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KILL THE SNITCH: HOW HENRIQUEZ-RIVAS AFFECTS ASYLUM ELIGIBILITY FOR PEOPLE WHO REPORT SERIOUS GANG CRIMES TO LAW ENFORCEMENT

James Carr

“[El Salvador] is a good place to kill. If you kill, you will get away with it.”

Abstract: In 2015, El Salvador became the murder capital of the world. Like its Central American neighbors, El Salvador has experienced a significant increase in gang violence during the past decade, as evidenced by its 2015 homicide statistics showing over 6,600 registered homicides in the country despite a population of only 6.3 million people. Rising crime rates and widespread gang influence are forcing many affected Central Americans to seek asylum in the United States.

Individuals may qualify for asylum if they have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. Some of the most recent immigration case law explores the definition of membership in a particular social group. In 2013, the Ninth Circuit’s decision in Henriquez-Rivas created a new particular social group by extending asylum eligibility to individuals who witness and testify to serious crimes committed by gangs. Henriquez-Rivas eliminates the requirement for a particular social group to be visible to the naked eye. According to the Ninth Circuit, if a proposed particular social group is understood by society to constitute a group, then that group is “socially distinct” and therefore cognizable.

This Comment argues that the particular social group created by Henriquez-Rivas should be expanded to include people who report serious gang crimes to law enforcement without the need to testify in court.

INTRODUCTION

In 1998, twelve-year-old Rocio Brenda Henriquez-Rivas’ father was brutally assaulted and murdered in El Salvador by four M-18 gang members. Henriquez-Rivas observed the men assault her father and heard the gunshots that killed him as she fled the scene. She identified two of the suspects from a lineup and testified against them in court.

3. Id.
4. Id. at 1086.
Both men were convicted and sentenced to prison terms of seven years and twenty-five to thirty years, respectively. When Henriquez-Rivas returned to her father’s home to collect some paperwork, an individual warned her that gang members recently visited her house and claimed responsibility for killing her father. A few years later, an unknown man visited Henriquez-Rivas’ school and asked if anyone knew “Rocio Henriquez.” Henriquez-Rivas feared the gang intended to harm her because she testified in court and because the gang was ordered to pay restitution to Henriquez-Rivas’ family. In 2005, she fled to the United States and applied for asylum.

Now assume that shortly after Henriquez-Rivas filed her asylum application, another individual from El Salvador, Jaime, also applied for asylum. Imagine the facts in Jaime’s case are strikingly similar to those of Henriquez-Rivas. Jaime witnessed his father’s assault at the hands of M-18 gang members and escaped before anyone could harm him. As Jaime fled the scene, he heard the gunshots that killed his father. Jaime reported the crime to the local police and provided them with physical descriptions of each of the gang members involved in the assault and murder. However, unlike Henriquez-Rivas, Jaime refused to testify in court against the gang members because he feared the gang would exact revenge on him for his testimony. Given the level of corruption within the police department, Jaime also suspected law enforcement had already betrayed his trust by identifying him to the M-18. One week before trial, Jaime received a series of anonymous phone calls threatening his life. He promptly left El Salvador and sought asylum in the United States.

The Immigration and Nationality Act of 1965 (INA) establishes the framework for determining whether refugees such as Henriquez-Rivas and Jaime should be granted asylum and a permanent home in the United States. According to the INA’s definition, a “refugee” is

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Jaime’s hypothetical scenario is a reality for many Central American immigrants fleeing gang violence. See Part III.A for examples of recent police corruption and gang influence in El Salvador.
someone who is (1) unable or unwilling to return to his or her home country (2) because of either past persecution or a well-founded fear of persecution (3) on account of race, religion, nationality, political opinion, or membership in a particular social group. Of these five protected interests, the term “particular social group” (PSG) is the most ambiguous.

The Board of Immigration Appeals (BIA) first confronted this ambiguity with its oft-cited PSG analysis in In re Acosta. After nearly thirty years of attempts to refine its definition, certain elements of PSGs remain a divisive issue among the circuit courts. While some circuits accept the BIA’s PSG analysis, others have either completely abandoned it or modified the analysis to maintain consistency with the BIA’s decisions made after In re Acosta.

In 2013, the Ninth Circuit decided Henriquez-Rivas v. Holder and recognized Henriquez-Rivas’ membership in a PSG while rejecting the BIA’s interpretation of PSG requirements. In overruling the BIA, the Ninth Circuit determined that Henriquez-Rivas had a well-founded fear.

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12. 8 U.S.C. § 1101(a)(42)(A) (2012) (“The term ‘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 ...”).

13. Donchev v. Mukasey, 553 F.3d 1206, 1215 (9th Cir. 2009) (citing Elien v. Ashcroft, 364 F.3d 392, 396 (1st Cir. 2004); Iwin v. INS, 144 F.3d 505, 510 (7th Cir. 1998)).

14. 19 I. & N. Dec. 211 (B.I.A. 1985). The BIA’s decision in In re Acosta held that the common characteristic that defines 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.” Id. at 233.

15. The circuits are divided on the “social visibility” requirement of the particular social group definition set forth by the BIA in In re C-A-, 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006) and later clarified by the BIA in In re S-E-G-, 24 I. & N. Dec. 579, 586–89 (B.I.A. 2008). The Third and Seventh Circuits expressly reject social visibility. See Valdiviezo-Galdamez v. Attorney Gen., 663 F.3d 582, 607 (3d Cir. 2011); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009). The Fourth Circuit has declined to even address social visibility. See Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014). The First (Rojas-Perez v. Holder, 699 F.3d 74 (1st Cir. 2012)), Second (Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007)), Fifth (Orellana-Monson v. Holder, 685 F.3d 511, 520 (5th Cir. 2012)), Sixth (Al-Ghorbani v. Holder, 585 F.3d 980, 991, 994 (6th Cir. 2009)), Eighth (Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008)), Ninth (Rojas v. Lynch, 807 F.3d 1123 (9th Cir. 2015)), Tenth (Rodas-Orellana v. Holder, 780 F.3d 982 (10th Cir. 2015)), and Eleventh (Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1197 (11th Cir. 2006)) Circuits all accept variations of the BIA’s “social visibility” requirement from In re C-A-.

16. See Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087–88 (9th Cir. 2013); Valdiviezo-Galdamez, 663 F.3d at 605–08; Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).

17. 707 F.3d 1081 (9th Cir. 2013).

18. Id. at 1083.
of persecution because of her membership in a newly recognized PSG: “witnesses who testify against gang members.” The Ninth Circuit’s decision confirmed that a PSG exists in the absence of “on-sight” visibility if the member’s identity has come to the attention of gang members. Although the decision did not address asylum eligibility for people in Jaime’s position—Salvadoran witnesses who report serious gang crimes to law enforcement—the court’s PSG analysis supports expanding eligibility to witnesses who do not testify.

This Comment addresses the lack of relief available to individuals like Jaime. Part I provides a brief history of asylum law and analyzes the evolution of PSGs. Part II identifies the effects of the Ninth Circuit’s Henriquez-Rivas decision on PSGs and how different circuits have either accepted or rejected that view. Part III explores the possibility of expanding the PSG created under Henriquez-Rivas to include applicants who report gang crimes without testifying in court, such as Jaime. This Comment argues that individuals from certain countries who report serious gang crimes to law enforcement should be eligible for asylum because they are considered members of a PSG by their respective societies.

I. EVOLUTION OF THE PARTICULAR SOCIAL GROUP CRITERIA

As violence and murder rates steadily rise throughout the Northern Triangle—an area consisting of El Salvador, Guatemala, and Honduras—there has been a marked increase in the number of people fleeing the area and seeking asylum abroad. The United States

19. Id.

20. Id. at 1088 (citing In re C-A-, 23 I. & N. Dec. at 960).

21. See infra note 192; see id. at 1091–94 for a discussion of “social distinction” and how it applies to the PSG analysis.

22. Part III focuses almost exclusively on El Salvador and the impact of gangs on Salvadoran society. However, this Comment does not limit the scope of its argument to El Salvador. The same arguments, as well as relevant country conditions evidence, may be applied to countries with similar levels of gang influence, such as Guatemala and Honduras.


24. Id. (Guatemala experienced 29.5 homicides per 100,000 people in 2015).

25. Id. (Honduras experienced 56.7 homicides per 100,000 people in 2015).

continues to process the majority of the asylum claims coming out of the region, but, according to the United Nations High Commissioner for Refugees (UNHCR), neighboring Central American countries experienced more than a 1000% increase in the number of Northern Triangle asylum applications between 2008 and 2014. These numbers reflect the fear and insecurity that motivates migration from the Northern Triangle.

For those individuals seeking refuge in the United States, satisfying the asylum requirements posed by the American legal system is daunting. It is not enough for an asylum applicant to demonstrate a well-founded fear of persecution, such as Jaime’s fear of M-18 gang persecution. The applicant must also prove either past harm or future harm as a result of one of the five protected grounds—race, religion, nationality, political opinion, or membership in a PSG.

A. The United States Recognizes Asylum Eligibility for People Who Have Suffered Severe Past Persecution or Fear Future Persecution on Account of a Protected Interest


27. Id. ("UNHCR has documented a 1,185% increase in the number of [Northern Triangle] asylum applications [submitted to] Mexico, Panama, Nicaragua, Costa Rica and Belize, combined, from 2008 to 2014.")


31. Id.

32. Diane Uchimiya, Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence, 23 BERKELEY LA RAZA L.J. 109, 131 n.166 (2013). The United States is bound by both the 1951 Convention and the 1967 Protocol. Id. at n.177.
on account of his race, religion, nationality . . . or political opinion.”

The 1951 Convention and the 1967 Protocol serve as legally binding treaties, obligating signatories to protect refugees forced to flee their countries due to persecution.

The United States derived its original definition of “refugee” from the 1951 Convention, which limited refugee status to individuals with a fear of future persecution.

That definition remained largely unchanged until 1980, when Congress passed an amendment to the INA, known as the Refugee Act of 1980 (“Refugee Act”). The Refugee Act served as a response to the needs of people suffering persecution in their homelands. It expanded the 1951 Convention’s definition to include individuals who had a well-founded fear of future persecution and individuals who had suffered past persecution. Under the current INA regulation, asylum applicants must now establish that they are:

unable or unwilling to return to, and [are] unable or unwilling to avail [themselves] 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.


34. Uchimiya, supra note 32, at 132.

35. See UNHCR, supra note 33, at art. 1. A refugee is any person who, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership [in] a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.

Id.


38. Uchimiya, supra note 32, at 133.

39. U.S. CITIZENSHIP & IMMIGRATION SERVS., supra note 30, at 7 (“In contrast, the UN definition focuses on well-founded fear.”).

