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Stanislaw Kraweicki

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Children Are Actors Too: In Search for Child Refugees' Agency

Stanisław Krawiecki*

"It is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children."¹

The above quoted perspective of an immigration judge in 1988, condoned by the First Circuit in 1998, exemplifies the prevailing attitude of courts and asylum practitioners towards child refugees.² There has been a considerable increase in concern about children and a movement to empower child asylum seekers procedurally within their asylum process.³ Nevertheless, the overwhelming substantive focus has been to develop claims based on extreme suffering of passive, undeserving children.⁴ While children do suffer from being in the midst of extreme state persecution in many cases, children are not always persecuted *only* as a collateral target of a state agent, insurgency, or gang going after their family or community. Sometimes children's active civic engagement or assertion of their rights leads to persecution. This is not to say that children are responsible for their persecution and thus should be denied asylum. To the contrary, this paper contends that children should be getting asylum based on persecution which punishes them for actively exercising their rights. The following pages hypothesize that that an agency-driven approach to child asylum claims is both feasible and necessary for the children to transition from passive victims into complete humans with legally cognizable claims based on their actions. This paper also seeks to broaden the understanding of what it means for a human and for a legal system that to realize that living your own life your own way can lead to being persecuted.

This paper starts by briefly outlining the main elements of an asylum claim. It then sets forth the *ratio scripturam*: highlighting the normative building blocks for active-agency asylum claims in the current international and domestic asylum framework. The following two sections briefly dive into case law, discussing cases which provide a basis for the proposed approach. Lastly, this article highlights the risks of its proposed approach and the bifurcation of asylum claims into (1) passive claims, that concentrate almost exclusively a child's vulnerability; and (2) active claims, that highlight child's actions as persecutors' reason for targeting them.

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¹ *Civil v. INS*, 140 F.3d 52, 55 (1st Cir. 1998).

² *See id.*

³ *See generally* JASON M. POBJOY, *THE CHILD IN INTERNATIONAL REFUGEE LAW* (2017); Deborah Anker et al., *Mejilla-Romero: A New Era For Child Asylum*, 12-09 IMMIGRATION BRIEFINGS (2012).

⁴ *See, e.g., id.* at 5.

I. THE CURRENT STATE OF CHILD ASYLUM CLAIMS

To qualify for asylum in the United States, an applicant has to meet the elements set forward by the Immigration Nationality Act (I.N.A.) statute. They must be both unable and unwilling to return to their country of origin.⁵ Moreover, the applicant must be unable to avail themselves of the protection of their home country because of suffered past persecution⁶ or have: (1) a well-founded fear of (2) future persecution; (3) on account of (4) one of the enumerated grounds—of which a particular social group⁷ and political opinion are of specific importance for this paper.⁸ This paper concentrates on elements three and four, claiming that there are more children persecuted *on account of* a ground *created by their action* than advocates and courts recognize.⁹

Most child asylum applications filed in the United States present children as passive victims of tyrannical persecution in their home countries. There is a good reason for this framing—primarily that many children are simply too young to be anything but passive in the face of persecution. For example, in *Ordoñez-Quino*, the Guatemalan military brutally bombed a child refugee's village, leaving the boy almost completely deaf.¹⁰ First Circuit *en banque* reversed and remanded earlier denials of asylum because the case, especially what is required for harm to rise to the level of persecution, should have been considered through child-sensitive lens.¹¹ Scholars such as Bhabha & Young underline that children are primarily dependent on their family.¹² Therefore, children are seen as collateral victims of violence in the persecution of their relatives or community.¹³ For instance, in *Kahssai*, the legal arguments before the court and the court's ultimate decision both highlighted the infliction of harm on close relatives as the source of persecution affecting the child.¹⁴

Moreover, the INS's *Guidelines for Children's Asylum Claims* have been hailed as a positive development within the asylum process.¹⁵ They underline children's passivity and their lack of understanding of the context around them—and might be the

⁵ 8 U.S.C §1101.

⁶ Which creates a presumption of future persecution, rebuttable by the government if it can show fundamental change in circumstances. 8 CFR § 208.13(B)(1)(i) (2022); *Ordonez-Quino v. Holder*, 760 F.3d 80, 87 (1st Cir. 2014).

⁷ The particular social group is the ground under which most children make claims. See Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. INT'L L. 285, 300320 (2009). See below for a discussion of children applicants as passive victims, a framework which fits neatly into PSG.

⁸ 8 U.S.C §1101.

⁹ See generally Anker et al., *supra* note 3, at 2.

¹⁰ *Ordonez-Quino*, 760 F.3d at 83.

¹¹ See *id.*

¹² Jacqueline Bhabha & Wendy Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 763 (1998).

¹³ See *id.*

¹⁴ See *Kahssai v. INS*, 16 F.3d 323, 328-329 (9th Cir. 1994).

¹⁵ USCIS, *Guidelines for Children Asylum Claims* (Dec. 10, 1998).

main reason that courts treat children's testimony and assess the strength of the children's claims differently than adults.¹⁶ But, they also evoke the belief that children are passive bystanders—based on the imprecise perception that child cases generally involve harm to very young children. These frameworks demonstrate a “passive victim” approach, which is the main mechanism through which children's cases are presented. This may at times be correctly based on the factual scenario in the case, but often it is an unchallenged default. However, this belief subsumes a whole category of individuals up to eighteen-years-old, and thus disregards the actions of many children.

