

Gang-Related Asylum Claims: An Overview and Prescription

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I. INTRODUCTORY REMARKS

This article addresses asylum claims arising from gang-related activity, one of the most important areas in asylum law over the last several years. One of the goals of this article is to show why certain cases of maltreatment of people by criminal gangs should give rise to protection under asylum law and, in some cases, the Convention Against Torture (“CAT”).¹ Of course, not every case in which someone is threatened by a criminal gang, even when such threats are very serious, warrants asylum as a remedy. This article contends, however, that if the point of asylum law (and other similar remedies) is to protect people who, for reasons they cannot or ought not have to change, are subject to dangers against which their country of origin or residence cannot or will not protect them, then a certain number of gang-related cases fall squarely into the zone that asylum law is meant to cover. The burden of this article is not, however, to defend this analysis of the point of asylum law² but rather, assuming such purpose, to sort out the cases that fit within this framework and which ought to qualify for asylum or CAT relief under United States law.

In recent years, the number of asylum claims based on the actions of criminal gangs has increased greatly. Cases involving the actions of gangs based out of Central America, the so-called

1. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 112 Stat. 2681, 1465 U.N.T.S. 221, available at <http://www2.ohchr.org/english/law/cat.htm>.

2. For scholarship supporting this interpretation, see MATTHEW GIBNEY, *THE ETHICS AND POLITICS OF ASYLUM*, 233–34 (Cambridge Univ. Press 2004); Andrew Shacknove, *Who is a Refugee?*, 95 *ETHICS* 274, 277 (Jan. 1985). In the present author’s dissertation, this claim is developed in a somewhat different way and at greater length, criticizing the account given by Shacknove and, to a lesser degree, Gibney, in the chapters entitled, “Who is a Refugee?” and “More on Refugees,” available upon request.

“Maras,” have gained the most attention,³ but similar cases have also arisen out of Albania, Eastern Europe, and other locations.⁴ The applicants in these claims not only face obvious and significant danger if they return to their home countries, but also face serious difficulties in successfully applying for asylum in the United States since these cases do not fit comfortably into the paradigm example of an asylum claim—one where the applicant is persecuted for his or her explicit political beliefs by a national government.⁵ Rather, in gang-related cases, the typical example is non-state actors acting for reasons that are not, at first glance, political.⁶ Given the explicit formulation of refugee and asylum law in the United States, and the relevant precedent decisions, applicants for asylum basing their claims on gang-related activity will need to take great care to show how their cases fit within the law. Further complications arise from the fact that most of these cases will be made under the protected ground of “particular social group,”⁷ an especially contested and problematic area in asylum law.

This article provides an overview of the legal terrain for practitioners and others who need to understand the law in this area. It also briefly argues how gang-related cases fit with what ought to be considered the core purpose of asylum and refugee law: to For the international community to provide protection to those who need it and who can only (or best) be protected by giv-

3. See, e.g., Deborah Sontag, *U.S. Deports Felons but Can't Keep Them Out*, N.Y. TIMES, Aug. 15 1997, at A1; Ginger Thompson, *Tattooed Warriors: Shuttlng Between Nations, Latino Gangs Confound the Law*, N.Y. TIMES, Sept. 26 2004, at A1.

4. See *infra* Part II.

5. For example, in the recent case of *Valdiviezo-Galdamez v. A.G. of the United States*, 502 F.3d 285 (3d Cir. 2007), the Third Circuit overturned a decision denying asylum to the applicant when the Immigration Judge based the court's decision on the fact that “there [was] no evidence that those criminal elements imputed any political opinion on the respondent . . .” *Id.* at 288.

6. See *infra* Part II.

7. See 8 U.S.C. § 1101(a)(42) (2006); see also 8 U.S.C. § 1158(b)(1)(B)(i) (2006) (“To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

ing them refuge in a safe country.⁸ To these ends, gang-related asylum claims are separated here into three broad categories, the existing law is applied to these cases, including a discussion of how such cases have been treated by the court system at the Immigration Judge (“IJ”) and appellate levels, and practical advice for practitioners who represent applicants in such cases is included.

Gang-related asylum claims may be broken down into three broad categories. The first group consists of female applicants who fear rape, human trafficking, or violence from a gang in her home country. In the second category, the applicant is a male with no prior gang affiliation or criminal history who has been threatened by a gang in his home country, a scenario often seen in forced recruitment cases. Finally, the third category of claims involve a person, either a former gang member or a person with gang tattoos, who fears being sent back to his home country. There is significant potential for variation within these categories and, as with all asylum claims, the particular facts of each case must be considered closely. The similarities among these groups, however, make the categorization of such asylum claims a useful tool for analysis.

As of yet, there are very few federal circuit court or Board of Immigration Appeals (“BIA”) decisions in asylum cases dealing with gang-related issues. Also, few precedent decisions are directly on point, at least for the case of male applicants fleeing forced gang recruitment or other harm from gangs. Even in the few existing precedent cases, discussed below, many of the most important questions have been reserved for the BIA to decide. Accordingly, any advice given on how to pursue such cases is necessarily tentative and at least partly speculative. Moreover, individual cases will also vary greatly depending on the country of origin and the level and intensity of gang activity in the particular

8. The purpose of the present article is not to give a full account of the violence and damage inflicted by gangs on Central America, but rather to focus on the legal issues relevant to asylum cases. For such background information, see *supra* note 3; see also Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 *GEO. IMMIGR. L.J.* 407, 409–16 (2006). Part III of Corsetti’s article overlaps to some degree with Part II.B of this article, albeit with a different focus. For example, Corsetti does not discuss female victims of gang violence or violence directed towards former gang members. Those who practice in this area, however, should consult his very useful article.

country. Significant country conditions research will therefore be essential for a successful case. In particular, it will be essential to show that the danger presented by criminal gangs in the applicant's home country is of a different kind than that faced in countries with functioning legal systems. Though this may be difficult, the substantial documentation now available regarding the extreme violence and danger presented by Central American gangs makes such a showing of danger possible.⁹

