CASE COMMENT

HEY, HEY, THE GANG'S ALL HERE! THE FOURTH CIRCUIT FIGHTS FOR FORMER GANG MEMBERS IN *MARTINEZ V. HOLDER*

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"There's a staggering humanitarian crisis on the U.S. border, and it's only going to get worse."[1]

I. INTRODUCTION: CRISIS ON THE SOUTHERN BORDER

Imagine for a moment that you live in one of the most violent cities in Central America.[2] The criminal gangs that wreak havoc in your hometown have just murdered your best friend because he refused to join their organization.[3] You have done everything in your power to resist the gangs' recruitment, but now they are demanding that you join or face the consequences.[4] As a last resort, you flee to the United States, and make it into the country illegally, but eventually the Department of Homeland Security catches up with you and initiates deportation proceedings.[5] You hope the law will offer you protection, but when the judge's decision to deport you is finally handed down, you are

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[1] *See* Brett Logiurato, *There's A Staggering Humanitarian Crisis On The US Border, And It's Only Going To Get Worse*, BUSINESS INSIDER (June 16, 2014), http://www.businessinsider.com/immigrant-children-border-crisis-2014-6.

[2] Although these facts are fictional, they are loosely based on factual scenarios from news stories, and cases where individuals who refused to join criminal gangs attempted to escape by entering the United States illegally, only to be refused protection under current asylum law. *See, e.g.*, Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014) (reversing Board of Immigration Appeals decision that former gang members cannot qualify for refugee protection based on former gang membership); Zelaya v. Holder, 668 F.3d 159 (4th Cir. 2012) (denying particular social group refugee claim of young Honduran males who refused to join gangs); Mayorga-Vidal v. Holder, 675 F.3d 9 (1st Cir. 2012) (upholding decision of Board of Immigration Appeals that young Salvadoran males who resisted gang recruitment did not constitute particular social group or asylum purposes); Larios v. Holder, 608 F.3d 105 (1st Cir. 2010) (rejecting proposed social group of Guatemalan youth who resisted gang recruitment due to lack of social visibility and sufficient particularity); Benitez-Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (arguing that former members of MS-13 constitute particular social group eligible for asylum and withholding of removal because status as former gang member cannot be changed except by rejoining gang); *Immigrant children crossing border into U.S. to escape violence*, CBS NEWS (June 17, 2014, 6:44 PM), http://www.cbsnews.com/videos/immigrant-children-crossing-border-into-united-states-to-escape-violence/.

[3] *See* INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR, 76 (2007), *available at* http://www.wola.org/sites/default/files/downloadable/Citizen%20Security/past/Harvard_Gangs_No PlaceToHide.pdf (noting that "Salvadorans who oppose gangs, whether by refusing to join, leaving a gang, or not complying with gangs' demands [sic], may face violent retribution on account of this retribution").

[4] *See id.* at 78 (quoting 25 year old former gang member) ("We would tell the young people to join . . . . We recruited four or five at a time. We killed several [people in the neighborhood] for not wanting to join us . . . . We killed about six guys around thirteen or fourteen years old . . . .").

[5] *See* CBS NEWS, *supra* note 2; *see also Martinez*, 740 F.3d at 906 (discussing how Department of Homeland Security had initiated removal proceedings based on illegal entry).

shocked to learn that you might have been granted asylum, if only you had joined the gang first.[6] In the Fourth Circuit, asylum may be granted based on an individual's status as a former gang member in cases where that individual otherwise might not be eligible if he had refused to join a gang.[7]

Stories like the above hypothetical have become all too common with the proliferation of violent criminal gangs like Mara Salvatrucha (MS-13) and the 18th Street Gang (M-18) in Central America.[8] A recent surge in undocumented

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[6] *See, e.g.*, *Martinez*, 740 F.3d at 906 (recognizing that former members of MS-13 who have renounced their membership may be eligible for asylum and withholding of removal); *Benitez-Ramos*, 589 F.3d at 429 (arguing that gangs are groups and former members of such groups share immutable characteristics that may subject them to persecution and therefore qualify them for asylum).

[7] *See Martinez*, 740 F.3d at 913 (holding that former gang members may qualify for refugee status based on immutable characteristic of former gang membership); *see also Zelaya*, 668 F.3d at 165 (holding that it is not "manifestly contrary" to law to deny refugee status to young Honduran males who refused to join gangs).

[8] *See* Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT'L L.J. 417, 418–22 (2014) (noting growth of MS-13 and M-18 in years following Salvadoran and Guatemalan Civil Wars); *see also* Julia Preston, *Hoping for Asylum, Migrants Strain U.S. Border*, N.Y. TIMES (April 10, 2014), http://www.nytimes.com/2014/04/11/us/poverty-and-violence-push-new-wave-of-migrants-toward-us.html; Joe Millman and Miriam Jordan, *Flow of Unaccompanied Minors Tests U.S. Immigration Agencies*, WALL ST. J. (January 29, 2014, 7:41 PM), http://online.wsj.com/news/articles/SB10001424052702303743604579351143226055538?mg=id-wsj; Laura Meckler, *The Numbers: Children at the Border*, WALL ST. J. (July 11, 2014, 11:20 AM), http://blogs.wsj.com/briefly/2014/07/11/children-at-the-border-the-numbers/?KEYWORDS=humanitarian+border+crisis; Diana Villiers Negraponte, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, BROOKINGS INST. (July 2, 2014, 3:15 PM), http://www.brookings.edu/blogs/up-front/posts/2014/07/02-unaccompanied-children-central-america-negroponte.

MS-13 and M-18 are the largest and most violent criminal gangs in Central America. *See* Fogelbach, *supra* note 8, at 418–22. Both gangs have their origins in the United States. *Id.* MS-13 was originally founded in the early 1980s by a group of Salvadoran youth in Los Angeles, California. *Id.* Its founders formed the gang in an attempt to protect themselves from the other violent gangs, like M-18, that had already established a presence in the city. *Id.* M-18 was originally formed in the early 1960s, but grew significantly during the 1980s as Central Americans seeking refuge from civil wars and conflict arrived in Los Angeles. *Id.*

Both of these gangs were largely exported to Central America during the period in the early 1990s that followed the end of the Salvadoran and Guatemalan civil wars. *Id.* The passing of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 led to the deportation of many gang members from the United States to Central America. *Id.* These deported members eventually established the powerful gang presence in El Salvador, Guatemala, and Honduras that we see today. *Id.* El Salvador, Guatemala, and Honduras represent the three countries from which most gang-related asylum seekers come. *See* Meckler, *supra* note 8.

immigrants—including tens of thousands of unaccompanied children—has created a massive humanitarian and political crisis on the southern border, bringing attention to the emerging importance of gang-related asylum issues.[9] Commentators have claimed that many, if not most, of the children flocking to the United States are doing so to escape pervasive gang violence in their home countries.[10] But asylum law in the United States does not offer protection to everyone who comes to the country to escape gang violence.[11]

Asylum law offers protection to refugees, or persons who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, *membership in a particular social group*, or political opinion, [are] outside the country of [their] nationality and [are] unable or, owing to such fear, [are] unwilling to avail [themselves] of the protection of that country."[12] In order to receive refugee status as a member of a particular social group, an individual must show that they share a common, "immutable characteristic . . . that either is beyond [their] power . . . to change or is so fundamental . . . that [they] ought not be required to [change it]."[13] Several federal circuit courts have allowed former gang members to take advantage of particular social group status to gain refugee protection, while leaving individuals who resist gangs with limited legal protection.[14] Such decisions hold that because violent gangs like MS-13 and M-18 punish or kill anyone who attempts to renounce membership or leave the gang, the particular social group of "former gang members" deserves spe-

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[9] *See* Meckler, *supra* note 8 ("The influx of unaccompanied children is creating a humanitarian and political crisis for the Obama administration, as it struggles to house and process thousands of Central American children crossing the U.S.-Mexico border."); Logiurato, *supra* note 1.

[10] *See* Suzanne Gamboa and Carrie Dann, *Children at the Border Raise Question of who is a Refugee,* NBC NEWS (June 30, 2014), http://www.nbcnews.com/storyline/immigration-border-crisis/children-border-raise-question-who-refugee-n144696 ("Many of the children and families arriving at America's southern doorstep, overwhelming shelters and navigating an already clogged system, are fleeing unrelenting violence or economic destitution.").

[11] For a further discussion of what is required to receive protection under United States' asylum law, *see infra* text accompanying notes 24–99.

[12] *See* Deborah E. Anker, *Law of Asylum in the United States*, § 1:2 (Database updated May 2014) (quoting 1951 United Nation Convention relating to the Status of Refugees ratified by United States in 1968) (emphasis added).

[13] *See id.* § 5:42 (quoting Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985)).

[14] The Fourth Circuit has recognized refugee status for former gang members while denying the same for individuals who resisted gang recruitment. *See* Zelaya v. Holder, 668 F.3d 159 (4th Cir. 2012) (holding that young Honduran males who resisted gang recruitment did not qualify for refugee status); Martinez v. Holder 740 F.3d 902 (4th Cir. 2014) (holding that former gang members may qualify for refugee status). The Sixth and Seventh Circuits have also determined that former gang members qualify for refugee status. *See* Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010) (holding that former member of Honduran gang was member of particular social group); Benitez-Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (holding that former gang member qualified for refugee status).

cial protection.[15]

In *Martinez v. Holder*, the Fourth Circuit held that "former gang membership" constitutes an immutable characteristic that may qualify former gang members for refugee status.[16] As a result, even individuals who *voluntarily* join criminal gangs may gain refugee status and protection from deportation.[17]

This Comment argues that the holding in *Martinez* ignores the legislative intent of asylum law, and recommends that courts adopt an approach that focuses on whether gang membership was originally voluntary or forced.[18] Part II traces the evolution of asylum law in the United States as it has been applied to individuals seeking particular social group status as former members of criminal organizations.[19] Part II also provides a brief discussion of the legal relevance of forced gang recruitment.[20] Part III outlines the Fourth Circuit's reasoning in *Martinez*.[21] Part IV provides a critical analysis of the court's holding in *Martinez* and argues that asylum law was never intended to offer protected status to individuals who voluntarily join criminal gangs.[22] Part V concludes with an assessment of the practical implications of *Martinez* and recommends that courts adopt an approach that focuses on whether an individual's gang membership was, in the first instance, voluntary or forced.[23]

II. GANGLAND: ASYLUM LAW IN THE UNITED STATES AND ITS APPLICATION TO CURRENT AND FORMER GANG MEMBERS

The development of "particular social group" jurisprudence in the United

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[15] *See Martinez*, 740 F.3d at 905 ("[Martinez] claims that as a former member of the violent Mara Salvatrucha gang . . . [he qualifies for refugee status because] he would be killed if sent back to El Salvador because he renounced his membership . . . .").

