

CAN I GET A WITNESS? A CASE FOR ASYLUM FOR PROSECUTORIAL WITNESSES WHO TESTIFY AGAINST GANGS AND OTHER GANG-RELATED CLAIMS

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I. INTRODUCTION

Consider the following:¹ Orlando lives in El Salvador in the town of Sonsonate, where the Mara Salvatrucha (MS-13) gang exercises a powerful presence. As Orlando approaches his uncle's house, he hears gunshots and observes four MS-13 gang members fleeing the scene. Thereafter, Orlando learns that the MS-13 gang has fatally shot his cousin. He cooperates with local police by describing the suspects, corroborating his uncle's description. When police apprehend two of the suspects, Orlando and his uncle agree to testify in their criminal prosecution.

MS-13 begins delivering threatening messages to Orlando's family. He receives two notes conveying the gang's intent to kill his family. A member of MS-13 warns Orlando, "shut up, or you'll be next." Before trial, Orlando decides to travel to the United States with his wife and children, where they apply for asylum. Should Orlando and his family constitute a "particular social group" to receive refuge under United States asylum law? When Orlando's case came before the Fourth Circuit, the Court ruled that family members of prosecutorial witnesses who agree to testify against gangs constitute a particular social group.² However, the Court explained that the uncle, the prosecutorial witness, could not qualify for asylum as a member of this group, stating that "only the relatives of such witnesses, testifying against MS-13, who suffer persecution on account of their family ties" meet the requirement for membership in a particular social group.³

Orlando's case is just one example of the intersection of gang-based violence and how courts try to reconcile gang-based claims with the parameters set forth in U.S. asylum law. Politics and ideology also play a

1. *Crespin-Valladares v. Holder*, 632 F.3d 117, 120 (4th Cir. 2011); *see generally* CLARE R. SEELKE, CONG. RESEARCH SERV., RS21655 EL SALVADOR: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS 20 (2013) (describing gang violence in El Salvador).

2. *Crespin-Valladares*, 632 F.3d at 121.

3. *Id.*

large role in U.S. refugee admissions from overseas, even though enactment of U.S. asylum law in 1980 resulted in part from a humanitarian impulse and obligation. Under our current law, violent acts gang members perpetuate against innocent people are not considered within the proper bounds of refugeehood.

One possible avenue for relief for persons fearing gang persecution is through membership in a particular social group, one of the five protected grounds of asylum enumerated in the Immigration and Nationality Act (INA).⁴ In deciding Orlando's case, the Fourth Circuit's reasoning illustrates one potential reading of the Board of Immigration Appeals' (Board) legal standard for what groups of persons qualify as a "particular social group."⁵ Under the current approach, the Board requires that the group share the following: a common characteristic other than the risk of being persecuted; "have particular and well-defined boundaries; and [sic] possess a recognized level of social visibility" to be perceived as a group by society.⁶ The federal appellate courts that adopt the Board's test for a particular social group have denied asylum to persons fleeing Central American gangs, who have claims based on gang resistance, or opposition to gangs.⁷

4. 8 C.F.R. § 1208.13(b)(1) (2014).

5. 8 U.S.C.A. § 1101(a)(42)(B) (West 2014) (Congress made a particular social group as a ground of persecution in the Immigration and Nationality Act, [hereinafter "INA"]).

6. *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008). In a recent pair of decisions, the Board of Immigration Appeals ("Board") re-visited its requirements for membership in a particular social group and re-named the social visibility test as "social distinction." See *In re W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *In re M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). In light of the confusion surrounding the application of social visibility, the Board clarified that "social distinction" does not require the group to be identifiable on-sight or literally visible. *Id.* at 236. Instead, social distinction means "the extent to which the ground is understood to exist as a recognized component of the society in question." *Id.* at 239. Thus, the Board announced that the group's recognition is defined in terms of the society in question, rather than by the perception of the persecutor. *Id.* The respondent *In re M-E-V-G-* sought asylum on the basis of opposition to MS-13 gang recruitment efforts in Honduras. *Id.* at 228. Echoing its previous decisions, the Board explained that because gangs' criminal activity in this region of the world plague all members of society, one part of the population cannot be differentiated from another. *Id.* at 250-251. The Board passes the torch to Congress to provide relief in this arena. *Id.* at 251.

7. See, e.g., *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011) (finding that the purported particular social groups, "family that experienced gang violence" and "persons resistant to gang violence" did not have social visibility because there was no evidence the gang specifically targeted the family as a group); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009) (finding that young Honduran men resisting gang recruitment did not constitute a particular social group for lack of social visibility because "the risk of harm is not limited to young males who have recruitment").

The social visibility requirement helps ensure that a social group is not “just a demographic slice that has nothing more to connect it than the bare demographic feature, and the shared characteristic does not rest on shared persecution.”⁸ Conditions in Central American countries and El Salvador in particular, indicate that gang culture is widespread.⁹ Because gang members frequently resort to violence, it is difficult to prove that the level of risk for a particular group is substantially higher, compared to the rest of the population.¹⁰ Therefore, the Board’s social visibility requirement makes it difficult for asylum seekers persecuted by gangs to satisfy the “particular social group” ground.

Although the Fourth Circuit found that Orlando’s purported group—family members of prosecutorial witnesses who testified against gangs—constituted a particular social group, the Court clarified in a subsequent decision that the group “did not include the family member who agreed to be the prosecutorial witness; rather, it only included the family members of such witness.”¹¹ The Court reasoned that the purported social group excluded the prosecutorial witness because it would not satisfy the particularity requirement for a particular social group, and testifying against gangs would be too broad to adequately delimit the group.¹² Although the Court primarily relied on the particularity requirement to distinguish the prosecutorial witness’ eligibility from the family group, this discrepancy also presents an issue of social visibility. This Article argues that as a matter of law and policy, prosecutorial witnesses who testify against gangs should meet the Board’s statutory requirements for asylum eligibility.

Part I of this Article will introduce three avenues of relief for aliens seeking refuge in the United States: (1) asylum, (2) withholding of removal, and (3) withholding of removal under the Convention Against Torture.¹³

8. Matthew Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 841 (2008).

9. See generally CLARE R. SEELKE, CONG. RESEARCH SERV., RS21655 EL SALVADOR: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS 20 (2013).

