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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.”¹

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.² Henriquez-Rivas observed the men assault her father and heard the gunshots that killed him as she fled the scene.³ She identified two of the suspects from a lineup and testified against them in court.⁴

1. Jared Goyette, *Óscar Martínez on Why El Salvador Is a ‘Good Place to Kill,’*, PUB. RADIO INT’L (Apr. 20, 2016, 12:15 PM), <http://www.pri.org/stories/2016-04-20/scar-mart-nez-why-el-salvador-good-place-kill> [<https://perma.cc/3RYA-5U4P>] (containing comments made by investigative journalist Óscar Martínez).

2. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1085 (9th Cir. 2013).

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.⁵ 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.⁶ A few years later, an unknown man visited Henriquez-Rivas' school and asked if anyone knew "Rocio Henriquez."⁷ 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.⁸ In 2005, she fled to the United States and applied for asylum.⁹

Now assume that shortly after Henriquez-Rivas filed her asylum application, another individual from El Salvador, Jaime,¹⁰ 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.¹¹ 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.

11. See U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING, ASYLUM ELIGIBILITY PART III: NEXUS AND THE FIVE PROTECTED CHARACTERISTICS 5 (2009), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf> [<https://perma.cc/EYQ5-KDV6>] [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III].

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.¹² Of these five protected interests, the term “particular social group” (PSG) is the most ambiguous.¹³

The Board of Immigration Appeals (BIA) first confronted this ambiguity with its oft-cited PSG analysis in *In re Acosta*.¹⁴ After nearly thirty years of attempts to refine its definition, certain elements of PSGs remain a divisive issue among the circuit courts.¹⁵ 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*.¹⁶

In 2013, the Ninth Circuit decided *Henriquez-Rivas v. Holder*¹⁷ and recognized Henriquez-Rivas’ membership in a PSG while rejecting the BIA’s interpretation of PSG requirements.¹⁸ In overruling the BIA, the Ninth Circuit determined that Henriquez-Rivas had a well-founded fear

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); *Lwin 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.”¹⁹ 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.²⁰ 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.²¹

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.²²

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,²³ Guatemala,²⁴ and Honduras²⁵—there has been a marked increase in the number of people fleeing the area and seeking asylum abroad.²⁶ 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.

23. El Salvador experienced 103 homicides per 100,000 people in 2015. David Gagne, *InSight Crime’s 2015 Latin America Homicide Round-up*, INSIGHT CRIME (Jan. 14, 2016), <http://www.insightcrime.org/news-analysis/insight-crime-homicide-round-up-2015-latin-america-caribbean> [https://perma.cc/778D-Z33U].

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).

26. *Children on the Run*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/en-us/children-on-the-run.html> [https://perma.cc/L27E-UK96].

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 2014.²⁷ These numbers reflect the fear and insecurity that motivates migration from the Northern Triangle.²⁸ For those individuals seeking refuge in the United States, satisfying the asylum requirements posed by the American legal system is daunting.²⁹ 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.³⁰ 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.³¹

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*

In 1968, the United States committed itself to the protection of refugees by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees (the “1967 Protocol”), which expanded on the 1951 United Nations Refugee Convention Relating to the Status of Refugees (the “1951 Convention”).³² Under Article 33 of the 1951 Convention, “[n]o [c]ontracting [s]tate shall expel or return . . . a refugee in any manner whatsoever to . . . where his life or freedom would be threatened

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.”)

28. See *Five Facts About Migration from Central America's Northern Triangle*, WASH. OFFICE ON LATIN AM. (Jan. 15, 2016), <https://www.wola.org/analysis/five-facts-about-migration-from-central-americas-northern-triangle/> [<https://perma.cc/4GTY-NXUF>].

29. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT, REFUGEES AND ASYLEES: 2014 1 (2016) (only 23,533 individuals were granted asylum in 2014).

30. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING, ASYLUM ELIGIBILITY PART I: DEFINITION OF REFUGEE; DEFINITION OF PERSECUTION; ELIGIBILITY BASED ON PAST PERSECUTION 8 (2009), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf> [<https://perma.cc/UE9K-2X8R>] [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS.].

31. *Id.*

32. Diane Uchimiyu, *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.”³³ 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.³⁴

The United States derived its original definition of “refugee”³⁵ from the 1951 Convention, which limited refugee status to individuals with a fear of future persecution.³⁶ That definition remained largely unchanged until 1980, when Congress passed an amendment to the INA, known as the Refugee Act of 1980 (“Refugee Act”).³⁷ The Refugee Act served as a response to the needs of people suffering persecution in their homelands.³⁸ 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.³⁹ 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.⁴⁰

33. U.N. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; UNITED NATIONS HIGH COMM’R FOR REFUGEES, U.N. Refugee Agency, Exec. Comm. of the High Comm’r’s Programme, Sub-Comm. of the Whole on Int’l Protection, *Note on Non-Refoulement (Submitted by the High Commissioner)*, at ¶ 1, U.N. Doc. EC/SCP/2 (Aug. 23, 1977) [hereinafter UNHCR] (finding non-refoulement widely accepted as a customary norm of international law and noting that “[t]he most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution.”) *Id.* ¶ 18.

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.

36. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 30, at 6–7.

37. *See* Maurice A. Roberts, *The U.S. and Refugees: The Refugee Act of 1980*, 12 ISSUE: A JOURNAL OF OPINION, 4–6 (1982). The Refugee Act of 1980 served as the first comprehensive amendment to the country’s general immigration laws. *Id.* at 4. For a more detailed explanation of the INA, *see* Tom Gjelten, *The Immigration Act That Inadvertently Changed America*, THE ATLANTIC (Oct. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409/> [<https://perma.cc/ZH3N-T76H>].

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

41. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 30, at 15 (“The degree of harm must be addressed before an asylum officer may find that the harm that the applicant suffered or fears can be considered ‘persecution.’”).

