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ASYLUM TO A PARTICULAR SOCIAL GROUP: NEW DEVELOPMENTS AND ITS FUTURE FOR GANG-VIOLENCE VICTIMS

INTRODUCTION

In 1886, the United States of America completed and dedicated the Statue of Liberty.¹ She became a “beacon of light for immigrants coming to America.”² She welcomed newly-arrived immigrants to the land of opportunity through the words etched on her base, “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me”³ She embraced “all castaways, misfits and homeless types dreaming of freedom.”⁴ While Ellis Island closed its immigration processing facilities in 1954, the message etched on the Statue of Liberty lives on through the U.S. Citizenship and Immigration Services (“USCIS”).⁵ The United States welcomes many immigrants who yearn to be free from persecution through the USCIS asylum and refugee process.⁶

Unfortunately, thousands of applicants fail to meet the basis for U.S. asylum and must return to their native country.⁷ One of the reasons that applicants fail to meet the standards for asylum is the inability of the applicant to base their case on one of the five protected grounds for asylum.⁸ The U.S. Attorney General has the authority to grant asylum “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁹ When a country or another third party persecutes an individual because of their race, religion, nationality, and political opinion, the statutory basis for asylum is apparent.¹⁰ However, for some, the more ambiguous category of *membership in a particular social group* is their only option.¹¹

1. *Statue of Liberty History*, STATUE OF LIBERTY NOW, <http://www.statueoflibertynow.com/statue-of-liberty-history.html> (last visited Mar. 7, 2012).

2. *Id.* (“For the first [sixteen] years of its existence, the Statue of Liberty [literally] was a ‘beacon of light’ because it was a ‘fully functioning lighthouse’ on Ellis Island.”)

3. *Statue of Liberty Poem*, STATUE OF LIBERTY NOW, <http://www.statueoflibertynow.com/statue-of-liberty-poem.html> (last visited Mar. 7, 2012).

4. *Id.*

5. *See Ellis Island History Continued*, NAT’L PARK SERVICE, <http://www.nps.gov/elis/historyculture/ellis-island-history-continued.htm> (last visited Sept. 11, 2010).

6. *Id.*

7. *See* U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF PLANNING, ANALYSIS, & TECH., IMMIGRATION COURTS: FY 2009 ASYLUM STATISTICS (March 2010), *available at* <http://www.justice.gov/eoir/efoia/FY09AsyStats.pdf> (last visited Oct. 9, 2010).

8. Nathan Brooks, *In Praise of Creativity: Gang-Based “Social Group” Claims in Asylum Cases*, 56 FED. LAW. 26, 26 (2009).

9. 8 U.S.C. § 1101 (a)(42)(A) (2006).

10. Brooks, *supra* note 8, at 26.

11. *See* Jeffrey D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee*

Sadly, due to the legislature's vagueness and unclear intent, the courts have produced a "wide-rang[e]" of inconsistent rulings on what constitutes a particular social group and when individuals can use this statutory basis for asylum in the United States.¹² Thus, victims of domestic violence, female genital mutilation ("FGM"), and gang violence, whose best option is to use the statutory ground of being members in a particular social group, have little success in their asylum petitions.¹³ However, since the Board of Immigration Appeals' ("BIA") 1996 decision in *In re Kasinga*,¹⁴ courts have become more open to the usage of the particular social group category for asylum claims by victims of gender violence.¹⁵ The very recent decisions in domestic violence cases, such as *In re R.A.* and *In re L.R.*, demonstrate further proof of the courts' stance.¹⁶ By using the new standards and rules adopted from successful gender violence asylum cases, the basis for what defines a *particular social group* should be expanded to accept the legitimate claims of individuals who have been the target of gang violence.¹⁷ Immigration officials should use the recent developments in gender violence asylum claims as a standard to accept victims of gang violence as members of a particular social group.

This article examines the possibility of immigration officials to consider gang violence victims as members of a particular social group in order to qualify for asylum.¹⁸ Part II examines the history and procedure of the asylum procedure.¹⁹ Part III shows how the courts currently assess the particular social group category by first describing past cases, the tests that emerged from them, and then the recent developments in gender violence asylum claims.²⁰ Part IV examines how immigration officials should apply the recent developments in gender violence to victims of gang violence due to their similarities.²¹

Their Wrath, 20 GEO. IMMIGR. L.J. 407, 418 (2006); Zsaleh E. Harivandi, Note, *Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum*, 95 CORNELL L. REV. 599, 605-06 (2010); Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 506 (2010).

12. Siddiqui, *supra* note 11, at 506.

13. See Corsetti, *supra* note 11, at 421; Harivandi, *supra* note 11, at 600; Siddiqui, *supra* note 11, at 506.

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

15. See Harivandi, *supra* note 11, at 608.

16. See *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001); *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.: Current Update*, CTR. FOR GEN. & REFUGEE STUDIES, <http://cgrs.uchastings.edu/campaigns/alvarado.php> (last visited Mar. 7, 2012); Lauren Markham, *Domestic Abuse Survivor Wins Asylum Case*, CHANGE.ORG (Aug. 21, 2010, 9:00 AM), <http://news.change.org/stories/domestic-abuse-survivor-wins-asylum-case> (Asylum Granted to "L.R." by Immigration Judge August 4, 2010).

17. See sources cited *supra* note 16.

18. See generally Corsetti, *supra* note 11, at 408.

19. See generally Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 604(a)(2)(B), 110 Stat. 3009, 3009-691 (1996); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); *History of Migration and Immigration Laws in the United States*, AM. COMP. LITERATURE ASS'N, <http://www.umass.edu/complit/aclanet/USMigrat.html> (last visited Aug. 17, 2010).

20. See generally *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986); *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985); *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006); *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *In re R-A-*, 24 I. & N. Dec. 629 (B.I.A. 2008).

21. See generally *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); Corsetti, *supra* note 11.

ASYLUM BACKGROUND AND PROCEDURE

The United States has always been a safe haven for persecuted individuals, as evidenced by the early French refugee settlement, Asylum, established in the United States in 1793.²² However, the fear of foreigners, particularly those of Asian descent, caused the United States to restrict the migration of individuals to its land.²³ In 1917, due to concern regarding national security during World War I, Congress enacted the first restrictive immigration law.²⁴ The 1917 Act “paved the way” to the Immigration Act of 1924 and the quota system still in use today.²⁵ Besides establishing a quota system, the Immigration Act of 1924 further excluded entry into the United States for aliens ineligible for citizenship due to their race or nationality.²⁶

To further restrict immigration, the United States passed the Immigration and Nationality Act of 1952 (“INA”) on the heels of another war.²⁷ The sponsors of this Act, Senator McCarran and Congressman Walter, feared “communist infiltration through immigration and that unassimilated aliens could threaten the foundations of American life.”²⁸ Because he thought the quota system was racially discriminatory, President Truman vetoed it.²⁹ Congress, however, overturned his veto and passed the law.³⁰ While highly restrictive to certain racial groups,³¹ the INA did include a provision that “allowed refugees who were fleeing persecution from communist or communist-dominated countries or from the Middle East to be admitted to the United States.”³² Thus, the INA became the foundation of our current immigration and asylum law.³³

In addition to the INA, international laws also helped contribute to the formation of current U.S. asylum law.³⁴ In 1951, delegates from twenty-six countries, including the United States, met in Geneva, Switzerland to deal with the “hundreds of thousands of refugees [that] wandered aimlessly across the European continent or squatted in makeshift camps” due to World War II.³⁵ There they adopted the 1951 Convention relating to the Status of Refugees.³⁶

One of the primary things the 1951 Convention established was the definition of the term *refugee*.³⁷ It applied the term *refugee* to any person who:

22. REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 23 (5th ed. 2007) (Asylum was settled in northeastern Pennsylvania “by refugees from the French Revolution.”).

23. See *History of Migration and Immigration Laws in the United States*, *supra* note 19.

24. *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP’T OF ST.: OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1921-1936/ImmigrationAct> (last visited Aug. 17, 2010).

25. *Id.*

26. *Id.*

27. *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, U.S. DEP’T OF ST.: OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1945-1952/ImmigrationAct> (last visited Aug. 17, 2010).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. GERMAIN, *supra* note 22, at 24.

