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Cover Page Footnote

J.D./M.A. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A., 2006, High Point University. The author would like to thank, Juan Fogelbach, Christina Kube, and Charles “Locky” Nimick for their constant guidance and support during the writing process. The author would also like to express her gratitude to her parents and her brother, three of the most inspiring individuals she knows. Finally, this Note is dedicated to the author’s baby sister, Rachel, in anticipation that life will also take her to wonderful places.

CLEARLY AMORPHOUS: FINDING A PARTICULAR SOCIAL GROUP FOR CHILDREN RESISTING GANG RECRUITMENT

Adreanna Orlang⁺

The applicant, a minor, fears that he will be harmed or killed by gang members on account of his membership in a particular social group: young men in Guatemala who resist gang recruitment. When the applicant was eleven years old, members of gang XXX began heavily recruiting in the applicant's town. Gang members told the applicant and other young boys in the neighborhood that if they refused to join gang XXX, they and their families would be killed. The first time he refused to join gang XXX, five gang members beat the applicant and left him bleeding. Gang members followed the applicant around his town daily, hitting the applicant with sticks and knives when he tried to hide from them. Once, gang members sliced the back of the applicant's neck with a machete. The applicant relocated to another town to escape the harm, but when the gang found out that he had relocated, the gang told the rest of his family that they would be exterminated if the applicant did not join their ranks. To demonstrate the seriousness of their threats, gang members shot the applicant's grandmother in the head.¹

⁺ J.D./M.A. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A., 2006, High Point University. The author would like to thank, Juan Fogelbach, Christina Kube, and Charles "Locky" Nimick for their constant guidance and support during the writing process. The author would also like to express her gratitude to her parents and her brother, three of the most inspiring individuals she knows. Finally, this Note is dedicated to the author's baby sister, Rachel, in anticipation that life will also take her to wonderful places.

1. This narrative, though completely fabricated, resembles a typical asylum claim based on resisting gang recruitment. *See, e.g.,* Lizama v. Holder, 629 F.3d 440, 443 (4th Cir. 2011) ("He claimed his resistance to gang recruitment would inspire manipulation, extortion, and even death threats from gang members."); Bonilla-Morales v. Holder, 607 F.3d 1132, 1135 (6th Cir. 2010) ("[G]ang members broke into [the applicant's] home, pointed guns at [her] family members, and took [the applicant's grandson] with them. They told [the grandson] that they would rape his sister if he did not join."); Marroquin-Ochoma v. Holder, 574 F.3d 574, 576 (8th Cir. 2009) (describing how gang members threatened to kill the applicant and the applicant's family, and then attacked the applicant's father after the applicant refused to give the gang money or join the gang); Barrios v. Holder, 581 F.3d 849, 853 (9th Cir. 2009) (describing the applicant's testimony, stating "[t]he gang members wanted [him] to join the gang but he refused [and] [a]s a result . . . [o]n one occasion, they cut his neck with a switchblade"); S-E-G-, 24 I. & N. Dec. 579, 580 (B.I.A. 2008) ("[G]ang members warned . . . that the brothers must join the gang or else their bodies might end up in a dumpster . . . [T]he respondents . . . learned that the [gang] shot and killed a young boy in the neighborhood after he refused to join the gang.").

Political asylum is protection offered by a sovereign authority to a person who is no longer safe in his or her home country.² An alien applying for asylum in the United States must prove that he or she is a refugee within the statutory meaning of the term.³ This includes showing that he or she has suffered persecution or has a “well-founded fear of persecution,” either of which must be “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁴ Additionally, the alien must prove that he or she is unwilling or unable to seek protection from his or her home country.⁵ Persecution based on religion, nationality, race, and political opinion is usually easy to recognize.⁶ However, those individuals whose reasons for seeking asylum do not fit neatly into one of these four categories may attempt to fit their claim into a fifth category—membership in a particular social group (PSG).⁷

2. See *Immigration & Naturalization Serv. v. Cardoza-Fonesca*, 480 U.S. 421, 425 (1987); see also *Acosta*, 19 I. & N. Dec. 211, 235 (B.I.A. 1985), *overruled in part by Cardoza-Fonesca*, 480 U.S. 421. The act of granting asylum is almost as old as recorded civilization, with the earliest references to asylum being made more than 3500 years ago in the early empires of the Middle East. See UNITED NATIONS HIGH COMM’R FOR REFUGEES, PROTECTING REFUGEES & THE ROLE OF UNHCR 5 (2009), available at <http://www.unhcr.org/basics/BASICS/4034b6a34.pdf>.

3. 8 U.S.C. § 1158(b)(1)(A) (2006).

4. *Id.* § 1101(a)(42)(A). These categories of persecution are commonly referred to as the five “protected grounds” of asylum. See, e.g., *Jiang v. Gonzales*, 474 F.3d 25, 30 (1st Cir. 2007) (“[T]he evidence . . . did not rise to the level needed to show a well-founded fear of future persecution on account of a protected ground.”). The statute places the burden on the applicant to prove that one of the protected grounds is a central reason for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i).

5. 8 U.S.C. § 1107(a)(42)(A). In 2009, the United States granted 22,119 individuals asylum. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 43 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

6. See, e.g., *Jiang*, 474 F.3d at 26 (explaining that the applicant’s asylum claim was based on his fear of religious persecution after helping a Catholic priest avoid arrest for illegally practicing his faith); *Giday v. Gonzales*, 434 F.3d 543, 545–47 (7th Cir. 2006) (describing the applicant’s claimed persecution as premised on nationality because the applicant faced persecution by the Eritrean government on account of her partial Ethiopian ancestry); *Sulaman v. U.S. Attorney Gen.*, 147 F. App’x 872, 874–75 (11th Cir. 2005) (*per curiam*) (explaining the applicant’s asylum claim was premised on fear of racial persecution by black South Africans because the applicant and his family are of Indian descent and “[s]ince the end of apartheid, Indians were discriminated against by blacks”); *N-M-A-*, 22 I. & N. Dec. 312, 314–15 (B.I.A. 1998) (explaining the applicant’s original asylum claim was based on persecution for political opinion because the communist-backed Afghan government beat the applicant and detained him for one month after the applicant distributed anti-communist flyers).

7. See *Acosta*, 19 I. & N. Dec. at 219 n.5, 232 (explaining that the category of “membership in a particular social group” was added as an afterthought to the U.N. convention relating to the Statute of Refugees, from which Congress adopted its definition of “refugee”; it may have been added to capture claims that do not fall squarely into one of the other categories); see also *infra* notes 72–77 and accompanying text. However, this category is not unlimited and is not to be mistaken for a safety net. See *C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (finding

Since the Central American civil wars of the 1980s, street gangs known as *maras* have established a foothold in countries such as El Salvador, Guatemala, and Honduras.⁸ Central American countries offer gangs a fertile breeding ground as many Salvadoran, Guatemalan, and Honduran communities, still reeling from the devastation created by the civil wars,⁹ suffer from widespread poverty, flawed social infrastructures, and pervasive violence.¹⁰

These gangs, largely composed of young men who have been marginalized by social and economic problems,¹¹ obtain control of urban territories through

that boundaries on the definition of PSGs are necessary because the term is not meant to be a “catchall” for claims that do not fit perfectly into the other categories).

8. Connie McGuire, Wash. Office of Latin Am., *Why a Resource Manual on Central American Gangs?*, in CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1, 1 (2008); Oliver Jütersonke et al., *Gangs, Urban Violence, and Security Interventions in Central America*, 40 SECURITY DIALOGUE 373, 378–80 (2009) (explaining the history of *maras* in El Salvador, Guatemala, and Honduras, and comparing the transnational *maras* to the more localized youth groups known as *pandillas*); *id.* at 376 (“Although gangs . . . have long featured in Central American societies, their growth and influence over the past two decades is unprecedented.”); *see also* BEATRIZ MANZ, WRITENET, CENTRAL AMERICA (GUATEMALA, EL SALVADOR, HONDURAS, NICARAGUA): PATTERNS OF HUMAN RIGHTS VIOLATIONS 25 (2008) (reporting that in Honduras, 500 per 100,000 people are members of gangs; in Guatemala, the number is 111 per 100,000; and in El Salvador, the number is 152 per 100,000 (citing Mark A. Cohen & Mauricio Rubio, Solutions Paper: Violence and Crime in Latin America 9–10 & fig.14 (June 2007) (final version published in LATIN AMERICAN DEVELOPMENT PRIORITIES COST AND BENEFITS (Bjorn Lombard, ed. 2000))); CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL 34112, GANGS IN CENTRAL AMERICA 5 (2011) (estimating that approximately 70,000 gang members (not limited to *maras*) live in Central America, with the most severe activity occurring in El Salvador, Honduras, and Guatemala).

9. In El Salvador, for example, the left and right wings of the government fought a civil war beginning in 1980, in which guerilla and national forces clashed. Juan J. Fogelbach, Comment, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order*, 7 SAN DIEGO INTL. L. J. 223, 226–27 (2005). Over a period of twelve years, 75,000 people perished and the youth were left troubled with memories of grenade blasts and massacres. *Id.* at 227. Many Salvadorians left the country to escape the violence. *Id.* The death toll, combined with the relocation movement, decimated Salvadorian family structures. *Id.*

10. *See id.* at 252 (describing that years of war have left Central America with “broken family structures, violent childhoods, abject poverty, and [a] large black market of left over war caliber weapons that allow [gangs] to flourish”); *see also* MANZ, *supra* note 8, at 4 (“[T]he economic devastation caused by these internal wars . . . and the inability of governments to invest in infrastructure and human capital have contributed to increased gang membership and crime.” (footnote omitted)); United Nations High Comm’r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶¶ 10–11 (Mar. 31, 2010) [hereinafter *Guidance Note on Refugee Claims*], available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html> (stating that street-gang activity is most prevalent in areas that suffer from poverty and weak rule of law, among other things). Central America has “the highest male youth homicide rates in the world.” Jütersonke et al., *supra* note 8, at 378 n.8 (citing PAULO SÉRGIO PINHEIRO, UNITED NATIONS, WORLD REPORT ON VIOLENCE AGAINST CHILDREN 357 (2006)). In 2004, the annual homicide rate in Central America was over four times the global homicide rate. *Id.* at 374–75.

11. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the

intimidation and fear.¹² Gang activities range from minor crimes such as vandalism, petty theft, robbery, and assault, to serious offenses such as drug trafficking, extortion, murder and other crimes of violence.¹³ In gang-controlled areas,¹⁴ local residents live with gang violence on a daily basis.¹⁵

To maintain their numbers and influence over an area, gangs force poor and socially marginalized young people to join their ranks.¹⁶ Gang members view resisting recruitment as a sign of disrespect; thus, resistance often induces the gang to retaliate violently against individuals who refuse gang association.¹⁷ Gangs do not limit retaliation to the individuals being recruited; to coerce individuals into joining, gang members will also frequently threaten the resistor's family members.¹⁸ However, even those youths who have only weak family ties are still susceptible to recruitment because they lack parental guidance.¹⁹

Committee on Economic, Social and Cultural Rights—El Salvador, ¶ 22, U.N. Doc. E/C.12/SLV/CO/2 (June 27, 2007).

