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# FORCED MARRIAGE AND THE GRANTING OF ASYLUM: A REASON TO HOPE AFTER *GAO V. GONZALES*

## ABSTRACT

This note addresses the significance of *Gao v. Gonzales* through the analysis of the development of asylum gender laws in the United States. The analysis includes a brief history of asylum law in the United States and the issues the courts have addressed concerning gender and asylum law. The note concludes with an analysis of the *Gao* decision and the potential consequences of the decision.

## INTRODUCTION

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## INTRODUCTION

On March 3, 2006, the Second Circuit decided *Gao v. Gonzales*,<sup>1</sup> a precedential asylum decision.<sup>2</sup> As a result of the decision, Hong Ying Gao, a young Chinese refugee, was permitted to stay in the United States.<sup>3</sup> Fearing for her life and liberty, Gao had fled to the United

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1. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006). Since completing this note, the Supreme Court of the United States vacated and remanded *Gao v. Gonzales*, based on its decision in *Gonzales v. Thomas*, 547 U.S. 183 (2006). *Keisler v. Gao*, No. 06-1264, 2007 U.S. LEXIS 10267 (Oct. 1, 2007). In *Gonzales v. Thomas*, the court stated that “a court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.” *Id.* at 186 (quoting *INS v. Ventura*, 537 U.S. 12, 16 (2002)). Rather, the Supreme Court held that except in rare circumstances, the court of appeals must remand the case back to the agency for further review and explanation. *Id.* At time of publication, the case had been remanded. Despite the Supreme Court’s ruling, the Second Circuit’s decision still represents a glimmer of hope for female asylum seekers.

2. Tresa Baldas, *Waiting for Asylum: Battered Women Stuck in a Legal Limbo*, NAT’L L.J., Mar. 13, 2006, at 1, 20; U.S. Dep’t of Justice, *Women in China Who Are Sold Into Marriage Are Particular Social Group*, 10 IMMIGR. LITIG. BULL., Feb. 2006, at 1, available at <http://0225.0145.01.040/civil/oil/10news2.pdf> [hereinafter U.S. Dep’t of Justice].

3. *Gao*, 440 F.3d at 72.

States seeking asylum.<sup>4</sup> The court recognized Gao's plight and found that she qualified for asylum based on her membership in a particular social group.<sup>5</sup> According to the court, Gao's social group consisted of "women who have been sold into marriage (whether or not that marriage has yet taken place)"<sup>6</sup> who live in an area of China that enforces and validates forced marriages.<sup>7</sup> This was the first court of appeals to assess whether forced marriage could be cited as a basis for asylum.<sup>8</sup>

A person must satisfy a four-prong test to qualify as a refugee seeking asylum in the United States.<sup>9</sup> First, the person must be a refugee, defined as someone who is "outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided."<sup>10</sup> Second, the person must be "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country."<sup>11</sup> Third, the person must show persecution or have "a well-founded fear of persecution" if forced to return to the country of origin.<sup>12</sup> Fourth, the persecution or fear of persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>13</sup>

The Second Circuit found that Gao satisfied all of these requirements based on her membership in a particular social group.<sup>14</sup> Since Congress passed the Refugee Act of 1980, this category has been the least utilized category, because the statute's language does not indicate what Congress intended a particular social group to encompass.<sup>15</sup> Furthermore, there is no legislative history to indicate what they intended.<sup>16</sup> Despite its under-utilization, however, most asylum seekers tend to litigate claims of persecution based solely or predominantly

4. *Id.* at 64.

5. *Id.*

6. *Id.* at 70.

7. *Id.*

8. Elizabeth Cronin & Elizabeth Badger, *Can Being Sold Into Marriage Constitute a Basis for Asylum?*, 235 N.Y. L.J., Apr. 4, 2006, at 4. *Gao v. Gonzales* was the first published decision assessing whether asylum should be granted to women fleeing a forced marriage. A few Immigration Judges and Board of Immigration Appeals Judges had granted asylum to women fleeing forced marriages prior to the Second Circuit decision. Karen Musalo & Stephen Knight, *Gender-Based Asylum: Analysis of Recent Trends*, 77 INTERPRETER RELEASES 1541 (2000).

9. 8 U.S.C. § 1101(a)(42)(A) (2006); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987).

10. *Cardoza-Fonseca*, 480 U.S. at 427.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Gao v. Gonzales*, 440 F.3d 62, 71 (2d Cir. 2006).

