

# WHO ARE THE REAL REFUGEES? LABELS AS EVIDENCE OF A “PARTICULAR SOCIAL GROUP”

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*The United States is at its humanitarian best when it welcomes the persecuted of the world as its own. Among numerous elements, one claiming asylum must show that he or she has suffered or will suffer persecution on the basis of one of five protected grounds: race, nationality, religion, political opinion, or membership of a particular social group (“PSG”). Presently, the Board of Immigration Appeals (“the Board”) requires one seeking asylum based on membership in a PSG to show that her proposed group shares an immutable characteristic, is particular, and is socially distinct.*

*Unfortunately, PSG doctrine has two major faults. First, the Board frequently examines a PSG using analysis suited for other elements of an asylum claim. As a result, PSG doctrine is unnecessarily complicated and inconsistent. Second, the Board has not clarified the types of evidence it accepts. Adding to the confusion, the Third and Seventh Circuit Court of Appeals explicitly do not require a showing of particularity or social distinction, resulting in a circuit split. Unsurprisingly, the result is that many prospective refugees who might otherwise prove their claims are not granted asylum.*

*This problem, however, is not without a solution. All cultures practice labeling, a technique that allows them to identify a collection of people and speak of them as a group. Applying PSG terminology, labeling signifies that group members share an immutable characteristic, that the group has definite boundaries, and that the culture recognizes these people as a group. Accordingly, and in conjunction with a well-cabined analysis of each element, the Board can clarify PSG doctrine and effectively mend the circuit split by recognizing labels as simultaneous evidence of immutability, particularity, and social distinction. Further, by doing so, the Board will enable the United States to spare refugees from needless suffering while meeting its noblest humanitarian commitments.*

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## INTRODUCTION

Who are the real refugees? Following the 2015 Paris and San Bernardino attacks, this question divided Americans.<sup>1</sup> Afraid that terrorists might claim asylum, presidential hopefuls and a majority of governors sought to exclude all Syrian refugees.<sup>2</sup> Such a policy stands in contrast to what may be the United States’ noblest humanitarian commitment: welcoming those who set foot on American soil rather than turning them away to face certain persecution.

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1. Jon Schuppe, *Syrians in America: How Safe Is the U.S. Refugee Program?* NBC NEWS (Nov. 19, 2015), <http://www.nbcnews.com/storyline/paris-terror-attacks/how-safe-u-s-refugee-program-n465841>. During the final edits of this Note, President Trump signed an executive order temporarily banning most refugees from Syria and six other Muslim-majority nations. Cameron Joesph, *President Trump Signs Executive Order that Gives Preference to Christian Syrian Refugees*, N.Y. DAILY NEWS (Jan. 28, 2017, 2:50 AM), <http://www.nydailynews.com/news/politics/president-trump-signs-executive-order-targeting-refugees-article-1.2957723>. The order does not ban Christian refugees fleeing these nations. *Id.*

2. Stephanie Condon, *Fact Checking 2016 Candidates on Syrian Refugees*, CBS NEWS (Nov. 20, 2015), <http://www.cbsnews.com/media/fact-checking-2016-candidates-on-syrian-refugees/6/>; Ashley Fantz & Ben Brumfield, *More Than Half the Nation’s Governors Say Syrian Refugees Not Welcome*, CNN (Nov. 19, 2015, 3:20 PM), <http://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/>.

One claiming asylum must establish that she has been persecuted, or has a well-founded fear of persecution, based on a protected ground.<sup>3</sup> While those fleeing persecution based on race, nationality, religion, or political opinion<sup>4</sup> are prototypical refugees, those seeking asylum on a fifth ground—membership in a particular social group (“PSG”)—have the additional, confounding task of demonstrating that their claimed ground is cognizable under the Immigration and Nationality Act (“the Act”).<sup>5</sup> Following numerous inconsistent decisions by the Board of Immigration Appeals (“the Board”), confusion about how to formulate one’s PSG has frustrated many otherwise legitimate refugees.<sup>6</sup>

Because the Act and the United Nations Convention on Refugees leave PSG undefined, the task of defining it is a matter of judicial interpretation. In *In re Acosta*, the Board first articulated its influential immutability test holding that a person claiming membership in a PSG must show that the purported group shares a characteristic that members either cannot change or should not be required to change.<sup>7</sup> Nineteen years later in *In re C-A-*, the Board added the United Nations High Commissioner for Refugees’ (“UNHCR”) social-perception test as an additional requirement,<sup>8</sup> although the UNHCR intended it as an alternative test.<sup>9</sup> As a result, one claiming asylum on the basis of a PSG must now show that the claimed group meets three prongs: immutability, particularity, and social distinction.<sup>10</sup> That is, a claimant must prove that the group shares an immutable characteristic, has articulable boundaries, and is recognized as a group in the society from which she fled.

Facially, this definition appears sensible; however, it has two critical faults. First, the Board’s PSG analysis is inconsistent with the other four protected

3. 8 U.S.C. § 1101(a)(42) (2012).

4. *Id.*

5. See *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 602 n.14 (3d Cir. 2011) (“[W]e remanded to the BIA for a determination of whether Valdiviezo-Galdamez’s proposed social group was a ‘particular social group’ within the meaning of the INA.”); United Nations High Comm’r for Refugees, Convention and Protocol Relating to the Status of Refugees 14 (2010), <http://www.unhcr.org/3b66c2aa10.html>. By contrast, one claiming the ground of religion need not prove that religion is cognizable. See, e.g., *Jiang v. U.S. Attorney Gen.*, 173 F. App’x 929 (2d Cir. 2006).

6. See Daniel González, *Migrants Seeking Asylum from Gangs Have a Lot to Prove*, ARIZ. REPUBLIC (Jan. 23, 2015), <http://www.azcentral.com/story/news/politics/immigration/2015/01/23/young-migrants-seeking-asylum-from-gangs-in-us/22228805/>.

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

8. 23 I. & N. Dec. 951, 960–61 (B.I.A. 2006).

9. United Nations High Comm’r for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Guidelines], <http://www.refworld.org/docid/3d36f23f4.html>. The Guidelines have persuasive authority in the United States.

10. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2013); see also Guidelines, *supra* note 9. *M-E-V-G-*’s sister case, *In re W-G-R-*, 26 I. & N. 208 (B.I.A. 2014), explains the same doctrine. For simplicity, this Note focuses on *M-E-V-G-* alone.

grounds.<sup>11</sup> For example, when analyzing claims based on other grounds, the Board has not shown concern over broadly defined groups.<sup>12</sup> Also, when determining whether a proposed PSG is cognizable under the Act, the Board uses methods of analysis better suited to other elements of an asylum claim—namely, nexus and the particularly serious crime bar.<sup>13</sup> Second, the Board has not clarified what kinds of evidence it requires to demonstrate the existence of a PSG and in particular, how to put forward evidence of social distinction.

Adding to the confusion, the Third and Seventh Circuit Court of Appeals have rejected particularity and social distinction as inconsistent with the Board's own precedent.<sup>14</sup> This has resulted in a circuit split in which refugees in any circuit will face a test more rigorous than what the UNHCR intended when it introduced the social-perception test.<sup>15</sup> Until the Board clarifies how otherwise legitimate refugees are to frame and prove their groups, PSG doctrine will become increasingly problematic, and the United States will fail its noblest of humanitarian duties.<sup>16</sup>

Labels, however, present a ready solution to the ambiguities of PSG doctrine. The universal practice of labeling is a means by which societies impart and form a sense of self, distinguish members from nonmembers, and recognize that specific traits unite such people so much so that they have created a shorthand tag to speak of them collectively.<sup>17</sup> Grounded in the sociological significance of labels, this Note calls for the Board to recognize that a claimant can conclusively establish that a PSG is immutable, particular, and socially distinct by offering the label or labels that her society uses for her claimed group.

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11. Benjamin Casper et al., *Matter of M-E-V-G- and the BIA's Confounding Legal Standard for 'Membership in a Particular Social Group'*, IMMIGR. BRIEFINGS, June 2014, at 1; Ivan A. Tereschenko, Note, *The Board of Immigration Appeals' Continuous Search for the Definition of Membership in a Particular Social Group in Matter of M-E-V-G- and Matter of W-G-R- in the Context of Youth Resistant to Gang Recruitment in Central America*, 30 CONN. J. INT'L L. 93, 118–19 (2014).

12. Tereschenko, *supra* note 11, at 118–19.

13. See *M-E-V-G-*, 26 I. & N. Dec. at 250 (using a nexus analysis to analyze a proposed PSG); *Arteaga v. Mukasey*, 511 F.3d 940, 942–43 (9th Cir. 2007) (using an analysis suitable for the particularly serious crime bar).

14. See *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582 (3d Cir. 2011); *Gatmi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *infra* Section II.B. Immigration courts are administrative law courts in the Department of Justice; appeals from immigration courts are first heard by the Board and then the circuit court in the jurisdiction in which the immigration court sits. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION & CITIZENSHIP: PROCESS & POLICY 254–56, 1273 (7th ed. 2012).

