A Call for Refuge: The Case of Forced Marriages

Emily A Harrell, North Carolina Central University
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VI. Introduction

The question of whether lifelong, involuntary marriage constitutes a redressable claim for asylum is quite significant, and brings into question the position of the United States and the duties owed to refugees in such circumstances. This issue is particularly significant given the demonstrated concern for human rights as manifested by the United States accession to the 1967 United Nations Protocol Relating to the Status of Refugees (the Protocol). The present government of the United States seeks to abrogate this responsibility under the Protocol in the instance of forced marriages, as evidenced by a stated belief that providing asylum under these circumstances would be over-inclusive.\(^1\)

In Gao v. Gonzalez, the Second Circuit Court of Appeals faced this particular issue and held that women who were forced into marrying within a Chinese community where forced marriage was condoned and enforceable qualified as a “particular social group” eligible for asylum within the meaning of the Immigration and Nationality Act (the Act).\(^2\) As such, these conditions constituted a legal basis for granting asylum under the Act.\(^3\) But it remains to be seen whether other circuit courts of appeals will follow this holding, and if the Supreme Court were faced with this issue, whether it would affirm Gao.\(^4\)

The current Administration has asked that the Supreme Court review Gao’s case in order that it may reverse the appeals court’s holding in granting Gao asylum.\(^4\)

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\(^3\) Id.
\(^4\) Warren Richey, An Immigration Judge Said No, but an Appeals Court Panel Found a Valid Fear of Persecution, CHRISTIAN SCIENCE MONITOR, Mar. 23, 2007 (evaluating the repercussions of Gao v. Gonzalez). In particular, U.S. Solicitor General Paul Clement requested this reversal. Id.
However, if a petition of certiorari is granted, as desired by the government, the Supreme Court should affirm *Gao v. Gonzalez* since it is in accordance with asylum case law and its underlying implementing policy. Not only does case law support the holding in *Gao*, but justice requires an interpretation of asylum law which provides refuge for enslaved foreign nationals.

This note will set forth the procedural requirements for obtaining asylum. In particular, it will focus on what constitutes a “particular social group” within the meaning of the Act and whether Gao’s “particular social group” adheres to that precedent. This note will examine whether Gao’s apprehension of harm may be considered well-founded and whether that harm may be considered a nationwide threat of persecution. This discussion will conclude with a plea for other circuit courts of appeals to concur with *Gao’s* holding and, should the Supreme Court grant certiorari on this issue, that it must affirm the Second Circuit’s decision.

VII. *Gao v. Gonzalez*, 440 F.3d 62 (2d Cir. 2006).

*Gao v. Gonzalez* is a recent decision from the Second Circuit Court of Appeals that dealt with a Chinese woman (Gao) whose family sold her into marriage.⁵ After Gao attempted to terminate her engagement with her abusive future husband ‘Zhi’, he threatened her and said he would have his uncle, an influential local official, arrest her if she refused to comply with their marriage arrangement.⁶ Gao moved an hour away, but Zhi persistently vandalized her parents’ home and even followed her one night to find out

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⁵ *Gao*, 440 F.3d at 64. The court also discussed Gao’s claims relating to withholding of removal and the Convention Against Torture, but this discussion will focus on of Gao’s request for asylum based on her “well-founded fear” of “persecution”. *Id.*

⁶ *Id.*
where she was living. Gao fled to the United States with the fear that she would be forced to marry Zhi and live in an abusive relationship if she remained in China.8

In Gao v. Gonzalez, Circuit Judge Straub concluded that for purposes of asylum, women who were forced into marrying within a Chinese community where forced marriage was condoned and enforceable qualified as a “particular social group.”9 The rationale behind this decision was based on Matter of Acosta’s definition of “particular social group” as “a group of persons all of whom share a common, immutable characteristic… that cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”10

The Second Circuit also based this opinion on the fact that there was not necessarily government protection for Gao since “trafficking for women, for marriage… is widespread, and that official efforts to combat the problem have been hampered by corruption and by active resistance by village leaders.”11 Moreover, Gao was not necessarily able to avoid persecution by relocating within China since Zhi impeded her attempt to escape to another town.12 Thus, the Second Circuit vacated and remanded the decision of the Board of Immigration Appeals (BIA), which had not granted asylum to Gao.13