42. *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (citing *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc)).

43. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 30, at 16.

44. *See In re T-Z-*, 24 I. & N. Dec. 163, 171 (B.I.A. 2007); *In re Laipenieks*, 18 I. & N. Dec. 433, 457 (B.I.A. 1983) (quoting H.R. REP. NO. 95-1452 at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4702 (“The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”)).

45. *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004).

46. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 30.

47. *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010).

48. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 30, at 15.

49. *See Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004) (“[E]ven in situations of widespread civil strife, ‘it is irrelevant whether one person, twenty persons, or a thousand persons were targeted or placed at risk,’ so long as there is a nexus to a protected ground.”); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004).

a subjective element.⁵⁰ The subjective element is met only if an applicant's fear of persecution is genuine.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.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.⁵³

The objective element is satisfied if there exists "a reasonable possibility of suffering [the feared] persecution."⁵⁴ The Supreme Court clarified that the objective requirement of a "well-founded fear" does not require a high statistical probability of persecution.⁵⁵ "[E]ven a ten percent chance of persecution may establish a well-founded fear."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."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.'"⁵⁸

This Comment addresses expanding the PSG created by *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

50. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING, ASYLUM ELIGIBILITY PART II: WELL-FOUNDED FEAR (Mar. 13, 2009), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTCLesson%20Plans/Well-Founded-Fear-31aug10.pdf> [<https://perma.cc/4GA3-WQDA>] [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II].

51. See *In re Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985).

52. *Id.* at 221.

53. *Id.*

54. 8 C.F.R. § 208.13(b)(2)(B) (2016).

55. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

56. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001); see also *Cardoza-Fonseca*, 480 U.S. at 440 (quoting *INS v. 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.").

57. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, *supra* note 50, at 5; *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (applicant needs evidence that is credible, direct, and specific).

58. *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000), *overruled on other grounds by Adebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009).

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.⁵⁹ 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.”⁶⁰ 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].”⁶¹ 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.⁶² To satisfy this requirement, the adjudicator must find it is reasonable that the persecutor believes the applicant possesses the characteristic.⁶³ 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

59. See *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

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 Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

61. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, *supra* note 50, at 7.

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).

65. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, *supra* note 50, at 7.

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.*

70. *In re M-Z-M-R-*, 26 I. & N. Dec. 28, 32 (B.I.A. 2012).

71. *Id.* at 33.

infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.”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.⁷³

Finally, applicants must also establish the persecutor’s inclination to persecute him or her.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.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.⁷⁶

Inclination is also established by relying on relevant country conditions and human rights reports.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.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.

72. 8 C.F.R. § 1208.13(b)(3) (2016).

73. See *M-Z-M-R-*, 26 I. & N. Dec. at 34.

74. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, *supra* note 50, at 7.

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

76. 8 C.F.R. § 208.13(b)(2)(iii) (2016).

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 . . .”).

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

79. See UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS, ¶¶ 37–38, 41 (Mar. 31, 2010), <http://www.refworld.org/docid/4bb21fa02.html> (last visited Sept. 23, 2016).

80. Uchimiya, *supra* note 32, at 162.

81. UNITED NATIONS HIGH COMM'R FOR REFUGEES, *supra* note 79, ¶¶ 37–38, 41.

82. *Id.* ¶¶ 53–54.

83. Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGRATION BRIEFINGS 11 (2012), <http://cgrs.uchastings.edu/sites/default/files/October%202012%20Immigration%20Briefings.pdf> [<https://perma.cc/VVD5-V4C3>].

84. U.S. SENATE CAUCUS ON INT'L NARCOTICS CONTROL, RESPONDING TO VIOLENCE IN CENTRAL AMERICA 7 (Sept. 2011), http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=a67575d5-66dd-4e36-a4ae-6a4f70de500a&SK=689B2D014C1464F4CFD6561AA5FEDC4F [<https://perma.cc/FH8W-5Y77>]; see also CLARE RIBANDO SEELKE, U.S. CONG. RESEARCH SERV., GANGS IN CENTRAL AMERICA 5 (Feb. 20, 2014), <http://www.fas.org/sgp/crs/row/RL34112.pdf> [<https://perma.cc/3B3Y-DQ32>]. The MS-13 has reportedly been hired by Mexican drug cartels to carry out revenge killings. *Id.*

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

86. *El Salvador: Crime and State Efforts to Combat Crime; State Protection for Victims and Witnesses (2012–August 2015)* ¶ 3.1, IMMIGRATION & REFUGEE BD. OF CAN. (Sept. 1, 2015), <http://www.refworld.org/docid/55ffa7354.html> (last visited Sept. 23, 2016).

87. *Id.*

88. See U.S. CITIZENSHIP & IMMIGRATION SERVS. PART II, *supra* note 50, at 5–7.

89. See U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 5.

90. *INS v. Elias-Zacarias*, 502 U.S. 478, 481–84 (1992).

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).

93. *In re Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).

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.⁹⁵

In *In re Acosta*, the BIA first interpreted “particular social group” to require an “immutable characteristic.”⁹⁶ 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.⁹⁷ Acosta claimed he was being persecuted by “anti-government guerillas who targeted small businesses in the transportation industry.”⁹⁸ 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.⁹⁹ 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.”¹⁰⁰ 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*¹⁰¹ refined the *Acosta* standard by introducing “social visibility” and “particularity” as additional factors to the PSG analysis.¹⁰² 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.¹⁰³ The BIA defined “social visibility” as “the extent

95. *Id.* at 232–33.

96. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013).

97. *In re Acosta*, 19 I. & N. Dec. at 232.

98. *Id.* at 216.

99. *Id.* at 233–34.

100. *Id.* at 233.

101. *In re C-A*, 23 I. & N. Dec. 951 (B.I.A. 2006).