In *Civil*, the applicant, who was sixteen at the time, expressed a view that a former president of Haiti should be restored to power.¹⁷ She said this to a friend on the street, but was overheard by an alleged persecutor who commented, “Children shouldn't be talking about such things. There are a lot of people who don't like [the former president] and they can kill you.”¹⁸ That same night, the applicant's house was stoned and the applicant fled the country fearing further retaliation for what she said.¹⁹ She asserted political opinion as grounds for her claim—the political opinion which she had expressed to her friend, and for which the former president's opponents wanted to punish her. However, the court would *only* consider child asylum possible for a passive victim and did not believe that an *action* by the applicant could have been the driver of persecution.²⁰

Even the most transformative advocates in the country explicitly hail the *Mejilla-Romero* court granting asylum to applicant who had suffered harms as a child due to his family being targeted a sign of progress, because it allows asylum lawyers to humanize child asylees.²¹ Advocates argue that concentrating primarily on trauma and vulnerabilities of child victims should be the main mechanism with which courts and advocates view their cases and expand their understanding of child asylum.²² Though it is a framework worth considering, concentrating exclusively on passivity and vulnerability when discussing many child refugees obscures an integral part of their humanity.

II. A NEW FRAMEWORK

Nevertheless, a child-actions-centric framework remains at the advocates' and court's fingertips, waiting to be discovered and utilized. The children's-rights approach to asylum law can offer a perspective of children as exercisers of rights, rather than simply as victims. Advocates and courts could learn from how Jason Pobjoy highlights the interplay of the United Nations Convention on the Rights of the Child (“CRC”) and the asylum process for children while simultaneously underlining the agency of children in

¹⁶ Memorandum from Jeff Weiss, Acting Director, Office of International Affairs to The Asylum Immigration Officers at INS, *Guidelines for Children's Asylum Claims*, p. 12-13 (Dec. 10, 1998).

¹⁷ *Civil v. INS*, 140 F.3d 53, 54 (1st Cir. 1998).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 56.

²¹ See Anker et al., *supra* note 3, at 2.

²² *Id.* at 3.

the proceedings.²³ The CRC's framework is based on receptiveness to the child's actions, words, and recognizing their agency.²⁴ Although listening to the child is also mandated at the asylum process stage, the fact that the CRC had to remind practitioners that children are actors, not objects, speaks to the normative reliance on passivity in cases with child clients.²⁵

Indeed, viewing children through a condescending, passive lens, regardless of their circumstances, is a product of cultural insensitivity. To move our system forward, we must become more culturally aware and recognize that not all cultures view children the same way. Children are not always viewed as dependent and passive; they are expected to act and shape their future, albeit in their own ways.²⁶ By countering traditional Western notions of dependence and passivity, we can empower children in a broad sense and promote a children-sensitive model of active citizenry.²⁷ By adopting the notion of an active child asylee, we empower children to be independent social actors as Pobjoy calls for²⁸—only in a new dimension. Rather than simply promoting agency as a child's advocate in a refugee claim, society must accept that minors have the capacity to exercise the full scope of their rights prior to fleeing from persecution.

How and why do children exercise their rights then? Further, what, broadly, is the nature of those rights? Children's rights should center on their prerogative to shape their own future and live life their own way, without being subjected to outside threats. Thus, if a child's way of life is being disrupted by gangs, governments, or rebel forces, children have the right to refuse to submit to their control. This means not only resisting prior or forced recruitment, but also escaping their fate after being captured. It is that escape, as an active expression of refusal to submit instead of being a passive collateral victim of persecution of another, that should be highlighted if present.

Importantly, women's active refusal to submit to gender discrimination has been recognized by asylum practitioners.²⁹ A similar emancipation can empower children. The intended effect of asylum law is to give effect to international rights through domestic

²³ See Pobjoy, *supra* note 3, at 27.

²⁴ G.A. Res. 44/25, Convention on the Rights of the Child, art. 15, (Sept. 2, 1990) Granted, in addition to the disempowering best interests principle which mandates other actors to think for the child. *See Id.* at Art. 3(1). UNHCR, *Refugee Children No. 47 (XXXVIII) -1997*, Refworld, at(d) (1987).

²⁵ *See, e.g.*, UNHCR, *Refugee Children and Adolescents U.N. Doc. No. 84 (XLVIII)*, CRC Executive Comm. On its Forty-Eighth Session, at a. (1997) (framing children as active subjects of rights, meaning they exercise their rights as agents).

²⁶ *See* Joanne Westwood, *Childhood in Different Cultures*, in *AN INTRODUCTION TO EARLY CHILDHOOD STUDIES* 19 (Maynard T, Powell S. eds. 2013).

²⁷ *See* Daiva Stasiulis, *The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement*, 6:4 *CITIZENSHIP STUD.* 517, 518 (2002).

²⁸ *See* Pobjoy, *supra* note 3, at 28.

²⁹ *See* Deborah Anker, *Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States*, in *GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE* 46, 63 (2014).

processes.³⁰ A human rights approach to children's asylum will frame them as subjects or rights, not objects.³¹ The intended normative and framing benefits are exemplified by the facts in *Santos-Guaman*.³² The applicant, a child at the time of the actions at issue, is an indigenous Quiché from Ecuador.³³ His teachers and peers made fun of him in school, then his colleagues did the same at work, and he was ultimately targeted for wearing traditional clothing and speaking his own language.³⁴ In effect, the applicant was a child pursuing his own way of life and exercising his rights to do so through various means, which directly led to the persecution. Recognizing the agency of kids who make decisions to live as they see fit at a very young age helps attach meaning to their rights and empowers them.