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7 Id. at 64-65.
8 Id. at 65.
9 Id.
10 Id. at 67 (citing Matter of Acosta, 19 I. & N. Dec. 211, 223 (BIA 1985) (landmark BIA case describing “particular social group” for asylum purposes). Circuit Judge Straub also concluded that there may have been “substantial evidence” to infer that Gao feared future persecution on account of her membership in this “particular social group.” Gao, 440 F.3d at 64.
11 Id. at 70 (citing BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF ST, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: CHINA (2002). This evidence combined with that of Zhi’s threats of having her arrested by his powerful and political uncle show the lack of governmental protection in China. Gao, 440 F.3d at 70.
12 Id. at 71.
13 Id.
VIII. Background: A Procedural Roadmap of Asylum Law

a. Asylum: The Standard of Proof

In 1987, the Supreme Court held that to establish a “well-founded fear of persecution” for purposes of seeking asylum, a petitioner does not need to prove that it is “more likely than not” that she would be persecuted in her native country. \(^{14}\) Rather, “[a]n alien’s fear may be well-founded even if there is only a slight, though discernable, chance of persecution.” \(^{15}\) The question becomes whether there is a realistic likelihood of being persecuted upon one’s return to her native country. \(^{16}\)

This less-strict “well-founded fear” standard of proof, provided for by section 208(a) of the Act, permits the Attorney General to discretionarily grant asylum if he determines that an alien is a refugee. \(^{17}\) Pursuant to 8 U.S.C. § 1101(a)(42), a “refugee” is:

…any person 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… \(^{18}\)

\(^{14}\) Cardoza-Fonseca, 480 U.S. at 435. The determination of whether an alien is eligible for asylum is governed by this “well-founded fear of persecution” standard rather than the more rigid standard that is applied to petitions for withholding of removal. Id. at 428. Withholding of removal is a non-discretionary form of providing relief to a foreign national who claims that she would be persecuted upon returning to her native country. Id. at 423.

\(^{15}\) Id. at 431.

\(^{16}\) Matter of Acosta, 19 I. & N. Dec. at 225. Asylum law is based on the premise that a person requires international protection when her native country is no longer safe for that particular individual. Id. at 235 (discussing Grahl-Madsen, The Status of Refugees in International Law, §§ 76, 77, at 97, 100 (1966)). For this reason, the petitioner must demonstrate a nation-wide threat of persecution rather than a threat of persecution in a particular region of the nation. Matter of Acosta, 19 I. & N. Dec. at 235. See also Immigration and Nationality Act, 8 C.F.R. § 208.13(b)(2)(ii) (2007) (discussing “well-founded fear” of “persecution”).

\(^{17}\) Cardoza-Fonseca, 480 U.S. at 427. “The Attorney General shall establish a procedure … to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)…” Id. (citing 94 Stat. 105, 8 U.S.C. § 1158(a) (emphasis added) (2007)).

The drafting committee for the UN Protocol explained, “[t]he expression ‘well-founded fear of being the victim of persecution…’ means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.” The BIA has acquiesced to the common meaning of “fear” as a subjective condition, defined as, “an emotion characterized by the anticipation or awareness of danger” for asylum purposes.

b. “Persecution”

In Matter of Acosta, the BIA construed “persecution” to mean “either a threat to the life or freedom of, or the infliction of suffering or harm… in a way regarded as offensive.” The harm or suffering could encompass confinement, torture, economic deprivation, or “restrictions so severe that they constitute a threat to an individual’s life or freedom.” However, it must be “inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”

