University of Cincinnati Law Review

Volume 91 | Issue 1 Article 3

October 2022

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INTRODUCTION

A. The Saravia Youth

Fifteen years old and alone, A.H. arrives to the United States from Honduras.[2] Arrested at the U.S. border by federal immigration authorities, he is identified as an "unaccompanied minor"[3] and is placed in the care and custody of the U.S. Department of Health and Human Services[4] pending his safe release. [5] A.H.'s mother is located in New York, and he is quickly released to her care.[6] Two years later, while A.H. is still a

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2. Saravia v. Sessions, 280 F. Supp. 3d 1168, 1179 (N.D. Cal. 2017).

3. *Id.* at 1178–79. An unaccompanied minor, otherwise statutorily referred to as an "unaccompanied alien child" ("UAC"), is a minor child who has no lawful U.S. immigration status and has either no parent or legal guardian in the United States or no parent or legal guardian in the United States available to provide for his or her care and physical custody. Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (2006).

4. Within the Department of Health and Human Services ("HHS"), the Department of Unaccompanied Children ("DUCS") of the Office of Refugee Resettlement ("ORR") is responsible for the care and custody of unaccompanied minors. 6 U.S.C. § 279(b)(1)(A). The Department of Homeland Security ("DHS") retains its role in prosecuting an unaccompanied minor child for removal and returning any child to his home country if the Executive Office for Immigration Review ("EOIR") orders removal. *Id.*

5. *See also Saravia*, 280 F. Supp. at 1177–78. The Homeland Security Act's ("HSA") provisions relating to the treatment of unaccompanied minors were amended in 2008 by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. No. 110-457, §§ 235(b)(2)–(3), 122 Stat. 5044, 5077 (codified as amended at 8 U.S.C.A. §§ 1232(b)(2)–(3) (West Supp. 2010)). The TVPRA requires that all unaccompanied children in HHS custody be placed in the "least restrictive setting" that is in the best interests of the child and that HHS shall conduct "safety and suitability assessments" of a proposed custodian's home before placement. *Id.* at §§ 235(c)(1)–(2). Government regulations further detail the standards for release. 8 C.F.R. § 236.3(b) (2019). A child may be released in order of preference to (1) a parent, legal guardian, or an adult relative (sibling, aunt, uncle, or grandparent) not in DHS custody; (2) a parent, legal guardian, or an adult relative in DHS custody if such adult and child can be released simultaneously; (3) a person designated by the parent or legal guardian via sworn affidavit when such parent or legal guardian is outside the country; or (4) in unusual and compelling circumstances, to another adult who agrees to care for the child and ensures his or her presence at all subsequent immigration proceedings. *Id.* For an overview of the TVPRA provisions relating to unaccompanied children, *see What Is the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)?* KIDS NEED DEF. (Apr. 1, 2019), https://supportkind.org/resources/what-is-trafficking-victims-protection-reauthorization-act; Deborah Lee et al., *Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (Feb. 19, 2009), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1822&context=facscholar.

6. *Saravia*, 280 F. Supp. at 1179.

minor, he is arrested for a second time by federal immigration authorities in New York on suspicion of gang affiliation.[7] Without being provided notice or a hearing to challenge his rearrest, A.H. is flown to California, placed in a high security youth detention facility,[8] and held indefinitely.[9]

Through a program dubbed "Operation Matador," A.H. was one of many noncitizen adults and children rounded up in New York on suspicion of gang affiliation.[10] Like A.H., other arrested children had originally come to the United States as unaccompanied minors and been released to family.[11] These children then found themselves relocated to high security facilities far from home, without being provided notice or a hearing to challenge their repeat detention.[12]

With A.H. named as the lead plaintiff, the *Saravia v. Sessions* class action challenged the rearrest of unaccompanied noncitizen children on

7. *Id.* at 1180.

8. ORR facilities have three security levels: shelter, staff-secure, and secure. The shelter setting is the least restrictive and is provided to children who cannot otherwise be released but need the least security. Staff-secure facilities provide closer supervision. Secure is the most restrictive setting and is designated for children who (1) are charged with or convicted of a crime or adjudicated as delinquent; (2) have committed or threatened acts of crime or violence while in ORR custody; (3) have engaged in unacceptably disruptive acts; (4) are a flight risk; or (5) need extra security for their own protection. WOMEN'S REFUGEE COMM'N & ORRICK HERRINGTON & SUTCLIFFE LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 56–59 (2009), https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/halfway_home.pdf. *See also Saravia*, 280 F. Supp. at 1178–79. The standards regarding the care and release of unaccompanied minor noncitizen children stem from the stipulated settlement agreement resulting from *Reno v. Flores*, a class action lawsuit that challenged both the detention and release of immigrant children. Reno v. Flores, 507 U.S. 292 (1993); Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544-RJK (C.D. Cal. Jan. 17, 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf. For numerous scholars writing on the treatment of unaccompanied minors and the roles of the DHS and HHS, *see, e.g.*, Christine M. Gordon, *Are Unaccompanied Children Really Getting a Fair Trial?: An Overview of Asylum Law and Children*, 33 DENV. J. INT'L L. & POL'Y 641 (2005); Linda Kelly, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011); Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States*, 28 HAMLINE J. PUB. L. & POL'Y 357 (2006); Christopher Nugent, *Whose Children are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219 (2006); M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311 (2010).

9. *Saravia*, 280 F. Supp. at 1177.

10. Saravia v. Sessions, 905 F.3d 1137, 1140 (9th Cir. 2018). *See also* N.Y. IMMIGR. COAL. ET AL., SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 19–26 (May 2018) (discussing Operation Matador and its impact on New York communities), https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf.

11. *Saravia*, 280 F. Supp. at 1181.