II. BREAKDOWN OF TYPES OF GANG-RELATED ASYLUM CASES

In the following section, gang-related asylum claims are broken down into the three general categories noted above, with an analysis of the existing law as shown through several recent decisions. Though many of these decisions are non-precedential, they serve to illustrate how courts at various levels have approached these and similar cases. Following the discussion of precedent, this article will both outline pitfalls to avoid in ensuring a successful case and offer advice regarding the manner in which to frame the case. Many issues will be similar in all three types of cases; when this is so, the same analysis will apply to all three categories and the issue will be addressed only once considering more discussion would be unnecessary. As a general rule, in all three types of cases the applicant must show that the harm feared is not merely the result of criminal activity or the result of a general social breakdown or disturbance.¹⁰ Therefore, cases perceived as involving mere fear of criminal activity or civil unrest will generally be speedily denied.¹¹

A. Female Applicant Fears Rape, Trafficking, or Violence from a Gang in Her Home Country

The first type of case is that of a female applicant who fears rape, being trafficked or forced into prostitution, or other violence

9. See, e.g., Arana, *infra* note 12; Corsetti, *supra* note 8; Sontag *supra* note 3, among many other examples. Corsetti, in particular, provides references to many other sources.

10. Immigration and Nationality Act (hereinafter "INA") § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2006); see also *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

11. See, e.g., *Kharkhan v. Ashcroft*, 336 F.3d 601 (7th Cir. 2003).

from a gang. The typical applicant in such cases is a young, unmarried woman, although there are exceptions. The applicant may have already been raped or forced into prostitution by gang members or may have good reason to expect such violence if she does not flee. The violence aimed at women by the Central American gangs is notorious, as is the danger faced by women from traffickers.¹² Therefore, that the women in such cases face a well-founded fear of persecution will not be the most significant element of these cases; rather the difficulties, which are substantial, lie elsewhere.

The first difficulty faced by the applicant in such cases is that she will have to show that she fears, not just criminal activity in general, but persecution on the basis of one of the protected grounds: race, nationality, religion, political opinion, or membership in a particular social group.¹³ Part of this burden will be showing that the applicant's fear is particularized as opposed to a general level of danger arising from widespread criminal activity, as seen in *Kharkhan v. Ashcroft*.¹⁴ In *Kharkhan*, a Ukrainian woman claimed that she was afraid of crime if she returned to her home country.¹⁵ The court ruled that she had not shown that this danger was in any way particularized to her, stating that "expos[ure] to the dangers of an uncontrolled criminal element . . . [does] not amount to a well-founded fear of persecution on the basis of any . . . protected ground."¹⁶

Similarly, in *Koliada v. INS*,¹⁷ the court argued that the Ukrainian applicant's "fear of crime" was "legitimate" but ruled that it was "not relevant"¹⁸ to his asylum claim for reasons similar to those given by the court in *Kharkhan*.¹⁹ A recent IJ decision held that an Albanian woman who was raped and kidnapped by traffickers, but who managed to escape and flee to the United

12. See Ana Arana, *How the Street Gangs Took Central America*, 84 FOREIGN AFF. 3-4 (June 2005) ("[T]he Maras left in their wake what had become their traditional trademark: the tortured bodies of young women.").

13. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2006); *Elias-Zacarias*, 502 U.S. at 481.

14. 336 F.3d 601 (7th Cir. 2003).

15. *Id.* at 603.

16. *Id.* at 605.

17. 259 F.3d 482 (6th Cir. 2001).

18. *Id.* at 488.

19. *Id.*; see also *Kharkhan*, 336 F.3d at 601.

States, faced only harm from criminals seeking to make money and did not face persecution on the basis of a protected ground.²⁰ Her proposed social group (one of the protected grounds), “young Albanian women who will not voluntarily enter the sex trade,” was rejected.²¹

This last case illustrates the important point that even if the applicant’s fear of persecution is well-founded, it must be “on account of” a protected ground to provide sufficient ground for an asylum claim. That is, a nexus between the persecution and the protected grounds must be established. In gang-related cases of this type, the protected ground will almost always be membership in a particular social group.²²

The foundational decision for membership in a particular social group, as applied to gang-related cases, is *In re Acosta*.²³ In *Acosta*, the BIA established that “particular social group[s],” for the purpose of asylum, are “group[s] of persons all of whom share a common, immutable characteristic” that the members of the group “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”²⁴ Several specific points about social group analysis, however, apply specifically to the cases in question.

First, as a general rule, the “particular social group” cannot be defined by the harm feared, such as when the proposed social group is: “victims of the sex trade.” The representative case here is *Gomez v INS*.²⁵ The rule established in *Gomez* is essentially a point of logic: the applicant is not being persecuted because she is a member of a group that has suffered some harm; rather, if she has a legitimate social-group-based claim, she must have suffered the

20. *In re* [Anonymous] A# [redacted], Immigration Court, Chicago II, May 29 2003 (on file with author). All Immigration Judge decisions discussed in this article that are not otherwise available in reporters are on file at the Center for Gender and Refugee Studies at University of California Hastings College of the Law and were reviewed by the author as part of this study.

21. *Id.*

22. Religion or political opinion are also conceivable protected grounds here but are not, in the opinion of the author, as likely to be viable grounds in this first set of cases as they might be in others, as discussed below.

23. 19 I. & N. Dec. 211 (B.I.A. 1985).

24. *Id.* at 233.

25. 947 F.2d 660, 663–64 (2d Cir. 1991).

harm because she was a member of some social group and was then singled out independently of the harm suffered. This point is essential for framing a case because positive decisions by IJs have been reversed where the IJ granted relief based on a social group that was clearly defined in terms of the violence suffered, such as “victims of domestic violence.” The Third Circuit has affirmed this point, noting that “[t]he ‘particular social group’ must have existed before the persecution began.”²⁶

The social group used by the applicant should be defined by reference to those immutable²⁷ or fundamental characteristics that are the specific reason why either the applicant is targeted or why the larger society fails to protect the applicant. In this way the “nexus” requirement is illustrated. There must be, as shall be seen, a causal connection between the features that define the social group and the harm feared.