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.”¹⁰⁴ To satisfy the “particularity” requirement, the social group must be clearly and easily defined.¹⁰⁵

In re C-A- concerned a confidential informant that provided police with information on the notorious Cali Cartel¹⁰⁶ over a four-year period.¹⁰⁷ In May 1995, the applicant was confronted and beaten by three armed men.¹⁰⁸ The noise of the altercation brought neighbors out of their homes, and the attackers fled.¹⁰⁹ The attackers warned the applicant that life “would get worse for him and his family” for informing on the cartel.¹¹⁰ The applicant went into hiding and moved to the United States in 1996.¹¹¹ The BIA failed to recognize the PSG at issue in *In re C-A-* because confidential informants remain out of public view.¹¹² “[V]isibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.”¹¹³ The confidential informant at issue in *In re C-A-* neither appeared as a witness nor came to the attention of cartel members.¹¹⁴

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.¹¹⁵ With its decision in *In re S-E-G-*,¹¹⁶ the

(Mar. 12, 2003), <http://articles.latimes.com/2003/mar/12/nation/na-immig12> [<https://perma.cc/T7XB-RRMX>].

104. *In re C-A-*, 23 I. & N. Dec. at 957.

105. *Id.* (rejecting “noncriminal informants” as a particular social group because its membership is “too loosely defined to meet the requirement of particularity.”).

106. The Cali Cartel was an association of five independent Colombian drug trafficking organizations that rose to prominence during the 1980s and 90s after the collapse of the Medellín Cartel. The cartel managed criminal enterprises throughout Latin America, Europe, and the United States. See U.S. DEP’T OF JUSTICE, THE CALI CARTEL: THE NEW KINGS OF COCAINE (Nov. 1994), <https://www.ncjrs.gov/pdffiles1/Digitization/152436NCJRS.pdf> [<https://perma.cc/QL9A-CHT5>].

107. *In re C-A-*, 23 I. & N. Dec. at 952.

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.

116. 24 I. & N. Dec. 579 (B.I.A. 2008).

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

117. See Frydman & Desai, *supra* note 83, at 2.

118. *In re S-E-G-*, 24 I. & N. Dec. at 584.

119. *Id.* at 586 (citing *In re C-A-*, 23 I. & N. Dec. at 956).

120. See *supra* note 15.

121. NAT’L IMMIGRANT JUSTICE CTR., *Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R-* 12 (Jan. 2016), <http://immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf> [<https://perma.cc/3N94-2PKH>].

122. *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 604 (3d Cir. 2011), *remanded to the Immigration Judge sub nom. In re M-E-V-G-*, 26 I&N Dec. 227 (B.I.A. 2014) (“[W]e are hard-pressed to understand how the ‘social visibility’ requirement was satisfied in prior cases using the *Acosta* standard.”).

123. *Id.* “[T]he BIA’s ‘social visibility’ requirement would pose an unsurmountable obstacle to refugee status” for established PSGs such as “women who are opposed to female genital mutilation ([*In re*] *Kasinga*[], 21 I. & N. Dec. 357 (B.I.A. 1996)), homosexuals registered in Cuba ([*In re*] *Toboso-Alfonso*[], 20 I. & N. Dec. 819 (B.I.A. 1990)), and former members of El Salvador’s national police ([*In re*] *Fuentes*[], 19 I. & N. Dec. 658 (B.I.A. 1988)).”

124. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

application “condone[s] arbitrariness.”¹²⁵ 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.¹²⁶

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.¹²⁷ 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.”¹²⁸ The group must also be socially visible and recognizable by society in general.¹²⁹

PSGs are evaluated on a case-by-case basis.¹³⁰ Adjudicators are expected to examine the shared characteristic that defines the group to determine whether a group is considered socially visible.¹³¹ 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.”¹³² 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.”).

131. *In re C-A-*, 23 I. & N. Dec. at 955.

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.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.”¹³⁴ Asylum adjudicators are often tasked with evaluating subjective and objective elements of an applicant’s fundamental characteristic under the immutability prong.¹³⁵ The subjective element considers how the applicant experiences the fundamental characteristic as part of his or her identity or conscience.¹³⁶ The objective requirement considers basic human rights norms.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.¹³⁸ Voluntary assumption of extraordinary risk of serious harm in taking on a trait that defines a group may also be evidence of immutability.¹³⁹ However, an applicant who undertakes risks for monetary or material reward cannot claim the characteristic is immutable.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.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.”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.¹⁴³ In certain instances, some group members may conceal their identity to avoid persecution. Judge

133. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 23.

134. *In re Acosta*, 19 I. & N. Dec. at 234.

135. *See In re Kasinga*, 21 I. & N. Dec. 357, 366, 373 (B.I.A. 1996).

136. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 23.

137. *Id.*

138. *Id.* at 24–25.

139. *Id.* at 25.

140. *Id.*

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

142. *Id.* at 960.

143. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 27.

Posner in *Gatimi v. Holder*¹⁴⁴ explained: if people are trying to kill, torture, or persecute you, “you will take pains to avoid being socially visible.”¹⁴⁵ 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.”¹⁴⁶

In *In re A-M-E & J-G-U*,¹⁴⁷ the BIA reviewed Guatemalan country conditions to better understand the context of the proposed PSG.¹⁴⁸ The BIA held that “affluent Guatemalans” were not socially visible within Guatemalan society.¹⁴⁹ After a careful review of country conditions, the court was unable to see a difference in danger between “affluent Guatemalans” and society in general.¹⁵⁰ In other words, affluent Guatemalans were no more visible to society than non-affluent Guatemalans. Similarly, in *Donchev v. Mukasey*,¹⁵¹ 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.¹⁵²

PSGs must also meet a third requirement: “particularity.”¹⁵³ “Particularity” means that society can readily recognize who is a member of the group and who is not a member of the group.¹⁵⁴ 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.¹⁵⁵ The definition of the group needs to provide a point of reference for “determining who the members of the group are so that membership

144. 578 F.3d 611 (7th Cir. 2009).