40. Id. at 6.
An asylum officer or immigration judge must first determine whether the harm the applicant fears rises to the level of persecution before moving to an analysis of the protected interest.⁴¹ Persecution is characterized as “the infliction of suffering or harm . . . in a way regarded as offensive.”⁴² The BIA has found that both serious physical harm and non-physical harm can amount to persecution.⁴³ Deprivation of food, liberty, housing, and employment are just a few examples of non-physical harm recognized by the BIA.⁴⁴ Threats of serious harm, as experienced by both Henriquez-Rivas and Jaime, may constitute persecution when they are combined with confrontations or other mistreatment.⁴⁵ Once it is determined that an applicant’s harm is sufficiently serious, the adjudicator must next establish whether the applicant is a refugee based on either past persecution or a well-founded fear of future persecution.⁴⁶ An applicant that alleges past persecution has the burden of establishing that “the persecution was on account of one or more protected grounds . . . and the persecution was committed by the government, or by forces that the government was unable or unwilling to control.”⁴⁷ Some courts also look to the motivation of the persecutor in determining whether the applicant suffered persecution.⁴⁸ Applicants are not required to present proof that they were targeted or singled out.⁴⁹

Courts require that applicants seeking asylum based on a well-founded fear of future persecution satisfy both an objective element and
a subjective element.\textsuperscript{50} The subjective element is met only if an applicant’s fear of persecution is genuine.\textsuperscript{51} To meet the subjective element, applicants cannot have a primary motivation for seeking refuge in the United States other than a genuine fear of persecution.\textsuperscript{52} For example, “disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in . . . the United States” does not meet the subjective element of a well-founded fear of future persecution.\textsuperscript{53}

The objective element is satisfied if there exists “a reasonable possibility of suffering [the feared] persecution.”\textsuperscript{54} The Supreme Court clarified that the objective requirement of a “well-founded fear” does not require a high statistical probability of persecution.\textsuperscript{55} “[E]ven a ten percent chance of persecution may establish a well-founded fear.”\textsuperscript{56} Determining the existence of a well-founded fear is to be “based on facts that would lead a reasonable person in similar circumstances to fear persecution.”\textsuperscript{57} The objective element may also be satisfied if the applicant is able to prove past persecution, thus “giving rise to a rebuttable ‘presumption that a well-founded fear of future persecution exists.’”\textsuperscript{58}

This Comment addresses expanding the PSG created by \textit{Henriquez-Rivas} to include applicants with a well-founded fear of future persecution rather than applicants who have already suffered severe past persecution. As such, it is important to understand the necessary criteria...

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{50} U.S. \textsc{Citizenship} \& \textsc{Immigration} \textsc{Servs.}, \textsc{Asylum Officer Basic Training}, \textsc{Asylum Eligibility Part II: Well-Founded Fear} (Mar. 13, 2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees\%20\&\%20Asylum/Asylum/AOBTC\%20Lesson\%20Plans/Well-Founded-Fear-31aug10.pdf [https://perma.cc/4GA3-WQDA] [hereinafter \textsc{U.S. Citizenship} \& \textsc{Immigration Servs. Part II}].
\item \textsuperscript{51} \textit{See In re Acosta}, 19 I. \& N. Dec. 211, 212 (B.I.A. 1985).
\item \textsuperscript{52} \textit{Id. at 221.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} 8 C.F.R. \textsection 208.13(b)(2)(B) (2016).
\item \textsuperscript{55} \textsc{INS} v. \textsc{Cardoza-Fonseca}, 480 U.S. 421, 436 (1987).
\item \textsuperscript{56} Al-Harbi v. \textsc{INS}, 242 F.3d 882, 888 (9th Cir. 2001); \textit{see also Cardoza-Fonseca}, 480 U.S. at 440 (quoting \textsc{INS} v. \textsc{Stevic}, 467 U.S. 407, 424–25 (1984)) (“[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.”).
\item \textsuperscript{57} U.S. \textsc{Citizenship} \& \textsc{Immigration Servs. Part II}, supra note 50, at 5; \textsc{Lolong} v. \textsc{Gonzales}, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (applicant needs evidence that is credible, direct, and specific).
\item \textsuperscript{58} \textsc{Ladha} v. \textsc{INS}, 215 F.3d 889, 897 (9th Cir. 2000), overruled on other grounds by \textsc{Adebe} v. \textsc{Mukasey}, 554 F.3d 1203, 1208 (9th Cir. 2009).
\end{enumerate}
\end{footnotesize}
to establish that a well-founded fear exists for applicants who have not suffered severe past persecution.

B. A Well-Founded Fear of Future Persecution Requires Possession, Awareness, Capability, and Inclination

Four basic criteria are required to establish a well-founded fear of future persecution: possession, awareness, capability, and inclination. Possession and awareness are the most easily recognizable of the four criteria and warrant little attention. The possession requirement is met if the applicant is targeted for possessing a trait the persecutor “seeks to overcome.” Awareness is satisfied if the applicant can prove that “there is a reasonable possibility that the persecutor could become aware that the applicant possesses the characteristic [at issue].” If the claim is based on a characteristic the applicant does not actually possess, but that the persecutor believes the applicant possesses, the applicant can still satisfy the possession requirement. To satisfy this requirement, the adjudicator must find it is reasonable that the persecutor believes the applicant possesses the characteristic. For instance, if a gang erroneously believes that a witness reported a crime to law enforcement, that witness will satisfy both the possession and awareness requirements if an adjudicator determines it is reasonable for the gang to believe the witness reported the crime. Revisiting Jaime’s situation, he needs to first establish that the M-18 is aware he possesses a characteristic before he establishes the capability and inclination of the M-18 to persecute him for possessing that characteristic.

Jaime meets the possession requirement because he witnessed and reported the serious gang crime to law enforcement. For Jaime to meet the awareness requirement, he must establish that the M-18 is aware that he witnessed a crime and reported it to law enforcement. The M-18

60. In re Acosta, 19 I. & N. Dec. at 226 (holding that the applicant must “possess a belief or characteristic a persecutor seeks to overcome . . . by means of punishment of some sort.”). However, the persecutor does not need to possess a malignant intent. See Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997); In re Kisinga, 21 I. & N. Dec. 357 (B.I.A. 1996).
62. Id.
63. Id. This is known as an “imputed characteristic”; see also U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, supra note 11, at 80 (“Persecution inflicted upon an individual because the persecutor attributes to the individual one of the protected characteristics constitutes persecution on account of that characteristic.”).
called Jaime and threatened him after he reported the crime, which means that the M-18 is aware he possesses the trait. If the facts of the case were to change, and Jaime was not threatened at any point after his report to police, it would still be possible for Jaime to establish that the M-18 was aware, or could become aware, of his possession of the trait. To do this, a court might look to the level of corruption that exists within El Salvador’s police and, in particular, whether certain departments have been corrupted by gangs.64

The third factor in determining whether a well-founded fear exists is the assessment of the persecutor’s capability to actually persecute the applicant. To satisfy capability, applicants may rely on evidence of government entities that participate in the persecution, directly or indirectly.65 Specifically, is the government willing to control the persecutor and to what extent is the persecutor able to “enforce its will throughout the country[?]”66 Evidence of country conditions establishing that gang members are able to harm individuals similarly situated to Jaime would also satisfy the capability requirement.67 Internal relocation poses a potential bar to an asylum claim.68 For example, if it is reasonable for an applicant to relocate to another part of the country and avoid future persecution, “adjudicators should consider . . . whether the applicant would face other serious harm in the place of suggested relocation.”69

The BIA uses a two-step inquiry to determine the applicant’s ability to relocate and the reasonableness of that relocation.70 First, the relocation must be to a part of the country where the applicant has no well-founded fear of continued persecution.71 Second, an Immigration Judge is tasked with determining “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial

64. See Zahedi v. INS, 222 F.3d 1157, 1163 (9th Cir. 2000) (for usefulness of country conditions). Part III of this Comment reveals more information related to Salvadoran police corruption by the M-18 and Mara Salvatrucha (MS-13).
66. Id.
67. Id. at 7. One factor to consider in evaluating capability is “the extent to which the persecutor has the ability to enforce its will throughout the country.” In Jaime’s case, the M-18 is more than capable of tracking Jaime’s whereabouts anywhere within El Salvador. See infra note 79 and accompanying text.
68. 8 C.F.R. § 208.13(b)(3) (2016).
69. Id.
71. Id. at 33.
infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.\textsuperscript{72} The Department of Homeland Security (DHS) has the burden of meeting the abovementioned criteria and demonstrating that relocation is safe and accessible to the applicant.\textsuperscript{73}

Finally, applicants must also establish the persecutor’s inclination to persecute him or her.\textsuperscript{74} The applicant can use prior threats or harm by the persecutor as well as the persecutor’s treatment of similarly-situated individuals to establish the existence of inclination.\textsuperscript{75} However, the applicant is not required to provide evidence that he or she would be singled out individually for persecution if:

- (A) The applicant establishes that there is a pattern or practice in his or her country . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

- (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.\textsuperscript{76}

Inclination is also established by relying on relevant country conditions and human rights reports.\textsuperscript{77} For example, if Country X is notorious for practicing female genital mutilation (FGM) on the vast majority of indigenous women, it logically follows that indigenous women from Country X will have a well-founded fear of future FGM. According to the Eighth Circuit, there does not need to be “a showing of persecution of all members of a group” to establish that a pattern or practice of behavior exists.\textsuperscript{78} The mere fact that the majority of indigenous women from Country X suffer FGM is enough to meet the requirement for a well-founded fear of future persecution.

\textsuperscript{72} 8 C.F.R. § 1208.13(b)(3) (2016).

\textsuperscript{73} See M-Z-M-K, 26 I. & N. Dec. at 34.

\textsuperscript{74} U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, supra note 50, at 7.

\textsuperscript{75} Id.; Zhang v. Ashcroft, 388 F.3d 713, 718 (9th Cir. 2004); Sotelo-Aquije v. Slattery, 17 F.3d 33 (2d Cir. 1994).

\textsuperscript{76} 8 C.F.R. § 208.13(b)(2)(iii) (2016).

\textsuperscript{77} See Molina-Estrada v. INS, 293 F.3d 1089, 1096 (9th Cir. 2002) (“When, as here, a petitioner has not established past persecution, there is no presumption to overcome . . . [and] the IJ and the BIA are entitled to rely on all relevant evidence in the record, including a State Department report . . . .”).

\textsuperscript{78} U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, supra note 50, at 7; Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995); Feleke v. INS, 118 F.3d 594 (8th Cir. 1997).
In Jaime’s case, M-18 members are both capable and inclined to harm Jaime for identifying them to police. Jaime established “inclination” when the gang started threatening his life and presumably began looking for him after he made his report to law enforcement. Gangs are well connected throughout El Salvador, Guatemala, and Honduras, and they are often able to get assistance from law enforcement to uncover the whereabouts of witnesses.\(^79\) The two most notorious gangs in El Salvador, the MS-13 and the M-18, consist of networks of hundreds of neighborhood gang cells.\(^80\) As a result, these vast gang networks prevent many of these witnesses from safely relocating to other parts of the region.\(^81\)

Given that many of the Central American gangs . . . have country- or even region-wide reach and organization, there may generally be no realistic internal flight alternative . . . attempts [at relocation] have often been unsuccessful as gangs can locate the individual in urban as well as rural areas, appearing at the applicant’s home and place of work as well as near the homes of family members.\(^82\)

Individuals who testify against gang members are especially vulnerable to gang persecution.\(^83\) Witnesses to Central American gang crimes are frequently afraid to testify in court due to corruption within the judicial system and concerns about retaliation.\(^84\) Prosecutors and judges are “equally afraid to pursue cases against high-profile criminals.”\(^85\) Out of 28,324 cases that went to trial in El Salvador from

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80. Uchimiya, supra note 32, at 162.