15. Hannah McCuiston, Note, “*Membership in a Particular Social Group*”: *Why United States Courts Should Adopt the Disjunctive Approach of the United Nations High Commissioner for Refugees*, 88 ST. JOHN'S L. REV. 531, 547 (2014); Isaac T.R. Smith, Note, *Searching for Consistency in Asylum's Protected Grounds*, 100 IOWA L. REV. 1891, 1908 (2015). Namely, claimants in the Third and Seventh Circuits must prove their proposed PSG is immutable while those in the remaining circuits must prove their PSG is immutable, particular, and socially distinct. In contrast, the UNHCR intended that claimants might prove their PSG is either immutable or socially perceptible. *Guidelines*, *supra* note 7, at 4.

16. Tereschenko, *supra* note 11, at 118–19.

17. See *infra* Part III.

Accordingly, Part I surveys the elements of asylum, paying particular attention to nexus and the particularly serious crime bar, the concerns of which creep into PSG analysis. Part II focuses on PSG doctrine, its development and its shortcomings. Part III examines the sociological significance of labels as the primary means by which people identify and comprehend social boundaries. Part IV offers sample analyses and calls on the Board to specifically recognize that labels are definitive proof of immutability, particularity, and social distinction, and that by cabining its analysis, the United States can meet its humanitarian commitments without fear of being overrun by frivolous claims.

### I. THE ELEMENTS OF ASYLUM

To obtain a grant of asylum, a claimant must show that she is a “refugee” as defined in the Act.<sup>18</sup> A refugee is:

[A]ny person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>19</sup>

Broken down into discrete elements, a claimant must first show that she has suffered persecution or has a well-founded fear of persecution.<sup>20</sup> Second, the claimant must rest her claim on a protected ground.<sup>21</sup> Third, there must be a nexus between that protected ground and her persecutor’s motivation to harm.<sup>22</sup> Fourth, the claimant must show that her persecutor was a government actor or that the government was unwilling or unable to protect her.<sup>23</sup>

Even if a claimant establishes these elements, she may need to rebut evidence of changed conditions in her native country or that relocation within that country would be unreasonable.<sup>24</sup> Finally, she must not trigger any of the statutory bars, and an immigration judge must find her entitled to a favorable exercise of discretion.<sup>25</sup> Although the failure of any element will cause her claim to fail, this Note pays special attention to nexus and the particularly serious crime bar because their concerns often creep into PSG analysis.<sup>26</sup> Further, by recognizing the

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18. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A) (2012).

19. *Id.* § 1101(a)(42)(A); *see also* CHERI L. HO, IMMIGRATION LAW IN THE NINTH CIRCUIT: SELECTED TOPICS B-1 (updated ed., 2016), [http://www.ca9.uscourts.gov/guides/immigration\\_outline.php](http://www.ca9.uscourts.gov/guides/immigration_outline.php) (collecting asylum cases and doctrine in the Ninth Circuit).

20. Ho, *supra* note 19, at B-3 to -14, B-18 to -20, B-29 to -41, B-48 to -79.

21. *Id.* at B-48 to -72.

22. *Id.* at B-41 to -79.

23. *Id.* at B-15 to -19.

24. *Id.* at B-24 to -26.

25. *Id.* at B-80 to -82, B-85 to -97.

26. *See In re M-E-V-G-*, 26 I. & N. Dec. 227, 250 (B.I.A. 2013) (using nexus analysis to analyze a proposed PSG); *Arteaga v. Mukasey*, 511 F.3d 940, 942–43 (9th Cir. 2007) (using analysis suitable for the particularly serious crime bar).

concerns these elements represent—with nexus being the heart of asylum—one is better able to isolate PSG analysis and appreciate how limited in scope it must be.

#### A. *Nexus*

Nexus is the most frequent trespasser into PSG analysis. To show that persecution was “on account of” a protected ground, a claimant must show that the ground “was or will be at least one central reason” motivating the persecution—the ground must be something the persecutor “seeks to overcome.”<sup>27</sup> In *In re J-B-N- & S-M-*, the Board stated, “[T]he protected ground cannot play a minor role . . . it cannot be incidental, tangential, superficial, or subordinate to another reason.”<sup>28</sup> There, the claimants migrated from Burundi to Rwanda and became involved in a land dispute with their extended family, who used local police to harass them.<sup>29</sup> In finding an insufficient nexus between the persecutors’ motivation and the claimants’ nationality, the Board reasoned that the persecutors’ primary motivation was a desire to profit from the sale of the land.<sup>30</sup>

Similarly, in *Parussimova v. Mukasey*, the Ninth Circuit explained that a protected ground meets the one-central-reason standard if the persecutor would not have caused the harm if the ground were absent or the ground by itself would have motivated the harm.<sup>31</sup> There, the court found an insufficient nexus to a protected ground, race, when two Kazakh men attempted to rape a woman, calling her a “Russian pig [who] had to get out of their country”—all because she wore the pin of an American company, Herbalife.<sup>32</sup> The court reasoned that, although the men were aware of her race, it was not a central motivation.<sup>33</sup>

Despite the unduly strict application in *Parussimova*, the one-central-reason standard is sensible because it demands a strong connection between the persecutor’s motive, the harm, and the protected ground. Its limits, however, are demonstrated by exploitation cases where benefits to the persecutor also provide motivation.<sup>34</sup> When deconstructed, persecution, in these circumstances, is not an end in itself, but a means of benefitting the persecutor’s group, whether for economic, religious, or political reasons.<sup>35</sup> Thus, persecutors may perceive disfavored groups either as an obstacle or an opportunity to further their own economic, religious, or political interests. As T. Alexander Aleinikoff, former U.N. Deputy High Commissioner for Refugees, observed, “[P]ersecutors choose groups

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27. 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *see also In re Acosta*, 19 I. & N. Dec. 211, 211–12 (B.I.A. 1985) (“[P]ersecution[] . . . means harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. . .”).

28. 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

29. *Id.* at 209–11.

30. *Id.* at 215.

31. 555 F.3d 734, 741 (9th Cir. 2008).

32. *Id.* at 737.

33. *Id.* at 742.

34. Human trafficking and child soldiers are prototypical examples of exploitation cases. *See infra* note 38.

35. *See* Ronald Christenson, *The Political Theory of Persecution: Augustine and Hobbes*, MIDWEST J. POL. SCI. 419, 438 (1968).

and victims for a variety of reasons, not simply based on the fundamentality of the trait that defines the group.”<sup>36</sup> Although a few recent decisions indicate that exploitation may find recognition under the one-central-reason standard,<sup>37</sup> the present doctrine holds that “greed and wealth” are insufficient to establish nexus.<sup>38</sup>

Either way, nexus creeps into PSG analysis. In *In re M-E-V-G-*, the Board tested for social distinction by considering the persecutor’s objectives and whether

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36. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group,”* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 300 (E. Feller et al. eds., 2003) [hereinafter *Protected Characteristics*], <http://www.unhcr.org/419cbe1f4.html>.

37. See *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), *vacated on procedural grounds* by *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007) (holding that a woman sold into marriage established nexus where she was persecuted after she refused to marry her parents’ creditor); *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (2d Cir. 2010) (criticizing the Board for characterizing a sexual assault, attempted kidnapping, and forced marriage as a “debt collection dispute” and holding that “simultaneous existence of a personal dispute does not eliminate [the] nexus” between persecution and a protected ground). *But see Ying Lin v. U.S. Attorney Gen.*, 319 F. App’x 777 (11th Cir. 2009) (holding that selling a daughter into marriage to pay a debt was a personal matter between the mother and her creditor). One commentator forcefully argues that the Eleventh Circuit erred in *Ying Lin*:

Although the persecutor may have targeted Ms. Lin both because of his personal desire to secure money from her family *and* because he recognized Ms. Lin as vulnerable, due to her poverty, marital status, and isolation . . . the court focused only on the former explanation . . . [T]he notion that a family’s participation in persecution somehow vitiates nexus has no basis in asylum law . . . [The persecutor] is often able to force [marriage] due to other characteristics she possesses—ranging from her gender, age, level of education, financial standing and even the lack of protection from her family—all of which can be “common immutable characteristics” . . . *In such cases, family participation does not destroy nexus, it creates it.*

Natalie Nanasi, *An “I Do” I Choose: How the Fight for Marriage Access Supports a Per Se Finding of Persecution for Asylum Cases Based on Forced Marriage*, 28 COLUM. J. GENDER & L. 48, 67–68 (2014) (emphasis added).