A. The Practical Benefits of this Approach

There is also a practical benefit to emphasizing actions of children as giving rise to the fear of persecution. As elaborated below, courts often seem more likely to doubt “passive” grounds for asylum—those which suggest that the victim had done nothing but had been targeted, nevertheless. For that reason, this paper conceptualizes child-agency-based political opinion asylum claims. However, because of the risks related to relying on that ground alone, it then argues that the particular social group (“PSG”) ground could be the avenue where children’s agency plays the most important role. A PSG is defined as a group united by a voluntary association, including a former association, or by an innate [immutable] characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.³⁵ Furthermore, for a PSG to be cognizable, it needs to meet two, often indistinguishable, requirements: social distinction and particularity.³⁶

First, activity-based particular social group (“PSG”) grounds for asylum preemptively counters an argument that the social group is amorphous or that, in essence, the applicant was targeted randomly, not because of their characteristics. By narrowing the proposed PSGs from all victims of a certain persecutor to only those who have acted against them, it would mitigate some courts’ objection that the proposed social groups are too expansive and thus too amorphous to meet the particularity requirement. In *Lukwago*, the applicant had been a forcefully conscripted Lord’s Resistance Army (“LRA”) child soldier in Uganda.³⁷ He escaped

³⁰ *Perkovic v. I.N.S.*, 233 F.3d 615, 623 (6th Cir. 1994).

³¹ See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 990 (2002).

³² *Santos-Guaman v. Sessions*, 891 F.3d 12 (1st Cir. 2018).

³³ *Id.* at 14.

³⁴ *Id.*

³⁵ *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005); See *Acosta*, Interim Decision #2986 (B.I.A. 1985).

³⁶ See *Acosta*, Interim Decision #2986 (B.I.A. 1985); *Matter of S-E-G* (B.I.A. 2008).

³⁷ *Lukwago v. Ashcroft*, 329 F.3d 157, 164 (3d Cir. 2003).

four months after conscription, at the age of 15.³⁸ He presented two types of claims: (1) that he had been targeted because he was a child from Northern Uganda who was abducted and enslaved (passive claim); and (2) that he feared future persecution as a member of the PSG of former child soldiers *who have escaped LRA enslavement* (active claim).³⁹

In partially reversing the Board of Immigration Appeals ('BIA'), the court only responded favorably to the second, active claim.⁴⁰ In rejecting the passive claim, the court argued that there was evidence that Lukwago was targeted not because of his age (i.e., passive membership in the child PSG), but because of LRA's general need of labor.⁴¹ There was evidence that all ages of people were targeted for the general need of labor.⁴² It appears that what made the difference was that by acting—escaping—Lukwago differentiated his PSG by establishing a clear active component.⁴³ It may be that child soldiers who flee may be targeted for reasons unique to that group, such as retribution or the desire to re-recruit. In other words, emphasizing the active grounds for asylum can limit the size of the proposed PSG to those who acted.

Indeed, courts might be biased towards asylum applicants they see as 'braver.' In *Henriquez-Rivas*, that tendency was salient and emphasis on the agency of the child applicant made a practical difference.⁴⁴ The court shared the government's sentiment that a general "opposition" to a gang's actions is not enough to define a valid PSG.⁴⁵ However, the child applicant in this case had testified in domestic court in el Salvador against the gang members.⁴⁶ The court granted asylum because it saw the applicant's affirmative act (the testimony) expressing his opposition as basis to fear retaliation from the gangs.⁴⁷ The court thus distinguished those who acted from those only generally opposed to gangs or otherwise passively engaged by gangs—with the latter unable to state a cognizable claim in the court's view.⁴⁸

Furthermore, emphasizing the child's agency counters another argument raised by the government: That the PSG lacks clear borders and ways to decide who belongs to the

³⁸ *Id.*

³⁹ *Id.* at 165.

⁴⁰ *Id.* at 179-180.

⁴¹ *Id.* at 170.

⁴² *Id.* at 172.

⁴³ *Id.* at 174-175

⁴⁴ *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1104 (9th Cir. 2013).

⁴⁵ *Id.* at 1084-1085; for similar court reasoning *see also Santos-Lemus v. Mukasey*, 542 F.3d 738, 748 (9th Cir. 2008); *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009) (noting that there is more to PSG than just resisting gang recruitment).

⁴⁶ *Henriquez-Rivas*, 707 F.3d at 1092.

⁴⁷ *Id.*

⁴⁸ *Id.*; *See also Orellana-Guzman v. Sessions*, 742 Fed. Appx. 214 (9th Cir. 2018) (denying petition for review because being merely a passive witness of gang violence in general is not enough to qualify for asylum).

group and who does not. In *Matter of S-E-G*, the BIA held that the proposed PSG was composed of “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang” based on their personal, moral and religious opposition to the gang’s values and activities was too amorphous.⁴⁹ Because people can understand “resisting” and the other qualifiers differently, the group is not defined particularly enough to know who is in it and who is not.⁵⁰ Emphasizing agency may address that concern. It is clear who has acted, like escaping the LRA, fighting a gang member, or testifying in court. These actions are the precise factors which situate children within an “active” PSG.