[16] *See id.* at 913 (reversing BIA's decision that former gang membership is not immutable characteristic of particular social group for purposes of asylum protection).

[17] *See Benitez-Ramos*, 589 F.3d at 428 (reporting that Ramos voluntarily joined Mara Salvatrucha when he was fourteen).

[18] For a further discussion of how the holding in *Martinez* overlooks the legislative intent of asylum law, *see infra* text accompanying notes 150–75.

[19] For a further discussion of the development of asylum law in the United States and the evolution of jurisprudence regarding refugee protection based on particular social group status, *see infra* text accompanying notes 30–91.

[20] For a further discussion of the legal relevance of forced gang recruitment, *see infra* text accompanying notes 92–99.

[21] For a further discussion of the facts, holding and rationale of *Martinez*, *see infra* text accompanying notes 100–49. For a further discussion of a suggested alternative approach, *see infra* text accompanying notes 166–82.

[22] For a further discussion of the legislative intent of asylum law, and a critical analysis of the holding in *Martinez*, *see infra* text accompanying notes 150–75.

[23] For a further discussion of the impact of the *Martinez* holding, and court decisions that follow a similar line of reasoning, *see infra* text accompanying notes 176–182.

States is somewhat convoluted.[24] Asylum law in the United States is expressly based on international conventions, which generally stipulate that voluntary association with a criminal organization will act as a bar to receiving refugee status.[25] However, because the term "particular social group" has not been statutorily defined, courts have been somewhat inconsistent in their interpretation and application of the law.[26] As previously mentioned, several circuit courts have held that former gang members constitute a particular social group; however, the First Circuit has held that Congress never intended to grant refugee status based on voluntary membership in a criminal gang.[27] Although courts have generally emphasized the current, inactive, or former membership status of gang members, the issue of forced gang recruitment has not received much attention in particular social group cases.[28] Although the circumstances of gang recruitment are typically tragic, the distinctions between voluntary and forced gang membership have important legal consequences for particular social group cases.[29]

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[24] For a further discussion of the development of asylum law in the United States and its application to members of a particular social group, *see infra* text accompanying notes 24–91.

[25] *See* Deborah E. Anker, *Law of Asylum in the United States*, § 1:1 (Database updated May 2014) ("U.S. asylum law is domestic law expressly based on international law."). In her treatise on this topic, Deborah Anker also points out that the international sources of domestic law—sources that generally influence asylum decisions in domestic courts—include "the Refugee Convention itself, interpretations and pronouncements of the United Nations High Commissioner for Refugees (UNHCR), interpretations from tribunals of various states that are parties to the Convention, and other relevant bodies of international law, including human rights law and international criminal law." *Id.* For a further discussion of the importance of pronouncements of the UNHCR to former gang member cases, *see infra* text accompanying notes 155–56.

[26] *See* Cantarero v. Holder, 734 F.3d 82, 85 (1st Cir. 2013) ("The [law] does not define the term particular social group. The term originated in the [United Nations Convention relating to the status of refugees], with no guidance in the legislative history as to its meaning. Because of this indeterminacy in the drafting process, the United States, along with other developed countries, has had to struggle to give meaning to a term that has little pedigree of its own.") (citation and internal quotation marks omitted); *see also* Deborah E. Anker, *Law of Asylum in the United States*, § 5:41 (Database updated May 2014) (addressing causes of "confusion in interpretation" of particular social groups).

[27] *See supra* text accompanying note 14; *see also Cantarero*, 734 F.3d at 86 (arguing that Congress did not intend to give protected status to former gang members because it would undermine manifest humanitarian purpose of asylum).

[28] For further discussion of the distinctions made between current, inactive, and former gang members, *see infra* text accompanying notes 58–91.

[29] For further discussion of the distinction between voluntary gang membership and forced gang recruitment, *see infra* text accompanying notes 92–98.

A. *Refugee Act of 1980*

The United States ratified the United Nations Convention relating to the Status of Refugees—the primary international treaty on the subject—in 1968.[30] However, Congress did not codify a domestic asylum statute until 1980.[31] Nonetheless, The Refugee Act of 1980 specifically adopted the same language and meanings included in the United Nations treaty.[32] In fact, the leading commentator on asylum law in the United States has noted that, "[both] Congress and the Supreme Court have been clear . . . [that] the 1980 Refugee Act [was intended] to reflect U.S. legal obligations under the Refugee Convention."[33] Because the Refugee Act of 1980 was expressly and intentionally based on international law, domestic courts draw heavily from international sources when adjudicating refugee cases.[34]

The Refugee Act of 1980 provides three basic forms of protection for refugees: asylum, withholding of removal, and protection from removal under the Convention Against Torture.[35] Asylum is technically a discretionary protection offered to those persons who meet the definition of a refugee; however, it is rarely denied to qualifying individuals.[36] Withholding of removal protection is similar to asylum but imposes a higher burden of proof, and it is *non-discre-*

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[30] *See also* Anker, *supra* note 25 at § 1:1 (discussing history of United Nations Refugee Convention and Congress's adoption of Refugee Act of 1980).

[31] *See* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102; *see also* Anker, *supra* note 25 at § 1:1 ("[Asylum Law] has been a formal part of U.S. domestic law for 33 years. The United States ratified the major international refugee treaty, the United Nations Convention relating to the Status of Refugees [ ] in 1968, but it did not enact specific statutory measures until 1980.").

[32] *See* Anker, *supra* note 25 at § 1:1 (noting that "U.S. asylum law is domestic law expressly based on international law").

[33] *See* Anker, *supra* note 25 at § 1:1

[34] *See* Anker, *supra* note 25 at § 1:1 (noting that UNHCR interpretations and pronouncements constitute one source of U.S. Asylum law). Although UNHCR pronouncements are here referred to as a "source" of domestic asylum law, courts in the United States recognize that such sources not binding, though they may provide pertinent insight into the meaning of the law. *See Acosta*, 19 I. & N. Dec. 211, 220 (BIA 1985) ("Since Congress intended the definition of a refugee in [the Refugee Act of 19080] to conform to the [United Nations Convention], it is appropriate for us to consider various international interpretations of that agreement. However, these interpretations are not binding upon us in construing [the Refugee Act] . . . who should be considered a refugee is ultimately left by the [Convention] to each state in whose territory a refugee finds himself." (citing Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, Transnat'l Legal Probs. of Refugees: 1982 MICH. Y.B. INT'L LEGAL STUD. 339, 344–45 (1982))).

[35] *See* Deborah E. Anker, *Law of Asylum in the United States*, § 1:2 (Database updated May 2014) (addressing three major treaty-based forms of protection for individuals fleeing persecution in home country).

[36] *See id.* ("Under U.S. law, asylum is formally discretionary, though discretionary denials are not common.").

tionary when an individual sufficiently proves that their "life or freedom would be threatened in [their home] country . . . ."[37] Finally, the Convention Against Torture (CAT) protects individuals who demonstrate that they will suffer extreme human rights abuses in their home country, either at the hands of the government or as a result of the state's acquiescence to such abuse.[38]

B. *Development of Particular Social Group Law*

Both United States' law and the international law on which it is based are clear in stating that individuals persecuted as a result of their membership in a particular social group may be considered refugees.[39] However, neither source provides a specific definition of the term "refugee".[40] The Board of Immigration Appeals (BIA) has provided a general framework for determining whether proposed social groups may be accepted, although specific determinations are made in each federal circuit on a case-by-case basis.[41] As a result, interpretations of the law have widely differed, particularly in cases addressing proposed social groups based on association with criminal organizations such as gangs.[42]

1. *Matter of Acosta* and Immutable Characteristics

Matter of Acosta was the first case to establish a functional definition for

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[37] *See id.* (indicating that "[t]he United States may be unique among signatories to the treaty in interpreting the withholding of removal provision as imposing a higher burden of proof than asylum").

[38] *See id.* (acknowledging that CAT protects individuals when government "has failed in its fundamental obligation" to protect citizens resulting in marginalization and inability to exercise certain fundamental rights).

[39] *See id.* (recounting Refugee Convention definition of "refugee").

[40] *See* Benitez-Ramos v. Holder, 589 F.3d 426, 428 (7th Cir. 2009) (asserting that "there is no statutory definition of 'particular social group'" but also that BIA has provided definition); *see also Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985) ("The requirement of persecution on account of 'membership in a particular social group' comes directly from the Protocol and the U.N. Convention. Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol. This ground was not included in the definition of a refugee proposed by the committee that drafted the U.N. Convention; rather it was added as an afterthought.") (citations omitted).

[41] *See* Deborah E. Anker, *Law of Asylum in the United States*, § 5:40 (Database updated May 2014) (". . . the best and most functional definition of [particular social group] can be found in the [BIA's] decision in *Matter of Acosta* . . . ."); *see also id.* § 5:41 ("Practitioners have often presented convoluted and circular [particular social groups] . . . . Adjudicators have also engrafted elements from other grounds onto the [particular social group] definition."); Acosta, 19 I. & N. at 233 ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.")

[42] For a further discussion of how various courts have addressed the issue of particular social groups based on past association with criminal groups, *see infra* text accompanying notes 59–91.