A normal concern at this point is making the social group too broad, a basis upon which courts regularly reject asylum applications.²⁸ A social group is not overly broad, however, as long as the characteristics that define it are the specific characteristics that result in the individual being targeted. In some cases, this will simply be characteristics such as gender or ethnicity if these are the reasons for the applicant being targeted for persecution. A proposed social group, however, should not be a bare demographic or

26. *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). But note that having suffered persecution in the past could, logically, be the reason why a group is later or again singled out for additional or new persecution. This, however, would be to move up a level in the analysis and is not likely to be an especially common case.

27. “Immutable” here must be understood in a somewhat special sense. The important factor seems not to be that the trait cannot change (though this will often suffice) but rather that the trait cannot be changed *by the will of the applicant*. For example, in *In re Fauziya Kasinga* the BIA accepted a social group definition that included, among other elements, the factor of being a “young woman.” *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). Obviously being a “young woman” is not an immutable trait in any strong sense—one needs only wait for it to change. But equally as obvious, the applicant could not make herself not be young through an act of will. This insusceptibility to change via the will of or actions by the applicant seems, then, to be the essential element of the “immutability” requirement.

28. See, e.g., *Sanchez-Trujillo*, *supra* note 29; *In re A-M-E & J-G-U*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

statistical group, since for the purpose of asylum, a particular social group “does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance.”²⁹

Additionally, even within a successfully drawn social group, the applicant will likely have to show that the risk she faces is “particularized” in some way *to her* if she is to make a successful claim. For example, in a recent unpublished Seventh Circuit decision a woman from Albania had faced harassment and threats of kidnapping and rape for many years by gang members who apparently wished to traffic her for prostitution.³⁰ She faced at least one attempted kidnapping but was never actually raped or kidnapped.³¹ The court rejected the social group of “young women in Albania without male protection” even though it involved immutable characteristics, because, the court said, the problems faced by this group simply related to “one manifestation of a larger crime problem” facing Albania and did not show the risk to be particularized to her or members of her proposed social group.³²

In contrast, an example of a recent successful application at the IJ level can help give an idea of how one might frame a potential social group. In *In re E_ S_ and A_ M_*,³³ the applicant was a young Guatemalan woman who had been abused at home and ran away at a young age, after which she lived on the streets.³⁴ She was taken in by a gang and was forced to work for them.³⁵ She soon became pregnant by a gang member.³⁶ A rival gang threatened to kill members of the gang with whom she was involved and several members were, in fact, killed before the applicant fled to

29. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986). A good example here is the recent BIA case, *In re A-M-E & J-G-U*, where the proposed social group of “affluent Guatemalans” was rejected, though not solely for this reason. *In re A-M-E & J-G-U*, 24 I. & N. Dec. at 76.

30. *Lleshanaku v. Ashcroft*, 100 Fed. Appx. 546, 547 (7th Cir. 2004).

31. *Id.*

32. *Id.* at 549–50.

33. A# [redacted] Phoenix, AZ, Immigration Court, March 20, 2003 (on file with author).

34. *Id.*

35. *Id.*

36. *Id.*

the United States.³⁷ The IJ held that she had suffered persecution at the hands of her family and had a well-founded fear of future persecution as a member of a particular social group, “abandoned street children.”³⁸ Moreover, the IJ concluded that the Guatemalan government not only failed to protect members of such a group but also actively took part in their persecution.³⁹ The applicant’s young age (seventeen at the time of her application), the fact that she did not seem involved in serious criminal activity herself, and the complicity of the Guatemalan government were all contributing factors in the IJ’s grant of asylum.⁴⁰ The important point here is that the proposed group, “abandoned street children,”⁴¹ was not only more vulnerable to crime (though this, of course, was true) but also was specifically targeted as a group.

In addition to membership in a particular social group, a female applicant who fears persecution by gangs may also consider basing her claim on the ground of political opinion. With respect to female applicants in the cases discussed above, this is less likely to be successful than in other gang-related cases, as there appears to be little indication that gangs target women for anything that can be thought of plausibly as a political opinion. In particular, if gangs target women for monetary reasons or for personal sexual gratification, then political opinion is unlikely to be a cause of the persecution. One must consider, however, “mixed motive” cases. For example, even if a gang would potentially attack any young woman without male protection, it might especially focus on any such women who also publicly opposed gang activity. If this is the case, then certainly it should be raised in an asylum hearing.⁴²

Since criminal gangs are, in most instances, neither agents of nor controlled by states or national governments, applicants in such cases will have to navigate the special issues relating to non-state actors in asylum cases. Although the paradigm asylum case

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Note also that the applicant need not actually hold political opinion in question if it is imputed to her by her persecutors. *See Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995) (upholding imputed political opinion as a protected ground).

involves persecution by agents of the state, “[persecution] may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. . . . [Such acts] can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”⁴³ Thus, an asylum claim may be based on the actions of non-state actors, such as criminal gangs, if the applicant can show that the government is unable or unwilling to protect her from the gangs.

The question of whether a government is “unable or unwilling” to protect an applicant, however, is often a difficult one. Mere ineffectiveness by the police in combating criminal gangs (a situation found in most developing countries) will often not be enough to establish an asylum claim. Each case must be looked at individually, with a clear discussion of the relevant facts for the case in question. Exactly how ineffective the police force must be before international protection is warranted may depend on specific factors of particular cases.