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19 Cardoza-Fonseca, 480 U.S. at 431. A principal rationale for Congress having created this definition of “refugee” was to adhere to the Protocol, which was acceded by the United States in 1968. Id. at 436-37. In fact, Congress’s definition of “refugee” is virtually identical to that of the Protocol. Id. at 434. Therefore, it is appropriate to consider the intent of the drafting committee of the Protocol to determine the meaning of the congressional definition of “refugee.” See id. at 437. However, it is interesting to note that each country that adheres to the Protocol has autonomy to determine who is a “refugee.” Matter of Acosta, 19 I. & N. Dec. at 225 (discussing Young, Between Sovereigns: A Reexamination of the Refugee’s Status, Transnat’l Legal Probs. of Refugees: 1982 Mich. Y.B. Int’l Legal Stud. 339, 344-45 (1982)). In some ways, the U.S.’s definition of “refugee” is more inclusive and thus offers more protection than international agreement calls for, exceeding the Protocol’s definition by allowing persons to apply for refugee status even if they are in their native country. Matter of Acosta, 19 I. & N. Dec. at 225 n.6 (discussing Martin, The Refugee Act of 1980: Its Past and Future, Transnat’l Legal Probs. of Refugees: 1982 Mich. Y.B. Int’l Legal Stud. 91, 101-03 (1982)).

20 Matter of Acosta, 19 I. & N. Dec. at 221 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 831 (16th ed. 1971)). This subjective fear must be one’s primary motivation for seeking asylum. Matter of Acosta, 19 I. & N. Dec. at 221. “No other motivation, such as dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States, satisfies the definition of a refugee created in the Act.” Id.

21 Id. at 222 (discussing the validity of the pre-1980 construction of “persecution” within the meaning of the Act).

22 Id. (discussing various forms of persecution as interpreted in Blazina v. Bouchard, 286 F.2d 507, (3d Cir. 1961), Dunat v. Hurney, 297 F.2d 744 (3d Cir. 1962), and Matter of Salama, 11 I. & N. Dec. 536 (BIA 1966)). “Persecution” encompasses many different forms of adverse treatment, such as “‘non-life [-] threatening violence and physical abuse’ or non-physical forms of harm such as ‘the deliberate imposition
c. “Particular Social Group” according to BIA

In Matter of Acosta, discussed above, the BIA established what the term “particular social group” could encompass for purposes of asylum.24 This case involved a Salvadoran national who was a member of a taxi cooperative organization whose members had received numerous threats, were assaulted, and some were even killed due to the actions of anti-government guerillas.25 The petitioner in particular had been threatened, and although he did not intend to work as a taxi driver if he were to return to El Salvador, he would continue to fear for his life.26

The BIA interpreted the phrase “persecution on account of membership in a particular social group”27 to mean

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership… [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.28

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23 Id. (emphasis added). In Ivanishvili v. I.N.S., the Second Circuit Court of Appeals reiterated the fact that private actions could constitute persecution so long as the government is proved to have been unwilling to control those actions. Ivanishvili, 433 F.3d at 342.
25 Id. at 216.
26 Id. at 216-17.
The BIA held that the petitioner in *Matter of Acosta* was not a member of a “particular social group” because the members of the taxi cooperative could change jobs; thus, the characteristics of the taxi drivers were not immutable.29

It is instructive to look at what the BIA has decided with respect to other gender-related issues regarding what constitutes members of a “particular social group.” Five years after the BIA decided *Matter of Acosta*, the BIA held that a homosexual could be granted asylum if he or she shows a “well-founded fear of future persecution” in his or her homeland based on their sexual orientation.30 Thus, homosexuals are considered members of a “particular social group.”31

Six years after *Matter of Toboso-Alfonso*, the BIA turned over another decision regarding human rights violations against women.32 In *In re Fauziya Kasinga*, it recognized that female genital mutilation (FGM) can be the basis for an asylum claim.33 In particular, the BIA recognized as members of a “particular social group” young female members of the Tchamba-Kunsuntu Tribe in Togo who have not yet had FGM and who are opposed to the practice.34 The BIA found that FGM constituted persecution because

29 *Id.* at 234. The BIA also held that the petitioner’s fear was not well-founded since the facts did not indicate any likelihood that would he would be persecuted by guerillas upon his return to El Salvador. *Id.* at 232. This particular portion of the decision was made in the light of the fact that the petitioner did not intend to continue as a taxi driver upon his return. *Id.*

30 *See* Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990) (homosexual applicant showed that his freedom was threatened due to his membership in a particular social group in Cuba). The applicant in *Matter of Toboso-Alfonso* was persecuted in Cuba because of his status as a gay man. *Id.* at 822. The Cuban government keeps files on all homosexuals. *Id.* Because of this, homosexuals are subjected to physical examinations, questioning, and criminal detentions. *Id.* Also, the applicant was given an ultimatum by his employer to leave the country or be put in a penitentiary. *Id.* In effect, this individual was granted asylum because of his fear of persecution by both the government and individuals. See *id.*

31 *See* id. at 823.