"particular social groups."[43] Not only has the *Acosta* definition governed the development of social group jurisprudence in the United States, but it has also been widely accepted and influential in international courts as well.[44] In *Acosta*, a thirty-six year-old male citizen of El Salvador entered the United States illegally and sought asylum and withholding of removal protection based on his membership in a particular social group.[45] The proposed social group consisted of Salvadoran taxi drivers who had suffered death threats and harassment as a result of their refusal to participate in guerilla organized work stoppages in their home country.[46] The BIA held that in order to establish refugee status based on a particular social group, one must show:

> persecution . . . directed toward an individual who is a member of a group of persons all of whom share a common, *immutable characteristic*. 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."[47]

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[43] *See* Anker, *supra* note 41, at § 5:40 (declaring definition of particular social group in *Acosta* to be "best and most functional").

[44] *See id.* (noting that *Acosta* definition "has been adopted and elaborated upon by the Canadian Supreme Court, decisions by other states parties to the Convention, and guidelines issued by the UNHCR").

[45] *See Acosta*, 19 I. & N. at 213 (detailing factual history of case and reporting that "[Acosta] conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. [He then] sought relief from deportation by applying for a discretionary grant of asylum . . . and for mandatory withholding of deportation to El Salvador . . . .").

[46] *See Acosta*, 19 I. & N. Dec. 211, 216–17 (BIA 1985) (repeating facts of case). This group of taxi drivers was organized as a cooperative organization called "COTAXI." *Id.* The group consisted of approximately 150 individuals and was organized to enable members to purchase and operate taxis in the city. *Id.* During the late 1970's, COTAXI drivers were contacted by anonymous sources, believed to be guerillas, who urged the taxi drivers to participate in work stoppages throughout the city. *Id.* When the members of COTAXI refused to stop working, many of their taxis were "seized and burned, or used as barricades." *Id.* Because they still refused to participate in the work stoppages, five drivers from COTAXI (three of whom were Acosta's friends) were killed on the job. *Id.* Acosta received multiple threats on his life, and at one point was badly beaten by three anonymous men. *Id.* To escape further persecution, Acosta escaped from El Salvador to the United States. *Id.* These facts are included to demonstrate the dire conditions faced by individuals who seek asylum, and to recognize that, regardless of circumstances, individuals must meet the established requirements in order to qualify for protection. *Id.* at 236–37 (holding that respondent did not meet legal requirements for asylum or withholding of removal).

[47] *See id.* at 233 (emphasis added) (applying the ejusdem generis doctrine to develop particular social group definition). The doctrine of ejusdem generis ("of the same kind") holds that the general words included in a statute should be consistently interpreted with the more specific words. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES, § 5:41 (2011 ed. 2011) (database updated May 2014) (defining doctrine of ejusdem generis).

The BIA went on to clarify that shared characteristics are only considered immutable when they "either cannot [be changed], or should not be required to [be changed] because [they are] fundamental to [a person's identity or conscience]."[48] Consequently, the BIA held that the proposed social group of Salvadoran taxi drivers was inadequate because their shared characteristics were not immutable such that they could not (or should not) be changed.[49] In other words, it would not have been improper to expect the Salvadoran taxi drivers to change jobs or participate in the work stoppages to avoid persecution.[50] Although the immutability requirement established in *Acosta* provides the basic framework for determining refugee status based on membership in a particular social group, several additional requirements tend to factor into decisions to grant asylum.[51]

2. Social Distinction and Particularity

In 2006, the BIA added a "social visibility" requirement to the *Acosta* immutability framework.[52] More recently, the visibility requirement has been

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In this case, following the doctrine of ejusdem generis requires that the general term "particular social group" be interpreted consistently with the other, more specific grounds for asylum included in the statute—political opinion, religion, race, and nationality. *Id.* ("As the Board explained in *Matter of Acosta*, the other four grounds—political opinion, religion, race, and nationality—can be understood as specific applications of the immutable characteristic/fundamental beliefs paradigm."). In other words, the court in *Acosta* held that all of the grounds for refugee protection in the statute were intended to protect individuals' immutable, fundamental identities. *See* Acosta, 19 I. & N. at 233 ("[R]ace, religion, nationality, and political opinion. Each of these grounds describes persecution aimed at an immutable characteristic . . . .") (internal quotation marks omitted).

[48] *See Acosta*, 19 I. & N. at 233–34 ("Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.").

[49] *See id.* at 234 ("The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages.").

[50] *See id.* (recognizing that while "[i]t may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats . . . the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.").

[51] *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES, § 5:43 (2011 ed. 2011) (database updated May 2014) (addressing additional requirements of social distinction and sufficient particularity).

[52] *See id.* ("Although for 25 years *Acosta* has provided the accepted framework for analyzing PSG, the Board did not consistently apply it. In 2006 in the case of *Matter of C-A-*,

changed to one of "social distinction."[53] In an attempt to limit the vast array of potentially "amorphous" social group claims, the BIA also added a "particularity" requirement to reinforce the *Acosta* framework.[54] The social distinction and particularity requirements have not been universally adopted by the circuit courts.[55] In fact, the controversy surrounding these additional criteria has led one commentator to state that, "[b]oth social visibility and particularity threaten the integrity and grounding of the *Acosta* framework."[56] Despite the fact that the social distinction and particularity requirements have not been uniformly adopted or applied, courts have invariably addressed the more significant immutability requirement in gang-related particular social group cases.[57]

3. Gang Signs: Current vs. Former Members

Matter of McMullen was one of the first cases to address the issue of refugee status for current members of criminal organizations.[58] In *McMullen*, a member of the Provisional Irish Republican Army (PIRA) entered the United States using a fraudulent passport, and subsequently sought asylum and withholding of removal protection when faced with deportation.[59] McMullen argued that

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the Board, without acknowledgement that it was changing course, added a new criterion of 'social visibility' onto the *Acosta* framework.").

[53] *See id.* ("The Board in two very recent cases issued in 2014 changed the social visibility test to one of social distinction.") (internal quotation marks omitted).

[54] *See id.* ("Board decisions state that 'particularity' requires a group description that is not subject to too many variable interpretations making it difficult to delimit the group, but that the criterion is not meant to exclude a group simply because there is ambiguity 'at the margins.'").

[55] *See id.* (expressing Seventh and Third Circuits' frustrations in holding that "[these] requirements are not entitled to *Chevron* deference" as well as First Circuit's questioning of social visibility).

[56] *See id.* ("All classifications—even race and nationality—contain a degree of ambiguity at the margins, and some of the grounds of persecution can contain significant ambiguity as to who is a member. The Board's reasoning regarding the particularity requirement, unfortunately, has been unintelligible and its application has been inconsistent at best. . . . [D]ecisions by the Third and Seventh Circuits emphasize [that] the particularity and social visibility requirements may be indistinguishable from each other and are fundamentally incoherent.").

[57] For a further discussion of application of Acosta immutability framework in cases involving gang-related particular social group claims, *see infra* text accompanying notes 58–90.

[58] *See McMullen*, 19 I. & N Dec. 90, 90 (BIA 1984) (addressing current but inactive member of the Provisional Irish Republican Army).

[59] *See id.* at 91–92 (noting factual circumstance of McMullen's arrival in United States). McMullen's membership status is analytically important when considering the holding in *Martinez*. *See* Martinez v. Holder, 740 F.3d 902, 913 (4th Cir. 2014) (contending that "[t]he BIA's reliance on *In re McMullen* in this case was misplaced in that McMullen was still a member of the PIRA," not former member). The facts of *McMullen* indicate that while he

his refusal to participate in a kidnapping operation constituted a political opinion that "would [ ] subject [him] to persecution by the PIRA if [he were] deported to . . . Ireland."[60] The BIA rejected this argument and held that Congress did not intend to protect individuals who voluntarily joined criminal organizations.[61] Furthermore, the BIA stated that, "internal use of violence by the PIRA does not constitute persecution within the meaning of the [law]."[62] Because McMullen voluntarily joined the PIRA with knowledge of the group's violent tendencies, he could not receive asylum or withholding of removal based on his subjection to internal PIRA discipline.[63]

Similarly, in *Arteaga v. Mukasey*, the Ninth Circuit held that Congress never intended to offer refugee protection to individuals who voluntarily associate with criminal gangs, regardless of whether they are current or former members.[64] In *Arteaga* a Salvadoran male who had been admitted into the United States as a lawful permanent resident joined the "New Hall 13" gang when he was fourteen years old.[65] The Department of Homeland Security sought to

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had been an active member of the PIRA, McMullen officially resigned from the organization in 1974. *McMullen*, 19 I. & N. at 93 (noting that "[t]he respondent testified that he had no fear of reprisals [ ] in 1974 after his initial resignation from the PIRA"). The court stated that, "[t]he facts of this case have previously been discussed in the Ninth Circuit's decision and our prior order." *Id.* at 92.

In the Ninth Circuit opinion McMullen argued that he only rejoined the gang after repeated intimidation attempts and "including an incident in which he claim[ed] he was kidnapped at his place of employment and driven to a remote area . . . ." McMullen v. INS, 658 F.2d 1312, 1314 (9th Cir. 1981). However, the BIA ultimately held that, "[d]espite his claim that he agreed to work for the PIRA because of threats, [McMullen began working with the PIRA again] because '[t]hey were low on manpower and money and the organization was trying to get back on its feet.'" *McMullen*, 19 I. & N Dec. at 94 (addressing McMullen's voluntary membership status in PIRA) (internal citations omitted). Therefore, the BIA proceeded in this case as if McMullen was a current member of a criminal organization. *Id.*

[60] *See McMullen*, 19 I. & N Dec. at 93 (describing McMullen's supposed fear of persecution).

[61] *See id.* at 95 ("[McMullen's actions did not] represent conduct which Congress intended to protect by its adoption of the asylum and withholding provisions contained in [the Refugee Act of 1980].").

[62] *See id.* (claiming that because internal use of violence by PIRA was apolitical and indifferent to political views of members it did not satisfy legal definition of persecution).