12. The two other named minors, F.E. and A.G., had similarly been released by ORR to family in Suffolk County, New York, and were later re-arrested. *Id.* at 1181. Upon re-arrest, F.E. was sent to a secure facility in Shenandoah Valley, Virginia. A.G. was sent to a secure facility in Yolo County, California. *Id.*

suspicion of gang affiliation.[13] Upon certifying a class of similar noncitizen minors,[14] the United States District Court for the Northern District of California recognized the violation of their procedural due process.[15] The court ordered a preliminary injunction, requiring "prompt hearing[s]" and "notice of the basis for the rearrest."[16] When the federal government appealed, the United States Court of Appeals for the Ninth Circuit affirmed the injunction, finding the district court had not abused its discretion in requiring the federal government to provide hearings and greater procedural protections to the class members.[17]

Following the court's decision in *Saravia v. Sessions*, *Saravia v. Barr* finalized a national settlement agreement for the minor class members.[18] Pursuant to the settlement, class members are now entitled to a hearing within ten days of rearrest.[19] At such hearing, the government must give notice of the changed circumstances justifying the rearrest.[20] The settlement also provides other immigration related protections for noncitizen children suspected of gang affiliation. For children applying for Special Immigrant Juvenile Visas, T Visas, U Visas, and asylum, the federal government agrees to "not consider allegations of gang affiliation . . . except to the extent permitted by the INA [Immigration and Nationality Act] and other applicable law."[21] If such protected

13. *Id.* at 1168.

14. The District Court provisionally certified a class of noncitizens meeting the following criteria: (1) the noncitizen came to the country as an unaccompanied minor; (2) the noncitizen was previously detained in ORR custody and then released by ORR to a sponsor; (3) the noncitizen has been or will be rearrested by DHS on the basis of a removability warrant on or after April 1, 2017, on allegations of gang affiliation. *Id.* at 1177. *See also Saravia*, 905 F.3d at 1141.

15. *Saravia*, 280 F. Supp. at 1196.

16. *Id.* at 1197, 1205–06.

17. *Saravia*, 905 F.3d at 1145. .

18. Settlement Agreement and Release, Saravia v. Barr, No. 17-cv-03615 (N.D. Cal. Sept. 17, 2020) https://www.aclunc.org/sites/default/files/Saravia_Settlement_Agreement.pdf [hereinafter Saravia Settlement Agreement].

19. Saravia Settlement Agreement, supra note 18.

20. *Id.*

21. *Id.* at 20. Through protections for Special Immigrant Juvenile ("SIJ") applicants, United States Citizenship and Immigration Services ("USCIS") agreed that it would not deny consent or "use its consent authority to reweigh evidence" upon a determination that the underlying state court "did not consider or sufficiently consider evidence of the petitioner's gang affiliation." *Id.* at 18–19. *See also* USCIS, PA-2021-03, Special Immigrant Juvenile Classification and *Saravia v. Barr* Settlement Policy Alert (2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210318-SIJ.pdf. SIJ visas are available to children declared in state custody proceedings to (1) be dependent on the court or in the custody of a state agency, department, individual or entity appointed by the court; (2) be unable to be reunified with one or both parents because of abuse, abandonment, neglect or any similar basis under state law; and (3) not have best interests to return to the country of nationality or last habitual residence. Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(27)(J). As a general matter, U visas and T visas are nonimmigrant visas available, respectively, to victims of certain U.S. crimes who assist in their investigation and victims of trafficking. 8 U.S.C. §§ 1101(a)(15)(U), (T). Such nonimmigrant visas are of terrific value because of their numerous benefits, which include: a means of securing lawful permanent

applications were previously denied based on suspicions of gang affiliation, *Saravia* class members may have their underlying cases reopened and reconsidered based on the settlement's new procedural safeguards.[22]

B. The Children of Asylum

Like the *Saravia* minors who were prejudiced by suspicions of gang affiliation in the United States, minors seeking asylum based on fear of gang reprisals in their home countries are often challenged by systemic suspicion of gang affiliation.[23] In the gang-based asylum context, this distrust was apparent in the first gang related asylum case published by the Board of Immigration Appeals ("BIA""). In 2008, the BIA denied asylum to a claimant who feared being perceived as a gang member in his home country.[24] The BIA simply concluded that the law was not intended to protect "violent street gangs who assault people and who traffic in drugs and commit theft," regardless of whether membership was actual or *perceived.*[25] Gang resisters and their families were subject to a similar blanket determination: "Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances."[26] While the BIA's explicit dismissal of all gang related cases was later retracted,[27] gang-based claims continue to be disproportionately denied.[28]

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residency for undocumented immigrants as well as nonimmigrant visa holders in the United States; waivers for many criminal and immigration violations; and the ability to apply for certain family members. For further general discussion of SIJ, T and U visas, and asylum, *see* LEGOMSKY & THRONSON, *infra* note 35. For further discussion of youth based asylum, *see supra* notes 2-5 and accompanying text.

22. Saravia Settlement Agreement, *supra* note 18, at 20.

23. Criminal statutes have similarly relied on overbroad and vague definitions of gang membership to address gang violence. For discussion of such anti-gang legislation and efforts to challenge on grounds of overbreadth and vagueness, *see, e.g.*, Beth Bjerregard, *The Constitutionality of Anti-Gang Legislation*, 12 CAMPBELL L. REV. 31 (1998); Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002).

24. *In re* E-A-G-, 24 I. & N. Dec. 591, 596 (BIA 2008).

25. *Id.* at 596 (BIA 2008) (citing Arteaga v. Mukasey, 511 F.3d 940, 945–46 (9th Cir. 2007)).

26. *Id.* at 598 (quoting Campos-Guardado v. INS, 809 F.2d 285, 290 (5th Cir. 1987)) (quotation marks omitted).

27. "[O]ur holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs." *In re* M-E-V-G-, 26 I. & N. Dec. 227, 251 (BIA 2014). For court reactions to such administrative bar, *see, e.g.*, Vasquez Rodriguez v. Garland, 7 F.4th 888, 896–97 (rejecting the BIA's position that perceived gang members are ineligible for asylum but upholding 9th Circuit precedent barring asylum for "active" gang members) ; Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2019) (rejecting BIA administrative bar finding that it "is not Congress's view" to deny former gang members asylum or withholding of deportation).

28. Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims*, 20 BERKELEY LA RAZA L.J. 5, 14–22 (2010) (comparing the use of the particular social groups terms of "particularity" and "social distinction" between gang and non-gang asylum cases). For further discussion of the "particularity" and "social distinction" terms, *see infra* notes

Not only is there a factual connection between the *Saravia* children and the gang-based asylum classes of children — both being burdened by similar suspicions — there is also a legal connection. The two classes share a common vulnerability: their minor age. The victory of the plaintiff class in *Saravia* leans heavily on the special protections children merit when subject to disparaging treatment. In reliance on their minor age, the *Saravia* children raised unique liberty interests which strengthened their procedural due process claim.[29] These special considerations included the heightened damage resulting to children from detention,[30] the right of their parents to be in "the companionship, care, custody and management" of their children,[31] and the children's "reciprocal right" to be "raised and nurtured by their parents."[32] As noncitizens, the children were also at special risk. While procedures exist to ensure a hearing for a noncitizen adult who is rearrested, no clear process existed for children.[33] As the district court reasoned, if an adult subject to rearrest is entitled to this process, "surely an unaccompanied minor placed with a sponsor is entitled to at least the same level of protection."[34]

Saravia's recognition of the vulnerability of migrant children caught up in the systemic distrust of gangs provides a critical perspective from which to examine the claims of noncitizen children seeking asylum due to fear of gang violence. While a successful asylum claim must meet numerous criteria,[35] gang-based asylum claims are most significantly

38 and accompanying text.

29. *Saravia* relied upon the traditional procedural due process test of *Mathews v. Eldridge*, which requires consideration of (1) "the private interest [of life, liberty or property] that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Saravia*, 280 F. Supp 3d at 1195 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

30. "The detention of minors without due process results in "extreme or very serious damage" to this vulnerable population that is not "capable of compensation in damages." Saravia v. Sessions, 280 F. Supp. 3d 1168, 1201 (N.D. Cal. 2017) (quoting Melendres v. Arapio, 695 F.3d 990, 999 (2012)).

31. *Id.* at 1196 (citing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

32. *Id.* at 1196 (citing D.B. v. Cardall, 826 F.3d 721, 740 (4th Cir. 2016)); Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002)).

33. As *Saravia* noted, when a noncitizen adult is re-arrested, he is entitled to a bond redetermination hearing at which DHS must show changed circumstances. *In re* Sugay, 17 I. & N. Dec. 637, 640 (BIA 1981) ; *Saravia*, 280 F. Supp. at 1200.

34. *Saravia*, 280 F. Supp. at 1200.

35. Asylum can be granted to an individual who meets the definition of a refugee. 8 U.S.C. § 1158(b)(1)(A) (2009). A "refugee" is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account

challenged by the necessity of showing the fear of persecution is on account of the asylum seeker's "membership in a particular social group."[36] At its inception, the "particular social group" standard contemplated that group members share an "immutable characteristic" that they cannot, or should not, be required to change.[37] However, in addition to such "immutable" commonality, the BIA now requires that a particular social group possess "particularity" and evidence a "social distinction" in the society in question.[38] These latter two elements of

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of race, religion, nationality, membership in particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42)(A) (2014). United States refugee law is pursuant to the Refugee Act of 1980, 8 U.S.C. § 1101 (1980). The law is a result of the United States' obligations recognized by acceding to the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, (entered into force by the U.S, on Nov. 1, 1968). By acceding to the Protocol, the United States accepted the Protocol's adoption of Articles 2 to 34 of the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223. For further discussion of United States asylum law, refugee law, and its relation to U.S. international treaty obligations, *see* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (17th ed. 2020); STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY (7th ed. 2019).

36. In addition to gang-based claims, the particular social group basis of asylum has been a significant source of public controversy for claims relating to domestic violence and family. *In re* A-B-III, 28 I. & N. Dec. 307 (A.G. 2021), and *In re* L-E-A II, 28 I. & N. Dec. 304 (A.G. 2021), are the most recent, important and positive developments for these two issue groups, respectively. For current discussions of these recent decisions, *see* Vanita Gupta, Associate Attorney General, U.S. Dept. of Just., Memorandum for the Civil Division, Impact of Attorney General Decisions in *Matter of L-E-A-* and *Matter of A-B-* (June 16, 2021), https://www.justice.gov/asg/page/file/1404826/download (instructing the Civil Division Office of Immigration Litigation to "review any pending cases" being challenged in the federal courts of appeals and "take appropriate steps" in light of recent decisions); *Attorney General Garland Vacates Matter of A-B- and Matter of L-E-A-*, CATH. LEGAL IMMIGR. NETWORK (July 28, 2021), https://cliniclegal.org/resources/attorney-general-garland-vacates-matter-b-and-matter-l-e (providing practice tips to advocates in light of recent decisions). For earlier discussions of the use of particular social group in cases of domestic violence and family, *see, e.g.*, Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107 (2012); Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1 (2016); Linda Kelly, *The Ejusdem Generis of A-B-: Ongoing Asylum Advocacy for Domestic Violence Survivors*, 75 NAT'L LAWS. GUILD 65 (2018); Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARV. INT'L REV. 45 (Fall 2014 / Winter 2015).

37. *In re Acosta* set the immutability characteristic for particular social groups by analogizing this statutory ground to asylum's other four statutory grounds of race, religion, nationality and political opinion. It recognized that in each instance there existed "a group of persons all of whom share a common, immutable characteristic . . . that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439, 441 (BIA 1989).