33 *Id.*

34 *Id.* Pursuant to the test set forth in *Matter of Acosta*, this particular social group is defined by immutable characteristics: those of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe”. *Id.* at 366. Moreover, “the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.” *Id.*
of the fact that persecution can be “infliction of harm or suffering by... persons a
government is unwilling or unable to control, to overcome a characteristic of the
victim.” The BIA also found that this persecution was deemed “on account of” the
petitioner’s status as a member of the “particular social group,” and the threat was
nationwide, thereby allowing the petitioner to meet all of the elements of an asylum
claim. It is quite interesting to note that in this case, the BIA declined to determine
specifically whether entering a forced marriage would constitute a “well-founded fear of
persecution.”

d. “Particular Social Group” according to the Second Circuit

In 1991, the Second Circuit Court of Appeals held that Salvadoran women who
had previously been beaten and raped by Salvadoran guerillas did not constitute a
“particular social group” for purposes of an asylum claim. In his decision in Gomez v.
I.N.S., Circuit Judge Altimari wrote that the petitioner had failed to show that the
guerillas would be inclined to harm her in the future because of her association with a
particular social group. In essence, the court did not rule this way because the proposed
social group was too broad, but due to the absence of proof that she would be “singled
out for further brutalization on the basis of her past persecution.”

35 Id. at 365 (citing Matter of Acosta, 19 I. & N. Dec. at 211, 222-23). The petitioner’s situation was
worsened by the fact that the police and government in Togo were conscious of the practice of FGM and
would not take steps to protect her from it. Id. at 359. In the case at hand, Gao’s situation was comparably
worsened by the fact that her future husband was well-known in the country and a friend of the police. Id.
36 Id. at 367. See also Matter of Acosta, 19 I. & N. Dec. at 211.
37 In re Fauziya Kasinga, 21 I. & N. Dec. at 368. Although the Tenth Circuit did have a more broad
holding than In re Fauziya Kasinga in a 2005 case, Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005).
Niang’s decision was more expansive because it relates to whether FGM in general is persecution,
regardless of whether it was done by a particular tribe (although it was influential that the petitioner was a
member of the Tukulor Fulani tribe). See Niang, 422 F.3d at 1193.
38 Gomez v. I.N.S., 947 F.2d 660 (2d Cir. 1991) (petitioners for asylum did not show sufficient cause for
redress).
39 Id. at 663.
40 Gao, 440 F.3d at 64 (citing Gomez, 947 F.2d at 664).
Despite *Gomez*, the Second Circuit has been relatively favorable to female foreign natives who fear a brutal male-centered customary practice in their homeland.\textsuperscript{41} Eight years later, in 1999, the Second Circuit Court of Appeals conceded with the BIA that FGM may be the basis for an asylum claim.\textsuperscript{42} In *Abankwah v. I.N.S.*, the court held that the petitioner had both a subjective and objective fear to FGM due to a common, yet brutal Ghanaian custom.\textsuperscript{43}

e. **“Particular Social Group” according to the Department of Homeland Security**

The current position of the Department of Homeland Security (DHS) is relevant to determine current immigration policy. A pending case, *Matter of R-A-*, was remanded to the BIA after its initial decision that Guatemalan women facing domestic abuse did not consist of a “particular social group.”\textsuperscript{44} The DHS now argues that married women in Guatemala who cannot leave an abusive relationship constitute a “particular social group.”\textsuperscript{45}