Moreover, it counters the court’s problems with tautology. For instance, Davis showed how the PSG of former child soldiers might not always be accepted in the contemporary judicial landscape.⁵¹ The PSG is criticized by some decision-makers for being defined just by the persecution itself⁵²—especially if age is not seen as a sufficient defining characteristic. Once advocates introduce agency into the proposed PSG, the past-action-based immutable characteristic will be independent of persecution.

All the normative and practical reasons do not intend to suggest dismantling a child-sensitive approach to asylum. On the contrary, there needs to be a balance struck between extreme passivity, dependency, and treating a child like an adult.⁵³ Emphasizing vulnerability and agency can go hand-in-hand for two reasons. First, children are likely to suffer more when they are persecuted for exercising their rights and taking action. Children are more vulnerable and distinguish themselves to potential persecutors by taking an action that offends them.⁵⁴ Second, when children are targeted, persecution interferes with their development during *formative years* and can cause permanent changes in their brain.⁵⁵ The relationship between agency (which is crucial for a child)

⁴⁹ *Matter of S-E-G, et al.*, 24 I. & N. 579, 585 (B.I.A. 2008).

⁵⁰ *Id.*

⁵¹ Tessa Davis, *Lost in Doctrine: Particular Social Group, Child Soldiers, and the Failure of U.S. Asylum Law to Protect Exploited Children*, 38 FLA. ST. U. L. REV. 653, 653 (2011).

⁵² *See, e.g., id.* at 666 (criticizing the court for failing to recognize other characteristics besides the persecution itself).

⁵³ This is not an area that only American courts can improve in. Stasiulis highlights children-rights cases *sensu lato* in Canada which fit children into either extremely dependent and therefore deserving of protection, *see Li v. Canada, (Minister of Citizenship and Immigration) (2000) F.C. 2037.*, or fully self-sufficient and therefore undeserving of protection *Zhu v. Canada (Minister of Citizenship and Immigration) (2001) F.C. 1251.*, esp. para. 34).

⁵⁴ E.g. testifying or fleeing.

⁵⁵ *See, e.g., Johanna Bick & Charles A. Nelson, Early Adverse Experiences and the Developing Brain*, 41 NEUROPSYCHOPHARMACOLOGY REV. 177, 177 (2015) (on how early-in-life adverse experiences have a higher impact on one’s brain than those later in life—which highlights the developmental impacts of persecuting a child for acting the way the child sees fit can have on the child’s neuroprocesses concerning independent thinking and action going forward).

and vulnerability,⁵⁶ along with their lack of power to seek protection, cumulatively call for a re-evaluation of how child asylum cases should work.

III. REIMAGINING CHILD AGENCY IN ASYLUM CLAIMS

There are two main avenues for highlighting children's agency that this article will discuss: (1) the ground of political opinion; and (2) particular social group. Both avenues contemplate that the actions by children rather than characteristics present from the child's birth, both are an expression of a right that the child has and should not be afraid to exercise, and both raise potential reasons for persecution. This section proceeds by discussing how an action by a child can form a political opinion ground for asylum, even if the action is not overtly political. Then the section addresses how PSG requirements can be met by restoring agency to children.

A. Political Opinion

For children, an action that signals rejection and opposition is especially significant—for their development and highlighting their actions as an active expression of an opinion. Rejection of gender stereotypes and refusal to submit to oppression has been recognized by the Ninth Circuit as a manifestation of political opinion.⁵⁷ If, in the gender context, an action can be classified as expressing a political opinion of refusal to submit to oppression, then, in a child context, an action of leaving or acting against a gang or organization could also be characterized as refusal to submit to oppression which constitutes a political opinion. It is potentially vital to children's development to provide a platform for children to be able to take actions consistent with their *developing* political and moral backbone.

Just as the fight to get the courts and the US government to look at gender-based asylum cases differently,⁵⁸ the same fight should commence with respect to children. Persuading the courts to recognize that children do have political opinions more often than we think would contribute to the process.

Although the immigration judge, BIA, and the circuit court itself made a mockery of that idea in *Civil*,⁵⁹ constantly presenting child asylum seekers as agents can make progress towards that goal. They held Lucienne Yvette Civil's statements of support for the former president of Haiti were not an example of political opinion.⁶⁰ That is an unexplainable rejection of a clear case of political expression by a child. But to qualify as a political opinion, the reason for persecution does not have to be a verbalization of

⁵⁶ Ulrika Wernesjö, *Unaccompanied Asylum-seeking Children: Whose Perspective?*, 19 CHILDHOOD 495, 500 (2011).

⁵⁷ See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 5:30 (2012, ed.).

⁵⁸ See Anker, *supra* note 3, at 3.

⁵⁹ *Civil v. INS*, 140 F.3d 52, 55 (1st Cir. 1998). ("It is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children").

