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Paths to Protection: Ideas, Resources, and Strategies for Presenting Central American Gang-related Asylum Claims

MeghannBoyle\* [\[FN1\]](#)

The Center for Gender and Refugee Studies (CGRS) has received a substantial number of requests for technical support from practitioners preparing gang-related protection claims. This marked increase in requests for gang claim information has inspired the creation of this *Briefing*. At this point in time, there are too few resolved cases to make any definitive assertions as to court receptivity of such claims or to surmise which arguments may be “successful.” The goal of this *Briefing* is therefore to present the complexity of issues involved in gang claims and offer some guidance in formulating protection claims with gang-related elements.

CGRS maintains a database of summaries of cases before the Immigration Courts and the Board of Immigration Appeals (BIA, or Board). These summaries are compiled from information reported to CGRS by the representing attorneys. Many of these summaries are accompanied by unpublished immigration judge (IJ) and BIA decisions, or briefs to these bodies, when they are made available to CGRS by the attorney. Each case is assigned a number in the database and throughout this *Briefing*, cases available on the CGRS database will be cited as “*Matter of Anon.*, CGRS Case # \_\_\_” followed by the location and date of the hearing. Any citations to unpublished decisions available through sources other than CGRS will contain information directing the reader to the location of the decision.

Two appendices appear at the end of the *Briefing*. Appendix I contains sources of information on Latin American gangs. Appendix II contains summaries of all gang-related cases cited in this *Briefing*, both published and unpublished, as well as additional cases involving gang-related claims. Cases that are available through the CGRS database will indicate what type of documentation (IJ decision, BIA decision, attorney brief, government brief, etc) is available from CGRS.

## **GANG ACTIVITY IN CENTRAL AMERICA: ORIGINS AND HISTORY** [\[FN1\]](#)

The wide scale gang activity prevalent in many Central American countries today (particularly El Salvador, Honduras, and Guatemala) is the result of a combination of factors. During the Civil Wars of the 1980s and 1990s, thousands fled violence from both government and guerrilla forces and headed for the United States. Many settled in Los Angeles in neighborhoods dominated by street gangs. The two largest Salvadoran gangs, Mara Salvatrucha (MS-13) and the 18th St. Gang (Mara 18) began as protection organizations for Salvadoran youth in Los Angeles. According to Ernesto Miranda, a founder of MS-13, “We had to start the group to defend ourselves. In the beginning there were 30 of us. We were around 11 years old.” [\[FN2\]](#)

In 1996, Congress expanded the definition of aggravated felonies under the INA, thus increasing the number of

immigrants and permanent residents considered deportable. These new laws allowed the U.S. to deport large numbers of so-called “criminal aliens” back to Central America. These deportees included gang members who brought gang recruitment tactics back to their home countries where large numbers of homeless street children, with the same desire for protection as the Salvadoran children in L.A., became easy targets for recruitment.

## CATEGORIES OF GANG RELATED ASYLUM CLAIMS

There are simply not enough published or reported gang-related cases to create highly specific categories. For the purposes of this *Briefing*, claims are broken down along two lines: gender and gang membership, creating four categories:

1. male former gang members
2. male non-members
3. female former gang members, and
4. female non-members

The structure of an asylum argument will vary depending on the category that the claim falls into. A female non-member claim will likely involve some form of actual or threatened sexual violence on the part of a male gang member on account of membership in a particular social group. A male non-member claim, however, will likely involve actual or threatened violence in the form of stabbings, shooting, or beatings used as a recruitment tactic by male gang members on account of either membership in a particular social group or political opinion. Female former gang members are the least represented category in this *Briefing* and therefore it is not possible to identify commonalities in such claims; however it is possible to surmise that such claims will involve harms particular to women and social groups or political opinions associated with gang membership.

Male former gang member claims can involve persecution from a variety of sources including former gang associates, government officials, rival gang members, and vigilante groups. The variety of persecutors creates a variety of nexus reasons as well. Former gang members are generally targeted by their former gang associates as a form of retaliation for leaving the group. Government officials target these youth in enforcing *mano dura* (iron hand) policing policies. Many former gang members may have past persecution claims based on violence at the hands of rival gangs and may still be in danger from these groups because of former gang affiliation. Finally, individuals with no gang connections may simply retaliate against gang members as a form of vigilante justice in reaction to a government's inability to protect its citizens from gang violence.

This *Briefing* will analyze gang-related asylum claims in each of these four categories. The discussion of these claims will focus upon issues that are often a barrier to presenting a successful asylum claim, such as formulating a social group, articulating a political opinion, proving nexus, and demonstrating that the governments are unwilling or unable to control the gangs.

### ***Male Former Gang Members*** [\[FN3\]](#)

Claims by former gang members will likely prove most difficult in the following four areas: (1) proving that the applicant deserves the discretionary grant of asylum, (2) overcoming statutory bars in both asylum and withholding of removal, (3) demonstrating that state initiatives to end gang violence are persecutory and not legitimate methods of prosecution, and (4) identifying a Convention [\[FN4\]](#) ground and establishing nexus.

**Discretionary Relief and Statutory Bars.** Asylum will be the most difficult form of relief to obtain in cases involving a former gang member because of its discretionary nature. As seen in CGRS Case #4158, [\[FN5\]](#) an IJ may find that the requirements for asylum have been met, but still make a discretionary judgment that past gang activity makes an applicant undeserving of the discretionary grant of asylum. For this reason, any evidence of rehabilitation or exemplary behavior since arriving in the U.S. should be included in the record to bolster a discretionary grant of asylum. In any case, it is imperative to ensure that an asylum claim by a former gang member clearly meets the higher “more likely than not” standards of withholding of removal and Convention Against Torture (CAT) relief, both non-discretionary forms of protection. If the applicant fears harm from several sources, as in CGRS Case #4158, the sheer multiplicity of potential persecutors could satisfy the “more likely than not” standard.

Claims involving former gang members may face a number of statutory bars to asylum as well. A new U.S. Immigration and Customs Enforcement (ICE) initiative called “Operation Community Shield,” described on ICE’s Web site as “an aggressive law enforcement action with the goal to investigate, arrest and prosecute any violent street gang members, leaders and/or associates,” [\[FN6\]](#) may discourage former gang members from revealing themselves to the government by seeking asylum immediately upon arrival, potentially leading to one-year bar problems. Again, it is imperative to create a record, to the extent possible, that meets the heightened standards of withholding and relief under CAT in the event that the applicant is time-barred from asylum.

In addition to the one-year bar, there are several statutory bars to both asylum and withholding of removal that involve prior criminal conduct and national security concerns. [\[FN7\]](#) If an applicant falls into any of these statutory bars, he may still be eligible for deferral of removal under CAT; however this form of relief does not prevent the applicant from being detained by the Department of Homeland Security (DHS). [\[FN8\]](#) The applicant’s prior activities while a member of the gang, both criminal and non-criminal, must be thoroughly explored to determine if the applicant may be statutorily barred from certain forms of relief.