12. Jeffrey D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 409–10 (2006) (explaining that gangs maintain their power over an area because of widespread membership, government corruption, access to sophisticated weaponry, and willingness to exercise force). When exerting their control, gangs often extort neighborhood residents, local businesses, and public transportation. MANZ, *supra* note 8, at 4. Gangs demand money from these local entities to secure “protection,” implying that the gangs will not hurt them if they pay. Fogelbach, *supra* note 9, at 234; *see also* SEELKE, *supra* note 8, at 6 (explaining that failure to pay extortion demands usually results in violent retaliation). For example, in Guatemala, gang leaders demand from bus companies as much as \$25 per bus each week, totalling nearly \$5000 per week. INT’L CRISIS GRP., GUATEMALA: SQUEEZED BETWEEN CRIME AND IMPUNITY 13–14 (2010), *available at* <http://www.unhcr.org/refworld/docid/4c2847a72.html>. If the sums are not paid, the bus drivers are killed. *Id.* at 14.

13. SEELKE, *supra* note 8, at 4.

14. Fogelbach, *supra* note 9, at 246 (“Turf is commonly established by graffiti on zones of influence—areas where crime is primarily committed by members of one gang.”). According to one commentator, gangs commonly take over “slums and shantytowns,” which are left unprotected by public security. Jütersonke et al., *supra* note 8, at 4.

15. *Guidance Note on Refugee Claims*, *supra* note 10, at ¶¶ 1, 8.

16. *Id.* ¶ 7; *see also* S-E-G-, 24 I. & N. Dec. 579, 581 (B.I.A. 2008) (stating the immigration judge believed the applicants’ harm resulted from the gang’s desire to recruit the applicants as opposed to persecution on account of membership in a PSG or a certain political opinion).

17. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 6.

18. *See, e.g.*, Ramos-Lopez v. Holder, 563 F.3d 855, 857 (9th Cir. 2009) (describing how a gang threatened to kill the applicant or a member of his family if the applicant tried to flee the country a second time to escape the gang); S-E-G-, 24 I. & N. Dec. at 579–80 (describing how the gang threatened to rape a female family member if the two male applicants did not join the gang).

19. *See Guidance Note on Refugee Claims*, *supra* note 10, ¶ 36. In Guatemala, where 111 of every 100,000 people are gang members, civil war and its aftereffects have left many children orphaned. *Street Children—Guatemala*, TOYBOX, <http://www.toybox.org.uk/street-children/where-we-work/guatemala.aspx> (last visited Feb. 27, 2012). Those not orphaned may still be abandoned because their parents are impoverished. *Id.* Between 2008 and 2009, one child was abandoned in Guatemala every four days. *Id.* Additionally, two-thirds of Guatemalan children live in poverty, making them likely targets for gang recruitment. *Id.*

Once a gang targets an individual, the threat of severe harm often remains constant and unwavering until the youth acquiesces to recruitment.²⁰

Children who oppose gang recruitment find little relief from retaliation. Relocation within the same country does not guarantee protection because many gangs have nationwide influence,²¹ which Central American governments have been unable to forestall.²² To escape persecution, an increasing number of children who resist gang recruitment in Central America seek security elsewhere, commonly applying for asylum in the United States.²³ However, in the majority of these cases, gangs do not threaten or harm these children based on their religion, nationality, race, or political opinion.²⁴ Therefore, to establish refugee status, these youths must attempt to fit within the definition of an acceptable PSG.²⁵

20. See *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 6; see also *Ramos-Lopez*, 563 F.3d at 857 (recounting the applicant's history of receiving repetitive threats of violence for his continued refusal to join the gang); *S-E-G-*, 24 I. & N. Dec. at 580 (describing how gang members harassed and beat the applicants, threatening to kill them if they did not join the gang).

21. See *Guidance Note on Refugee Claims*, *supra* note 10, ¶¶ 53–54 (noting how gangs have national or regional networks making internal relocation unsuccessful because gangs can locate their targets in both rural and urban settings outside of the neighborhoods they directly control).

22. See NIELAN BARNES, WASH. OFFICE ON LATIN AM., EXECUTIVE SUMMARY: TRANSNATIONAL YOUTH GANGS 8–9 (2007), available at http://www.wola.org/publications/transnational_study_cu_youth_gangs (explaining that weak states, like those in Central America, lack the capabilities required to contain gang violence in any meaningful way). For example, El Salvador has been unable to contain gangs because of prison overpopulation, insufficient resources, and the police's incapability to respond to the vast amount of criminal activity. Fogelbach, *supra* note 9, at 253. Furthermore, the police are often absent, allowing gangs to effectively maintain control over their respective territories without state interference. See, e.g., Jütersonke et al., *supra* note 8, at 4.

23. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 2.

24. Cf. *id.* ¶¶ 12–17 (describing the various categories of gang victims, including individuals resisting recruitment, former and current members, anti-gang advocates, and family members of those targeted by gangs). Some applicants have applied for asylum on the theory that their resistance to gang recruitment equates to a manifestation of political opinion; however, these claims have not been any more successful than those involving PSGs. See, e.g., *Orellana-Monson v. Holder*, 332 F. App'x 202, 203–04 (5th Cir. 2009) (*per curiam*) (finding that mere political opposition to gang activity is not enough to qualify for asylum based on persecution for political opinion); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008) (upholding the principle that a mere “general aversion” to gang activity does not fit into the category of a political opinion), *abrogated in part by* *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908–12 (9th Cir. 2008). But see *Guidance Note on Refugee Claims*, *supra* note 10, ¶¶ 45–51 (describing circumstances in which gangs may be so intertwined with the state and state politics that consideration of whether opposition to gang activities is a political opinion may be warranted).

25. See *supra* notes 3–7 and accompanying text (identifying the five “protected grounds” warranting asylum, and explaining the significance of the PSG category). One commentator explained that, “[a] major hurdle to gang-based asylum claims is successfully fitting the claim into one of the five protected grounds.” SEBASTIAN AMAR ET AL., CAIR COAL., SEEKING ASYLUM FROM GANG-BASED VIOLENCE IN CENTRAL AMERICA: A RESOURCE MANUAL 8 (2007), available at <http://www.aifl.org/lac/GangResourceManual.pdf>.

Youths who use their resistance to gang recruitment as the basis for a PSG have had only minimal success obtaining asylum in the United States.²⁶ The Board of Immigration Appeals²⁷ (Board) firmly holds that a PSG for children resisting gang recruitment is too “amorphous”—lacking the sufficient particularity required for a grant of asylum.²⁸ Unless the applicant identifies a more particularized social group, the asylum claims of these youths will continue to be denied.²⁹ Upon denial of their asylum claims, these children are removed from the United States and sent back to their home countries where they face harm and possible death at the hands of their persecutors—the gangs they refuse to join.³⁰

The rapid evolution of PSG analysis has created the potential to change this unfortunate result.³¹ In August 2010, an immigration judge granted asylum to a Mexican woman on remand in the matter of *L.R.* based on the woman’s fear of domestic violence.³² The immigration judge made a favorable grant based

26. See *infra* Part I.B.1 (discussing two decisions from the Board of Immigration Appeals denying PSG status to applicants who cited resistance to gang recruitment as grounds for asylum and positing that immigration judges and the Board will continue to deny similar applications in the future). The few decisions that favor PSGs for children resisting gang recruitment come from immigration judges, but these opinions are often unreported. Corsetti, *supra* note 12, at 421. Furthermore, even when these opinions exist, they are often difficult to obtain because they are not made public. *Id.* at 421 n.83. Only decisions from the appellate body—the Board—and from reviewing courts are available on commercial databases. *Id.*

27. The Asylum Officer Corps of U.S. Citizenship and Immigration Services (USCIS), a sub-agency of the Department of Homeland Security, adjudicates asylum claims in the first instance. U.S. DEP’T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2009, at 4 (2010). Applicants who fail to establish eligibility for asylum to USCIS asylum officers and lack valid immigration status are subject to removal proceedings, presided over by an immigration judge of the Executive Office for Immigration Review. *Id.* During these proceedings, the immigration judge reviewing the matter “de novo” makes the eligibility determination independent of the officer’s decision. For a detailed overview of this process, see *Matter of L.R.*, U. CAL., HASTINGS CENTER FOR GENDER & REFUGEE STUD., <http://egrs.uchastings.edu/emphasis/matter%20of%20LR.php> (last visited Aug. 26, 2011). The judge may grant asylum, or deny the application and order the alien’s removal from the United States. U.S. DEP’T OF HOMELAND SEC., *supra*, at 4. If asylum is denied, the applicant may appeal to the Board of Immigration Appeals. *Id.*

28. See, e.g., S-E-G-, 24 I. & N. Dec. 579, 584–85 (B.I.A. 2008).

29. See *id.*; see also Corsetti, *supra* note 12, at 421 (observing that an immigration judge is more likely to find a legitimate PSG with an increased showing of particularity).

30. See 8 C.F.R. § 208.14(c)(1) (2011).

31. See *infra* Part II (describing the most recent change in PSG analysis, which occurred in the matter of *L.R.*); *infra* Part III (discussing how the framework offered by the Department of Homeland Security in *L.R.* can be applied to children who resist gang recruitment).

32. Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14 (reporting on the decision as announced by the woman’s attorney). The actual decision of the immigration judge, like all immigration judge decisions, is not public record. See Corsetti, *supra* note 12, at 421 n.83. Asylum proceedings are conducted in private to protect the anonymity of the applicant, which is essential when the persecutor may still be searching for the applicant. *Id.* However, the attorney of record for the woman graciously provided redacted copies of the immigration judge’s order granting asylum,

upon a supplemental briefing submitted by the Department of Homeland Security (DHS) at the request of the Board.³³ The DHS brief set forth alternative ways of defining a PSG for victims of domestic violence seeking asylum.³⁴ The analytical concepts devised by DHS, as applied to situations involving domestic violence, reveal a promising avenue for formulating a successful PSG for children resisting gang recruitment.³⁵

This Note examines the recent grant of asylum in the matter of *L.R.* and advocates for the application of DHS's PSG analysis in that matter to children seeking asylum based on persecution for resisting gang recruitment. First, this Note discusses an applicant's burden of establishing their eligibility for asylum on the grounds of membership in a PSG. This discussion outlines the

Department of Homeland Security's supplemental brief filed in the matter at the request of the Board, and the applicant's response brief. This Note utilizes information gathered from these sources, which are on file with the author, as well as from media reports. *See, e.g., Obtaining Asylum in the United States*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6dla?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39de4d77d73210VgnVCM100000082ca60aRCRD> (last updated Mar. 10, 2011).

33. Supplemental Brief of Department of Homeland Security at 3, *L.R.* [redacted] (B.I.A. Apr. 13, 2009) [hereinafter DHS Supplemental Brief], available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>. The procedural history of this matter is important in understanding how the decision was rendered. In October 2007, the immigration judge denied the application for asylum based on past and future potential domestic violence. *Id.* at 2. On appeal, the Board requested supplemental briefing on the issue of whether the applicants, *L.R.* and her two sons as derivative beneficiaries, qualified as members of a PSG with claims based on domestic violence. *Id.* at 3. In April 2009, DHS submitted a brief stating its current position on whether, in general, domestic-violence victims with similar claims are members of a PSG, but DHS also went one step further. *See id.* at 4–5. Because asylum applicants have the burden of proof, DHS normally limits its briefing to critiques of the PSG analyses asserted by the applicant. *Id.* However, DHS—recognizing the unsettled nature of the law as applied to domestic-violence claims—offered alternative analyses to qualify asylum applicants as members of a PSG to propogate clarity in this area of law. *Id.* at 5. In light of these alternatives, DHS recommended remanding the matter to the immigration judge for further fact-finding. *Id.* Shortly preceding this brief, DHS and the applicants had filed a joint motion seeking the same. Brief of the Respondent in Support of Applications for Asylum, Withholding of Removal, and CAT Relief at 2, *L.R.* [redacted] (B.I.A. Mar. 10, 2010) [hereinafter Applicant's Brief] (on file with the author); *see also Matter of L.R.*, *supra* note 27. On remand, the applicants submitted their supplemental brief, which applied their factual background to the alternatives set forth by DHS. Applicant's Brief *supra* at 3–4. DHS, upon review of the new evidence, agreed that the applicants were eligible for asylum, which the judge subsequently granted on August 4, 2010 “by stipulation of the parties.” *Matter of L.R.*, *supra* note 27; *see also* Order of the Immigration Judge on Remand at 1, *L.R.* [redacted] (Aug. 4, 2010) [hereinafter Order of the Immigration Judge] (on file with the author).