38. *Cece v. Holder*, 733 F.3d 662, 686 (7th Cir. 2013); *Jutus v. Holder*, 723 F.3d 105, 111 (1st Cir. 2013). In *Cece*, the Seventh Circuit considered whether Albanian girls, boys, women, and men could establish nexus by the characteristics that made them targets for trafficking in Greece; namely, sexual exploitation, criminal bidding, prostitution, and manual labor, respectively. 733 F.3d at 686. Ultimately, the 7th Circuit did not reach the issue, but it did signal approval of the Board’s holding that the persecutors were motivated by profit. *Id.* In part, the Board reached its conclusion because traffickers preyed upon a cross section of Albanians, rather than narrow groups. *Id.* The court’s reasoning is suspect. Although the persecutors’ primary motivation may have been economic, unconsidered reasons may have equally motivated these Greeks to target Albanians; namely, the strained relationship between the two nations. See Besar Likmeta, *Albania Asks Greece to Declare War Finally Over*, BALKANINSIGHT (Jan. 18, 2013), <http://www.balkaninsight.com/en/article/albania-calls-on-greece-to-abolish-war-declaration>.

the persecutor perceived the purported group as a distinct group.<sup>39</sup> There, the Board discounted the validity of the claimant's group, "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs," because evidence of indiscriminate gang violence undermined both nexus and whether his PSG was cognizable under the Act.<sup>40</sup> Although the Board recognized that the persecutor's perception is really a question for nexus because it considers why persecutors focus attention on the group,<sup>41</sup> it nevertheless considered persecutor's perception in its PSG determination, conflating the elements.<sup>42</sup> Likewise, in *In re C-A-*, the Board erred when it focused on a cartel's motivation for persecuting informants by considering whether "noncriminal informants" constituted a PSG.<sup>43</sup>

### ***B. Particularly Serious Crime Bar***

Numerous statutory bars are another barrier to asylum—the most significant of which is the particularly serious crime bar.<sup>44</sup> An "inherently discretionary" question, courts determine whether a claimant was convicted of a particularly serious crime by considering the following factors: (1) the nature of the conviction; (2) the underlying circumstances and facts; (3) the sentence imposed; and (4) whether the crime indicates the alien will be a danger to the community.<sup>45</sup> In *In re Frentescu*, the Board found that the claimant did not commit a particularly serious crime when he burglarized an unoccupied building because there were no aggravating factors, he was not armed, and he received a three-month prison sentence.<sup>46</sup> Crimes deemed particularly serious include mail fraud,<sup>47</sup> substantial battery with a dangerous weapon,<sup>48</sup> and aggravated felonies.<sup>49</sup>

Although such crimes form an independent basis for denying a claim, courts nevertheless consider the danger certain individuals may pose in their PSG analysis as well. In *Arteaga v. Mukasey*, the claimant arrived in the United States from El Salvador at age four, joined a Mexican street gang as a teenager, and

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39. 26 I. & N. Dec. at 250; *see also* *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (holding that a PSG is "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor"); *infra* Section II.C.

40. 26 I. & N. Dec. at 250.

41. *Id.* at 242. In other words, the question of whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) is entirely distinct from the question of nexus.

42. *Id.* at 250–51.

43. 23 I. & N. Dec. 951, 960–61 (B.I.A. 2006); *see infra* Section II.C.

44. 8 U.S.C. § 1158(a)–(b) (2012) (enumerating the statutory bars).

45. *Blandino-Medina v. Holder*, 712 F.3d 1338, 1344 (9th Cir. 2013); *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982).

46. 18 I. & N. Dec. at 247.

47. *Arbid v. Holder*, 700 F.3d 379, 379 (9th Cir. 2012).

48. *Ali v. Achim*, 468 F.3d 462, 467–70 (7th Cir. 2006).

49. Aggravated felonies are specifically enumerated in the Act. *See* 8 U.S.C. §§ 1101(a)(43), 1158(b)(2)(B)(i).



received numerous tattoos to mark his membership in the gang.<sup>50</sup> There, the Ninth Circuit held that Arteaga's proposed PSG, "tattooed gang member[s]," was not cognizable under the Act.<sup>51</sup> The court reasoned, "We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft."<sup>52</sup> Certainly not—the particularly serious crime bar makes this clear. Accordingly, when confronted by the claim of a tattooed gang member, a court should not analyze whether tattooed gang members constitute a PSG by considering whether such group, if recognized, would pose a threat to society. Instead, a court should isolate its PSG analysis and address these concerns when it turns to the particularly serious crime bar.

To be clear, the concerns that shape nexus and the particularly serious crime bar represent legitimate government interests. However, in order for asylum to function properly, these concerns must be isolated from the pure question of what constitutes a PSG. Accordingly, this Note now turns to PSG doctrine.

## II. AN ENIGMATIC GROUND: "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP"

While there is little dispute over the other four protected grounds—race, religion, nationality, and political opinion—particular social group is elusive in meaning.<sup>53</sup> In part, this is due to its nebulous origins during the original United Nations Convention on Refugees Treaty negotiations, where the Swedish delegate who proposed it observed, "[E]xperience has shown that certain refugees have been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included."<sup>54</sup> The delegate offered no further explanation, and his proposal was adopted without discussion.<sup>55</sup> Generally, courts have sought to interpret PSG consistently with the other protected grounds without allowing the category to swallow them up or become a catch-all.<sup>56</sup>

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50. 511 F.3d 940, 942–43 (9th Cir. 2007) (denying withholding of removal, a lesser form of relief).

51. *Id.* at 945.

52. *Id.*

53. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 230 (B.I.A. 2014); *Protected Characteristics*, *supra* note 36, at 265–66.

54. *Protected Characteristics*, *supra* note 34, at 265–66 (alteration in original).

55. Andrew I. Schoenholtz, *The New Refugees and the Old Treaty: Persecutors and Persecuted in the Twenty-First Century*, 16 CH. J. INT'L L. 81, 108 (2015). Some commentators have suggested groups relevant at the time—e.g., gay men, nobility, landowners, capitalists, civil servants, professionals, farmers, workers, and the middle class. *Id.*; McCuiston, *supra* note 15, at 535.

56. Tereschenko, *supra* note 11, at 116; Josh Lunsford, *Not Seeing Eye to Eye on Social "Visibility,"* IMMIGR. L. ADVISOR, Feb. 2014, at 2. No compelling case has been made for why PSG should not encompass the other four grounds, only that enumerating the four would be superfluous. This suggests PSG was carefully crafted through deliberation rather than adopted as a late addition without discussion. Schoenholtz, *supra* note 55, at

In the United States, the Board (subject to circuit court review) has the task of defining PSG. For nearly two decades, the test used was the Board's own immutability standard.<sup>57</sup> However, in 2002, the UNHCR published an updated version of its *Guidelines on International Protection*, which contain "social perception" as an alternative test aimed at making it easier to demonstrate membership in a PSG.<sup>58</sup> The *Guidelines* state, "[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society."<sup>59</sup> Nations adopting this definition would expand asylum to groups who are united by characteristics not traditionally interpreted as immutable. The *Guidelines* add:

If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop . . . is neither unchangeable nor a fundamental aspect of human identity, [shopkeepers] . . . might nonetheless constitute a particular social group if in [that] society they are recognized as a group . . . .<sup>60</sup>

As expansive as this test may be, the *Guidelines* do not detail how one should demonstrate that the society from which a claimant fled recognizes the proposed PSG as a group.

However, contrary to the UNHCR's intent to expand the ability of prospective refugees to make PSG-grounded claims, the Board severely restricted that potential by incorporating the social-perception test as an *additional* requirement in *In re C-A*.<sup>61</sup> Specifically, the Board introduced the social-perception test as two distinct prongs: particularity and social visibility (later renamed social distinction).<sup>62</sup> Beginning with the universally recognized immutability prong, the remainder of this Part explores each of the three prongs to illustrate their central aims and shortcomings.

### A. Immutability

The first prong an asylum claimant must satisfy is that her proposed PSG is united by an immutable characteristic that members cannot change or should not be required to change.<sup>63</sup> The characteristic may be voluntary or innate, present or

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107–08. That the delegates sought to capture the four grounds while leaving open the possibility for un contemplated groups is, at the very least, plausible.

57. Lunsford, *supra* note 56, at 2. A characteristic is immutable if it either "is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *In re Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985); *see also infra* Section II.A.

58. *Guidelines*, *supra* note 9, at 4.

59. *Id.* at 3–4 (emphasis added).

60. *Id.* at 4 (emphasis added).

61. 23 I. & N. Dec. 951, 960 (B.I.A. 2006).

62. *Id.*; *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

63. *Acosta*, 19 I. & N. Dec. at 233.

former, or even a shared experience.<sup>64</sup> Importantly, a group cannot be circularly defined—being targeted for persecution cannot, by itself, form the basis for a PSG.<sup>65</sup>

The Board first articulated this test in *Acosta*.<sup>66</sup> There, the claimant, a taxi driver in El Salvador, formed a cooperative known as COTAXI to gain economic independence, when anonymous agents, believed to be guerrillas, asked the company to participate in anti-government work stoppages.<sup>67</sup> After a year of refusing to participate, three COTAXI founders began to receive threatening notes before attackers stopped and burned numerous taxis, assaulting and killing the drivers.<sup>68</sup> Over the next two years, the claimant received several death threats before attackers beat him and robbed him of his cab.<sup>69</sup>

In denying that the claimant belonged to a cognizable PSG, the Board noted the sparse discussion at the U.N. Convention and applied the canon of construction *ejusdem generis*, interpreting PSG to be “of the same kind” as the other protected grounds.<sup>70</sup> Attempting to interpret PSG consistently with the other grounds, the Board held that PSG was aimed at “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>71</sup> The Board doubled down on the immutability-identity link stating, “[W]hatever the common characteristic . . . it [must be] fundamental to their individual identities or consciences.”<sup>72</sup>

Despite this sensible standard, the Board took a short-sighted view of how the claimant’s career formed his identity before dismissing his claim. The Board reasoned that the claimant could “avoid the threats of the guerillas either by changing jobs or by cooperating in work stoppages.”<sup>73</sup> While the Board correctly

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64. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000). An example of a former association would be a former police or military officer who suffers persecution at a time when he is no longer an officer. *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000).