33. *Id.*

34. *Id.*

35. Ray Wilkinson, Editorial, *The Refugee Convention at 50...*, 2 REFUGEES, no. 123, 2001, at 2.

36. *Id.*

37. Convention Relating to the Status of Refugees, *supra* note 19, art. 1A.

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of 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 country³⁸

In addition, the Convention determined to whom the term *refugee* did not apply.³⁹ The convention stated that any person who had “committed a crime against peace, a war crime, or a crime against humanity” was not eligible for protection under the status of refugee.⁴⁰

Besides defining the term *refugee*, the 1951 Convention provided a “broader” range of rights to refugees.⁴¹ Those rights include “freedom of religion and movement, the right to work, education and accessibility to travel documents.”⁴² It also highlights the refugee’s duties to the government of their host country.⁴³ Lastly, the 1951 Convention specifies host governments shall not return refugees to their home country where they fear persecution.⁴⁴

Unfortunately, though, the 1951 Convention on the Status of Refugees did have a couple of setbacks.⁴⁵ First, it did not define the term *persecution*.⁴⁶ This has resulted in differing and contrasting views of what constitutes persecution, as well as whether persecution applies to groups, and whether a government must commit the persecution.⁴⁷ Second, the framers of the 1951 Convention meant for it to help only post-World War II refugees.⁴⁸ The general provisions of the Treaty state that the term *refugee* applies only to any person who fears persecution “[a]s a result of events occurring *before 1 January 1951*.”⁴⁹ However, because the refugee crisis did not end with the post-World War II refugees, the Convention needed amending and “strengthening” to assist new exiles.⁵⁰

In 1967, the U.N. General Assembly implemented the Protocol relating to the Status of Refugees, which removed the 1951 restrictions.⁵¹ It stated that the 1951 Convention rights applied to all refugees regardless of the January 1, 1951 deadline.⁵² While the United States did not sign on as a party to the 1951 Convention, it did sign on as a state party to the 1967 Protocol.⁵³ Thus, the United States adopted a broader

38. *Id.* art. 1A(2).

39. *Id.* art. 1F.

40. *Id.*

41. Marilyn Achiron, *A ‘Timeless’ Treaty under Attack*, 2 REFUGEES, no. 123, 2001, at 4, 11.

42. *Questions and Answers: The Most Frequently Asked Questions about the Refugee Convention*, 2 REFUGEES, no. 123, 2001, at 16.

43. *Id.* at 17 (“Refugees are required to respect the laws and regulations of their country of asylum.”).

44. *Id.*

45. See Achiron, *supra* note 41, at 12-19.

46. *Id.* at 14.

47. See *id.* at 14, 18-19.

48. *Id.* at 12.

49. Convention Relating to the Status of Refugees, *supra* note 19, art. 1A(2) (emphasis added).

50. Achiron, *supra* note 41, at 12.

51. *Id.*

52. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

53. See *The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, 2 REFUGEES, no. 123, 2001, at 28.

definition of *refugee*, including the principle of not returning refugees to their home country where they fear persecution.⁵⁴

However, it was not until 1980 that the United States gave the 1967 Protocol true effect through the Refugee Act.⁵⁵ The Refugee Act of 1980 amended the current INA by expanding the definition of the term *refugee*.⁵⁶ It, like the 1951 Convention relating to the Status of Refugees,⁵⁷ found that a refugee is any person who cannot return to their home country because the country cannot protect them from “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵⁸ It also states that a country’s government should not return an alien to a country where the “alien’s life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵⁹ The Refugee Act, in effect, adopted all the provisions in the 1951 Convention and the 1967 Protocol.⁶⁰

In 1996, the U.S. Congress amended the INA by imposing a deadline for filing an asylum application, amongst other things.⁶¹ These amendments, titled the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”), require applicants to file for asylum within a year after the day the alien arrives in the United States,⁶² unless the applicant can establish extraordinary circumstances that contributed to the delay in filing the application within the one-year deadline.⁶³

In the aftermath of the terrorist attacks on September 11, 2001, Congress passed the USA PATRIOT Act of 2001 and the REAL ID Act of 2005.⁶⁴ The USA PATRIOT Act “expanded the bars to asylum and allowed the detention of ‘suspected terrorists’” even if the United States had granted them asylum.⁶⁵ The REAL ID Act made changes to the applicant’s burden of proof and credibility determination.⁶⁶ It states that for an applicant to be considered a refugee, they “must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason” for their persecution in their home country.⁶⁷ Without any more recent legislation, the INA absorbs all these acts and amendments to frame the current process an applicant must follow and meet for the United States to grant them asylum.⁶⁸

An applicant may choose one of two options to obtain asylum in the United

54. GERMAIN, *supra* note 22, at 24.

55. *Id.*

56. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102.

57. Convention Relating to the Status of Refugees, *supra* note 19.

58. Refugee Act of 1980 §201.

59. *Id.* § 203(h)(1).

60. GERMAIN, *supra* note 22, at 24.

61. *Id.*

62. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 604(a)(2)(B), 110 Stat. 3009, 3009-691 (1996).

63. *Id.* § 604(a)(2)(D).

64. GERMAIN, *supra* note 22, at 25.

65. *Id.*

66. REAL ID Act of 2005, Pub. L. No. 109-13, div. B., § 101(a)(3)(B), 119 Stat. 231, 303.

67. *Id.*

68. 8 U.S.C. §§ 1101, 1158 (2006).

States.⁶⁹ These options include the *affirmative* asylum process with the USCIS and the *defensive* asylum process with the Executive Office for Immigration Review (“EOIR”).⁷⁰ In the *affirmative* asylum process, an individual applies for asylum by directly mailing their application to one of the four USCIS service centers.⁷¹ The individual must file their application within one year of the individual’s arrival in the United States.⁷² Usually, within forty-three days after an applicant files their Form I-589, *Application for Asylum and for Withholding of Removal*, a USCIS asylum officer interviews the asylum applicant “in a non-adversarial manner.”⁷³ The asylum officer renders a decision on whether to grant the applicant asylum within sixty days.⁷⁴ To receive the decision, the applicant must personally come to the asylum office to retrieve it.⁷⁵

If the asylum officer approves the application, the United States allows the applicant to remain and continue their application process by receiving work authorization, financial and other resettlement assistance, an Alien Number, and their Refugee Travel Document.⁷⁶ On the other hand, if the asylum officer denies the individual’s application for asylum, the asylum officer serves the applicant with a formal notice of denial and begins removal proceedings.⁷⁷ The asylum officer then places the applicant in the second path of obtaining asylum, *defensive* asylum processing.⁷⁸ Here, the asylum applicant requests “asylum as a defense against removal from the United States.”⁷⁹ An Immigration Judge (“IJ”) at the EOIR hears the asylum application in an adversarial setting.⁸⁰ The judge hears both the applicant’s and the U.S. government’s positions regarding the applicant’s eligibility for asylum.⁸¹

If the IJ denies the applicant’s asylum petition, the applicant has the opportunity to appeal the decision to the BIA.⁸² The BIA can review “IJ decisions in exclusion, deportation, and removal proceedings.”⁸³ Once the BIA renders a decision, the applicant, as well as the U.S. government attorney, may file a petition for judicial review after the final order against the applicant by the BIA.⁸⁴

69. *Obtaining Asylum in the United States: Two Paths*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9ff067e3183210VgnVCM100000082ca60aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Apr. 9, 2010) (on file with author).

70. *Id.*

71. ROBERT C. DIVINE & R. BLAKE CHISAM, *IMMIGRATION PRACTICE* 16-12 (2009-2010 ed. 2009).

72. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 604(a)(2)(B), 110 Stat. 3009, 3009-691 (1996).

73. *Obtaining Asylum in the United States: Two Paths*, *supra* note 69.

74. DIVINE & CHISAM, *supra* note 71, at 16-13.

75. *Id.*

76. *See id.* at 16-22 to 16-24.

77. *Id.* at 16-14.

78. *Obtaining Asylum in the United States: Two Paths*, *supra* note 69. Whether or not they file for affirmative asylum, an individual can invoke defensive asylum in deportation proceedings.