At least some judges have hesitated to grant asylum in cases where the government in question seems to be making an effort to combat the problem, even if it is not fully successful. For example, in *Lleshanaku v. Ashcroft*,⁴⁴ the court acknowledged that the Albanian government had “difficulty” controlling gangs that traffic women, but expressed reluctance to grant asylum if the applicant did not first “attempt to seek police protection.”⁴⁵ Another relevant but non-binding case in this area is *Romero-Rodriguez v. U.S. Attorney General*.⁴⁶ Here, the Eleventh Circuit upheld the

43. The Office of the U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65, U.N. Doc. HCR/14/4/Eng/Rev.1 (Jan. 1992) [hereinafter *Handbook*], available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>; see also *Kibinda v. AG of the United States*, 477 F.3d 113, 119 (3d Cir. 2007) (concluding that the applicant must show persecution on the basis of an enumerated ground by government or “forces the government is unable or unwilling to control”) (quoting *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 160 (3d Cir. 2005)); *Sangha v. I.N.S.*, 103 F.3d 1482, 1487 (9th Cir. 1997) (holding that the applicant must show that the state cannot or will not protect her).

44. 100 Fed. App’x 546 (7th Cir. 2004).

45. *Id.* at 549.

46. 131 Fed. App’x 203 (11th Cir. 2005) (unpublished).

ruling of an IJ that the applicant did not have a well-founded fear of persecution from gangs because “the Honduran government was attempting to control the lawlessness that exists in that country.”⁴⁷ Perhaps most importantly, in both *Lleshanaku* and *Romero-Rodriguez*, the applicants had not been harmed by the gangs who sought to recruit them at the time they fled to the United States.⁴⁸ Although these are not precedential decisions, they evidence the reasoning of the courts in such cases.

Recently, the Eighth Circuit in *Menjivar v. Gonzales*⁴⁹ reaffirmed that more is needed than mere “difficulty” in “controlling private behavior” on the part of the government, reasoning that a foreign government’s failure to act in a particular case may be insufficient grounds for an asylum claim if the government had legitimate reasons for its inaction.⁵⁰ In *Menjivar*, the police took several hours to respond to a call by the applicant, but the nearest police station was one and a half hours away.⁵¹ The police sought the applicant’s assailant but were unable to find him as the assailant had fled to Honduras.⁵² When the assailant returned to El Salvador, the applicant did not contact the police again but fled to the United States.⁵³

In all non-state actor asylum cases, the question of internal relocation must be considered. In the case of state actors, it is assumed that the persecutors have state-wide reach.⁵⁴ In situations where the persecutor is a non-state actor, however, the applicant, before seeking international protection, must first consider relocating within the state if this will take her out of danger.⁵⁵ That being the case, many gangs in Central America have nation-wide reach

47. *Id.* at 204.

48. *See Lleshanaku*, 100 Fed. App’x at 547; *Romero-Rodriguez*, 131 Fed. App’x at 203.

49. 416 F.3d 918 (8th Cir. 2005).

50. *Id.* at 921.

51. *Id.*

52. *Id.* at 920.

53. *Id.*

54. *See* 8 C.F.R. § 208.13(b)(3)(ii) (2006).

55. 8 C.F.R. § 208.13(b)(3)(i) (2006) (“In the case in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.”).

and organization, and the affected countries are often quite small, making it easier for a gang to find its victim anywhere within the country in question.⁵⁶ Although this issue will have to be argued on a case-by-case basis, the region-wide reach of several gangs, joined with the small size of the countries most often at issue, may help to distinguish Central American gang cases from those arising from criminal activity in large countries such as Russia or Ukraine.

Recently, some courts have taken a more generous approach to the question of internal relocation when the persecutor is a non-state actor if the applicant has suffered past persecution. In *Valdiviezo-Galdamez v. Attorney General*,⁵⁷ the Third Circuit held that when an applicant has suffered past persecution, the burden of proof switches from the applicant to the government to show that internal relocation is an option, even when the persecutor is a non-governmental actor.⁵⁸ Therefore, at least in cases where the applicant has suffered past persecution, a slightly lower standard may apply in some cases.⁵⁹

B. Male Applicant Without Former Gang Ties or Criminal Activity Threatened by a Gang in His Home Country

The second main group of cases involves male applicants, with no prior affiliation with gangs or criminal activity, who nonetheless face danger from gangs for opposing gang activity or who are forcibly recruited into a gang. Many of the same issues discussed above occur here; when that is the case, the discussion shall not be repeated, but will only refer to the account given above. However, because these cases do pose several distinct issues and difficulties, they must be looked at separately.

As discussed above, the male applicant who fears persecution from gang members after refusing to be recruited into a gang must show that he is targeted on the basis of a protected ground and does not merely fear crime in general or social unrest.⁶⁰ The cases discussed above are relevant for the analysis here as well. One additional case that will need to be distinguished if one hopes

56. See generally Arana, *supra* note 11; Corsetti, *supra* note 8.

57. 502 F.3d 285 (3d Cir. 2007).

58. *Id.* at 292 (referencing and interpreting 8 C.F.R. § 208.13(b)(3)(i) (2006)).

59. *Id.*

60. See *supra* Part II.A.

to make a successful claim here is *Bolshakov v. INS*.⁶¹ In *Bolshakov*, members of the Russian mafia threatened to kill the applicant, a businessman, if he did not give them money.⁶² He was threatened on several occasions and beaten by the mafia members before he fled to the United States.⁶³ The IJ held,⁶⁴ and the Ninth Circuit affirmed,⁶⁵ that, “at most . . . [Bolshakov and his wife] had been the victim[s] of criminal activity in Russia” and that, therefore, they had not established that this activity was related to a protected ground.⁶⁶

As the above cases show, in order for an applicant to establish that he is eligible for asylum and does not merely fear crime, he will have to show explicitly that he faces persecution on the basis of a protected ground.⁶⁷ Membership in a “particular social group” is a likely category for this sort of gang-related asylum cases as well, since the claims often will not fall clearly into any other category.⁶⁸

A standard pitfall in social group analysis that will be especially essential to avoid is making the proposed group too broad. An example of such an overbroad group might be “young Salvadoran males.” The court in *Sanchez-Trujillo v. INS*⁶⁹ held that, for the purpose of asylum, a particular social group “does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance.”⁷⁰ Two factors are at work in social group formulation. First, the proposed social group cannot be just a demographic slice that has nothing more to connect it than the bare demographic feature.⁷¹

61. 133 F.3d 1279 (9th Cir. 1998).