38. This article examines the terms "particularity" and "social distinction" to the extent they are relied upon by the BIA as well as numerous circuits. *See e.g.*, Ordonez Azmen v Barr, 965 F.3d 128, 135 (2d Cir. 2021) (accepting both terms and acknowledging the overlap): Amaya v. Rosen, 986 F.3d 424 (4th Cir. 2021); Vasquez-Rodriguez v. Garland, 7 F.4th 888 (9th Cir. 2021); Rodas-Orellana v. Holder, 780 F.3d 982 (10th Cir. 2015). For recognition of the replacement of "social distinction" for the earlier term "social visibility," *see infra* notes 39-40 and accompanying text. Importantly, there is some resistance to accepting both the "social distinction" and "particularity" requirements. The Third Circuit rejected both

particularity and social distinction (previously known as "social visibility") were formalized in the earliest BIA precedent denying asylum to children fleeing gang violence.[39] Unsurprisingly, the particularity and social distinction elements remain the most difficult hurdle for such young asylum seekers. [40]

This article argues that the lessons and protections realized by the *Saravia* youth can be shared by minor asylum seekers fleeing gang violence. Through the lens of *Saravia*, the particular social group traits of "youth" and "gang resistance" can successfully meet asylum's particularity and social distinction requirements. Importantly, legitimate concerns of gang affiliation can also be appropriately addressed without undue reliance on mere suspicions.

This article first explores how "youth" and "gang-based" terms are traditionally challenged by asylum's particular social group requirements of immutability, particularity and social distinction.[41] It then discusses more recent, favorable circuit interpretations of such terms for children

"particularity" and "social visibility." Valdiviezo-Galdamez v. Att'y Gen. (*Valdiviezo-Galdamez II*), 663 F.3d 582 (3d Cir. 2011). The Fourth and Seventh Circuits have dismissed the earlier social visibility terminology, although have not outright accepted or dismissed particularity or social distinction. For relevant cases in the Fourth Circuit rejecting the use of social visibility, *see, e.g.*, Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014); Zelaya v. Holder, 668 F.3d 158 (4th Cir. 2012); Temu v. Holder, 740 F.3d 887, 894 (4th Cir. 2014). For cases in the Seventh Circuit rejecting social visibility, *see* Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009). For analysis and predictions of the circuits' treatment of the "particularity" and "social distinction" terms, *see* Harris & Weibel, *supra* note 28, at 14–23; Kelly, *The New Particulars of Asylum's "Particular Social Group"*, 36 WHITTIER L. REV. 219, 227–35 (2015). LEGOMSKY & THRONSON, *supra* note 35, at 1207–14.

39. *In re* S-E-G-, 24 I. & N. Dec. 579, 581 (BIA 2008) (adapting the terms "particularity" and "social visibility" to deny finding of a particular social group for "Salvadoran youths who have resisted gang recruitment" and "family members of such Salvadoran youth"). The BIA later renamed "social visibility" as "social distinction" to end criticisms that the requirement necessitated ocular visibility of the group characteristic. In so doing, the BIA insists that such terms have the same meaning. *In re* W-G-R-, 26 I. & N. Dec. 208, 216 (BIA 2014) ("We now rename that requirement 'social distinction' to clarify that social visibility does not mean ocular visibility."). *See also In re* M-E-V-G-, 26 I. & N. Dec. 227, 238 (BIA 2014) ("'Literal' or 'ocular' visibility is not, and never has been, a prerequisite for a viable particular social group.") This article will use the current term of social distinction to refer to both terms. For circuit criticism and rejection of the social visibility term, *see, e.g.*, Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) (rejecting social visibility because "you can be a member of a particular social group only in a complete stranger could identify you as a member if he encountered you on the street, because of your appearance, gait, speech patterns, behavior or other discernible characteristic"). For circuit recognition of both terms and recognizing their similarity, *see, e.g.*, Rodas-Orellana v. Holder, 780 F.3d 982, 990–91 (10th Cir. 2015). For discussion of the circuit's criticisms of the earlier term social visibility, *see* Harris & Weibel, *supra* note 28, at 10–12; Kelly, *supra* note 38, at 223–25.

40. *In re* W-G-R-, 26 I. & N. Dec. 208, 221 (BIA 2014) (denying "former members of the Mara 18 gang in El Salvador who have renounced their gang membership"). The BIA found it insufficiently particular because it was "too diffuse, as well as being too broad and subjective" and lacked social distinction, as the "record contain[ed] scant evidence that Salvadoran society [distinguished] . . . the treatment or status of former gang members." *Id.* at 222.

41. *See infra* notes 73-87 and accompanying text (Part I).

and others fleeing gang violence while maintaining *Chevron* deference to administrative agency guidelines.[42] Combining such positive circuit development with the lessons of *Saravia*, this article mounts asylum claims for children fleeing gang violence by arguing that the special vulnerability of children is a critical component of their particular social groups.[43] Finally, this article follows *Saravia's* lead and recognizes the necessity of fair procedural safeguards in asylum law to protect against credible threats of gang violence by asylum seekers.[44]

I. THE CHALLENGES OF "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP"

A. Youth

Through the particular social group trio of immutability, particularity and social distinction, "youth" rarely stand a chance.

Prior to the conception of particularity and social distinction, immutability was originally used to strike against youth. *In re Acosta* originally imagined the immutability necessary to establish membership in a particular social group to be a "shared characteristic" that could be either "innate" or a "shared past experience."[45] However, even that basic test could not be met by youth. Despite their evident commonalities, the BIA determined that "young, working class, urban males of military age" could not comprise a particular social group because they did not share a "common characteristic that is fundamental to their identity as a member of that discrete social group."[46] Likewise, Honduran street children targeted by gangs and police lacked immutability because "poverty, homelessness and youth are far too vague and all encompassing."[47]

When the BIA later conceded that age and past experiences such as

42. *See infra* notes88-95 and accompanying text (Part II).

43. *See infra* notes 98-106 and accompanying text (Part III).

44. *See infra* notes107-112 and accompanying text (Part IV).

45. *In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds*; *In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1989).

46. *In re* Sanchez & Escobar, 19 I. & N. Dec. 276, 285 (BIA 1985), *aff'd sub nom.* Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576–77 (9th Cir. 1986) (finding it of "central concern" that members of a particular social group show the existence of a "voluntary associational relationship among purported members"), *modified by* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (interpreting particular social group immutability to mean the group is "united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."). For the BIA's rejection of the voluntary association test , *see In re* C-A-, 23 I. & N. Dec. 951, 956–57 (BIA 2006), *aff'd* Castillo-Arias v. Gonzales, 446 F.3d 1190 (11th Cir. 2006).

47. Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005). *See also* Lukwago v. Ashcroft, 329 F.3d 157, 172–78 (3d Cir. 2003) (rejecting "children" as a particular social group because it was an "extremely large and diverse group" but accepting "former child soldiers who have escaped LRA [Lord's Resistance Army] captivity").

gang resistance could be immutable,[48] particularity and social distinction immediately took up the work against youth. Such shift began in 2008 upon the introduction of particularity and social distinction in the gang-based asylum cases of *Matter of S-E-G-*[49] and *Matter of E-A-G-*. [50] Fundamentally, particularity is intended to "set the outer limits"[51] or otherwise define who is included in the group. Social distinction[52] asks whether "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."[53] While directed at all particular social group claims, the additional criteria of particularity and social distinction significantly challenge the ability of children fleeing gang violence to qualify for asylum.[54]

Salvadoran youth who resist gang recruitment now lack particularity because "people's ideas of what those terms mean can vary."[55] They have also not been considered socially distinct because there is "little in the background evidence" to show that the young gang resisters would be "'perceived as a group' by [Salvadoran] society, or that these individuals suffer from a higher incidence of crime than the rest of the population."[56] Consequently, neither Salvadoran youths who have resisted gang

48. The BIA elaborated:

> "[Y]outh" is not an entirely immutable characteristic . . . . In saying this, however, we acknowledge that the mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable. Furthermore, youth have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.

In re S-E-G-, 24 I. & N. Dec. 579, 583–84 (BIA 2008).

49. *Id.*

50. *In re* E-A-G-, 24 I. & N. Dec. 591 (BIA 2008).

51. *In re* M-E-V-G- 26 I. & N. Dec. 227 (BIA 2014) (quoting Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)). *See also Sanchez-Trujillo*, 801 F.2d at 1576.

52. Previously known as social visibility. For discussion of the replacement of the term "social visibility" with the current term "social distinction," *see supra* note 39-40 and accompanying text.

53. *In re* W-G-R-, 26 I. & N. Dec. 208, 217 (BIA 2014).

54. For discussion of circuits not following such terminology, *see supra* notes 38 and accompanying text.

55. *S-E-G-*, 24 I. & N. Dec. at 585 (citing Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008)).

56. *Id.* at 586–87. *See also In re* E-A-G-, 24 I. & N. Dec. 591, 594 (BIA 2008) (denying social visibility to young Honduran gang resisters). *S-E-G-* and *E-A-G-* were decided under the prior "social visibility" standard, which has been replaced by "social distinction." For discussion of such developments, *see supra* notes 39-40 and accompanying text. *E-A-G-* also denied "young persons who are perceived to be affiliated with gangs" based upon the creation of an administrative bar against actual and perceived gang members. *E-A-G-*, 24 I. & N. Dec. at 593. Shortly thereafter, the BIA withdrew such administrative bar. M-E-V-G-, 26 I&N at 251 For further discussion of the administrative bar, *see* Kelly, *supra* note 38 at 221, 226. .

recruitment, [nor] family members of such Salvadoran youth"[57] can meet particular social group standards.

Other efforts to more tightly define youth-based groups in fear of gangs continue to be rejected for lack of particularity,[58] social distinction,[59] or both.[60] As the United States Court of Appeals for the First Circuit observes, reiterations of such proposed groups fail given the repeated rejection of groups bearing "similar hallmarks -- namely youth who are resistant to gang membership."[61]

Like the children of the *Saravia* class action, in the asylum context, the problem of "youth" is largely intertwined with "gang affiliation."[62] Notably, outside of the gang context, "youth" can be a successful qualifying condition. *In re Kasinga* is the most obvious example.[63] Fearing forced female genital mutilation ("FGM") by her Tchamba-Kunsuntu Tribe of Togo, Kasinga was granted asylum upon the recognized particular social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by the tribe, and who oppose the practice."[64] While Kasinga's case predated particularity and social distinction requirements, "young women" was recognized as an immutable characteristic.[65] Even after the introduction of particularity

57. *S-E-G-*, 24 I. & N. Dec. at 582.

58. Escobar-Batres v. Holder, 385 F. App'x 445, 447 (6th Cir. 2010) (no particularity for Salvadoran teenage girls targeted for recruitment by the Maras).

59. Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) ("young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang' not a particular social group because did not show "a discrete class of persons who would be perceived as a group by the rest of society"); Orellana-Monson v. Holder, 685 F.3d 511, 516, 522 (5th Cir. 2012) ("Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but who have refused to join" lack social visibility, as there is little evidence would be perceived this way by society); Rivera-Barrientos v. Holder, 666 F.3d 641, 653 (10th Cir. 2012) (no social distinction for "Salvadoran women between ages 12 and 25 who resisted gang recruitment").

60. Ortiz-Puentes v. Holder, 662 F.3d 481, 483 (8th Cir. 2011) (lacking particularity and social visibility, i.e. social distinction, for young Guatemalans who refused to join gangs and were persecuted and beaten as a result); Mayorga-Vidal v. Holder, 675 F.3d 9, 16 (1st Cir. 2012) (accepting immigration judge's decision finding no particularity nor social distinction in "young Salvadoran men who have already resisted gang recruitment and whose parents are unavailable to protect them"); Umaña-Ramos v. Holder, 724 F.3d 667, 674 (6th Cir. 2013) (finding lack of particularity or social distinction for "young Salvadorans who ha[ve] been threatened because they refused to join the MS gang").

61. *Mayorga-Vidal*, 675 F.3d at 15.

62. For discussion of the *Saravia v. Sessions* class action challenging the rearrest and indefinite detention of noncitizen minors on suspicion of gang affiliation, *see supra* notes1-22 and accompanying text.

63. *In re* Kasinga, 21 I. & N. Dec. 357 (BIA 1996). For other critics of the inconsistent use of "youth" as a particular social group trait, *see* LEGOMSKY & THRONSON, *supra* note 35, at 1208.