10. Beatriz Manz, *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations*, REF WORLD 4-6 (Aug. 2008), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=48ad1eb72>

11. *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012).

12. *Id.* (relying on *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (holding that opposition to gangs does not provide “concrete trait that would readily identify a person as possessing such a characteristic.”)).

13. See *infra* Part I; see also 8 U.S.C.A. §1101(a)(1) (West 2014) (defining the term alien as “any person not a citizen or national of the United States.”); 8 U.S.C.A. §1158(A)(1)

Part I discusses the requirements for a particular social group that are articulated in Board precedent.¹⁴ Part II explains how the Board's social visibility test gave rise to a circuit split over its incompatibility with the Board's immutable characteristics test.¹⁵ Part III explores the failure of the social visibility to create clear a guideline for asylum seekers with gang-based claims. Relying on the Fourth Circuit's decision in *Crespin-Valladares v. Holder* as a framework, Part III argues that a prosecutorial witness should be included as part of a particular social group because prosecutorial witnesses that testify against gangs independently constitute a particular social group under the Board's approach. The social visibility test may support a bright line rule for rejecting claims broadly based on resisting gang recruitment, or opposing gangs,¹⁶ but this test produces inconsistent outcomes when a group resists gangs and is socially visible based on a family relationship, or kinship ties.¹⁷ Alternatively, Congress should amend the INA and enumerate a separate ground for relief.

II. BACKGROUND

The sheer number of asylum seekers from countries where gang activity is prevalent illustrates the humanitarian exigency in the United States for legislative solutions to this problem.¹⁸ Section A presents an overview of gang activity in Central American countries that creates an impetus for immigration to the United States. After discussing the detrimental impact of gang activity on human rights, Section B describes the enactment of asylum legislation in the United States. Section C explains how the Board has defined a particular social group under the Immigration and Nationality Act.

(West 2009); 8 U.S.C.A. §1231(b)(3) (West 2009) (setting forth the criterion for aliens seeking protection in the United States).

14. *See infra* Part I.

15. *See infra* Part II.

16. *In re S-E-G-*, 24 I. & N. Dec. 579, 586 (B.I.A. 2008).

17. *See, e.g., Crespin-Valladares v. Holder*, 632 F.3d 117, 120 (4th Cir. 2011).

18. *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009).

A. Central American Street Gang Persecution Triggers Immigration to the United States

Seventy thousand gang members are active in local street gangs in the “northern triangle” of Central America—El Salvador, Honduras, and Guatemala—countries that share the highest homicide rates in the world.¹⁹ In fact, “[t]he violent MS-13 and 18th Street gangs disrupt social and economic order and threaten citizen safety in these Central American countries.”²⁰ Gang members regularly engage in criminal activity, and have contributed to a thriving illegal narcotics market.²¹ While these gangs originated as loosely organized groups in the United States, scholarship suggests that they are evolving into sophisticated and centralized syndicates abroad.²² Criminal gang operations span international borders, presenting a circular problem for United States immigration control: the increasing number of persons coming to the United States fleeing gang recruitment, or fear of persecution by gangs demands a humanitarian solution [to provide a pathway for relief], and deportations of Central American youths from the United States provide gangs with a consistent and vulnerable recruitment pool.²³

Opposition to criminal gangs by reporting their activity to the local police, or refusal to join criminal gangs in the northern triangle, “is to risk death.”²⁴ Gang members accrue rank within a gang by demonstrating a “propensity for violence, bravado, audacity, and a do-or-die commitment to the gang and the lifestyle.”²⁵ Maintaining a reputation in the gang requires members to “violently [confront] anyone who challenges them or engages in activities construed as an insult or act of disrespect.”²⁶ Failure to engage

19. MICHEL SHIFTER, COUNCIL ON FOREIGN RELATIONS, COUNTERING CRIMINAL VIOLENCE IN CENTRAL AMERICA, 3 (2012); *see also* CLARE R. SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA (2011).

20. *See* CLARE R. SEELKE, CONG. RESEARCH SERV., RL34112 GANGS IN CENTRAL AMERICA (2011).

21. SHIFTER, *supra* note 19, at 6.

22. *Id.*

23. *Id.* at 7.

24. Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 407 (2006).

25. Thomas Boerman, *Central American Gang Related Asylum Cases: Background, Leverage Points and the Use Of Expert Witnesses*, ILW.COM, <http://www.ilw.com/articles/2009,1215-boerman.shtm> (last visited Apr 20, 2013).

26. TOM DELANY, AMERICAN STREET GANGS (Prentice Hall, 1st ed. 2005).

in acts of intimidation causes gang members to lose status within their own gang, rivals, and the public.²⁷

Because of the widespread problem of gang violence in Central America, United States immigration policy guards against opening the floodgates to this potentially diffuse population of asylum seekers. Legal scholarship supporting the floodgates theory argues that loosening the standards for asylum may incentivize aliens placed in removal proceedings to make strategic claims for asylum to extend their stay in the United States.²⁸ Immigration judges reject credible applicants who set forth claims based on gang resistance of opposition because they are “loath to open the immigration floodgates.”²⁹ However, the floodgates argument fails to consider that recognizing victims of gang violence under protected ground does not guarantee that this group of asylum seekers will be eligible for refugee status. Asylum-seekers must still demonstrate persecution to establish a valid claim for refugee status, and a nexus between the persecution and the protected ground.

B. Legal Standards: Applying for Asylum

After the U.S. became a signatory to the United Nations Convention and Protocol Relating to the Status of Refugees, Congress passed the Refugee Act of 1980 (Refugee Act). The Refugee Act created asylum provisions in conformance with international standards.³⁰ Asylum offers protection for aliens in the United States who suffered past persecution, or possess a well-founded fear of future persecution in their country of nationality, and their government is unable or unwilling to protect them. The persecution must be on account of one of five protected grounds: religion, race, nationality, membership in a particular social group, or political opinion.³¹

27. *Id.*

28. Corsetti, *supra* note 24, at 435.

29. *Id.*

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (giving statutory authority to the United States’ commitment to humanitarian concerns set forth in the Protocol Relating to the Status of Refugees, Art. 1, U.S.T. 6223, 606 U.N.T.S. 267 (1967), and the Convention Relating to the Status of Refugees, Art. 1, 189 U.N.T.S. 150 (1951). The Protocol expanded the definition of the Convention by eliminating geographic and time restrictions on the definition of refugee).