34. DHS Supplemental Brief, *supra* note 33, at 3–5. Because the regulations provide that only decisions by the Board and Attorney General are binding precedent, the DHS brief and the immigration judge's decision are only persuasive authority. *See* 8 C.F.R. § 1003.1(g) (2011); *see also Matter of L.R.*, *supra* note 27.

35. *See infra* Parts II–III; *cf. Matter of L.R.*, *supra* note 27 (explaining that the reasoning in DHS's brief provides a sound approach to the creation of PSGs related to gender-based claims).

precedential decisions that helped form the current asylum-eligibility analyses. Next, this Note considers how the Board and federal circuit courts of appeals have regulated prior articulations of PSGs for children resisting gang recruitment. Then, this Note describes the facts underlying the matter of *L.R.* and analyzes the frameworks used by DHS to identify viable PSGs in its supplemental brief. In particular, this Note identifies which elements of these frameworks should be applied to asylum claims beyond those involving victims of domestic violence. In conclusion, this Note applies the *L.R.* frameworks by analogy and proposes a PSG that establishes asylum eligibility for children resisting gang recruitment.

I. THE BURDEN ON CHILDREN RESISTING GANG RECRUITMENT TO PROVE REFUGEE STATUS BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Asylum requires an applicant to prove that he or she meets the statutory definition of a refugee.³⁶ A grant of asylum is discretionary,³⁷ and is only available if the applicant satisfies four elements: the applicant has a subjective fear of persecution, the fear is well-founded, the persecution is based on one or more of the five protected grounds, and the applicant is unable or unwilling to return to his home country because of that persecution.³⁸

A. *Interpreting Congressional Silence: Defining the Elements of Asylum*

The terms “fear of persecution,” “on account of . . . membership in a particular social group,” and “unable or unwilling” all figure prominently in the statutory definition of refugee, but lack separate and precise definitions.³⁹

36. See *supra* notes 3–5 and accompanying text.

37. 8 U.S.C. § 1158(b)(1)(A) (2006) (“The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.” (emphasis added)).

38. See *supra* notes 4–7 and accompanying text; see also *Acosta*, 19 I. & N. Dec. 211, 218–19 (B.I.A. 1985), *overruled in part by* *Immigration & Naturalization Serv. v. Cardoza-Fonesca*, 480 U.S. 421, 425 (1987). If an applicant can establish past persecution, the asylum officer and immigration judge must presume that the applicant has a well-founded fear of future persecution. See *id.* The presumption may be rebutted by a preponderance of the evidence, showing that changed circumstances in the applicant’s home country have vitiated the applicant’s well-founded fear or that relocation within that country would alleviate that fear. *Id.* For example, this presumption would be rebutted if an applicant claimed past persecution by a past communist regime, but the regime no longer existed in the present day. *E.g.*, *N-M-A-*, 22 I. & N. Dec. 312, 314–15 (B.I.A. 1998) (explaining the applicant was ineligible for asylum because his fear of persecution by Afghanistan’s communist government disappeared after the regime was toppled).

39. See 8 U.S.C. § 1101(a)(42)(A) (2006).

This congressional silence consequently requires the Board and various courts of appeals to interpret their meanings.⁴⁰

1. An Applicant's Motivation for Seeking Asylum Must Be Based on a "Fear of Persecution"

Whether premised on incidents that occurred in the past or those that are likely to occur in the future, an applicant's need for asylum must stem from a fear of being persecuted in his or her home country.⁴¹ Congress, however, has never defined "fear of persecution."⁴² In the absence of express legislative direction, the Board and federal circuit courts have attempted to interpret the meaning of this phrase.⁴³

In the matter of *Acosta*, the Board contemplated at length what constitutes a "fear of persecution."⁴⁴ The Board determined that a genuine "fear" of facing persecution in one's home country must be the "primary motivation" of an asylum seeker.⁴⁵ The Board then defined "persecution" as "suffering or harm [inflicted upon an individual] in order to punish an individual for possessing a belief or characteristic a persecutor seeks to overcome."⁴⁶ In defining the term, the Board also suggested the level of harm or suffering required to prove "persecution."⁴⁷ Based on prior case law, the Board explained that confinement, torture, and severe economic deprivations or restrictions may rise to the level of persecution, but found that generalized conditions of hardship or violence, especially those shared by a common population, do not.⁴⁸

This general definition has since been narrowed through subsequent case-by-case interpretation. For example, the Third Circuit in *Fatin v. Immigration & Naturalization Service* recognized that "persecution" does not include all that American society considers unjust or unlawful; rather, the term must be limited to extreme conduct to prevent an extraordinary number of individuals from qualifying for asylum.⁴⁹ Because the United States cannot serve as a refuge for so many applicants, the court reasoned that Congress

40. See *infra* Part I.A.1–3.

41. 8 U.S.C. § 1101(a)(42)(A).

42. *Id.*; *Acosta*, 19 I. & N. Dec. at 220.

43. *Acosta*, 19 I. & N. Dec. at 222–23 (discussing how the term "persecution" has been construed by various courts).

44. *Id.* at 221.

45. *Id.*

46. *Id.* at 222.

47. *Id.*

48. *Id.*

49. 12 F.3d 1233, 1240 & n.10 (3d Cir. 1993) (reasoning that if America's standards of fairness and constitutionality are applied to the term "persecution," then "a significant percentage of the world's population would qualify for asylum in [the United States]—and it seems most unlikely that Congress intended such a result"). The Third Circuit also clarified that subjective fear of persecution alone is insufficient to establish asylum, suggesting that the fear must be objectively reasonable. *Id.* at 1241 n.11.

likely intended a much narrower interpretation that is commensurate with extreme conduct.⁵⁰ Isolated incidents of verbal harassment,⁵¹ threats other than those directed against life or freedom,⁵² and trivial attempts at intimidation⁵³ are acts that other courts deemed insufficient to be considered “persecution” within the extreme-conduct standard set forth in *Fatin*.

The decision by the First Circuit in *Nelson v. Immigration & Naturalization Service* illustrates the difficulty of meeting the extreme-conduct standard.⁵⁴ In *Nelson*, the female asylum applicant claimed that she experienced past persecution through a combination of solitary confinement, physical abuse, and harassment.⁵⁵ Despite the applicant’s repeated exposure to maltreatment, the court concluded that, although these incidents were unfortunate, occasional detention and physical harm did not warrant classification as persecution.⁵⁶

Although the applicant in *Nelson* fell short of proving persecution, others have managed to satisfy the extreme-conduct requirement. For example, the applicant in *Lukwago v. Ashcroft* alleged repeated threats and beatings coupled with severe psychological trauma from forced confinement and exposure to murder; the Third Circuit found this treatment commensurate with persecution.⁵⁷ Five years later, in *Ngengwe v. Mukasey*, the Eighth Circuit found that an applicant who suffered a combination of physical beatings, psychological distress, actual property confiscation, and threats of forced marriage could successfully prove past persecution.⁵⁸

These decisions demonstrate that to prove a “fear of persecution” an applicant must, at a minimum, exhibit an objectively reasonable fear of a persecutor’s threatened or actual extreme conduct.⁵⁹ The conduct may cause

50. See *id.* at 1240 n.10.

51. See *Sepulveda v. U.S. Attorney Gen.*, 401 F.3d 1226, 1231–32 (11th Cir. 2005) (finding “menacing telephone calls” and verbal threats directed at the applicant and her family insufficient to meet the requisite standard for persecution).

52. See *Lukwago v. Ashcroft*, 329 F.3d 157, 167–68 (3d Cir. 2003) (stating that persecution must constitute real threats to life or freedom).

53. See *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) (declaring that “low-level intimidation and harassment” are excluded from the definition of persecution (quoting *Al Yatim v. Mukasey*, 531 F.3d 584, 587 (8th Cir. 2008))).

54. 232 F.3d 258, 264–65 (1st Cir. 2000).

55. *Id.* at 264 (stating the applicant experienced three bouts of solitary confinement and multiple instances of abuse and harassment, including threatening phone calls and surveillance).

56. *Id.* (recognizing that the applicant was indeed mistreated, but finding that the mistreatment did not extend far beyond “harassment and annoyance”).

57. *Lukwago*, 329 F.3d at 169–70 (describing the repeated physical and psychological abuse endured by the applicant as well as his forced exposure to the murder of his parents, and “the killing and physical torture of his fellow captives, innocent civilians, and government soldiers”).

58. *Ngengwe*, 543 F.3d at 1036–37 (remanded to the Board to determine whether the non-physical actions of the applicant’s in-laws constituted past persecution).

59. See *supra* notes 43–48 and accompanying text; see also *Lukwago*, 329 F.3d at 168, 170 (finding that a combination of threats, beatings, and psychological trauma rose to the level of persecution).

physical or psychological harm, but the behavior must pose a genuine threat to the applicant's life or freedom to satisfy the requirements of persecution.⁶⁰

2. The Persecution that an Applicant Fears Must Be "on Account of" Membership in a Particular Social Group

Experiencing general harm or suffering does not establish asylum eligibility.⁶¹ Rather, persecutors must inflict the requisite harm or suffering on the applicant in retaliation for a "belief or characteristic [that the applicant has which the] persecutor seeks to overcome."⁶² This belief or characteristic must fall into one of the five protected grounds to be eligible for asylum.⁶³ To prove that the feared persecution is on account of the applicant's membership in a PSG, the applicant must: (1) identify an appropriate PSG; (2) prove membership in the identified PSG; and (3) demonstrate a nexus between that membership and the applicant's persecution.⁶⁴

Read literally, the statutory language would permit any two individuals to qualify as a PSG. To avoid this unintended result, certain limiting factors developed in the PSG analysis. Similar to the development of "fear of persecution," the Board's decision in *Acosta* also marked the starting point for

60. See *supra* notes 49–58.

61. See *Mogharrabi*, 19 I. & N. Dec. 439, 447 (B.I.A. 1987) ("[F]earing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum.").

62. *Acosta*, 19 I. & N. Dec. 211, 223 (B.I.A. 1985), *overruled in part by* *Immigration & Naturalization Serv. v. Cardoza-Fonesca*, 480 U.S. 421, 425 (1987); see also *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 90–91 (1st Cir. 2008) (rejecting the applicant's appeal because the court agreed with the Board that the applicant's past persecution was based on personal vendettas two gang members had against the applicant for providing the police with information about an arson the gang members started, not on his membership in a PSG of informants). The Ninth Circuit has rejected the Board's definition of "persecution" from *Acosta* to the extent that it requires proof of the persecutors' subjective intent to punish the applicant, explaining a persecutor's intent does not make the harm any less painful to the victim. See *Pitcherskaia v. Immigration & Naturalization Serv.*, 118 F.3d 641, 648 (9th Cir. 1997). In 2010, the Ninth Circuit clarified that the motivation of the "persecutors" is important, however, to determining whether there is a nexus between the alleged conduct and a protected ground. *Zetino v. Hodler*, 622 F.3d 1007, 1016 (9th Cir. 2010); see also *Grava v. Immigration & Naturalization Serv.*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000) (acknowledging that persecutors are able to have mixed motives, which does not weaken the basis for asylum if the causal connection or nexus is there to begin with).