**Prosecution v. Persecution.** A former gang member’s claim of harm at the hands of the government naturally raises the question of whether that harm is illegitimate persecution or legitimate prosecution for criminal gang activity. In general, governments have the right to prosecute individuals for common law offenses; however, when punishment for crime becomes excessive or enforcement of laws is discriminatory, prosecution becomes more akin to persecution. [\[FN9\]](#) El Salvador, Guatemala, and Honduras have adopted repressive policing strategies to deal with gang crime and violence. These policies are often referred to collectively as *mano dura* (iron hand) policies after El Salvador’s *Super Mano Dura* (super iron hand) anti-gang reform package passed in 2004. Under these new “zero-tolerance” regimes many gang members have been arrested, tortured, and even killed. Often times, police arrest men and women simply for having tattoos or for associating with known gang members. The extreme punishments exacted against suspected gang members and the discriminatory targeting of young people based on tattoos or association with “bad people” are evidence that the *mano dura* policies go beyond the legitimate prosecutory powers of sovereign states. [\[FN10\]](#)

In at least one case, the BIA found that an applicant failed to establish that Guatemala’s “aggressive” anti-gang policies were something other than lawful attempts to protect the populace from gang violence. [\[FN11\]](#) The IJ in the same case had originally granted the applicant deferral of removal under CAT. His decision was based partly upon background documents establishing that Guatemalan police tortured and killed gang members under the *mano dura* policies and that the Guatemalan government expended relatively little effort in investigating, prosecuting, and punishing the responsible officers. [\[FN12\]](#) The BIA, by contrast, found that Guatemalan authorities were simply “aggressively attempting to deal with gang violence.” [\[FN13\]](#) While the IJ was willing to infer from the documentary evidence that the applicant was likely to be held and interrogated upon his arrival in Guatemala based upon his status as a criminal deportee and the extensive tattoos on his upper body, the Board desired more direct proof that he would in fact be detained by authorities upon arrival. The dissenting Board member disagreed with the level of proof required by the majority, stating that “he does not need to prove a certainty or even a high probability” that he would be tortured. [\[FN14\]](#)

Based upon the cases reported to CGRS, it is unclear whether IJs will interpret the *mano dura* policies as legitimate state action or abuses of prosecutory powers rising to the level of persecution. It is likely that the prosecution/persecution question will be an issue in cases involving former gang members claiming harm from the government. The best practice in these cases is to thoroughly document all abuses against current and former gang members in the enforcement of the *mano dura* policies.

**“On Account of” Membership in a Particular Social Group.** Difficulties arise in identifying a Convention ground and establishing nexus for applicants who are former gang members. The Sixth Circuit has now rejected the social group of “tattooed youth,” but appears to have left the door open for former gang membership to be a valid basis for a social group. [FN15] It is important to be clear that the applicant fears persecution on account of his former membership in a gang, which is immutable. [FN16] Although police forces may target youth that have tattoos, at the core of the *mano dura* policies is an assumption that all youths with tattoos are present or former gang members. It is the presumed gang affiliation that motivates the authorities, and not the mere fact of having visible tattoos.

While the presence of visible tattoos alone is unlikely to create a viable social group, tattoos may be a vital part of an argument for a social group composed of “former gang members.” Since *Matter of Acosta*, the BIA has endeavored to inject a visibility component into the social group analysis. [FN17] Most recently, in *Matter of C-A-*, the BIA claims that the “visibility component” is both supported by UNHCR and reflected in previous Board decisions. While UNCHR does mention visibility as a component of social group analysis, it is considered an *alternative* to the immutable and fundamental requirements. [FN18] It is not considered an additional, necessary element in composing a social group. As for the BIA's claim that they have always considered visibility in their social group decisions, it is difficult to see how the cases it cites as examples contain groups which possess characteristics that are especially visible by society: women of a particular tribe who are opposed to female genital mutilation, [FN19] persons listed by the government as being homosexual, [FN20] former members of the national police, [FN21] and land owners. [FN22] Although the BIA's reasoning in *C-A-* appears flawed, it was nonetheless upheld by the Eleventh Circuit [FN23] and visibility will likely continue to be an important component to social group analysis. In this way, tattoos indicating a former gang affiliation may help establish the visibility of a social group based on actual or imputed gang membership. [FN24]

**“On account of” Political Opinion.** A Convention ground to consider that will be discussed at greater length in the discussion of male non gang-members, below, is political opinion. At least three IJs have accepted the argument that resistance to forced gang recruitment is the expression of a political opinion [FN25] of either “neutrality in an environment in which political neutrality is fraught with hazard” [FN26] or “believing in following the rule of law and earning an honest living and ... opposing gang life and its accompanying illegal activities.” [FN27] The renunciation of gang membership could also be perceived as the assertion of a political opinion of neutrality or of a belief in following the rules of society. However, there are several obstacles to making a political opinion claim, which will be discussed in the following section.

#### ***Male Non-Gang Members*** [FN28]

Non-member claims by men who were or will be persecuted by gangs face complications in two areas: (1) defining the Convention ground and establishing nexus, and (2) demonstrating that the government is unwilling or unable to protect these men. All of the cases in this section involve some form of violence exacted against the applicant in retaliation for the applicant's refusal to join a gang.

**“On Account of” Political Opinion.** Gang recruitment claims can be reminiscent of asylum claims based upon forced recruitment by guerilla groups in the 1980s and early 1990s. Many claims involving refusal to join the guerrillas were based on persecution on account of the political opinion of neutrality. In dealing with the guerilla recruitment claims, courts were careful to interpret political opinion and nexus in such a way so that fear of generalized violence amidst a civil war would not become a valid basis for asylum. [FN29] Unfortunately, the

neutrality as political opinion argument has been largely ineffective except in the Ninth Circuit. Other circuits either reject neutrality as a political opinion, or decline to decide that issue and instead deny claims for lack of nexus. [\[FN30\]](#)

Courts will likely hold similar reservations when faced with gang claims. The cases currently available suggest that some IJs are not averse to finding persecution based on political opinion in gang claims. In CGRS Case #3913, the IJ found that the applicant held a political opinion of neutrality and was persecuted on account of that political opinion. However, should this decision be reviewed, it could prove to be problematic. The IJ bases his nexus finding solely upon the applicant's resistance to the gang's recruitment: "...the gang was aware of the respondent's opinion. Upon being asked to join, respondent expressly declined to do so telling the gang leader that he was happy as he was." [\[FN31\]](#) The 1992 Supreme Court decision in *Zacarias* made mere resistance to recruitment in guerilla claims insufficient to establish nexus. [\[FN32\]](#) If the gang cases follow the same trajectory as the guerilla recruitment cases, then some additional evidence showing that the gang was motivated by the applicant's political neutrality will be required. It is unclear what this additional evidence may be, short of specific, pointed references by the gang to the applicant's neutrality. Absent such references, expert testimony and documentary evidence discussing the perception of gang members of those who refuse to join them may be sufficient to establish nexus under *Zacarias*. [\[FN33\]](#)

The political opinion of the applicant need not be neutrality. An argument can also be made that gangs represent organized, political resistance against societal and governmental values and rules. [\[FN34\]](#) In that case, the resistance to recruitment can be interpreted as a political opinion embracing the rules and values of society. Retaliation for refusal to join a gang is therefore arguably motivated by an expression of a political opinion.