15. Cronin & Badger, *supra* note 8, at 1.

16. *Id.*

on gender within the particular social group category.<sup>17</sup> As a consequence of the lack of legislative intent, the rulings in these cases have been varied and inconsistent.<sup>18</sup> With the *Gao* ruling, the Second Circuit helped to further define what constitutes a particular social group and set the standard for expanding the definition to allow for membership in a particular social group based solely on gender.<sup>19</sup>

Currently, courts most frequently cite the Board of Immigration Appeals' decision in the *Matter of Acosta* when attempting to define a particular social group.<sup>20</sup> The Board in *Matter of Acosta* held, "'persecution on account of membership in a particular social group' 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."<sup>21</sup> In addition, the common characteristic must be one that the individual cannot change, or one that is so fundamental to his or her identity that he or she should not be required to change it.<sup>22</sup>

In its analysis of what traits might fall into this broad category, the Board of Immigration Appeals recognized that gender might be included.<sup>23</sup> The court noted that shared characteristics might include, "innate one[s] 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."<sup>24</sup> While the courts in *Gao* and *Acosta* recognized that sex might, in fact, be a characteristic that could be considered in identifying a particular social group, other courts have been reluctant to recognize gender as an acceptable trait for identifying an individual's membership in a particular social group.<sup>25</sup> This has further increased the variability and inconsistency of decisions based on particular social group membership.<sup>26</sup>

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17. See Kris Ann Blaser Moussette, *Female Genital Mutilation and Refugee Status in the United States: A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 387 (1996).

18. D.M. Osborne, *The Gender Gap: Women Seeking Asylum for Claims Based on Rape or Domestic Violence Still Get a Skeptical Hearing in the U.S.*, AM. LAW., Feb. 1, 2006, at 74.

19. Warren Richey, *Does the Prospect of Arranged Marriage and Abuse Warrant Asylum in the U.S.?*, CHRISTIAN SCI. MONITOR, Mar. 23, 2007, available at <http://www.csmonitor.com/2007/0323/p01s02-usju.htm>.

20. *Gao v. Gonzales*, 440 F.3d 62, 67-68 (2d Cir. 2006).

21. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (emphasis added) (quoting 8 U.S.C. § 1101(a)(42)(A)).

22. *Id.*

23. *Id.*; *Gao*, 440 F.3d at 67-68.

24. *Gao*, 440 F.3d at 67 (emphasis omitted) (quoting *Matter of Acosta*, 19 I. & N. at 223).

25. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics — other than gender and youth — such that would-be persecutors could identify them as members of the purported group.")

26. Musalo & Knight, *supra* note 8, at 1543.

*Gao* followed *Acosta* in recognizing that a particular social group can be primarily defined by a person's gender.<sup>27</sup> The *Gao* decision reflects an awareness in the United States of gender-specific persecution that affects women throughout the world.<sup>28</sup> Advocates for allowing women to claim membership in a particular social group based on their gender believe *Gao* indicates the court's ability to recognize that gender can be a characteristic on which to base asylum.<sup>29</sup> If other courts follow the Second Circuit and grant asylum to women based on their desire to escape cultural practices within their nations of origin, asylum law in the United States may eventually recognize gender as a valid identification for membership in a particular social group that merits protection under its asylum laws.

This note will address the significance of *Gao v. Gonzales* through the analysis of the development of asylum gender laws in the United States. Part I will address the background of asylum law in the United States. Part II will address the issues the United States courts have had with gender and asylum law. Part III will focus on the Second Circuit's decision in *Gao*. Part IV will address the consequences of that decision.

## I. A BRIEF HISTORY OF ASYLUM LAW IN THE UNITED STATES

The Refugee Act of 1980 created the current asylum guidelines.<sup>30</sup> Passed on March 17, 1980, the Act amended the Immigration and Nationality Act and the Migration and Refugee Assistance Act of 1962.<sup>31</sup> Congress's declared purpose for the Refugee Act was to further the United States' history of "respond[ing] to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas."<sup>32</sup>

The United States government saw an increasing need to extend humanitarian aid to citizens of foreign countries who were suffering persecution at the hands of their governments or because of the inaction of their government.<sup>33</sup> The Act was intended "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States . . ."<sup>34</sup>

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27. Cronin & Badger, *supra* note 8, at 8.

28. Osborne, *supra* note 18, at 76.

29. See U.S. Dep't of Justice, *supra* note 2, at 20.

30. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 427 (1987).

31. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. § 102 (1980).

32. See *id.* § 101.

33. *Id.*

34. *Id.*

The Refugee Act amended the Immigration and Nationality Act by including a paragraph that defined a refugee:<sup>35</sup>

The term 'refugee' means [] any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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>36</sup>

The Refugee Act also added a section that called for the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum."<sup>37</sup> Under this provision, asylum is granted if the alien can show that he fits the definition of a refugee under the Refugee Act.<sup>38</sup>

As the purpose of the Refugee Act suggests, this Act was intended to facilitate and regulate asylum. In that vein, it has succeeded, but it has also been the subject of legal debate and controversy.<sup>39</sup> The one factor that has received the most attention is the "particular social group" classification, because of its vagueness relative to the other four factors.<sup>40</sup> Courts have created their own standards and, as a result, have ruled inconsistently on the meaning of a particular social group.<sup>41</sup> One area that has garnered national attention is whether gender should be considered as a subcategory of a particular social group.<sup>42</sup>

## II. GENDER AND ASYLUM LAW IN THE UNITED STATES

Gender is not one of the five grounds explicitly protected under United States asylum laws.<sup>43</sup> As a result, a woman seeking asylum

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35. *See id.* § 201.

36. *Id.*

37. *See id.* § 208(a).

38. *Id.*

39. Moussette, *supra* note 17, at 386-88.

40. *Id.* at 383.

41. *Id.*

42. *Id.* at 387-88. Courts disagree on whether women should be considered a particular social group. While the Third Circuit and the Board of Immigration Appeals recognize that sex could be considered a particular social group, neither has granted asylum based on an individual's sex. In contrast, the Eighth, Ninth, and Second Circuits have stated that sex by itself does not constitute a particular social group.

43. *See* 8 U.S.C. § 1101(a)(42)(A) (2006).

to escape persecution on account of her gender must allege that she is being persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>44</sup> Claiming that she is a victim of persecution based on her gender alone has not yet been sufficient in the United States to gain asylum.<sup>45</sup>

Women suffering persecution from domestic abuse or other traditional, culturally approved practices<sup>46</sup> often do not qualify under any of the categories except the particular social group.<sup>47</sup> Qualifying under this protected ground, however, has proven to be difficult for many female asylum seekers, because both courts and the Department of Homeland Security have been reluctant to recognize such a broad-based claim.<sup>48</sup> Despite the United States agencies' reluctance, the international community has recognized and taken action to promote women's rights and raise awareness of the gender-specific persecution women face around the world.<sup>49</sup>

In 1991, the United Nations High Commissioner for Refugees issued *Guidelines on the Protection of Refugee Women*.<sup>50</sup> These guidelines officially recognized the unique persecution women face and made suggestions about how to make the asylum process more accommodating of women's gender-specific issues.<sup>51</sup> The purpose of creating these gender-specific guidelines was to ensure that women's claims were "treated equally and fairly with men's, and to promote an understanding that human rights norms govern the structure of asylum protection."<sup>52</sup> The Commission recommended that member nations develop guidelines for asylum protection to address the unique

44. *Gao v. Gonzales*, 440 F.3d 62, 66 (2d Cir. 2006) (quoting 8 U.S.C. § 1101(a)(42)).

45. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (stating that Fatin had met her burden of proving that she was a member of a particular social group composed of Iranian women. The court did not, however, find that she had been persecuted based on her membership in that group or that she had a well-founded fear of such persecution).

46. Practices include, but are not limited to: "[sex] trafficking, sexual slavery, honor killing, domestic violence, and other gender-related human rights abuses," such as female genital mutilation and forced marriage. Letter from Gregory W. Meeks & John Conyers, U.S. Congressmen, to John Ashcroft, Att'y General of the U.S. Dep't of Justice (Feb. 27, 2003), available at <http://www.humanrightsfirst.org/asylum/ASHCRO.pdf>.

47. See Moussette, *supra* note 17, at 382-83.

48. Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, in IMMIGRATION AND NATURALIZATION INSTITUTE (39TH ANNUAL) 195, 200 (Practising Law Institute ed., 2006); Moussette, *supra* note 17, at 387; Osborne, *supra* note 18, at 76.

49. See generally U.N. HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991), available at <http://www.unhcr.org/partners/PARTNERS/3b9cc1c14.pdf> (compiling guidelines from the "framework outlined in the UNHCR Policy on Refugee Women").