63. See 8 U.S.C. § 1101(a)(42)(A) (2006). A causal connection must exist, establishing a nexus between the applicant's membership in a PSG and the harm that he or she fears. See, e.g., *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137 (6th Cir. 2010) (finding that because the applicant was harmed before the alleged gang recruitment, no causal connection existed between resisting the gang's efforts and the persecution suffered); *Zetino*, 622 F.3d at 1016 ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground.").

64. See *Fatin v. Immigration & Naturalization Serv.*, 12 F.3d 1233, 1240 (3d Cir. 1993); *supra* note 63.

interpretation of the phrase “membership in a particular social group.”⁶⁵ Although Congress did not define membership in a PSG,⁶⁶ the Board recognized that the four other protected grounds—race, religion, nationality, and political opinion—all shared a commonality of being “immutable characteristics.”⁶⁷ The Board reasoned that these grounds are immutable because they are either impossible to change or are so fundamental to an individual’s identity that he or she should not be required to change it.⁶⁸ The Board then extended this immutability by implication to the meaning of membership in a PSG.⁶⁹

In addition to immutability, the Third Circuit in *Lukwago v. Ashcroft* concluded that the PSG must exist even in the absence of the claimed persecution.⁷⁰ More recently, in *C-A-*, the Board added that members of a PSG must be “socially visible,” meaning that they must have characteristics that make them recognizable within their society,⁷¹ and that the group must be described with “particularity.”⁷² However, members of a PSG are neither required to associate with one another nor required to have anything in common aside from their immutable characteristics.⁷³

65. *Acosta*, 19 I. & N. Dec. at 233; see, e.g., *Fatin*, 12 F.3d at 1239–40 (using the Board’s decision in *Acosta* as a starting point for interpreting the phrase “particular social group”).

66. *Acosta*, 19 I. & N. Dec. at 232.

67. *Id.* at 233 (applying ejusdem generis, a doctrine stating that general words enumerated in conjunction with specific words should be interpreted similarly to those specific words, to determine the meaning of “particular social group” in relation to the other enumerated protected grounds).

68. *Id.*

69. *Id.* Compare *id.* (noting that the immutable characteristic shared by members of the group might be “sex, color, or kinship ties, or in some circumstances it might be a shared past experience”), with *A-M-E-*, 24 I. & N. Dec. 69, 71 (B.I.A. 2007) (affirming the immigration judge’s decision based on the reasoning that being wealthy is a changeable trait and therefore not immutable).

70. 329 F.3d 157, 172 (3d Cir. 2003).

71. *C-A-*, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006). Some believe this is a misreading of the guidelines set forth by the U.N. High Commissioner for Refugees (UNHCR). See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (“[The standard of social visibility] makes no sense; nor has the Board attempted in this or any other case to explain the reasoning behind the criterion of social visibility.”); Email from Anonymous Immigration Judge to author (Feb. 9, 2011, 09:51 EST) (on file with author) (“[T]he B.I.A. (and some courts) twisted the ‘social visibility’ factor to restrict, rather than expand protection as the [U.N. High Commissioner for Refugees] intended.”). Publications by the UNHCR are not binding on the U.S. government; however, they are persuasive and should help “steer the adjudication” of asylum claims. See Andrew Morton & Wendy A. Young, *Children Asylum Seekers Face Challenges in the United States*, 20 REFUGEE 13, 17–18 (2002).

72. *C-A-*, 23 I. & N. Dec. at 957 (rejecting the proposed PSG of “noncriminal informants” as “too loosely defined”).

73. *Id.* at 956–57. Despite its opponents, several circuits have “gradually approved ‘social visibility’ as a criterion” in the PSG analysis. *Id.* at 616 (citing to decisions by the First, Second, Eighth, Ninth, and Eleventh Circuits).

Asylum applicants claiming membership in groups deemed “too amorphous” will be rejected.⁷⁴ However, in decisions such as *A-M-E-*, the Board has alluded to the possibility of constructing a PSG using a typically amorphous characteristic if that characteristic can be more specifically defined under particular circumstances.⁷⁵ The Eighth Circuit, in *Ngengwe*, further cautioned that an overly narrow PSG would also be rejected.⁷⁶ Although an overly narrow PSG may describe why one individual experiences persecution, the constricted description defeats the creation of a “group.”⁷⁷

As discussed, qualifying for asylum on account of membership in a particular social group is challenging. First, an applicant must identify an immutable characteristic.⁷⁸ Second, an applicant must construct a PSG around their immutable characteristic that is neither too broad nor too narrow.⁷⁹ Finally, an applicant must show that he or she is a member of this precisely defined group, and that he or she has been persecuted or “has a well-founded fear of persecution” on account of membership in this group.⁸⁰

3. *Asylum Must Be an Applicant’s Last Hope for Shelter from an “Unable or Unwilling” State of Origin*

When an applicant can prove that the persecution they fear is on account of membership in a PSG, the final hurdle entails proving that their home country cannot or will not supply relief from the harm.⁸¹ This most often arises in one of two circumstances; either the home country’s government is the

74. See, e.g., *S-E-G-*, 24 I. & N. Dec. 579, 584–85 (B.I.A. 2008) (rejecting “wealthy” as a sufficiently particular immutable characteristic because it is a term that depends on personal perspective for definitional limits, and one’s wealth may change from day to day). An asserted PSG will be deemed “amorphous,” if the terms defining that PSG are subject to varying interpretations, thereby preventing a common understanding of the group’s composition. *Id.* at 585.

75. See, e.g., *A-M-E-*, 24 I. & N. Dec. 69, 75 n.6 (B.I.A. 2007). For example, “wealth” as the only shared characteristic of a PSG is too amorphous because “the concept of wealth is so indeterminate.” *Id.* at 76. However, “should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level,” the proposed PSG would more clearly delineate members from nonmembers based on unchanging characteristics. *Id.* at 75 n.6.

76. *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (stating that society would not realistically perceive an overly narrow collection of characteristics as a distinct social group).

77. *Id.* (“[A] widowed Cameroonian female member of the Bamileke tribe, in the Southern region that belongs to a family or has in-laws from a different tribe and region . . . who have falsely accused her of causing her husband’s death” identifies only one person’s situation—not that of a group).

78. *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by* *Immigration & Naturalization Serv. v. Cardoza-Fonesca*, 480 U.S. 421, 425 (1987).

79. See *supra* notes 76–79 and accompanying text.

80. *Fatin v. Immigration & Naturalization Serv.*, 12 F.3d 1233, 1240 (3d Cir. 1993); see also *supra* notes 62–66 and accompanying text.

81. See 8 U.S.C. § 1101(a)(42)(A) (2006).

persecutor,⁸² or the government cannot or will not control non-governmental persecutors.⁸³ The statute denotes this requirement as an inability or unwillingness of an applicant to avail himself or herself of protection.⁸⁴

Once again, the Board's decision in *Acosta* led the way in defining the language of the statute.⁸⁵ In *Acosta*, the Board determined that to receive asylum, the threat of persecution to an applicant must be countrywide.⁸⁶ Additionally, the regulations require that asylum be denied if relocation anywhere within one's home country would provide a safe option, and such internal relocation would be a reasonable expectation under the circumstances.⁸⁷ The Ninth Circuit, in *Cardenas v. Immigration & Naturalization Service*, asserted that the relocation must offer more than a temporary "post-threat harmless period."⁸⁸

B. Previously Rejected PSGs Relative to Children Resisting Gang Recruitment

To maintain their influence over urban areas in Central America,⁸⁹ gangs are forcibly recruiting neighborhood children under the age of twelve.⁹⁰ Gangs recognize the vulnerability of these children due to their young age⁹¹ and

82. See *Llana-Castellon v. Immigration & Naturalization Serv.*, 16 F.3d 1093, 1098, 1100 (10th Cir. 1994) (revising and remanding the Board's decision to overrule the immigration judge's finding of a well-founded fear of persecution at the hands of the Sandista government).

83. See *id.* at 1097; see also *Lizama v. Holder*, 629 F.3d 440, 442 (4th Cir. 2011) ("[The applicant] assert[ed] that . . . gang members would torture him with the awareness—or willful blindness—of government officials."); *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007) ("An applicant must show the government's acquiescence in the persecutor's acts or its inability or unwillingness to investigate and punish those acts, and not just a general difficulty preventing the occurrence of particular future crimes."). The home government's efforts or lack thereof must rise to the level of mistreatment because no government can provide *absolute* protection to all of its citizens. *Keiser*, 505 F.3d at 42–43.

84. 8 U.S.C. § 1101(a)(42)(A).

85. *Acosta*, 19 I. & N. Dec. 211, 235 (B.I.A. 1985), *overruled in part by* *Immigration & Naturalization Serv. v. Cardoza-Fonesca*, 480 U.S. 421, 425 (1987).

86. *Id.*

87. 8 C.F.R. § 208.13(b)(1)(i), (b)(2)(ii) (2006).

88. 294 F.3d 1062, 1065, 1067 (9th Cir. 2002). Otherwise, the *Cardenas* court concluded, relocation amounts to nothing more than a small hurdle for persecutors to overcome in reaching their target. See *id.*

89. Jütersonke et al., *supra* note 8, at 376–78 (discussing the prevalence of gangs in urban Central America).

90. *Guidance Note on Refugee Claims*, *supra* note 10, ¶¶ 7–8; McGuire, *supra* note 8, at 2.

91. See David E. Arredondo, *Principles of Child Development and Juvenile Justice: Information for Decision-Makers*, 5 J. CTR. FAM., CHILD. & CTS. 127, 127 (2004) (observing that juveniles are "still in the process of neurobiological, psychological, social, and moral development" and thus are very sensitive to environmental influences). Adolescents are especially susceptible to gang demands because their brains cause them to act impulsively and instinctively in emotionally charged situations. See *id.* at 129. Adults would be less susceptible to gang recruitment, on the other hand, because they use the part of their brain associated with reason to process emotionally charged decisions. See *id.*

economic disadvantage.⁹² Gangs also target children under twelve, who are generally immune from prosecution under the laws of El Salvador, Guatemala, and Honduras.⁹³ Furthermore, a lack of alternatives makes gang recruitment an enticing option for young adolescents.⁹⁴

Children who resist gang recruitment often find themselves in dangerous situations.⁹⁵ Gangs see resistance to their demands as a sign of disrespect, punishable by harsh treatment.⁹⁶ The violence subsides only if the child finally agrees to join the gang,⁹⁷ the gang abandons efforts to recruit the child and decides to kill the child instead,⁹⁸ or the child is able to relocate safely out of the gang's reach.⁹⁹

Central American states such as El Salvador, Guatemala, and Honduras have attempted to control gang violence through harsh social-cleansing practices known as *mano dura*, which target suspected gang members.¹⁰⁰ However,

92. See *supra* notes 11, 18 and accompanying text; see also USAID, CENTRAL AMERICA AND MEXICO GANG ASSESSMENT 15 (2006), available at http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf (stating several risk factors that make children susceptible to joining a gang, including poor economic situations and limited access to jobs or educational opportunities).