[63] *See id.* ("Having elected to participate in the PIRA, with knowledge of its internal disciplinary policies, the respondent is not now in a position to complain.").

[64] *See* Arteaga v. Mukasey, 511 F.3d 940, 940 (9th Cir. 2007) (holding that regardless of current or former status member of Mexican street gang could not receive particular social group status for purposes of asylum and withholding of removal because of voluntary association with criminal gang).

[65] *See id.* at 942–43 (recounting facts and stating that New Hall 13 is "a malignant Mexican street gang"). Arteaga was brought into the United States by his parents when he was four years old. *Id.* In this case, the court noted that after joining the gang, "Arteaga would go

have him deported after he was convicted of an aggravated felony and illegal possession of methamphetamine.[66] Arteaga argued that his tattoos, which unmistakably marked him as a gang member, were an immutable characteristic that qualified him for refugee status as a member of a particular social group.[67] Arteaga's proposed social group was defined as "American Salvadorian [sic] U.S. gang members of a Chicano American street gang, and [ ] former members of the same."[68] The court stated that, "calling a street gang a 'social group' as meant by our humane and accommodating law does not make it so," and held that offering refugee protection to Arteaga as a member of a particular social group would subvert Congress's original intent.[69] The court stated that such a holding would "pervert the manifest humanitarian purpose of the statute [by creating] a sanctuary for universal outlaws."[70]

However, in *Lukwago v. Ashcroft*, the Third Circuit held that former mem-

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'gang banging,' participating in violent fights involving knives and guns, and going into rival-gang neighborhoods to find rival-gang members to beat up or run over with a vehicle." *Id.* In addition to participating in violence against others, Arteaga's gang membership "made him a target for violent attacks by rival gangs." *Id.* at 943.

[66] *See id.* at 943 ("Arteaga was convicted in California Superior Court of 1) possession of methamphetamine in violation of California Health and Safety Code . . . 2) unlawful driving and taking of a vehicle . . . and 3) possession of a concealed weapon . . . . He was sentenced to two years for each conviction, the sentences to run concurrently. Subsequently, the Department of Homeland Security charged Arteaga with removability as an alien convicted of an aggravated felony and an offense related to a controlled substance.").

[67] *See id.* at 945 (claim by Arteaga's Counsel) ("Arteaga's unique history and shared cultural experience as a *former* gang member qualifie[d] as 'an innate characteristic' and thus he [was] a member of a social group."). Arteaga also pointed out that, "he could not clothe himself to adequately conceal all of his tattoos . . . which mark[ed] him . . . as a member of New Hall 13 . . . ." *Id.* at 943. Consequently, he argued that if he were deported, rival gangs would persecute him because of these unmistakable markings. *Id.*

[68] *See id.* at 942 (reciting Arteaga's proposed social group) (internal citations omitted). Here, it is important to emphasize that the proposed social group in *Arteaga* includes both current and former gang members. *Id.* In Benitez-Ramos v. Holder, the Seventh Circuit distinguished its case from *Arteaga* on the assumption that *Arteaga* was principally decided on the issue of current gang membership. *See* Benitez-Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009) (concluding that *Arteaga* was decided "not [on the issue of] Arteaga's status as a former gang member but [on] his possible status as a current member"). The Seventh Circuit's conclusion on the holding in *Arteaga* was essentially incorrect, as the court here states that, "Arteaga's attempt to present himself as a former member of a social group fares no better." *Arteaga*, 511 F.3d at 946.

[69] *See id.* at 945–46 (9th Cir. 2007) ("Arteaga's 'shared past experience' includes violent criminal activity. We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.").

[70] *See id.* (deciding that refugee protection based on current or former gang membership does not serve humanitarian goal of law). The court also referred to shared past experiences in gangs when it stated that, "such activity is not fundamental to gang members' individual

bership in a violent criminal organization can establish membership in a particular social group, but only in certain circumstances.[71] In *Lukwago*, a fifteen-year-old Ugandan boy was kidnapped by the Lord's Resistance Army and forced to fight as a child soldier.[72] The court held that because "Lukwago share[d] the past experience of abduction, torture, and escape with other former child soldiers," he qualified as a member of a particular social group.[73] The court also held that the immutability requirement was met because Lukwago's status as a former child soldier was "a characteristic he [could not] change and one that [was] now, unfortunately, fundamental to his identity."[74] Therefore, the court held that, in some instances, an immutable characteristic might be based on the shared past experience of involuntary membership in a criminal organization.[75]

Notwithstanding, in *Cantarero v. Holder*, the First Circuit held that the shared past experience of gang membership did not constitute an immutable characteristic because Congress did not want to offer refugee protection to members of criminal groups.[76] In *Cantarero*, a citizen and native of El Salva-

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identities or consciences, and they are therefore ineligible for protection as members of a social group under [the Refugee Act of 1980]." *Id.* at 946.

[71] *See* Lukwago v. Ashcroft, 329 F.3d 157, 178–79 (3d Cir. 2003) (holding that former child soldiers constitute members of particular social group for purposes of asylum and withholding of removal).

[72] *See id.* at 164 (restating facts of case). In this case, members of the Lord's Resistance Army—"a rebel force that oppose[d] the Ugandan government"—attacked Lukwago's home, murdered his parents, and took Lukwago and several others hostage. *Id.* While in captivity, Lukwago was forced to do manual labor; he was forced to learn how to use weapons; and eventually, he "was forced to fight on the front line" in over ten battles against the Ugandan military. *Id.* Lukwago stated in court that his captors warned him that, if he attempted an escape, they would kill him. *Id.* After approximately four months, Lukwago was able to escape captivity, flee Uganda, and make his way to the United States where he sought refugee status as a member of a particular social group. *Id.* at 164–65.

[73] *See id.* at 178 (recognizing Lukwago's proposed social group of former child soldiers) ("[M]embership in the group of former child soldiers who have escaped LRA captivity fits precisely within the BIA's own recognition that a shared past experience may be enough to link members of a 'particular social group.'").

[74] *See id.* (analyzing immutability of Lukwago's shared past experience as forced child soldier).

[75] *See id.* ("[I]nasmuch as we interpret the [law's] reference to a 'particular social group' to include the definition Lukwago has proffered, the record fully supports his claim that he is a member of a 'particular social group' and that he has a subjective fear of persecution by the LRA.").

[76] *See* Cantarero v. Holder, 734 F.3d 82, 87 (1st Cir. 2013) (holding that former membership in MS-18 is not immutable characteristic of particular social group because offering protection based on voluntary gang membership would undermine purpose of asylum law).

An important distinction between *Cantarero* and *Martinez* is that the court in *Cantarero* was obliged to give the BIA's decision deference under the Supreme Court's decision in

dor who had lived in the United States for several years sought refugee protection when he was faced with deportation.[77] Cantarero had joined the East Boston Arm of the 18th Street gang (M-18) when he was sixteen years old.[78] However, two years later he grew fearful of the gang's violent nature, underwent a religious conversion, and decided to leave the gang.[79] Cantarero argued that, if deported, he would face persecution in El Salvador based on his status as a former gang member.[80] In refusing this argument the court stated that:

> . . . it is inconceivable that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.[81]

Additionally, the court stated that recognition of social groups composed of former gang members would "undermine the legislative purpose of [asylum law]."[82] Furthermore, the court noted that such recognition would "offer an incentive for aliens to join gangs [ ] as a path to legal status."[83] Accordingly, the court held that an individual cannot receive particular social group status

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Chevron v. Natural Res. Def. Council. *Id.* at 84–85 (reciting obligations under *Chevron*) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). *Chevron* requires courts to give deference to administrative law decisions when they are "confronted with a question implicating an agency's construction of the statute which it administers." *Id.* at 84–85 (quoting I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)). In such cases the court must determine first, "whether the statute is silent or ambiguous with respect to the specific issue before [it]," and if so, "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 85 (quoting *Chevron*, 467 U.S. at 843). In this case, the court held that its review of the BIA's decision was subject to Chevron deference; furthermore, the court held that the BIA's decision was based on a reasonable interpretation of the Refugee Act of 1980. *Id.* ("We have no doubt that the BIA's decision in this case passes muster under this deferential standard.").

[77] *See id.* at 84 (summarizing circumstances surrounding Cantarero's arrival in United States).

[78] *See id.* at 83 ("The 18th Street gang is a prominent violent criminal gang that is active throughout the United States and Latin America.").

[79] *See id.* at 83–84 ("[Cantarero] learned that gang membership entailed engaging in a variety of illicit activities, including robberies, thefts, and drug dealing . . . . [He] became afraid of the violent nature of gang life following a gang-related shooting . . . . Soon, [he] experienced a religious conversion and decided to leave the gang.").

[80] *See id.* at 84 (noting Cantarero's fear of persecution after leaving gang, especially from Salvadoran branch of M-18, if deported).

[81] *See id.* at 85–86 (quoting Arteaga v. Mukasey, 511 F.3d 940, 945–46 (9th Cir. 2007)) (citation omitted).

[82] *See id.* at 85 (agreeing with BIA's conclusion that recognizing former gang members as particular social group would contravene legislative purpose).

[83] *See* Cantarero v. Holder, 734 F.3d 82, 86 (1st Cir. 2013) (explaining that offering particular social group status to former gang members would reward gang membership).

based on prior gang membership.[84]

In *Benitez-Ramos v. Holder*, the Seventh Circuit reached the opposite conclusion and held that former gang membership is an immutable characteristic and, therefore, can provide a basis for particular social group status.[85] In *Benitez-Ramos*, a Salvadoran member of MS-13 entered the United States illegally, became a born again Christian, and renounced his gang membership.[86] Subsequently, he decided that he could not return to El Salvador because he would be killed for leaving the gang.[87] The court distinguished between current and former gang membership, and held that former gang membership is an immutable characteristic because the only way for a person to change their status as a former gang member is to rejoin the gang—which should not be required.[88] The court also rejected the argument that Congress did not intend to offer refugee protection to former gang members, stating that:

> That is not Congress's view. It has barred from seeking asylum or withholding of removal any person who faces persecution for having been a persecutor (a Nazi war criminal, for example) or who has committed a "serious nonpolitical crime." But it has said nothing about barring former gang members . . . .[89]

In other words, the court held that former gang membership does serve as a basis for particular social group refugee status because it is not one of the specifically enumerated bars to asylum in the Refugee Act.[90] In light of the dis-

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[84] *See id.* ("A former gang member was still a gang member, and the BIA is permitted to take that into account. That he renounced the gang does not change the fact that [Cantarero] is claiming protected status based on his prior gang membership, and he does not deny the violent criminal undertakings of that voluntary association.").