IX. **Analysis**

*Gao v. Gonzalez* has further developed previously existing case law, yet a reasonable interpretation of asylum law reveals that Gao does fall within the definition of a “refugee,” despite the case’s novelty and numerous criticisms. U.S. Solicitor General Paul Clement argues that the Second Circuit Court of Appeals has threatened to “transform American asylum law into a worldwide haven for women trapped in

\textsuperscript{41} See *Abankwah v. I.N.S.*, 185 F.3d 18 (2d Cir. 1999).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{45} Id
potentially abusive relationships after being sold into forced marriages.” Despite this view, Gao’s holding remains in accordance with asylum law, its underlying policy, and our societal notions of justice and democracy. It should not be discounted merely because it may appear over-inclusive.

For an analysis of Gao’s case as it pertains to the definition of a “refugee” within the meaning of the Act, it is helpful to recall the definition of “refugee.” Gao fits within this definition of a refugee because she is unwilling to return to China, and “unwilling to avail herself of the protection of that country because of a well-founded fear of persecution on account of membership in a particular social group.”

a. “Persecution”

“Persecution,” as it falls within the meaning of the Act, surely encompasses being forced into an abusive marriage. A plain meaning of the Act indicates Gao’s fear of future persecution. Not only was Gao’s future husband abusive, but he also threatened to have her arrested and even vandalized her parents home. This behavior undoubtedly constitutes threats to an individual’s freedom by way of severe and offensive restrictions.

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46 Richey, supra note 3.
47 A “refugee” is “…any person 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…” 8 U.S.C. § 1101(a)(42) (emphasis added).
48 Id.
49 See Matter of Acosta, 19 I. & N. Dec. at 222 (discussing the validity of the pre-1980 construction of “persecution”). Recall that persecution may entail threats to an individual’s freedom by way of severe and offensive restrictions. Id.
50 Gao, 440 F.3d at 64-65.
51 See Matter of Acosta, 19 I. & N. Dec. at 222. Gao’s threat of facing an unwanted abusive marriage is certainly nation-wide. See Gao, 440 F.3d at 64. Gao had already moved one hour away to escape Zhi and he cunningly followed her to her new home. Id. at 64-65. Zhi’s connections with influential local officials worsen the threat even more, as he would be more likely able to locate Gao. Id. at 65.
It has been well-established that private actions may constitute persecution if the government is “unable or unwilling to control” the harm or suffering inflicted.\textsuperscript{52} In \textit{Fauziya}, the petitioner was granted asylum due to her refusal to adhere to the socially accepted custom of female genital mutilation.\textsuperscript{53} The members of the tribe were the persecutors, and the fact that the government was not able or willing to prohibit this social custom allowed it to be considered “persecution” within the meaning of the Act.\textsuperscript{54} Nor does one’s government have to condone harmful acts in order for those acts to qualify as persecution; it merely must be unwilling or unable to control the harm or suffering inflicted by the persecutor.\textsuperscript{55}

The Chinese government has proven to be unable to abolish forced marriages.\textsuperscript{56} In its attempts to prevent trafficking, the government has been hampered both by official corruption and by opposition of village authorities.\textsuperscript{57} The country’s attempts to protect women natives have been futile - there is not much redress for women victims.\textsuperscript{58} Despite

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\textsuperscript{52} See \textit{Matter of Acosta}, 19 I. \& N. Dec. at 222. This is not a case of first impression with respect to private actions, contrary to what Richey alludes to in his article. See Richey, \textit{supra}, note 4. In fact, there have been numerous cases that found that the harm or suffering does not have to be inflicted by the government itself, and may be inflicted by individuals. See \textit{In re Fauziya Kasinga}, 21 I. \& N. Dec. 357. See also \textit{Abankwah}, 185 F.3d 18.

\textsuperscript{53} See \textit{In re Fauziya Kasinga}, 21 I. \& N. Dec. at 365. Although the persecution in \textit{Fauziya} is more physically severe than those in \textit{Gao}, a forced marriage nonetheless fits into the definition of persecution due to one’s loss of their freedom. See 8 U.S.C. § 1101(a)(42). However, this portion of the discussion focuses on whether acts of persecution must be inflicted by the government.