50. *Id.*

51. *Id.*

52. Osborne, *supra* note 18, at 75.

situations females face.<sup>53</sup> Canada was the first country to adopt gender-specific guidelines.<sup>54</sup>

On March 9, 1993, the Canadian Immigration and Refugee Board issued "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution."<sup>55</sup> These guidelines were the first set of guidelines to recognize that women fleeing gender-motivated persecution could qualify for asylum.<sup>56</sup> The guidelines set out four nonexclusive categories of persecution that women might face.<sup>57</sup> These included persecution based on gender discrimination, kinship, and gender-discriminating religious or customary laws and practices of their native country.<sup>58</sup> The establishment of these guidelines gives credence to the numerous applications women filed based on these persecutions.<sup>59</sup>

Using the Canadian guidelines, a coalition of human rights organizations in the United States developed similar guidelines for the United States' asylum law.<sup>60</sup> They presented these guidelines to the Office of International Affairs, within the Department of Justice in 1994.<sup>61</sup> Using the suggestions and recommendations from the coalition of human rights organizations, the Canadian model, and the U.N. guidelines, the Department of Justice created its own guidelines that it presented in 1995.<sup>62</sup>

The guidelines outlined the legal analysis of claims under each of the five protected categories in the context of gender-related claims.<sup>63</sup> The guidelines noted that some women make claims based on their race, religion, nationality, or political opinion, but others seek asylum based on female-specific persecution that could only qualify them for

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53. *Id.*

54. Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 621, 621-22 (1996); Memorandum from Phyllis Coven, Office of International Affairs, The Department of Justice on Considerations For Asylum Officers Adjudicating Asylum Claims From Women to All INS Asylum Officers and HQASM Coordinators, at 3 (May 26, 1995) (copy on file with author), reprinted in 7 INT'L J. REFUGEE L. 700, 702 (1995) [hereinafter Coven Memo].

55. Coven Memo, *supra* note 54, at 3, 7 INT'L J. REFUGEE L. at 702.

56. *Id.*

57. Gomez, *supra* note 54, at 626.

58. *Id.*

59. *Id.*

60. Osborne, *supra* note 18, at 74-75; Coven Memo, *supra* note 54, at 1, 7 INT'L J. REFUGEE L. at 700 (submitting recommendations was the Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services).

61. Coven Memo, *supra* note 54, at 1, 7 INT'L J. REFUGEE L. at 700.

62. *Id.*

63. *Id.* at 8-18, 7 INT'L J. REFUGEE L. at 707-18.



asylum under the particular social group category.<sup>64</sup> The guidelines stressed the importance of the "United States asylum adjudicators[]" understand[ing] those complexities and giv[ing] proper consideration to gender-related claims."<sup>65</sup>

Reviewing several cases recently decided by the courts, the guidelines noted that an increasing number of asylum applicants were defining their membership in a particular social group based on their gender.<sup>66</sup> The guidelines also noted the varied judicial response to these claims.<sup>67</sup> They found some courts had ruled that gender could be considered a basis for membership in a social group while others had refused to recognize it.<sup>68</sup> Despite the recognition by some courts that gender was a basis for membership in a particular social group, no court had found that a woman had been or would be persecuted on account of her gender.<sup>69</sup> The guidelines also recognized a series of cases in which women claimed gender as one part of their particular social group.<sup>70</sup>

While the guidelines recognized that asylum adjudicators need to be aware of the complexities that accompany gender-related asylum claims, they failed to make concrete recommendations as to how the claims should be handled.<sup>71</sup> The guidelines recognized this shortcoming, claiming that there was an overall lack of "bright line" rules within asylum law, only recommending adjudicators seek advice on a case-by-case basis and stay informed about evolving asylum case law.<sup>72</sup> The guidelines were a significant step toward increasing awareness of the gender-specific persecution that women may face, but they lacked the conclusive legal guidance that asylum adjudicators needed to begin making consistent decisions in this area of asylum law.<sup>73</sup>

The only guidance the guidelines offered was, "when considering whether gender might combine with other characteristics to define a particular social group, [adjudicators] should consider whether such additional characteristics are likely to be ascertainable by persecutors."<sup>74</sup> Since the guidelines were released, the decisions about gender-related asylum have continued to be inconsistent.<sup>75</sup>

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64. *Id.* at 8, 7 INT'L J. REFUGEE L. at 707.

65. *Id.*; see also, Price, *infra* note 175, at 435-36.