93. Fogelbach, *supra* note 9, at 237 (noting that in these countries, children under the age of twelve cannot be legally tried as adults, and generally the highest penalty available upon capture is having their parent or guardian notified). Furthermore, children under the age of twelve are afforded special protections from legal liability and exploitation. *Id.* at 247. By recruiting young children to carry out illegal activities, these loopholes allow gangs to avoid the legal consequences of getting caught. See *id.* at 237–47. See also *Orellana-Monson v. Holder*, 332 F. App'x 202, 203–04 (5th Cir. 2009) (“We are cognizant of extensive gang activity in El Salvador and also of the gang’s despicable practice of recruiting young children to commit crimes.”); *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 502 F.3d 285, 286 (3d Cir. 2007) (stating that young gang members engage in illegal activities like drug trafficking and murder).

94. See Corsetti, *supra* note 12, at 413–14.

95. See *supra* note 1 (providing examples of threats that resistance to gang recruitment yields).

96. See *supra* notes 17–18 and accompanying text; see also *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 22 (stating that threats and violence are the primary methods gangs employ to coerce an individual to join the gang).

97. See *Valdiviezo-Galdamez*, 502 F.3d at 287 (noting that the gang members who attacked the applicant screamed, “Don’t run. Don’t be afraid. Sooner or later you will join us.”); *S-E-G-*, 24 I. & N. Dec. 579, 580 (B.I.A. 2008) (describing persistent threats to the applicants’ lives if they continued to resist recruitment).

98. See, e.g., *Valdiviezo-Galdamez*, 502 F.3d at 287 (highlighting the applicant’s testimony that the gang told him they would no longer offer membership and they were going to kill him instead); *S-E-G-*, 24 I. & N. Dec. at 580.

99. *Guidance Note on Refugee Claims*, *supra* note 10, ¶¶ 53–54 (discussing the option of relocating to evade persecution and noting the often expansive reach of gangs, which—when country- or region-wide—can render internal relocation ineffective); see *supra* note 1 (providing examples of asylum seekers fleeing from gang persecution); see also, e.g., *Valdiviezo-Galdamez*, 502 F.3d 287 (involving an applicant who fled to the United States from Honduras because of gang threats).

100. See, e.g., *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 9 (noting that these *mano dura* policies target suspected gang members for unlawful arrests, police violence, and

these efforts have been counterproductive; gangs have adapted to these policies with increased organization and decreased visibility, resulting in minimal improvement to public security.¹⁰¹ As a result, the police offer little protection to children targeted for recruitment.¹⁰² Because most gangs have country-wide networks, adequate relocation often requires finding a safe haven in another country.¹⁰³ Children seeking refuge from gang recruitment commonly apply for asylum in the United States.¹⁰⁴

1. The Companion Cases of S-E-G- and E-A-G-: Children Resisting Gang Recruitment Are Not Eligible for Asylum

Striking a delicate balance between a group that is neither overly broad nor exceedingly narrow is essential to crafting an appropriate PSG.¹⁰⁵ In 2008, the Board decided, in companion cases *S-E-G-* and *E-A-G-*, that PSGs involving children resisting gang recruitment were too amorphous to warrant a grant of asylum because they lacked the social-visibility requirement.¹⁰⁶ To date, no published opinion has granted asylum to a child who has resisted gang recruitment based on a PSG analysis.¹⁰⁷

extrajudicial killings); *see also* McGuire, *supra* note 8, at 3–5 (criticizing the *mano dura* policies of El Salvador, Guatemala, and Honduras as highly ineffective).

101. BARNES, *supra* note 22, at 2; McGuire, *supra* note 8, at 4.

102. *See supra* note 22; *see also* McGuire, *supra* note 8, at 4 (observing that the police have lost control and often target youths in general for punishment associated with gang activities).

103. *See, e.g., S-E-G-*, 24 I. & N. Dec. at 580 (describing the testimony of a professor at Central American University about the improbability of relocating in a small country like El Salvador because a gang's influence can extend to every corner of the country).

104. *Guidance Note on Refugee Claims, supra* note 10, ¶ 2 (“During recent years, an increasing number of claims have been made especially in . . . the United States of America, notably by young people from Central America who fear persecution at the hands of violent gangs in their countries of origin.”).

105. *See supra* notes 76–79, 82 and accompanying text.

106. *E-A-G-*, 24 I. & N. Dec. 591, 593–96 (B.I.A. 2008); *S-E-G-*, 24 I. & N. Dec. at 588.

107. *See Lizama v. Holder*, 629 F.3d 440, 443–44 (4th Cir. 2011) (rejecting the PSG consisting of “young, Americanized, well-off, Salvadoran male deportee with a criminal history who opposes gangs”); *Larios v. Holder*, 608 F.3d 105, 108–09 (1st Cir. 2010) (rejecting the PSG defined as “young Guatemalan men recruited by gang members who resist such recruitment”); *Orellana-Monson v. Holder*, 332 F. App'x 202, 203 (5th Cir. 2009) (rejecting the PSG identified as “Salvadoran males between the ages of eight and fifteen who have been recruited but who do not wish to belong to a gang”); *Ramos-Lopez v. Holder*, 563 F.3d 855, 856 (9th Cir. 2009) (rejecting the PSG articulated as “young Honduran men who have been recruited by the MS-13, but who refuse to join”); *Cruz-Alvarez v. Holder*, 320 F.App'x 273, 274 (5th Cir. 2009) (rejecting the PSG defined as “children targeted for recruitment into gangs”); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 741, 745–46 (9th Cir. 2008) (rejecting the PSG described as “the class of young men in El Salvador who resist the violence and intimidation of gang rule”), *abrogated in part by Marmolejo-Campos v. Holder*, 558 F.3d 903, 908–12 (9th Cir. 2009); *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 502 F.3d 285, 290 (3d Cir. 2007) (declining to decide whether “young Honduran men who have been actively recruited by gangs and who have refused to join the gangs” is a PSG because the petition was denied for lack of a causal nexus to a protected ground); *E-A-G-*, 24 I. & N. Dec. at 594 (rejecting the PSG articulated as “persons resistant to gang

In *S-E-G-*, two male children from El Salvador were denied asylum after claiming persecution on account of membership in a PSG defined as “Salvadoran youth who refused recruitment into the MS-13 criminal gang.”¹⁰⁸ After the boys were beaten for refusing to join MS-13, the gang members told them that further refusal might result in “their bodies end[ing] up in a dumpster.”¹⁰⁹ Before leaving El Salvador, the applicants’ fears intensified when they learned that another boy in the neighborhood was shot and killed after refusing the same gang’s recruitment efforts.¹¹⁰

Relying on the definition of “particular social group” set forth in *Acosta* and focusing on the terms “social visibility” and “particularity” emphasized in *C-A-*, the Board found that the asserted PSG—“Salvadoran youth who refused recruitment into the MS-13 criminal gang”—was too amorphous.¹¹¹ According to the Board, the PSG, as articulated by the applicants, lacked sufficient particularity because it encompassed a “large and diffuse” portion of society and the motivations of the gang members to target youth varied.¹¹² The Board questioned whether the gangs limited their recruitment to children with shared characteristics of economic disadvantages and proximity to MS-13 central areas, or whether these characteristics merely made them easier targets.¹¹³ The Board also failed to recognize a “socially visible” group because no evidence indicated that gangs or society in general perceived youth refusing recruitment as an identifiable group.¹¹⁴ It found little distinction between the way gangs targeted the applicants compared to the Salvadorian public.¹¹⁵ Despite contrary guidance from the U.N. High Commissioner for Refugees (UNHCR),¹¹⁶ the Board based their denial of asylum on the observation that the harm the applicants faced was no more severe than the harm anyone else in El Salvador would encounter if they defied a gang’s wishes.¹¹⁷

membership”); *S-E-G-*, 24 I. & N. Dec. at 590 (rejecting the PSG defined as “Salvadoran youth who refused recruitment into the MS-13 criminal gang”).

108. *S-E-G-*, 24 I. & N. Dec. at 579, 590.

109. *Id.* at 580.

110. *See id.*

111. *Id.* at 582–83, 590; *see supra* Part I.A.2 (using case law that defined “particular social group,” “social visibility,” and “particularity”).

112. *S-E-G-*, 24 I. & N. Dec. at 585–86.

113. *Id.* at 585.

114. *Id.* at 586–87.

115. *Id.* at 587.

116. *See Guidance Note on Refugee Claims, supra* note 10, ¶ 35 (noting that a group need not experience a higher incidence of targeting than the general public to qualify as a PSG); *see also infra* notes 218–19 and accompanying text (explaining the guidance given by the UNHCR on this matter).

117. *S-E-G-*, 24 I. & N. Dec. at 587–88 (explaining that because gang violence invades almost all aspects of Salvadoran life, violence is not limited to those who resist recruitment efforts); *see also supra* note 55 and accompanying text (stating that generalized harm and suffering do not warrant asylum).

Although it involved a very different fact pattern, the companion case, *E-A-G-*, similarly found that the named PSG did not warrant a grant of asylum.¹¹⁸ In *E-A-G-*, the applicant declined his cousin's invitation to join a gang, but he was not directly threatened or harmed in response.¹¹⁹ The applicant's family received threats from people whom the applicant believed to be gang members, but he could not confirm gang members were responsible, nor did he know why his family was being threatened.¹²⁰ Nonetheless, the immigration judge found the applicant to be a member of the PSG defined as "persons resistant to gang membership."¹²¹ The Board disagreed and focused heavily on the PSG's lack of social visibility: "[t]here is no showing that [persons who resist joining gangs] are of concern to anyone in Honduras . . . or that . . . [they] are seen as a segment of the population in any meaningful respect."¹²²

Subsequent circuit court decisions, such as *Ramos-Lopez v. Holder* and *Santos-Lemus v. Mukasey*, frequently cite to these two companion cases to uphold the conclusion that PSGs pertaining to children resisting gang recruitment are too amorphous and lack social visibility.¹²³ In *Ramos-Lopez*, the Ninth Circuit suggested that a shared experience of gang recruitment is too broad and diverse to stand as the only commonality among individuals in an articulated group.¹²⁴ Furthermore, agreeing with *S-E-G-*,¹²⁵ the court in *Santos-Lemus* held that resisters are not eligible for asylum because gang violence is so widespread in Central America that the general population is exposed to the same harm.¹²⁶

118. *E-A-G-*, 24 I. & N. Dec. 591, 593 (B.I.A. 2008).

119. *Id.* at 592.

120. *Id.*

121. *Id.* at 593.

122. *Id.* at 594–95 (explaining that the PSG was not "socially visible," and lacked any identifiable characteristics, thus precluding asylum).

123. *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (using the companion cases to conclude that the applicant did not assert an eligible PSG in "young Salvadoran men refusing gang recruitment efforts"); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 741 (9th Cir. 2008) (using *S-E-G-* to conclude that the asserted PSG of "young [men] in El Salvador resisting gang violence unstoppable by the police" was not socially visible and even less particular than the PSG considered in *S-E-G-*), *abrogated in part by* *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908–12 (9th Cir. 2009).

124. *See Ramos-Lopez*, 563 F.3d at 862. Shortly after deciding *Ramos-Lopez*, the Ninth Circuit confirmed its reasoning. *See Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009) (rejecting the applicant's argument because it was indistinguishable from that proposed in *Ramos-Lopez*).

125. *See S-E-G-*, 24 I. & N. Dec. 579, 587–88 (B.I.A. 2008) (explaining that gang violence "affects all segments of" El Salvador).

126. *See, e.g., Santos-Lemus*, 542 F.3d at 746 (rejecting the asserted PSG, in part for its lack of social visibility, because the asserted harassment was merely a part of "general community and civil unrest," rather than a specific targeting of PSG members).