⁶⁰ *Id.*

political views. Henceforth, many children, including those who either do not want to or are not able to say what their views are directly, can have political opinions. Actions can demonstrate opinions and beliefs.⁶¹ Moreover, to form a ground for asylum, a persecutor need only attribute a political opinion to the refugee and target them because of it—even if in fact the refugee had not held or expressed that precise opinion.⁶² It is not entirely co-extensive with the “imputed political opinion” ground in that imputation to children has been used by advocates to suggest the child is at risk of persecution because of their family’s views.⁶³

On the other hand, a persecutor can attribute an opinion to a child based directly on the child’s actions—targeting the child to change that opinion⁶⁴ *as perceived by the persecutor*.⁶⁵ It might often be the case that, for some reason, a persecuting agent is deathly afraid of children holding political views opposed to them.⁶⁶ Whether it is because the child is important in a community or the persecutor believes it should be easier to control children and is upset with every failure is unimportant. That child can then be subject to violent persecution, which will have a greater impact on a child than adult because of the unfinished psychological development and the related greater sensitivity of children.⁶⁷ Indeed, even a flight from an actor attempting to harm the person fleeing can be an expression of a political opinion of opposition to that actor—and thus could be enough to create an extremely well-founded fear of future persecution.⁶⁸ The child can then be oppressed not only for that political opinion, but also simply to exploit the child. Economic reasons as well as political opinion grounds still make a valid asylum claim so long as the opinion is one of the persecutor’s central reasons.⁶⁹

Furthermore, neutrality can also form political opinion.⁷⁰ That neutrality is possibly crucial in cases of children, where sharp and precisely articulated extreme political views might not be formed, but politically and morally charged willingness to

⁶¹ See ANKER, *supra* note 57, at §5:7 (noting that actions can constitute direct evidence of nexus).

⁶² *Id.*; See generally A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INT’L L. 129 (Vol. I 1966); see also JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 155-56 (2014), which was cited with approval by the UK Supreme Court in *RT (Zimbabwe)* (UKSC, 2012), at 363 [53] (focus is always on the existence of a *de facto* political attribution, notwithstanding the objective unimportance of the claimant’s political acts, her own inability to characterize her actions as flowing from a particular political ideology).

⁶³ See, e.g., *Mejilla-Romero v. Holder*, 600 F.3d 63, 78 (1st Cir. 2010) (neighbor calling the child’s family “communists”).

⁶⁴ See *In re S-P-*, 21 I&N. June 486, 492-494 (BIA 1996) (discussing how to prove the motive of the persecutor).

⁶⁵ See *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007) (noting that a political opinion can be that which is actually held and that which is imputed by the persecutor).

⁶⁶ *Civil v. I.N.S.*, 140 F.3d 52 (1st Cir. 1998) (which is what the court did not recognize in this case).

⁶⁷ See, e.g., *Anker et al.*, *supra* note 3, at 8.

⁶⁸ See, e.g., *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1281 & 1286 (9th Cir. 1984) (expressing refusal to join a guerilla group by fleeing the country).

⁶⁹ *Tornes v. Garland*, 993 F.3d 743, 751 (9th Cir. 2021) (“that an unprotected ground, such as a personal dispute, also constitutes a central reason for persecution does not bar asylum”).

⁷⁰ ANKER, *supra* note 57, § 5:25.

escape an oppressive organization which the child disagrees with is very possible. Additionally, neutrality can be much more offensive to persecutors when it is a child expressing it, because the organization expects children to be easily controlled.⁷¹ In effect, neutrality can be interpreted as anti-persecutor.⁷² For instance, in *Alvarez Lagos*, the applicant refused to pay the gang and fled the area.⁷³ The court held that the BIA should have considered the argument that the gang imputed an anti-gang political opinion to the applicant based simply on that refusal and flight as actions demonstrating unwillingness to be involved.⁷⁴ The fact that a child will not verbalize the reason behind those actions into a stated opinion does not prevent imputed political opinion claims based on a child's agency.⁷⁵ Asylum jurisprudence and advocacy has already recognized that children can suffer more from the same harm than adults because of their earlier stage of development. Therefore, we should not only recognize that a child might hold an opinion or express an opinion without being able to precisely verbalize it—with their unfinished development being one explanation. And that expression can often be a basis for fear of future persecution.

Therefore, recognizing children's agency can expand the perception of children as political actors and, in the long run, empower children to develop into active citizens. More proximately, it can lead to asylum based not only on expressly political words and acts;⁷⁶ but also, those which will be interpreted as such. For example, non-associational activism⁷⁷ or flight can lead at the very least to the persecutor imputing a hostile political opinion to the child.

⁷¹ See generally *Oliva v. Lynch*, 807 F.3d 53, 57 (4th Cir. 2015) (where a child merely decided to leave a gang after witnessing brutality and did not engage in express anti-gang actions, but thereafter drew violent threats from the gang).

⁷² See also *RT v. Sec'y of State for the Home Dep't*, UKSC 38, ¶¶ 32, 42 (2012) (recognizing that neutrality can result in the persecutors imputing a political opinion to the applicant).

⁷³ *Alvarez Lagos v. Barr*, 927 F.3d 236, 244 (4th Cir. 2019).

⁷⁴ See generally *id.* at 236.

⁷⁵ See, e.g., *Argueta v. I.N.S.*, 759 F.2d 1395, 1397 (9th Cir. 1985) (holding that by refusing to join and subsequently fleeing the country, the applicant expressed a neutral political opinion although he never verbalized his opinion).

⁷⁶ See, e.g., *Canjura-Flores v. I.N.S.*, 784 F.2d 885, 889 (9th Cir. 1985) (stating that membership in a leftist organization is an expression of political opinion).