65. *M-E-V-G-*, 26 I. & N. Dec. at 242. Persecution, however, can be a relevant factor in considering whether the group is socially visible or distinct. *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

66. 19 I. & N. Dec. 211.

67. *Id.* at 216.

68. *Id.*

69. *Id.* at 217.

70. *Id.* at 233. Namely, “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” *Ejusdem Generis*, BLACK’S LAW DICTIONARY (10th ed. 2014). For example, “in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*, the general language or *any other farm animals*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.” *Id.*

71. *Acosta*, 19 I. & N. Dec. at 233.

72. *Id.*

73. *Id.* Likewise, the Board dismissed the possibility that *Acosta* could base his claim in political opinion because, although the guerrillas were motivated by their own

noted that a career is not immutable because it is within one's power to change, it failed to consider whether the claimant's career might be so fundamental to his identity that he should not be required to change it in order to avoid persecution.<sup>74</sup> Further, by framing his claim as a right to the job of one's choice rather than as a question of identity, the Board confused the issue and ignored the deep connection between one's career and sense of self.<sup>75</sup> Despite the inconsistency in application, the *Acosta* immutability standard is likely consistent with what the Swedish delegate intended.<sup>76</sup> Examples of PSGs that the Board has found to possess immutable characteristics include: "Mexican gay men with female sexual identities,"<sup>77</sup> "young girls in the Benadiri clan,"<sup>78</sup> and "former police officers."<sup>79</sup>

Unfortunately, however, the immutability formulation does not make clear who determines whether a characteristic meets the should-not-be-required-to-change standard or how such a determination should be made. Should it be the source culture? American culture? A judge? Or the claimant herself? Some commentators argue for a narrow view of immutability by proposing seemingly trivial characteristics such as "left-handed men" or "roller-bladers."<sup>80</sup> However, Aleinikoff argues, "The Convention is aimed at preventing the infliction of serious abuses based on group membership, *not at preserving membership in groups that are deemed important or worthy.*"<sup>81</sup> At the risk of circularity, suffering persecution for a trait is strong evidence that the trait is so central to one's identity that she should not be required to change it, however absurd it may seem to a court.<sup>82</sup>

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politics, the claimant neither established that he held a particular political opinion nor that the guerrillas persecuted him on the basis of such an opinion. *Id.* at 234–35.

74. Certainly each member of the Board is called "judge" by colleagues, holds the position with pride, and would suffer great injury if barred from the bench and practice of law. In similar fashion, a taxi driver who forms a cooperative to enable himself and his colleagues to gain financial independence may equally derive his identity from his career and should not be required to change it to avoid persecution. Moreover, the Board's failure in this regard is odd because the claim could have been denied on several other bases. The Board also held that the claimant failed to establish a well-founded fear of persecution were he to return to El Salvador, and that he failed to rebut the Department of Homeland Security's evidence that internal relocation in El Salvador would be reasonable. *Id.* at 236. Further, the Board could have denied his claim based on changed conditions following his testimony that the guerrillas were no longer active, and that if he returned he would not continue as a taxi driver because it was financially unfeasible. *Id.* at 232.

75. See *id.* at 236; Katherine C. Powell, *The Role of Concept of Self and Societal Expectations in Academic and Career Achievement*, 38 J. ADULT EDUC. 32, 32–37 (2009).

76. See Casper, *supra* note 11, at 1 (discussing *Acosta's* wide international acceptance).

77. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000).

78. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

79. *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000).

80. See *Protected Characteristics*, *supra* note 36, at 299; Michelle Foster, United Nations High Comm'r for Refugees, The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments Relating to 'Membership of a Particular Social Group' 6, U.N. Doc. PPLA/2012/02 (2012), <http://www.refworld.org/docid/4f7d94722.html>.

81. *Protected Characteristics*, *supra* note 36, at 299.

82. *Id.*

Accordingly, in the realm of PSG analysis, the question must not be, “Would anyone persecute a group for this characteristic?” That is the task of nexus.<sup>83</sup> Instead, the question must simply be, “Is there a characteristic that unites this group?”

### **B. Particularity**

The second PSG prong, particularity, requires that a proposed PSG have precise boundaries marking who is included and who is excluded.<sup>84</sup> Meaningful distinctions are in view—the group must be narrowly defined, not “amorphous, overbroad, diffuse, or subjective.”<sup>85</sup> First introduced in passing reference and without explanation in *In re C-A*,<sup>86</sup> particularity has evolved into a robust but inconsistent test. Groups found to possess particularity include those who testify in court against gang members,<sup>87</sup> “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses against the gangs,”<sup>88</sup> and “married women in Guatemala who are unable to leave their relationship[s].”<sup>89</sup>

Oddly, in *Escobar v. Gonzales*, the Third Circuit held that homelessness (alongside poverty and youth) lacked particularity because it was “too vague and all encompassing.”<sup>90</sup> There, the claimant fled an abusive home when he was nine years old and lived and slept in the streets, where gangs and police often threatened him, because they wanted him to steal for them.<sup>91</sup> In affirming the Board’s holding that “Honduran street children” lacked particularity, the Third Circuit failed to explore whether a boundary might exist between children who were homeless and those who were not; for instance, whether the child has a home. The court simply declared homelessness “all encompassing”—no small overstatement.<sup>92</sup> Consequently, some criticize particularity as an attempt to limit PSG-based claims.<sup>93</sup> Certainly, when compared to the other grounds, each of

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83. See *supra* Section I.A.

84. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

85. *Id.* at 238–39.

86. 23 I. & N. Dec. 951, 957 (B.I.A. 2006).

87. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013).

88. *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012). Curiously, the Fourth Circuit denied that the witness himself belonged to a PSG. *Id.*

89. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 392–93 (B.I.A. 2014).

90. 417 F.3d 363, 368 (3d Cir. 2005). The Third Circuit later rejected particularity and social visibility as inconsistent with the Board’s own precedent. *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 608 (3d Cir. 2011).

91. *Escobar*, 417 F.3d at 364.

92. *Id.* at 368. At the other extreme, the Board held that “wealthy Guatemalans” do not constitute a PSG because “wealthy” and “affluent” are subjective and could refer to the top 1% as well as the top 20%. *A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007). Ironically, the Board implicitly recognized a boundary by selecting the 20% figure where 20% of Guatemalans lived above the poverty line. *Id.*

93. National Immigrant Justice Center as Amici Curiae Supporting Respondent at 13–14, *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582 (3d Cir. 2011) (No. A097-447-286), <http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus>

which encompasses enormous populations with tremendous internal diversity,<sup>94</sup> the established principle of *ejusdem generis* indicates that PSGs may likewise be broad and diffuse.<sup>95</sup> Instead, Central American youth are rarely found to be members of a cognizable PSG.<sup>96</sup>

Complicating matters, the Third and Seventh Circuits have rejected particularity as a prong entirely.<sup>97</sup> The Third Circuit held that particularity is “little more than a reworked definition of ‘social visibility’” and inconsistent with the Board’s own precedent.<sup>98</sup> The Seventh Circuit rejected social visibility as unhelpful, and it ignored particularity altogether.<sup>99</sup> As a result, immigration courts sitting in these circuits consider only whether the proposed PSG possesses an immutable characteristic. As a practical matter, all circuits currently impose a more rigorous standard than the UNHCR intended when it introduced the social perception test—the majority employing three elements rather than one, and all circuits foreclosing the possibility of meeting either of two alternate tests alone.<sup>100</sup>

### C. Social Visibility/Distinction

Social distinction, the third prong, considers whether the society from which a refugee flees recognizes a claimed PSG as a group.<sup>101</sup> In *In re C-A-*, the claimants were a married couple from Colombia who proposed the PSGs, “noncriminal informants” and “noncriminal informants who had informed against the Cali Cartel.”<sup>102</sup> There, the husband owned a bakery frequented by the cartel’s loose-lipped chief of security who openly spoke about cartel operations over a

%20FINAL.pdf. In *In re S-E-G-*, the Board conceded that size was “an important factor” but only secondary to whether the description might create a “benchmark for determining group membership.” 24 I. & N. Dec 579, 584 (B.I.A. 2008).

94. Some races (e.g., Asian), nationalities (e.g., Indian), religions (e.g., Islam), and political groups (e.g., Communists) have populations numbering in the billions and consist of young and old; rich and poor; and men and women in a variety of life circumstances who are, nevertheless, united by that race, nationality, religion, or political opinion.

95. Tereschenko, *supra* note 11, at 118–19.

96. See *Barrios v. Holder*, 581 F.3d 849, 854 (9th Cir. 2009) (rejecting “young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang’s criminal activities”); *Ramos-Lopez v. Holder*, 563 F.3d 855, 860 (9th Cir. 2009) (rejecting “young Salvadoran men who have been recruited by gangs, but refuse to join”); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745–46 (9th Cir. 2008) (rejecting “young men in El Salvador resisting gang violence”). Another obstacle is that courts consistently hold that Central American gangs persecute indiscriminately rather than in a manner that targets specific groups. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 653 (10th Cir. 2012); *S-E-G-*, 24 I. & N. Dec. at 587.

97. *Valdiviezo-Galdamez*, 663 F.3d at 582; *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *McCuiston*, *supra* note 15, at 532.

98. *Valdiviezo-Galdamez*, 663 F.3d at 608.