79. *Id.*

80. *Id.*

81. *Id.*

82. GERMAIN, *supra* note 22, at 228. In addition, the United States also has the opportunity to appeal a decision to the BIA. *Id.*

83. *Id.*

84. DIVINE & CHISAM, *supra* note 71, at 11-98.

The applicant can then file a petition for review in the federal appellate court in the circuit where the IJ proceedings took place.⁸⁵ The circuit court of appeals can only examine the administrative record of the IJ.⁸⁶ The court of appeals allows the U.S. Attorney General discretionary judgment on whether to grant asylum.⁸⁷ The court of appeals upholds the Attorney General's judgment as "conclusive unless manifestly contrary to the law and an abuse of discretion."⁸⁸ As a last chance appeal, an applicant can request a stay of removal from the Department of Homeland Security ("DHS") district director.⁸⁹ If this fails, along with the appeals, the applicant must obey the removal order and return to his or her native country, if they have not already done so.⁹⁰

CURRENT STATE OF ASYLUM LAW

Precedence in Asylum Cases

Unlike most court decisions, decisions rendered by IJs and asylum officers carry no precedential value.⁹¹ Most are even issued without a written opinion.⁹² On the other hand, published decisions of the BIA are binding on all officers and employees of the DHS and IJs.⁹³ Not all BIA decisions are binding, though.⁹⁴ The BIA designates precedential decisions as interim decisions until the BIA publishes them.⁹⁵ While unpublished decisions are not binding on the BIA, IJs, or asylum officers, courts may use the unpublished decision as an interpretation of the BIA's position on a specific issue.⁹⁶ If the Attorney General does not agree with a BIA decision, she or he has the power to review any BIA decision.⁹⁷ They rarely do this, though.⁹⁸ In addition, the BIA cannot "ignore or disregard regulations" dispensed by the Attorney General.⁹⁹

While a BIA decision and the Attorney General's review usually represent the last resting place for an asylum petition, federal courts have often become the final decision makers in asylum cases.¹⁰⁰ Federal courts, unlike the BIA, have the authority to make decisions on constitutional issues, claims that question the validity of the Refugee Act, asylum regulations, and statutes.¹⁰¹ Because an applicant can appeal a BIA decision to

85. *Id.* at 11-99.

86. *Id.*

87. 8 U.S.C. § 1158(a) (2006).

88. 8 U.S.C. § 1252(b)(4)(D) (2006).

89. DIVINE & CHISAM, *supra* note 71, at 11-115.

90. *See id.* at 11-111, 11-112.

91. *Precedential LGBT/H Asylum Cases*, IMMIGR. EQUALITY, <http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/precedential-cases/> (last visited Mar. 8, 2012).

92. *Id.*

93. GERMAIN, *supra* note 22, at 16.

94. *See id.*

95. *Id.*

96. *Id.*

97. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 417 (2007).

98. *Id.*

99. GERMAIN, *supra* note 22, at 16.

100. *Id.* at 17.

101. *Id.*

the U.S. circuit court of appeals where the initial removal decision arose,¹⁰² a court of appeals' decision only binds and affects the asylum cases and decisions from its own circuit.¹⁰³ Thus, due to the lack of binding decisions that apply nationally, there has been "stunning variability from one circuit to another."¹⁰⁴ The asylum applicants do not enjoy the benefit of stare decisis because similar asylum cases do not always have similar results.¹⁰⁵ Unfortunately, asylum applicants and their attorneys cannot predict the outcome that will have lasting effects on the "litigants' lives, liberty, or property."¹⁰⁶

Thus, because of the variability and inconsistency in interpreting the statutory term *particular social group*,¹⁰⁷ asylum applicants, such as those escaping gang violence, have difficulty defining their *particular social group* in terms that satisfy the court before them.¹⁰⁸ Thus, all immigration officials and judges should consistently adopt the new standards and rules regarding *membership in a particular social group* set forth in recent key decisions such as *In re R.A.* and *In re Kasinga* in order to grant victims of gang violence a legitimate opportunity at asylum.¹⁰⁹

The Membership in a Particular Social Group Category

The Attorney General of the United States has the authority to grant asylum to an individual who has applied for asylum via the appropriate measures.¹¹⁰ In order to qualify for asylum, the individual must establish "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."¹¹¹ Thus, an applicant must establish that they fit into one of the five enumerated grounds in order to qualify for asylum in the United States.¹¹²

While victims of violence based on race, religion, and nationality have an easier time fitting into one of the five enumerated grounds, most victims of gender and gang violence do not.¹¹³ Thus, the victims of gender and gang violence must resort to the fourth enumerated ground of *membership in a particular social group*.¹¹⁴ This category has been the "catch-all" category for any applicant to use that is persecuted for a ground not enumerated.¹¹⁵ While it is easy to claim persecution based on *membership in a particular social group*, the United States does not easily grant an applicant asylum

102. DIVINE & CHISAM, *supra* note 71, at 11-99.

103. GERMAIN, *supra* note 22, at 17.

104. Legomsky, *supra* note 97, at 422. For a study regarding inconsistency among asylum decisions, see Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

105. See Ramji-Nogales, *supra* note 104, at 299-301.

106. *Id.* at 299.

107. Legomsky, *supra* note 97, at 424.

108. See Harivandi, *supra* note 11, at 606-07.

109. See generally Brooks, *supra* note 8, at 27; Matthew J. Lister, *Gang-related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 834-35 (2008).

110. 8 U.S.C. § 1158(b)(1)(A) (2006).

111. *Id.* § 1158(b)(1)(B).

112. Brooks, *supra* note 8, at 26.

113. See Corsetti, *supra* note 11, at 418; Harivandi, *supra* note 11, at 606.

114. See sources cited *supra* note 113.

115. Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 171 (2001).

based on this ground because it is “an especially contested and problematic area in asylum law.”¹¹⁶ This is due to courts struggle with the definition and standard to determine a *particular social group*.¹¹⁷

The BIA’s Immutability Test

The BIA first attempted to define and develop a standard for a *particular social group* in the seminal case, *Matter of Acosta*.¹¹⁸ In *Acosta*, a national from El Salvador attempted to claim asylum to avoid deportation to his home country because of his fear of persecution on account of his membership in a particular social group.¹¹⁹ Acosta was a taxi driver who founded a cooperative organization of 150 taxi drivers entitled COTAXI.¹²⁰ Starting around 1978, Acosta believed anti-government guerillas targeted him and other taxi drivers.¹²¹ These guerillas wanted the taxi drivers to participate in work stoppages in order to harm El Salvador’s economy.¹²² Because Acosta and the other drivers did not give in to the demands, the aggressors destroyed several taxis and killed five COTAXI drivers.¹²³ In early 1981, Acosta received three notes threatening his life, warning him that he would be executed, and to not contact the police for help.¹²⁴ Because he felt his life threatened, Acosta migrated to the United States.¹²⁵

Acosta argued at his immigration hearing that anti-government guerillas persecuted him because he was a member of a “particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador.”¹²⁶ To determine if Acosta had met the *particular social group* standard, the BIA used the doctrine of *eiusdem generis* to decipher the phrase *membership in a particular social group*.¹²⁷ The doctrine of *eiusdem generis* holds that “general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”¹²⁸ The BIA found that all members of a specific enumerated ground (race, religion, nationality, and political opinion) share an immutable characteristic that is “beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”¹²⁹

116. See Lister, *supra* note 109, at 829.

117. Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 767 (2003).

118. *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985); Bradley B. Baniias, Note, “Membership in a Particular Social Group”: Does America Comply with its International Obligation?, 1 CHARLESTON L. REV. 123, 136 (2007).

119. *In re Acosta*, 19 I. & N. Dec. 211.

120. *Id.* at 216.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 217.

125. *Id.*

126. *Id.* at 232.