A recent decision from the First Circuit summarized the major reasons that PSGs premised on resisting gang recruitment have been rejected.¹²⁷ In *Larios v. Holder* the court rejected the asserted PSG of “young Guatemalan men recruited by gang members who resist such recruitment.”¹²⁸ The court agreed with the immigration judge that the gang targeted the applicant in a general attempt to increase the gang’s numbers rather than on account of the applicant’s membership in the PSG.¹²⁹ The court first reasoned that the PSG was not socially visible because it lacked recognizable characteristics to make it stand out in the community as a distinct group;¹³⁰ also, the PSG was not sufficiently particular because the ambiguity of the terms used to define the PSG made discerning members from non-members “virtually impossible.”¹³¹

As indicated by *S-E-G-* and *E-A-G-*, the Board believes that PSGs concerning “resistance to gang recruitment” should be rejected as overly broad, amorphous, and lacking in social visibility.¹³² Without a PSG that sufficiently articulates an immutable characteristic, showcases particularity, and exemplifies social visibility, courts will continue to deny asylum to individuals who resist gang recruitment.¹³³

II. THE MATTER OF *L.R.*: DHS PROVIDES GUIDANCE ON ARTICULATING ACCEPTABLE PSGS

Similar to the treatment of asylum claims from children resisting gang recruitment, immigration judges and the Board regularly denied asylum to victims of domestic abuse until recently.¹³⁴ On August 4, 2010, after considering the position advocated by DHS in a supplemental brief to the Board, an immigration judge on remand granted asylum to a Mexican woman

127. *See Larios v. Holder*, 608 F.3d 105–09 (1st Cir. 2010).

128. *Id.* at 108–09.

129. *Id.* at 109. *But see* *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 502 F.3d 285, 291 (3d Cir. 2007) (“No reasonable factfinder could conclude that [the applicant] was attacked for any reason other than his status as a young Honduran man who had been recruited to join [a] gang and refused to join.”).

130. *Larios*, 608 F.3d at 109 (citing *Mendez-Barrera v. Holder*, 602 F.3d 21, 26–27 (1st Cir. 2010)).

131. *Id.* at 109 (“There are . . . questions about who may be considered ‘young,’ the type of conduct that may be considered ‘recruit[ment],’ and the degree to which a person must display ‘resist[ance].’ These are ambiguous group characteristics, largely subjective, that fail to establish a sufficient level of particularity.” (alteration in original) (quoting *Mendez-Barrera*, 602 F.3d at 27)).

132. *See supra* notes 102–22 and accompanying text.

133. *Cf. Ramos-Lopez v. Holder*, 563 F.3d 855, 859 (9th Cir. 2009) (recognizing that deference is given to the Board’s published decisions when dealing with ambiguous terms in the Immigration and Naturalization Act (citing *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908–12 (9th Cir. 2009))).

134. *See* *Preston*, *supra* note 32, at A14 (recognizing that the grant of asylum in the matter of *L.R.* brought “new clarity to asylum law after almost 15 years of arcane and tangled litigation, when [asylum] claims from domestic abuse victims were regularly dismissed”).

known as “L.R.” based on her membership in a PSG premised on domestic violence.¹³⁵ The result for L.R. indicates a significant progression in PSG analyses.¹³⁶ DHS’s proposed alternatives for asserting PSGs in *L.R.* are of equal significance to the formulation of new PSGs outside of the domestic-violence context.¹³⁷

A. The Facts Underlying the Matter of L.R.

L.R., a female applicant from Mexico, suffered severe long-term abuse at the hands of her common-law husband.¹³⁸ The two had lived together with their three children.¹³⁹ Over the course of several decades, L.R.’s husband regularly raped her and threatened her with weapons¹⁴⁰ because, according to L.R., her husband believed that he owned L.R. by virtue of his dominant position in their relationship.¹⁴¹ L.R. tried to escape captivity numerous times; once when she was two months pregnant, her husband caught her, locked her in a room, and tried to burn her alive.¹⁴² L.R. could not safely relocate to another part of Mexico because her husband used the Internet to track her down.¹⁴³ The police offered L.R. no protection—“[s]he would show the police her bruises and

135. See *supra* notes 32–35 and accompanying text. The applicant is known only by her initials because asylum cases are kept confidential. See Preston, *supra* note 32, at A14; *supra* note 32.

136. Amy Lieberman, *Is Domestic Violence Cause for US to Grant Asylum?*, CHRISTIAN SCI. MONITOR, Feb. 1, 2011, <http://www.csmonitor.com/USA/Justice/2011/02101/is-domestic-violence-cause-for-US-to-grant-asylum> (reporting that DHS’s supplemental brief and the grant of asylum to L.R. signal a policy shift in the United States’ approach to victims of domestic violence seeking asylum). As an example of previous policies, the Board squarely denied asylum to a Guatemalan victim of domestic violence in the matter of *R-A-*. See *R-A-*, 22 I. & N. Dec. 906, 927–28 (B.I.A. 1999). The applicant claimed membership in the PSG of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” *Id.* at 911. According to an attorney at the center for Gender and Refugee Studies (CGRS), the grant rates for asylum cases involving domestic violence have significantly increased since *L.R.* because many judges now feel more confident granting these petitions. Lieberman, *supra* (quoting Lisa Frydman, senior attorney at CGRS).

137. See *infra* Part III; see also *Matter of L.R.*, *supra* note 27 (noting that DHS’s analysis is not limited to domestic violence and can be applied broadly to gender-based claims).

138. See Preston, *supra* note 32, at A14. CGRS, a group that represented L.R. during part of her struggle to gain asylum in the United States, asserts that L.R. did not voluntarily choose this man to be her common-law husband. *Matter of L.R.*, *supra* note 27. L.R. met her common-law husband when she was at a teacher training school in Mexico, where he was the school’s sports coach. *Id.* He was almost fifteen years her senior and raped her at gunpoint. *Id.* Afterward, he made L.R. his prisoner for two decades using violence and death threats. *Id.*

139. *Matter of L.R.*, *supra* note 27. These three children were conceived because L.R.’s husband raped her. See *supra* note 33.

140. Preston, *supra* note 32, at A14.

141. See DHS Supplemental Brief, *supra* note 33, at 15.

142. Applicant’s Brief, *supra* note 33, at 10 (explaining that L.R. was a teacher, and had to register her personal information online each time she relocated).

143. *Id.* at 26–27.

injuries, but the police [would not help her because her husband's abuse was a] private [matter] and her life was not in danger."¹⁴⁴

L.R. first filed for asylum in the United States in December 2005.¹⁴⁵ An immigration judge denied her asylum claim in 2007.¹⁴⁶ L.R. appealed this decision to the Board, which then requested supplemental briefing from the applicant and DHS.¹⁴⁷ Upon a joint motion, the matter was remanded to the immigration judge for further fact finding.¹⁴⁸

B. Acceptable PSG Formulations for Victims of Domestic Violence

DHS's supplemental brief expressed the agency's position on whether victims of domestic violence can establish themselves as a "particular social group" for purposes of asylum eligibility.¹⁴⁹ DHS intended the brief to serve as a guide for asylum claims, and set forth PSG formulations that could qualify applicants for asylum.¹⁵⁰ DHS proposed two alternative PSGs that would be acceptable for victims of domestic violence.¹⁵¹

When L.R. initially applied for asylum, her proposed PSG was "Mexican women in an abusive domestic relationship who are unable to leave."¹⁵² DHS quickly disposed of this proposal in its entirety as circular, because the immutable characteristic of the PSG cannot be the same as the persecution feared, which, in this case, would be abuse in a domestic relationship.¹⁵³

144. *Id.* at 11–12. Furthermore, police officers told L.R.'s husband that L.R. had complained, causing her husband to retaliate against L.R. with more severe beatings and punishment. *Id.* at 12. L.R. even contacted a Mexican judge for protection, but the judge only offered to help in exchange for sexual favors. *Id.* at 16–17. L.R. refused. *Id.* at 17.

145. *Id.* at 1. However, this was not the first time L.R. attempted to come to the United States. *Id.* at 12–13. She first fled to the United States in 1991, but her husband found her and threatened to take the children and kill her family if she did not return to his household. *Id.* She returned to Mexico in 1993, but he continued to physically and verbally abuse her and the children. *Id.* at 21. L.R. realized that he would not stop until he killed her; therefore, she fled to the United States with the children in 2004. *Id.* She did not immediately seek asylum because of the psychological trauma that decades of abuse wrought. *Id.* at 21–22.

146. *See supra* note 33. The immigration judge found that she was barred from asylum because her claim was not timely (an issue which is not relevant to this Note), and her past persecution did not satisfy any of the protected grounds for asylum; rather, the judge found that the beatings were merely a result of her husband's violent nature. *Matter of L.R.*, *supra* note 27.

147. DHS Supplemental Brief, *supra* note 33, at 2–3.

148. Applicant's Brief, *supra* note 33, at 2–3; *see also supra* note 33.

149. DHS Supplemental Brief, *supra* note 33, at 4.

150. *Id.* at 5 ("[I]n order to contribute to a process leading to the creation of better guidance to both adjudicators and litigants, the Department will offer here alternative formulations of 'particular social group[s]' that could, in appropriate cases, qualify aliens for asylum . . .").

151. *Id.* at 14.

152. *Id.* at 5.

153. *Id.* at 10–11 (explaining that L.R.'s proposed PSG was fatally flawed because the "abusive domestic relationship" was not only the immutable characteristic of the PSG, but also the persecution that L.R. feared). DHS, agreeing with the UNCHR, concluded that permitting this circular logic would be the equivalent of declaring that persecution no longer has to be on

Hence, DHS constructed new PSGs using the definition of “particular social group” set out in the matter of *Acosta* and clarified through subsequent case law, emphasizing the more recently identified elements of “social visibility” and “particularity” from *C-A*.¹⁵⁴ DHS concluded that L.R. could qualify for one of two acceptable PSGs upon remand: (1) “Mexican women in domestic relationships who are unable to leave”; or (2) “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”¹⁵⁵

III. USING THE PSGS ARTICULATED IN THE MATTER OF *L.R.* TO CREATE A PSG FOR RESISTING GANG RECRUITMENT

Although the immigration judge did not issue a written opinion explaining the merits of L.R.’s asylum application, one must infer from the grant that L.R. satisfied each of the requisite elements: (1) identifying a particular social group; (2) establishing her membership in the identified PSG; (3) proving a “well-founded” fear of persecution on account of her membership in the PSG; and (4) illustrating that she would not be safe from her persecutor by relocating within Mexico.¹⁵⁶ Satisfying elements two, three, and four requires application of the asylum seeker’s particular facts to the legal rules set forth in the above discussions of the law; however, this factual analysis is predicated on the establishment of a visible PSG, which is solely a legal determination.¹⁵⁷

Because DHS focused on the legal principles of constructing PSGs without focusing on a particular set of facts, the analytical framework that DHS used in

account of one of the five protected grounds. *Id.* at 6 (reasoning that this circular logic equates to a PSG of “individuals [that] are targeted for persecution because they belong to a group of individuals who are targeted for persecution”).

154. *Id.* at 7–21; see *supra* Part I.A.2 (discussing the elements of appropriate PSGs as defined through case law).

155. DHS Supplemental Brief, *supra* note 33, at 14–15. DHS noted that this was not an exhaustive list of possible PSG formulations for victims of domestic violence because much depends on a case-by-case analysis. *Id.* at 11 n.9.