64. *Kasinga*, 21 I. & N. Dec. at 357.

65. *Id.* For my earlier suggestion that the sympathy surrounding the FGM issue and Kasinga's case may have led to softening of some asylum principles for potential FGM victims, *see* Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, HASTINGS L.J. 557, 590–92 (2000).

and social distinction, circuits recognize youth-based, non-gang related groups such as "unmarried young women in Albania" between 15 and 25 years old[66] and "young Albanian women who live alone."[67]

B. Gang-Based Terms

Outside of the youth context, particular social groups couched in gang-based terms also cannot meet the new particular social group standards.[68] According to the BIA, social distinction asks whether members of the perceived group "suffer from a higher incidence of crime than the rest of the population."[69] This consideration can be fatal for gang resisters and their families. While the BIA realizes there may be "no doubt" that gangs retaliate against people who refuse to join, gangs direct harm "against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power."[70] As the rationale goes, because gangs harm everyone, their use of violence is indiscriminate. Accordingly, there is nothing "socially distinct" about proposed particular social groups based on gang resistance. These groups are "not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang's interests."[71] Combined, the "indiscriminate" nature of violence and reliance on persecutor motives make social distinction difficult to evidence for gang resisters. If gangs use violence indiscriminately, without being motivated to harm any certain group, the claimant is drawing "distinction[s] without a difference."[72]

II. CIRCUIT TREATMENT OF PARTICULARITY AND SOCIAL DISTINCTION IN YOUTH GANG-BASED ASYLUM

In light of such challenging treatment of "youth" and "gang-based" terms, children fleeing gang violence can nevertheless find protection in

66. Paloka v. Holder, 762 F.3d 191, 198 (2d Cir. 2014) (remanding the proposed group so that BIA may reconsider the age and gender parameters in light of the BIA's decisions in the same year of *In re* M-E-V-G-, 26 I. & N. Dec. 227 (BIA 2014) and *In re* W-G-R-, 26 I. & N. Dec. 208 (BIA 2014)).

67. Cece v. Holder, 733 F.3d 662, 669 (7th Cir. 2013) (recognizing proposed social group as immutable). For discussion of the Seventh Circuit's rejection of the former term "social visibility" and lack of explicit recognition of "social distinction" or "particularity," *see supra* notes38 and accompanying text.

68. This article uses the terms "gang-based" and "gang-related" to generally reference any asylum claim relying on fear of gangs—including those due to former, active or perceived gang membership, gang resistance or reprisals against family members because of such gang membership or resistance.

69. *In re* S-E-G, 24 I. & N. Dec. 579, 587 (BIA 2008).

70. *Id.*

71. *Id.*

72. Cruz-Guzman v. Barr, 920 F.3d 1033, 1036 (6th Cir. 2015).

particularity and social distinction. Following *Saravia's* lead, a combined recognition of the underlying vulnerability of children and the prejudices of suspected gang affiliation can provide the proper contextual understanding of asylum's terms. Positive circuit case law is also instructive.

There are many criticisms of the overlap between the particularity and social distinction standards. Particularity's overlap with social distinction has led a few jurisdictions to flatly reject the need for either or both considerations.[73] However, notwithstanding the difficulties, a majority of jurisdictions rely on both terms, often citing the need to give *Chevron* deference to administrative agency standards.[74] Yet even with such deference, circuits have developed creative legal maneuvers to more favorably apply the requisite administrative terminology to asylum claims. The following Parts each look at a different circuit's approach, starting with the Fourth Circuit.

A. Disentangling the Terms

Some jurisdictions attempt to disentangle the particularity and social distinction terms. For example, the United States Court of Appeals for the Fourth Circuit steadfastly refuses to allow determinations of particularity to blend with social distinction.[75] Particularity is considered a definitional inquiry.[76] Accordingly, a particularity determination cannot depend on evidence of social perceptions.[77] Instead, such factual determinations of whether "a social group is recognized within a society" are contained to the social distinction analysis.[78] In sum, each analysis "emphasize[s] different analytical aspects of a 'particular social group,' and it is necessary to address both elements . . . ."[79]

Once particularity and social distinction are disentangled, the legal evaluation of particularity determines whether the terms of the proposed particular social group are sufficiently "self-limiting," so that the group is neither indeterminate nor amorphous.[80] By creating this firm distinction,

73. For a discussion of circuit acceptance of the terms, *see supra* notes 39 and accompanying text.

74. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (limiting judicial rejection of agency standards to instances in which such standards are determined to be "impermissible" or "unreasonable"). *See also supra* notes 39 and accompanying text on circuit acceptance of BIA terms. For courts' acknowledgement of *Chevron* deference in the application of the BIA's particular social group terms, *see, e.g.*, Rivera-Barrientos v. Holder, 666 F.3d 641, 645 (10th Cir. 2012).

75. Amaya v. Rosen, 986 F.3d 424 (4th Cir. 2021).

76. *Id.* At 434.

77. *Id.*

78. *Id.*

79. *Id.* At 433.

80. *Id.* At 429, 434.

the Fourth Circuit could conclude that "former Salvadoran MS-13 members" were sufficiently particular. [81] The BIA's prior rejection in *W-G-R-* of this *identical* group was a result of inartful standards.[82] As the Fourth Circuit broke down each proposed term (i.e., former, MS-13 members, and Salvadoran), the court found no ambiguity as to who was included in the group.[83] Gradation in membership also did not render members too amorphous.[84] Applying a little *ejusdem generis*, the Fourth Circuit reasoned that any of the statutorily listed grounds for asylum could be vulnerable to gradations in membership.[85] In the context of religion, Catholics, for example, could be subdivided based on their involvement or commitment.[86] Yet such groups are readily recognized without being subjected to any gradation criticisms.[87]

B. Society in Question

Alternatively, the United States Court of Appeals for the Second Circuit strictly reads BIA precedent and insists that *both* particularity and social distinction evaluations are made from the perspective of the *society in question.*[88] Following such prescription, the court rejects the BIA's

81. *Id.* At 434.