127. *Id.* at 232-33. Since Congress did not provide guidance in the interpretation of the statutory ground of *membership in a particular group*, the BIA found the doctrine of *eiusdem generis* as the most helpful interpretation device. The other four grounds for asylum restrict refugee status to people who are unable or should not be required to change a characteristic to avoid persecution. *Id.*

128. *Id.*

129. *Id.*

Thus, the individual is persecuted because they are a part of a group that shares a “common, immutable characteristic.”¹³⁰ The common immutable characteristic can be innate such as “sex, color, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership.”¹³¹ Whatever it is, an individual cannot change or should not be made to change the immutable characteristic they share with others because it is fundamental to their being.¹³² The BIA made clear that when determining if an applicant was a member of a particular social group it would individually evaluate any proposed immutable characteristic.¹³³

Because the BIA found that members of Acosta’s social group could avoid persecution by simply changing jobs, it denied Acosta asylum because his group did not share an immutable characteristic that could not or should not be changed.¹³⁴ Regardless of the denial of asylum in the case, *Acosta* provided the seminal approach to look at claims based on a particular social group.¹³⁵ The *Acosta* test placed the first limit as to what could be defined as a particular social group.¹³⁶ The test is flexible enough to allow new groups to use the enumerated ground as a basis for their claim, but not so vague to allow any person to use it.¹³⁷ Because of this flexibility, members of various particular social groups, including gender violence, have successfully claimed asylum basis due to their membership in a particular social group.¹³⁸ Most of the federal circuits and courts follow this approach.¹³⁹ While it is the majority test, some courts have etched out their own interpretation of a *particular social group*.¹⁴⁰

The Ninth Circuit’s Voluntary Association Test

The year after the BIA decided *Acosta*, the Ninth Circuit carved out its own definition of *membership in a particular social group* in *Sanchez-Trujillo v. I.N.S.*¹⁴¹ In that case, two individuals from El Salvador tried to receive asylum because government officials persecuted them on the grounds that they were members of a particular social group.¹⁴² Their claimed particular social group consisted of “young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador.”¹⁴³ The court found that even though the

130. *Id.*

131. *Id.*

132. *Id.* at 234.

133. *Id.* at 233.

134. *Id.* at 234.

135. Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 51-52 (2008).

136. *See id.* at 52.

137. *Id.*

138. *See* T. David Parish, *Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 936 (1992).

139. Bantias, *supra* note 118, at 138.

140. Brooks, *supra* note 8, at 27.

141. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986).

142. *Id.* at 1572.

143. *Id.* at 1573, 1577-78. One of the applicants testified that government officers had accosted and attacked him due to his alleged rebel group membership. The other testified he was detained and searched on four separate occasions by security forces in El Salvador. *Id.* at 1571-89. The BIA found that the government did

petitioners had been victims of dangers and violence in El Salvador, none of it was a result of their membership in a particular social group or their alternative claim of political opinion.¹⁴⁴

In determining whether the petitioners were members of a particular social group, the court looked at the statutory words *particular* and *social*, which precede and “modify” the statutory word *group*.¹⁴⁵ The court found that the statutory phrase implies a “collection of people closely affiliated with each other, who are actuated by some common impulse or interest” that are not a broad population segment.¹⁴⁶ The court was mostly concerned with the presence of a voluntary associational relationship that exposes a fundamental common characteristic to the identities of the members of the particular social group.¹⁴⁷

While stating the need for a voluntary associational relationship among the members of a particular social group, the Ninth Circuit stated in a contradictory fashion that “a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family.”¹⁴⁸ For most individuals, one does not get to choose their family members (except for matrimonial ties); one’s family members are the result of biology and not one’s voluntary association.¹⁴⁹ Yet, even with this blatant contradiction of *Acosta*, the Ninth Circuit did not revise the voluntary, associational test until 2000 in *Hernandez-Montiel v. I.N.S.*¹⁵⁰

In *Hernandez-Montiel*, the applicant petitioned for asylum on the grounds that he was persecuted due to his membership in a particular social group consisting of “gay men with female sexual identities in Mexico.”¹⁵¹ Because this particular social group was not voluntary, the court recognized that not every particular social group fit their voluntary associational relationship requirement.¹⁵² To harmonize the voluntary association test with the *Acosta* immutability requirement, the Ninth Circuit found that a particular social group is “one 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.”¹⁵³ Because the court found that sexual identity and orientation are immutable and should not be required to change, the court concluded that the applicant was a member of a particular social group.¹⁵⁴

not persecute them for not serving in the military or actively supporting the government. *Id.* at 1577-78. The BIA found persecution by the government fell equally to all citizens of El Salvador. *Id.* at 1577.

144. *Id.* at 1577-78, 1581.

145. *Id.* at 1576.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* Heyman, *supra* note 117, at 776.

150. *Id.*

151. *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000), *overruled on separate grounds by* *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

152. *Id.* at 1092.

153. *Id.* at 1093.

154. *Id.* at 1094-1095. The court found that *Hernandez-Montiel* was entitled to asylum because he was subject to persecution through the harassment and rape imposed on him by the police due to his female sexual identity. *Id.*

Thus, the Ninth Circuit, by altering its previous test developed in *Sanchez-Trujillo*, broadened the means of defining a particular social group through the voluntary association test and the immutable characteristic test.¹⁵⁵ Even though the Ninth Circuit embraced *Acosta* and its immutability test, in 2006, the BIA felt compelled to adopt a new test that created additional challenges for asylum applicants.¹⁵⁶

The BIA's New Social Visibility Test

First stated in the Second Circuit decision of *Gomez v. I.N.S.*, the social visibility test requires that a particular social group's fundamental characteristic be distinguishable to the persecutor or visible to the eyes of the outside world.¹⁵⁷ After relying on *Acosta* for more than two decades,¹⁵⁸ the BIA decided to add the social visibility test to the particular social group analysis in *In re C-A-*, decided in 2006.¹⁵⁹ The BIA found that "noncriminal drug informants working against the Cali drug cartel" do not constitute a particular social group because the members lacked social visibility.¹⁶⁰ After vowing to adhere to the *Acosta* test, the BIA considered as a pertinent factor the extent to which society sees those with the characteristic in question as members of a social group.¹⁶¹ It rationalized the social visibility factor because innate characteristics are easily recognizable and understood by others to distinguish social groups.¹⁶² Thus, the BIA found that the petitioner's group did not meet the social visibility test because an informant's nature is unknown, undiscovered, and out of the public view.¹⁶³

To further reinforce their adoption of the social visibility test, the BIA used the test a year later in *In re A-M-E & J-G-U*.¹⁶⁴ It reaffirmed the requirement that the public should generally recognize the group's shared characteristic.¹⁶⁵ Because violence and crime in Guatemala affected all people regardless of socio-economic status, the BIA decided the persecutors did not socially recognize the petitioners because of their membership in a particular social group.¹⁶⁶ Thus, because Guatemalan society did not perceive the petitioners' group consisting of affluent Guatemalans as socially visible, the petitioners failed to show they were members of a particular social group.¹⁶⁷

By simply disallowing groups because they lack social visibility, the social visibility test can be in direct conflict with the BIA's well-established precedent in

155. See Marouf, *supra* note 135, at 53.

156. See *id.* at 78.

157. *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (finding that Gomez's membership in a group comprised of women who had been previously battered and raped by Salvadoran guerillas is not a particular social group because would-be persecutors could not identify members of said group from the common population).

158. See Marouf, *supra* note 135, at 63.

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

160. *Id.* at 961.

161. *Id.* at 956-57.

162. *Id.* at 959.

163. *Id.* at 960.

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

165. *Id.* at 74.

166. *Id.* at 75.

167. *Id.* at 69.

Acosta.¹⁶⁸ The social visibility test fails to include any group persecuted for an immutable characteristic but not directly visible to society.¹⁶⁹ Furthermore, the addition of the social visibility test is in contradiction to the doctrine of *ejusdem generis*.¹⁷⁰ Courts should not require social visibility for a particular social group since it is not a requirement for the other enumerated grounds of race, religion, nationality, or political opinion.¹⁷¹

Not only did the BIA depart from *Acosta* when it adopted the social visibility test from *C-A-* and *A-M-E & J-G-U*, it made it more difficult for the United States to grant asylum to bona fide petitioners based on their membership in a particular social group.¹⁷² First, many characteristics of persecuted groups are not externally visible.¹⁷³ In an attempt to prevent further persecutions, members of a particular social group may feel as if they must hide their immutable characteristic and try to remain invisible from society.¹⁷⁴ Second, many times society cannot recognize members of well-established social groups because the characteristic is not socially visible.¹⁷⁵ For example, most people cannot recognize if a woman is a member of a particular social group consisting of females who have not undergone the practice of FGM and oppose it.¹⁷⁶ Lastly, society may choose not to recognize the victim of persecution as a member of a particular social group.¹⁷⁷ Such is the case for domestic violence victims who live in societies that tolerate or promote domestic violence.¹⁷⁸ Since much of society considers domestic violence a private problem, most of the time it would not be able to recognize visibly which women have suffered abuse by a domestic partner.¹⁷⁹ Thus, the social visibility test made it harder for social groups, such as those of gender and gang violence, to petition for asylum and “easier for fearful [asylum] adjudicators to reject such groups.”¹⁸⁰

Acceptance of Gender Violence Victims as Members of a Particular Social Group

Like victims of gang-related violence,¹⁸¹ victims of gender violence historically have had very little success in the United States granting them asylum.¹⁸² However,

168. Marouf, *supra* note 135, at 104.

169. Stanley Dale Radtke, *Defining a Core Zone of Protection in Asylum Law: Refocusing the Analysis of Membership in a Particular Social Group to Utilize Both the Social Visibility and Group Immutability Component Approaches*, 10 J.L. & SOC. CHALLENGES 22, 39 (2008).