145. *Id.* at 615.

146. *In re A-M-E & J-G-U*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

147. 24 I. & N. Dec. 69 (B.I.A. 2007).

148. *Id.* at 74.

149. *Id.*

150. *Id.* at 74–75.

151. 553 F.3d 1206 (9th Cir. 2009).

152. *See id.* at 1219.

153. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 28.

154. *See* Frydman & Desai, *supra* note 83, at 23 (citing *In re S-E-G*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008)).

155. *In re S-E-G*, 24 I. & N. Dec. at 584.

may be delimited or ascertained.”¹⁵⁶ The proposed PSG from *In re S-E-G-* contained too many variables to pass the particularity test.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.”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.¹⁵⁹

The BIA’s three-prong test remained unchanged until the Ninth Circuit’s 2013 *Henriquez-Rivas* decision.¹⁶⁰ *Henriquez-Rivas* sought to reconcile post-*Acosta* decisions with the “social visibility” requirement introduced by *In re C-A-*.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.¹⁶²

II. UNDERSTANDING THE SOCIAL VISIBILITY REQUIREMENT

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

156. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 28.

157. *In re S-E-G-*, 24 I. & N. Dec. at 584–85.

158. U.S. CITIZENSHIP & IMMIGRATION SERVS. PART III, *supra* note 11, at 28.

159. PSGs that are defined by terrorism, criminal activity, or other persecutory activity also fail the three-prong test established by *In re C-A-*. 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).

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

161. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1088 (9th Cir. 2013).

162. See *Rojas-Pérez v. Holder*, 699 F.3d 74 (1st Cir. 2012) (recognizing the persuasiveness of the “social visibility” analyses from *Gatimi* and *Valdiviezo-Galdamez*); *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 589 (3d Cir. 2011) (finding that after *Acosta*, the BIA recognized a number of PSGs that lacked “social visibility”); *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”).

163. See *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013).

courts and potential asylum seekers.¹⁶⁴ The BIA’s holdings in *In re M-E-V-G*¹⁶⁵ and *In re W-G-R*¹⁶⁶ emphasized that “social visibility” is concerned with whether society recognizes the PSG as “socially distinct.”¹⁶⁷ It does not mean the group must be literally visible to the naked eye—known as “on-sight” visibility.¹⁶⁸ Some circuits continue to struggle with the concept of social visibility.¹⁶⁹ 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*.¹⁷⁰

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.¹⁷¹ Although both suspects were convicted, one of them was released from prison early.¹⁷² 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

164. *In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

165. 26 I. & N. Dec. 227 (B.I.A. 2014). *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).

167. See NAT’L IMMIGRANT JUSTICE CTR., *supra* note 121, at 4.

168. *Id.*

169. See *supra* note 15.

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 resisting 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.*

court.¹⁷³ 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."¹⁷⁴ However, the BIA reversed the immigration judge's finding because it believed Henriquez-Rivas' proposed PSG was too amorphous and not socially visible.¹⁷⁵ Henriquez-Rivas appealed the BIA's decision to the Ninth Circuit.¹⁷⁶

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*.¹⁷⁷ 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."¹⁷⁸ 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."¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ 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 *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

Henriquez-Rivas eliminated the need for a PSG to be visible to the eye.¹⁹⁰ The Ninth Circuit used *Henriquez-Rivas* to expand on its earlier holding from *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 *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 *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.” *Flores-Rios v. Lynch*, 807 F.3d 1123, 1127 (9th Cir. 2015) (citing *Henriquez-Rivas*, 707 F.3d at 1088–89). The BIA’s 2014 decision in *M-E-V-G-* formally “recast the ‘social visibility’ requirement as one of ‘social distinction.’” *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.

194. *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 604 (3d Cir. 2011).

195. See *Flores-Rios*, 807 F.3d 1123.

196. See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 234 (B.I.A. 2014); *In re W-G-R*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

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. *In re M-E-V-G-*, 26 I. & N. Dec. at 240.

199. *Id.*

200. *Id.*

201. See *In re M-E-V-G-*, 26 I. & N. Dec. at 228; *In re W-G-R-*, 26 I. & N. Dec. at 209.

202. *In re M-E-V-G-*, 26 I. & N. Dec. at 228.

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”).

206. *In re W-G-R-*, 26 I. & N. Dec. at 216.

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.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.²¹⁴ It remains to be seen whether the Third Circuit is willing to adopt the “social distinction” requirement introduced by *In re M-E-V-G-* and *In re W-G-R-*.

In re M-E-V-G- and *In re W-G-R-* also briefly addressed the issue of perspective as it relates to whether a group is socially distinct.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 *Henriquez-Rivas*, the Ninth Circuit looked to the persecutor’s perspective.²¹⁶ The Second Circuit also considers “social visibility” from the perspective of the persecutor, as well as the outside world.²¹⁷ The BIA, on the other hand, bases its determination on the general perception of society.²¹⁸ While the BIA recognizes the value of viewing the group from the persecutor’s perspective, it believes that doing so would “conflate the fact of the persecution with the reasons for it.”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.²²⁰

C. *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, *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

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

214. *Valdiviezo-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 *Chevron* deference because the BIA did not provide a “principled reason” for adopting these new requirements. *Id.*

215. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 241–42 (B.I.A. 2014).

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

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

218. *In re M-E-V-G-*, 26 I. & N. Dec. at 242.

219. See NAT’L IMMIGRANT JUSTICE CTR., *supra* note 121, at 8; *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.”).