31. See 8 U.S.C.A. § 1101(a)(42) (West 2014) (defining an alien who is eligible for asylum as a “refugee”); see also 8 U.S.C.A. § 1158(b)(1)(A) (West 2006) (identifying the conditions for granting asylum).

The United States may grant asylum to any alien in the United States who qualifies as a refugee under the INA.³² Asylum status enables an alien³³ to seek employment and become a lawful permanent resident; however, asylum “does not convey a right to remain permanently in the United States.”³⁴ Aliens in the United States may apply for asylum through an affirmative or defensive process. Asylum applicants who apply affirmatively submit their applications to the United States Immigration and Customs Service (the Service), where an asylum officer reviews the applications.³⁵ If the officer does not grant asylum, the alien may become removable from the United States, and the Service refers the case to the Executive Office of Immigration Review.³⁶ Aliens placed in removal proceedings have the opportunity to present their asylum claims in hearings before an Immigration Judge.³⁷

An alien placed in removal proceedings has two other opportunities for relief: withholding of removal under the INA and withholding of removal under the Convention Against Torture (CAT).³⁸ Congress understood asylum and withholding of removal as providing a similar purpose, and for that reason, made the standards for eligibility comparable. One key difference is that an alien who seeks asylum must submit an application within one year of entering the United States, whereas there is no statute of limitations for withholding.³⁹ CAT withholding imposes even more stringent criterion, requiring that the persecution amount to torture and occur with the acquiescence, or consent of a state official.⁴⁰

32. Immigration and Nationality Act (“INA”), ch. 477, 66 Stat. 163 (1952) (codified as amended at

8 U.S.C.A. §1158(1)(A) (West 2009)) (explaining that asylum may be granted by an asylum officer in the Department of Homeland Security or by an immigration judge in the Executive Office for Immigration Review in the Department of Justice. Even if an applicant for asylum meets all the statutory requirements, the asylum officer or immigration judge has the authority to deny the application on other grounds).

33. Although the term “alien” is considered derogatory or offensive in some contexts, I use the term “alien” as interchangeable with asylum seeker and asylum applicant.

34. 8 U.S.C.A. § 1158(c)(2) (West 2009).

35. 8 U.S.C.A. §1225(b)(1)(B) (West 2009).

36. 8 U.S.C.A. §1225(b)(1)(B)(iii)(I).

37. 8 U.S.C.A. §1225(b)(1)(B)(iii)(III).

38. 8 U.S.C.A. § 1231 (West 2009).

39. 8 U.S.C.A. § 1158(a)(2)(B) (requiring an alien to file for asylum within one year of entering the United States).

40. 8 U.S.C.A. §1231.

C. Defining a Particular Social Group

Domestic and international sources of immigration law fail to shed light on the meaning of what groups of persons constitute a particular social group. The INA does not provide a definition for a particular social group.⁴¹ The United Nations Guidelines suggest, but does not require, that those claiming membership in a particular social group actually share a characteristic, or that a group is perceived as such by society.⁴² Because Congress never drafted a definition for a particular social group in the INA, the Board developed a legal test through case law to determine whether a proposed group fits within a protected ground.⁴³ This legal test is crucial to understanding the obstacles in providing protection to persons fearing gang-based violence, even where it is in the best interest of United States immigration policy to provide protection when the country of origin has failed to protect its citizen's basic needs.

The following cases discussed in this Section trace the development of criterion that the Board uses to determine a particular social group for gang resistance. The Board first interpreted the meaning of a particular social group as persons who share an "immutable characteristic."⁴⁴ Twenty-one years later, the Board introduced a more rigorous test when it held that social visibility and particularity are prerequisites to proving a particular social group.⁴⁵ Disagreement over whether the social visibility requirement should provide a basis for denying asylum to victims of persecution, and if so, what factors federal courts should consider in determining a socially visible group, produced a circuit split.⁴⁶

41. See James Racine, *Youth Resistant to Gang Recruitment As A Particular Social Group in Larios v. Holder*, 31 B.C. THIRD WORLD L.J. 457, 461 n.24 (2011) (quoting *Fatin v. INS*, 12 F.3d 1233, 1238-39 (3d Cir. 1993)).

42. See U.N. Human Rights Comm., Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Jan. 1, 1992), www1.umn.edu/humanrts/instree/refugeehandbook.pdf; see also U.N. High Comm'r for Refugees, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 1, 3 (May 7, 2002), <http://www.unhcr.org/3d58de2da.pdf>.

43. See *infra* note 44.

44. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

45. *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008); see also *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (finding that groups based on shared suffering or being targeted for persecution do not satisfy social visibility).

46. See *infra* Part III.B.2.

1. *The Immutable Characteristics Test*

The Board first defined membership in a particular social group in *Matter of Acosta*.⁴⁷ This case involved an El Salvadorian taxi driver who applied for asylum because he feared persecution by guerillas as a result of his participation in a taxi cooperative.⁴⁸ Relying first on the United Nations Human Rights Convention and the INA, the Board tried to discern the definition of a particular social group.⁴⁹ The Board then applied the canon of statutory construction known as *ejusdem generis* to construe the meaning of membership in a particular social group.⁵⁰ Finding that the other four enumerated protected grounds of race, nationality, religion, and political opinion describe persecution aimed at immutable characteristics, the Board imputed this definition to a particular social group.⁵¹

The immutable characteristics test covers traits that individuals are either unable to change by their actions, or as a matter of conscience should not be required to change because it's fundamental to their individual identities or consciences.⁵² For example, the Board understood an immutable characteristic to be a shared innate characteristic, including sex, race, kinship ties, or shared past experiences.⁵³ Applying this test to the facts of the case, the Board held that the taxi driver “had the power to change” his membership in the taxi cooperative and evade persecution by the guerillas.⁵⁴ Accordingly, the driver and his family did not satisfy the legal standard for membership in a particular social group.⁵⁵

The immutable characteristics test provided the exclusive rubric for determining membership in a particular social group for twenty-one years and established “important precedents extending protection to social groups

47. *In re Acosta*, 19 I. & N. Dec. at 233.