170. Marouf, *supra* note 135, at 105.

171. *Id.*

172. *Id.* at 78.

173. *Id.* at 79.

174. *Id.* For example, a homosexual will sacrifice his or her self-identity by suppressing his or her social visibility in order to avoid any further persecution and violence. *See id.*

175. *See* Harivandi, *supra* note 11, at 612.

176. *Id.* at 612-13.

177. *See* Marouf, *supra* note 135, at 95.

178. *Id.*

179. *Id.*

180. *Id.* at 91; Elyse Wilkinson, Note, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 390 (2010).

181. Lister, *supra* note 109, at 830.

182. Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1804-05 (1997).

recently, they have had more success thanks to the efforts and outcry of the international community.¹⁸³ This has opened the asylum door to victims of gender violence who base their claim on membership in a particular social group.¹⁸⁴ This open door led to the favorable outcomes in the two most important U.S cases, *In re Kasinga* and *In re R-A-*, which pertain to gender asylum claims.¹⁸⁵

In re Kasinga

In *In re Kasinga*, the applicant was a nineteen-year-old woman from Togo whose husband and aunt had attempted to force her to undergo FGM.¹⁸⁶ The applicant was a member of the Tchamba-Kunsuntu Tribe, which subjects its female members to FGM at the age of fifteen.¹⁸⁷ Her “influential” father, fortunately, did not force her to undergo FGM because he opposed the practice.¹⁸⁸ However, her father passed away, and her aunt became her primary caretaker.¹⁸⁹ The aunt then forced the applicant into a polygamous marriage with a man that was forty-five years old and had three other wives.¹⁹⁰ Before the marriage took place, the applicant’s aunt and future husband attempted to force her to undergo FGM due to the customs of their tribe.¹⁹¹ Fearing the “imminent mutilation,” the applicant fled Togo and eventually made her way to the United States, where she immediately requested asylum.¹⁹²

Before the BIA could determine if the applicant qualified for asylum in the United States, the BIA had to establish that she was a member of a particular social group.¹⁹³ The BIA found that the applicant’s particular social group was “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”¹⁹⁴ The BIA found that the applicant’s social group met the immutable characteristic test set forth in *Matter of Acosta* because “the characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed.”¹⁹⁵ Additionally, the BIA found that the characteristic of having “intact genitalia” is so fundamental to a person that they should not be required to change it.¹⁹⁶

In re R-A- and In re L.R.

While *Kasinga* illustrates that gender related claims could qualify under the enumerated ground of membership in a particular social group, the BIA decided to limit

183. Heyman, *supra* note 117, at 789.

184. See Seith, *supra* note 182, at 1828.

185. Siddiqui, *supra* note 11, at 522.

186. *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 358-59.

193. *Id.* at 365.

194. *Id.*

195. *Id.* at 366.

196. *Id.*

the scope of gender related claims in *In re R-A-*.¹⁹⁷ The applicant, R-A-, was a native of Guatemala who got married at the age of sixteen.¹⁹⁸ From the onset of her marriage, her husband physically and sexually abused her.¹⁹⁹ He was always “domineering and violent” towards her.²⁰⁰ He husband insisted that she accompany him wherever he went.²⁰¹ When the applicant did not abide by her husband’s irrational requests, he would beat her and strike her so much that on one occasion he dislocated the applicant’s jaw.²⁰² On another occasion, he kicked R-A- cruelly in the spine because she would not abort their three to four month-old fetus.²⁰³ In addition to the physical abuse, R-A-’s husband constantly raped her.²⁰⁴ He would beat her before and after raping her.²⁰⁵ Her husband would forcefully sodomize R-A- and even gave her a sexually transmitted disease acquired from his extra-marital affairs.²⁰⁶ R-A- ran away several times from her home with their two children, but her husband always found them.²⁰⁷ He would always retaliate against her actions by further beating R-A-.²⁰⁸ He whipped her with an electrical cord, threatened her with a machete, broke windows and a mirror on her head, and pistol-whipped her.²⁰⁹ The violence was so continuous and harmful to R-A- that she even attempted suicide.²¹⁰

Even with the enormous amount of violence R-A- endured, the Guatemalan police did not protect her.²¹¹ The police did not take further action when R-A-’s husband ignored the summons they had issued him.²¹² A judge even told R-A- that “he would not interfere in domestic disputes.”²¹³ This response from the local authorities can be attributed to the fact that spousal abuse is common in Latin American countries and that these countries lack effective methods to deal with domestic violence.²¹⁴ Taking all of the facts of R-A-’s abuse, as well as the lack of protection from the Guatemalan government, an IJ granted her asylum in September 1996.²¹⁵

However, the Immigration and Naturalization Service appealed the decision to the BIA where the BIA reversed the IJ’s decision.²¹⁶ The BIA found that R-A-’s claimed particular social group, “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male

197. See Binder, *supra* note 115, at 182.

198. *In re R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 2001).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 908-09.

209. *Id.* at 909.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 910.

215. *Id.* at 907.

216. *Id.*

domination,” was not in fact a particular social group.²¹⁷ Even before the decision in *In re C-A-*, the BIA discounted R-A-’s particular social group because it was too abstract.²¹⁸ Even though her group may have contained an immutable or fundamental individual characteristic to satisfy the *Acosta* test, the group was not “recognized and understood to be a societal faction” or a recognized segment within the Guatemalan population.²¹⁹ The BIA reasoned that if the group made up of victims of spousal abuse were not recognized or seen as a particular social group, then the alleged persecutor was not targeting and harming the victim based on her membership in a particular social group.²²⁰ Thus, the BIA found that R-A- was not entitled to asylum in the United States because her husband did not persecute her based on her membership in a particular social group.²²¹

While not directly invoking the social visibility test, the majority invoked a version of it by requiring that Guatemalan society identify R-A-’s group as a subdivision of society.²²² A reason why Guatemalan society might not identify domestic violence victims as members of a particular social group is that domestic violence is considered a “public secret” that takes place in the private sphere.²²³ Also, the social stigma attached to the domestic abuse “may make women reluctant to seek help.”²²⁴ Thus, it would be very hard for society to identify and recognize domestic violence victims as a group.²²⁵

Perhaps in recognition of this challenge, Attorney General Janet Reno vacated the BIA decision in January 2001.²²⁶ She remanded the case back to the BIA in order for it to reconsider *In re R-A-* following the publication of the proposed new asylum regulations.²²⁷ However, the regulations never finalized, and R-A-’s case remained in asylum “limbo” until September 2008.²²⁸ Attorney General Michael Mukasey reviewed the case and issued an opinion.²²⁹ He lifted the stay and ordered the BIA to revisit the issues in her case by considering recent relevant court decisions.²³⁰ The BIA, on December 4, 2008, conceding to the requests made by the DHS and R-A-, remanded the case back to the original immigration court.²³¹

Prior to the IJ issuing a decision in the *R-A-* case, another separate case involving a Mexican woman known as “L.R.” progressed through immigration court.²³² For this

217. *Id.* at 917.

218. *Id.* at 918.

219. *Id.*

220. *Id.* at 919.

221. *Id.* at 925.

222. Marouf, *supra* note 135, at 95 n.221.

223. *Id.* at 94-95.

224. *Id.* at 95.

225. *See id.* at 97.

226. *In re R-A-*, 22 I. & N. Dec. at 906.

227. *Id.* Several members of congress proposed the regulations on December 7, 2000. *Id.*

228. D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 384 (2d ed. 2009).

229. *Id.*

230. *In re R-A-*, 24 I. & N. Dec. 629, 630 (B.I.A. 2008).

231. *Documents and Information on Rody Alvarado’s Claim for Asylum in the U.S.: Current Update*, *supra* note 16.