82. *Id.* (discussing *In re* W-G-R-, 26 I. & N. Dec. 208 (BIA 2014)).

83. The court elaborated:

> First, the reference to a single notorious gang leaves no ambiguity as to how a "gang" might be defined. Second, the group only includes people of Salvadoran nationality, eliminating many people with MS-13 affiliation from other countries. Third, and most significantly, the group does not include those who never joined the MS-13 gang.

Id. At 434.

84. *Id.* At 435.

85. The BIA's use of the ejusdem generis, or "of the same kind," legal principle served to justify the particular social group's requirements of immutability, particularity and social distinction, as those requirements were found comparable to traits resulting from race, nationality, political opinion or religion. For the BIA's use of ejusdem generis as a justification for its evolving particular social groups standards, *see In re* Acosta, 19 I. & N. Dec. 211 (BIA 1985); *In re* S-E-G-, 24 I. & N. Dec. 579 (BIA 2008); *In re* A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (Attorney General Sessions using ejusdem generis to justify rebuking *In re* A-R-C-G-, 26 I. & N. Dec. 338 (BIA 2014)).

86. More descriptively:

> Consider, for example, a claim of persecution as a result of being Catholic. Catholics, of course, vary widely in the time they have been part of that faith as well as in their level of commitment and involvement. Those differences may make it difficult to establish the required nexus of persecution or even whether a petitioner is or is not Catholic. But they have nothing to do with particularity.

Amaya, 986 F.3d at 434.

87. *Id.* At 435.

88. As the Second Circuit stated, quoting the BIA, "[t]here is considerable overlap between the

rationale that "former *Guatemalan* gang members" cannot show particularity simply because the BIA had previously determined that "former *Salvadoran* gang members"[89] lacked particularity.[90] As the Second Circuit observes:

> The BIA rather appears to have imposed a general rule, untied to any specific country or society, that groups consisting of "former gang members" are insufficiently particularized. If so, the agency failed to adhere to its own precedents disclaiming per se rules and requiring a fact-based inquiry into the views of the relevant society . . . .[91]

The Second Circuit also adheres to BIA precedent in reminding the BIA that a group's particularity is to be based on whether "there is evidence that members of the relevant society actually 'generally agree on who is included in the group,' not whether they 'may' (or may not) agree."[92] The BIA therefore could not find that "former Guatemalan gang members" was "too loosely defined" because "Guatemalans may not agree" on various parameters of who is considered a "former member."[93]

C. Society as a Whole

Like particularity, circuits provide helpful answers to the recurring problem of whose perspective is to be used in determining social distinction. Relying on BIA precedent, numerous circuits emphasize that "the particular social group must be perceived by society as a whole, not solely by the group's alleged persecutors."[94] Indeed, to allow the persecutor's motives to be relevant to the "socially distinct" determination conflates the particular social group requirement with the "on account of" motivational explanation of why the harm is being directed at the proposed group.[95]

'social distinction' and 'particularity' requirements . . . because the overall definition [of a particular social group] is applied in the fact-specific context of an applicant's claim for relief." Ordonez Azmen v. Barr, 965 F.3d 128, 134–35 (2d Cir. 2020) (quoting *In re* M-E-V-G-, 26 I. & N. Dec. 227, 240–41 (BIA 2014)). "The particularity inquiry is thus closely tied to the society out of which the claim arises." *Id.* At 135.

89. *In re* W-G-R-, 26 I. & N. Dec. 208 (BIA 2014) (emphasis added).

90. *Ordonez Azmen*, 965 F.3d at 135.

91. *Id.*

92. *Id.* (quoting *In re W-G-R-*, 26 I. & N. at 221) (emphasis added).

93. *Id.* at 135 (noting the BIA had in part rejected the claimant's particular social group because "Guatemalans may not agree on how long one will be considered a former gang member or even who is considered be a former gang member") (emphasis added).

94. Nolasco v. Garland, 7 F.4th 180, 187 (4th Cir. 2021) (relying on *In re* M-E-V-G, 26 I. & N. at 238, 242 (BIA 2014); *In re* W-G-R-, 26 I. & N. Dec. (BIA 2014)). *See also* Rodas-Orellana v. Holder, 780 F.3d 982, 991 (10th Cir. 2015) (considering whether "citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group" and whether "the applicant's community is capable of identifying an individual as belonging to the group") (quoting Rivera-Barrientos v. Holder, 666 F.3d 641, 650–51 (10th Cir. 2012)).

95. Despite such overlap, other circuits more readily accept that the persecutor's opinion may be

III. RE-IMAGINING "YOUTH" AND "GANG-BASED" ASYLUM TERMS

Combined, the circuits' emphasis on disentangling the terms[96] and their reliance upon the relevant social contexts[97]and societal perspectives[98] can be used to the advantage of children seeking asylum from the threat of gang violence. Once youth-based particular social groups are placed in their unique social context, "youth" and "gang-based" traits give contour to the particular social group requirements of "particularity" and "social distinction." As *Saravia* recognizes, in the United States, children — and more notably children with perceived gang affiliation — are readily seen as a "vulnerable" class.[99] This appreciation of children as a distinct group is a universal norm. However, the legally necessary, individualized country specific documentation can easily support this notion.[100] Numerous privileges and distinctions are dependent upon age – including those associated with basic notions of education, employment, marriage, and independence. How individual societies view their children — known or perceived to be targeted by gangs — can also be evidenced through country condition documentation, expert witnesses, as well as the personal accounts of the child and the child's family.

For example, country condition reports from El Salvador evidence the numerous programs and protections directed at children. They also acknowledge the heightened risk children face of being targeted for gang recruitment.[101] Expert witnesses, such as local academics, also provide insights into the treatment of children. Only after considering children and their heightened risk from the relevant foreign country's perspective can

a factor in considering a group's social distinction. *See* Quintanilla-Mejia v. Garland (2d Cir. 2021) (persecutor's opinion can be a consideration but not sufficient alone); Pirir-Boc v. Holder (9th Cir. 2014) (persecutor's motives can be a factor in evaluating social distinction); Cruz-Guzman v. Barr, 920 F.3d 1033 (6th Cir. 2019).