82. Id. ¶¶ 53–54.


85. See U.S. Senate Caucus on Int’l Narcotics Control, supra note 84, at 40.
January to September 2014, only 3,898 resulted in convictions.86 Exactly 11,146 of these cases were dismissed due to lack of evidence or prosecutor inactivity.87 These low conviction rates indicate that the courts are not always able to offer adequate protection to people in Jaime’s situation.

Asylum applicants who effectively meet the possession, awareness, capability, and inclination requirements are generally deemed to have established a well-founded fear of future persecution.88 For those applicants who establish a well-founded fear of persecution, such as Jaime, the next step in the asylum process is to demonstrate the link between the well-founded fear and one of the five protected interests.

C. In re C-A- Altered the Post-Acosta Landscape by Introducing More Confusion to the Particular Social Group Analysis

The five protected interests are referred to as the “statutorily protected grounds.”89 For a refugee to be eligible for asylum, the persecutor’s motivation must be on account of the applicant’s possession of at least one of the five statutorily protected grounds: race, religion, nationality, political opinion, or membership in a PSG.90 The applicant is then required to provide direct or circumstantial evidence that the persecutor was or would be motivated to persecute the applicant because of the protected ground.91 Persecution because of race, religion, nationality, or political opinion goes beyond the scope of this Comment. Instead, this Comment addresses the confusion and disagreement among the courts when it comes to defining persecution of a PSG.92

Persecution because of membership in a PSG was included in the INA’s definition of “refugee” in order to maintain consistency with the 1967 Protocol and the U.N. Convention.93 However, Congress failed to define the term “particular social group” in the INA.94

87. Id.
89. See U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, supra note 11, at 5.
91. Sangha v. INS, 103 F.3d 1482, 1486–87 (9th Cir. 1997).
92. Cordoba v. Holder, 726 F.3d 1106, 1114 (9th Cir. 2013) (recognizing that the phrase “particular social group” is ambiguous).
94. Id.
It has been suggested that the notion of “social group” was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee. The UNHCR has suggested that a “particular social group” connotes persons of similar background, habits, or social status and that a claim to fear persecution on this ground may frequently overlap with persecution on other grounds such as race, religion, or nationality.

In *In re Acosta*, the BIA first interpreted “particular social group” to require an “immutable characteristic.” In *Acosta*, a taxi driver from El Salvador, Acosta, argued that he was a member of a PSG consisting of other members of the same taxi cooperative to which he belonged. Acosta claimed he was being persecuted by “anti-government guerillas who targeted small businesses in the transportation industry.” The BIA ultimately rejected this argument because the identifying characteristic of the proposed PSG was not immutable—that is, drivers were free to change jobs. According to the BIA, the common characteristic that defines a group “must be 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 consciences.” For twenty years, the *Acosta* immutability standard was the only guidance the BIA offered for determining the existence of a PSG.

In 2006, the BIA’s holding in *In re C-A* refined the *Acosta* standard by introducing “social visibility” and “particularity” as additional factors to the PSG analysis. With its decision in *In re C-A*, the BIA became more consistent with the United Nations guidelines, which confirmed the importance of “visibility” in identifying the existence of PSGs. The BIA defined “social visibility” as “the extent

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95. *Id.* at 232–33.
96. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013).
98. *Id.* at 216.
99. *Id.* at 233–34.
100. *Id.* at 233.
102. *Id.* at 957, 959–60.
103. *Id.* at 960. The “social visibility” requirement from *In re C-A* was issued three years after the Justice Department asked five liberal judges on the Board of Immigration Appeals to step down. Critics called the action a “purge” of all pro-immigration judges. See Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a ‘Purge’*, L.A. TIMES
to which members of a society perceive those with the characteristic in question as members of a social group.” To satisfy the “particularity” requirement, the social group must be clearly and easily defined.

In re C-A- concerned a confidential informant that provided police with information on the notorious Cali Cartel over a four-year period. In May 1995, the applicant was confronted and beaten by three armed men. The noise of the altercation brought neighbors out of their homes, and the attackers fled. The attackers warned the applicant that life “would get worse for him and his family” for informing on the cartel. The applicant went into hiding and moved to the United States in 1996. The BIA failed to recognize the PSG at issue in In re C-A- because confidential informants remain out of public view. “[V]isibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.” The confidential informant at issue in In re C-A- neither appeared as a witness nor came to the attention of cartel members.

In 2008, the BIA clarified that the “social visibility” and “particularity” factors introduced in In re C-A- were, in fact, requirements for all PSGs. With its decision in In re S-E-G-, the

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105. Id. (rejecting “noncriminal informants” as a particular social group because its membership is “too loosely defined to meet the requirement of particularity.”).
108. Id.
109. Id.
110. Id.
111. Id. at 953.
112. Id. at 960–61.
113. Id. at 960.
114. Id. at 953, 960–61.
115. In re S-E-G-, 24 I. & N. Dec. 579, 582–84 (B.I.A. 2008). The BIA’s decisions in In re S-E-G- and In re C-A- continued the court’s trend of requiring more for particular social groups to gain recognition. Some critics maintain that this departure from Acosta can be directly attributed to the BIA “purge” of 2003, which resulted in a more conservative, less friendly immigration court. See Alonso-Zaldivar & Peterson, supra note 103.
BIA “unequivocally elevated social visibility and particularity to the status of binding requirements.”117 “Particularity” was no longer vaguely defined, as it was after In re C-A-.

The essence of the “particularity” requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. . . . [T]he key question is whether the proposed description is sufficiently “particular” . . . .118

The BIA also reaffirmed its interpretation of “social visibility” by once again discussing the United Nations guidelines and emphasizing the importance that members of the PSG be “perceived as a group by society.”119

Most circuits have accepted the BIA’s “social visibility” and “particularity” requirements from In re C-A- and In re S-E-G-.120 However, both the Third and Seventh Circuits reject the application of “social visibility” to PSGs.121 The Third Circuit maintains that “social visibility” is inconsistent with prior BIA decisions that relied solely on the Acosta immutability standard.122 Moreover, many PSGs recognized before In re C-A- would fail the BIA’s social visibility requirement.123

The Seventh Circuit holds that “[social visibility] makes no sense” and rejects its use for the same reasons the Third Circuit refuses to adopt the test.124 The Third and Seventh Circuits reason that “social visibility” adds more confusion to the PSG analysis and that the BIA’s inconsistent

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117. See Frydman & Desai, supra note 83, at 2.
119. Id. at 586 (citing In re C-A-, 23 I. & N. Dec. at 956).
120. See supra note 15.
124. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).
application “condone[s] arbitrariness.” Still, despite the debate surrounding “social visibility,” the First, Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits accept at least some variation of the BIA’s “social visibility” requirement.

D. The BIA Uses a Three-Prong Test for Evaluating Particular Social Groups

The “immutability,” “social visibility,” and “particularity” requirements derived from the BIA’s decisions in In re Acosta, In re C-A-, and In re S-E-G- make up the three-prong test the BIA established for evaluating proposed PSGs. Under that test, “the group must comprise individuals who share a common, immutable [or fundamental] characteristic—such as sex, color, kinship ties, or past experience.” The group must also be socially visible and recognizable by society in general.

PSGs are evaluated on a case-by-case basis. Adjudicators are expected to examine the shared characteristic that defines the group to determine whether a group is considered socially visible. PSGs are “united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” A group must meet all the three prongs of the

125. Id. at 615–17; Valdiviezo-Galdamez, 663 F.3d at 604.
126. See Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013); Rojas-Perez v. Holder, 699 F.3d 74, 81 (1st Cir. 2012); Orellana-Monson v. Holder, 685 F.3d 511, 520 (5th Cir. 2012); Gaitan v. Holder, 671 F.3d 678, 681 (8th Cir. 2012); Rivera-Barrientos v. Holder, 666 F.3d 641, 652–53 (10th Cir. 2012); Al-Ghorbani v. Holder, 585 F.3d 980, 991, 994 (6th Cir. 2009); Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Castillo-Arias v. Attorney Gen., 446 F.3d 1190, 1197 (11th Cir. 2006).
127. See U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, supra note 11, at 21 (discussing the impact of In re Acosta and In re C-A-); NAT’L IMMIGRANT JUSTICE CTR., supra note 121, at 1–2 (discussing the impact of In re S-E-G- on the BIA’s PSG requirements).
128. See U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, supra note 11, at 22 (citing In re Acosta, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985)).
129. See In re C-A-, 23 I. & N. Dec. 951, 960; Castillo-Arias, 446 F.3d at 1198.
130. In re Acosta, 19 I. & N. Dec. at 233–34; see also Morgan v. Holder, 634 F.3d 53, 61 (1st Cir. 2011) (“Asylum cases, virtually by definition, call for individualized determinations.”).
132. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1084 (9th Cir. 2013) (citing Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000), overruled on other grounds by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005)).
BIA test—immutability, social visibility, and particularity—to be considered a PSG.\footnote{133}

The BIA hoped the immutability requirement would “preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”\footnote{134} Asylum adjudicators are often tasked with evaluating subjective and objective elements of an applicant’s fundamental characteristic under the immutability prong.\footnote{135} The subjective element considers how the applicant experiences the fundamental characteristic as part of his or her identity or conscience.\footnote{136} The objective requirement considers basic human rights norms.\footnote{137} For example, applicants fleeing female genital mutilation have a stronger claim from an objective perspective than a member of a terrorist organization escaping persecution from the same terrorists he once supported because there is no basic human right to pursue an association with terrorist organizations.\footnote{138} Voluntary assumption of extraordinary risk of serious harm in taking on a trait that defines a group may also be evidence of immutability.\footnote{139} However, an applicant who undertakes risks for monetary or material reward cannot claim the characteristic is immutable.\footnote{140}

If an asylum applicant establishes that membership in a PSG is immutable, the applicant must also establish that the group is recognizable or distinct within the society in question.\footnote{141} The BIA defined “social visibility” in a manner that it hoped would ensure that PSGs would not become a “‘catchall’ applicable to all persons fearing persecution.”\footnote{142} Distinctive traits shared by group members are a good indication of social distinction, but the group is not required to self-identify to be considered socially distinct.\footnote{143} In certain instances, some group members may conceal their identity to avoid persecution. Judge

\begin{thebibliography}{99}
\bibitem{133} U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, \textit{supra} note 11, at 23.
\bibitem{134} \textit{In re Acosta}, 19 I. & N. Dec. at 234.
\bibitem{136} U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, \textit{supra} note 11, at 23.
\bibitem{137} \textit{Id.}
\bibitem{138} \textit{Id.} at 24–25.
\bibitem{139} \textit{Id.} at 25.
\bibitem{140} \textit{Id.}
\bibitem{142} \textit{Id.} at 960.
\bibitem{143} U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, \textit{supra} note 11, at 27.
\end{thebibliography}
Posner in *Gatimi v. Holder* explained: if people are trying to kill, torture, or persecute you, “you will take pains to avoid being socially visible.” Judge Posner’s remarks help explain the BIA’s determination that social distinction must be “considered in the context of the country of concern and the persecution feared.”

