can prejudice a judge or immigration officer when encountering a gang-related asylum petition.174 Thus, creating country condition documents to illustrate the danger that Latin American gangs present to their victims and the families of their victims becomes vital to the asylum petition.175

In order to create the best chance for an alien to receive asylum, attorneys should stress that the alien is being targeted because of his or her kinship ties.176 Persecutions should not be described as being so narrowly targeted towards the alien that the IJ could determine that the attacks were personal vendettas or due to some other personal relation.177 However, at the same time, the persecution should be described as a broad occurrence that is experienced by many or most that live in the alien’s country of origin.178

170 See id. at 653 (recognizing B.I.A.'s reluctance granting asylum for gang members despite lack of Congressional intent).
171 Id.
172 See Wash. Off. of Latin Am., supra note 38, at 2-3 (introducing importance of accurate and detailed country conditions reports); see also GERMAIN, supra note 11, at 96 (explaining country conditions documentation).
173 GERMAIN, supra note 11, at 96-97.
174 See Wash. Off. of Latin Am., supra note 38, at 6 (commenting on how imprecise beliefs can circulate among those working in the justice system). “Distorted images exaggerate the phenomenon, promote myths about gangs and spread the idea that gang members cannot be rehabilitated.” Id.
175 See id. (stressing importance of accurate country condition documents).
177 See GERMAIN, supra note 11, at 105 (citing Cordero-Trejo v. I.N.S., 40 F.3d 482 (1st Cir. 1994)) (differing cases where threats and attacks were considered to be personal vendettas).
178 See In re S-E-G-, 24 L. & N. Dec. at 587 (finding that experience of alien was not unique). The B.I.A. found the experience of being attacked by gangs was not uniquely experienced by the
It is important for advocates to accurately portray the persecuting gang’s activity across the country and the persecuting gang’s relationship to the alien in country condition reports.179 This can be done by producing a number of documents that center on the alien’s family relation with a gang member or target.180 This can be done by presenting the death certificates of family members, police reports issued by the alien or the alien’s family members, or other documentation of persecution faced by the family by gang members.181 News articles and country reports from both government entities can also be used to supplement an asylum petition in order to create a more complete illustration of gang violence in Central America.182 These documents should work to display a nexus between the persecution faced by the alien and the kinship or family ties with a gang member or target.183 By supplying a wide variety of country condition documents, an advocate will have the best chances of bettering an IJ’s understanding of gangs and the persecution faced by the alien.184

VI. CONCLUSION

Today, gang violence continues to push families and children out of Central America and towards the Mexico-U.S. border. The growth of gang violence in Central America can be attributed to a number of factors including: extreme poverty, poor judicial infrastructure, ineffective anti-gang policies, and the mass deportation of L.A. gang members. These factors have resulted in a cycle of gang violence with gang members recruiting younger and younger children. Many people who live in these

---

179 See Wash. Off. of Latin Am., supra note 38, at 6 (emphasizing importance of accurate portrayals of gangs in Central America).

180 See Wash. Off. of Latin Am., supra note 38, at 2 (giving examples of evidence that can be presented).

181 See id. (listing the evidence that can exhibit persecution). Evidence can include “police reports in which threats by the gang are reported, death certificates of family members murdered by gangs, and affidavits by family members and expert witnesses who can verify the persecution and/or fear of future persecution that the asylum seeker claims in his or her affidavit.”

182 See GERMAIN, supra note 11, at 96 (supplying examples of country conditions reports sourced by other organizations). “[Country Conditions] evidence may be in the form of expert or lay testimony, documentation from the applicant’s home country, newspaper articles, or human rights reports from the Department of State, Amnesty International, Human Rights Watch, or other reputable organizations.”

183 See id.; see also Wash. Off. of Latin Am., supra note 38, at 2 (instructing how to prepare effective country conditions documents).

184 See Wash. Off. of Latin Am., supra note 38, at 2 (elucidating how country condition documents help IJs). Country condition documents can show that there is a framework or pattern of persecution linked to the alien. Id.
gang-controlled areas are not only afraid of the gangs, but their children are forced and coerced into joining the gangs. In an environment that so easily breeds violence and perpetuates gang membership, it becomes difficult for many people to avoid becoming involved in criminal life.

Thus far, there has been a reluctance to admit those with gang-related asylum claims, even if they are legitimate family-based asylum claims. The rejection of family-based, gang-related asylum claims has muddied the already unclear definition of “particular social group”. It appears that IJs have contorted the definition of “particular social group” in order to exclude all gang-affiliated petitions. Rather than continuing to narrow and reshape the term “particular social group” to exclude gangs, IJs should analyze whether the alien participated in deportable activity under the Immigration and Nationality Act, as amended by the IIRIRA and the USA PATRIOT Act.

Lastly, when representing aliens who are claiming asylum based on family ties with a gang member or gang target, it is important to accurately portray gang activity in Central America. The environment that created gangs like MS-13 and 18th Street is made of unique and complex social issues that are beyond a weak or ineffective local criminal justice system; and in many instances, have caused the local government to acquiesce to gang activity and influence. As a result, it is important to show the bigger picture of gang violence and to explain to IJs why the cycle of gang violence causes many to flee their homes in search of the American border.

Maria S. Hwang