In CGRS Case #3992, the IJ found gangs to be organized around "a belief that the current political and social system has left many youth feeling abandoned." [\[FN35\]](#) When the applicant refused to join the gang, he expressed an intent to "follow the rules of society." [\[FN36\]](#) The nexus component, as in the neutrality claims, will most likely require a showing of knowledge by the gang members of the applicant's political opinion in order to establish that the persecution was motivated by the applicant's "follow the rules" opinion. In this case, testimony by the applicant that he voiced his desires to "follow the rules of society, to find honorable employment, to further his education and, at some point, to raise a family" on numerous occasions to the gang satisfied the IJ that the persecution was on account of his political opinion. However, it is important to keep in mind that courts may require further evidence of the gang's motivation in order to satisfy *Zacarias*. Expert and documentary evidence supporting the applicant's testimony are crucial elements of an asylum claim.

**"On Account of" Membership in a Particular Social Group.** Another way to approach forced recruitment claims is through membership in a particular social group (PSG). The BIA adopted its current definition of particular social group in the 1985 case *Matter of Acosta*. [\[FN37\]](#) This definition requires that a PSG be defined by shared characteristics that are either immutable or fundamental. This definition or a variation of this definition has been adopted by the majority of the circuit courts [\[FN38\]](#) and is often cited to internationally as well. [\[FN39\]](#)

Particular social group jurisprudence has increased considerably since the *Kasinga* [\[FN40\]](#) case, particularly in the area of gender claims. Tension exists between those who see the ground as a safety net to accommodate applicants who legitimately need humanitarian protection but do not fit into one of the other four grounds and those who fear that the PSG ground will be used to open the proverbial "floodgates." Fear of overuse of the PSG claim has caused the BIA to attempt to narrow the *Acosta* definition of particular social group. [\[FN41\]](#) PSG claims must therefore be carefully crafted in order to meet these definitional standards.

Four gang-related cases known to CGRS have made successful PSG claims at the IJ level, each using a different social group definition: (1) "young, poor, male Guatemalans who believe in the rules of law, in earning an honest living, and in not participating in illegal activities such as drug trafficking and the use of violence;" [\[FN42\]](#) (2) "part of the family in which he is recognized as property, and not protected by a child protection system in Guatemala"; [\[FN43\]](#) (3) abandoned street children; [\[FN44\]](#) and (4) those "who have been actively recruited by gangs, but who have refused to join because they oppose the gangs." [\[FN45\]](#) While these groups are radically different, the IJs all

found that these were groups whose members shared immutable or fundamental characteristics that provided the motivation for persecution by gang members. Each of these social group definitions could prove to be problematic as gang-related asylum claim jurisprudence develops.

Perhaps the most important question to keep in mind when formulating a particular social group is “Is this group membership the *motivation* for the persecution?” Courts can be skeptical of social groups based on very broad demographic characteristics, [FN46] but as long as those characteristics are clearly the motivation for the persecutor, a broad social group claim can succeed. [FN47] An applicant may belong to several different social groups, but only the social group that describes *why* the persecutor is driven to harm the applicant will satisfy the refugee definition. A recent Third Circuit case, [FN48] illustrates the importance of a clear and consistent analysis of the motivation of the persecutor. The court found that the IJ's finding that the petitioner was not attacked on account of his membership in the group of “young Honduran men who have been actively recruited by gangs and who have refused to join the gangs” was inconsistent with her finding that the individuals who attacked the petitioner wanted him to join the gang and engage in gang activities, and the IJ's specific recognition that the petitioner's “refusal caused [him] to be attacked by these men.” The court concluded that no reasonable factfinder could find that the petitioner was attacked for any reason other than his status as a young Honduran man who had been recruited to join the gang and refused to join. The court remanded the case to allow the agency to consider whether the petitioner's claimed social group satisfies the refugee definition.

Keeping this question of motivation in mind, assume for purposes of illustration the following facts: a non-persecutory recruitment attempt was made on an applicant. When the applicant refused to join the gang, gang members began to use violence in successive recruitment attempts. Of the four successful social groups listed above, although they may all identify groups targeted for recruitment by gangs, the fourth definition, those “who have been actively recruited by gangs, but who have refused to join because they oppose the gangs” seems to come closest to identifying the *motivation* of the persecuting gang members. However, even this group seems to contain an extra, irrelevant element, “because they oppose the gangs.” The reason for opposition does not change the fact that the gangs target people who refuse their recruitment attempts, regardless of the reasons for that refusal.

A second critical question to keep in mind is “Does this definition describe characteristics that are either immutable or fundamental?” Once someone has been recruited by a gang, that becomes an immutable, historical experience in their lives. [FN49] Additionally, the right to choose to not associate with particular people, especially when that association may involve participation in violent, criminal acts is a fundamental right. Any reason for the refusal (“because they oppose the gangs”) seems superfluous. [FN50] The gang is motivated by the refusal, and that refusal is both immutable (because it is in the past) and a fundamental right. While this element may be legally superfluous, opposition to the gangs may put the applicant in a more sympathetic light overall. Opposition to the gang lifestyle can be an important part of an asylum claim, although not necessarily as part of defining the social group.

This example in no way implies that all forced recruitment claims will use this exact social group or even a variation of it. It is merely a tool to illustrate the importance of keeping in mind the motivation of the persecutor and the immutability and/or fundamental qualities of the social group. The particular facts of each individual's claim will dictate the exact parameters of the social group definition.

**Unable or Unwilling to Control.** The same *mano dura* policies that raise prosecution/persecution issues in claims by former gang members raise concerns in non-gang member claims over whether the government is willing or able to control the gangs and protect society from gang violence. According to a report by the Washington Office on Latin America (WOLA), the governments of El Salvador and Honduras have both criminalized mere membership in a gang, regardless of actual criminal activity. [FN51] These policies have led to the arbitrary arrests of thousands of youth simply for sporting tattoos or wearing baggy pants. Guatemala has not passed any legislation, but has implemented similarly repressive policing policies. [FN52]

Asylum claims by non-gang members must emphasize the ineffectiveness of the *mano dura* policies. The

WOLA report states that “the practice of massive detention of suspected gang members has not reduced gang-related crime, and shows of police force, or of police-military force, while sometimes driving gang activity underground, have not broken up gangs or reduced crime levels.” [FN53] In reality, *mano dura* policies “have pushed the gangs underground and, as a result, they have become *more* organized.” [FN54] The *mano dura* policies may indicate a willingness on behalf of Central American governments to combat violent gang activity, but reports such as WOLA's reveal that the governments are currently unable to control the gangs.