156. See Order of the Immigration Judge, *supra* note 33; see also 8 U.S.C. § 1101(a)(42)(A) (2006); *supra* Part I.A (explaining these elements of establishing refugee status using membership in a PSG as the protected ground). This inference is appropriate because the regulations place the affirmative burden on the applicant to prove each element to establish eligibility for asylum. See 8 C.F.R. § 208.13(a) (2011). According to the CGRS, which represented L.R. in this matter, DHS submitted a filing to the judge and agreed, after reviewing L.R.’s response brief, that L.R. was eligible for asylum. *Matter of L.R.*, *supra* note 27.

157. See *S-E-G-*, 24 I. & N. Dec. 579, 580–81 (B.I.A. 2008) (explaining that before analyzing whether the applicant has demonstrated that he or she satisfies the elements of asylum, the Board must address whether the applicant has identified a PSG that is recognized under the law); see also *Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (recognizing that although assessing the visibility of an asserted PSG requires a case-by-case analysis, PSGs must, in the first instance, satisfy the appropriate legal standards), *overruled in part by* *Immigration & Naturalization Serv. v. Cardoza-Fonesca*, 480 U.S. 421, 425 (1987).

L.R. may be applicable to scenarios beyond traditional domestic violence.¹⁵⁸ In particular, the framework can be used to define a PSG for children resisting gang recruitment.¹⁵⁹

A. Immutable, Socially Visible, and Sufficiently Particular: Creating a PSG for Children Resisting Gang Recruitment

Although individuals described as “women fearing harm on account of their inability to escape a domestic relationship”¹⁶⁰ and “children fearing harm on account of their resistance to gang recruitment”¹⁶¹ may not seem to have a common basis for asylum, the groupings can be analyzed in a similar fashion. Asylum seekers can assert a PSG for children resisting gang recruitment by following the same four-step analysis that DHS set forth in its supplemental brief for the matter of *L.R.*¹⁶² Those asserting the PSG should define it as “Salvadoran, Guatemalan, or Honduran children under the age of twelve who gang members in control of their neighborhood expect to acquiesce to gang recruitment.”¹⁶³

1. “Status Within a Relationship”: The Immutable Characteristic of the PSG

As a starting point in its PSG analysis, DHS sought “to identify the specific characteristic that the persecutor targets in choosing his victim.”¹⁶⁴ DHS identified the characteristic in *L.R.* as her subordinate status in the domestic relationship with her common-law husband; he perceived *L.R.* as his property, which he believed meant he had the right to abuse her.¹⁶⁵

After identifying the specific characteristic targeted for persecution, the applicant must show that the characteristic is immutable as set forth in *Acosta*.¹⁶⁶ DHS stated that a characteristic could be immutable if “economic, social, physical, and other constraints” render leaving the relationship impossible, or if the persecutor refuses to recognize an end to the relationship, warranting a fear of future persecution.¹⁶⁷ DHS recognized that *L.R.* satisfied this requirement through her persecutor’s repeated abuse, which she could not

158. *Matter of L.R.*, *supra* note 27 (discussing the potential for extending the framework beyond domestic violence).

159. *See infra* Part III.A (creating a PSG for children resisting gang recruitment by utilizing the logic found in *L.R.*).

160. *See* DHS Supplemental Brief, *supra* note 33, at 14.

161. *See supra* note 109 (citing examples of asylum applicants asserting this PSG).

162. *See* DHS Supplemental Brief, *supra* note 33, at 15–21.

163. *See infra* Part III.A.1–3 (explaining why this PSG can provide a basis for asylum).

164. DHS Supplemental Brief, *supra* note 33, at 15.

165. *Id.* at 15–16.

166. *Id.* at 16.

167. *Id.*

escape even after leaving him multiple times.¹⁶⁸ Therefore, L.R.'s subordinate position in the relationship served as her immutable characteristic.¹⁶⁹

Applying DHS's logic in *L.R.*, the shared characteristic of children who resist gang recruitment is the "status" that these children occupy in the relationship with their persecutors.¹⁷⁰ The specific characteristic of these children targeted by gangs is their subordinate status in relation to gang members.¹⁷¹ In countries like El Salvador, Guatemala, and Honduras, children have subordinate relationships to the gang members that control their neighborhoods because of their vulnerability.¹⁷² Gang members perceive at-risk children in the areas they control as subordinate to them because of their vulnerability, and therefore target them for recruitment through force and intimidation.¹⁷³ Additionally, because gangs control those areas with at-risk children, they expect them to fill the lowest ranks of the gang's hierarchy, further propagating their perception that these expected recruits are subordinate to gang members.¹⁷⁴

DHS's analysis further proves the immutability of these children's subordinate status in relation to the gang members who recruit them. Expected recruits who resist gang recruitment efforts can be likened to a woman in an abusive relationship. The abusive husband in *L.R.* expected L.R. to comply with his demands because he believed he "owned" L.R. by virtue of his role as the dominant spousal figure.¹⁷⁵ Similarly, gangs believe that these children belong to them because the children reside in the neighborhoods that the gangs control.¹⁷⁶ This belief of control is exemplified when these children resist a gang's forcible recruitment, and gang members retaliate with threats, harassment, and violence.¹⁷⁷ DHS asserted that similar retaliation shows the immutability of the subordinate status of domestic-violence victims who

168. *Id.*; see also *supra* note 156 and accompanying text (explaining that after L.R.'s response brief, DHS argued that she satisfied the requirement for asylum).

169. See Applicant's Brief, *supra* note 33, at 49–50 (asserting that L.R.'s status in her domestic relationship was an immutable characteristic because her husband forced her into and made her remain in the relationship, refusing to accept that the relationship was over).

170. See DHS Supplemental Brief, *supra* note 33, at 15.

171. See *id.*

172. See *supra* notes 83–84 and accompanying text (emphasizing that gangs exploit these children because of their social and economic disadvantages as well as other vulnerabilities).

173. See *supra* notes 89–99 and accompanying text.

174. See USAID, *supra* note 92, at 15 (observing that children "represent the lowest level of the gang supply chain").

175. DHS Supplemental Brief, *supra* note 33, at 15.

176. Cf. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 42 (noting that when a gang controls an area, its members will often target the children who live in the area for recruitment merely because of their residency within the gang's sphere of control).

177. See, e.g., *supra* note 1; see also *supra* notes 95–99 (describing gang responses to individuals resisting recruitment).

challenged their spouses' perceived control.¹⁷⁸ Therefore, like L.R., these children cannot change their subordinate status because their persecutors—the gangs that control their neighborhoods—refuse to accept that these children resist recruitment.¹⁷⁹

Additional aspects of the proposed PSG, such as the children's ages, locations, and vulnerability due to economic disadvantage also render their subordinate status immutable.¹⁸⁰ As set forth in DHS's brief, when "economic, social, physical, or other constraints [make] it impossible for the applicant to leave the relationship during the period when the persecution [is] inflicted," the applicant's status within the relationship may be immutable.¹⁸¹ Because many Central American gangs have country- or region-wide influence, children resisting gang recruitment may find their attempts to flee to another part of the country to avoid retaliation futile.¹⁸² Furthermore, young, economically deprived children, especially those without familial support, lack the ability and resources to relocate on their own.¹⁸³ These constraints render it impossible for children resisting gang recruitment to change or escape their position in their role as expected recruit in relation to the gang. Therefore, the proposed PSG of "Salvadoran, Guatemalan, or Honduran children under the age of twelve who gang members in control of their neighborhoods expect to acquiesce to gang recruitment" sets forth an appropriate immutable characteristic of individuals in a subordinate position.¹⁸⁴

2. Social Visibility Is Illustrated Through the Way the State and Society Perceive Members of the PSG

Following the requirement articulated in *C-A-* that the PSG must be "socially visible,"¹⁸⁵ DHS's analysis in *L.R.* asked whether society perceives the PSG as a socially distinct group set apart by the members' shared, immutable

178. *Compare* Applicant's Brief, *supra* note 33, at 6–15 (describing the abuse of L.R. at the hands of her husband, including the increased punishments and threats L.R. received in retaliation for her attempts to flee and notify the authorities), *with supra* note 1 (recounting experiences that children have encountered after they resist gang recruitment).

179. *See* DHS Supplemental Brief, *supra* note 33, at 16.

180. *See Guidance Note on Refugee Claims, supra* note 10, ¶ 36.

181. DHS Supplemental Brief, *supra* note 33, at 16.

182. *Guidance Note on Refugee Claims, supra* note 10, ¶ 53; *see also supra* note 103 and accompanying text. For example, in some Central American countries, relocation is not a realistic option because gangs have harnessed recent technological advancements, such as the Internet and cellular phones, to extend and intensify their area of influence. Corsetti, *supra* note 12, at 410–11.

183. *See* McGuire, *supra* note 8, at 3.

184. This proposed PSG contains other characteristics that are also immutable. Nationality cannot be changed. *See supra* notes 72–73 and accompanying text. Although age does change with the passage of time, it is still immutable because age can *only* be changed with time and not to avoid persecution. *Cf. Guidance Note on Refugee Claims, supra* note 10, ¶ 53 (stating that age is immutable).

185. *C-A-*, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006).

characteristic.¹⁸⁶ In its brief, DHS indicated that, upon further fact finding, the subordinate status of women in domestically violent relationships could be considered socially visible in Mexico through a showing that women in these relationships are afforded less protection from harm due to their subordinate status.¹⁸⁷ In her response brief, L.R. asserted that in Mexico, female victims of domestic violence are not afforded government protection from abuse occurring within their domestic relationships.¹⁸⁸ Because of this “base cultural acceptance of violence against women,” L.R. concluded that women like herself in violent domestic relationships were viewed as a segment not worthy of police protection.¹⁸⁹ Therefore, L.R.’s immutable characteristic, subordinate status in a relationship, marked her as a member of a group that society perceived differently from the general population. Because DHS agreed with L.R. upon remand and the judge granted asylum, L.R.’s conclusion must have successfully established social visibility for her proposed PSG.¹⁹⁰

Children resisting gang recruitment may utilize the same rubric based upon distinctions made by the state and the rest of society to prove social visibility. In gang-controlled neighborhoods, where violence and criminal activity have become the unchallenged norm, those who expressly oppose the gang’s wishes are often a recognizable segment of the community.¹⁹¹ Because individuals who oppose gangs risk violent retaliation or death,¹⁹² those living in gang-controlled areas generally comply with gang demands instead of jeopardizing the safety of themselves or their loved ones.¹⁹³ Therefore, persons in these societies who resist gang demands are in an identifiable minority who “stand out [to and] from the rest of the community.”¹⁹⁴

The minority status of child resisters, coupled with governmental responses to gang violence, show a clear distinction between members of this PSG and the rest of society.¹⁹⁵ The governments of El Salvador, Guatemala, and Honduras have implemented “zero-tolerance,” or *mano dura*, policies to deal

186. DHS Supplemental Brief, *supra* note 33, at 17–18.

187. *Id.* This view was illustrated when police refused to rescue L.R. from her “private” affairs. *Id.* at 17.

188. Applicant’s Brief, *supra* note 33, at 50.

189. *Id.* at 51–52 (quoting DHS Supplemental Brief, *supra* note 33, at 18).

190. *See supra* note 164 and accompanying text.

191. *Guidance Note on Refugee Claims, supra* note 10, ¶ 12.

192. *Id.* ¶ 6; *see also* Corsetti, *supra* note 12, at 407.

193. *Guidance Note on Refugee Claims, supra* note 10, ¶¶ 10, 12; *see also supra* note 12.