[85] *See* Benitez-Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) (holding that former gang members may receive particular social group status based on immutable characteristic of former gang membership).

[86] *See id.* at 428 (describing Ramos's illegal entry into United States, conversion, and renunciation of gang membership).

[87] *See id.* ("[H]e decided that if he returned to El Salvador he could not rejoin the gang without violating his Christian scruples and that the gang would kill him for his refusal to join and the police would be helpless to protect him.").

[88] *See id.* at 429 (argument by court) ("[A] gang is a group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group . . . . One could resign from [current gang membership] but not from a group defined [by] *former* [gang membership].").

[89] *See id.* at 429–30 (reporting that Congress did not expressly forbid particular social group status based on former gang membership).

[90] *See id.* (arguing lack of congressional intent to bar former gang members). The enumerated bars to refugee protection are listed in the following passage from the Refugee Act of 1980:

> [Refugee status] does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

tinction between current and former gang membership, as well as Congress's failure to expressly mention former gang membership as a bar to refugee status, the court held that former gang membership is an immutable characteristic and, therefore, may establish a particular social group.[91]

C. *The Importance of Forced Gang Recruitment and Involuntary Membership*

The factual issue of gang recruitment—whether an individual's gang membership was voluntary or forced—has important legal ramifications in particular social group cases.[92] The following directive issued by the United Nations High Commissioner for Refugees (UNHCR) illustrates the importance of this distinction:

> In UNHCR's view, voluntary membership in organized gangs normally does not constitute membership of a particular social group within the meaning of the [United Nations Convention relating to the Status of Refugees]. Because of the criminal nature of such groups, it would be inconsistent with human rights and other underlying humanitarian principles of the [ ] Convention to consider such affiliation as a protected characteristic.[93]

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States. 8 U.S.C. § 1231(b)(3)(B).

[91] *See* Benitez-Ramos v. Holder, 589 F.3d 426, 429–30 (7th Cir. 2009). However, the Ninth Circuit did point out that, due to the statutory bar on serious nonpolitical crimes, Ramos may be barred from refugee protection. *See id.* at 431. The court stated that Ramos may not receive protection "[i]f he is found to have committed violent acts while a member of the gang (as apparently he did, although the evidence is not entirely clear)." *Id.*

[92] *See supra* text accompanying notes 58–91.

[93] *See* Fogelbach, *supra* note 8, at 423 (quoting directive issued by UNHCR regarding voluntary membership in organized gangs).

According to the UNHCR, individuals who voluntarily join gangs should not be given refugee status based on that association.[94] However, courts rarely place much emphasis on gang recruitment in particular social group cases based on gang membership.[95]

The UNHCR has also stated that gangs "rely heavily on forced recruitment to expand and maintain their membership."[96] However, at least one commentator has noted that:

> [t]he U.N. does not support this assertion . . . [but simply] leaves the reader to believe that a significant amount of individuals are or were gang members against their will.[97]

Unfortunately, the extent to which gangs actually rely on forced recruitment is not entirely known.[98] Nonetheless, the significant distinction between voluntary and forced recruitment is illustrated by one commentator's observation that, "[how] judges choose to define recruitment will play a central role in the asylum claims of current and former gang members."[99]

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[94] *See id.*

[95] *See* Martinez v. Holder, 740 F.3d 902, 907 (4th Cir. 2014) (reporting that "too some extent" recruitment in gang was involuntary but not discussing significance of issue or determining what exactly makes gang recruitment involuntary).

[96] *See* Fogelbach, *supra* note 8, at 423 ("Nevertheless, a United Nations Guidance Note on Refugee Claims Relating to Victims of Organized Gangs claims that the gangs 'rely heavily on forced recruitment to expand and maintain their membership.'") (quoting U.N. High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, *available at* http://www.unhcr.org/refworld/docid/4bb21fa02.html).

[97] *See id.* Fogelbach also adds in footnote 39 that, "[r]eferences to forced recruitment are unsupported by research. At no time does the U.N. source these claims by providing direct reference to primary or secondary sources or expert testimony." *See id.*

[98] *See* Fogelbach, *supra* note 8, 423–24 (2014) (presenting counterintuitive fact that "[w]ith limited exceptions, there are no reports indicating that MS-13 and M-18 systematically hand select individuals and force them to become gang members"). Fogelbach also states that that, "[a] close look at country conditions reports does not support the U.N.'s assertion of forced recruitment. Rather, an overwhelming amount of Central America youth is [sic] 'at risk' of joining gangs." *Id.* Factors that place Central American youth "at risk" of joining gangs include broken family structures and high rates of poverty. *Id.* at 424–26. Central America gangs offer struggling, at-risk children social acceptance and a way to acquire money and goods that would otherwise be out of their reach. *Id.*

Civil wars throughout Central America left tens of thousands of citizens dead, and caused an enormous breakdown in family structure. *Id.* Fogelbach notes that ninety percent of gang members come from broken families; as well as the fact that forty percent of Salvadorans and seventy-one percent of Hondurans live in conditions of poverty. *Id.* Such terrible country conditions provide a strong incentive for young people to join gangs, many of whom "offer a welfare structure, protection, a social and substitute family network, and a source of livelihood." *Id* at 427. In light of these facts, Fogelbach points out that, "the general consensus is that forced or deliberate recruitment is unnecessary." *Id.*

[99] *See id.* at 423 (indicating importance of defining gang recruitment and distinguishing

III. *MARTINEZ V. HOLDER*: RIVAL CIRCUITS RUMBLE OVER IMMUTABILITY AND PARTICULAR SOCIAL GROUP STATUS

A. *Brute Facts*

Julio Ernesto Martinez was born in San Miguel, El Salvador in 1980.[100] His stepfather died when he was twelve years old.[101] A few years after his stepfather's death, Martinez found structure, camaraderie, and social acceptance with a local group of boys who had similarly lost family members.[102] Martinez and his friends would often go to parties, drink, and smoke marijuana together.[103] Although his group had no official association with any gang, Martinez soon discovered that some of his friends had close ties to MS-13.[104]

Shortly after joining this new group of friends, several gang members who had been deported from the United States arrived in Martinez's neighborhood and "incorporated" his group into MS-13.[105] Martinez and his friends were told

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between forced and voluntary membership). To further illustrate why some Central American youth would voluntarily join such notoriously violent gangs, Fogelbach presented three first-hand accounts gathered from in-depth interviews with former members of MS-13. *Id.* at 427–30. One former member stated that was attracted to gang life because of his low-paying job as a cattle hand – "[a]lthough [he] was one of seven children, he was the only one of his family to join a gang. When asked what would have kept him out of the gang as a teen, [he] stated, 'A job.'" *Id.* Another former gang member from a broken home stated that he joined the gang to achieve greater social standing with women. *Id.* Finally, an individual who joined the gang at age twenty-two after serving in the military during the Salvadoran civil war, stated that he joined the gang when he became bored with his military post planting trees—"He said he voluntarily joined the gang, stating, "The devil took hold of me . . . . You know, sometimes you just go down the wrong path." *Id.* These stories are not presented to trivialize the notion of forced gang recruitment—which surely exists to some extent (as in *Lukwago*)—but to present the fact that many gang members are not forced to join. *Id.* at 428 (stating that "it is possible that their experiences significantly differ from today's youth. That is to say, forced gang recruitment may occur today despite that it is unfounded and unsupported by publicly available reports").

[100] *See* Martinez v. Holder, 740 F.3d 902, 906 (4th Cir. 2014) (noting that "Martinez was born in San Miguel, El Salvador, in 1980 and lived there until he entered the United States unlawfully in 2000").

[101] *See id.* at 906–07 (pointing out fact that Martinez came from broken home).

[102] *See id.* (referring to Martinez's desire for social acceptance and his association with other Central American youth from broken families).

[103] *See id.* (asserting that "the group went to parties, drank, and smoked marijuana together").

[104] *See id.* (commenting that "some of the boys who had recruited [Martinez] into this group [of older boys who also lost family members] were also associated with MS-13").

[105] *See* Martinez v. Holder, 740 F.3d 902, 907 (4th Cir. 2014) (considering that status of group changed when members of MS-13 arrived in Martinez's neighborhood). The facts of the case do not indicate exactly to what extent Martinez's incorporation into MS-13 was involuntary, or whether he had any opportunity to resist this incorporation. *Id.* (stating only that incorporation into MS-13 was "to some extent" involuntary).

that they had no choice but to join the gang, and that they were in fact "already . . . part of MS-13."[106] Rather than resist the incorporation, Martinez accepted his new membership status in MS-13 and agreed to undergo the traditional "jump-in" initiation—a brutal thirteen-second beating that serves as a rite of passage for new gang members.[107] After Martinez was officially initiated into MS-13, the newly-arrived gang members murdered the leaders of his original group of friends and established their control over the group.[108]

On orders from his new gang leaders, Martinez got tattoos to outwardly demonstrate his allegiance to MS-13.[109] He also took part in the disciplinary beating of another gang member who refused to follow orders.[110] Although Martinez did take part in some violent gang activity at first, he was later subjected to beatings for refusing to follow orders.[111] He rejected commands to extort money from certain members of the community and would no longer take part in the disciplinary beatings of other gang members.[112]

Eventually, Martinez grew tired of being beaten and decided to cut his ties with MS-13.[113] Even though two of his friends had already been killed for attempting to quit the gang, Martinez was determined to leave.[114] Martinez shared his intentions with the local gang leader who responded by telling him that the only way to get out of the gang was to die.[115] Still, Martinez remained

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[106] *See id.* ("Martinez testified that the new MS-13 arrivals informed him and his friends that they were 'already . . . part of MS-13' and that they had no option but to join the gang").