66. Coven Memo, *supra* note 54, at 13, 7 INT'L J. REFUGEE L. at 712.

67. Gomez, *supra* note 54, at 641.

68. Coven Memo, *supra* note 54, at 13, 7 INT'L J. REFUGEE L. at 712-13.

69. *Id.*

70. *Id.* at 13-15, 7 INT'L J. REFUGEE L. at 713-15.

71. *Id.* at 8, 13-14, 7 INT'L J. REFUGEE L. at 713-14; Gomez, *supra* note 54, at 641.

72. Coven Memo, *supra* note 54, at 8, 7 INT'L J. REFUGEE L. at 708.

73. Gomez, *supra* note 54, at 641-42.

74. *Id.*

75. See, e.g., *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (application for asylum based on gender-related grounds denied by Immigration Judge, then reversed by

Immediately following the release of the guidelines, an Immigration Judge refused asylum to a woman seeking to escape female genital mutilation.<sup>76</sup> She appealed the decision, and the Board of Immigration Appeals reversed the Immigration Judge's finding.<sup>77</sup> She was granted asylum based on her membership in the particular social group that consisted of, "young women of the Tchamba-Kunsuntu Tribe who have not had F[emale] G[enital] M[utilation], as practiced by that tribe, and who oppose the practice."<sup>78</sup> This decision was applauded by those who support expanding the definition of a particular social group.<sup>79</sup> There was hope that because it was a decision from the Board of Immigration Appeals and not a specific circuit court, it would have a broader impact on this area of asylum law.<sup>80</sup>

In reviewing the cases since the *Kasinga* decision, however, it seems that it did not have the desired effect. Immigration Judges, Board of Immigration Appeals' Judges, and circuit courts have continued to inconsistently rule on female asylum seekers claiming persecution on account of gender.<sup>81</sup>

In *Yadegar-Sargis v. INS*,<sup>82</sup> the Seventh Circuit held that Sargis's claim, based largely on her gender, did not qualify her for asylum.<sup>83</sup> Sargis claimed that she belonged to a particular social group of Iranian women of the Armenian Christian faith who did not want to wear traditional Islamic dress.<sup>84</sup> The persecution that she allegedly faced, on account of her membership in this group, was her inability to freely practice her religion.<sup>85</sup> Sargis also testified to a number of incidents in which she was refused state services and was harassed, because she was not wearing the traditional Muslim attire.<sup>86</sup> She further claimed that the state could not, and had not protected her from this persecution.<sup>87</sup>

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Board of Immigration Appeals); cf. *Gao v. Gonzalez*, 440 F.3d 62 (2d Cir. 2006) (application for asylum based on gender-related grounds denied by the Immigration Judge and the Board of Immigration Appeals, then reversed by the Second Circuit).

76. *In re Fauziya Kasinga*, 21 I. & N. Dec. at 357. Female genital mutilation "refers to three genital operations that entail incision, and usually removal, of all or part of the female external genitalia." Moussette, *supra* note 17, at 358.

77. *In re Fauziya Kasinga*, 21 I. & N. Dec. at 357.

78. *Id.* at 358.

79. Osborne, *supra* note 18, at 75-76.

80. *Id.*

81. *Id.*; see also, Baldas, *supra* note 2, at 1, 20.

82. 297 F.3d 596 (7th Cir. 2002).

83. *Id.* at 606.

84. *Id.* at 603-04.

85. *Id.* at 604.

86. *Id.* at 599.

87. *Id.* at 600.

The court acknowledged that Sargis had adequately proved her membership in a particular social group,<sup>88</sup> but refused to admit that she had faced persecution or feared persecution as a result of her membership in that group.<sup>89</sup> The court affirmed the decision of the Board of Immigration Appeals, finding that, "although 'deplorable,' these incidents constituted harassment, not persecution."<sup>90</sup>

In *Niang v. Gonzales*,<sup>91</sup> the Tenth Circuit came to a different conclusion about a woman's alleged persecution based on her membership in a particular social group.<sup>92</sup> Niang applied for asylum based on her membership in a particular social group that consisted of women in the Tukulo Fulani Tribe.<sup>93</sup> The court did not make a final determination on her asylum application, but did assert its understanding of a particular social group.<sup>94</sup>

The *Niang* court began its analysis by acknowledging the apparent reluctance of other courts to use gender as a defining characteristic of a particular social group.<sup>95</sup> It quickly rebuffed this reluctance, however, by asserting that the "focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted 'on account of' their membership."<sup>96</sup> Thus, the court states that it would recognize gender as a social group and would not require any additional identifying features.<sup>97</sup> The court did stress, however, that the woman would still have to show that she was being persecuted on account of her membership in the asserted social group.<sup>98</sup>

In *Gomez v. INS*,<sup>99</sup> the Second Circuit came to yet another conclusion about gender and its role in claiming asylum based on membership in a particular social group.<sup>100</sup> Gomez applied for asylum based on her membership in a particular social group.<sup>101</sup> She describes her social group as young women who have previously

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88. *Id.* at 604.