99. *Gatimi*, 578 F.3d at 616.

100. *McCuiston*, *supra* note 15, at 547.

101. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014). The Board first introduced the element as “social visibility” in *In re C-A-*. 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006).

102. *C-A-*, 23 I. & N. Dec. at 952.

period of five years—information that the claimant reported to the city’s general counsel.<sup>103</sup> This continued until three armed men attempted to kidnap the claimant, hit his son in the face with a pistol, and threatened to kill them both.<sup>104</sup> The claimants went into hiding and attempted to lease the bakery, but cartel members seeking information about the family harassed potential lessees.<sup>105</sup>

On remand from the Eleventh Circuit, the Board took up the question of whether “non-criminal drug informants working against the Cali drug cartel” constituted a PSG for asylum purposes.<sup>106</sup> After determining that the proposed PSG was not unified by a sufficiently immutable characteristic,<sup>107</sup> the Board introduced the “social visibility” prong and held that the claimants’ proposed PSG failed to meet this standard because informing on criminal activities takes place out of the general population’s sight.<sup>108</sup> This analysis is shortsighted. Earlier in the decision, the Board referred to groups finding PSG recognition but whose practices take place in secret; namely, homosexuals listed by the government.<sup>109</sup> One can hardly imagine that the Board would deny PSG status to closeted homosexuals in a homophobic culture simply because the government does not formally list such individuals.<sup>110</sup> Likewise, women who either have or have not suffered female genital mutilation may likewise seek to keep that status secret.<sup>111</sup> Further complicating matters, in making its PSG determination in *In re C-A-*, the Board inquired into the gang’s motivations—an analysis better suited for nexus.<sup>112</sup>

Likewise, in *In re M-E-V-G-*, the claimant was a Honduran teenager who, while traveling in Guatemala with his family, was kidnapped, beaten, and threatened with death by the Mara Salvatrucha gang in a recruitment effort.<sup>113</sup> When he refused to join them, the gang continually shot at him and threw rocks and spears at him.<sup>114</sup> The claimant sought to establish membership in the proposed PSG, “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”<sup>115</sup> Remanding the case, the Board first acknowledged the confusion inherent in the term “social visibility” and then clarified that it “was never intended to, and does not require, literal or ‘ocular’ visibility.”<sup>116</sup> The Board then coined the term “social distinction” to convey that the society of origin must consider that members comprise a group regardless of

103. *Id.* at 952.

104. *Id.* at 952.

105. *Id.* at 953.

106. *Id.* at 957. Alternatively, the claimant also proposed “noncriminal informants” but the Board rejected it for lack of particularity reasoning that such a group may also include those who inform on guerrillas. *Id.*

107. *Id.* at 958–59. The Board held that informing on the cartels was insufficiently immutable because it was entirely voluntary. *Id.* at 961.

108. *Id.* at 959–60.

109. *Id.* at 955.

110. *See Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

111. *Id.*

112. *C-A-*, 23 I. & N. Dec. at 960–61; *see also supra* Section I.A.

113. 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

114. *Id.*

115. *Id.*

116. *Id.* at 234.

whether they can visually identify members.<sup>117</sup> Despite the clarity of this most recent formulation, the Board has not identified the sort of evidence a claimant should offer to show that her native society recognizes her proposed PSG as a group.

**D. In re A-R-C-G-: Good Outcome, Curious Path**

Six months after *In re M-E-V-G-*, the Board took an unexpected turn in *In re A-R-C-G-* by recognizing select claims from domestic-violence victims.<sup>118</sup> In that case, the claimant was a Guatemalan woman who escaped years of abuse in which her husband regularly beat and raped her, including one incident in which he burned her breast with paint thinner.<sup>119</sup> Then, when she tried to leave him, he pursued her across the country, threatening to kill her.<sup>120</sup> Unfortunately, the PSG formulation the Board recognized, as well as its reasoning, complicated PSG doctrine.

In *In re A-R-C-G-*, the claimant's PSG consisted of "married women in Guatemala who are unable to leave their relationship."<sup>121</sup> There, the Board noted that, although marital status may be changed, it may also be immutable where the individual is unable to leave the relationship.<sup>122</sup> The Board, likewise, found that this group was particular because Guatemalan society had commonly accepted definitions for the key terms "married," "women," and "unable to leave the relationship."<sup>123</sup> Regarding social distinction, the Board looked for evidence that Guatemalan society "recognizes the need to protect victims of domestic violence, including whether the country has criminal laws designed to protect domestic-abuse victims, whether those laws are effectively enforced, and other sociopolitical factors."<sup>124</sup> Accordingly, the Board found that the proposed PSG was socially distinct because Guatemala has a "culture of machismo and family violence," rampant sexual abuse, and numerous domestic violence laws that authorities fail to enforce.<sup>125</sup>

While extending asylum to such women is laudable, the Board's analysis is problematic. First, the formulation is circular—a group cannot be defined by its

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117. *Id.* at 240.

118. 26 I. & N. Dec. 388 (B.I.A. 2014).

119. *Id.* at 389.

120. *Id.*

121. *Id.* at 388–89. Previously, the Board had rejected "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" because the formulation was defined for asylum and "it was unclear whether 'anyone in Guatemala perceives this group to exist in any form whatsoever. . . .'" *Id.* at 391 (citing *In re R-A-*, 22 I. & N. Dec. 906, 911, 918 (B.I.A. 2001)).

122. *Id.* at 392–93. The Board considered factors such as "religious, cultural, and legal constraints." *Id.* at 393.

123. *Id.*

124. *Id.* at 394.

125. *Id.*



experience of persecution.<sup>126</sup> While the Board cites numerous factors that prevent a woman from leaving her relationship, domestic violence received the foremost consideration.<sup>127</sup> In the alternative, if one identifies other forces that entrap Guatemalan women—“religious, cultural, and legal constraints”—then “unable to leave a relationship” becomes redundant because these factors describe all Guatemalan women.<sup>128</sup>

Moreover, a claim based on this PSG may have difficulty establishing nexus or the government’s role.<sup>129</sup> Namely, does the aggressor persecute this woman in order to “overcome” “women who are unable to leave their relationship”?<sup>130</sup> If she demonstrated the ability to leave the relationship, would he recognize that she did not belong to that group and respect her freedom? Or, consider a factor the court weighed heavily in *A-R-C-G-*: the refusal of police to interfere with family matters.<sup>131</sup> Would the same police intervene if they determined that the woman was able to leave the relationship? Sadly, these questions suggest that *A-R-C-G-* is worthy of celebration because of its result, not because it brings clarity to PSG analysis. Although one less category of PSGs may fall through the cracks, the root problem remains. Accordingly, some commentators advocate for the category “gender plus,” which combines gender and nationality; here, Guatemalan women.<sup>132</sup>

Post *A-R-C-G-*, two questions remain, both of which prevent PSG doctrine from properly functioning. First, how should a claimant formulate her proposed PSG? If she formulates her group broadly, she may run afoul of particularity as a court will find that the proposed group does not have clear boundaries or that it is overinclusive.<sup>133</sup> If she formulates it too narrowly, the

126. “[A] social group cannot be defined exclusively by the fact that its members have been subjected to harm.” *In re M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014); Lauren N. Kostas, Note, *Domestic Violence and American Asylum Law: The Complicated and Convoluted Road Post Matter of A-R-C-G-*, 30 CONN. J. INT’L L. 211, 231 (2015).

127. *A-R-C-G-*, 26 I. & N. Dec. at 394.

128. These may also capture unmarried women and girls, presuming that an unmarried woman’s relationship to her father and other men will share similar features in macho, patriarchal cultures. Gabriela Corrales, *Justice Delayed is Justice Denied: The Real Significance of Matter of A-R-C-G-*, 26 BERKELEY LA RAZA L.J. 70, 84 (2016).

129. See HO, *supra* note 19, at B-15 to 19; *supra* Part I.

130. *In re Acosta*, 19 I. & N. Dec. 211, 211–12 (B.I.A. 1985) (“[P]ersecution’ . . . means harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. . .”).

131. 26 I. & N. Dec at 393.

132. Kostas, *supra* note 126, at 232. Indeed, this formulation approaches the label-based test proposed in this Note. See Corrales, *supra* note 128, at 80–81; *infra* Part IV. At the risk of tedium, however, social distinction may prove problematic for gender plus because it is unclear whether Guatemalan culture views Guatemalan women differently from those of other nationalities. Regarding nexus, would a Guatemalan man, aware that his partner is Honduran, refrain from abusing her on that basis? Or considering the inability or unwillingness of the government to intervene, would Guatemalan police prevent the abuse of a Honduran woman?

133. Request to Appear as Amicus Curiae & Brief of the National Immigrant Justice Center as Amicus Curiae in Support of the Respondent Request to Appear as Amicus Curiae, at 19–20, *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582

group may lack distinction, and a court will find that she has offered an ad hoc description of people in her particular situation, but not of a group recognized in her society.<sup>134</sup>

Second, once a claimant formulates her PSG, how does she offer evidence of particularity or social distinction? Typically, the Board expects a claimant to offer expert testimony, country-condition reports, and press accounts.<sup>135</sup> However, such evidence may not be available. Whether such experts exist is problematic considering that many claimants flee from developing nations that have not drawn sufficient attention from scholars. Further, country-condition reports are oriented toward circumstances that the State Department considers significant rather than a thorough cataloging of PSGs and the ills they suffer.<sup>136</sup> The international press may be subject to the same criticisms, while state control may affect the reliability and effectiveness of local presses.<sup>137</sup> Taken together, this creates a situation where only already known, high-profile groups will find recognition.