[107] *See id.* ("Martinez, who was now 15, agreed to undergo MS-13's initiation rite of a beating that lasts 13 seconds"); *see also* Fogelbach, *supra* note 8, at 433 ("The traditional initiation rite is known as the 'jump-in.' The jump in requires a new member to submit to a gang beating allegedly lasting thirteen and eighteen seconds in the case of MS-13 and M-18, respectively").

[108] *See Martinez*, 740 F.3d at 907 ("Soon after Martinez's induction into MS-13, the deportees killed the original leaders of Martinez's group of friends and became the gang's new leaders").

[109] *See id.* at 907 ("They ordered Martinez to get tattoos signifying his allegiance to MS-13, which he did").

[110] *See Martinez*, 740 F.3d 902, 907 (4th Cir. 2014) (reporting that while Martinez beat fellow gang member for internal disciplinary reasons he also testified that he never committed any crimes for gang).

[111] *See id.* ("Because of his disobedience, the leaders of the gang beat Martinez on a weekly basis.").

[112] *See id.* (reciting fact that Martinez was also subjected to internal disciplinary beatings when he refused gang leaders' orders to extort money from members of community and to beat other gang members).

[113] *See id.* (stating Martinez's reasons for wanting to leave gang).

[114] *See id.* (recounting that by time Martinez was sixteen years old he became tired of beatings and decided to leave MS-13).

[115] *See id.* ("Indeed, two of Martinez's friends who attempted to leave the gang were killed . . . . Several weeks later [Martinez] encountered his local group leader, 'Psycho,' who

firm in his resolve to leave the gang.[116] As a result, the other members of the local MS-13 gang attempted to kill him.[117] Martinez survived the attack and eventually made his way to the United States, where he entered illegally in 2000.[118]

In 2006, Martinez was pulled over for a minor traffic violation and charged with possession of marijuana.[119] However, the Department of Homeland Security (DHS) had already initiated deportation proceedings based on Martinez's illegal entry into the country.[120] Consequently, Martinez pleaded the marijuana charge to probation before trial, and agreed to work with the FBI as a confidential informant in exchange for dropping his deportation proceedings.[121]

Despite his work as an informant, the FBI eventually determined that Martinez was "no longer useful," and DHS reopened his deportation proceedings.[122] Martinez acknowledged that he was subject to removal for entering the country illegally.[123] However, he argued that his life would be in danger if he were forced to return to El Salvador, and that he was eligible for protection under the Refugee Act of 1980.[124] Martinez argued that he qualified as a member of a

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asked him where he had been. When Martinez told Psycho that he wanted to leave the gang, Psycho responded that there was 'only one way to get out,' implying by death.").

[116] *See* Martinez v. Holder, 740 F.3d 902, 907 (4th Cir. 2014) (stating that nonetheless insisted on leaving gang).

[117] *See id.* ("When Martinez nonetheless insisted that he was quitting, gang members beat him and stabbed him, leaving him for dead. Martinez survived, however, and after leaving the hospital, went to live with a cousin in Intipuca, which is about an hours drive south of San Miguel").

[118] *See id.* at 906 (noting that Martinez entered the US in 2000). Martinez also experienced several more attempts on his life before escaping to the U.S. *Id.* at 907 (stating that MS-13 members found him and shot at him from car sending him to hospital for several weeks and shot at him again after he left hospital).

[119] *See id.* at 906 ("In March 2006, when Martinez was stopped while driving his friend's car with a malfunctioning brake light, the police found a marijuana blunt in a dashboard compartment of the car. Although Martinez denied any connection with the marijuana, he pleaded to probation before judgment in December 2007.").

[120] *See id.* (commenting that had already initiated removal proceedings based on his illegal entry).

[121] *See id.* (noting that DHS agreed to "close[ ] the proceedings because Martinez agreed to serve as a confidential informant, assisting the FBI in making controlled purchases of drugs and fake green cards").

[122] *See* Martinez v. Holder, 740 F.3d 902, 906 (4th Cir. 2014) (reporting that DHS reopened removal proceedings after FBI determined Martinez was no longer useful as confidential informant).

[123] *See id.* ("Martinez conceded that he was subject to removal, but he sought relief from removal on the ground that his life would be endangered should he be returned to El Salvador.").

[124] *See id.* at 908 (referring to Martinez's argument that under Refugee Act "he was

particular social group based on his former status as a member of MS-13.[125] However, both the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) rejected Martinez's claim, and held that:

> [b]eing a former member of a gang in El Salvador is not an immutable characteristic of a particular social group that could qualify for withholding of removal, since the characteristic resulted from the voluntary association with a criminal gang.[126]

Martinez then appealed the decisions of the IJ and the BIA to the Fourth Circuit Court of Appeals.[127]

B. *The Fourth Circuit's Reasoning: Once a Former Gang Member, Always a Former Gang Member*

The Fourth Circuit addressed three separate issues in *Martinez*.[128] First, the court had to decide whether, and to what degree, it would give *Chevron* deference to the BIA's prior decision.[129] The second most pertinent issue the court had to decide was whether former membership in a gang constitutes an immutable characteristic of a particular social group.[130] Finally, the court was asked to decide whether Martinez provided enough evidence to support his request for protection under the Convention Against Torture.[131] Ultimately, the court rejected the BIA's decision that former gang membership was not an immutable characteristic.[132]

1. *Chevron* Deference

The court began its analysis by announcing its "jurisdiction to review final orders of removal [ ] and final orders [ ] made by the BIA following appeal

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eligible for withholding of removal because his life was threatened on account of his membership in the particular social group of former gang members from El Salvador").

[125] *See id.* (stating that Martinez claimed that "as a *former* member of [MS-13], he is a member of a 'particular social group,' as would qualify for withholding of removal under § 1231(b)(3), and that he would be killed if sent back to El Salvador . . . " (emphasis added).).

[126] *See id.* (quoting decisions of IJ and BIA) (internal quotation marks omitted).

[127] *See id.* (providing procedural posture of case).

[128] *See* Martinez v. Holder, 740 F.3d 902, 906 (4th Cir. 2014) (summarizing issues and holding of case).

[129] *See id.* at 906 (recognizing that *Chevron* deference is accorded when agency interpretations are rendered in their authority to make rules carrying force of law).

[130] *See id.* at 910–11 (analyzing Martinez's particular social group claim).

[131] *See id.* at 913–14 (addressing Martinez's claim under Convention Against Torture).

[132] *See id.* at (beginning opinion by stating that "We reverse [the BIA's] ruling on immutability and remand Martinez's application for withholding of removal to permit the BIA to consider whether [his] proposed social group satisfies the other requirements for withholding of removal.").

from the decisions of the IJ."[133] Having established their jurisdiction, the court went on to consider whether it had any obligation to give deference to the BIA's decision.[134] Although courts are required to give deference to administrative decisions in certain circumstances, the Fourth Circuit held that deference was not required in this case because the BIA's decision was not made by the full three-member panel.[135] However, the court stated that it would still consider the fact that the BIA's decision represented "a body of experience and informed judgment to which [it could] properly resort for guidance."[136] Setting aside the issue of deference, the court concluded that, although it was not legally required to do so, it would still give the BIA's decision "modest deference."[137]

2. Immutable Characteristic

The only particular social group criterion at issue in *Martinez* was the immutability requirement; the additional requirements of social distinction and particularity were not presented in the case.[138] The court began by restating the

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[133] *See id.* at 908 (quoting Camara v. Ashcroft, 378 F.3d 361, 366 (4th Cir. 2004)) (internal quotation marks omitted).

[134] *See* Martinez v. Holder, 740 F.3d 902, 906 (4th Cir. 2014) (reasoning that Congress conferred decision making power to BIA to decide certain questions of law and courts are required to defer to BIA judgment when reviewing decisions that carry force of law); *see also supra* text accompanying note 76.

[135] *See Martinez*, 740 F.3d at 909–10 ("Because the decision in this case was issued by a single BIA member, it does not constitute a precedential opinion, as a precedential opinion may only be issued by a three-member panel . . . . When issuing a single-member, non-precedential opinion, the BIA is not exercising its authority to make a rule carrying the force of law, and thus the opinion is not entitled to *Chevron* deference.") (citations omitted).

[136] *See id.* at 910 (indicating that court would nonetheless accord BIA decision modest deference) (quoting A.T. Massey Coal Co. v. Barnhart, 472 F.3d 148, 168 (4th Cir. 2006) (internal quotation marks omitted)).