⁷⁷ See *Espinosa-Cortez v. U.S. Att'y Gen.*, 607 F.3d 101, 111–14 (3d Cir. 2010) (holding that FARC's threats to the petitioner were centrally motivated by political opinion where the petitioner refused to cease supplying food to the Colombian government and military and refused to act as an informant to FARC); *Martinez-Buendia v. Holder*, 616 F.3d 711, 713 (7th Cir. 2010) (holding that FARC had imputed an anti-FARC political opinion to the petitioner when she refused to attribute the work of her volunteer medical organization to FARC). See also *Delgado v. Mukasey*, 508 F.3d 702, 706–07 (2d Cir. 2007) (holding that the Board should have considered whether the Colombian applicant had a well-founded fear of persecution on account of imputed political opinion after she fled the country following her refusal to give technological assistance to FARC); cf. *Sanchez v. U.S. Atty. Gen.*, 392 F.3d 434, 438 (11th Cir. 2004) (holding that a Colombian social worker who had refused to meet with FARC or to pay a subsequent fine imposed for her non-cooperation lacked a well-founded fear of persecution on account of political opinion); *Lopez Ordonez v. Barr*, 956 F.3d 238, 244 (4th Cir. 2020) (finding that the Guatemalan military intelligence unit imputed a political opinion of “opposition to ... the military's human rights abuses” to the

Therefore, contrary to the *Civil* court's misguided and biased perception of the world, age does not prevent the formation of political opinions and should not preclude a finding of persecution on account of it. After all, some children are smarter and more morally upright than adults and thus will stand for what is right, attracting targeting.

B. Particular Social Group

However, there is a risk with actions that imply political opinion. Many courts deny political opinion claims, asserting that the persecutors acted only for personal or economic reasons, not actually imputing political opinions to the refugee.⁷⁸ This portion of the article concentrates on how recognizing children's agency can help define PSGs as grounds for asylum—and mitigate risks related to political opinion. A PSG under U.S. asylum law needs to be defined by shared immutable characteristic(s), must be defined with particularity, and must be socially distinct.⁷⁹ Child agency can form the basis of a PSG claim by meeting all three requirements.

i. Immutable Characteristics

PSGs of children based on their actions and agency should be cognizable. It is now generally accepted that age is an immutable characteristic that can define a PSG—at least in part.⁸⁰ Even though age changes and the applicant does age out of an age-defined PSG, at any given moment in time—like the moment of the relevant action which creates fear of persecution—age is not subject to one's control.⁸¹ However, age alone might not be enough to define a sufficiently precise PSG to meet the particularity requirement. Courts have held that a group defined only by age might be too broad with too many differences within it.⁸² In many contexts, such as the risk of forceful conscription for children in a large area or country, that is an illogical requirement. However, if we focus on children's agency, there is usually another characteristic which can be used to define the PSG.

applicant where he, as a forced conscript to the military, refused an order to kill an infant and threatened to report the military's atrocities to human rights entities); *Zavala Meza v. Barr*, 773 Fed. Appx. 977, 977 (9th Cir. 2019) (holding that “rejecting a job offer from a police commander” constitutes “an anti-corruption political opinion”); *Yusuf v. Sessions*, 724 Fed. Appx. 575, 577–78 (9th Cir. 2018) (holding the petitioner whose home was attacked with a bazooka after he refused to join a Somali militia because he desired not to “kill innocent people” suffered past persecution on account of political opinion).

⁷⁸ See, e.g., *Molina-Morales v. I.N.S.*, 237 F.3d 1048, 1051 (9th Cir. 2001) (upholding BIA's finding that the persecution the Salvadoran applicant suffered after reporting the rape of his aunt by the leader of the ARENA political party wasn't persecution on account of imputed political opinion; rather based on a “personal matter”).

⁷⁹ See *Acosta*, Interim Decision #2986 (B.I.A. 1985); *Matter of S-E-G* (B.I.A. 2008).

⁸⁰ See *S-E-G*, 24 I. & N. Dec. 579, 583-84 (B.I.A. 2008).

⁸¹ See *ANKER*, *supra* note 57, §5:63 (age change does not matter for PSG immutability).

⁸² *Gomez-Guzman v. Holder*, (2012) 485 Fed. Appx. 64, 66 (6th Cir. 2012) (affirming rejection of the claim based on “Guatemalan children under the age of fourteen” on the basis that “Gomez fails to demonstrate his proposed group is sufficiently particularized”).

PSGs generally emphasize children's vulnerabilities rather than emphasizing their agency: for instance, past forcible recruitment, street children, witness of violence,⁸³ or victim of gangs were all recognized PSGs.⁸⁴ Of course, that makes sense in fact-specific scenarios. However, because subsets of children may constitute PSGs,⁸⁵ active characteristics can also be emphasized. In other words, the fact that children actively exercise their rights should be part of the PSG definition. We should recognize child agency and craft a system which empowers children to exercise their rights, from beliefs to actions. This claims could emphasize children acting according to their conscience, crucial in the development of young humans. Moreover, morality is an attribute that one should not be required to change, further strengthening its applicability to framing PSGs. Thus, for example, a child who decides to run away from a rebel group after being forcefully conscripted, or a child who decides to report a gang member, or acts as the whistleblower on a government official, would be protected and recognized—not only as a vulnerable fourteen-year-old, but also as a young human being who acted against evil and whose right to act is valuable and should be protected as much as those of adults.⁸⁶ This way, the asylum system will grant agency to children by recognizing their capacity for reasoned choice.⁸⁷

Specifically, children who were at some point forced to work with or be members of violent organizations have a logical route to pleading a PSG. If they are applying for asylum, it is oftentimes because they either fled the group, or took an affirmative action which went against the group's interest. If former gang membership is immutable because past characteristics are no longer subject to change, then acting in the past or running away is equally as immutable. Moreover, it escapes the issue of being defined by shared persecution. While a potential PSG composed of "children of X age, former forced members of a gang" may be said to be defined almost exclusively by shared persecution, children of X age who run away from a gang would also be defined by shared affirmative action—agency. And when PSG is only partially defined by shared persecution, it is potentially cognizable.⁸⁸⁸⁹ Thus, more cases should attempt to frame the

⁸³ ANKER, *supra* note 57, §5:63.