Perhaps courts are simply incapable of reliably making PSG determinations<sup>138</sup>—at least following the current approach. Given the volume of claims,<sup>139</sup> courts are inclined to create rigid, clear tests.<sup>140</sup> Considering the wide variety of claims, however, any test must also leave room for discretion.<sup>141</sup> Additionally, current doctrine is complicated because PSG is a prescriptive, legal construct rather than descriptive of a “naturally arising phenomenon.”<sup>142</sup> One commentator explains, “[C]ourts ‘are not engaged here in an exercise of theoretical sociology . . . but in legal reasoning, that is, in defining the contents of a legal category to which legal consequences are attached.’”<sup>143</sup> But if courts are going to

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(3d Cir. 2011) (No. A097-447-286), <http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf>.

134. *Id.*; Spencer Kyle, *Safety over Semantics: The Case for Statutory Protection for Domestic Violence Applicants*, 16 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 505, 533–34 (2014).

135. Casper, *supra* note 11, at 1.

136. *See, e.g., Human Rights Reports*, U.S. DEP’T. OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/> (last visited Jan. 16, 2016).

137. *See, e.g., Burma 2015 Human Rights Report*, U.S. DEP’T. OF STATE 22, <https://www.state.gov/documents/organization/252963.pdf> (describing an incident where five individuals were arrested for “publishing information that could cause public fear or alarm after they printed a calendar that stated ‘Rohingya’ are an ethnic minority in the country.”).

138. Foster, *supra* note 75, at 75.

139. The Department of Homeland Security reported that approximately 25,000 asylum claims were filed in the United States in 2013. DANIEL C. MARTIN & JAMES E. YANKAY, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2013, at 5 (2014), [https://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2013.pdf).

140. Foster, *supra* note 80, at 75.

141. *Id.*

142. *Id.*

143. *Id.*

confront questions as profoundly sociological as these, they need a clear, reliable, and sociologically informed test.

### III. THE SOCIOLOGICAL SIGNIFICANCE OF LABELS

Labeling reaches from the very beginning of recorded history,<sup>144</sup> and likely beyond. In the Ancient Near East, human cultures did not recognize that something existed unless it had a name.<sup>145</sup> As social constructs, labels carry tremendous significance relevant to an asylum claim by marking social boundaries and imparting identity.

#### A. Labels as a Primary Means of Marking Social Boundaries

Whether a speaker uses a name that a group adopts for itself or one the wider culture assigns, a label is a shorthand way of encoding voluminous social information.<sup>146</sup> Labels are the “primary and perhaps indispensable” means by which people create, comprehend, and express social boundaries; indeed, in the absence of a label, a group may not exist at all.<sup>147</sup> Moreover, labels carry significance beyond a speaker’s ability to articulate, thereby enabling societies to efficiently and precisely speak collectively of similarly situated individuals.<sup>148</sup> Apart from a label, a speaker would need to recite numerous traits in order to discretely identify a set of persons while risking both over- or under-capture in cases where no member possesses every relevant trait.<sup>149</sup>

For example, the Maa people of Tanzania and Kenya distinguish among themselves on the basis of territorial associations using labels such as “Ilkeekonyokie (those-of-the-red-brown-trees) or Ilodokilani (those-of-the-red-robos).”<sup>150</sup> Moreover, the broader label, “Maa,” signals group members marked in general by each of the following characteristics: (1) use of the term “maa,” a sign of linguistic competence and respect; (2) use of the term “maasai,” a sign of “bravery, fortitude, and arrogance” illustrated by refusal to beg for one’s life or for a bride; (3) use of beads in apparel; and (4) practice of pastoralism.<sup>151</sup> Moreover, the Maa contrast themselves to the Iltorobo, whom they describe as “‘hunters,’

144. See JOHN H. WALTON, *ANCIENT NEAR EASTERN THOUGHT AND THE OLD TESTAMENT* 88 (2006).

145. *Id.*

146. Marcy Brink-Danan, *Names That Show Time: Turkish Jews as “Strangers” and the Semiotics of Reclassification*, 112 *AM. ANTHROPOLOGIST* 384, 385 (2010).

147. John G. Galaty, *Being “Maasai”; Being “People-of-Cattle”: Ethnic Shifters in East Africa*, 9 *AM. ETHNOLOGIST* 1, 3 (1982). Galaty writes specifically of ethnosociological categories; but while ethnicity (or nationality) is an independent, protected ground in which a claimant can establish an asylum claim, the Maasai people (the subject of the study) do not distinguish themselves by citizenship in nation-states. *Id.* at 3–4.

148. *Id.* at 15–16.

149. See, e.g., CHRISTIAN SMITH, *THE BIBLE MADE IMPOSSIBLE: WHY BIBLICISM IS NOT A TRULY EVANGELICAL READING OF SCRIPTURE* 4–5 (2011). Using the analogy of religion, Christians are a social group even though few beliefs and practices are common to all members. *Id.* Smith, a sociologist, calculates that there may be over 5 million unique forms of Christianity. *Id.* at 23–24.

150. Galaty, *supra* note 147, at 3.

151. *Id.* at 3–4, 16.

‘poor men,’ ‘inferiors,’ or ‘bride-givers.’”<sup>152</sup> Likewise, researchers found that although Turkish Jews had lived in the region for more than 500 years, were citizens, and spoke the language fluently, Muslim Turks labeled them “‘yabancı’[which means] stranger or foreigner.”<sup>153</sup>

Further, labels influence social norms by marking out-groups, that is, those that are disfavored.<sup>154</sup> Indeed, derogatory labels appear at the earliest stages of conflict.<sup>155</sup> As such, out-group labels indicate both the nature of the relationship between groups and the probability of intergroup hostility.<sup>156</sup> Where an out-group is small and unfamiliar, labels are likely to be simple and negative.<sup>157</sup> Labels used to describe gay men are illustrative. Hostile groups use numerous derogatory labels that are as offensive as they are descriptive. On the other hand, familiar, welcoming groups will accommodate in-group labels.<sup>158</sup> Thus, labels not only mark who is included in the group, but also the speaker’s posture toward that group.

### ***B. Labels as a Primary Means of Marking Identity***

So potent are labels that their use forms and alters the social reality of labeled persons.<sup>159</sup> Often, labels have a conforming effect such that one who bears a label progressively acts out the encoded characteristics.<sup>160</sup> For example, a woman who identifies as a “drinker” is more likely to behave in conformity with that trait as a way of expressing her identity than if she did not assume that label.<sup>161</sup> A label may also have the opposite effect.<sup>162</sup> When a man identifies himself as an “alcoholic,” he often does so to avoid alcohol.<sup>163</sup>

Further, one’s self-concept is largely formed through interactions where people pursue, adopt, or are assigned labels.<sup>164</sup> For example, an in-group label enables a group member to form the identity of another by conferring or denying

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152. *Id.* at 17.

153. Brink-Danan, *supra* note 146, at 385. Domestic labels include metal heads, stoners, preppies, and the much-reviled hipster. In each example, members generally share common practices, dress, and patterns of speech.

154. *See, e.g.*, Galaty, *supra* note 147, at 15–16; Brian Mullen et al., *A Social Psychological Study of Ethnonyms: Cognitive Representation of the In-Group and Intergroup Hostility*, 92 J. PERSONALITY & SOC. PSYCHOL. 612, 613 (2007).

155. Mullen, *supra* note 154, at 612. Consider the iconic scene from *Do the Right Thing*, where a member of each ethnic group recites a prolonged monologue consisting of series of slurs aimed at another group. (Spike Lee 1989).

156. Mullen, *supra* note 154, at 612.

157. *Id.*

158. *See* Howard Giles et al., *Towards a Theory of Interpersonal Accommodation Through Language: Some Canadian Data*, 2 LANGUAGE SOC’Y 177, 179–80 (1973).

159. *See, e.g.*, Galaty, *supra* note 147, at 15–16.

160. Bruce J. Biddle et al., *Social Influence, Self-Referent Identity Labels, and Behavior*, 26 SOC. Q. 159, 162–63 (1985).

161. *Id.* at 163.

162. *Id.* at 162–63.

163. *Id.*

164. *Id.* at 160.

membership through use or nonuse of the label.<sup>165</sup> Because labels mark social boundaries, they encourage recognized members to adhere to the group's traits and challenge would-be members to seek acceptance through conformity.<sup>166</sup> For example, the aspiring "punk" will change his hair and dress, purchase specific albums, attend certain concerts, and cease referring to himself as a "punker" lest he never gain membership, but be exposed as a "poser."<sup>167</sup> Through such experiences, a person learns group expectations and forms an identity.<sup>168</sup> Accordingly, one who claims a label for himself claims "a central component of the self."<sup>169</sup> Thus, labels, however insignificant they seem, are not trivial.