232. *Id.*

case, the DHS attorneys under the Obama Administration filed a brief asserting that women who were victims of domestic violence could qualify for asylum based on being members of a particular social group.²³³ The DHS proposed two formulations that outlined a framework through which victims of domestic violence could assert persecution based on membership in a particular social group.²³⁴ Still abiding by the social visibility test, the DHS stated that women in L.R.'s position could meet this test because they are a "segment of society that will not be accorded protection from harm inflicted by a domestic partner."²³⁵ This, according to the DHS, placed women in a "significant social distinction" that can show the required social distinction or perception required for the social visibility test.²³⁶ Embracing the DHS's position regarding social visibility for a particular social group, L.R. stated in her brief that she established social visibility because she belonged to a segment of society that was not protected from harm.²³⁷ On August 4, 2010, an IJ granted L.R. asylum.²³⁸

Following the suggestions in the brief submitted in the *L.R.* case, the DHS took the position in the *R-A-* case that R-A- deserved asylum.²³⁹ However, the DHS departed from the standards set in the *L.R.* brief and criticized the social visibility test.²⁴⁰ The DHS stated that the social visibility or perception test departed from the "sound doctrine" established in *Acosta*.²⁴¹ The DHS found no reason to depart from the *Acosta* test and that an IJ should examine R-A-'s claim using that test.²⁴² The DHS found that R-A- was a member of a particular social group comprised of "married women in Guatemala who are unable to leave the relationship."²⁴³ Thus, the IJ issued a decision on December 10, 2009 granting R-A- asylum because both parties in the case agreed that R-A- deserved asylum.²⁴⁴

APPLICATION TO VICTIMS OF GANG VIOLENCE

The evolution of the particular social group statutory ground through *In re*

233. Dep't of Homeland Sec.'s Supplemental Brief at 11, *In re L.R.*, (2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>. L.R. first filed for asylum in 2005. Brief of Respondents in Support of Applications for Asylum, Withholding of Removal & CAT Relief at 10, *In re L.R.*, (2010). She argued that she was persecuted in Mexico by her common-law husband who repeatedly raped her, threatened her with guns and machetes, attempted to burn her alive, and severely battered her. She continuously asked the Mexican authorities for protection, but without any avail (one judge offered to help only if she would have sex with him). She escaped to the United States with her two sons. *Id.*

234. Dep't of Homeland Sec.'s Supplemental Brief, *supra* note 233, at 11.

235. *Id.* at 18.

236. *Id.*

237. Brief of Respondents in Support of Applications for Asylum, Withholding of Removal & CAT Relief, *supra* note 233, at 50.

238. Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14.

239. Dep't of Homeland Sec.'s Position on Respondent's Eligibility for Relief at 19, *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001) (No. A73753922), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.

240. *Id.* at 25.

241. *Id.*

242. *Id.*

243. *Id.* at 31.

244. *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.: Current Update*, *supra* note 16.

Kasinga, *In re R-A-*, and *In re L.R.* has shown the willingness of the United States to restore the *Acosta* test and protect vulnerable groups.²⁴⁵ The United States must further extend this willingness to the vulnerable victims of gang violence.²⁴⁶ After all, the purpose of asylum law is to help and protect people who, for reasons they cannot or should not be made to change, are persecuted in their home country, which cannot protect them.²⁴⁷ Gang victims, like the victims of FGM and domestic violence, are prime examples of the type of people asylum law seeks to protect.²⁴⁸

State of Gang Violence in Central America

Individuals who seek protection from the U.S. asylum process for gang violence in their Central American country are usually individuals who refuse recruitment or allegiance to a gang or are former gang members.²⁴⁹ The gangs that threaten these individuals had their origin in Los Angeles immigrant communities in the 1980s.²⁵⁰ As Central Americans fled the poor conditions in their countries due to constant civil conflicts, many settled in Los Angeles where they encountered Mexican-American gangs.²⁵¹ The two primary Central American gangs that emerged from the Los Angeles immigrant community are the *Mara Salvatrucha*, or MS-13, and *Barrio Dieciocho*, or 18th Street Gang.²⁵² After the Congress passed the IIRIRA, the United States began deporting many gang members of MS-13 and the 18th Street Gang back to their country of origin.²⁵³

They returned to an area dubbed the Northern Triangle of Central America, where Guatemala, El Salvador, and Honduras converge.²⁵⁴ The governments in these countries could not do much to combat the gang problem.²⁵⁵ They had little resources for “prevention and intervention programs for at-risk youth or incarceration and

245. See *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996); Dep’t of Homeland Sec.’s Position on Respondent’s Eligibility for Relief, *supra* note 239, at 15.

246. Lister, *supra* note 109, at 828.

247. *Id.*

248. *Id.*

249. *Id.* at 830.

250. WASHINGTON OFFICE ON LATIN AMERICA, *Why a Resource Manual on Central American Gangs?*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, 1 (May 2008), available at http://www.wola.org/publications/central_american_gang_related_asylum_guide.

251. *Id.* at 2. “Honduras was the main staging ground” for the battles between the U.S. supported Contras and the Nicaraguan government. WASHINGTON OFFICE ON LATIN AMERICA, *Gangs in Honduras*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 1. From 1960 to 1996, the Guatemalan government and left-wing guerilla groups massacred 100,000 to 200,000 civilians in rural areas in a civil conflict. WASHINGTON OFFICE ON LATIN AMERICA, *Gangs in Guatemala*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 1. In 1981, a civil war broke out in El Salvador between the government, which was dominated by the armed forces, and guerilla forces comprised of “peasant groups, labor and student activists, and others.” Over 40,000 people were killed in the conflict. WASHINGTON OFFICE ON LATIN AMERICA, *Gangs in El Salvador*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 1.

252. WASHINGTON OFFICE ON LATIN AMERICA, *Why a Resource Manual on Central American Gangs?*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 1.

253. WASHINGTON OFFICE ON LATIN AMERICA, *Gangs in El Salvador*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 1.

254. WASHINGTON OFFICE ON LATIN AMERICA, *Why a Resource Manual on Central American Gangs?*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 2.

255. *Id.*

rehabilitation programs for serious [gang members].”²⁵⁶ In addition, the lack of economic opportunities further pushed youth to join the powerful gangs, known as *maras* in Central America.²⁵⁷ The youth in the Northern Triangle area saw these gang leaders as more powerful than the local gang leaders.²⁵⁸ Thus, they adopted the violent tendencies and the “live for the gang, die for the gang” mentality associated with the imported *maras*.²⁵⁹

The *maras* continue to spread terror throughout the rural and urban areas of the Northern Triangle area “through fear, intimidation, rape, and murder.”²⁶⁰ The *maras* persecute anyone who opposes their control and commands.²⁶¹ Thus, youth who refuse to join a *mara* or speak out against gang violence risk assault or death for themselves or their family members.²⁶² To combat this terror, the countries in the Northern Triangle area have enacted crackdown, zero tolerance policies, known as *Mano Dura* policies, that have only led to better organized and more dangerous *maras*.²⁶³ Unfortunately, the *Mano Dura* policies have been “ineffective and counterproductive” with homicide rates rising.²⁶⁴ In addition, the policies often violate human and due process rights by targeting any youth believed to be involved with the *maras*.²⁶⁵ This has resulted in overcrowded and overburdened prison facilities that simply provide a ground for gang members to acquire more knowledge and expertise on running effective *maras*.²⁶⁶

Because they are becoming more effective, individuals persecuted by *maras* cannot escape the violence by simply relocating within the country.²⁶⁷ The countries in the North Triangle area are “geographically small countries” with few places outside the reach of the *maras*.²⁶⁸ Technology, particularly cell phone technology, has allowed the *maras* to increase their strongholds over larger areas of the small countries.²⁶⁹ In addition, many members of the police forces in these countries are corrupt and may assist in the persecution of individuals escaping gang violence.²⁷⁰ Thus, because there is no reasonable safe area to escape the gang violence and begin a life free of fear, victims of gang persecution leave their home countries to seek asylum in the United States.²⁷¹

256. *Id.*

257. *Id.* at 1-2.

258. WASHINGTON OFFICE ON LATIN AMERICA, *Gangs in Honduras*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 2.

259. *Id.* The “live for the gang, die for the gang” mentality means that the only way to leave the gang is through death. *Id.*

260. Corsetti, *supra* note 11, at 409.

261. *Id.* at 407.