194. *Guidance Note on Refugee Claims, supra* note 10, ¶¶ 11–12 (observing that in contrast to “ordinary people” exposed to gang activity, resisters are a “special group” specifically targeted by gangs).

195. *Cf.* DHS Supplemental Brief, *supra* note 33, at 17–18 (explaining the state’s response can be considered a reflection of society’s view about the members of a PSG); *supra* text accompanying note 196.

with the corruption of gangs.¹⁹⁶ These policies, aimed at gang members, consist of draconian social-cleansing practices,¹⁹⁷ and have led to “the arrest and detention of thousands of youth” believed to be gang members.¹⁹⁸ Because children who resist gang recruitment cannot rightly be held as a part of this massive detention if they have no gang associations, the state must be able to distinguish between children who acquiesce to gang recruitment and those who oppose it.¹⁹⁹ Therefore, children who oppose gang recruitment are a distinct segment of society. They are socially visible to their neighbors as a minority class of youths that do not follow the status quo by acquiescing to gang demands.²⁰⁰ They are also recognized as socially distinct by the state as children who are not affiliated with gang activity.²⁰¹

3. *Ensuring that the PSG Is Sufficiently Particular by Clarifying Amorphous Terms*

The final part of DHS’s *L.R.* analysis focused on whether the proposed PSGs were particular enough to “clearly delineate[] who is in the group.”²⁰² Although asylum claims asserting the proposed PSG “Salvadoran, Guatemalan, or Honduran children under the age of twelve who gang members in control of their neighborhood expect to acquiesce to gang recruitment,”²⁰³

196. See, e.g., McGuire, *supra* note 8, at 4; see also *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 9; *supra* notes 100–03 (discussing Central American governmental responses to gangs). *Mano dura* have been referred to as the Central American governments’ “war on gangs.” Jütersonke et al., *supra* note 8, at 10.

197. See *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 12 (explaining that these *mano dura* policies include “extrajudicial killing, police violence, arbitrary or unlawful arrests and detention as well as inhumane prison conditions,” which are directed at those believed to be gang members); see also MANZ, *supra* note 8, at 37 (concluding that these *mano dura* policies have been ineffective in containing violence).

198. McGuire, *supra* note 8, at 4.

199. Cf. SEBASTIAN AMAR ET AL., *supra* note 25, at app.C at 45 (providing examples of gang-related tattoos and other distinct gang markings). Gang members are often recognizable within their societies. For example, in *Valdiviezo-Galdamez v. Attorney General of the United States*, the applicant knew the men who were harassing him were part of the gang Mara Salvatrucha because of their tattoos. 502 F.3d 285, 286 (3d Cir. 2007); see also *Orozco-Polanco*, No. A75-244-012, 2 (Immigration Ct., El Paso, Tex. Dec. 18, 1997) (“The El Bordo gang members cultivate a distinctive appearance, wearing big pants, shaving their heads, and having tattoos The members of [their] rival gang, which is called the Poporopes, dress like cowboys and wear seven-inch belt buckles.”). The state relies on such visible indicia, along with other signs demonstrating gang association, to differentiate between resisters and gang members and to prosecute gang members under *mano dura* legislation. See Melissa Siskind, *Guilt by Association: Transnational Gangs and the Merits of a New Mano Dura*, 40 GEO. WASH. INT’L L. REV. 289, 305–05 (2008) (describing the statutory requirements for a group to be recognized and prosecuted as a gang).

200. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 12.

201. See *supra* note 195.

202. DHS Supplemental Brief, *supra* note 33, at 18–21.

203. See *supra* text accompanying note 163.

will still be subject to a case-by-case determination for asylum eligibility, the template PSG satisfies the final requirement of particularity.²⁰⁴

DHS acknowledged in their supplemental brief potential concerns regarding the particularity of its proposed PSGs.²⁰⁵ In particular, DHS noted that the term “domestic relationship” might be considered amorphous.²⁰⁶ However, DHS suggested that this phrase could be defined with sufficient particularity by using the definition of “crime of domestic violence” found in U.S. immigration law.²⁰⁷

The seemingly amorphous relationship between a “gang and expected gang recruit” is defined in the proposed PSG with just as much particularity.²⁰⁸ The expected recruit must be: (1) under twelve years old; (2) living in a gang-controlled neighborhood of El Salvador, Guatemala, or Honduras; and (3) expected by gang members to acquiesce to gang recruitment.²⁰⁹ These specifications permit clear differentiation between members of the PSG and non-members because these elements do not entertain multiple interpretations.²¹⁰ The first two elements are clearly delineable characteristics of age and nationality; the third element, although factually subjective and requiring judgment as to who gangs expect to recruit, can be particularized with the deeper analysis set forth above, explaining precisely the group of vulnerable youths expected to join gangs.²¹¹

DHS also addressed overbreadth concerns, noting that the phrase “ability to leave a relationship” could be fairly ambiguous and permit multiple interpretations; however, DHS explained that applying the standard on a case-by-case basis would yield sufficient particularity because each applicant would apply the standard to his or her facts.²¹² This would allow the Board to assess with particularity an applicant’s reasonable ability to leave the relationship.²¹³

Applying this portion of the analysis to children resisting gang recruitment, members of the proposed PSG have a similar inability to leave their

204. See *supra* notes 78–79 and accompanying text (emphasizing the requirement of particularity).

205. DHS Supplemental Brief, *supra* note 33, at 19–20.

206. *Id.* at 19. This is likely because “domestic relationship” can refer to a number of living situations in common parlance, including, but not limited to, roommates, married couples, and same-sex partners.

207. *Id.* (quoting 8 U.S.C. § 1227(a)(2)(E)(i) (2006)). Importantly, DHS intended to use this statutory definition as an example of the potential for particularity, and did not intend it to be the only way to characterize “domestic relationship.” *Id.*

208. See *supra* text accompanying note 163.

209. See *supra* text accompanying note 163.

210. Cf. *S-E-G-*, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (rejecting a PSG because the court found the terms of the PSG could be read to have multiple meanings).

211. See *supra* notes 170–73 and accompanying text.

212. DHS Supplemental Brief, *supra* note 33, at 20.

213. *Id.* at 20 & n.14.

relationships.²¹⁴ For those who would argue that the PSG is overbroad, DHS's analysis found that some ambiguity does not trigger automatic rejection of the PSG so long as the Board can assess the reasonableness of the applicant's claim with sufficient probability.²¹⁵ Therefore, the Board should assess each child's asylum claim on its own facts to determine whether the gang's perception of the relationship or the child's social and economic characteristics eliminate any reasonable ability to escape the relationship.²¹⁶

Permitting asylum claims asserting this PSG would not flood the United States with applications because the PSG is not overly broad. The proposed PSG actually has narrow parameters, as it does not establish asylum for every child under twelve, nor does it establish asylum for every one of the gangs' recruits. Only children that *resist* recruitment face the requisite persecution for membership in this PSG.²¹⁷ Because many youths give in to gang recruitment, those who resist are likely to be few in number.²¹⁸ Hence, children who seek asylum under this PSG are a sufficiently particular, discrete class.

B. Alleviating Residual Issues Concerning the Construction of the Proposed PSG

Although the requisites of immutability, social visibility, and sufficient particularity may be satisfied using the rationale outlined in DHS's *L.R.* brief,²¹⁹ other concerns not covered in DHS's brief warrant a short discussion.

First, *Lukwago v. Ashcroft* requires that the PSG exist independently from the claimed persecution.²²⁰ Accordingly, regardless of whether the gangs harm them, members of the PSG proposed in this Note will remain anticipated gang recruits by virtue of their vulnerable age, economic situation, and habitation in

214. See *supra* notes 185–94 and accompanying text (explaining children's inability to leave the relationship because of the gangs' persistence and environmental constraints).

215. See DHS Supplemental Brief, *supra* note 33, at 20.

216. See *id.* at 16–20.

217. See *Guidance Note on Refugee Claims*, *supra* note 10, ¶¶ 6, 11–12 (explaining that refusing to give in to gang demands is what causes violent retaliation, and that those who resist recruitment are targeted with such responses); see also *supra* Part I.A (defining the requisite persecution for refugee status). Only those who face persecution are eligible to apply for asylum. 8 U.S.C. § 1101 (a)(42)(A) (2006).

218. See *supra* note 8 (providing information on the large number of gang members relative to the rest of the population); see also Corsetti, *supra* note 12, at 413–14 (describing the incentives for youths to join gangs, including the lack of incentives not to do so). For example, the children of Honduras are generally “unemployed youth[s] who are not in school” and are “unable to develop the skills required for attending a university or obtaining skilled employment [thus] they provide a ready pool of gang recruits. In the absence of familial and community support, many marginalized youth[s] have turned to gangs for social support, a source of livelihood, and protection.” SEELKE, *supra* note 8, at 6–7 (footnote omitted).

219. See *supra* Part III.A.1–3.

220. 329 F.3d 157, 172 (3d Cir. 2003).

gang-controlled neighborhoods;²²¹ thus, the PSG exists independent of the gang's persecution.

Additionally, the Board explained in *S-E-G-* that applicants who resist gang recruitment do not constitute a PSG because they do not face harm anymore severe than the harm faced by anyone else who defies a gang's demands.²²² However, this rationale stands in stark contrast to the guidance given by the UNHCR.²²³ To establish eligibility for asylum, "it is not necessary for [members of] a group to be victim[s] of a higher incidence of crime or human rights violations than the rest of the population."²²⁴ To say that these children are not entitled to establish asylum eligibility just because their persecutors also harm others for *different reasons*²²⁵ is to wrongfully ignore reasonable asylum claims from children who may legitimately need protection using the proposed PSG.²²⁶

IV. CONCLUSION

While controlling poverty-stricken urban neighborhoods through violence and extortion, gangs in El Salvador, Guatemala, and Honduras forcibly recruit children under the age of twelve to fill the lowest echelon of their ranks. Children who resist forced recruitment are targeted for violent retaliation—sometimes resulting in death. Because the Board's decisions in *S-E-G-* and *E-A-G-* held that children who resist gang recruitment do not have a recognized basis for asylum, the United States has not been able to offer these children protection.

The PSG proposed in this Note—"Salvadoran, Guatemalan, or Honduran children under the age of twelve who are expected by gang members in control of their neighborhoods to acquiesce to gang recruitment"—provides sound means for these children to establish asylum eligibility. Following the logic set forth by the DHS in its supplemental brief in the matter of *L.R.*, this PSG identifies an immutable characteristic, proves social visibility, and is sufficiently particular to establish eligibility for asylum.

221. See *supra* notes 91–92, 178 and accompanying text.

222. *S-E-G-*, 24 I. & N. Dec. 579, 587 (B.I.A. 2008).

223. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 35; see also *supra* notes 121–22 and accompanying text.

224. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 35.

225. Gang members harm child resisters on account of their membership in the proposed PSG, which should make them eligible for asylum. See *supra* Part III.A.1–3. However, gang members also persecute other members of society for various reasons. See *Guidance Note on Refugee Claims*, *supra* note 10, ¶12 (giving examples of ways that gangs target various members of society). While the determination of whether the other harms inflicted by gangs are on account of a protected ground falls outside the scope of this Note, the fact that gangs harm others for other reasons should have no impact on determining the viability of this PSG.

226. Cf. *Guidance Note on Refugee Claims*, *supra* note 10, ¶ 22 (explaining that the type of violence which is targeted specifically at children who resist gang recruitment violates a number of human rights, and would normally be considered persecution for the purposes of asylum).