Finally, labels are ubiquitous. One should recognize that all people bear numerous labels—each of which may impart significance to identity. Importantly, finding that a claimant belongs to a PSG no more entitles her to a grant of asylum than any other element taken in isolation. Accordingly, courts weighing the significance of a label to a claimant's identity should do so generously. It also follows that willingness to suffer persecution based on a label strongly favors a finding that the encoded characteristic is fundamental to one's identity, warranting protection.<sup>170</sup>

#### IV. LABELS AS EVIDENCE OF A COGNIZABLE PSG

The Board erred in *In re C-A-* by requiring claimants seeking asylum based on membership in a PSG to meet both the immutability and social-perception standards. However, the Board can prevent this error from spoiling future claims by accepting labels as evidence that the claimant's PSG possesses an immutable characteristic, is particular, and is socially distinct,<sup>171</sup> and by cabining the analysis of each element. By doing so, the Board can streamline PSG doctrine and help the United States uphold its humanitarian commitments without fear of being overrun by frivolous claims.

##### A. Labels Are Evidence of Immutability, Particularity, and Social Distinction

The significance of labels for asylum results from their ability to impart and evince that a person belongs to an immutable, particular, socially distinct PSG. As "a central component of the self,"<sup>172</sup> bearing a label is evidence that the characteristic is one the claimant either cannot change or should not be required to change.<sup>173</sup>

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165. See Galaty, *supra* note 147, at 15–16.

166. Biddle et al., *supra* note 160, at 164.

167. See, e.g., *Freaks and Geeks: Noshing and Moshing* (Dreamworks Television broadcast 17 Oct. 2000).

168. Biddle et al., *supra* note 160, at 164.

169. See *id.* at 160.

170. Protected Characteristics, *supra* note 36, at 299.

171. Both in-group and out-group labels should meet this standard (the latter also indicating nexus).

172. See Biddle et al., *supra* note 160, at 160.

173. Even the most prized identity markers—race and sex—are not immutable scientific categories. James Wong, *What's In a Name? An Examination of Social Identities*, 32 J. THEORY SOC. BEHAV. 451, 453 (2002). Interestingly, the Kmhmu of Southeast Asia

Moreover, labels are compelling evidence of particularity because they distinguish insiders from outsiders.<sup>174</sup> Although one who uses a label may not be able to fully articulate its significance, particularity is not dependent on full delineation.<sup>175</sup> Rather, particularity is concerned with whether the society of origin—and, by extension, a court—can distinguish who is included and excluded from the group.<sup>176</sup> Further, a label is compelling evidence of social distinction. A label reflects that society recognizes a group of people who share specific traits to such a degree that it has coined a shorthand tag to speak of them.<sup>177</sup> Although one might fear that a claimant will attempt to base her claim on trivial labels, this concern is better addressed by nexus. As Aleinikoff observed, “most trivial associations are not likely to attract persecutory acts; thus roller-bladers are quite unlikely to be recognized as refugees whether or not they constitute a ‘social group’ . . . [If they] were subject to persecution on the basis of membership in the group, why should international protection be denied?”<sup>178</sup>

Finally, because this one piece of evidence satisfies both the one-pronged immutability test of the Third and Seventh Circuits as well as the three-pronged tests of the other circuits, the Board can effectively mend the circuit split by recognizing labels as evidence of a cognizable PSG.<sup>179</sup>

Thus, persons claiming asylum based on membership in a PSG might demonstrate the existence of their group by offering a label used by their society, in their society’s language, with an English translation and definition. Further, the Board could require that claimants support an assertion that a society uses a

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recognize someone shares their ethnicity on the basis of speaking their language rather than by lineage, physical features, or birthplace. Frank Proschan, “*We Are All Kmhmu, Just the Same*”: *Ethnonyms, Ethnic Identities, and Ethnic Groups*, 24 AM. ETHNOLOGIST 91, 104–05 (1997). This is not to diminish race, sex, or any other label as less than essential to one’s identity, but rather to show that courts are ill-suited to determine whether a person should be required to alter any characteristic that imparts identity.

174. See *supra* Section III.B.

175. See, e.g., Galaty, *supra* note 147, at 16 (“[S]peakers intend to manipulate verbal categories, though . . . their own subtleties may elude their own descriptions.”); SMITH, *supra* note 149, at 4–5.

176. See *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (articulating “sufficient particularity” as the ability to “delimit [a group’s] membership.”). Moreover, because groups may possess many attributes, which no member entirely possesses, particularity should not be interpreted as so narrow a concept that it cannot accommodate diversity. See Section III.A.

177. Galaty, *supra* note 147, at 3. Curiously, in *In re M-E-V-G-*, the Board wondered whether “landowners” would qualify as a PSG in Canada where land ownership is so ubiquitous. 26 I. & N. Dec. 227, 241 (B.I.A. 2014). The use of the label in Canada and the existence of special interest groups such as the Real Property Association of Canada demonstrate that Canadians recognize landowners as a PSG. See *Canada’s Highest, Lowest Property Taxes*, HUFFINGTON POST: BUS. CAN. (Sept. 27, 2014, 10:29 AM), [http://www.huffingtonpost.ca/2014/09/27/property-taxes-canada\\_n\\_5890090.html](http://www.huffingtonpost.ca/2014/09/27/property-taxes-canada_n_5890090.html). Further, Canadians, like Americans, certainly recognize several subgroups within the larger group of landowners.

178. See *Protected Characteristics*, *supra* note 36, at 299.

179. See *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582,582; *Gatimi v. Holder*, 578 F.3d 611, 611 (7th Cir. 2009).

specific label with some combination of testimony, affidavit, print or electronic media, or other evidence.<sup>180</sup>

### *B. Sample Label-Based PSG Analysis*

To demonstrate the ability of labels to show membership in an immutable, particular, socially distinct PSG, consider the following analyses of gay men,<sup>181</sup> women (in contrast to women unable to leave a domestic relationship),<sup>182</sup> and various victims of Central American gang violence. Recognize how labels meet each PSG prong while leaving room for the remaining elements to test the validity of the claim.

Honduran culture labels gay men with many terms, including *solapa* (“closeted gay”).<sup>183</sup> This label communicates something immutable about group members: no gay man should be required to change his orientation, nor should he be forced out of the closet. Further, the label’s precise meaning demonstrates particularity: neither a merely effeminate man nor a gay man living out of the closet would identify as a *solapa*. Finally, the existence of the label itself is evidence of social distinction in Honduran society. Thus, a claimant offering the *solapa* label would have his case decided by whether he can meet the remaining, more substantial elements.

With regard to women, recall that after rejecting a number of domestic violence based PSGs, the Board in *In re A-R-C-G-* recognized the respondent’s proposed PSG, “married women in Guatemala who are unable to leave their relationship.”<sup>184</sup> Unlike this possibly circular or redundant formulation, the label *mujeres* (“women”) should qualify as a PSG. Although broad, the label “woman” encompasses innumerable aspects of a woman’s identity. Further, the shared identity as *mujeres*, rather than a shared experience of persecution, unites group members. Additionally, the term is particular because the boundary is well defined by anatomy and gender identity.<sup>185</sup> Again, the label itself is irrefutable proof of social distinction. As for nexus, a woman’s “woman-ness” and the exercise of her independence are precisely what her persecutor seeks to overcome in a macho, patriarchal culture. Finally, a government’s refusal to intercede in a domestic dispute on a woman’s behalf is likewise driven by her role in society.<sup>186</sup> As such,

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180. Alternatively, Congress could amend the Act at § 1101(a)(42) to include the same requirements. Likewise, the Administration could codify them under 8 C.F.R. § 208.13(b). Given that some of these sources have already shown to be problematic, more weight could go to the credibility of the claimant and witnesses or other sources from the country of origin. *See supra* Section II.D.

181. *See Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005).

182. *See supra* Section II.D.

183. MANUEL FERNANDÉZ-ALEMANY & STEPHEN O. MURRAY, HETEROGENDER HOMOSEXUALITY IN HONDURAS 189 (2002). Others include *culero* (“[F]aggot; from ‘culo’ (ass)”) and *loca* (“[E]ffeminate homosexual penetrated male”). *Id.* at 188.

184. 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

185. Recognizing the complexity of gender identity, this is an oversimplification—perhaps a gross oversimplification. Nevertheless, for the instant purpose it is at least a suitable illustration.