220. *Flores-Rios v. Lynch*, 807 F.3d 1123, 1127–28 (9th Cir. 2015).

home countries.²²¹ José Marvin Martínez was one of three Honduran immigrants whose story was chronicled by *The Guardian*.²²² Martinez fled to the United States in 2013 after gang members killed his brother.²²³ He was deported back to Honduras in August 2014 and murdered just four months later when a gunman shot him on a street corner.²²⁴ Martinez’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.²²⁵ For example, while the Sixth²²⁶ and Seventh Circuits²²⁷ recognize a PSG comprised of former gang members, the Ninth Circuit rejects that same PSG for policy reasons.²²⁸ 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.”²²⁹ The Seventh Circuit disagrees with the Ninth Circuit’s interpretation, noting that Congress “said nothing about barring former gang members.”²³⁰

Witnesses to gang crimes, such as Jaime from Part I, have also created confusion among the circuit courts.²³¹ *Henriquez-Rivas* applied a

221. Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to their Deaths*, THE GUARDIAN (Oct. 12, 2015, 1:57 PM), <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [https://perma.cc/65JK-X2CK].

222. *Id.*

223. *Id.*

224. *Id.*

225. See *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1088 (9th Cir. 2013) (recognizing witnesses who testify against gang members as a PSG); *Zelaya v. Holder*, 668 F.3d 159, 162 (4th Cir. 2012) (rejecting potential gang recruits as a PSG because the group was amorphous); *Garcia v. Attorney Gen.*, 665 F.3d 496, 498 (3d Cir. 2011) (recognizing witnesses who testify against gang members as a PSG); *Urbina-Mejia v. Holder*, 597 F.3d 360, 367 n.3 (6th Cir. 2010) (noting that former gang members would be easily recognizable); *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009) (finding that current gang membership does not satisfy the PSG requirement but implies that perhaps former gang members may satisfy that requirement); *Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007) (holding a group of current but inactive gang members too amorphous).

226. See *Urbina-Mejia*, 597 F.3d at 366–67.

227. *Benitez Ramos*, 589 F.3d at 429.

228. *Arteaga*, 511 F.3d at 945–46.

229. *Id.*

230. *Benitez Ramos*, 589 F.3d at 429–30.

231. See *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093 (9th Cir. 2013) (noting the confusion between “particularity” and “social visibility” in finding that witnesses who testify to serious gang crimes satisfy the PSG requirements); *Zelaya v. Holder*, 668 F.3d 159, 159 (4th Cir. 2012) (finding that Honduran teenagers threatened with gang recruitment did not satisfy the “particularity” requirement because the group was too amorphous); *Garcia v. Attorney Gen.*, 665 F.3d 496, 504 (3d

“social distinction” test to recognize asylum eligibility for witnesses who testify to gang crimes.²³² The Third Circuit, relying on the *Acosta* immutability standard, also recognized that witnesses who testify against gang members are members of a PSG.²³³ The Fourth Circuit’s holding in *Zelaya v. Holder*²³⁴ is a departure from the Third and Ninth Circuits.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.”²³⁶ Unlike Henriquez-Rivas, Zelaya did not testify against the gang.²³⁷ The Fourth Circuit failed to recognize Zelaya’s proposed PSG because it lacked “particularity” and was too “amorphous.”²³⁸

The *Zelaya* holding should not affect the PSG analysis for a person in Jaime’s situation for two reasons. First, the Court decided *Zelaya* before the BIA issued its opinions in *In re M-E-V-G-* and *In re W-G-R-*, which adopted the “social distinction” requirement and emphasized the importance of “social distinction.”²³⁹ As a result, the Fourth Circuit did not use a “social distinction” analysis to reject Zelaya’s proposed PSG.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.”²⁴¹ However, in his concurrence, Judge Floyd indicated that a group of

Cir. 2011) (recognizing the membership of only one of two sisters in a PSG comprised of Guatemalans that testify against gang members).

232. *Flores-Rios v. Lynch*, 807 F.3d 1123, 1127 (9th Cir. 2015).

233. *See Garcia*, 665 F.3d at 496.

234. 668 F.3d 159 (4th Cir. 2012).

235. *See Zelaya*, 668 F.3d at 159.

236. *Id.* at 162.

237. *Id.* at 163.

238. *Id.* at 166.

239. *See In re M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014); *In re W-G-R-*, 26 I. & N. Dec. 208, 208 (B.I.A. 2014).

240. *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 . . .”).

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).

prosecution witnesses to gang crimes would satisfy both the “particularity” and “social distinction” criteria.²⁴²

Second, *Zelaya* is not a case about witnesses who report gang violence to police.²⁴³ It is a case about gang recruitment.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.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.”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.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.²⁴⁸ Just two days before Kerry’s announcement, the Peace Corps suspended its program in El Salvador due to the “ongoing security environment.”²⁴⁹ Immigration advocates expressed concern that the United States was willing to deport Salvadorans back to El Salvador while terminating the Peace Corps

242. *Zelaya*, 668 F.3d at 169 (Floyd, J., concurring).

243. *Id.* at 166 (*Zelaya* is primarily concerned with evaluating “[r]esisting gang recruitment” as a PSG).

244. *Id.*

245. *Id.* at 162–63. To be clear, *Zelaya* was beaten by gangs and threatened with death on several occasions.

246. *Id.* at 166.

247. Part III discusses “particularity” and how it applies to individuals similarly situated to Jaime.

248. Cedar Attanasio, *John Kerry Announces Refugee Program Expansion in Guatemala, Honduras and El Salvador with UN Help*, L.A. TIMES (Jan. 13, 2016, 12:30 PM), <http://www.latintimes.com/john-kerry-announces-refugee-program-expansion-guatemala-honduras-and-el-salvador-un-364297> [<https://perma.cc/V6PQ-FSVC>].