[137] *See id.* (allowing that court would only give deference to degree it found BIA decision compelling). In full, the court stated that, "even that modest deference [which we give the BIA's decision] depends upon the thoroughness evident in [its] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* Thus, while the court asserts that it will give the BIA some deference, this statement makes clear that it will only do so insofar as it finds the BIA's reasoning persuasive. *Id.* In other words, the court will not give any significant deference to the BIA's decision. *Id.*

[138] *See id.* 910 (noting that immutability was the only issue relating to Martinez's membership in a particular social group up for review in the case). While the Fourth Circuit had previously endorsed both the immutability and particularity criterion created by the BIA, it had "explicitly declined to determine whether the social visibility criterion [was] a reasonable interpretation of the [Refugee Act of 1980]." *Id.* (citing Zelaya v. Holder, 668 F.3d 159, 165 (4th Cir. 2012)). As such, the only criteria the Fourth Circuit requires for a particular social group are immutability and particularity. *Id.* Because the particularity of Martinez's

immutability framework established in *Acosta*; that, in order for a characteristic to be immutable, it must be so fundamental to a person's identity that it "either cannot [be changed], or should not be required to [be changed]."[139] In addition, the court emphasized the *Acosta* holding that an immutable characteristic can be established by a "shared past experience such as former military leadership."[140]

The Fourth Circuit then rejected the BIA's holding that Martinez's social group claim failed because it was based on his voluntary association with a criminal gang.[141] Following the reasoning of the Seventh Circuit in *Benitez-Ramos*, the court stated that:

> Nothing in the [asylum] statute suggests that persons categorically cannot be members of a cognizable 'particular social group' because they have previously participated in antisocial or criminal conduct. Rather, Congress has identified only a *subset* of antisocial conduct that would bar eligible aliens from . . . [refugee status]. But Congress 'has said nothing about former gang members.'[142]

Furthermore, the court held that the only way for Martinez to change his status as a former gang member would be to rejoin MS-13.[143] The court then cited *Benitez-Ramos* in holding that it would be "perverse . . . to force individuals to rejoin such gangs to avoid persecution."[144]

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proposed social was not determinative in the BIA's decision, the only issue appealed to the court was whether Martinez's former membership in MS-13 constituted an immutable characteristic of a particular social group. *Id.*

[139] *See id.* at 910–11 (quoting *Acosta*, 19 I. & N. Dec 211, 233 (BIA 1985)) (citation omitted). The court's statement of the immutability requirement tracks the original language set down in *Acosta*. *Id.*

[140] *See* Martinez v. Holder, 740 F.3d 902, 911 (4th Cir. 2014) (stating that "[t]he BIA has explained that [t]he 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" (quoting *Acosta*, 19 I. & N. Dec. 211, 233) (internal quotation marks omitted)).

[141] *See id.* ("At the outset, we agree that Martinez's membership in a group that constitutes former MS-13 members is immutable.").

[142] *See id.* at 912 (citing to 8 U.S.C § 1231(b)(3)(B)) (quoting Benitez-Ramos v. Holder, 589 F.3d 426, 430).

[143] *See id.* at 911 (". . . he cannot change his status as a former gang member except by rejoining MS-13, which he claims would violate fundamental precepts of his conscience.").

[144] *See id.* (stating that "Martinez has presented extensive evidence that violence and criminality pervade MS-13, and we conclude, as has the Seventh Circuit, that it would be 'perverse' to interpret the [Refugee Act] to force individuals to rejoin such gangs to avoid persecution") (citing Benitez-Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009)). The Fourth Circuit also cited to the Seventh Circuit's treatment of *Arteaga v. Mukasey* to make a distinction between current and former gang membership. *See id.* at 912 (noting government's reliance on *Arteaga*). The court recognized that the government relied heavily on

In rejecting the BIA's holding, the court also distinguished between current and *former* gang membership.[145] The court recognized that current gang membership certainly does not qualify as an immutable characteristic, but stated that *former* membership does because it is "defined by a *rejection* of gang membership and its attendant violence."[146] Because Martinez repudiated MS-13, the court held that he should not be required to change his former membership status to avoid persecution and, therefore, that he qualified for particular social group status.[147]

3. Convention Against Torture

In response to Martinez's request for protection under the Convention Against Torture, the court held that there was not sufficient evidence to show that the Government of El Salvador would acquiesce in his persecution at the hands of MS-13.[148] On the contrary, the court stated that the Salvadoran Government had taken steps to address gang violence and persecution.[149] There-

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Arteaga in its arguments against Martinez. *Id.* The court applied the same reasoning as the Seventh Circuit when it stated that, "[*Arteaga* was] materially distinguishable [from this case] inasmuch as it affirmed the BIA's denial of withholding of removal from an alien who was *still* a gang member, albeit no longer active" (emphasis added). *Id.* (quoting Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007). However, as previously discussed, this reading of *Arteaga* is essentially incorrect; the holding in *Arteaga* stated that particular social group status cannot be *based* on gang membership, regardless of whether it is current or former (emphasis added). *See supra* text accompanying note 68.

[145] *See Martinez*, 740 F.3d at 912 (distinguishing between current and former gang membership).

[146] *See id.* ("We agree that *current* gang membership does not qualify as an immutable characteristic of a particular social group to support withholding of removal under [the Refugee Act]" (emphasis added).).

[147] *See id.* at (advocating for immutable characteristic of former gang membership by holding that "the BIA erred as a matter of law in its interpretation of the phrase 'particular social group' by holding that former gang membership is not an immutable characteristic").

[148] *Id.* at 913–14 ("To warrant CAT protection, an alien must prove, first, that it is more likely than not that he will be tortured if removed to the proposed country of removal and, second, that this torture will occur at the hands of government or with the consent or acquiescence of government.") (quoting Turkson v. Holder, 667 F.3d 523 (4th Cir. 2012)) (internal quotation marks omitted)). The court also stated that, "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." *Id.* (quoting 8 C.F.R. § 1208.18(a)(7)).

[149] *Id.* at 914 (referring to IJ decision concluding that Martinez "never reported the shooting or other threats to his life to the police in El Salvador" and that "country condition information reflects that government officials in El Salvador are taking some steps to address the difficult problem of gang violence there"). The court upheld the IJ and BIA decisions because "[Martinez] failed to show that the Salvadoran government would acquiesce in his future torture." Martinez v. Holder, 740 F.3d 902, 914 (4th Cir. 2014). Furthermore, the

fore, although Martinez did qualify as a member of a particular social group, the court held that his claim for protection under the Convention Against Torture failed.[150]

IV. WAG THE DOG: A CRITICAL ANALYSIS OF THE FOURTH CIRCUIT'S HOLDING IN *MARTINEZ*

President Abraham Lincoln once asked, "If you call a dog's tail a leg, how many legs does a dog have?"[151] President Lincoln was fond of invoking this simple query to illustrate an important point about the meaning and use of language in law.[152] The President would rebut the expected answer of "five" by arguing that "calling a tail a leg doesn't make it a leg, the answer is still four."[153] The Ninth Circuit applied this same logic to individuals who had voluntarily joined gangs and subsequently sought refugee status.[154] Like Lincoln's five-legged dog, former gang members may constitute a particular social group in a strictly analytical sense, but if giving refugee status to such a group "fails to comport with the manifest legislative purpose of the law," it should be considered an incorrect application of the law.[155]

As previously mentioned both United States law, and the international law on which it is based, recognize that refugee status should not be predicated on voluntary association with criminal organizations.[156] In addition, the UNHCR has explicitly stated this point in regards to former gang members.[157] Because Congress was clear in its intent to adopt a statute that reflected the meaning and humanitarian purpose of the United Nations Convention, it is not unreasonable to infer that Congress also intended to bar particular social group status based on voluntary gang membership.[158] Furthermore, Congress's failure to expressly classify former gang membership as a bar to refugee status does not change the "manifest humanitarian purpose" of the law, nor does it demonstrate a posi-

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court reinforced the BIA's argument that "[Martinez could not] complain that the Government did not prosecute his attackers because he never made a report." *Id.*

[150] *Id.* ("[I]t is apparent that the IJ and the BIA reviewed the relevant evidence before them. Accordingly, we affirm the BIA's decision to deny relief under the CAT").

[151] Arteaga v. Mukasey, 511 F.3d 940, 942 (9th Cir. 2007).

[152] *Id.*

[153] *Id.* (internal quotation marks omitted).

[154] *Id.* at 946 ("Following in the analytical footsteps of President Lincoln, calling a street gang a 'social group' as meant by our humane and accommodating law does not make it so.").

[155] *Martinez*, 740 F.3d at 914.

[156] *See supra* text accompanying notes 24–99.

[157] *See* Fogelbach, *supra* note 8 and *supra* text accompanying note 98.

[158] 8 U.S.C. § 1231(b)(3)(B), *supra* note 90; *see also* Cantarero v. Holder, 734 F.3d 82, 87 (1st Cir. 2013) ("Thus, we disagree that Congress's decision not to expressly exclude former gang members is probative of its intent as to whether they are eligible for refugee status as a protected group.").

tive intent to offer protected status to voluntary members of criminal organizations—regardless of whether their membership is current or former.[159]

In *Martinez* the court agreed that, "*current* gang membership does not qualify as an immutable characteristic of a particular social group."[160] However, the court failed to recognize that particular social group status based on former gang membership is still *based on gang membership*.[161] The court in *Arteaga* recognized the importance of this point when it stated that, "[d]isassociating oneself from a group does not automatically put one in another group as group is meant in the law."[162] Likewise, in *Cantarero* the court stated that, "a former gang member was still a gang member."[163] One might imagine that if President Lincoln were consulted on the issue, he would proclaim that, "calling former gang members a particular social group does not make it so, they still joined the gang voluntarily."[164]

A. *Immutability: Necessary but not Sufficient*

Given the terrible country conditions in Central America, it is easy to sympathize with the young people who *voluntarily* join gangs.[165] However, asylum law was not intended to grant refugee protection based on voluntary criminal association for any reason—especially when such protection is sought for fear of internal gang discipline as in *Martinez*.[166]

This is not to say that particular social group status should not be granted to those who were forced to join gangs or other criminal organizations against their will.[167] On the contrary, it is not hard to see that the humanitarian goals of

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[159] Cantarero, 734 F.3d at 86 ("The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the [Refugee Act], Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger.") (citing Arteaga v. Mukasey, 511 F.3d 940, 942 (9th Cir. 2007)).

[160] Martinez, 740 F.3d at 912 (agreeing that current membership does not constitute immutable characteristic but arguing that former membership does).

[161] *See* Cantarero, 734 F.3d at 86 (arguing that particular social group status based on former gang membership is still based on voluntary association with criminal group even when individual renounces membership).

[162] *Arteaga*, 511 F.3d at 946 (finding that Arteaga's attempt to propose social group composed of former gang members fared no better than group of current members).

[163] *Cantarero*, 734 F.3d at 86 (the "BIA's decision that this type of experience precludes recognition of the proposed social group is sound").

[164] *See Arteaga*, 511 F.3d at 945–46 (following analytical footsteps of President Lincoln).