186. *A-R-C-G-*, 26 I. & N. Dec. at 393.

the claim of a *mujer* from Guatemala would be decided not on the formulation of her PSG, but on the other elements of her claim.<sup>187</sup>

Finally, if labels were considered evidence of a PSG, victims of Central-American-gang violence would be able to have claims decided on their merits rather than by legal technicalities. Consider *Zelaya v. Holder*, where a Honduran teenager repeatedly refused recruitment by the Mara Salvatrucha 13 gang and consequently suffered multiple beatings and death threats.<sup>188</sup> There, the Fourth Circuit affirmed the Board's rejection of Zelaya's claimed PSG, "young Honduran males who refuse to join MS-13, have notified the authorities of MS-13's harassment tactics, and have an identifiable tormentor within MS-13."<sup>189</sup> While this formulation is an example of an overly narrow, ad hoc group, broader labels in use by Honduran society such as *jóven* ("youth"—one not yet recognized as a man or woman but no longer a child)<sup>190</sup> should be recognized. Although 10–20% of *jóvenes* age out each year, the characteristics are nevertheless immutable because each member is incapable of changing in the present. By virtue of a birthdate, life stage, and youthful appearance, the groups are particular—it is apparent who is included and who is not. Again, by labeling *jóvenes*, Honduran society recognizes these people as socially distinct; notably, from *hombres* ("men"), *mujeres* ("women"), and *niños* ("children").<sup>191</sup>

As a member of the PSG, *jóvenes*, Zelaya's claim may then be examined for other elements, such as past persecution and nexus. Whether regular beatings over several years, having a gun fired in front of one's face, and multiple death threats rise to the level of persecution is a question of fact.<sup>192</sup> Regarding nexus, Central American gangs are notorious for forcefully recruiting *jóvenes*. Such

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187. Some might fear that if the protected ground is simply "women," half the population from a particular region could establish a claim regardless of whether each one suffers persecution because each claimant need only establish a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b) (2013). However, one does not establish a well-founded fear so easily; the claimant has the burden of proving her fear is "subjectively genuine and objectively reasonable." *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013); *see also* HO, *supra* note 19, at B-29 to 41. Well-founded fear is a rigorous test. *See Singh v. INS*, 94 F.3d 1353, 1359 (9th Cir. 1996) ("[T]he severity of the discrimination, harassment, or violence directed at members of [a] group will determine the kind of individualized showing that will be required of an asylum applicant . . . who is a member of that group.").

188. 668 F.3d 159, 163 (4th Cir. 2012).

189. *Id.* at 165.

190. Compare *jóven*, COLLINS UNIVERSAL ENGLISH-SPANISH DICTIONARY (9th ed. 2009) ("youth"), with *hombre*, *id.* ("man"), and *niño*, *id.* ("child"). In 2009, while on a week-long mission trip outside Mexicali, Mexico, I observed that residents were careful to clearly distinguish *jóvenes*—young people (approximately 15–25 years old) who had not married, may be in school, and had not otherwise attained rites of passage—from *hombres* and *mujeres*, who were fully recognized adults.

191. Again, labels are ubiquitous; all people belong to an indeterminate number of PSGs. Simply establishing membership in a PSG is not sufficient to merit a grant of asylum; a claimant must also demonstrate the remaining elements, including nexus—that she was persecuted on the basis of her membership in this group. *See supra* Section I.A.

192. *See Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) ("[T]hreats of violence and death are enough.").



recruiting can only be described as purposeful exploitation targeted at this PSG because of their unique characteristics—namely, ease of manipulation and ability to escape criminal prosecution.<sup>193</sup> As such, *jóvenes* may have to wait for further evolution in nexus doctrine and the recognition of exploitation as a cognizable motivation.<sup>194</sup> Nonetheless, they should not be denied asylum for want of a cognizable PSG.

Similarly, small business owners persecuted by gangs and guerrillas have needlessly struggled to find PSG recognition.<sup>195</sup> Recall the facts of *Acosta*, where anti-government guerrillas persecuted a taxi driver for refusing to participate in work stoppages.<sup>196</sup> Given that Salvadoran culture uses the label *taxista* (“cab driver”), the analysis in *Acosta* would surely change. While it is correct that the claimant’s career was not immutable because he could change it, the Board failed to recognize that his career may be so fundamental to his identity that he should not be required to change it in order to avoid persecution.<sup>197</sup> Further, the label *taxista* would be evidence of particularity because driving a taxi as a profession clearly marks insiders from outsiders and, again, the label itself is evidence of social distinction.<sup>198</sup> Like *jóvenes*, such claims will likely turn on past persecution, government agency, and an evolution in nexus doctrine that recognizes exploitation.<sup>199</sup>

Finally, regarding “tattooed gang member[s],” the term commonly used in Guatemala, *mareros* (“gang member”) would establish that an immutable (based on past experiences that cannot be changed), particular, socially distinct PSG exists on an analysis similar to that for *taxistas*. Further, should one find it necessary to distinguish membership in one gang from another, a narrower label

193. IMMIGRATION & REFUGEE BD. OF CAN., *Honduras: The Recruitment of Mara Salvatrucha (MS) and 18th Street (Calle 18 or Mara 18) Gang Members; Whether Individuals Are Forced to Participate in Gang Activity* 2.1, REFWORLD (Jan. 24, 2012), <http://www.refworld.org/docid/4f4f2eeb2.html>. Again, some may fear that if the protected ground is simply “youth” then extraordinary numbers might establish a claim without having personally suffered persecution. Recall, however, that claimants who have not suffered persecution have the burden of showing that their fear is subjectively genuine and objectively reasonable. *Rusak*, 734 F.3d at 896.

194. See *supra* Section I.A.

195. See, e.g., *Ochoa v. Gonzales*, 406 F.3d 1166, 1168–69 (9th Cir. 2005); *Acosta*, 19 I. & N. Dec. 211, 216 (B.I.A. 1985).

196. 19 I. & N. at 216.

197. *Id.* at 234.

198. Whether Uber drivers would qualify for, or muddle, *taxista* analysis is an interesting exercise. The label, “Uber driver”—at least in American culture—suggests that despite similarities, the groups are easily distinguishable. See Joshua Berlinger & Dana Ford, *Kalamazoo Shooting Suspect Jason Dalton Blames Uber App*, CNN (Mar. 15, 2016), <http://www.cnn.com/2016/03/14/us/kalamazoo-shooting-suspect/> (“[Shooter] Dalton told his wife that night he believed an angry taxi driver was targeting him because, as an Uber driver, he was taking away business from traditional cab companies. . .”).

199. On the other hand, where market forces or policymaking cause a *taxista* to go out of business, persecution will not be established unless competitors use violence to increase market share. See *id.* Likewise, government regulation quashing an industry or making it unprofitable would not rise to the level of persecution.

based on the specific gang might be offered along with descriptions of identifying marks, customs of dress, and tattoos. Still, a final determination of whether any *marero* merits a grant of asylum will likely be decided by applying the particularly serious crime bar.<sup>200</sup>

### *C. Will Labels Cause a Flood of PSG-Based Claims?*

A label-based test as straightforward as the one articulated in this Note raises the immediate concern that courts—and the United States—will be inundated with PSG-based claims. Indeed, were the Board to fully implement the instant proposal, nexus would remain unchanged as the heart of an asylum claim. Accordingly, a claimant would still be required to show that her membership in the proposed PSG was a central reason motivating her persecution along with each and every other element of a cognizable claim.

First, a finding that a claimant belongs to a cognizable PSG does not demand a finding that she is entitled to a grant of asylum any more than if she had established that she was of a certain race, religion, nationality, or political opinion. The heart of an asylum claim remains nexus: the one central reason motivating the persecutor to persecute members of the claimant's group is a desire to overcome them because of their shared trait. While failure to demonstrate membership in a cognizable PSG may cause a claim to fail, establishing membership in one serves no benefit if the claimant cannot also establish nexus and the remaining elements.

Second, PSG analysis should conform to that of the other four grounds, for which members may number in the millions and within which there is tremendous diversity.<sup>201</sup> The expectation that a PSG should be small in number is false.<sup>202</sup> While logic suggests a persecuted group will normally constitute a minority, there is no reason that a PSG either must be a minority (as the population of women often exceeds that of men) or that it should be a marginal minority.

Once untethered from the concerns represented by the other elements of an asylum claim through well-cabined analysis, the straightforward question of whether the claimant's proposed PSG meets the immutability, particularity, and social-distinction requirements can be easily addressed by proposing and analyzing the appropriate labels.

## CONCLUSION

The United States is at its finest when it meets humanitarian needs. Nowhere is this more evident than when it offers the persecuted a new home within the safety of its borders. Yet, the Board's faulty incorporation of the UNHCR's social-perception standard prevents many deserving refugees from entering the country. Instead of liberalizing the grounds upon which a prospective

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200. See *supra* Section I.B.

201. *Syria Regional Refugee Response*, 3RP: REGIONAL REFUGEE & RESILIENCY PLAN, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Jan. 17, 2017). Upon last visit, there were 4,863,587 registered Syrian refugees—men and women, young and old. *Id.*

202. Asylum was designed to protect masses of people fleeing persecution. Corrales, *supra* note 128, at 86.

refugee might base her claim, the Board severely narrowed them when it introduced its convoluted three-prong test of immutability, particularity, and social distinction. As a result, finding recognition as a refugee on the basis of membership in a PSG is unpredictable. Even in the less stringent Third and Seventh Circuits, where courts reject particularity and social distinction, the standard remains more restrictive than the UNHCR intended because those courts have foreclosed the alternative social-perception test. So problematic is current PSG doctrine that even the long-called-for recognition of domestic-violence victims had the unintended consequence of complicating PSG doctrine and jeopardizing the claims of otherwise legitimate refugees.

Labels, however, present a ready solution. This ubiquitous practice by which societies impart and form one's sense of self is a strong indication of immutability—that the possessed characteristic cannot be changed or is so fundamental to one's identity that she should not be required to change it. Moreover, the use of labels to distinguish members from nonmembers demonstrates their power to show particularity. Further, a label is compelling evidence of social distinction because a label's very existence signifies that a society recognizes that certain individuals share specific traits and are united by them—so much so that it coined a shorthand term to describe them.

Finally, by cabining the analysis of each element and fully evaluating each claim on the merits, the Board can enable the United States to fulfill its humanitarian commitments under the U.N. Convention on Refugees without fear of being overrun by frivolous claims.