262. *Id.* at 407, 416.

263. WASHINGTON OFFICE ON LATIN AMERICA, *Why a Resource Manual on Central American Gangs?*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 4.

264. *Id.*

265. *Id.*

266. *Id.* at 4-5.

267. Corsetti, *supra* note 11, at 410.

268. *See id.*

269. *Id.* at 411.

270. WASHINGTON OFFICE ON LATIN AMERICA, *Gangs in Guatemala*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 3.

271. Corsetti, *supra* note 11, at 410, 416.

Recent Gang-Related Asylum Cases

In *Matter of S-E-G-*, a young female along with her younger twin brothers fled El Salvador to escape violence and threats from MS-13.²⁷² “MS-13 stole money from the brothers, harassed and beat them for refusing to join their gang, and threatened to rape or harm” their sister.²⁷³ MS-13 threatened the family that if the brothers did not join the gang, the bodies of the brothers could end up in a dumpster someday.²⁷⁴ Before they fled to the United States, the siblings learned that MS-13 had “shot and killed a young boy” from their neighborhood for refusing to join the gang.²⁷⁵

While the IJ found that MS-13 persecuted the applicants, the beatings and threats were based on the gang’s desire to recruit new members and not their membership in a particular social group.²⁷⁶ On appeal, the BIA also found that the applicants’ particular social group of “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” did not satisfy the BIA’s standards of particularity or social visibility.²⁷⁷ The BIA found that membership in a particular social group required “particular and well-defined boundaries” that would give it a level of social visibility.²⁷⁸ Thus, the BIA was using the social visibility test.²⁷⁹ The BIA required that society recognize S-E-G-’s proposed group as a “discrete class of persons.”²⁸⁰ The BIA found the risk of harm was not limited to the proposed social group of young males who lack stable families, are from middle to low-income classes, reside in territories controlled by the MS-13, and who resist recruitment to gangs.²⁸¹ Thus, the BIA found El Salvadorian society did not perceive S-E-G-’s proposed group as a particular social group and S-E-G- was not eligible for asylum since the proposed group was too broad and the members were too diverse and disconnected.²⁸²

Recently, the Tenth Circuit has discounted the finding in *S-E-G-* that the characteristic of resistance to gang recruitment of a particular social group did not satisfy the particularity requirement.²⁸³ Members of the MS-13 gang brutalized Rivera-Barrientos in her home country of El Salvador.²⁸⁴ The members of the gang tried to recruit her to join the gang, and after numerous refusals, they kidnapped her, smashed her face, raped her, and threatened her with death and the death of her mother if she reported the attack to the police.²⁸⁵ In fear of death and under the belief that even if she

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

273. *Id.* at 580.

274. *Id.*

275. *Id.*

276. *Id.* at 581.

277. *Id.* at 581, 583.

278. *Id.* at 582.

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

280. *S-E-G-*, 24 I. & N. Dec. at 584.

281. *Id.* at 585.

282. *Id.* at 586, 588, 590.

283. *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011).

284. *Id.* at 1225.

285. *Id.*

did report the attack to the police she would not be protected, she did not leave her home “for several days after the attack.”²⁸⁶ Throughout this time, the gang members continued to harass her by going to her house and demanding to see her with intentions of recruiting her.²⁸⁷ Luckily, they believed Rivera-Barrientos’ mother’s lies that her daughter’s whereabouts were unknown, and Rivera-Barrientos was able to escape El Salvador by taking a bus through Mexico in route to the United States, where she was apprehended as she tried to enter the country without proper documentation.²⁸⁸

In removal proceedings, Rivera-Barrientos argued she qualified for asylum because she was member of a particular social group consisting of “women in El Salvador between the ages of 12 and 25 who resisted gang recruitment.”²⁸⁹ The BIA denied her asylum relief because her particular social group was neither “defined with particularity” nor “socially visible.”²⁹⁰ On appeal, however, the Tenth Circuit found that her group was particular and that a “discrete class of young persons sharing the past experience of having resisted gang recruitment” is “not so vague.”²⁹¹ Therefore, Rivera-Barrientos’ particular social group was sufficiently particular to meet the standard for a “particular social group.”²⁹² On the other hand, the Tenth Circuit upheld the social visibility test that requires a “relevant trait [to] be potentially identifiable by members of the community, either because it [was] evident or because the information defining the characteristic [was] publically accessible” because it was a reasonable interpretation of the “particular social group” basis by the BIA.²⁹³

In contrast, in *Benitez Ramos v. Holder*, the Seventh Circuit found that a former member to a gang in El Salvador was a member of a particular social group and that the social visibility test was imprecise.²⁹⁴ Benitez Ramos grew up in El Salvador where he joined MS-13 at the age of fourteen.²⁹⁵ Shortly after arriving in the United States, he became a born-again Christian, renounced his gang membership, and vowed not to rejoin the *mara* if he was returned to El Salvador.²⁹⁶ Benitez Ramos argued that if the United States sent him back to his home country the *mara* “would kill him for his refusal to rejoin” and the police could not protect him.²⁹⁷ Embracing the *Acosta* test, the court found that being a former gang member “is a characteristic impossible to change” and that a gang was a group.²⁹⁸ The court reasoned that the social visibility test was unclear because many times the BIA would use the term *social visibility* in the literal sense and at times the term referred to the external criteria of the group members.²⁹⁹ While the

286. *Id.*

287. *Id.* at 1225-26.

288. *Id.* at 1226.

289. *Id.* at 1228-29.

290. *Id.* at 1229.

291. *Id.* at 1231.

292. *Id.*

293. *Id.* at 1233.

294. *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

295. *Id.* at 428.

296. *Id.*

297. *Id.*

298. *Id.* at 429.

299. *Id.* at 430. The court used the example of redheads and veterans. Society can visibly spot redheads at a glance, but cannot do the same for veterans. However, veterans are a group, but redheads are not. *Id.*

Seventh Circuit simply remanded the case back to the BIA for new consideration, it did point out the haziness of the social visibility test and that former gang members could possibly qualify as a particular social group.³⁰⁰

Thus, due to the *Ramos* holding, the Chief of the DHS Asylum Division sent out a memorandum to all of the U.S. Asylum Offices notifying them that former gang membership could be a basis for a particular social group for at least cases that arise in the Seventh Circuit.³⁰¹ For the rest of the U.S. circuits, the memorandum left the option of allowing former gang membership as a particular social group by not providing direct instructions on how to treat such claims.³⁰² Further evidence of this lack of resistance towards gang-related asylum claims is the numerous IJ decisions that have allowed former membership in a gang and refusal to join a gang as characteristics of a particular social group.³⁰³

Similarity to Gender Violence Asylum Claims

Like the victims of gender violence, victims of gang violence face “an uphill battle” in asserting their persecution on account of their *membership in a particular social group*.³⁰⁴ However, from the recent results in *Kasinga, R-A-*, and *L.R.*, it is apparent that the uphill battle can be won.³⁰⁵ The holdings in these cases have disregarded the rigidity of the social visibility test and cracked open the door to an asylum claim for gang violence victims since they share many similarities to the victims of gender violence.³⁰⁶

One of the first similarities both victims of gender violence and gang violence share is that their persecutors are non-government actors.³⁰⁷ For domestic violence victims, their persecutor is usually their domestic partner who commits the harm “behind closed doors.”³⁰⁸ For victims of gang violence, the *maras* that control their neighborhoods are the usual persecutors.³⁰⁹ Second, in the case of many victims of gender³¹⁰ and gang violence, they cannot escape their persecutors by relocating to a different part of their country.³¹¹ Fourth, the governments of the victims’ home countries are unable to protect them from further gender and gang violence.³¹² In the case of

300. *See id.* at 431-32.

301. Memorandum from Joseph E. Langlois, Chief, Asylum Div., to All Asylum Office Staff, 2010 WL 2292974 (INS) (March 2, 2010).

302. *Id.*

303. *See* Sebastian Amar et al., *Seeking Asylum from Gang-Based Violence in Central America: A Resource Manual*, CAPITAL AREA IMMIGR. RTS. COALITION 18-20 (Aug. 2007), available at <http://www.aif.org/lac/GangResourceManual.pdf>.

304. Corsetti, *supra* note 11, at 435.

305. *See In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *In re R-A-*, 24 I. & N. Dec. 629 (B.I.A. 2008); Preston, *supra* note 238, at A14.