48. *Id.* at 216.

49. *Id.* at 233 (finding that the Convention notes and the legislative history of a particular social group in the INA similarly failed to convey any meaning for determining a particular social group).

50. BLACK'S LAW DICTIONARY 712 (9th ed. 2009) (defining the canon of construction “holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

51. *In re Acosta*, 19 I. & N. Dec. at 233.

52. *Id.*

53. *Id.*

54. *Id.* at 234.

55. *Id.* at 236.

such as homosexuals [and] victims of female genital mutilation.”⁵⁶ In two gang-related asylum cases, the Board “formally injected the elements of ‘social visibility’ and ‘particularity’ into social group analysis” to add greater specificity.⁵⁷ In doing so, the Board affirmed that the requirements were compatible with the *Acosta* decision, “at the same time dubiously recasting some of its earlier social group cases as though considerations of social visibility had been relevant to their outcome.”⁵⁸

2. *Social Visibility Slips in As A Requirement to Form A Particular Social Group*

In 2006, the Board applied a new requirement of “social visibility” to augment the test for a particular social group.⁵⁹ A Colombian businessman who served as a private informant for the General Counsel for the city of Cali applied for asylum.⁶⁰ The case reached the Eleventh Circuit, and the court remanded the case to the Board to determine whether the proposed social group, “non-criminal informants working against the Cali cartel,” constituted a particular social group under the existing legal test.⁶¹ The businessman had gleaned detailed information regarding the Cali cartel’s operations from an affiliate who visited his store.⁶² After the businessman cooperated with General Counsel, who investigated and prosecuted drug traffickers, the cartel targeted the businessman and his family.⁶³ Members of the cartel brutally beat the businessman’s son in a public street, and warned that “things would get worse” for his family if he continued to work as an informant.⁶⁴

The Board held that proving a particular social group turned on the visibility of the group in society.⁶⁵ Here, the businessman’s persecution resulted from his activity as a private informant. Unlike those “informants who are discovered because they appear as witnesses or otherwise come to

56. Benjamin Casper ET AL., *The Evolution Convolution of Particular Social Group Law: From Clarity of Acosta to the Confusion of Matter of S-E-G-*, IMMIGR. PRAC. POINTERS, 565-66 (2010).

57. *Id.* at 566-67.

58. *Id.* at 566.

59. *In re C-A*, 23 I & N. Dec. 951, 952 (BIA 2006).

60. *Id.* at 951.

61. *Id.* at 952.

62. *Id.*

63. *Id.*

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

65. *Id.* at 959.

the attention of cartel members,” the Board ruled that the group did not have visibility because a private informant intends to covertly remain out of the public view.⁶⁶ Even though members of the cartel committed acts of violence against the businessman’s family in a public street, the Board construed the social visibility requirement to amount to a publicly recognizable trait shared by the group members.

3. *The Social Visibility Test Is Board Precedent*

In *In re S-E-G-*, the Board denied asylum to siblings fleeing MS-13 in El Salvador on the grounds that the proposed group—young Honduran males and their family members resisting gang recruitment efforts—failed to satisfy the social visibility requirement for the particular social group test.⁶⁷ The Board reasoned, “it is difficult to conclude that any group, as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador.”⁶⁸ Although the Board ruled that the pertinent society was that of “the country of concern and persecution feared,” the Board relied on how the criminal gangs in Honduras would perceive the proposed group to construe “the general societal perception.”⁶⁹

Shared past experiences and family ties would have satisfied the immutable characteristics test based on the Board’s *Acosta* decision.⁷⁰ Here, the Board ruled that gang resisters and their family members could not constitute a particular social group because criminal gangs would not view private informants differently from the rest of society.⁷¹ Observing that the social visibility test refined precedent, the Board ruled that membership in a particular social group is satisfied when society meaningfully distinguishes between individuals who have the asserted trait and those who do not possess the trait.⁷² By compounding the perspectives of the criminal gangs and society, this decision left open the question of

66. *Id.* at 960. *But see In re M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (explaining that the social visibility requirement, re-named “social distinction,” does not mean ocular visibility).

67. *In re S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008).

68. *Id.* at 588 (internal quotes omitted); *see also In re E-A-G-* 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (holding that gang membership does not form the basis for a cognizable social group).

69. *In re S-E-G-*, 24 I. & N. Dec. at 586-87.

70. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

71. *In re S-E-G-*, 24 I. & N. Dec. at 588.

72. *Id.*

whether the relevant society was framed by the country in question, or by the persecutors.⁷³ Although the social visibility test intended to clarify the parameters for defining a particular social group, it has only added confusion.⁷⁴

III. TREATMENT OF SOCIAL VISIBILITY IN THE FEDERAL APPELLATE COURTS

Many federal appellate courts—the First, Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits—accept the social visibility requirement as a dispositive factor for determining a particular social group.⁷⁵ One reason that circuit courts follow the Board’s approach is because “judicial deference to the Executive Branch is especially appropriate in the immigration context,” and achieving uniformity in interpreting immigration law is desirable.⁷⁶ Not all federal appellate courts require social visibility. Courts that require social visibility have found that “resisting gang recruitment” does not constitute a particular social group for lack of social visibility. Yet, courts that follow the *Acosta* test have found that former membership in a gang, and youth who have been actively recruited by gangs but have refused to join, constitute a particular social group.⁷⁷

73. Compare *In re S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008), with *In re E-A-G-* 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (focusing on social visibility within the country in question, the Board explained that the proposed group’s social visibility depended on the “extent to which society perceive those with the characteristics in question as members of a social group.”). But see *In re M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (clarifying that the salient inquiry for social visibility, re-named “social distinction,” is the country in question, not the persecutor).

74. See *In re S-E-G-*, 24 I. & N. Dec. at 579 (on remand, the Immigration Judge granted asylum to the respondents in *S-E-G-*. The Board wrote to the Attorney General that this should no longer be considered good law).