⁸⁴ Katelyn Masetta-Alvarez, *Tearing Down The Wall Between Refuge And Gang-Based Asylum Seekers: Why The United States Should Reconsider Its Stance On Central American Gang-Based Asylum Claims*, 50 CASE W. RES. J. INT'L L. 377, 404 (2018).

⁸⁵ See UNHCR, *Guidelines on International Protection: The Application of Article 1(A)(2) of the 1951 Convention And/Or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, ¶ 38 HCR/GIP/06/07 (Apr. 7, 2006).

⁸⁶ See, e.g., *Koudriachova v. Gonzales*, 490 F.3d 255, 263-64 (2d Cir. 2007) (action of defecting from the KGB).

⁸⁷ See Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 TEMP. L. REV. 1573, 1575 (1995).

⁸⁸ See generally *Henriquez-Rivas*, 707 F.3d at 1092.

⁸⁹ See, e.g., *M-E-V-G-*, 26 I. & N. Dec. 227, 231 (B.I.A. 2014); *Cruz v. Whitaker*, 758 Fed. Appx. 169, 170 (2d Cir. 2019) (holding that the applicant had "sufficiently raised a pattern and practice" claim based on "evidence showing that gangs target young men who resist gang recruitment" and remanding for further consideration of the PSG "young, poor men who resist gang recruitment" because "[a]lthough a 'particular social group' cannot be defined exclusively by the claimed persecution").

PSG as in *Lukwago* despite slightly differing facts: fear of future persecution on account of membership in the PSG of former child soldiers *who have escaped*.⁹⁰ This proposal combines efficiency in asylum claims in practice and recognizing agency of children.

ii. *Social Distinction*

This article has already discussed how including agency may help satisfy the particularity requirement of the PSG by drawing precise-enough boundaries of the proposed group. The main problem with social distinction related to agency is that many escapees or opponents of dangerous organizations want to remain invisible to the larger society to protect themselves from retributive persecution. Fortunately, ocular visibility is no longer required for a group to be a legally cognizable PSG.⁹¹ Instead, the society merely needs to recognize the PSG as a distinct subset of the society. People who escaped or otherwise actively fought against malevolent or hostile individuals, groups, organizations, or causes will be recognized as different from a mostly passive society *sensu lato*. Indeed, *Henriquez-Rivas* recognized invisibility resulting from hiding from persecution as a specific reason to still recognize many groups defined by an action.⁹² Many groups are special in the sense that their members will go to any length to remain invisible. Recognizing that their actions seem to have caused a threat to their lives by incensing a potential persecutor, actors like children will try to hide. Yet this does not prevent recognition of the group because society itself should realize that it is natural for the group to try to disappear from the view of their persecutors. Yet clearly, the subgroup still took a specific action.⁹³

This argument is crucial for children's claims, since parents might try to hide them from harm, and since they are intrinsically more vulnerable. Therefore, recognizing child agency for defining PSGs could result in a lower bar to pass in terms of social distinction. Both advocates and courts should take a child-sensitive approach to framing the social distinction of PSGs based on action.

Indeed, some courts have taken note. They validate the above analysis and accepting PSGs, while courts have denied political opinion as an asylum grounds for

⁹⁰ *Lukwago v. Ashcroft*, 329 F.3d 168, 183 (3d Cir. 2003).

⁹¹ *M-E-V-G-*, 26 I. & N. Dec. 227, 228 (B.I.A. 2014) (remanding to the immigration judge for further consideration of PSG "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs" in light of the Board's clarification that social distinction does not require ocular visibility).

⁹² See *Henriquez-Rivas v. Holder*, 707 F.3d 1087, 1087 (9th Cir. 2013); see also Judge Posner writing for the Seventh Circuit in *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009): "If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population.").

⁹³ It might also be possible to argue that social distinction is satisfied by persecutor distinguishing the group from the rest of the society. See *Gomez v. INS*, 947 F.2d 660, 664 (2 Cir. 1991) (noting that a discreet group is singled out for persecution).

children. Framing PSGs based on active characteristics of their members can be effective while emphasizing children's agency. For instance, in *Oliva*, the Fourth Circuit accepted an active PSG ground while denying the alternative proposed ground, based on political opinion.⁹⁴ The applicant was recruited to join the MS-13 gang in El Salvador as a child.⁹⁵ As a 16-year-old, he witnessed a brutal murder by MS-13 gang, which prompted his decision to leave the gang.⁹⁶ MS-13 prohibits its members from quitting.⁹⁷ As he continued to ignore the gang, he started receiving threats, which prompted him to flee to the U.S. and seek asylum.⁹⁸