249. Press Release, Peace Corps, Peace Corps El Salvador Program Suspended (Jan. 11, 2016), <https://www.peacecorps.gov/news/library/peace-corps-el-salvador-program-suspended/> [<https://perma.cc/MS4A-Q4LX>].

program because of increased violence in the country.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.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 provision²⁵² 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 . . .”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.²⁵⁴ Congress only allows a total of two-hundred S Visas per year,²⁵⁵ and it is unclear how many, if any, of these visas are being designated for MS-13 informants.²⁵⁶ It is problematic that the United States only recognizes S Visas for

250. Jerry Markon, *Peace Corps Suspends El Salvador Program as Violence Surges*, THE WASHINGTON POST (Jan. 14, 2016), <https://www.washingtonpost.com/news/federal-eye/wp/2016/01/14/peace-corps-suspends-el-salvador-program-as-violence-surges/> [<https://perma.cc/G827-FGUH>].

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 . . .”).

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.*

253. OFFICES OF THE U.S. ATT’YS, CRIMINAL RESOURCE MANUAL 1862 (2011), <https://www.justice.gov/usam/criminal-resource-manual-1862-s-visa-program-eligibility> [<https://perma.cc/9Z78-Y2XL>]. U.S. law enforcement generally reaches out to potential S Visa candidates.

254. See CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., EL SALVADOR: BACKGROUND AND U.S. RELATIONS 19 (Feb. 4, 2016), <https://www.fas.org/sgp/crs/row/R43616.pdf> [<https://perma.cc/XW4D-2V8W>].

255. See OFFICES OF THE U.S. ATT’YS, *supra* note 253.

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.

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 PSG²⁵⁷—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.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ The immutability requirement from *In re Acosta* has been endorsed by all of the federal circuit courts of appeals.²⁶¹ 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.

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

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

262. *Acosta*, 19 I. & N. Dec. at 233.

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).

264. See *Immigrants from El Salvador, Guatemala, and Honduras in U.S., 2009–2013*, MIGRATION POLICY INSTITUTE, <http://www.migrationpolicy.org/programs/data-hub/charts/immigrants-el-salvador-guatemala-and-honduras-us-2009-2013?width=1000&height=850&iframe=true> [https://perma.cc/UB72-AAAGP]. 28% of all Central American immigrants have settled in California. *Id.* Of the 2,589,000 immigrants from the Northern Triangle residing in the United States, almost 20%, 505,000 people, live in the greater Los Angeles area. *Id.* More than one-quarter of all Salvadorans living in the United States reside in California. *Id.*

265. See *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087–92 (9th Cir. 2013).

266. *Id.* at 1088 (citing *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006)).

267. *Id.* at 1090.

268. *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

Salvadoran society. Witnesses like Jaime do not belong to an amorphous class that lacks definition.²⁶⁹ 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.”²⁷⁰ This group failed “particularity” because it was not easily identifiable²⁷¹ and “people’s ideas of what those terms mean can vary.”²⁷² 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.”²⁷³ 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.²⁷⁴ El Salvador’s country conditions establish that witnesses who report serious gang crimes are “socially distinct” within Salvadoran society.²⁷⁵ Country conditions provide courts with “information about the context in which the . . . persecution took place,” so courts can effectively evaluate the

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.”).

270. *In re S-E-G-*, 24 I. & N. Dec. at 585.

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

272. *Id.* (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76).

273. *In re C-A-*, 23 I. & N. Dec. 959, 960 (B.I.A. 2006) (emphasis added).

274. *La Mara Salvatrucha Quería Tomar el Control del Congreso de Honduras*, ELSALVADOR.COM (Apr. 28, 2016, 8:01 PM), <http://www.elsalvador.com/articulo/internacional/mara-salvatrucha-queria-tomar-control-del-congreso-honduras-110969> [https://perma.cc/ZAV8-NDMS] (author translation). An investigation revealed that the Mara Salvatrucha invested more than \$500,000 in a local mayor with the hope that they could get him elected as president of the National Congress; *El Salvador: Police Corruption and Abuse*, IMMIGRATION & REFUGEE BD. OF CAN., § 2 (Sept. 8, 2015), <http://www.refworld.org/docid/560b85ce4.html> (last visited Sept. 23, 2016).

275. See *Zahedi v. INS*, 222 F.3d 1157, 1163 (9th Cir. 2000) (for usefulness of country conditions).

witness's credibility.²⁷⁶ In El Salvador,²⁷⁷ 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.²⁷⁸ Salvadoran society recognizes the risks associated with reporting gang crimes to police.²⁷⁹ 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"²⁸⁰ by averaging almost sixteen murders a day and nearly 7,000 for the entire year.²⁸¹ The majority of these killings are understood to be either the result of gang violence or the extrajudicial police killings of gang members.²⁸² This brutal police practice, known as *mano dura*, involves sending military and police into the streets to confront gang members and arrest them.²⁸³ *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 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/4S8M-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-27BJ] (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 Kinoshian & 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)).

280. Alan Gomez, *El Salvador: World's New Murder Capital*, USA TODAY (Jan. 8, 2016, 10:15 AM), <http://www.usatoday.com/story/news/world/2016/01/07/el-salvador-homicide-rate-honduras-guatemala-illegal-immigration-to-united-states/78358042/> [https://perma.cc/VWC7-U3T9].

281. Nina Lakhani, *Violent Deaths in El Salvador Spiked 70% in 2015, Figures Reveal*, THE GUARDIAN (Jan. 4, 2016, 6:14 PM), <http://www.theguardian.com/world/2016/jan/04/el-salvador-violence-deaths-murder-2015> [https://perma.cc/9RJW-PPXE] (stating that around 6,657 people were murdered in 2015, a 70% increase in violent deaths from 2014).