[165] *See supra* text accompanying notes 98–99.

[166] *See McMullen*, 19 I. & N. Dec. 90, 95 (BIA 1984) (arguing that those who join criminal organizations with knowledge of internal violence and retribution should be precluded from receiving refugee protection).

[167] *See Lukwago*, 329 F.3d at 178–79 (advocating for recognition of particular social group status for individuals who were involuntarily forced to become child soldiers).

asylum law are met in cases like *Lukwago*, where it was clear that his former membership in the Lord's Resistance Army was completely *involuntary*.[168] However, in cases where membership in a criminal gang was voluntary—like *McMullen*, *Arteaga*, and *Martinez*—the distinction between current and former group membership does not change the criminal nature of the group that was joined in the first place.[169] Nor does later rejection of membership in that group.[170]

The leading commentator on asylum law in the U.S. has argued that, "[f]ormer gang membership is undoubtedly the sort of unchangeable past experience embraced by. . . *Acosta*."[171] A shared past experience of gang membership is certainly the type of personal characteristic that an individual cannot change; and, surely, it *would* be perverse to force former gang members to rejoin their gangs to avoid persecution.[172] However, the proper issue here is *not* whether courts should force former members to rejoin their gangs, but whether they should grant those who voluntarily joined gangs protected status based on that membership.[173]

Because neither Congress nor the United Nations intended to offer refugee status based on *voluntary* membership in criminal gangs, courts should pay closer attention to the issue of forced gang recruitment and involuntary gang membership.[174] Although the immutability of a shared past experience may be a necessary condition for receiving particular social group status, immutability alone is not sufficient; the humanitarian purpose of the law must also be supported when particular social group status is granted.[175] For this reason, courts should not let the mere analytical fact of shared past experience control whether

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[168] *Id.* (insisting that particular social group status for former child soldiers fits precisely within the BIA's recognition that shared past experience may establish a social group).

[169] *See Arteaga*, 511 F.3d at 945 (9th Cir. 2007) (explaining that shared past experience of voluntary gang membership is at war past experiences intended to be recognized under law); *see also Cantarero*, 734 F.3d at 86 (concluding that renouncing gang membership does not deny original voluntary gang membership).

[170] *See Cantarero*, 734 F.3d at 86.

[171] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES, § 5:57 (Database updated May 2014) (defending position that former gang membership per se constitutes particular social group under *Acosta* immutability framework).

[172] *See* Benitez-Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009) (noting impossibility of changing certain past experiences); *see also Martinez*, 740 F.3d at 902 (arguing that it would be perverse to force former gang members to rejoin gangs to avoid persecution).

[173] *See Cantarero*, 734 F.3d at 86 (recognizing that granting particular social group status based on former gang membership would give aliens incentive to join gangs as a path to legal status).

[174] *See* Fogelbach, *supra* note 8, at 420 and *supra* text accompanying note 98 (arguing that courts should grant protection to deserving victims not those who voluntarily joined gangs).

[175] *See Cantarero*, 734 F.3d at 87 (". . . immutability, though a necessary predicate, is not sufficient for recognition as a social group.").

refugee status is appropriate.[176]

B. *What Deference Does it Make?*

In *Martinez*, the court avoided *Chevron* deference by relying on the fact that the BIA's decision was not issued by a full three-member panel and, therefore, did not carry the full force of law.[177] Nonetheless, the court stated that it would give the BIA's decision "modest deference," because its opinion represented "a body of experience and informed judgment to which we may properly resort for guidance."[178] However, the court stated that it would only go so far as to consider "the thoroughness evident in [the BIA's decision], the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[179] In other words, the court announced that it would not give the BIA's decision *any* measure of actual deference and would simply decide the case on the grounds it deemed most persuasive.[180]

The arguments presented by the court in *Martinez* would not have been sufficient to overcome *Chevron* deference had the issue not been avoided on a technicality.[181] *Chevron* requires a court to determine whether an agency's interpretation of ambiguous law is based on a "permissible construction of the statute."[182] As previously discussed, it would not be unreasonable to interpret United States' asylum law as withholding refugee protection from individuals who voluntarily joined criminal gangs.[183] In fact, the First Circuit has held that, when subject to *Chevron* deference, the same line of reasoning that was applied in *Martinez* is not persuasive enough to overcome it.[184] Because it is permissi-

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[176] *See Arteaga*, 511 F.3d at 942 (admonishing courts not to let expansive and abstract definitions of particular social group undermine purpose of asylum).

[177] *Martinez*, 740 F.3d at 910 (articulating reasons for not granting BIA's decision *Chevron* deference).

[178] *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 40 (1944)) (citation omitted) (internal quotation marks omitted).

[179] *Id.*

[180] *Id.*

[181] *See Cantarero*, 734 F.3d 82, 87 (1st Cir. 2013) ("In sum, we are not persuaded that those courts which reversed the BIA on this issue have advanced rationales sufficient to overcome *Chevron* deference."). To a large extent this issue is moot. The Fourth Circuit was within its authority to not grant the BIA's decision *Chevron* deference. However, the point is made to demonstrate the fact that the court's profession to grant modest deference" to the BIA's decision is really an empty gesture; and the fact that the court's reasoning was not strong enough to withstand the heightened standard required by *Chevron*. The court was only able to reach its decision because it avoided *Chevron* deference on a technicality, and was able to disregard the BIA.

[182] *Id.* at 85 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 843 (1984)).

[183] *See supra* text accompanying notes 151–176.

[184] *Cantarero*, *supra* note 181. In *Cantarero*, the court specifically cited the Seventh

ble to interpret the law as barring particular social group status for individuals who voluntarily joined gangs, the court in *Martinez* would not have been able to reach the same decision if it had been subject to *Chevron* deference.

C. *Missing the Mark*

In *Martinez* the court stated that its case was "materially distinguishable" from *Arteaga*.[185] In *Arteaga*, the individual seeking asylum was "*still* a gang member," while in *Martinez*, the appellant was a *former* gang member.[186] The court relied on the distinction between current and former membership, and held that this difference in status materially affects the immutability of a shared past experience and, therefore, an individual's particular social group status.[187] As previously discussed, this distinction should have no material impact when considering the "manifest humanitarian purpose" of asylum law.[188] Furthermore, in drawing this distinction, the court failed to recognize the Ninth Circuit's reasoning in *Arteaga*.[189]

In *Arteaga*, the court held that particular social group status should not be granted to individuals who voluntarily joined gangs, regardless of their current or former status.[190] In fact, the court in *Arteaga* invoked the logic of President Lincoln when it stated that, "calling a street gang a social group as meant by our humane and accommodating law does not make it so."[191] Furthermore, the court in *Arteaga* stated that "even if we focus our inquiry . . . on [the] unique and shared experience as a gang member, this characteristic is materially at war with those we have concluded are innate for the purposes of membership in a particular social group."[192] In *Martinez*, the court failed to recognize that the

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Circuit's decision in *Benitez-Ramos* as an example of reasoning that would not be sufficient to overcome *Chevron* deference. The First Circuit did not specifically cite to *Martinez* as an example of such insufficient reasoning—it could not have because *Martinez* was decided after *Cantarero*. However, the court in *Martinez* relied heavily on the Seventh Circuit's decision in *Benitez-Ramos*, which was also insufficient to overcome *Chevron* deference.

[185] *Martinez*, 740 F.3d at 911 (citing *Arteaga* to distinguish between current and former gang membership and stating, "[w]e agree that *current* gang membership does not qualify as an immutable characteristic").

[186] *Id.*

[187] *See id.*

[188] *See supra* text accompanying notes 151–164.

[189] *Martinez*, 740 F.3d at 911 (referring to *Arteaga* when stating that it "is materially distinguishable inasmuch as it affirmed the BIA's denial of withholding of removal from an alien who was '*still* a gang member, albeit no longer 'active'").

[190] *Arteaga*, 511 F.3d at 946 ("Arteaga's attempt to prevent himself as a former [gang member] fares no better. One who disassociates himself from a group may fall analytically into a definable category, but the category is far too unspecific and amorphous to be called a social group, whether that person is tattooed or not.").

[191] *Id.* at 946.

[192] *Id.*

distinction between current and former membership does not materially change the purpose of the law, and that granting particular social group status based on characteristics that are "materially at war" with the purpose of the statute is a misapplication of law.[193] As previously discussed, this remains true whether an individual is a current or former gang member. As a result, the court's attempt to distinguish its case from *Arteaga* is insufficient.

V. CONCLUSION

Imagine, once again that you live in one of the most violent cities in Central America.[194] The last thing you want is to join one of the gangs that terrorize your friends and neighbors.[195] Now imagine that you receive word that courts in the United States might give you refugee protection if you join a gang before fleeing your home country, or even after you enter the United States.[196] What would you do?[197]

Holdings like the one in *Martinez* run the risk of providing an incentive for individuals to join gangs in order to provide a path to citizenship—either while they are in Central America or once they arrive in the United States.[198] Whether these holdings provide a strong incentive or not, asylum law was never intended to create a public policy that grants protected status on the basis of gang membership.[199] Courts should only offer refugee protection to those who were forced to join gangs; they should not subvert the humanitarian purpose of asylum law by granting particular social group status based on voluntary gang membership.[200]

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[193] *Martinez*, 740 F.3d at 911.

[194] *See supra* text accompanying notes 2–6.

[195] *See id.*

[196] *See id.*

[197] *See Cantarero*, 734 F.3d at 86 (considering whether social group status based on former gang membership would provide incentive to join gangs).

[198] *See id.* ("Such recognition would reward membership in an organization that undoubtedly in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status).

[199] *See* 8 U.S.C. § 1231(b)(3)(B)(i)–(iv)

[200] *See* Fogelbach, *supra* note 8, at 417, 420 ("An understanding of this information should incline the courts to grant protection to deserving individuals, to wit victims, and not members or former members of the criminal class, irrespective of their membership in a creatively crafted particular social group.").