The Third Circuit recently held that an IJ erred in finding that a petitioner was required to show that the government “refused” to protect him, pointing out that the petitioner has only the burden of proving that the government was unable or unwilling to protect him. [FN55] The court further found that the IJ erred in finding that the petitioner had the additional burden of proving that the police refused to protect him on account of his race, religion, national origin, membership in a particular social group, or political opinion, pointing out that, while the petitioner must prove that the persecution he fears is on account of one of the enumerated grounds, he need not show that the government's refusal to control a group that engages in persecution is on account of one of these grounds. [FN56]

#### ***Female Former Gang Members [FN57] and Female Applicant With No Gang Affiliation [FN58]***

Gang-related asylum claims by women and girls will face many of the same problems as claims by men and boys. For this reason, and because CGRS has access to far fewer gang-related asylum decisions involving women, this section for the most part will not distinguish between gang members and non-members and will instead focus upon issues that are unique to asylum claims by women.

**Persecution.** Nearly all the gang-related asylum claims reported to CGRS concerning women applicants involve some form of sexual violence. In only one case did the IJ find that the harm experienced by the applicant did not rise to the level of persecution. [FN59] The majority of denials available to CGRS generally hinge on the nexus determination or the availability of state protection and not a finding of lack of past persecution; however other asylum decisions concerning violence against women indicate that courts still resist classifying such harms as persecution. [FN60] While decisions are more likely to turn upon other elements of the refugee definition, an asylum claim must still emphasize that sexual violence and violence against women are forms of persecution.

**“On Account of” Membership in a Particular Social Group.** Two of the most vexing aspects of asylum claims involving violence against women are defining the particular social group ground and establishing nexus to that ground. Courts fluctuate between recognizing the need for expansive definitions of grounds such as political opinion and social group and restricting these grounds so that “it does not become a draw for every sector of society who is unhappy with his or her position in society.” [FN61] While the *Acosta* decision suggests that gender can be a legitimate social group, no court has accepted a social group defined solely as “women.” [FN62] The closest any Court has come to defining social group solely by gender is the Ninth Circuit's 2005 *Mohammed* decision, which defined the social group as “Somalian women.” [FN63] Based on current asylum jurisprudence, a social group definition based solely upon gender is bound to fail under various BIA and circuit court decisions cautioning against social groups that are “too broad.” [FN64] For this reason, social groups in gender claims are often very specific—“young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice;” [FN65] “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination;” [FN66] “Iranian women who refuse to conform to the government's gender-specific laws and social norms.” [FN67]

Unfortunately, the heightened specificity of these social groups has the potential to make them seem contrived. The BIA referred to the social group definition in *R-A-* as “a legally crafted description of some attributes of her tragic personal circumstances.” [FN68] Thus, practitioners are forced to walk the fine line between definitions that are “too broad” and those that are “too narrow.”

CGRS currently has four IJ decisions concerning female applicants with gang-related asylum claims—two grant asylum to the female applicants and two deny all forms of protection. [FN69] Of the grants, one applicant was a gang member in her home country, the other was not affiliated with any gangs. Both denials involve non-gang members.

Two of the decisions, one grant and one denial, issued just six days apart, involve women (non-gang members) who were physically and sexually harassed and assaulted by male gang members in Guatemala. In her November 8, 2006, decision (hereafter the “Baltimore decision”) granting asylum, a Baltimore IJ defines the social group as “young women who refuse to be the victims of violent sexual predations of gang members.” [FN70] Just six days prior, on November 2, 2006, a San Francisco IJ defines the social group as “all young women of Guatemala who have been victimized by the gangs in the past and are vulnerable to the whims and violence of the gangs in the future because they control the social infrastructure of Guatemala and are not controlled by the authorities” [FN71] in her decision denying asylum (hereafter the “San Francisco decision”). These two cases illustrate how important the use of language can be in constructing a social group around gender.

The San Francisco IJ rejects the social group both as too broad and as inappropriately based on the harm to the group. [FN72] In contrast, the IJ who authored the Baltimore decision finds that the social group “can be categorized as ‘limited’ or ‘discrete’ as it does not include all young women in Guatemala or Central America but rather only those who have been targeted by gang members for sexual exploitation, as was Respondent, and who refuse to submit to the advances of those men.” She further explains that the definition finds its legitimacy in being based upon two immutable characteristics—gender and the refusal to be sexually victimized by gang members. [FN73] In both cases, the women had been approached by gang members and harassed and assaulted in various ways, but had not been raped or otherwise seriously physically injured. Both claims asserted that more serious physical harm was a likely result of the past experiences of harassment and assault. The successful claim viewed the past, less serious harm as a shared experience and the likely future, more serious harm as the persecution. Additionally, the successful claim portrayed the applicant as an active resistor to violence while the unsuccessful claim portrayed the applicant as a passive victim of violence. By using only the past harm as a shared experience with which to define the social group, the IJ avoided defining the group in terms of the feared persecution. Portraying the applicant as a resistor adds an additional fundamental characteristic with which to define the group. Thus the definition avoids two common pitfalls of PSG jurisprudence—groups which are “too broad” and groups defined by the feared persecution.

Whether these decisions hinge primarily upon the language used to define the social group or simply upon diverging interpretations of social group jurisprudence is unclear. The San Francisco IJ laments that “our laws ... do not provide a proper vehicle to handle the myriad social group issues emanating from the gang based extreme violence in Latin America, nor do they point to any methods for protection for the most vulnerable segments of society who are affected. This Court would feel better about providing some form of protection to this respondent but believes it impossible without legislating from the bench.” [FN74] It is impossible to know whether a simple change in language could overcome the foregone conclusion of an IJ that the asylum laws simply cannot accommodate social group claims in gang-related asylum cases. However, if there is a lesson that can be learned from these two cases, it may be that couching a social group definition in terms of active resistance to violence gives the IJ an additional “fundamental” characteristic, in addition to the immutable gender characteristic, upon which to base a social group definition. Finally, making clear distinctions (where appropriate) between past harms that differ from the feared future harm can overcome the prohibition against defining a social group by the persecution. [FN75]

CGRS Case #2689 is the only case involving a female gang member and although the asylum claim was successful, the IJ largely ignored the gang element. [FN76] The young woman joined the Mara 18 after fleeing from her abusive mother and stepfather at the age of 10. She joined the gang to escape life on the streets of Guatemala. Her name ended up on a “hit list” of a rival gang and the respondent fled to the United States. En route to the U.S., she was raped by coyotes in front of her infant daughter. The IJ found that she was a member of the social group “abandoned street children” and the police and society often actively exploit, abuse, and even murder these children on account of their membership in that group. [FN77]

**“On Account of” Political Opinion.** Women who resist sexual advances by gang members may have political opinion claims similar to men who resist recruitment by gangs. A woman who rejects the advances of an individual gang member may be motivated to do so by a revulsion to the gang lifestyle. If she expresses such revulsion to the gang member, then it could be argued that his continuing pursuit of her is partially motivated by her rejection of his lifestyle. That rejection, in turn, could arguably be interpreted by the gang member as a political opinion embracing the rules of society in opposition to the gang's political opinion that society's rules and regulations are wrong.