62. *Id.* at 1280.

63. *Id.* at 1280–81.

64. *Id.* at 1281.

65. *Id.* at 1282.

66. *Id.* at 1281.

67. See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

68. Political opinion, either manifest or imputed, is the most likely other option. See *infra* text accompanying notes 90–93. For the general rules for determining a particular social group, see *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

69. 801 F.2d 1571 (9th Cir. 1986).

70. *Id.* at 1576.

71. See *id.*

Secondly, even if a group can be drawn that has a statistically higher probability of facing persecution than would some other group, this does not suffice to establish an asylum claim unless the group in question has the proper causal connection to the harm feared.⁷² A proposed social group may, therefore, be too broad in either of these ways.

The overbroad social group may be contrasted with a successful social group formulation seen in *In re D_ V_*,⁷³ a recent IJ decision: “Honduran youths who have been actively recruited by gangs, but who have refused to join because they oppose the gangs.”⁷⁴ Past actions such as the refusal to join a gang are “immutable traits” in that they cannot be changed.⁷⁵ Furthermore, it would seem that opposition to violent, murderous criminal activity is not a trait or belief that one should be expected to change. Such opposition is at least arguably “fundamental to... [the] conscience” of those who do oppose criminal gangs.⁷⁶ The definition is narrow as it applies only to a small sub-section of society. Finally, the definition of the social group seems to fit with the actual motivation of the gangs in persecuting the applicant, thus fitting the *Zacarias* test for motive. The social group formulation in this recent IJ decision provides the proper causal connection between the facts that define the group and the harm faced. Of course, because this is merely an example from an IJ decision, it neither has precedential value nor may it work in all cases.⁷⁷

The Third Circuit, in *Valdiviezo-Galdamez*,⁷⁸ has recently given further support to the approach taken in *In re D_ V_* without, however, providing a definitive statement. In this case, the Third Circuit stated that the only plausible reason that members of the MS gang attacked and threatened the applicant was that he was a member of the group “young Honduran men who have been ac-

72. *See id.*

73. A # [Redacted], Immigration Court, San Antonio TX, September 9 2004, Slip-op at 10.

74. *Id.*

75. *Id.*

76. *Id.*

77. For further discussion of this particular case, especially in relation to the social group analysis, see *IJ Grants Youth Asylum Based on Forcible Gang Conscription*, 81 INTERPRETER RELEASES 1690, 1691 (Dec. 6, 2004).

78. 502 F.3d 285 (3d Cir. 2007).

tively recruited by gangs and who have refused to join gangs.”⁷⁹ While the Third Circuit declined to hold that this was a particular social group under the Immigration and Nationality Act (“INA”),⁸⁰ contending that the BIA must make such a definitive ruling,⁸⁰ it strongly indicated that such a social group was plausible⁸¹ and that such a finding would be in accord with recent BIA decisions and at least one recent IJ decision.⁸²

Returning to the definition of “social group” accepted in *In re D_ V_*, it is also worth noting that it is not completely clear whether “opposition to gangs” is a necessary part of a successful social group analysis in cases such as these, where an applicant fear persecution for refusing to join a gang. An applicant might be persecuted by a gang for refusing to join it even if the applicant’s reason for refusing to join is fear or some motive other than opposition to gang activity. In the recent case *Mohammed v. Gonzales*,⁸³ the Ninth Circuit held that in Female Genital Cutting (“FGC”) cases, opposition to the practice of FGC need not be a part of the social group definition because women and girls were not subjected to the practice as a result of their opposition to FGC, but rather because of their gender and clan membership.⁸⁴ It is not clear how far a similar parallel can be drawn in gang cases. It does seem plausible, however, that gangs will more actively seek to harm those who resist recruitment because they oppose gang activity. So, if an applicant does oppose gang activity, and the gang seeking to recruit him knows this, then this fact will likely strengthen a social group claim, or help give rise to an imputed political opinion claim, even if it is not strictly necessary to ground an asylum claim.

Note as well that the applicant must not only show that he has a well-founded fear of persecution from a gang, and that he is a member of a cognizable social group, but also that the persecution he fears is “on account of” his membership in the social group. This latter showing may sometimes be a difficult prospect. In *Lo-*

79. *Id.* at 290–91.

80. *Id.* at 291 (applying *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002)).

81. *Id.*

82. *Id.*; see also *In re D_ V_*, slip op. at 10 (IJ Castro, Sept. 9, 2004).

83. 400 F.3d 785 (9th Cir. 2005).

84. *Id.* at 797 n.16.

pez-Soto v. Ashcroft,⁸⁵ the Fourth Circuit upheld the denial of an asylum claim of a petitioner from Guatemala who had had several family members killed by the Mara 18 gang and who was threatened by the gang that he too would be killed if he did not join.⁸⁶ Though the Fourth Circuit accepted that he had a well-founded fear of persecution if he returned to Guatemala, and though they went along with many other circuits⁸⁷ in accepting that the social group proposed by the applicant (his immediate family) was a cognizable social group, they rejected his claim on the grounds that he had not shown that he faced persecution from gang members on the basis of his membership in this particular social group.⁸⁸ Rather, the court reasoned, he faced this persecution merely as a young man in Guatemala in general.⁸⁹

In addition to social group, political opinion may serve here as a basis for an asylum claim since opposition to gang activity or action in favor of law and order may be considered a political opinion.⁹⁰ Political opinion may be either “manifest” or “imputed” but there must be some evidence that gangs have this in mind in some way.⁹¹ This is necessary to avoid the claim that the applicant fears only general criminality. The Ninth Circuit has sometimes found opposition to certain sorts of criminal activity or corruption to be a

85. 383 F.3d 228 (4th Cir. 2004). Note that this decision was vacated via a consent decree and so no longer has precedential effect. *See* Li Fang Lin v. Mukasey, No. 06-1456, 2008 U.S. App. LEXIS 3519 at *15 (4th Cir. Feb. 20, 2008). The reasoning in the case, however, is still likely to be persuasive to many judges.