75. See, e.g., *Ramos-Lopez v. Holder*, 563 F.3d - Although the cial group, the c you mobility during that time.te or progression of the infection, the physcial ck, prevent loss855 (9th Cir. 2009); *Valdiviezo-Galdamez v. Att’y Gen.*, 502 F.3d 285 (3d Cir. 2007).

76. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citing *INS v. Abudu*, 485 U.S. 94, 110 (1998) (giving deference to the agency interpretation unless unreasonable, i.e., arbitrary or capricious, or clearly contrary to the law.); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

77. See generally *Valdiviezo-Galdamez v. Holder* 663 F.3d 582 (3d Cir. 2011); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009).

A. Social Visibility Denies Relief to Persons Resisting Gang Recruitment

The social visibility test is a barrier to asylum claims based on resisting gang recruitment. For example, the Eleventh Circuit ruled that “young persons who are perceived to be affiliated with gangs” and “Honduran schoolboys who refuse to join gangs” could not satisfy the social visibility requirement.⁷⁸ After finding a lack of evidence supporting the premise that Honduran society would identify a group that resisted gang recruitment, the Eleventh Circuit construed social visibility as a characteristic or trait visible to the naked eye.⁷⁹ The Ninth Circuit similarly upheld a Board decision that “Honduran men resist[ing] gang recruitment” did not constitute a particular social group because MS-13 members may target individuals who have refused to join, not because members of this group are generally visible to society.⁸⁰ Whereas resisting gang recruitment would constitute a shared prior experience under *Acosta*, the Ninth Circuit concluded that “shared past experience [does not necessarily] suffice to define a particular social group for asylum purposes.”⁸¹

B. Former Gang Members May Be Eligible for Asylum

Federal appellate courts defer to an agency’s interpretation of a statute unless it is “arbitrary, capricious, or manifestly contrary to the statute.”⁸² The Third and Seventh circuits declined to adopt the Board’s social visibility test, refusing to give deference to the Board’s interpretation of a particular social group. Rejecting the Board’s interpretation of a particular social group as requiring social visibility, the Third and Seventh circuits found that social visibility was not a reasonable interpretation of membership in a particular social group because it contradicted the immutable characteristics test in *In re Acosta*.⁸³

A former gang member applied for withholding of removal as a member of a particular social group of “tattooed, former Salvadoran gang

78. *Gomez-Benitez v. Att’y Gen.*, 295 F. App’x 324, 326 (11th Cir. 2008).

79. *Id.*

80. *Ramos-Lopez*, 563 F.3d. at 862.

81. *Id.* at 860.

82. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 844 (1984).

83. *See Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009); *Valdiviezo-Galdamez v. Holder* 663 F.3d 582 (3d Cir. 2011).

members.”⁸⁴ The Seventh Circuit determined that this group satisfied the immutable characteristics test and reasoned, “a gang is group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group.”⁸⁵ The court held that a group’s social visibility, relying on externally identifiable criteria, “is irrelevant to whether if there is persecution, it will be on the ground of group membership.”⁸⁶ The court highlighted a problem with the social visibility requirement: “often it is unclear whether the Board is using the term ‘social visibility’ in the literal sense or in the ‘external criterion’ sense, or even whether it understands the difference.”⁸⁷ The Sixth Circuit similarly held that “former gang members” would constitute a particular social group⁸⁸ under the *Acosta* test when it found that it would be “impossible to change membership in the group of the former 18th Street gang members.”⁸⁹

C. Defining A Particular Social Group in the Fourth Circuit

Even though the Fourth Circuit has never addressed whether social visibility is a reasonable interpretation of a particular social group,⁹⁰ the court endorsed the Board’s approach in a trilogy of cases. In *Lizama v. Holder*, the court considered the meaning of particular social group and granted agency deference to the Board’s immutable characteristics test in *Acosta*.⁹¹ *Crespin-Valladares* and *Zelaya v. Holder* discuss the implications of the Board’s social visibility test to gang-related asylum claims.⁹² In *Crespin-Valladares*, the court recognized that the “family provides a prototypical example of a particular social group.”⁹³ Because the family is easily recognizable and understood by others to constitute a particular social group, the family ties between the uncle and his nephew satisfied the

84. *Benitez Ramos*, 589 F.3d at 428-29.

85. *Id.* at 429.

86. *Id.* at 430.

87. *Id.*

88. *Urbina-Mejia v. Holder*, 597 F.3d 360, 367 (6th Cir. 2010).

89. *Id.* at 366.

90. Brief for Petitioner at 4, *Contreras-Martinez v. Holder*, 560 U.S. 903 (2010) (No. 09-830) 2010 U.S. Lexis 3983.

91. *Lizama v. Holder*, 629 F.3d 440, 446-47 (4th Cir. 2011).

92. See *Zelaya v. Holder*, 668 F.3d 159, 165 (4th Cir. 2012); *Crespin-Valladares v. Holder*, 632 F.3d 117, 120 (4th Cir. 2011).

93. *Crespin-Valladares*, 632 F.3d at 125 (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)) (internal quotations omitted).

Board's visibility requirement.⁹⁴ The court noted this was particularly true because "[Orlando] and his uncle public cooperated with the prosecution" against violent gang members.⁹⁵ Because a family member public cooperated with government law enforcement, testified in court, and the gang knew that the petitioners had a relationship with the witness, the witness and family members could be "readily verified."⁹⁶ Relying on the court's decision in *Crespin-Valladares*, the plaintiff in *Zelaya* applied for asylum based on the social group of "young Honduran males who refused to join gangs, notified authorities of gang harassment, and had an identifiable tormentor within the gang."⁹⁷ However, the court distinguished this case from *Crespin-Valladares* on two grounds. First, the protected ground in *Crespin-Valladares* turned on the social group of family members.⁹⁸ Second, "the proposed group excludes persons who merely testify against MS-13," including the complaining witness himself.⁹⁹ The court clarified that opposition to gangs is not a "concrete trait that would readily identify a person possessing such a characteristic."¹⁰⁰ The concurring opinion suggests an incongruity in the court's narrow reading of *Crespin-Valladares*, arguing that the witness himself "presumably also satisfies . . . the social visibility criteria."¹⁰¹

Although the *Crespin* court commented that the uncle's testimony increased the group's social visibility, the court did not need to address whether witnesses testifying against gangs would independently satisfy a group's social visibility.¹⁰² Instead, the court relied on the family, a universally recognized group that federal appellate courts generally agree comports with the definition of a particular social group.¹⁰³ Whereas the Fourth Circuit was cautious to rule on whether a prosecutorial witness was eligible for asylum, the Ninth Circuit granted asylum to a prosecutorial witness who testified against gangs.¹⁰⁴ The Ninth Circuit adopted the Second Circuit's dicta *in re C-A-*, which reasoned that a prosecutorial

94. *Id.* at 125-26.