\textsuperscript{54} See \textit{In re Fauziya Kasinga}, 21 I. \& N. Dec. at 365.

\textsuperscript{55} See \textit{Matter of Acosta}, 19 I. \& N. Dec. at 222. The holding in \textit{Matter of Acosta} in particular corroborates the fact that a government need not condone these harmful acts. In fact, this case involved a group of anti-government guerrillas who threatened, assaulted and killed members of a taxi cooperative. \textit{Id.} at 216.

\textsuperscript{56} \textit{Country Report}, \textit{supra} note 10.

\textsuperscript{57} \textit{Id}.

\textsuperscript{58} For example, China does not have a law that targets domestic violence nor is there a law that targets sexual harassment in the workplace. \textit{Id}. Moreover, the local law enforcement does not typically interfere with these matters because they are viewed as “family matters.” \textit{Id}.
\end{flushleft}
these human rights abuses and lack of protective laws, the government is disinclined to accept criticisms of its practices.\textsuperscript{59}

b. \textit{“Well-Founded Fear”}

Representatives of the current Administration would likely argue that Gao’s fear of being in a forced abusive marriage culminates into a broader desire to have personal freedom and therefore, her fear is not “well-founded” and her claim may not be redressed by asylum law.\textsuperscript{60} Yet there is a fallacy in this argument due to the fact that normally a broader desire to have personal freedom encompasses this yearning to escape persecution. It is clear that Gao wants personal freedom – what asylum seeker does not?

Gao clearly satisfies the requirement of having both a subjective and objective fear of persecution.\textsuperscript{61} In accordance with the requirement of a subjective fear, Gao anticipates an enslaved abusive relationship, which may be commonly viewed by any human person as a form of danger.\textsuperscript{62} Gao’s precarious situation also satisfies the need for there to be a realistic likelihood that she would be persecuted; since her parents already sold her to Zhi, there is no question as to the probability of future persecution upon her return to China.\textsuperscript{63}

\textsuperscript{59} \textit{Id.} The Chinese government does not allow non-governmental organizations to analyze the country’s human rights conditions - the country argues that there are different ways to perceive human rights and it has yet to take steps to comply with international human rights agreements. \textit{Id.}

\textsuperscript{60} \textit{See Matter of Acosta}, 19 I. & N. Dec. at 221. One’s fear of persecution must be one’s primary reason to seek asylum rather than a broader desire to have personal freedom. \textit{Id.} But since it has already been established that a threat of one’s freedom via severe restrictions is sufficient basis for persecution, Gao’s situation constitutes persecution. \textit{Id.} at 222. The question now is whether that fear of persecution is “well-founded.”

\textsuperscript{61} \textit{See Gao}, 440 F.3d 62.

\textsuperscript{62} \textit{See Matter of Acosta}, 19 I. & N. Dec. at 221. (citing \textsc{Webster’s Third New International Dictionary} 831. Recall that a subjective fear is characterized by \textit{“an emotion…[of an] anticipation of or awareness of danger.”} \textit{Id.}

\textsuperscript{63} \textit{See Matter of Acosta}, 19 I. & N. Dec. at 225. \textit{See also Gao}, 440 F.3d at 64.
c. “Particular Social Group”

The Second Circuit Court of Appeals held that Gao was a member of a “particular social group” which encompasses women who were forced into marrying within a Chinese community where forced marriage was condoned and enforceable. Many of the commentators who argue against the Second Circuit’s ruling in Gao premise their argument on the fact that this is a new, all encompassing category of a “particular social group.” However, this novel category of potential refugees fits perfectly into the modern trend of asylum cases.

Recall that in Fauziya, young members of the tribe who had not yet had FGM and who were opposed to the practice were considered members of a “particular social group.” These women had immutable characteristics of being young women and members of the tribe as well as the fundamental characteristic of having intact genitalia. So why would a woman in a culture that condoned forced marriage who wants to have control over her own body not be considered a member of a “particular social group?” One cannot change being a woman and should not be required to alter something so fundamental as what one decides to do with her own body in order to succumb to physical abuse by her future husband.