306. *See sources cited supra* note 305. *See generally* Corsetti, *supra* note 11.

307. *See* Lister, *supra* note 109, at 837.

308. Michael G. Heyman, *Protecting Foreign Victims of Domestic Violence: An Analysis of Asylum Regulations*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 122 (2008).

309. Corsetti, *supra* note 11, at 407.

310. *See In re Kasinga*, 21 I. & N. Dec. 357, 359 (B.I.A. 1996).

311. Corsetti, *supra* note 11, at 410-11.

312. *Id.* at 412-15; Seith, *supra* note 182, at 1804-05.

domestic violence victims, the local governments refuse to step in and protect them because they do not want to step into the private matters between a husband and his wife.³¹³ While the governments of Central America have enacted crackdown policies to combat gang violence, these *Mano Dura* policies have been ineffective in protecting innocent victims and have increased the tension between gang members and police.³¹⁴

Lastly, both victims of gender and gang violence have difficulty in meeting the social visibility test.³¹⁵ In *In re R-A-*, the BIA rejected R-A-'s particular social group because it was not recognized or seen as a segment of the population in Guatemala.³¹⁶ In *Matter of S-E-G-*, the BIA also rejected the respondents' proposed particular social group because it was not particular enough and because the Salvadoran society would not perceive it as a group.³¹⁷ Thus, in both situations, the social visibility test is very difficult to satisfy.³¹⁸ On the other hand, both groups of gender violence and gang violence victims have a greater opportunity to pass the *Acosta* test.³¹⁹ The characteristics of having intact genitalia,³²⁰ being involved with a male companion who practiced male domination through violence,³²¹ and refusing to join a gang³²² are all common characteristics that cannot be changed or should not be made to change.³²³ Additionally, the youth characteristic that many gang violence victims use also meets the *Acosta* test because a person cannot change their age.³²⁴ Therefore, the particular social groups consisting of gang violence victims would meet the *Acosta* test and be able to proceed to the rest of the asylum analysis.³²⁵ Since the social visibility test has not been used for victims of FGM³²⁶ and domestic violence,³²⁷ it should similarly be rejected and not used for victims of gang violence.³²⁸

Rejection of Floodgates Argument

Unfortunately, many see the recent results of gender violence claims as a means to open the floodgates to immigrants.³²⁹ The argument set forth by these individuals stems from the fear of fraudulent applicants and an open border policy that allows anyone to

313. See Seith, *supra* note 182, at 1810-11.

314. WASHINGTON OFFICE ON LATIN AMERICA, *Why a Resource Manual on Central American Gangs?*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, *supra* note 250, at 4.

315. See Brooks, *supra* note 8, at 27, 50; Harivandi, *supra* note 11, at 615.

316. *In re R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 2001).

317. *In re S-E-G-*, 24 I. & N. Dec. 579, 584, 587 (B.I.A. 2008).

318. *Id.*; *R-A-*, 22 I. & N. Dec. at 918.

319. See *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009); *R-A-*, 22 I. & N. Dec. at 918.

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

321. *R-A-*, 22 I. & N. Dec. at 911.

322. *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

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

324. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 937 (3d ed. 2009).

325. See *Acosta*, 19 I. & N. Dec. at 233.

326. *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996).

327. Dep't of Homeland Sec.'s Position on Respondent's Eligibility for Relief at 25, *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001) (No. A73753922).

328. See Wilkinson, *supra* note 180, at 417.

329. Jon Feere, *Open-Border Asylum: Newfound Category of 'Spousal Abuse Asylum' Raises More Questions than It Answers*, BACKGROUNDER 13 (July 2010), available at <http://www.cis.org/articles/2010/alvarado.pdf>.

remain in the United States.³³⁰ However, even if the definition of a *particular social group* was expanded further to include victims of gang violence, the immigration floodgates would not be opened because of a variety of reasons.³³¹ First, immigration officials do not take asylum applications lightly.³³² They examine the applicant's evidence thoroughly in order to combat the fear of opening the door to an unworthy immigrant.³³³ Second, the asylum process is not a one-step process.³³⁴ The applicant must show he or she has a well-founded fear of persecution in his or her home country.³³⁵ If the persecutor is a non-state actor, the applicant must show that the government is unable or unwilling to protect him or her.³³⁶ Third, the applicant must show that internal relocation within the country is not possible or will not eliminate the ongoing persecution.³³⁷ Lastly, the applicant must show that he or she was persecuted *on account* of his or her membership in the particular social group.³³⁸ The protected ground of membership in a particular social group must be one of the primary reasons for the victim's persecution.³³⁹ In other words, the victim's persecution must be "causally linked" to their membership in a particular social group.³⁴⁰ Thus, due to these difficult additional requirements, immigration officials would still turn away a substantial amount of gang violence applications regardless of the acceptance of their particular social group.³⁴¹

CONCLUSION

In order for the United States to embrace the principle behind the asylum process, it needs to clarify what is a *particular social group*.³⁴² The confusion about this qualifying statutory ground has led to various tests and decisions that have had devastating consequences to worthy immigrants, such as victims of gender and gang violence.³⁴³ One specific test, the social visibility test, has eliminated the possibility of these individuals receiving asylum based on their membership in a particular social group.³⁴⁴ Luckily, many immigration officials recognize the inconsistencies of the social visibility test and have rejected its use or have adapted it loosely.³⁴⁵ Such has been the luck of R-A- and L.R. where immigration and government officials looked beyond the

330. *Id.* at 9, 13.

331. Corsetti, *supra* note 11, at 408.

332. *Id.* at 435.

333. *See id.*

334. *See* 8 U.S.C. § 1158 (2006).

335. Lauren Gilbert, *Family Violence and U.S. Immigration Law: New Developments*, 01-03 IMMIGR. BRIEFINGS 1, 24 (2001).

336. *Id.*

337. GERMAIN, *supra* note 22, at 98-99.

338. Siddiqui, *supra* note 11, at 509-10.

339. *Id.* at 509.

340. *Id.*

341. *See id.* at 528.

342. Convention Relating to the Status of Refugees, *supra* note 19, pmbl. (stating the principle that all human beings should enjoy "fundamental rights and freedoms without discrimination").

343. *See* Wilkinson, *supra* note 180, at 416-17.

344. *Id.*

345. Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009); *see* Amar et al., *supra* note 303, at 18-20.

rigors of the social visibility test to the needs of vulnerable and innocent people and granted them asylum based on their membership in a particular social group consisting of domestic violence victims.³⁴⁶

Additionally, the fear of letting undeserving individuals into the United States should not hinder immigration officials from adhering to the precedent established in *Acosta*.³⁴⁷ This internationally adopted standard requires that the basis of a *particular social group* is the existence of an immutable characteristic that an individual “cannot change or should not be required to change because it is fundamental” to their identity.³⁴⁸ The social visibility test, on the other hand, requires that a group be recognized or visible to society.³⁴⁹ Most victims of gang violence, as well as gender violence, can meet the common, immutable characteristic test, but not the social visibility test.³⁵⁰ Thus, immigration officials should no longer use the social visibility test or should use it as an alternative when an applicant cannot meet the immutability requirement.³⁵¹ The recent decisions in *In re R-A-* and *In re L.R.* demonstrate why social visibility should not be a requirement for asylum.³⁵² The purpose of the 1951 Convention and the welcoming message etched on the Statue of Liberty was to provide a refuge to the persecuted.³⁵³ Thus, the United States should welcome and permit gang violence victims to encompass a particular social group since this Country is strengthened through such individuals who have rejected the gangster lifestyle and have been persecuted and harmed as a result of that rejection.

—Lorena S. Rivas-Tiemann*

346. *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001); Preston, *supra* note 238, at A14.

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

348. Marouf, *supra* note 135, at 48.

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

350. See Wilkinson, *supra* note 180, at 413.

351. See *id.* at 414.

352. See generally *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001); Markham, *supra* note 16.

353. See generally Convention Relating to the Status of Refugees, *supra* note 19, pmbli.; *Statue of Liberty Poem*, *supra* note 3.

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"One by one, sometimes bold, sometimes hesitant, sometimes demanding, sometimes faltering, they emerged — individuals. People, with voices, faces, eyes. People with hope. People without hope. People still fighting. People with all courage squeezed out of them. People with stories." Lorena Hickok, 1937.