Women who are dating or otherwise intimately involved with gang members and who are abused by those gang members, however, will probably find that their circumstances are equated with the circumstances of victims of domestic violence. Asylum claims involving violence against women that attempt to attribute a political opinion to women who resist domestic abuse have not been successful. The leading case, *Matter of R-A-*, was rejected by the BIA in 1999. The immigration judge found that the applicant's abusive husband imputed a political opinion to her that “women should not be dominated by men” and he abused her because of this opinion. [FN78] The Board found that the husband would have abused the applicant regardless of what opinions she may hold or that he may impute to her. This decision was later vacated by the Attorney General and the decision is still pending the issuance of regulations regarding asylum claims by women fleeing domestic violence. In these types of cases, while a political opinion claim may be appropriate in certain circumstances, it is important to develop alternative grounds such as particular social group or even religion. [FN79] Unfortunately there are not enough gang-related asylum claims by females using the political opinion ground available to CGRS to provide a better analysis.

**Unwilling or Unable to Protect.** As with claims by male non-gang members, claims by female non-members need to show that the *mano dura* policies are ineffective against gang violence and may in fact make the violence worse. However, claims by women must also emphasize the oftentimes shocking amounts of violence against women as well as the lack of response by police forces to that violence. [FN80] Not only are women vulnerable to gang violence, but the police are often much less likely to investigate crimes against women, thereby increasing the impunity with which gangs harm women.

Complications may arise in proving government inability or lack of will to protect where (1) the woman never contacted the authorities to report abuses, or (2) the woman did contact the authorities and the authorities conducted some type of investigation. In the first situation, documentation of widespread governmental inability or lack of will to respond to similar complaints will be necessary to show that the woman was reasonable in assuming that reporting the threats of harm or actual harm she experienced would be futile. [FN81] In the second situation, documentation or testimony by the applicant of the ineffectiveness of the government's investigation will be necessary. [FN82]

## CONCLUSION

The purpose of this article is to provide a starting point for formulating claims for protection based upon gang-related violence. In addition, the appendices to this article provide preliminary resources for background information on Central American gangs as well as summaries of available IJ, BIA, and federal court decisions regarding gang-related asylum claims. Unless otherwise noted, all unpublished IJ and BIA decisions referenced in this memo and its appendices can be accessed through the CGRS database at <http://cgrs.uchastings.edu>.

Until more published federal court decisions are available, decisions involving gang-related claims will remain highly unpredictable. This *Briefing* is intended to be a guide to available information and possible strategies for successful gang-related asylum claims.

[FN1]. Since this *Briefing* is more concerned with legal issues and strategies in presenting gang-related asylum claims, this history of Central American gangs is far from comprehensive. Further sources of information about the historical development of Central American gangs can be found in Appendix I. The primary source used in this *Briefing* is the recent report by the Washington Office on Latin America (WOLA) entitled “Youth Gangs in Central America: Issues in Human Rights, Effective Policing, and Prevention,” November 2006, available at [http://www.wola.org/index.php?option=com\\_content&task=viewp&id=80&Itemid=2](http://www.wola.org/index.php?option=com_content&task=viewp&id=80&Itemid=2).

[FN2]. Michele A. Voss, *Young and Marked for Death: Expanding the Definition of Particular Social Group in Asylum Law to Include Youth Victims of Gang Persecution*, 37 Rutgers L.J. 235, 239 (2005).

[FN3]. See CGRS Case #s 3717, 4158, 4159, 4160, summarized in Appendix II. See also *Castellano-Chacon v. I.N.S.*, 341 F.3d 533 (6th Cir. 2005).

[FN4]. The U.S.' definition of refugee closely tracks the definition of refugee found in the *1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, hereafter “*Convention*.”

[FN5]. *Matter of Anon.*, CGRS Case #4158, IJ Decision, Eloy, AZ (February 17, 2005).

[FN6]. <http://www.ice.gov/pi/investigations/comshield/index.htm>.

[FN7]. The INA prohibits both asylum and withholding protection from being extended to anyone who (1) is found to be a persecutor of others, (2) has been convicted of an aggravated felony, (3) the IJ has serious reasons to believe has committed a serious nonpolitical crime outside the U.S. prior to arrival in the U.S., (4) the IJ has reasonable grounds for believing is a danger to the security of the U.S., or (5) has engaged in “terrorist activities” as defined in INA § 212(a)(3)(B) [8 USCA § 1182(a)(3)(B)] and INA 237(a)(4)(B) [8 USCA § 1227(a)(4)(B)]. INA § 208(b)(2) [8 USCA § 1158(b)(2)] and INA § 241(b)(3)(B) [8 USCA § 1231(b)(3)(B)].

[FN8]. Withholding of removal under CAT is governed by the same statutory bars as withholding of removal under the INA. 8 C.F.R. § 1208.16(d)(2).

[FN9]. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, ¶¶ 56-60, January 1992 (hereinafter “UNHCR Handbook”). Available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>. See also *Matter of A-G-*, 19 I. & N. Dec. 502, 506 (BIA 1987) (acknowledging that while countries may require military service from its citizens and may punish those who refuse to serve, “exceptions to this rule may be recognized in those rare cases where a disproportionately severe punishment would result on account of one of the five grounds”); *Baballah v. Ashcroft*, 367 F.3d 1067, 1075-1076 (9th Cir. 2004) (finding that discriminatory enforcement of fishing laws by Israeli Marines against an Israeli Arab fisherman because of his ethnicity was one of many instances of persecution experienced by the applicant).

[FN10]. For more information on *mano dura* policies and their effects, see the recent report by the Washington Office on Latin America (WOLA), “Youth Gangs in Central America: Issues in Human Rights, Effective Policing, and Prevention,” November 2006, available at [http://www.wola.org/index.php?option=com\\_content&task=viewp&id=80&Itemid=2](http://www.wola.org/index.php?option=com_content&task=viewp&id=80&Itemid=2).

[FN11]. *Matter of Anon.*, CGRS case #4159, BIA Decision (February 11, 2005).

[FN12]. *Matter of Anon.*, CGRS case #4159, IJ Decision (July 22, 2004).

[FN13]. *Matter of Anon.*, BIA decision at 3, *supra* n. 11.