86. *Id.* at 230.

87. *See, e.g.*, *Iliev v. I.N.S.*, 127 F.3d 636, 642 n.4 (7th Cir. 1997); *Fatin v. I.N.S.*, 12 F.3d 1233, 1239–40 (3d Cir. 1993); *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993).

88. *Lopez-Soto*, 383 F.3d at 235–36.

89. *Id.* at 236–39.

90. In the question-and-answer period after this article was presented in Memphis, an audience member suggested that he thought, at least for applicants in this category, that political opinion was more likely to be a successful ground than would social group. Most of the successful cases encountered by the author, however, have been on the basis of social group claims and applicants in similar situations (such as forced rebel recruitment cases) have had some difficulty in establishing political opinion claims. Regardless, if an applicant can present a colorable political opinion claim, he certainly ought to do so.

91. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 486 (1992).

manifestation of political opinion, especially where this is in opposition to corruption that is “inextricably intertwined” with government activity—as opposed to isolated cases of corrupt behavior—and where the actions of the applicant can be characterized as those of a “whistleblower.”⁹² Such a scenario is, perhaps, most likely in cases where the police are complicit with gangs in their criminal activity, as is often the case in Central America.⁹³

Often the stance of an applicant who fears forced recruitment to a gang is more clearly characterized as neutrality rather than opposition. Consider, for instance, a scenario in which the applicant does not wish to join a gang and fears for his safety if he does not join; but where, at the same time, the applicant also does not actively oppose gangs before being recruited. A stance of “neutrality” can, in some cases, ground a political opinion claim, although in such cases the applicant’s position of neutrality must be manifest and the gang must oppose this position.⁹⁴ If neutrality is not “manifest,” it will be hard to distinguish from mere fear of generalized civil disturbances, which, as noted, is not a ground for asylum.⁹⁵

A claim might be made here by analogy to neutrality cases relating to guerrilla activity, as seen in *Bolanos-Hernandez v. INS*.⁹⁶ After *Zacarias*, however, it seems that neutrality must be based on an explicit political consideration to be a basis for asylum since, in that case, the Supreme Court rejected the idea that opposition to forced recruitment is always a political opinion, noting that, “[e]ven someone who supports a guerrilla movement might resist recruitment for a number of reasons—fear of combat, a desire to remain with one’s family and friends, a desire to earn a better living in civilian life, to mention only a few.”⁹⁷ Because the applicant in *Zacarias* did not show that his opposition was due to a political motive,⁹⁸ (he had testified to the contrary), he had not established

92. See *Grava v. I.N.S.*, 205 F.3d 1177, 1181 (9th Cir. 2000).

93. See *Arana*, *supra* note 11 at 6; *Corsetti*, *supra* note 8 at 413.

94. See *In re Vigil* 19 I. & N. Dec. 572, 576 (B.I.A. 1988).

95. *Id.*

96. 767 F.2d 1277 (9th Cir. 1984).

97. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

98. The applicant testified that he refused to join because “he was afraid that the government would retaliate against him and his family if he did so.” *Id.* at 480.

that the danger he faced from rebel groups was “on account of” a protected ground.⁹⁹ Similarly, if an applicant refused to join a gang because, say, his job paid a better wage than he could expect to make from gang activity, and he could not otherwise show that he was threatened by the gang, then pressure to join the gang might not count as persecution.¹⁰⁰ With that said, such cases seem unlikely to be very common.

In re Vigil poses another potential worry for cases based on forced recruitment into gangs.¹⁰¹ In *Vigil*, the BIA held that forced recruitment by rebel or guerrilla groups *as such* did not count as persecution under the INA.¹⁰² The BIA said that the forced recruitment by guerrillas was not done to persecute those forcibly recruited, but rather to further the guerrillas’ political goals.¹⁰³ While a threat to harm someone who opposes forced recruitment may be persecution, forced recruitment itself was not, the BIA held.¹⁰⁴ Similarly, IJs may hold that gangs are not seeking to persecute the applicant by forcing his recruitment but merely seeking to further their own criminal goals. Thus, it will be necessary to show that if one refuses to be recruited by a gang, then an illegal use of violence will follow. The fact that gangs, even more so than guerrilla groups, do not have a right to enforce their will by violence should be enough to distinguish forced gang recruitment

99. *Id.* at 482–83.

100. *See generally id.*

101. 19 I. & N. Dec. 572, 577–78 (B.I.A. 1988). It is unclear, however, how the decision fits with *Pitcherskaia v. INS*, in which the Ninth Circuit held:

[D]efinition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem “offensive” Motive of the alleged persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her “on account of” a characteristic or perceived characteristic of the alien.

Pitcherskaia v. I.N.S., 118 F.3d 641, 647 (9th Cir. 1997). Forced recruitment into an unlawful armed band, whether a guerrilla group or a street gang, would seem to fit this “objectively offensive” test and therefore, notwithstanding *In re Vigil*, should be considered persecution regardless of the recruiter’s motive—at least in the Ninth Circuit.

102. *In re Vigil*, 19 I. & N. Dec. 572, 577–78 (B.I.A. 1988).

103. *Id.*

104. *Id.*

from coercive government conscription. When possible, it will likely be useful to frame the case so that the harm feared is not the forced recruitment itself but rather the threat of further harm if the applicant refuses to join the gang.