95. *Id.*

96. *Id.*

97. *Zelaya*, 668 F.3d at 165.

98. *Id.* at 166.

99. *Id.*

100. *Id.*

101. *Id.* at 169.

102. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011).

103. *Zelaya*, 668 F.3d at 165.

104. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1155 (9th Cir. 2013).

witness could not recant his or her public testimony in a court reporting, and it would therefore be *bad social policy* to deny asylum to such an applicant.¹⁰⁵

IV. ANALYSIS

Gang-related asylum claims fit squarely within the purpose of asylum law: to protect individuals living in constant danger of violence by giving them refuge in a safe country. However, it is extremely difficult for asylum seekers to win a claim that is based on Central American gang violence.¹⁰⁶ Orlando's case demonstrates that a person who fears persecution as a member of a specific social group, like a family, is more likely to be successful than a more generalized social group of prosecutorial witnesses who testify against gangs.

Section A of this Analysis will touch on immigration policy concerns regarding asylum for former gang members, persons fleeing gang recruitment, persons fleeing gang violence. Section B of this Analysis proposes that immigration policy should support granting asylum to prosecutorial witnesses who testify against gangs. Moreover, this Section argues that prosecutorial witnesses who testify against gangs should independently satisfy the social visibility because society sees members of this group as socially distinct.¹⁰⁷

A. Immigration Policy of Gang-Based Asylum Claims

A majority of gang-based asylum applications can be divided into three bases of persecution: former gang membership, resistance to gang recruitment, and resistance to gang violence. The federal courts' legal interpretations of a particular social group account for some discrepancies in the outcomes in these gang cases.¹⁰⁸ There are also underlying policy implications that both support and reject making persons with gang-based claims eligible for asylum. One overarching policy concern is that an overly inclusive concept of refugeehood—one that would incorporate victims of gang activity—is not only morally suspect, but also overburdens

105. *Id.*; *In re C-A*, 23 I & N. Dec. 951, 956 (BIA 2006).

106. *See supra* Part I.

107. *See supra* Part II.

108. *See supra* Part III.

relief programs. Because resources devoted to refugee programs are scarce, prioritizing asylum-seekers by need is crucial for the viability of the refugee assistance programs. However, an overly narrow concept of refugeehood could lead to the denial of safety to persons outside the bounds of extreme persecution of genocide and tyranny, and are left are unprotected from the injuries of another by their country of origin.

1. Former Gang Members

Membership in a violent criminal gang is not within the purview of a particular social group asylum law. *Former* gang membership is distinguishable, because individuals in this group have abandoned and rejected the gang-lifestyle. Moreover, not all gang members join voluntarily. Some members join for familial support, protection, and as a result of financial need.¹⁰⁹ When former gang members are returned to a country like Guatemala, Honduras, or El Salvador, where the government is unable to adequately control gangs, it is challenging to escape from the gang culture, and shed the social stigma of being associated with being a gang member.¹¹⁰ Moreover, the visual and permanent signals of gang affiliation, such as gang tattoos, make former gang members an easy target for gang recruitment and reincorporation into the gang. Moreover, former gang members may risk economic persecution in their home country, if they are deprived of a livelihood, property, and basic means of subsistence because of their former gang affiliation.

Even if former gang members may have a genuine fear of persecution if returned to their country of origin, the past criminal conduct of former gang members raises national security concerns. The limitations to protection under asylum law indicate that the safety of United States citizens within our borders trumps the threat of persecution to a former gang member. Lawmakers delineated safeguards in the INA that prevent granting refugee status to this class of former gang members. The INA contains provisions that make aliens ineligible for asylum. The persecutor bar excludes persons who participated in the persecution of others, or committed a serious nonpolitical crime.¹¹¹ As a matter of discretion, Immigration Judges may deny asylum in an exercise of discretion based on

109. Alexandra Grayner, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G*, 63 HASTINGS L.J. 1417, 1420 (2012).

110. *See supra* Part II.

111. 8 U.S.C.A. § 1158(b)(2)(A)(iii) (West 2006).

former membership in a criminal group.¹¹² If former gang members demonstrate that they will face harsh retaliation for leaving the gang, they should be eligible for asylum, absent a criminal background.

2. *Central Americans Resisting Gang Recruitment*

Asylum seekers who resist conscription into gangs act consistently with U.S. domestic and foreign policy. However, U.S. asylum law provides perverse incentives for persons outside the U.S. who are faced with the choice of joining a gang, or resisting gang recruitment. This issue raises similar concerns as in *In re S-K-*. Here, the Board held that the respondent provided “material support” to an organization that carried out terrorist activities, even though the organization was allied with a U.S.-backed resistance group in Burma.¹¹³ Similarly, resistance to the MS-13 gang is consistent with U.S. foreign policy. Moreover, the MS-13 gang is not a problem that is unique to Central America and the group maintains a considerable presence in the United States. In 2012, the Department of Homeland Security labeled MS-13 as a “transnational criminal organization.”¹¹⁴ MS-13 has its roots in the United States, and grew out of the Los Angeles riots and anti-gang laws that resulted in increased incarceration of Latino youths. Federal immigration laws intensified in 1996 and led to mass deportations of Central American youths with criminal convictions. These youths then established MS-13 cells abroad. Because MS-13 is a threat to the national security of U.S. and Central America, our foreign policy should be biased towards individuals resisting gang recruitment, and our asylum law should reflect this alignment.