[FN14]. *Id.* (Filppu, dissenting).

[FN15]. In [Castellano-Chacon v. I.N.S.](#), 341 F.3d 533 (6th Cir. 2005), the Sixth Circuit, while acknowledging that former gang membership was not put forth as a social group on appeal, nonetheless rejected the IJ's reasoning that [Bastanipour v. I.N.S.](#), 980 F.2d 1129 (7th Cir. 1992) (holding that "drug traffickers" are not members of a "particular social group" for purposes of the INA) precluded a claim that former gang members could constitute a social group.

[FN16]. "The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a *shared past experience* such as former military leadership or land ownership." [Matter of Acosta](#), 19 I. & N. Dec. 211, 233 (BIA 1985) (emphasis added). The BIA narrowed this statement in a recent decision, cautioning that *Acosta* "does not mean that any past experience that may be shared by others suffices to define a particular social group for asylum purposes." [Matter of C-A](#), 23 I. & N. Dec. 951 (BIA 2006), *aff'd* [Castillo-Arias v. U.S. Attorney General](#), 446 F.3d 1190 (11th Cir. 2006). The Board goes on to explain that those who assume risk in their occupations, such as police officers, would not form a particular social group, but concedes that *former* police officers who are persecuted because of their previous occupation may conceivably make a valid social group claim.

[FN17]. *Matter of C-A*, *supra* n. 16 (rejecting the social group of "confidential informants against the Cali cartel" partly because the group is not recognized as a group by society); [Matter of R-A](#), 22 I. & N. Dec. 906 (BIA 1999) *vacated* by the AG on January 19, 2001 (stating that for a "group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristics as warranting suppression or the infliction of harm").

[FN18]. UNHCR defines a social group as "a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, May 2002, available at <http://www.unhcr.org/publ/PUBL/3d58de2da.pdf> (emphasis added).

[FN19]. [Matter of Kasinga](#), 21 I. & N. Dec. 357 (BIA 1996).

[FN20]. [Matter of Toboso-Alfonso](#), 20 I. & N. Dec. 819 (BIA 1990).

[FN21]. [Matter of Fuentes](#), 19 I. & N. Dec. 658 (BIA 1988).

[FN22]. *Matter of Acosta*, *supra* n. 16.

[FN23]. [Castillo-Arias v. U.S. Attorney General](#), 446 F. 3d 1190 (11th Cir. 2006).

[FN24]. While tattoos may contribute to the visibility of a social group, the immigration courts may not view them as "immutable" characteristics. See *Matter of Anon.*, IJ Decision, York, PA (September 28, 2005), available at [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org). ("A tattoo is not an immutable characteristic. It can be removed ... Just as a hair cut can be changed, just as clothing can be changed, a tattoo can in fact be removed."). Therefore, any reliance on tattoos to bolster the visibility element of a social group should take into consideration the viability of successful tattoo removal for the particular client.

[FN25]. See *Matter of Anon.*, CGRS Case # 3913, IJ Decision, Los Angeles, CA (May 1, 2002); *Matter of Anon.*, CGRS Case # 3914, IJ Decision, El Paso, TX (December 18, 1997); *Matter of Anon.*, CGRS Case # 3992, IJ

Decision, San Antonio, TX (September 9, 2004).

[FN26]. CGRS Case #3913, *supra* n. 25, IJ Decision at 14, quoting [Sangha v. INS, 103 F.3d 1482 \(9th Cir. 1997\)](#).

[FN27]. CGRS Case #3914, *supra* n. 25, IJ Decision at 14.

[FN28]. See CGRS Case #s 3306, 3913, 3914, 3992, 3997. See also [Lopez-Soto v. Ashcroft, 383 F.3d 228 \(4th Cir. 2004\)](#); [Romero-Rodriguez v. U.S. Atty. Gen., 131 Fed. Appx. 203 \(11th Cir. 2005\)](#); *Matter of Anon.*, IJ Decision, York, PA (Sept. 28, 2005); *Matter of Anon.*, BIA Decision (March 1, 2006); *Matter of Anon.*, IJ Decision, San Francisco, CA (March 20, 2006); *Matter of Anon.*, IJ Decision, San Francisco, CA (April 23, 2007); and *Matter of Anon.*, IJ Decision, Arlington, VA (May 21, 2003).

[FN29]. See e.g., [Campos-Guardado v. INS, 809 F.2d 285, 290 \(5th Cir. 1987\)](#) (although not a guerrilla recruitment claim, this case supports the notion that “asylum is not available to every victim of civil strife, but is restricted to those persecuted for a particular reason”); [Matter of Maldonado-Cruz, 19 I. & N. Dec. 509 \(BIA 1988\)](#) (guerilla organizations do not engage in forced recruitment in order to overcome the political opinions of those recruited, but merely to increase the numbers of the group); [INS v. Elias-Zacarias, 502 U.S. 478 \(1992\)](#) (Supreme Court found that regardless of whether neutrality is a political opinion, guerilla groups were not motivated by this opinion to persecute Zacarias. They were instead motivated by his refusal to fight, which is not a Convention ground). Prior to the *Zacarias* decision, a string of guerilla recruitment decisions by the Ninth Circuit found that neutrality is a political opinion that can be established by the applicant either through a pronouncement of neutrality or an affirmative act, such as refusal to acquiesce to forced recruitment. Simply remaining neutral in the midst of a civil war was not sufficient to establish persecution on account of political opinion. See e.g. [Bolanos-Hernandez v. INS, 767 F.2d 1277 \(9th Cir. 1984\)](#), [Del Valle v. INS, 776 F.2d 1407 \(9th Cir. 1985\)](#), [Arteaga v. INS, 836 F.2d 1227 \(9th Cir. 1988\)](#), [Desir v. Ilchert, 840 F.2d 723 \(9th Cir. 1988\)](#), [Maldonado-Cruz v. INS, 883 F.2d 788 \(9th Cir. 1989\)](#). In *Zacarias*, the Supreme Court declined to accept that simple resistance to recruitment was enough to establish nexus in guerilla cases. The *Zacarias* decision made the motivation of the persecutor paramount to the nexus analysis-- the applicant would have to provide other direct or circumstantial evidence that the guerilla group was aware of his political opinion and was motivated by that political opinion to cause harm to the applicant.