Finally, applicants in these cases will have to address all of the same issues relating to non-governmental actors discussed above. Because the issues faced by applicants in the second group in non-governmental actor cases, are very similar to those faced by the female applicants in my first group I shall, for the most part, not specifically address these issues again here. However, the recent unpublished decision of *Romero-Rodriguez v. U.S. Attorney General*¹⁰⁵ is worth mentioning again, since it is directly on point. In this case, the Eleventh Circuit upheld the ruling of an IJ that the applicant did not have a well-founded fear of persecution from gangs because “the Honduran government was attempting to control the lawlessness that existed in that country.”¹⁰⁶ Once again, this clearly demonstrates the need to show that the government in the applicant’s country is unable to provide protection from gang members. This might be accomplished by citing country conditions reports and also by showing that the applicant sought, but failed to receive, adequate police protection.

*C. Former Gang Member or Person with Gang Tattoos who
Fears Being Sent Back to His Home Country*

The final class of gang-related cases involves claims brought by former gang members or those with gang tattoos that indicate an affiliation with a gang. These cases differ from the earlier two in that here the applicants most often claim a fear of persecution not from gangs, although they may fear this as well, but from the government or government-related “death squads” that kill or otherwise persecute former gang members. Additionally, in the vast majority of such cases the applicants have either engaged in or have been convicted of criminal activity. Therefore, their claims will either fall under the Convention Against Torture or Withholding of Removal rather than traditional asylum since nearly all such cases involve criminal bars to asylum, or at least

105. 131 Fed. App’x 203 (11th Cir. 2005) (unpublished).

106. *Id.* at 204–06.

behavior which would result in a denial of asylum based on the exercise of discretion.¹⁰⁷

An applicant who is ineligible for asylum, because of criminal bars or because of adverse discretionary elements, might be able to apply for Withholding of Removal. Comparing the two forms of relief, the criminal bar for Withholding of Removal in INA § 241(b)(3)(B) is somewhat more generous than that for asylum in INA § 208(b)(2)(A)(ii): the former applies to convictions for “particularly serious crimes” for which a penalty of at least five years has been imposed, whereas the latter applies to convictions for any particularly serious crime without regard to the length of the sentence.¹⁰⁸ Therefore, some applicants who are criminally barred from asylum may still qualify for Withholding of Removal.

In order to qualify for Withholding of Removal, however, the applicant will still have to show that he faces persecution on the basis of a protected ground, as in an asylum claim. Particular social group is again the most likely category. For example, “ex-gang member” would seem to be a straightforward social group as it picks out a group of people who have a common immutable characteristic.¹⁰⁹ Considering past membership cannot be undone, the *Acosta* test would thus be satisfied in this example. Furthermore, this seems to be a group that is readily noticed by the societies in question and whose members are treated in certain ways *because* of their membership in this group. Still, it would be necessary to show that all members of this group face danger, a task that may sometimes be difficult. This is especially true since one’s past gang membership is not the sort of thing that one has a clear right or strong interest in making known to the public, in contrast to, for instance, one’s sexual identity or religion. Thus, it might be argued that the applicant could or should simply hide this fact.

Perhaps more seriously, the commentary on the proposed regulation on social group claims¹¹⁰ attempts to rule out claims based on past gang membership as a social group, noting that:

107. For criminal bars to asylum, see INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006).

108. Compare INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2006) with INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006).

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

110. First proposed in 2000 but still not yet adopted.

[N]ot all past experiences should qualify as traits which, if shared by others, can define a particular social group for asylum and withholding purposes. The experience of joining a violent gang in the past, for example, cannot be changed. At that point in the past, however, that experience could have been avoided or changed. In other words, the individual could have refrained from joining the group. Certainly, it is reasonable for any society to require its members to refrain from certain forms of illegal activity. Thus, for example, under this language, persons who share the past experience of having joined a gang would not constitute a particular social group on the basis of a past experience.¹¹¹

This potential worry has recently been born out in a very recent Ninth Circuit decision, *Arteaga v. Mukasey*.¹¹² In *Arteaga*, the Ninth Circuit held that “criminal gangs” could not count as “social groups” for the purpose of the INA because asylum was intended to serve humanitarian purposes, the direct opposite of the sort of purposes furthered by criminal street gangs.¹¹³ While this opinion has precedential effect in the Ninth Circuit and will likely be persuasive in other circuits, especially given the unsympathetic nature of the applicants, it is not above criticism. Nothing in the INA or the current regulations strictly implies that the socially undesirable nature of a particular social group negates a potential duty to protect the members of such a group from persecution. Be this as it may, those bringing such cases will clearly face great difficulty.

Another possible social group characterization would be “people with gang tattoos.” Even though this characterization would meet the *Acosta* test, there are potential drawbacks here as well, similar to those mentioned above. Judges may very well determine that this proposed category is overbroad. For example, in

111. Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76594 (Dec. 7, 2000) (*to be codified at* 8 C.F.R. § 208).

112. 511 F.3d 940 (9th Cir. 2007).

113. *Id.* at 946.

Castellano-Chacon v. INS,¹¹⁴ the Sixth Circuit held that the applicant's evidence referred only to "tattooed youth" and because he was now twenty-seven years old, and so no longer a "youth," he had not presented evidence that it was more likely than not that he faced persecution as a member of a particular social group.¹¹⁵

Additionally, judges may sometimes suggest that tattoos should be removed or simply covered up.¹¹⁶ The removal or concealment of tattoos is, of course, an option available only for those who have a relatively small number of tattoos. Because this infeasibility of removal or concealment will likely be obvious to anyone who sees a gang member covered with tattoos, a moral line may be drawn here from the fact that the proposed remedy is not one that could, in many cases, be realistically implemented. As a lot, former and current gang members are deeply unsympathetic clients. In a significant portion of cases, gang members face deportation for drug-related or other serious crimes and they often have violent pasts. Given these characteristics, it is understandable, if not perhaps admirable, that judges will look for any plausible ground to deny Withholding of Removal—anyone representing such a client must squarely face this fact. While it is impossible to give certain advice without knowing the details of a case, it will likely be useful if an applicant can show that he is no longer involved with criminal activity, has made other positive contributions to society, or that others who do not share the applicant's negative traits will be harmed if he is removed.