Individuals that resist gang recruitment pose less of a floodgates problem than individuals fleeing gang violence. Certain segments of society in Honduras, El Salvador, and Guatemala are at a greater risk of gang recruitment, including young men in prisons or detention centers, impoverished children, and individuals living in gang-controlled neighborhoods.¹¹⁵ These groups are set apart from the rest of society and particularly vulnerable to gang retaliation, beatings, and other forms of

112. See *In re Pula*, 19 I&N 467 (BIA 1987).

113. *In re C-A*, 23 I & N. Dec. 951, 956 (BIA 2006).

114. Margot Kniffin, *Balancing National Security and International Responsibility: The Immigration System's Legal Duty to Asylees Fleeing Gang Violence in Central America*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 314, 33 (2011).

115. Grayner, *supra* note 109, at 1425.

physical coercion to join the ranks of the gang. Moreover, granting asylum to persons who resist gang recruitment and demonstrate a well-founded fear of persecution brings the United States into conformance with its obligations in the 1951 Convention and 1967 Protocol, and the United Nation's current position on gang-based asylum claims. The United High Commissioner for Refugees has identified categories of persons who are opposed to gangs and are targeted for retaliation as a result, including those who have resisted gang recruitment.¹¹⁶

3. *Central Americans Fleeing Gang Violence*

The underlying policy concern with granting asylum to persons fleeing gang violence is the experiences of the populations in Central American countries with gang members and gang violence are diffuse. Asylum seekers are penalized under the current law because they are part of a group that cannot be separated from the rest of society because everyone could be construed as a victim of gangs. However, the size of the group should not be a determinative factor. Where generalized violence is pervasive and senseless, the fear of harm is even more credible. Asylum claims based on fear of persecution by gangs should be evaluated on a case-by-case basis and there should not be a per se rule denying relief to such applicants because of their social group. Lawmakers should recognize that gang activity in Central America is widespread and presents a constant threat of violence, such that an asylum seeker's well-founded fear should be the central inquiry for refugee status.

B. Prosecutorial Witnesses Who Testify Against Gangs Should Be Treated As A Special Group Under Asylum Law

In communities where it is risky to oppose gangs, particularly in closely integrated, gang-controlled neighborhoods, gang-resisters are set apart from society.¹¹⁷ Gangs are well marked by their tattoos, clothing, and associations.¹¹⁸ Most people in the community know who is a member of a gang.¹¹⁹ However, a shared fear of gang violence would not be enough to

116. U.N. High Comm'r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Crimes*, ¶ 33, U.N. Doc. 10040532 (Mar. 2010).

117. Lister, *supra* note 8, at 845.

118. Lister, *supra* note 8, at 845.

119. Lister, *supra* note 8, at 846.

satisfy a particular social group under the Board's approach.¹²⁰ Although Central American gangs target and intimidate individuals at random, gangs also persecute groups because they specifically threaten the gang's power and control,¹²¹ and this is particularly true for asylum applicants who testify against gang members in criminal proceedings.

Not all individuals who fear the effects of gang activities are eligible for asylum in the United States, and a legal test with a meaningful limiting principle should serve to shield against these claims.¹²² As explained above, *In re C-A-*, *In re S-E-G-*, and *In re E-A-G-* foreclosed many asylum claims based on proposed particular social groups relating to a fear of gangs.¹²³ Even though the Third and Seventh Circuits declined to adopt the social visibility test for gang-based claims,¹²⁴ and the other circuits have set aside the social visibility requirement to grant asylum for gang-based claims, this Paper argues that either courts should find that prosecutorial witnesses are eligible for asylum, or Congress should amend the INA to provide refuge for this basis of persecution.

1. Crafting a Socially Visible Group is an Obstacle for a Genuine Asylum Claim

Orlando's case raises another dimension of confusion surrounding the social visibility test: what part of a purported group should be subject to the social visibility test?¹²⁵ The implications of the court's decision raises two issues that contribute to the confusion of what makes a group socially visible. First, whether a prosecutorial witness is a member of the social group that is defined by its family ties to that witness and second, whether prosecutorial witnesses can independently constitute a particular social group.¹²⁶ Although the court in *Crespin-Valladares* applied the social visibility test to family members, a frequently recognized group, this result ignored the visibility of prosecutorial witnesses.

The existence of a particular social group depends on a persecutor's motive for targeting and harming an individual, as distinguished from a

120. See *supra* Part I.

121. See U.N. High Comm'r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Crimes*, ¶ 33, U.N. Doc. 10040532 (Mar. 2010).

122. See *supra* note 8.

123. See *supra* Part I.

124. See *supra* Part II.

125. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125-126 (4th Cir. 2011).

126. *Id.* at 121.

common, randomized crime.¹²⁷ Some scholars argue that when social visibility turns on a group's physical appearance, rather than its social salience, courts actually narrow the intended scope of the social visibility test.¹²⁸ However, courts consistently treat the family as a particular social group and this classification depends on non-physical traits.¹²⁹ Although the family only extends to a confined number of people, the group largely depends on blood and kinship ties.

The societal perception approach to determining a particular social group identifies a relevant social community in gang-related cases, usually by looking at members of the country in question, and whether persons fleeing or fearing gang activity could be set apart from the rest of that community.¹³⁰ The Ninth Circuit raised the issue surrounding the lack of guidance on determining the relevant community. The court asked, "Should the social circle constitute the applicant's community as a whole? The United States? The global community? Should the immutable characteristic be identifiable to a stranger, or recognizable in a more general sense to the community at large?"¹³¹ Although a social group cannot be defined exclusively by the persecution that the members of the group suffer, the relevant social perception may shed light on whether individuals who testify against gangs are subject to a higher incidence of gang retaliation, or violence, compared with the rest of the particular population. Prosecutorial witnesses fit within this rationale because they have been exposed to gang activity and gang violence, and they place themselves in the public view by participating in the criminal system.

Prosecutorial witnesses who publicly testify against gangs should satisfy the social visibility under the narrowest lens: physical appearance. By testifying in court, prosecutorial witnesses who testify against gangs place themselves in the public eye so that society can identify them, and therefore can be understood as distinct from the rest of society. Whereas prosecutorial witnesses are part of a broader group that opposes or resists gangs, the shared characteristic is not shared persecution. Instead, testifying in court serves as the shared trait that becomes immortalized in police records and court documents.