In *In re A-M-E & J-G-U-* the BIA reviewed Guatemalan country conditions to better understand the context of the proposed PSG. The BIA held that “affluent Guatemalans” were not socially visible within Guatemalan society. After a careful review of country conditions, the court was unable to see a difference in danger between “affluent Guatemalans” and society in general. In other words, affluent Guatemalans were no more visible to society than non-affluent Guatemalans. Similarly, in *Donchev v. Mukasey*, the Ninth Circuit did not recognize the Roma people as a socially visible group because country conditions did not indicate that the Bulgarian government or society placed restrictions on their freedom any more than non-Roma affiliated people.

PSGs must also meet a third requirement: “particularity.” “Particularity” means that society can readily recognize who is a member of the group and who is not a member of the group. In *In re S-E-G-* the BIA held the following group did not meet the particularity requirement because it was too amorphous: a group composed of boys who lacked stable families and adult protection from the MS-13 gang, who were from middle- and low-income families living in territories controlled by the MS-13, and who refused gang recruitment. The definition of the group needs to provide a point of reference for “determining who the members of the group are so that membership

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144. 578 F.3d 611 (7th Cir. 2009).
145. Id. at 615.
148. Id. at 74.
149. Id.
150. Id. at 74–75.
151. 553 F.3d 1206 (9th Cir. 2009).
152. See id. at 1219.
may be delimited or ascertained.”\textsuperscript{156} The proposed PSG from \textit{In re S-E-G-} contained too many variables to pass the particularity test.\textsuperscript{157}

The United States Citizenship and Immigration Services (USCIS) advises its own asylum officers that “[p]articular social groups defined in terms that are amorphous, indeterminate, subjective, inchoate, or variable will fail the particularity requirement because membership in groups defined in this manner are difficult to delimit.”\textsuperscript{158} If there is no way to tell a member of the group from a non-member of the group, then it does not pass the particularity requirement, and thus the group fails the three-prong test established by the BIA.\textsuperscript{159}

The BIA’s three-prong test remained unchanged until the Ninth Circuit’s 2013 \textit{Henriquez-Rivas} decision.\textsuperscript{160} \textit{Henriquez-Rivas} sought to reconcile post-\textit{Acosta} decisions with the “social visibility” requirement introduced by \textit{In re C-A-}.\textsuperscript{161} “Immutability” and “particularity” continue to play an essential role in the BIA’s PSG analysis, but circuit courts are beginning to reevaluate their stance on the application of “social visibility” to situations where people are actively trying to conceal their group membership from persecutors.\textsuperscript{162}

\section*{II. UNDERSTANDING THE SOCIAL VISIBILITY REQUIREMENT}

The definition of “particular social group” remains ambiguous despite BIA attempts to clarify it.\textsuperscript{163} After continued debate among the circuit courts, the BIA issued two decisions in 2014 to give clarity to lower

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\textsuperscript{156} U.S. CITIZENSHIP \& IMMIGRATION SERVS. PART III, supra note 11, at 28.

\textsuperscript{157} \textit{In re S-E-G-}, 24 I. \& N. Dec. at 584–85.

\textsuperscript{158} U.S. CITIZENSHIP \& IMMIGRATION SERVS. PART III, supra note 11, at 28.

\textsuperscript{159} PSGs that are defined by terrorism, criminal activity, or other persecutory activity also fail the three-prong test established by \textit{In re C-A-}. \textit{See} Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992); Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007) (holding that current or former gang membership is not considered a particular social group due to the gang members’ criminal activities).

\textsuperscript{160} \textit{See} \textit{In re M-E-V-G-}, 26 I. \& N. Dec. 227 (B.I.A. 2014); \textit{In re W-G-R-}, 26 I. \& N. Dec. 208 (B.I.A. 2014). These opinions were both issued in 2014, one year after \textit{Henriquez-Rivas}.

\textsuperscript{161} \textit{See} \textit{Rojas-Pérez v. Holder}, 699 F.3d 74 (1st Cir. 2012) (recognizing the persuasiveness of the “social visibility” analyses from \textit{Gatimi} and \textit{Valdiviezo-Galdamez}); \textit{Valdiviezo-Galdamez v. Attorney Gen.}, 663 F.3d 582, 589 (3d Cir. 2011) (finding that after \textit{Acosta}, the BIA recognized a number of PSGs that lacked “social visibility”); \textit{Gatimi v. Holder}, 578 F.3d 611, 615 (7th Cir. 2009) (holding that “member[s] of a group that [have] been targeted for assassination or torture or some other mode of persecution . . . will take pains to avoid being socially visible”).

\textsuperscript{162} \textit{See} \textit{Cordoba v. Holder}, 726 F.3d 1106, 1114 (9th Cir. 2013).
courts and potential asylum seekers. The BIA’s holdings in *In re M-E-V-G.* and *In re W-G-R.* emphasized that “social visibility” is concerned with whether society recognizes the PSG as “socially distinct.” It does not mean the group must be literally visible to the naked eye—known as “on-sight” visibility. Some circuits continue to struggle with the concept of social visibility. Meanwhile, the Ninth Circuit rejects “on-sight” visibility and instead utilizes its “social distinction” analysis developed in 2008, six years before the BIA’s decisions in *In re M-E-V-G.* and *W-G-R.*

A. Henriquez-Rivas Replaced the BIA’s “On-Sight” Visibility Requirement in Favor of “Social Distinction”

After Rocio Brenda Henriquez-Rivas’ father was murdered in El Salvador in 1998, she identified two of the suspects and testified against them in court. Although both suspects were convicted, one of them was released from prison early. Henriquez-Rivas escaped to the United States because she believed that the gang members responsible for her father’s death would try to harm her for testifying against them in


165. 26 I. & N. Dec. 227 (B.I.A. 2014). In *In re M-E-V-G.* concerned a Honduran youth that claimed membership in a particular social group, “namely Honduran youths who have been actively recruited by gangs but who have refused to join because they oppose gangs.” *Id.* at 228. The BIA held that “literal or ‘ocular’ visibility is not required” and renamed the “social visibility” element as “social distinction.” *Id.*

166. 26 I. & N. Dec. 208 (B.I.A. 2014). In *W-G-R.*, the asylum applicant fled El Salvador because he feared persecution as a member of the proposed PSG consisting of former M-18 gang members who renounced their gang membership. The BIA eliminated the need for a PSG to be socially visible with its holding in *W-G-R.* “To be socially distinct, a group need not be *seen* by society; it must instead be *perceived* by society.” *Id.* at 216 (emphasis in original).


168. *Id.*


170. Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008), abrogated by Henriquez-Rivas v. Holder, 707 F.3d 1081, 1085 (9th Cir. 2013). The Ninth Circuit first adopted the “social distinction” test with its decision in *Santos-Lemus.* *Henriquez-Rivas,* 707 F.3d at 1088. The proposed group in *Santos-Lemus,* “young men in El Salvador resistant gang violence,” failed the “social distinction” test because the group was generally unrecognizable by others in the community. Because the harassment Santos-Lemus suffered was part of widespread criminality and civil unrest throughout El Salvador, the Ninth Circuit found that he was at no more risk to violence than young males that did not resist gang recruitment. *Santos-Lemus,* 542 F.3d at 746.

171. *Henriquez-Rivas,* 707 F.3d at 1086.

172. *Id.*
The immigration judge presiding over Henriquez-Rivas’ case held she was a member of a PSG as previously defined by the BIA—“people testifying against or otherwise oppos[ing] gang members.” However, the BIA reversed the immigration judge’s finding because it believed Henriquez-Rivas’ proposed PSG was too amorphous and not socially visible. Henriquez-Rivas appealed the BIA’s decision to the Ninth Circuit.

The Ninth Circuit’s analysis of the BIA’s decision relied heavily on the BIA’s opinions from In re Acosta and In re C-A-. During its discussion of “social visibility” in In re C-A-, the BIA referenced former military leadership and land ownership as examples of “easily recognizable traits.” However, the Ninth Circuit was keen to point out “[t]hose traits would not be ‘easily recognizable’ if the ‘social visibility’ criterion required ‘on-sight’ visibility, because former military officers do not always wear epaulets, nor do landowners wear T-shirts mapping their holdings.” The Ninth Circuit reasoned that the key to the BIA’s own precedent is not ocular recognition of a group, but whether the social group is understood by others in society to constitute a social group. Accordingly, if the social group is out of public view, it “should be understood in the context of societal understanding”—not whether it is visible to the naked eye. The Ninth Circuit looked to the BIA’s interpretation of “social visibility” in In re C-A- to arrive at the conclusion that “on-sight” visibility is unnecessary to the PSG analysis:

We emphasize that to render C-A-’s statements consistent with a proper understanding of “social visibility,” the requirement that an applicant’s conduct has “come to the attention of” his persecutors must not be construed to exclude all conduct that occurs “out of the public view.” If an applicant can demonstrate

173. Id. In addition to serving prison sentences, the gang members were also forced to pay restitution to the Henriquez-Rivas family.
174. Id.
175. Id. at 1093.
176. Id. at 1083.
177. Id. at 1088.
178. Id.
179. Id.
180. Id. at 1088 (citing In re C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006)). The Henriquez-Rivas court “believe[d] that the perception of the persecutors may matter the most.” Flores-Rios v. Lynch, 807 F.3d 1123, 1127 (9th Cir. 2015) (citing Henriquez–Rivas, 707 F.3d at 1087). However, in 2015, the Ninth Circuit concluded that the persecutor’s perception in assessing the social visibility requirement was unnecessary. See id.
181. Henriquez-Rivas, 707 F.3d at 1088.
as a factual matter that he reasonably fears persecution because some covert action that he has taken may “come to the attention of” his persecutors, then it is irrelevant whether the action would as a general matter not be discovered because of its covert nature.\(^{182}\)

The court determined that Henriquez-Rivas satisfied the “social visibility” requirement when she “[came] to the attention” of the gang by testifying against her father’s killers in court.\(^ {183}\) Moreover, the Ninth Circuit considered evidence that Salvadoran society recognized “the unique vulnerability” of people who testify against gangs.\(^ {184}\) The court referenced a 2006 witness protection law enacted to protect people who testify against violent criminals in court as further support for Henriquez-Rivas’ proposed PSG.\(^ {185}\)

Membership in Henriquez-Rivas’ proposed PSG was easy to verify and therefore delimited.\(^ {186}\) Unlike the applicant in \textit{In re S-E-G-}, Henriquez-Rivas belonged to a PSG that could “accurately be described in a manner sufficiently distinct that the group would be recognized . . . as a discrete class of persons.”\(^ {187}\) The Ninth Circuit relied on country conditions evidence to find that Salvadoran society recognizes witnesses who testify against gang members as a distinct group.\(^ {188}\) As such, the court recognized Henriquez-Rivas’ membership in a PSG.\(^ {189}\)