Oliva proposed two grounds: imputed anti-gang political opinion and membership in a PSG composed of individuals who left the gang without permission for moral and religious reasons.⁹⁹ The political opinion ground was denied by both the BIA and the Fourth Circuit because the courts failed to perceive "enough" political views in *Oliva's* actions.¹⁰⁰ However, the Fourth Circuit mandated the BIA to reconsider the PSG on remand.¹⁰¹ In effect, the court recognized that *Oliva's* act in leaving the gang was the main cause of the gang's threats and persecution.¹⁰² In essence, the court demonstrated an attitude receptive to recognizing agency-based PSGs for children: not a PSG composed of those forcefully recruited or even former members, but those who took an affirmative, clear step to leave. It is true that distinction between those two types of PSGs may be thin. However, the semantic difference in framing might lead to a change of outcomes—agency-based PSGs could be a development that judicial actors across the system may buy into.

iii. Membership in the PSG—Growing Up

The final issue with child agency deals with aging out. For example, *Oliva's* asylum case was considered once he turned eighteen and was no longer a child, even though he fled the gang when he was still a child.¹⁰³ Still, certain violent groups can search for a child who defies them forever because of the perceived offense and dishonor brought by someone 'weak' opposing them. Therefore, if we advocate for recognizing children agency in the asylum process, PSGs based on children's agency become both practically and normatively welcomed despite the victim's age at the time of application.

In fact, the case quoted at the beginning of this essay, *Civil*, shows precisely why agency-based child PSG claims should be pushed to expand our understanding of

⁹⁴ *Oliva*, 807 F.3d, *supra* note 71 at 60-61.

⁹⁵ *Id.* at 56.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 57.

⁹⁹ *Id.* at 54.

¹⁰⁰ *Id.* at 60-61

¹⁰¹ *Id.* at 61.

¹⁰² *Id.*

¹⁰³ *See generally, id.* at 53.

children agency.¹⁰⁴ It was apparent from the facts of the case that Ton Ton Macoutes were in fact scared of the views, voices, and actions of children—they targeted them to prevent local civil society organizing.¹⁰⁵ Children possess extreme potential and extreme vulnerability. Therefore, asylum's legal framing should find a balance which recognizes both their agency and the disproportionately harmful effects of their persecution.

IV. RISKS OF THE PROPOSED APPROACH

There are several potential disadvantages carried by always highlighting and emphasizing a child's actions beyond other qualities (e.g., their vulnerabilities). First, it risks creating a hierarchy of child asylum seekers. It could create a bipolar image, normatively and in practice in courts, of *fighters versus victims*. An international protection system such as asylum should not require a successful escape from children who are forcefully conscripted to fight; or require standing up to the killers of their parents instead of running away.

Second, the proposed approach might risk neglecting the real story of child suffering. An advocate trying to push the idea of a child-agent may overlook all the times when a child is targeted for being innocent or in the wrong place at the wrong time. For example, Ordoñez Quino was a clear victim, rather than an agent: the child in that case was injured for life when his village was bombed.¹⁰⁶ Atrocities inflicted upon helpless children must not be forgotten. Still, the distinction could be maintained. This paper simply argues for agency to be counted when it exists. Moreover, formulating chapters of each story and each asylum application could help: a child can be both a victim and an agent.

Third, agency-focused child advocacy may over-emphasize certain grounds: political opinion and particular social group. However, with most child cases already presented under PSG,¹⁰⁷ the approach may boost an existing trend.

Fourth, aging out of persecution is perhaps one of two areas in which not only normatively or indirectly; but also, proximately and doctrinally this proposed shift could affect asylum law. Some courts could interpret emphasizing agency as suggesting that children must be protected because it is important to let them act the way they want *as children*. Hence, careful phrasing will be required to avoid *Lukwago* or *Oliva* being denied their claims just because the actual case is considered when they are over eighteen.¹⁰⁸

¹⁰⁴ See *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

¹⁰⁵ See *id.* at 61.

¹⁰⁶ *Ordonez-Quino v. Holder*, No. 13-1215 (1st Cir. 2014).

¹⁰⁷ See *id.* (as an example of the vast majority of child asylum cases, where children are collateral targets and victims).

¹⁰⁸ Here is where Davis' past persecution approach perhaps has an advantage: fear of future persecution may address a period of adulthood, while past persecution emphasizes the period when the applicant was a child. See Davis, *supra* note 51 at 655 (proposing a general definition for that group).

Lastly, emphasizing agency may exaggerate children's capacity to act. The long-fought concessions in how child asylum cases would be at risk of reversal if courts begin requiring more "agency" from the victim in seeking state protection before fleeing their country. However, a court will likely already require more effort from a teenager than a newborn. This distinction simply highlights the need to strike a balance.

V. CONCLUSION

Overall, this article proposes increased emphasis on children's agency. This paper has demonstrated that there are several avenues through which a child's agency can be demonstrated and highlighted in the asylum process. Increased use of the "particular social group" asylum ground will enable advocates to protect children for the wide array of actions they take and the rights they exercise. At the same time, the courts will have more flexible asylum grounds and strong foundations to work with—social groups are clearly socially distinct, particular, and based on several immutable characteristics. Children can benefit twofold. Normatively, their agency and identity as actors, not objects, will be emphasized. Furthermore, in practice, a more informed balance will be struck between their intangible power, for which persecutors often seek to harm them, and vulnerability, deserving of increased asylum protection. The next step should be reimagining cases, past, present, and future, to recognize that children are active participants in their own lives. Our duty is to protect the children's right to be themselves when oppression leads them to come knocking on our door.