[FN30]. See e.g., [Matter of Vigil, 19 I. & N. Dec. 572, 576 \(BIA 1988\)](#), (“respondent...did not express his desire to remain neutral to anyone when he was in El Salvador... respondent was not threatened by the guerrillas or the government because of his neutrality opinion”); [Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 n.4 \(11th Cir. 1990\)](#) (“This circuit has not adopted the Ninth Circuit's belief that political neutrality is a political opinion for purposes of the Act”); [Matter of Maldonado-Cruz, 19 I. & N. Dec. 509, 516 \(B.I.A. 1988\)](#) (referring to the idea of neutrality as political opinion, the BIA stated: “We know of no Fifth Circuit case which agrees with the rationale of *Bolanos-Hernandez*”); [Novoa-Umania v. INS, 896 F.2d 1, 3 \(1st Cir. 1990\)](#) (in order to successfully claim persecution on account of neutrality, the applicant must show “1) that a group with the power to persecute him intends to do so specifically because the group dislikes neutrals, or 2) that such a group intends to persecute him because he will not accept its political point of view, or 3) that one or more such groups intend to persecute him because each (incorrectly) thinks he holds the political views of the other side”); [Lopez-Zeron v. U.S. Dep't of Justice, 8 F.3d 636, 638 \(8th Cir. 1993\)](#) (“Whether or not Lopez's and Sarmiento's neutrality constitutes a political opinion or makes them members of a particular social group, we agree with the government that Lopez and Sarmiento have not shown that their fear of persecution is connected to or based on their political neutrality”); [M.A. v. U.S. I.N.S., 899 F.2d 304, 315-316 \(4th Cir. 1990\)](#) (“It is unclear whether neutrality can be considered a “political opinion” within the meaning of the Refugee Act ... M.A. has brought forward no evidence to show that the persecution he fears ... has anything to do with his “neutral” political opinions”).

[FN31]. CGRS Case #3913, *supra* n. 25, IJ Decision at 14-15.

[FN32]. *Zacarias*, *supra*, n. 28.

[FN33]. For more information on using expert witnesses in asylum hearings, see Racheal Keast, [Using Experts for Asylum Cases in Immigration Court](#), 82 *Interpreter Releases* 1237 (August 1, 2005).

[FN34]. See e.g. Max Manwaring, *Street Gangs: The New Urban Insurgency*, Strategic Studies Institute, U.S. Army War College (March 2005), 12-15, available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=597>. (briefly describing the evolution of Central American gangs from mere criminal entities to organizations with political agendas).

[FN35]. CGRS Case #3992, *supra* n. 25, IJ Decision at 13.

[FN36]. *Id.* at 14.

[FN37]. *Matter of Acosta*, *supra* n. 16 (Using the doctrine of *ejusdem generis* (“of the same kind”), the BIA reasoned that since the four other Convention grounds described immutable traits, then a particular social group must be a group that shares immutable characteristics: “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed”).

[FN38]. See *Matter of C-A-*, *supra*, n. 16 (recognizing that the First, Third, Sixth, and Seventh Circuits have adopted the *Acosta* standard and that the Second and Ninth circuits use similar formulations. The Ninth Circuit uses *Acosta* and also allows an alternative standard of “voluntary association.” The Second Circuit follows the Ninth Circuit’s voluntary associational standard and additionally requires a social group to be externally cognizable.).

[FN39]. See e.g. *Immigration and Refugee Board of Canada, Legal Services Division, Interpretation of the Convention Refugee Definition in the Case Law*, § 4.5 (2002) (citing *Acosta* as one of three cases providing a “good working rule” for defining particular social group.); *Shah and Islam v. Secretary of State for the Home Department*, 1999 UKHL 20 (1999) (U.K.) (Adopting the *Acosta* standard and finding that Pakistani women are a social group).

[FN40]. *Matter of Kasinga* at 365, *supra* n. 19 (finding that “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” constitute a particular social group).

[FN41]. See, e.g., *Matter of R-A-*, *supra* n. 17 and *Matter of C-A-*, *supra* n. 16 (both decisions inject a “visibility” component into particular social group analysis in addition to the *Acosta* requirements of immutable and fundamental characteristics).

[FN42]. CGRS Case #3914, *supra* n. 25, IJ Decision at 11.

[FN43]. *Matter of Anon.*, CGRS Case #3306, IJ Decision at 17, Portland, OR (May 25, 2005).

[FN44]. *Matter of Anon.*, CGRS Case #3997, IJ Decision at 9, Phoenix, AZ (date unknown); *but see Escobar v. Gonzales*, 417 F.3d 363 (8th Cir. 2005) (rejecting the social group “Honduran street children” as too broad).

[FN45]. CGRS Case #3992, *supra* n. 25, IJ Decision at 10.

[FN46]. In *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573, 1576-1577 (9th Cir. 1986), the Ninth Circuit rejected the social group of “young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador” as a “mere demographic division of the population” that “simply is not that type of cohesive, homogeneous group to which we believe the term ‘particular social group’ was intended to apply.”

[FN47]. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (in an FGM asylum claim, the Court found the social

group “Somalian females” valid because the sole reasons for the persecution were the applicant's gender and her citizenship).

[FN48]. [Valdiviezo-Galdamez v. Attorney General of U.S.](#), 2007 WL 2554965 (3d Cir. 2007).

[FN49]. *But see Matter of C-A-*, *supra* n. 16 (Acosta “does not mean that any past experience that may be shared by others suffices to define a particular social group for asylum purposes”).

[FN50]. *See e.g., Mohammed v. Gonzales*, *supra* n. 47 (“We believe that opposition is not required in order to meet the “on account of” prong in female genital mutilation cases. The persecution at issue in these cases—the forcible, painful cutting of a female's body parts—is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality. That is, the shared characteristic that motivates the persecution is not opposition, but the fact that the victims are female in a culture that mutilates the genitalia of its females.”).

[FN51]. WOLA, “Youth Gangs in Central America: Issues in Human Rights, Effective Policing, and Prevention,” November 2006.

[FN52]. *Id.* at 5.

[FN53]. *Id.* at 11.

[FN54]. *Id.* at 5.

[FN55]. *Valdiviezo-Galdamez*, *supra* n. 48.

[FN56]. *Id.*

[FN57]. *See* CGRS Case # 2689.

[FN58]. *See* CGRS Case #s 2899, 3886. *See also* [Castro-Perez v. Gonzales](#), 409 F.3d 1069 (9th Cir. 2005); [Menjivar v. Gonzales](#), 416 F.3d 918 (8th Cir. 2005); *Matter of Anon.*, IJ Decision, Baltimore, MD (Nov. 2, 2006); *Matter of Anon.*, IJ Decision, San Francisco, CA (Nov. 8, 2006); and *Matter of Anon.*, IJ Decision, San Francisco, CA (Oct. 3, 2006).

[FN59]. CGRS Case #2663 involves a young Salvadoran woman who was stalked and assaulted by a gang member who was trying to force her to join a prostitution ring run by his gang. The attorney for the applicant reported that the IJ found that stalking, assault, and attempted forced recruitment into prostitution did not rise to the level of persecution. Unfortunately, CGRS does not have a copy of the IJ's decision for this case.