\textit{Henriquez-Rivas} eliminated the need for a PSG to be visible to the eye.\(^ {190}\) The Ninth Circuit used \textit{Henriquez-Rivas} to expand on its earlier holding from \textit{Santos-Lemus v. Mukasey},\(^ {191}\) and reinforced its position that “social visibility” means “social distinction.”\(^ {192}\) By looking to

\(^{182}\) Id. at 1088 n.7.
\(^{183}\) Id. at 1092.
\(^{184}\) Id.
\(^{185}\) Id.
\(^{186}\) Id.
\(^{187}\) Id. at 1093 (citing \textit{In re S-E-G-}, 24 I. & N. Dec. 579, 584 (B.I.A. 2008)).
\(^{188}\) Id. at 1088.
\(^{189}\) Id.
\(^{190}\) Id.
\(^{191}\) 542 F.3d 738 (9th Cir. 2008).
\(^{192}\) The \textit{Henriquez-Rivas} court did not use the words “social distinction” to describe the “social visibility” requirement, but its holding—a proposed group must “be perceived as a group by society”—has been understood to mean “social distinction.” \textit{Flores-Rios v. Lynch}, 807 F.3d 1123, 1127 (9th Cir. 2015) (citing \textit{Henriquez-Rivas}, 707 F.3d at 1088–89). The BIA’s 2014 decision in \textit{M-E-V-G-} formally “recast the ‘social visibility’ requirement as one of ‘social distinction.’” \textit{Id.} at 1127.
society’s perceptions of the group, rather than visible recognition, the Ninth Circuit sought to reconcile the BIA’s prior inconsistent rulings on “social visibility.”193 As discussed earlier, the BIA recognized numerous PSGs that lacked “on-sight” recognition during the time between In re Acosta and In re C-A. 194 Henriquez-Rivas served as a benchmark to which the BIA could look for guidance in future PSG determinations.195

B. Where We Are Today: How “Social Distinction” Fits into the BIA’s Particular Social Group Analysis

The BIA revisited the meaning of “social visibility” just one year after the Ninth Circuit decided Henriquez-Rivas.196 The BIA intended to use In re M-E-V-G- and W-F-R- to clarify the ambiguity surrounding the “social visibility” requirement and address the criticism coming out of the circuit courts.197 To arrive at a more practical understanding of “social visibility,” the BIA referenced the Ninth Circuit’s analysis in Henriquez-Rivas.198 The BIA never intended “social visibility” to be read literally,199 which is why the BIA renamed the requirement “social distinction” and emphasized the need for a PSG to be perceived or recognized by society, but not seen.200

Both In re M-E-V-G- and In re W-G-R- concerned Central American youths who feared persecution by gangs.201 In In re M-E-V-G-, the BIA was tasked with determining whether “Honduran youth[s] who have been actively recruited by gangs but who have refused to join because they oppose the gangs” satisfied the three-prong PSG test developed from In re Acosta, In re C-A-, and In re S-E-G-.202 Specifically, the BIA

193. See Henriquez-Rivas, 707 F.3d at 1088.
195. See Flores-Rios, 807 F.3d 1123.
197. In re M-E-V-G-, 26 I. & N. Dec. at 234 (“We believe that these [social group] requirements provide guidance to courts . . . [and] are necessary to address the evolving nature of claims asserted [on account of membership in a PSG].”); In re W-G-R-, 26 I. & N. Dec. at 214. The BIA briefly addressed “particularity” in each opinion and noted its overlap with “social visibility.” “This [overlap] occurs because both ‘particularity’ and ‘social visibility’ take account of the societal context specific to the claim for relief[,] . . . [but] it is necessary to address both elements to properly determine whether the group is cognizable . . . .” In re W-G-R-, 26 I. & N. Dec. at 214.
198. Id.
199. Id.
200. Id.
sought to provide clarification on the most confusing of the three requirements: “social visibility.”203 With its decision in In re M-E-V-G-, the BIA ultimately removed “social visibility” as a requirement for proposed PSGs and concluded that “[s]ociety can consider persons to comprise a group without being able to identify the group’s members on sight.”204

The BIA reached the same conclusion in In re W-G-R- that it reached in In re M-E-V-G-, and even incorporated similar language and authority in each opinion.205 The BIA admitted that its “use of the word ‘visibility’ unintentionally promoted confusion” and needed to be replaced.206 The BIA settled on “social distinction” as a more practical tool for evaluating PSGs.207 “[S]ocial distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group.”208 In arriving at its decision to replace “social visibility” in favor of “social distinction,” the BIA pointed to the fact that the court had recognized numerous groups that lacked ocular visibility during the time between In re Acosta and In re C-A-.209 According to the BIA, under the “social distinction” test, it would not have mattered that the groups lacked visibility, so long as society understood that the groups shared a common characteristic that defined them.210

Despite the BIA’s attempts to refine the PSG requirements, some circuits consider the “social visibility” criteria inconsistent211 and in need of further clarification.212 The Seventh Circuit was the first of the circuit courts to push back on the BIA’s “social visibility” requirement and continues to adhere exclusively to the BIA’s Acosta immutability

203. Id. at 236.
204. Id. at 240.
205. See In re M-E-V-G-, 26 I. & N. Dec. at 237 (“[A]n applicant for asylum or withholding of removal seeking relief based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”); In re W-G-R-, 26 I. & N. Dec. at 208 (PSG membership requires “a common immutable characteristic, defined with particularity, and socially distinct within the society in question”).
207. Id. at 217.
208. Id.
209. Id.
210. Id.
211. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).
212. See Scatambuli v. Holder, 558 F.3d 53, 60 (1st Cir. 2009).
standard.\textsuperscript{213} In 2011, the Third Circuit rejected the “social visibility” requirement because it “would pose an unsurmountable obstacle to refugee status” for those groups that previously qualified as PSGs under the Acosta standard.\textsuperscript{214} It remains to be seen whether the Third Circuit is willing to adopt the “social distinction” requirement introduced by \textit{In re M-E-V-G-} and \textit{In re W-G-R-}.

\textit{In re M-E-V-G-} and \textit{In re W-G-R-} also briefly addressed the issue of perspective as it relates to whether a group is socially distinct.\textsuperscript{215} In other words, should courts consider the recognition of a social group from the perspective of the persecutor or the perspective of society? In \textit{Henriquez-Rivas}, the Ninth Circuit looked to the persecutor’s perspective.\textsuperscript{216} The Second Circuit also considers “social visibility” from the perspective of the persecutor, as well as the outside world.\textsuperscript{217} The BIA, on the other hand, bases its determination on the general perception of society.\textsuperscript{218} While the BIA recognizes the value of viewing the group from the persecutor’s perspective, it believes that doing so would “conflated the fact of the persecution with the reasons for it.”\textsuperscript{219} In 2015, the Ninth Circuit changed its stance and adopted the BIA’s view that “social distinction” requires the group to be perceived by society.\textsuperscript{220}

C. \textit{Gang-Related Particular Social Groups Receive Varied Treatment from the Circuit Courts Because There Is No Universal Understanding of Particular Social Group Requirements}

In October 2015, \textit{The Guardian} published an exposé detailing the imminent threat of violence that countless Central American immigrants face when the United States government deports them back to their

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\textsuperscript{213} See NAT’L IMMIGRANT JUSTICE CTR., supra note 121, at 3; Cece v. Holder, 733 F.3d 662, 669 (7th Cir. 2013).

\textsuperscript{214} Valdiviez-Galdamez v. Attorney Gen., 663 F.3d 582, 608 (3d Cir. 2011). Additionally, the Third Circuit reasoned that “social visibility” and “particularity” were not entitled to \textit{Chevron} deference because the BIA did not provide a “principled reason” for adopting these new requirements. \textit{Id.}


\textsuperscript{216} Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013).

\textsuperscript{217} See Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2nd Cir. 2007).

\textsuperscript{218} \textit{In re M-E-V-G-}, 26 I. & N. Dec. at 242.

\textsuperscript{219} See NAT’L IMMIGRANT JUSTICE CTR., supra note 121, at 8; \textit{In re M-E-V-G-}, 26 I. & N. Dec. at 242 (“The perception of the applicant’s persecutors may be relevant, because it can be indicative of whether society views the group as distinct.”).

\textsuperscript{220} Flores-Rios v. Lynch, 807 F.3d 1123, 1127–28 (9th Cir. 2015).
home countries. José Marvin Martínez was one of three Honduran immigrants whose story was chronicled by *The Guardian*. Martínez fled to the United States in 2013 after gang members killed his brother. He was deported back to Honduras in August 2014 and murdered just four months later when a gunman shot him on a street corner. Martínez’s story demonstrates the overwhelming value that obtaining asylum protection can have for Central American individuals who have a well-founded fear of gang violence.

A number of circuit courts have ruled on gang-related PSGs with mixed results. For example, while the Sixth and Seventh Circuits recognize a PSG comprised of former gang members, the Ninth Circuit rejects that same PSG for policy reasons. According to the Ninth Circuit, Congress did not intend to offer refugee status to “violent street gangs who assault people and who traffic drugs and commit theft.” The Seventh Circuit disagrees with the Ninth Circuit’s interpretation, noting that Congress “said nothing about barring former gang members.”

Witnesses to gang crimes, such as Jaime from Part I, have also created confusion among the circuit courts. *Henriquez-Rivas* applied a
“social distinction” test to recognize asylum eligibility for witnesses who testify to gang crimes.\textsuperscript{232} The Third Circuit, relying on the \textit{Acosta} immutability standard, also recognized that witnesses who testify against gang members are members of a PSG.\textsuperscript{233} The Fourth Circuit’s holding in \textit{Zelaya v. Holder}\textsuperscript{234} is a departure from the Third and Ninth Circuits.\textsuperscript{235} Zelaya feared persecution because of his membership in a group consisting of “young Honduran males who (1) refuse[d] to join the Mara Salvatrucha 13 gang (MS-13 gang), (2) have notified the authorities of MS-13’s harassment tactics, and (3) have an identifiable tormentor within MS-13.”\textsuperscript{236} Unlike Henriquez-Rivas, Zelaya did not testify against the gang.\textsuperscript{237} The Fourth Circuit failed to recognize Zelaya’s proposed PSG because it lacked “particularity” and was too “amorphous.”\textsuperscript{238}

The \textit{Zelaya} holding should not affect the PSG analysis for a person in Jaime’s situation for two reasons. First, the Court decided \textit{Zelaya} before the BIA issued its opinions in \textit{In re M-E-V-G-} and \textit{In re W-G-R-}, which adopted the “social distinction” requirement and emphasized the importance of “social distinction.”\textsuperscript{239} As a result, the Fourth Circuit did not use a “social distinction” analysis to reject Zelaya’s proposed PSG.\textsuperscript{240} In fact, the Fourth Circuit is the only circuit court that has declined to adequately address the application of “social visibility” as a requirement to the PSG analysis, much less “social distinction.”\textsuperscript{241} However, in his concurrence, Judge Floyd indicated that a group of