127. See Brief for Petitioner at, *Henriquez Rivas v. Holder*, 449 F. App'x. 626 (9th Cir. 2011) (No. 09-71571).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

2. *Witness Cooperation with the Law Enforcement is Socially Visible*

The application of the social visibility by the circuit courts in *Valladares* and *In re C-A*-also raises an arbitrary distinction between public and private cooperation pursuant to the “social visibility” requirement. Although the Board raised this problem in *In re of S-E-G-* and further explained the scope in *In re of E-A-G-*, circuit courts have not consistently applied social visibility and or followed the Board’s guidelines: that the shared trait does not have to be physically visible. The Ninth Circuit has “practically ignored the [social visibility] prong;” instead, it relies on whether the proposed group is recognizable by others in the community.¹³²

Civil informants are not physically visible, and purposefully remain out of the public view to avoid detection. However, the Board has recognized that this is not the only way to construe the social visibility test. Shared characteristic do not need to be “highly visible and recognizable by others.”¹³³ Even though gang members may know and detect a civil informant working against the gang, this informant would only be eligible for asylum if known by society.¹³⁴ Since a group based on private civil informants who cooperate with police against gangs would likely fail based on prior precedent, why not craft a claim based on a successfully litigated and socially visible group? The Fourth Circuit’s analysis in *Valladares* suggests that had the Colombian businessman’s son in *In re C-A-* crafted a proposed social group based on his father’s cooperation with the police, his group could muster under the social visibility requirement based on kinship ties.

C. *Solutions*

In “Balancing National Security and International Responsibility: The Immigration System’s Legal Duty to Asylees Fleeing Gang Violence in Central America,” Margot Kniffin argues that “[l]awmakers [sic] continue to rely on political influences to perpetuate biased asylum laws that unfairly deny victims of persecution protection within our borders.”¹³⁵ The federal appellate courts have made a mess of the Board’s legal test for crafting a socially visible particular social group, and the Supreme Court has refused

132. *Id.*

133. *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996).

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

135. Kniffin, *supra* note 114, at 338.

to weigh in, deferring to the Board's authority and expertise. In light of the ongoing discussions on the proposed comprehensive immigration reform bill, the opportunity is ripe for lawmakers to correct inequities in asylum law.¹³⁶ U.S. lawmakers must craft a workable solution that upholds humanitarian obligations to asylum-seekers in conformance with international and domestic law.

Lawmakers must consider the danger MS-13 poses to Central Americans in the Northern Triangle and the risk of a national security breach and opening the floodgates to a diffuse segment of Central American population. When Congress enacted the Refugee Act of 1980, the United States demonstrated its commitment to providing a pathway for refugees to obtain protection from persecution in their country of nationality, in conformance with the UN Protocol Relating to the Status of Refugees. The Immigration Courts and federal courts interpret asylum law differently, creating unpredictable legal barriers for persons fleeing gang-based persecution with genuine claims. Therefore, Congress is well placed to enact specific legislation that safeguards prosecutorial witnesses from Central American countries controlled by MS-13. Congress could expand the definition of "refugee" in the INA to include persons who testify against gangs as a matter of policy, as it did in 1996 to include persons forced to undergo sterilization after violating China's one-child policy.¹³⁷ Alternatively, Congress could provide a pathway for gang-based asylum claims by eliminating the nexus requirement for humanitarian asylum.

Humanitarian interests support legislation that protects persons fleeing persecution by MS-13 on a case-by-case basis. Similarly, deporting former gang-members would likely encourage repatriation to the gang as a means of survival. Therefore, making asylum available for this particular class of with gang-based claims could curb the growth of the MS-13 gang. Moreover, safeguards such as the persecutor bar and grounds of inadmissibility and deportation prohibit persons who pose a danger to national security asylum eligibility. Former gang members could also provide law enforcement with valuable intelligence about MS-13's narcotics and human trafficking operations.

U.S. asylum law excludes the prosecutorial witness from protection because the reason for persecution does not fit squarely within any of the five protected grounds. Immigration policy should mirror U.S. domestic

136. *Id.*

137. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2014)).

law that compensates victims and witnesses of crime for their cooperation, sufferings, and losses as a result of their involvement with criminal prosecutions.¹³⁸ For example, the Victim and Witness Protection Act of 1982 explains that “without the cooperation of victims and witnesses, the criminal justice system would cease to function.”¹³⁹ Witnesses are placed in protection programs. Because the United States shares the same threats by MS-13 as other countries, including murder, illegal drug trafficking, rape, robbery, we should extend the privilege of refugee status to asylum seekers who actively participate in the prosecution of gang activity. Because the United States has the means to protect citizens from harm, and the absence of state protection triggers the need for refugee status, the failure of a sovereign state to adequately protect or offer resources to its prosecutorial witnesses that put themselves in harm’s way to advance *international* peace and safety should certainly give such individuals footing under asylum law.

V. CONCLUSION

Because asylum is discretionary, fact intensive, and courts review each claim on a case-by-case basis, the determination of a particular social group requires a uniform and mechanically applied legal test. Coherence among Immigration Judges, the Board, and the federal circuit courts would promote judicial efficiency and provide asylum seekers greater assurance of the merits of their claim. Although lawmakers lack agency expertise with regard to the nuances in immigration laws, Congress is best positioned to create a legislative rule that weighs natural security concerns, humanitarian obligations, and foreign policy biases.

In the meantime, courts should recognize prosecutorial witnesses who testify against gangs as a particular social group—either under the immutable characteristics, or the social visibility test. Although gangs may persecute prosecutorial witnesses as reprisal or retribution for interfering with their criminal activities, gangs target prosecutorial witnesses because of the shared past experience of testifying as prosecutorial witnesses, which

138. *Zelaya v. Holder*, 668 F.3d 159, 165 (4th Cir. 2012) (Floyd, J., concurring).

139. Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, §2(a)(1), 96 Stat. 1248 (1982).

is permissible under the immutable characteristics test.¹⁴⁰ As articulated within *In re C-A-*, “informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members” are visible and recognizable to the public.¹⁴¹

140. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

141. *In re C-A-*, 23 I & N. Dec. 951, 959 (BIA 2006).