[FN60]. A recent example is the Fifth Circuit decision, [Mwembie v. Gonzales](#), 443 F.3d 405 (5th Cir. 2006). Ms. Mwembie was working in the Marble Palace in the Democratic Republic of the Congo (DRC) on the day that former President Laurent Kabila was assassinated in that same building. Ms. Mwembie was arrested and imprisoned along with other government workers under the suspicion that she had been involved in allowing the assassins into the Palace. During her incarceration, Ms. Mwembie endured daily rapes by multiple prison guards, which eventually led to her having a miscarriage. The Court failed to find a nexus between the horrific persecution Ms. Mwembie endured while imprisoned and a Convention ground. While there was no specific finding that the rapes did not rise to the level of persecution, part of their reasoning included a finding that multiple, daily rapes by prison guards over a period of two weeks are part of “legitimate prosecution.” In this same decision, the Court also declined to “address the issue of whether a rape or a killing of someone in custody of a government official who was holding the person in custody constitutes torture,” as if declaring that “rape as a tool of prosecution is torture” would be a controversial stance for the Court to take. Subsequently, as a result of extensive advocacy, the government agreed to remand the

case to the BIA and then the IJ for further development of these issues, (the IJ originally based her denial upon lack of credibility, which the Fifth Circuit rejected). However, the federal decision has not been withdrawn.

[FN61]. *Matter of Anon.*, IJ Decision, San Francisco, CA (Nov. 2, 2006) (on file with the author).

[FN62]. In two cases involving Iranian women applicants, the Third and the Eighth Circuits both accepted that gender *could* be the sole basis for a social group, but ultimately found that the women could not show that their persecutors were motivated solely by their membership in that group. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Safae v. INS*, 25 F.3d 636 (8th Cir. 1994). By contrast, the Second Circuit has definitively held that “possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group.” *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991). *But see Gao v. Gonzales*, 440 F.3d 62, 69 (2nd Cir. 2006) (“*Gomez* can reasonably be read as limited to situations in which an applicant fails to show a *risk* of future persecution on the basis of the ‘particular social group’ claims, rather than as setting an *a priori* rule for which social groups are cognizable.”).

[FN63]. *Mohammed v. Gonzales*, *supra* n. 47.

[FN64]. *See e.g., Sanchez-Trujillo v. INS*, *supra* n. 46 (finding that the modification of the term “group” by the terms “particular” and “social” indicate that “particular social group” is not meant to encompass “every broadly defined segment of the population”); *see also Gomez*, *supra* n. 62 (“[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group”).

[FN65]. *Kasinga*, *supra* n. 19.

[FN66]. *R-A*, *supra* n. 17. Throughout this article, the BIA's decision in *R-A* has been cited to illustrate the development of asylum jurisprudence at the BIA. It should be noted that this decision was vacated by the Attorney General in 2001 and no new decision has yet been issued. DHS subsequently issued a brief in favor of granting asylum to the applicant on the basis that she belongs to the social group “married women in Guatemala who are unable to leave the relationship.” *See* Department of Homeland Security's Position on Respondent's Eligibility for Relief, *Matter of R-A* (February 19, 2004), available at <http://cgrs.uchastings.edu/campaigns/alvarado.php>.

[FN67]. *Fatin*, *supra* n. 62.

[FN68]. *R-A* at 919, *supra* n. 17.

[FN69]. Both denials were written by the same San Francisco IJ.

[FN70]. *Matter of Anon.*, CGRS Case # 4541, Baltimore (Nov. 8, 2006), available at [www.refugees.org](http://www.refugees.org).

[FN71]. *Matter of Anon.*, IJ Decision, San Francisco (Nov. 2, 2006) (on file with the author) (the decision does not indicate if this language is the precise language used by the applicant to describe her group or whether this particular definition originated with the Court).

[FN72]. Asylum jurisprudence does not permit social groups to be defined based upon the persecution feared. *See e.g. Rreshpia v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005) (requiring that members of a particular social group share “a narrowing characteristic other than their risk of being persecuted”); *see also* UNHCR, *Guidelines on international protection: “membership of a particular social group”* at ¶ 14, *supra*, n. 18, available at <http://www.unhcr.org/publ/PUBL/3d58de2da.pdf>.

[FN73]. While the IJ uses the term “immutable” to describe the applicant's resistance to sexual violence, the more accurate *Acosta* term would be “fundamental.”

[FN74]. *Matter of Anon.*, *supra* n. 71, IJ Decision at 12.

[FN75]. *See also*, [Lukwago v. Ashcroft](#), 329 F.3d 157, 172 (3d Cir. 2003) (“the shared experience of enduring past persecution may, under some circumstances, support defining a ‘particular social group’ for purposes of fear of future persecution”).

[FN76]. *Matter of Anon.*, CGRS Case # 2689, IJ Decision, Phoenix, AZ (March 20, 2003).

[FN77]. *But see Escobar v. Gonzales*, *supra* n. 44 (rejecting the social group “Honduran street children” as too broad).

[FN78]. *R-A-* at 911, *supra* n. 17.

[FN79]. *See e.g.*, [Matter of S-A-](#), 22 I. & N. Dec. 1328 (BIA 2000) (Moroccan woman with liberal Muslim views was persecuted by her conservative Muslim father on account of her religious beliefs).

[FN80]. *See e.g.*, CGRS, “Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety,” November 2005. *See also*, CGRS, “Guatemala's Femicides and the Ongoing Struggle for Women's Human Rights,” September 2006; “Amnesty International, Guatemala: No protection, no justice: Killings of women in Guatemala,” June 2005; “Amnesty International, Guatemala: No protection, no justice, Killings of women in Guatemala (an update),” July 2006.

[FN81]. *See Castro-Perez v. Gonzales*, 409 F.3d 1069 (9th Cir. 2005). Castro-Perez was raped by a gang member, but did not report the rape to the police because she did not think the police would do anything about it. The record in support of her claim was limited to the U.S. Department of State Country Report on Human Rights Practices which demonstrated that rape was a crime punishable by imprisonment in Honduras. The report did not speak to the effectiveness or willingness of the police in the investigation and prosecution of these crimes. The Court upheld the denial of her asylum claim.

[FN82]. *See Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005). Menjivar was shot at by a gang member named Moncho and reported the incident to the police. The police investigated and looked for her shooter, but did not find him. Although Menjivar's shooter came looking for her a year after the shooting, the Court found that the police were not ineffective in their investigation because “Moncho was angry at her precisely because ‘the police were looking for him.’ This testimony supports an inference not only that the police were pursuing Moncho, but also that their pursuit was effective enough that it provoked his anger.”

[FNal1]. \* **MeghannBoyle** is a 2007 graduate of U.C. Hastings College of the Law. This article was researched and written during her internship with the Center for Gender and Refugee Studies. The author would like to thank Karen Musalo and Stephen Knight for their generosity and mentorship. Thanks also go to Diana Rodriguez and Felecia Bartow for providing valuable research assistance. Finally, the author would like to thank her husband for supporting her through the law school experience.

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