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Cir. 2011) (recognizing the membership of only one of two sisters in a PSG comprised of Guatemalans that testify against gang members).
\textsuperscript{232}. Flores-Rios v. Lynch, 807 F.3d 1123, 1127 (9th Cir. 2015).
\textsuperscript{233}. See Garcia, 665 F.3d at 496.
\textsuperscript{234}. 668 F.3d 159 (4th Cir. 2012).
\textsuperscript{235}. See \textit{Zelaya}, 668 F.3d at 159.
\textsuperscript{236}. \textit{Id.} at 162.
\textsuperscript{237}. \textit{Id.} at 163.
\textsuperscript{238}. \textit{Id.} at 166.
\textsuperscript{240}. \textit{Zelaya}, 668 F.3d at 166 (“The critical problem with Zelaya’s proposed social group for purposes of seeking asylum is that it fails the BIA’s particularity requirement. First, as we have previously recognized, opposition to gangs is an amorphous characteristic . . . .”).
\textsuperscript{241}. Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014) (the court did not address “social visibility” because Martinez failed the “immutability” prong); Crespin-Valladares v. Holder, 632 F.3d 117, 125–26 (4th Cir. 2011) (“social visibility” was not mentioned when determining the validity of the claim); Lizama v. Holder, 629 F.3d 440, 446–47 (4th Cir. 2011) (the claim was considered too amorphous to be valid).
\end{flushleft}
prosecution witnesses to gang crimes would satisfy both the “particularity” and “social distinction” criteria.\textsuperscript{242} Second, Zelaya is not a case about witnesses who report gang violence to police.\textsuperscript{243} It is a case about gang recruitment.\textsuperscript{244} Although Zelaya was harassed and threatened for not joining a gang, he did not witness a serious gang crime and then report that serious gang crime to law enforcement.\textsuperscript{245} He complained twice to the police about being harassed by gangs which, according to the Fourth Circuit, “adds little . . . in the face of the common sense proposition that MS-13 would look unfavorably upon anyone who complained about its harassment tactics to the police.”\textsuperscript{246} Henriquez-Rivas and Jaime both witnessed a murder—a far more serious crime than threatening someone for not joining a gang. Jaime’s proposed PSG is unaffected by Zelaya because his group is not amorphous and passes the “particularity” requirement that Zelaya’s group failed.\textsuperscript{247} Furthermore, the Fourth Circuit’s PSG analysis from Zelaya differs significantly from the current BIA “social distinction” analysis. Therefore, Zelaya does not apply to Jaime’s case.

III. RECOGNIZING A NEW PARTICULAR SOCIAL GROUP

On January 13, 2016, U.S. Secretary of State John Kerry announced that the United States would expand refugee screenings to people fleeing violence in El Salvador, Honduras, and Guatemala.\textsuperscript{248} Just two days before Kerry’s announcement, the Peace Corps suspended its program in El Salvador due to the “ongoing security environment.”\textsuperscript{249} Immigration advocates expressed concern that the United States was willing to deport Salvadorans back to El Salvador while terminating the Peace Corps

\textsuperscript{242}. Zelaya, 668 F.3d at 169 (Floyd, J., concurring).
\textsuperscript{243}. Id. at 166 (Zelaya is primarily concerned with evaluating “[r]esisting gang recruitment” as a PSG).
\textsuperscript{244}. Id.
\textsuperscript{245}. Id. at 162–63. To be clear, Zelaya was beaten by gangs and threatened with death on several occasions.
\textsuperscript{246}. Id. at 166.
\textsuperscript{247}. Part III discusses “particularity” and how it applies to individuals similarly situated to Jaime.
program because of increased violence in the country.\textsuperscript{250} The announcements prove the United States government was aware of the nexus between Central American gang violence and an increase in the number of refugees fleeing the region.\textsuperscript{251}

Although the United States recognizes the risks associated with being a witness to a serious gang crime, it has been reluctant to extend immigration relief to these witnesses and other individuals similarly situated to Jaime. After the September 11, 2001 attacks, Congress passed legislation to accommodate informants by making the S Visa a permanent provision\textsuperscript{252} The S Visa provides temporary immigration status to “aliens who provide critical, reliable information necessary to the successful investigation or prosecution of a criminal organization . . .”\textsuperscript{253} In 2012, the United States Treasury Department opened the door for someone in Jaime’s position to obtain an S Visa by designating the MS-13 as a “transnational criminal organization,” but MS-13 informants may only obtain an S Visa if they have already made it across the border and into the United States.\textsuperscript{254} Congress only allows a total of two-hundred S Visas per year,\textsuperscript{255} and it is unclear how many, if any, of these visas are being designated for MS-13 informants.\textsuperscript{256} It is problematic that the United States only recognizes S Visas for

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\bibitem{251} John Kerry, Sec’y of State, Remarks on the United States Foreign Policy Agenda for 2016 (Jan. 13, 2016) (transcript available at http://www.state.gov/secretary/remarks/2016/01/251177.htm [https://perma.cc/QMS5-WCS2]) (“[W]e have plans to expand the U.S. Refugee Admissions Program in order to help vulnerable families and individuals from El Salvador, Guatemala, and Honduras, and offer them a safe and legal alternative to the dangerous journey that many are tempted to begin . . .”).

\bibitem{252} KARMA ESTER, CONG. RESEARCH SERV., RS21043, IMMIGRATION: S VISAS FOR CRIMINAL AND TERRORIST INFORMANTS 1 (2005), https://www.fas.org/sgp/crs/terror/RS21043.pdf [https://perma.cc/8TD9-UPLQ]. The S Visa was originally scheduled to expire on September 13, 2001. The new law amended the INA “to provide permanent authority for the administration of the ‘S’ Visa.” Id.


\bibitem{255} See OFFICES OF THE U.S. ATT’YS, supra note 253.

\bibitem{256} It is unlikely the U.S. would see much value in obtaining intelligence information from most witnesses fleeing gang violence in the Northern Triangle.
\end{thebibliography}
informants who are already present in the United States. However, the existence of the S Visa program is still persuasive for extending protection to Jaime and other witnesses alike because it serves as evidence that the United States government is willing to acknowledge the danger and value of informants.

A. Witnesses Who Report Serious Gang Crimes to Law Enforcement Are Members of a Particular Social Group

Jaime’s PSG—Salvadoran witnesses who report serious gang crimes to law enforcement—passes both the BIA’s three-prong test and the Acosta immutability standard followed by the Third and Seventh Circuits. Courts that incorporate the “social distinction” prong in their PSG analysis may rely on either direct or circumstantial evidence to demonstrate persecution on account of membership in a PSG. In Jaime’s case, Salvadoran society’s perception of witnesses who report gang crimes is shaped by the power and influence of El Salvador’s gangs. Evidence of this influence establishes the basis for creating a new PSG that does not require a witness to a serious gang crime to testify in court against gang members.

The BIA’s immutability standard is satisfied if the common characteristic that defines members of the group cannot be changed. The immutability requirement from In re Acosta has been endorsed by all of the federal circuit courts of appeals. Because witnesses that report serious gang crimes cannot change what they have already seen and undo their report to law enforcement, witnesses such as Jaime pass

257. While this Comment focuses almost exclusively on El Salvador, it is intended to serve as a guide for witnesses to gang crimes around the globe. For example, witnesses from Guatemala and Honduras may rely on similar evidence to make the same argument that they are members of a PSG.

258. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, supra note 11, at 32. “To determine whether the applicant has been persecuted or has a well-founded fear of persecution on account of his or her membership in a particular social group, the asylum officer must elicit and consider all evidence, direct and circumstantial, providing information about the motivation of the persecutor.” Id. (emphasis in original). For example, country conditions reports are relevant circumstantial evidence that can be used to establish the persecutor’s motives. Id. at 13.

259. In re M-E-V-G, 26 I. & N. Dec. 227, 244 (B.I.A. 2014) (“Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ . . . in a particular society.”); see also NAT’L IMMIGRANT JUSTICE CTR., supra note 121, at 6. Pro-immigration critics argue that In re M-E-V-G precludes pro se applicants from gaining asylum because “the BIA requires an asylum applicant to formulate a group in terms which are statistically precise,” which often requires a lawyer.


261. See NAT’L IMMIGRANT JUSTICE CTR., supra note 121, at 1.
the immutability standard.262 If Jaime’s case were heard in either the Third or Seventh Circuits, his PSG would likely be recognized by the sheer fact that the shared characteristic of the group is immutable.263 The more interesting debate is whether Jaime’s proposed PSG also meets the additional “social distinction” requirement followed by the Ninth Circuit and the BIA.

Circuits that require “social visibility” should rely on the Ninth Circuit’s decision in *Henriquez-Rivas* to evaluate the validity of a proposed PSG that recognizes witnesses who report serious gang crimes for two reasons. First, the majority of immigrants fleeing the Northern Triangle eventually resettle in the Ninth Circuit, which means their cases are most frequently heard in the Ninth Circuit.264 Second, *Henriquez-Rivas* has already provided the Ninth Circuit with an established framework for analyzing asylum claims involving witnesses to gang crimes.265 Analyzing Jaime’s PSG merely requires the Ninth Circuit to refocus its “social distinction” analysis from *Henriquez-Rivas* and evaluate the dangers that Henriquez-Rivas would have faced from the M-18 before she testified against them in court. By eliminating the “social visibility” requirement and replacing it with “social distinction,” *Henriquez-Rivas* shifts the focus from the troubling task of assessing a group’s visual recognition to assessing whether society understands the group exists.266 After determining the group is “socially distinct,” a court will direct its attention to deciding whether the group also passes the “particularity” requirement.267

For Jaime to meet the “particularity” requirement, he must establish that his PSG is easy for Salvadoran society to accurately describe.268 Unlike the PSG at issue in *In re S-E-G-*, Salvadoran witnesses who report serious gang crimes to law enforcement are easily defined by

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263. *Gatimi* v. *Holder*, 578 F.3d 611, 615 (7th Cir. 2009); *Valdiviezo-Galdamez* v. *Attorney Gen.*, 663 F.3d 582, 604 (3d Cir. 2011).
266. *Id.* at 1088 (citing *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006)).
267. *Id.* at 1090.
Salvadoran society. Witnesses like Jaime do not belong to an amorphous class that lacks definition. In In re S-E-G-, the BIA rejected a group comprised of “male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment.” This group failed “particularity” because it was not easily identifiable and “people’s ideas of what those terms mean can vary.” Conversely, membership in Jaime’s group is specifically limited to individuals who complete a two-step process—witness a serious gang crime and report it to law enforcement. Courts that are provided with enough evidence to recognize Jaime’s group as “socially distinct” will likely find his group also satisfies the “particularity” requirement.

1. **Kill the Snitch: Salvadoran Witnesses Risk Their Lives to Report Serious Gang Crimes to Law Enforcement**

Using the rationale of In re C-A-, the BIA determined that “[social] visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.” By reporting gang crimes to Salvadoran law enforcement, witnesses like Jaime come to the attention of gang members due to widespread gang influence and police corruption. El Salvador’s country conditions establish that witnesses who report serious gang crimes are “socially distinct” within Salvadoran society. Country conditions provide courts with “information about the context in which the . . . persecution took place,” so courts can effectively evaluate the

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269. Henriquez-Rivas, 707 F.3d at 1085 (“The group [in In re S-E-G-] lacked ‘particularity’ because the category was too ‘amorphous’ and the group membership was not easily definable.”).