282. *Id.*

283. See Kinoshian & 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.²⁸⁴ Because of this conflict, people are reluctant to report information to the police regarding criminal gang activity for fear of gang reprisal.²⁸⁵

Fear of gang violence is so prevalent throughout the country that even police officers wear masks to conceal their identities from gangs.²⁸⁶ Organized attacks on police officers and their families are common.²⁸⁷ This helps explain why witnesses choose not to testify against gangs; they fear gangs will respond by harming them and their families.²⁸⁸ In April 2015, a seventy-nine-year-old man was dragged out of his house and stabbed to death.²⁸⁹ 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."²⁹⁰

In El Salvador, there is no guarantee a witness's identity will be protected or that gangs will be prosecuted for their crimes.²⁹¹ In

284. See Lakhani, *supra* note 281.

285. See Kinoshian & Albaladejo, *supra* note 279 ("People are afraid that if they report [gang crimes] . . . that people will come after them.").

286. Joshua Partlow, *El Salvador Debates Which Is Worse: Gangs or Police?*, THESTAR.COM (May 25, 2015), <https://www.thestar.com/news/world/2015/05/25/el-salvador-debates-which-is-worse-gangs-or-police.html> [<https://perma.cc/WJ5N-5USV>] ("[Police] in black masks are sweeping through this city . . ."); see also Lakhani, *supra* note 281 ("[G]angs are rapidly and violently expanding into even the smallest rural communities in order to run extortion rings and control territory."); *Gangs of El Salvador*, VICE NEWS (Dec. 1, 2015), <https://news.vice.com/video/gangs-of-el-salvador-full-length> [<https://perma.cc/3MFY-QJ5F>].

287. Beatriz Calderón, *Capturan a Dos Pandilleros por el Homicidio de la Madre de un Policía*, LA PRENSA GRAFICA (May 10, 2016, 3:20 PM), <http://www.laprensagrafica.com/2016/05/10/capturan-a-dos-pandilleros-por-el-homicidio-de-la-madre-de-un-policia> [<https://perma.cc/P7RB-V3QE>] (author translation); see also *Capturan a Tres Implicados en Homicidio de Policía en San Miguel*, ELSALVADOR.COM (Apr. 29, 2016, 4:19 PM), <http://www.elsalvador.com/articulo/sucesos/capturan-tres-implicados-homicidio-policia-san-miguel-111134> [<https://perma.cc/XW2T-37LE>] (author translation). In April 2016, three gang members murdered a police officer on his day off. *Id.*

288. Jorge Beltrán 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); Suchit 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.²⁹² 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 2013.²⁹³ El Salvador's criminal conviction rate is below 5%.²⁹⁴ Meanwhile, in neighboring Guatemala, only 3% of 250,000 gang complaints filed in 2011 were prosecuted.²⁹⁵ This failure to hold gangs criminally liable for their actions has led to a "sense of impunity"²⁹⁶ and freedom to operate.²⁹⁷

In 2014, El Salvador's Attorney General accused lawyers, judges, and police of accepting bribes from gangs in exchange for more favorable sentences.²⁹⁸ Even former President Mauricio Funes personally admitted to paying gangs for political support.²⁹⁹ 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").

292. R. Solano et al., *Pandilleros Asesinan a Testigo bajo Régimen de Protección*, ELSALVADOR.COM (Feb. 24, 2015 11:40 AM), <http://www.elsalvador.com/articulo/sucesos/pandilleros-asesinan-testigo-bajo-regimen-proteccion-73684> [https://perma.cc/9LPT-ZE2M] (author translation).

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.laprensagrafica.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.

295. MICHAEL BOULTON, UNICEF, *LIVING IN A WORLD OF VIOLENCE: AN INTRODUCTION TO THE GANG PHENOMENON* 28 (July 2011), <http://www.refworld.org/docid/4e3260a32.html> (last visited Sept. 23, 2016).

296. *Id.*

297. *Id.*

298. Suchit Chávez, *FGR Acusa a 127 por Corrupción en Juzgados*, LA PRENSA GRAFICA (Aug. 2, 2014, 6:00 AM), <http://www.laprensagrafica.com/2014/08/02/fgr-acusa-a-127-por-corrupcion-en-juzgados> [https://perma.cc/5GWP-WKBA] (saying that the Attorney General accused 127 people of influence peddling and bribery) (author translation).

299. Roger Noriega, *MS-13's Secretly Backing Ruling Party in El Salvador*, NEW YORK POST (Mar. 3, 2014, 5:59 AM), <http://nypost.com/2014/03/03/ms-13s-secretly-backing-ruling-party-in-el-salvador/> [https://perma.cc/8HPN-992D]; *see also* Jessica Ávalos, *Fiscal: Hay Alcaldes Involucrados con Pandillas*, LA PRENSA GRAFICA (Feb. 18, 2015, 6:00 AM), <http://www.laprensagrafica.com/2015/02/18/fiscal-hay-alcaldes-involucrados-con-pandillas> [https://perma.cc/8B5V-95SU] (describing how, in 2015, the Attorney General's Office announced an investigation that found many mayors throughout El Salvador "dedicated to working with gangs" (author translation)); Arron Daugherty, *3 Former El Salvador Presidents Investigated for Corruption*, INSIGHT CRIME (Feb. 12, 2016), <http://www.insightcrime.org/news-briefs/three-el-salvador-presidents-investigated-corruption> [https://perma.cc/H8W8-XQEL] ("El Salvador's last three presidential administrations, which span 15 years, have been marred by corruption allegations . . .").

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?³⁰⁰ The United States has recognized this corruption and level of sophistication since 2012, when it imposed financial sanctions against MS-13.³⁰¹ 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.³⁰² Despite attempts to curtail the problem,³⁰³ claims of corruption persist today.³⁰⁴

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.³⁰⁵ Gangs routinely hire police officers to protect their

300. *El Salvador, un País Desangrado por las Pandillas*, EL COMERCIO (Dec. 14, 2015), <http://elcomercio.pe/mundo/latinoamerica/salvador-pais-desangrado-pandillas-fotos-noticia-1863557> [https://perma.cc/Z2SK-69UH] (author translation); see also *Freedom in the World 2015: El Salvador*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2015/el-salvador> [https://perma.cc/M333-WV4G] (“In June 2014, the attorney general announced that Defense Minister David Munguía Payés was under investigation for involvement in arms trafficking, potentially to supply gangs.”).