96. *See supra* notes 75-79 and accompanying text (discussing disentangling the terms "particularity" and "social distinction").

97. *See supra* notes 88-93 and accompanying text (discussing assessing "particularity" and "social distinction" from the relevant society in question).

98. *See supra* notes 94-95 and accompanying text (discussing assessing "particularity" and "social distinction" from the perspective of the relevant society at large, not the persecutor).

99. *See supra* notes19-22 and accompanying text (discussing the *Saravia v. Barr* class action settlement and related federal court cases).

100. For the necessity of documenting the relevant society's recognition of a particular social groups, *see, e.g., In re* S-E-G-, 24 I. & N. Dec. 579, 586–87 (BIA 2008) (denying "Salvadoran youth" recognition because there was "little in the background evidence" to suggest Salvadoran society perceived them as a group).

101. Pablo Ceriani Cernadas & Marinka Yossiffon, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges*, *in* CHILDHOOD, MIGRATION, AND HUMAN RIGHTS 161 (2015), https://cgrs.uchastings.edu/sites/default/files/18_Lanus_English_1.pdf; U.N. High Comm'r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (2014), https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html.

their distinct vulnerability be properly addressed. As one such Salvadoran expert states:

> Another direct effect of the rise of gangs in El Salvador is widespread forced recruitment of children. The gangs especially target for recruitment those children who possess qualities seen as useful or desirable to the gangs. Youth known for displaying leadership qualities, for example, are often targeted.[102]

Findings that gang-based particular social groups fail because gang violence is too "indiscriminate"[103] or because of reliance on the persecutor's perspective[104] are also vulnerable. Circuits warn against drawing distinctions based on gradations in membership[105] and expect the broader, societal perspective to be evaluated.[106] A unique society's recognition of the special vulnerability of its children to such violence is not altered simply because gangs amply use violence.

IV. ADDRESSING THE INTENT TO DENY

Regardless of any improved understanding of the terminology of particularity and social distinction, the changes will not be enough for gang-based youth asylum claims. For these children's claims to successfully advance, not only the means, but the overarching intent to deny, must be addressed. Put differently, if we admit that the underlying distrust of gang-related cases in the *Saravia* case, asylum, or any other legal context may not be wholly unjustified, what measures can be used to ensure awarding asylum in the gang-based context does not forsake United States safety?

The *Saravia s*ettlement witnessed numerous procedural measures put in place to safeguard against unfounded prejudices while allowing for evaluation of real danger.[107] Fortunately, asylum law has numerous existing provisions which prevent and otherwise bar granting asylum to undesirable individuals. These measures address questions of risk on an individual case-by-case basis, rather than using a blanket proxy to deny all gang-based cases.[108]

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102. Roberto Rodriguez Melendez, Co-Director, José Simeón Cañas Central American University, Investigations Unit, Expect Declaration (Nov. 26, 2014).

103. For the challenges to gang-based asylum cases due to the recognition of general gang violence, *see supra* notes 48-54 and accompanying text.

104. For criticisms of the use of a persecutor's motives to evaluate a particular social group, *see supra* notes 94-95 and accompanying text.

105. *See, e.g., supra* notes 93and accompanying text.

106. *See, e.g., supra* notes 94 and accompanying text.

107. For discussion of the *Saravia* settlement, *see supra* notes 9-17and accompanying text.

108. For discussion of the BIA's previous administrative bar to asylum for gang-related cases, *see Kelly, supra* note 38, at 221, 226.

As an initial matter, asylum is conditioned on a positive exercise of discretion.[109] Both asylum and withholding of removal standards also include mandatory bars against denying relief to anyone who engages in persecution, has been convicted of a "particularly serious crime," commits "a serious nonpolitical crime," or is otherwise regarded "as a danger to . . . security . . . ."[110] Courts have routinely used such discretionary and mandatory bars to deny relief to wrongdoers.[111] Importantly, the *Saravia* settlement now adds another safeguard to curb against the abuse of such measures in the asylum context. As the *Saravia* settlement details, in cases of asylum (as in other recognized *Saravia* protected benefits), "adequate notice"' and "a meaningful opportunity to be heard" shall be provided to the applicant prior to a denial based "partially or entirely on the basis of suspected gang affiliation."[112]

CONCLUSION

The potential breadth of the particular social group requirement for seeking asylum in the United States will continue to be tested by children and adults escaping violence from countries all over the world. In each instance, prejudices cannot substitute for due consideration of standards and their proper application. For children fleeing gang violence, the lessons taught by the *Saravia* youth can educate our asylum law.

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109. *See* 8 U.S.C. § 1158(b)(1)(A) (2006) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum . . . . ") (emphasis added).

110. *See* 8 U.S.C. §§ 1158(b)(2)(A)(i)–(iv), 1231(b)(3)(B)(i)–(iv) (asylum and withholding of removal exceptions). Asylum also denies relief to certain individuals found inadmissible or deportable based on terrorism grounds. 8 U.S.C. § 1158(b)(2)(A)(v). When individuals are not eligible for asylum or withholding for such reasons, the Convention Against Torture (CAT) is typically another form of relief sought. CAT is defined by the United States as follows:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

Pub. L. 105-277, div. G., tit. XXII, § 2242, 112 Stat. 2681-822 (1998). CAT was enacted into U.S. law on October 21, 1998, by the Fiscal Year 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act. *Id.* H.R. REP. NO. 144-825 (1998); S. REP NO. 101-30 (1990). *See also* 136 CONG. REC. S17486, S17491–92 (1990); G.A. Res. 39/46 (Dec. 10, 1984). For further discussions of withholding of removal and CAT as alternatives to asylum, *see* LEGOMSKY & THRONSON, *supra* note 35, and accompanying text.

111. Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009) (recognizing the explicit congressional bars to asylum and withholding of removal).

112. Saravia Settlement Agreement, *supra* note 18, at 21.