271. Id. at 584 (citing In re A-M-E & J-G-U-, 24 I. & N. Dec. 69, 73–74 (B.I.A. 2007)).


275. See Zahedi v. INS, 222 F.3d 1157, 1163 (9th Cir. 2000) (for usefulness of country conditions).
witness’s credibility. In El Salvador, there is overwhelming evidence that proves witnesses who report serious gang crimes to law enforcement are at risk of being seriously harmed or even killed. Salvadoran society recognizes the risks associated with reporting gang crimes to police. The evidence presented in this Comment suggests that Salvadoran society also recognizes that witnesses who report gang crimes to police are members of a “socially distinct” group.

In 2015, El Salvador became the “murder capital of the world” by averaging almost sixteen murders a day and nearly 7,000 for the entire year. The majority of these killings are understood to be either the result of gang violence or the extrajudicial police killings of gang members. This brutal police practice, known as mano dura, involves sending military and police into the streets to confront gang members and arrest them. Mano dura has only exacerbated the problem of gang

276. Id.

277. While this Comment focuses almost exclusively on El Salvador, the same arguments can be applied to places with similar levels of gang violence.

278. For example, in May 2015, M-18 murdered a man because it suspected he was an informant. Jorge Beltrán Luna, Aumento de Homicidios por Suspechas de que Son Informantes de la Policía, ELSALVADOR.COM (May 20, 2015, 8:00 PM), http://www.elsalvador.com/articulo/sucesos/aumento-homicidios-por-suspechas-que-son-informantes-policia-75396 [https://perma.cc/4SSM-LVJP] (author translation); see also Repunte de Homicidios en el Área de la Matanza, ELSALVADOR.COM (Mar. 3, 2016, 10:08 PM), http://www.elsalvador.com/articulo/sucesos/repunte-homicidios-area-matanza-103678 [https://perma.cc/2YBL-WR] (discussing how two healthcare workers were killed in March 2016 because the MS-13 suspected they reported witnessing a murder to police) (author translation).

279. Sarah Kinosian & Angelika Albaladejo, El Salvador’s Security Strategy in 2016: Change or More Mano Dura?, LATIN AM. WORKING GROUP (Feb. 29, 2016), http://www.lawg.org/action-center/lawg-blog/69-general/1599-el-salvadors-security-strategy-in-2016-change-or-more-mano-dura- [https://perma.cc/MMV6-WRCF] (“[A] culture of silence with regards to corruption and violence has been created” by gang threats to kill those that speak to police); see also Una Clica Controla el Barrio San Jacinto, ELSALVADOR.COM (Dec. 20, 2015, 10:00 PM), http://www.elsalvador.com/articulo/sucesos/una-clica-controla-barrio-san-jacinto-96646 [https://perma.cc/2HG7-Q2Y6] (in the community of Harrison Step, a journalist observed “a warning painted on a wall: kill the snitch” (author translation)).


282. Id.

283. See Kinosian & Albaladejo, supra note 279. El Salvador also implemented mano dura from 2003 to 2009, but its practice failed to reduce murder rates. For many incarcerated gang members, prison was an opportunity to consolidate groups and expand criminal networks.
violence as gangs have redoubled their efforts to assert control over disputed areas of El Salvador and evade arrest. Because of this conflict, people are reluctant to report information to the police regarding criminal gang activity for fear of gang reprisal.

Fear of gang violence is so prevalent throughout the country that even police officers wear masks to conceal their identities from gangs. Organized attacks on police officers and their families are common. This helps explain why witnesses choose not to testify against gangs; they fear gangs will respond by harming them and their families. In April 2015, a seventy-nine-year-old man was dragged out of his house and stabbed to death. After killing him, M-18 members sent a message to the community by hanging a piece of cardboard around the man’s neck with the phrase “for snitching.”

In El Salvador, there is no guarantee a witness’s identity will be protected or that gangs will be prosecuted for their crimes. In

284. See Lakhani, supra note 281.
285. See Kinosian & Albaladejo, supra note 279 (“People are afraid that if they report [gang crimes] . . . that people will come after them.”).
288. Jorge Beltran Luna, San Hilario Se Resiste a Vivir bajo Control de la MS, ELSALVADOR.COM (Apr. 2, 2016, 8:30 PM), http://www.elsalvador.com/articulo/sucesos/san-hilario-resiste-vivir-bajo-control-106407 [https://perma.cc/J79P-MDF2] (discussing how witnesses are especially reluctant to come forward in communities where gang members have family) (author translation); Sachit Chavez, “Medio Millón” Exonerado de Homicidios por Falta de Testigo, LA PRENSA GRAFICA (Oct. 29, 2015, 6:00 AM), http://www.laprensagrafica.com/2015/10/29/medio-millon-exonerado-de-homicidios-por-falta-de-testigo [https://perma.cc/44PL-CAGZ] (saying that money laundering charges were dropped against a key figure in the MS-13 gang because prosecutors were unable to locate the witness) (author translation).
289. See Beltrán Luna, supra note 278.
290. Id.
291. See IMMIGRATION & REFUGEE BD. OF CAN., supra note 274, at § 1, “The Global Corruption Barometer 2013, by Transparency International, notes that 87 percent of respondents declared that the Salvadoran police was ‘corrupt/extremely corrupt,’ and 18 percent said they had paid a bribe to
February 2015, gang members murdered a witness under police protection while he was waiting at a bus stop. Two months later, six gang members burst into the home of Reina Ortiz and shot her and her four-year-old daughter to death because Ortiz was planning to testify against the gang for murdering her brother in 2013. El Salvador’s criminal conviction rate is below 5%. Meanwhile, in neighboring Guatemala, only 3% of 250,000 gang complaints filed in 2011 were prosecuted. This failure to hold gangs criminally liable for their actions has led to a “sense of impunity” and freedom to operate.

In 2014, El Salvador’s Attorney General accused lawyers, judges, and police of accepting bribes from gangs in exchange for more favorable sentences. Even former President Mauricio Funes personally admitted to paying gangs for political support. Gangs have also begun using the

police officers.” Id. A former PNC (Policia Nacional Civil) director was linked to a relationship with criminal gangs. Id. at 2; See also Alberto Arce, Bloodshed in El Salvador Reaching Levels of 1980s Civil War, CNSNEWS.COM (June 22, 2015, 7:15 PM), http://www.cnsnews.com/news/article/bloodshed-el-salvador-reaching-levels-1980s-civil-war [https://perma.cc/XJ6N-499L] (reporting that El Salvador arrested more than 12,000 gang members in 2015 “with little to show for it”).


293. Jessel Santos, Matan a Testigo de Homicidio y Su Hija de 4 Años, LA PRENSA GRAFICA (May 19, 2015, 6:00 AM), http://www.laprengrafica.com/2015/05/19/matan-a-testigo-de-homicidio-y-a-su-hija-de-4-aos [https://perma.cc/F8ZN-WWE8] (author translation).

294. See Seelke, supra note 254, at 9.


296. Id.

297. Id.


same firearms exclusively reserved for El Salvador’s armed forces, which raises the question—is the government supplying the gangs with these weapons in exchange for support?

The United States has recognized this corruption and level of sophistication since 2012, when it imposed financial sanctions against MS-13. A year later, Senator Patrick Leahy of Vermont spoke out against El Salvador’s police corruption and its lack of concern for improving public safety. Despite attempts to curtail the problem, claims of corruption persist today.

Once Jaime reports the crime he witnessed to law enforcement, he runs the risk that corrupt police officers will pass along his identity to gang members. Gangs routinely hire police officers to protect their

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302. Hector Silva, The Fixer and El Salvador’s Missed Opportunity, INSIGHT CRIME (Mar. 6, 2014), http://www.insightcrime.org/investigations/the-fixer-and-el-salvadors-missed-opportunity [https://perma.cc/6XVB-DW8J] (“In the last few years I have seen how Salvadorans are victims of violence, of a corrupt police, of individuals in security positions who worry more about getting rich than improving conditions for their people.”).


304. Eugenia Velásquez & Alex Torres, Se Revela Posible Negociación del FMLN con Pandilleros, ELSALVADOR.COM (May 7, 2016, 9:53 PM), http://www.elsalvador.com/articulo/nacional/revela-posible-negociacion-del-fmln-con-pandilleros-111978 [https://perma.cc/2YDN-UU6D] (author translation). In May 2016, El Salvador’s El Faro newspaper revealed that the FMLN political party negotiated deals with the MS-13 and M-18 gangs in exchange for support in the 2014 presidential election. Id.; see also Seelke, supra note 254, at 19 (stating that in 2013, USAID suspended funding intended for individuals affected by the global financial crisis because it believed the money was ending up in gang members’ hands).

305. See Una Clica Controla el Barrio San Jacinto, supra note 279 (“Police do not escape the control of the gangs. In fact, they may be the most controlled.” (author translation)); Oscar Martinez, The Gang Informant El Salvador Failed to Protect, INSIGHT CRIME (Jan. 16, 2015), http://www.insightcrime.org/news-analysis/the-gang-informant-el-salvador-failed-to-protect [https://perma.cc/NM88-N35Q] (discussing how two police officers, Jose Wilfredo Tejada and Walter Misael Hernandez, detained a 23-year-old boy who was later tortured and murdered by a notorious M-13 member; the police informant that testified against Tejada, Hernandez, and the M-13 member was also murdered).
ability to traffic drugs and commit other crimes.\footnote{306} Between 2009 and 2013, more than 500 police officers were arrested for corruption and involvement in criminal activities.\footnote{307} Many of these officers worked with gangs by providing them information about witnesses who had reported gang crimes.\footnote{308} Even today, there are reports that certain police officers are either gang members who have infiltrated the police, or they have family who are gang members they seek to protect.\footnote{309} In fact, a recent VICE News investigation estimated that almost half a million people in El Salvador depend on the country’s 60,000 gang members for financial support.\footnote{310} Another study commissioned by El Salvador’s Security Ministry estimated that as many as 470,000 citizens were in some way affiliated with gangs.\footnote{311} This degree of gang dependency makes it challenging for people in Jaime’s position to escape gang detection.