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64 Id.
65 See Richey, supra, note 4.
66 In re Fauziya Kasinga, 21 I. & N. Dec. 357.
67 Id. at 366. But see Matter of Acosta, 19 I. & N. Dec. at 234 (the characteristic of being a taxi cab driver was not considered immutable or fundamental to one’s identify).
68 For sake of argument, this comment does not consider modern sex change operations.
69 In fact, guidelines of the INS have specified that “rape… sexual abuse and domestic violence… may serve as evidence of past persecution on account of one or more of the five grounds.” Id. at 362 (discussing the acquiescence of the U.S. Department of Justice to the determination of persecution on specific grounds). Gao would certainly have to tolerate all of these human rights violations, as her husband would likely physically abuse her and have nonconsensual sexual relations with her. See Gao, 440 F.3d at 64.
One may seek to analogize the facts of *Gao* to those of *Gomez*, another Second Circuit Court of Appeals case, in order to show that because the court did not allow asylum to someone who had been abused sexually in a male-centered society, the court should not have allowed Gao to obtain refugee status.\(^{70}\) However, Gomez was not considered a refugee because of the absence of evidence showing she would be singled out for future persecution, rather than what whether or not she could have constituted a member of a “particular social group.”\(^{71}\)

It is also appropriate to consider the holding of *Toboso Alfonso*, in which homosexuals from Cuba were found to constitute a “particular social group” in light of the fact that the Cuban government fostered discriminatory practices against homosexuals. Gao’s situation is even more specific as a member of a particular social group - not only is Gao a native of a country who fosters discriminatory practices against women, but she has more importantly been forced into an abusive marriage. Moreover, this notion of this “particular social group” adheres to current immigration policy advocated by DHS, urging that Guatemalan women who cannot leave an abusive relationship be recognized as a “particular social group.”

d. **U.S.’s Obligations Under the UN Protocol on the Status of Refugees**

The United States’ obligations under the Protocol would be abrogated if the Supreme Court were to overrule *Gao*.\(^{72}\) Moreover, such a position would appear inconsistent with other tenets of the Executive Branch that has made promotion of

\(^{70}\) *See Gomez*, 947 F.2d 660. *See also Gao*, 440 F.3d 62.

\(^{71}\) *Gomez*, 947 F.2d at 664.

\(^{72}\) *See Cardoza-Fonseca*, 480 U.S. 421, 433 (1987) (discussing the United States’ accession to the Protocol). In so far as the Protocol was acceded with the advise and consent of the U.S. Senate, it has the force of law within the United States, notwithstanding the US right to define what constitutes “refugee status.” *Id.*
democracy and human rights a centerpiece of its foreign policy. Thus the government’s obligation under this duly ratified convention would require it to seek to affirm Gao, rather than to seek to strike it down.

X. Conclusion

The foregoing analysis supports the position that the other circuit courts should concur with the Second Circuit’s findings in Gao, and if reviewed by the Supreme Court under *certiorari* as requested by the Solicitor General, the findings of the Second Circuit should be affirmed. Gao satisfies the requirements of the Immigration and Nationality Act in terms of membership in an immutable and fundamental “particular social group” and as a member of such has well founded fears of persecution where the government of China is unwilling or unable to provide protection from such persecution. Thus, Gao is eligible for asylum and should be granted refugee status.

The essence of the Solicitor General’s petition to the Supreme Court is the argument that finding that Gao is a member of a particular social group is over-inclusive. One could argue that Gao’s case is one of a dispute between families, a local matter in China, and therefore outside the purview of the U.S. courts. However, such an argument would be specious as the consequences of forced marriage are tantamount to imprisonment, torture and slavery and, as such, constitute clear violations of human rights for which the UN Protocol on the Status of Refugees was intended to offer protections.

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73 See *Id.* Also, it would appear inconsistent with current immigration policy, particularly in light of the fact that the U.S. offers more protection than the convention calls for. See *Matter of Acosta*, 19 I. & N. Dec. at 225 n.6 (discussing Martin, *supra*, note 19).
74 See *Id.*
75 See Gao, 440 F.3d 62.
76 See *Id.*