Next, some possible future developments in this area must be noted. Both the House and the Senate have introduced legislation¹¹⁷ that would make being a member of a designated street gang a deportable offense and would bar those so designated from applying for asylum or from receiving protection under Temporary Protected Status ("TPS").¹¹⁸ No criminal conviction would be

114. 341 F.3d 533 (6th Cir. 2003).

115. *Id.* at 551.

116. *See, e.g., In re Ever Jonathan Rivas Vallejo* (B.I.A. 2004) (on file with author).

117. *See* Secure Borders FIRST (For Integrity, Reform, Safety, and Anti-Terrorism) Act, H.R. 2954, 110th Cong. (2007); Border Security and Immigration Reform (Border Security) Act of 2007, S. 330, 110th Cong. (2007); *see also* Alien Gang Removal Act of 2005, H.R. 2933, 109th Cong. (2005).

118. *See Border Security Act* § 205(a)(3).

needed to instance a deportation under the proposed legislation.¹¹⁹ The Department of Homeland Security would have the authority to designate groups to be “criminal street gangs.”¹²⁰ Under the proposal, “criminal street gang participation” would be added to the list of criminal offenses found in INA § 237(a)(2) that make an applicant ineligible for a visa or entry.¹²¹ The proposed legislation has not yet emerged from committee in either the House or the Senate so, at the present time it is unclear if it will become law. Obviously, such a development would even further limit the narrow options held by applicants in this last category and, therefore, development in this area must be watched closely.

The last category to be explored is protection under the Convention Against Torture.¹²² One of the advantages under the CAT is that former gang members seeking to avoid deportation are not excluded from relief due to certain criminal convictions, nor are such applicants required to show that the harm feared is “on account of” one of the protected grounds.¹²³ There are, however, other significant difficulties for a former gang member that make establishing a CAT claim significantly more difficult. First, the burden of proof is higher: the applicant must show that it is “more likely than not” that he will be subjected to torture if he is returned to his country of nationality.¹²⁴ This is obviously a much more difficult standard to meet than the “well-founded fear” standard for asylum, which required only a ten percent chance that the feared persecution will happen.¹²⁵

Next, CAT withholding has a more rigorous “state actor” requirement than does asylum. To illustrate, the applicant must show that the feared torture is “at the instigation of or with the

119. *See generally id.* at § 205.

120. *See generally id.*

121. For further discussion on this issue, see *House Judiciary Subcommittee Holds Hearings on Alien Gang Removal Bill*, 82 INTERPRETER RELEASES 1064, 1064 (July 1, 2005).

122. 8 C.F.R. § 208.16 (2006).

123. *See* 8 C.F.R. § 208.16(c)(2) (2006).

124. *Id.*

125. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987). This numerical representation, however, while common and perhaps useful as a mnemonic, is potentially misleading because it may unreasonably raise an expectation of precision in determining the level of risk an applicant faces.

consent or acquiescence” of public authority.¹²⁶ “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.”¹²⁷ The BIA has held that mere inability to stop an action does not amount to acquiescence on the part of authorities.¹²⁸ Rather, the authorities must willfully choose to not intervene or, in some cases, be “willfully blind” to the feared torture.¹²⁹ A significant amount of the danger faced by former gang members that returned to their countries of nationality seems to come from “death squads.”¹³⁰ For such actions to fall under a CAT claim, the applicant will have to show significant links between the actions of such groups and the government to satisfy the “acquiescence” standard. Additionally, as should be clear, a fear of gang warfare or of being killed by a rival gang will almost certainly not work for CAT withholding.

In a recent unpublished opinion, the BIA overturned a decision by an IJ granting deferral under the Convention to a former gang member from Guatemala.¹³¹ The applicant had joined a gang in the United States at a young age.¹³² He was deportable as an aggravated felon for selling drugs and had significant gang-related tattoos over most of his upper body, a feature that would make him readily identifiable as a gang member to the Guatemalan government.¹³³ The IJ order a deferral of removal because the applicant had established that it was more likely than not that he would be immediately detained and tortured by the Guatemalan authorities if he were removed to Guatemala.¹³⁴ The BIA overruled the

126. 8 C.F.R. § 208.18(a)(1) (2006).

127. 8 C.F.R. § 208.18(a)(7) (2006).

128. See, e.g., *In re* Maria Cristina Guevara, No. A37 239 114, 2008 WL 243751 (B.I.A. Jan. 11, 2008) (unpublished decision); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003).

129. *Id.*

130. See, e.g., Ginger Thompson, *Guatemala Bleeds in Vice of Gangs and Vengeance*, N.Y. TIMES, Jan. 1 2006, at A10.

131. *In re* J_ A_ R_ A_, A # [redacted] (B.I.A. Feb. 11, 2005) (reversing *In re* R_ S_ (York, PA Immigration Court, July 2004)) (on file with author).

132. *Id.*

133. *Id.*

134. *Id.*

IJ, holding that the applicant had not shown that he would be immediately detained because he had only hearsay stories to support this claim, and also holding that not all police brutality amounts to torture.¹³⁵ This case illustrates some of the difficulties faced under the CAT standard.

III. CONCLUDING REMARKS

Gang-related asylum cases in all three categories present special challenges to both applicants and the attorneys representing them. The cases depart from typical asylum cases in a number of ways, most obviously by involving non-state actors and a less clearly defined nexus between the harm feared and a protected ground. Therefore, significant work must be done to prepare a case to establish a claim as genuine, which must include significant research on country conditions. And yet, if one of the purposes of asylum law is to protect people from persecution based on characteristics they cannot or should not have to change because their own government cannot or will not protect them, then all of these cases, in fact, do fall squarely within the traditional paradigm. With creative formulation and use of evidence, applicants in this emerging genre of asylum claims may experience more success.

135. *Id.*