To evaluate “social distinction,” courts are encouraged to consider any criminal laws designed to protect victims of the proposed group.\footnote{312} As Henriquez-Rivas points out, “Salvadoran society recognizes the unique vulnerability of people who testify against gang members in criminal proceedings, because gang members are likely to target these individuals as a group.”\footnote{313} In 2006, the El Salvador legislature passed a witness protection law to protect witnesses from dangerous criminals.

\begin{footnotes}
\item[307] David Marroquín, Más de 500 Policías Detenidos Ligados a Hechos Delictivos, ELSALVADOR.COM (Apr. 14, 2013, 8:00 PM), http://www.elsalvador.com/articulo/sucesos/mas-500-policias-detenidos-ligados-hechos-delictivos-33694 [https://perma.cc/3UFDGFPU] (the reporting officers were arrested for crimes ranging from extortion, bribery, theft, sexual assault, domestic violence, drug trafficking, and links to criminal gangs) (author translation).
\item[308] Id.
\item[309] Id. (noting certain officers provide gangs with details about patrols so their friends and family can avoid arrest). See also Maras Están Infiltradas en la Policía y el Ejército de El Salvador, LA PENS\textsc{A} (Dec. 14, 2015), http://www.laprensa.hn/mundo/911239-410/maras-esta%C3%A1n-infiltradas-en-la-policia-el- ejercito-1239-410 [https://perma.cc/YKC6N6BC] (reporting that in 2015, El Salvador’s Secretary of Communications recognized that gangs have successfully infiltrated the police and military ranks) (author translation).
\item[310] See Gangs of El Salvador, supra note 286.
\item[313] Henriquez-Rivas v. Holder, 707 F.3d 1081, 1092 (9th Cir. 2013).
\end{footnotes}
such as the M-18 gang and the MS-13 gang. The law’s purpose was to encourage witnesses to come forward and report crimes.

The witness protection program’s inability to offer adequate protection remains a point of contention, especially when one considers the vast gang networks at play in the Northern Triangle. According to a former prosecutor, gangs murdered at least 100 witnesses in 2010, often mutilating bodies in the process. Moreover, some judges continue to deny witnesses anonymity from gang members at trial, which limits the overall effectiveness of the witness protection program. In 2011, at least ten witnesses under the program’s protection were forced to testify in front of gang members without the use of voice distortion devices or masks to hide their identities. Six hours after one of these witnesses testified, his son and niece were killed in a home attack.

314. Id. “The law states, in pertinent part: ‘Considering . . . [t]hat the current Salvadoran reality evidences the necessity that victims, witnesses and others who are involved in . . . judicial proceedings, as well as their families . . . should be protected to avoid violations of their rights . . . .’” Id. at n.15 (citing Decreto No. 1029, Ley Especial Para La Protección De Víctimas Y Testigos [Special Law for Victim and Witness Protection], May 25, 2006, 1, 603 (El Sal.), http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-especial-para-la-protectICON-de-victimas-y-testigos). “The decree provides for ordinary and extraordinary protection measures, Chapter III, Art. 10 and 11, which include changes of identity and residence, even to foreign countries.” Id.


316. See IMMIGRATION & REFUGEE BD. OF CAN., EL SALVADOR, supra note 86 (noting, for example, a police investigator under witness protection was killed by gang members); LAURA PEDRAZA FARISA ET AL., INT’L HUMAN RIGHTS CLINIC, HUMAN RIGHTS PROGRAM, HARVARD LAW SCH., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 88, 160–61 (2010), http://helenlavrencelaw.com/wp-content/uploads/2016/05/No-Place-to-HideJan-2010.pdf [https://perma.cc/PL2M-YDNL]; Thomas Boerman, Youth Gangs in El Salvador: Unpacking the State Department 2007 Issue Paper, IMMIGRATION DAILY, http://www.illw.com/articles/2010,1117-boerman.shtml [https://perma.cc/HY57-GZSN] (last visited July 31, 2016) (explaining that gangs may target individuals from a particular church); Solano, supra note 292; Kinosian & Albaladejo, supra note 279 (noting that according to a human rights group investigating extrajudicial killings, “witness protection practically does not exist. There is little attention to victims, and no one wants to come forward to speak.”).

317. See UNITED NATIONS HIGH COM’R FOR REFUGEES, supra note 81.


319. See IMMIGRATION & REFUGEE BD. OF CAN., supra note 86, ¶ 3.2.


321. Id.
The specific language of El Salvador’s witness protection law does not limit protection to witnesses that testify at trial.\textsuperscript{322} The protection is available to witnesses “involved in [any] judicial proceeding,”\textsuperscript{323} which suggests that people who report crimes to law enforcement qualify for the program. Individuals in Jaime’s situation are faced with a decision between trusting the witness protection program, or choosing to ignore crimes they witness. To make matters even worse, El Salvador’s gangs treat “snitches” and potential “snitches” the same: they kill them.\textsuperscript{324}

2. \textit{Going One Step Further: The Case for Expanding Asylum Eligibility to Witnesses Who Do Not Report Serious Gang Crimes to Law Enforcement}

This Comment urges courts to recognize the PSG consisting of witnesses who report serious gang crimes to law enforcement. However, recognizing this PSG should not preclude courts from recognizing a PSG consisting of witnesses to serious gang crimes who do not report those crimes to law enforcement.\textsuperscript{325} In fact, the same evidence that supports expanding asylum eligibility to include people like Jaime also supports expanding eligibility to include certain witnesses who do not report serious gang crimes.\textsuperscript{326} While the danger for reporting gang crimes is certainly higher than the danger for not reporting those same crimes, Salvadoran society recognizes the inherent risk of being a witness to a gang crime and the consequences of reporting that crime to law enforcement.\textsuperscript{327}

Assume that Jaime never provided police with detailed physical descriptions of the gang members who killed his father because the M-18 discovered Jaime’s identity before he had an opportunity to report the crime. Evidence suggests that Salvadoran society still accepts Jaime’s

\textsuperscript{322} See Decreto No. 1029, Ley Especial Para La Protección De Víctimas Y Testigos [Special Law for Victim and Witness Protection], May 25, 2006, 1 (El Sal.) (author translation).
\textsuperscript{323} Id.
\textsuperscript{324} Jorge Beltrán Luna, \textit{Aumento de Homicidios por Sospechas de que Son Informantes de la Policía}, ELSalvador.COM (May 20, 2015, 8:00 PM), http://www.elsalvador.com/articulo/sucesos/aumento-homicidios-por-sospechas-que-son-informantes-policia-75396 [https://perma.cc/F8MP-AHSJ] (author translation).
\textsuperscript{325} If the M-18 erroneously believes Jaime reported the crime to police, Jaime has an imputed characteristic and therefore meets the four factors needed to establish a well-founded fear. \textit{See supra} note 63.
\textsuperscript{326} For instance, El Salvador’s ineffective witness protection program and the overwhelming evidence of police corruption deters witnesses from reporting gang crimes to law enforcement. \textit{See supra} Part III.A.1.
\textsuperscript{327} Henríquez-Rivas v. Holder, 707 F.3d 1081, 1092 (9th Cir. 2013).
membership in a “socially distinct” group despite the fact he did not report the crime. 328 Salvadoran society recognizes that gangs routinely murder people for simply witnessing crimes—even if the witness does not intend to report the crime to law enforcement. 329 In March 2016, the MS-13 murdered two healthcare workers in their home because the gang suspected the couple witnessed a homicide and reported it to police. 330 This example shows how gangs are now targeting and killing people they suspect of being witnesses or informants. 331 In specific instances, being considered a “snitch” is no less dangerous than being the actual “snitch” who reports the gang crime directly to law enforcement. 332 Witnessing a gang crime is reason enough to trigger a deadly response from gangs. 333 Requiring witnesses to report serious gang crimes to police is the same as effectively requiring witnesses to announce their identities and home addresses to gangs. 334

328. Id.
329. See Ángela Castro, Matan a Dueño de Pupusería en Mejicanos, EL SALVADOR.COM (July 13, 2014, 7:00 PM), http://www.elsalvador.com/articulo/sucesos/matan-dueno-pupuseria-mejicanos-64312 [https://perma.cc/P9E3-96HS] (reporting police suspected a pupusería owner was murdered because he may have witnessed a homicide that took place in the area) (author translation); Sarah Kinosian et al., El Salvador’s Gang Violence: Turf Wars, Internal Battles, and Life Defined by Invisible Borders, LATIN AM. WORKING GROUP: JUST AM.: A BLOG BY LAWG (Feb. 10, 2016), http://lawg.org/action-center/lawg-blog/69-general/1579-el-salvadors-gang-violence-turf-wars-internal-battles-and-life-defined-by-invisible-borders [https://perma.cc/WE8C-2CA2]; Matan a Cuatro Jóvenes en San Juan del Gozo, EL SALVADOR.COM (Aug. 23, 2015, 6:58 PM), http://www.elsalvador.com/articulo/sucesos/matan-cuatro-jovenes-san-juan-del-gozo-85361 [https://perma.cc/Q8ST-QVS3] (reporting a former gang member was hunted down and murdered in August 2015 after he joined a religious youth group and three additional youths were killed because the gang did not want to leave any witnesses) (author translation); Matan a Dos Personas en Rosario de Mora, EL SALVADOR.COM (Sept. 27, 2015, 1:41 PM), http://www.elsalvador.com/articulo/sucesos/matan-dos-personas-rosario-mora-88544 [https://perma.cc/6UYM-HEWF] (reporting that in 2015 an old man was murdered because he walked past a group of gang members while they executed another man) (author translation).
330. See Repunte de Homicidios en el Área de la Matanza, supra note 278 (reporting couple was surrounded by their grandchildren when they were shot to death) (author translation).
331. See Luna, supra note 278 (reporting various instances in which Salvadorans were murdered because gangs suspected they were police informants, including a man from Usulután who was shot to death and cut up by a machete in front of his family because he was a friend of a police officer) (author translation).
332. Id.
333. Id.
334. Jaime will have difficulty establishing a nexus between the persecution and the protected interest if he refused to report the gang crime because he feared the police were corrupted by the M-18. Specifically, critics will argue that Jaime is not being targeted for possessing a trait, but rather because the M-18 is trying to expand its criminal activities. Adequately evaluating the merits of this proposed PSG likely requires a separate analysis that goes beyond the scope of this Comment.
As Judge Posner noted in *Gatimi*, members of a group that are being persecuted will go to great lengths to conceal their identities.\(^{335}\) This is especially true in a place like El Salvador, where gangs operate with impunity. Even some police officers fear gang reprisal for simply mentioning how and why a crime took place.\(^{336}\) Witnesses to gang crimes have an obvious explanation for attempting to conceal their identities—gangs kill snitches. The dangers associated with reporting gang crimes to law enforcement outweigh the risks of witnessing a gang crime and not reporting it. However, both groups are presumed to be snitches and treated alike. In El Salvador, gangs have sent a very clear message to society: “snitches will be killed.”\(^{337}\)

**CONCLUSION**

The 1967 Protocol imposes a duty on the United States to protect refugees like Jaime from their persecutors. If the United States refuses to honor this duty, it not only forecloses the opportunity for Jaime to gain asylum, but it also forces Jaime to return to El Salvador where he faces almost certain death. The United States is aware that Jaime cannot safely return to El Salvador. Fortunately, American courts are capable of expanding asylum eligibility by recognizing new PSGs under the BIA’s updated three-prong test. Because Jaime’s group passes this test, he is a member of a PSG. Therefore, he and every other member of his group should be afforded the same opportunity to win asylum that the Ninth Circuit gave to Henriquez-Rivas.

\(^{335}\) *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

\(^{336}\) See *Castro*, *supra* note 329 (author translation).

\(^{337}\) *Una Clic Controla el Barrio San Jacinto*, *supra* note 279 (author translation); *see also* Luna *supra*, note 278 (author translation).