301. Hannah Stone, *US Ranks MS-13 Alongside Zetas in Gang List*, INSIGHT CRIME (Oct. 12, 2012), <http://www.insightcrime.org/news-analysis/us-ms13-zetas-transnational> [https://perma.cc/N2XV-7LQR]; see also Seelke, *supra* note 254, at 18 (“The U.S. government has funded anti-gang programs in El Salvador since 2008.”).

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.”).

303. See Nelson Renteria, *U.N., El Salvador Launch U.S.-Backed Anti-Corruption Program*, REUTERS (Jan. 25, 2016, 6:31 PM), <http://www.reuters.com/article/us-el-salvador-corruption-idUSKCN0V32SG> [https://perma.cc/5VZZ-GFYT]. In early 2016, the U.N. announced a U.S. financed program to combat corruption in El Salvador. *Id.*

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-UUBD] (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 Clicca 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 Martínez, *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/NM8B-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.³⁰⁶ Between 2009 and 2013, more than 500 police officers were arrested for corruption and involvement in criminal activities.³⁰⁷ Many of these officers worked with gangs by providing them information about witnesses who had reported gang crimes.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.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.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.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.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."³¹³ In 2006, the El Salvador legislature passed a witness protection law to protect witnesses from dangerous criminals

306. Candy Gomez, *Desarticulan Red de Corrupción en El Salvador, Entre Ellos Dos Jueces*, STARMEDIA (July 30, 2014, 7:15 PM), <http://noticias.starmedia.com/violencia-inseguridad/desarticulan-red-corrupcion-en-salvador-entre-ellos-dos-jueces.html> [https://perma.cc/BW8L-UNZ4] (author translation).

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/3UFD-GFPU] (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).

308. *Id.*

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 PRENSA (Dec. 14, 2015), <http://www.laprensa.hn/mundo/911239-410/maras-est%C3%A1n-infiltradas-en-la-polic%C3%ADa-y-el-ej%C3%A9rcito-de-el-salvador> [https://perma.cc/YKC6-N6BC] (reporting that in 2015, El Salvador's Secretary of Communications recognized that gangs have successfully infiltrated the police and military ranks) (author translation).

310. See *Gangs of El Salvador*, *supra* note 286.

311. Jessel Santos, *470,264 Personas Afines a Pandillas*, LA PRENSA GRAFICA (May 25, 2013, 6:00 AM), <http://www.laprensagrafica.com/470-264-personas-afines-a-pandillas> [https://perma.cc/4BSK-L9XU] (author translation).

312. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 394 (B.I.A. 2014).

313. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013).

such as the M-18 gang and the MS-13 gang.³¹⁴ The law's purpose was to encourage witnesses to come forward and report crimes.³¹⁵

The witness protection program's inability to offer adequate protection remains a point of contention,³¹⁶ especially when one considers the vast gang networks at play in the Northern Triangle.³¹⁷ According to a former prosecutor, gangs murdered at least 100 witnesses in 2010, often mutilating bodies in the process.³¹⁸ Moreover, some judges continue to deny witnesses anonymity from gang members at trial, which limits the overall effectiveness of the witness protection program.³¹⁹ 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.³²⁰ Six hours after one of these witnesses testified, his son and niece were killed in a home attack.³²¹

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-proteccion-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.*

315. *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).

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 FARIÑA 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://helenlawrencelaw.com/wp-content/uploads/2016/05/No-Place-to-HideJan_2010-1.pdf [<https://perma.cc/PL2M-YDLN>]; Thomas Boerman, *Youth Gangs in El Salvador: Unpacking the State Department 2007 Issue Paper*, IMMIGRATION DAILY, <http://www.ilw.com/articles/2010,1117-boerman.shtm> [<https://perma.cc/HY57-GZSN>] (last visited July 31, 2016) (explaining that gangs may target individuals from a particular church); Solano, *supra* note 292; Kinoshian & 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 COMM’R FOR REFUGEES, *supra* note 81.

318. Jaime Ulises Marinero, *Asesinados por el “Pecado” de Haber Sido Testigos (y III Entrega)*, LA PÁGINA (Feb. 9, 2011, 7:53 AM), <http://www.lapagina.com.sv/ampliar.php?id=46899> [<https://perma.cc/2FHZ-AGGN>] (author translation).

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

320. Jessica Ávalos, *FGR Denuncia Desprotección De Testigos*, LA PRENSA GRAFICA (Dec. 12, 2011, 12:00 AM), <http://www.laprensagrafica.com/el-salvador/judicial/236615-fgr-denuncia-desproteccion-de-testigos.html> [<https://perma.cc/5VM5-W3WM>].

321. *Id.*

The specific language of El Salvador's witness protection law does not limit protection to witnesses that testify at trial.³²² The protection is available to witnesses "involved in [any] judicial proceeding,"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.³²⁴

2. *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.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.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.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

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).

323. *Id.*

324. Jorge Beltrán Luna, *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).

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. See *supra* note 63.

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. See *supra* Part III.A.1.

327. *Henriquez-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*, ELSALVADOR.COM (July 13, 2014, 7:00 PM), <http://www.elsalvador.com/articulo/sucesos/matan-dueno-pupuseria-mejicanos-64312> [<https://perma.cc/F9E3-96HS>] (reporting police suspected a pupusería owner was murdered because he may have witnessed a homicide that took place in the area) (author translation); Sarah Kinoshian 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*, ELSALVADOR.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*, ELSALVADOR.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).