89. *Id.*

90. *Id.* at 600.

91. 422 F.3d 1187 (10th Cir. 2005).

92. *Id.* at 1201.

93. *Id.* at 1198.

94. *Id.* at 1201-02 (reversing the decision of the Board of Immigration Appeals and remanding the case for further proceedings consistent with its opinion).

95. *Id.* at 1199-1200.

96. *Id.* at 1199-1200 (quoting 8 U.S.C. § 1101(a)(42)(A) (2006)).

97. *Id.* at 1200.

98. *Id.*

99. 947 F.2d 660 (2d Cir. 1991).

100. *Id.* at 664.

101. *Id.* at 663-64.

been raped and beaten by the guerilla forces in El Salvador.<sup>102</sup> The Immigration Judge and the Board of Immigration Appeals denied her application, holding that she had not met her burden for gaining asylum protection in the United States.<sup>103</sup> The Second Circuit agreed with their conclusions.<sup>104</sup> In agreeing with the lower court's decisions, the Second Circuit held that, "[a] particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor — or in the eyes of the outside world in general."<sup>105</sup> Under this characterization of a particular social group, the court asserts, "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."<sup>106</sup> The court held that Gomez had failed to identify any characteristics other than youth and gender that would identify her to would-be persecutors, or others in general, as a young woman who had been attacked by guerillas in the past.<sup>107</sup> Her inability to establish this connection prevented the court from granting her asylum.<sup>108</sup> As the decisions in these three circuits suggest, immigration courts, as well as circuit courts, have come to various conclusions on the meaning of a particular social group concerning gender.

The Department of Homeland Security<sup>109</sup> and three Attorney Generals<sup>110</sup> seem to be uncertain of their positions in this debate over the potential expansion of the particular social group definition.<sup>111</sup> In January of 2001, then Attorney General, Janet Reno, vacated a Board of Immigration Appeals decision that denied asylum to a Guatemalan woman seeking refuge from her abusive husband.<sup>112</sup> After vacating the decision, her staff and the Immigration and Naturalization Services proposed regulations for gender-related asylum claims.<sup>113</sup> The regulations were not approved at that time, and to date, have not been approved.<sup>114</sup>

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102. *Id.*

103. *Id.* at 664.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. The Department of Homeland Security was formerly the Immigration and Naturalization Services.

110. Janet Reno, John Ashcroft, and Alberto Gonzales.

111. Osborne, *supra* note 18, at 76.

112. Brief of Dep't of Homeland Sec.'s Position on Respondent's Eligibility for Relief at 8, *In re Alvarado-Pena* (BIA 2004) (No. A 73 753 922); *see also* Osborne, *supra* note 18, at 75-76 (discussing the unusual procedural history of the case).

113. Osborne, *supra* note 18, at 76.

114. *Id.*

According to a Department of Homeland Security spokesperson, "the U.S. Department of Homeland Security and the Justice Department are still in the process of 'finalizing the reg[ulation]s.'"<sup>115</sup> They attribute the five-year delay to the complexity of the issue, as well as the reorganization of the departments.<sup>116</sup>

Under the current proposed regulation, abused women would qualify as members of a particular social group.<sup>117</sup> As a result of the five-year delay, some are skeptical that the regulations will ever be finalized, or at least will not be finalized in the near future.<sup>118</sup> Without formal regulations, judges will continue to establish the requirements for women to gain asylum based on their membership in a particular social group.<sup>119</sup>

These issues are expressed in the Second Circuit's recent decision that granted asylum based on membership in a particular social group that was largely defined by gender.<sup>120</sup> The court grapples with the meaning of a particular social group and the conflicting precedent in the area.<sup>121</sup> Ultimately, the decision they come to has mixed implications for women seeking asylum.

### III. *GAO V. GONZALES*

In March 2006, the Second Circuit made a ground-breaking decision when they found Gao belonged to a social group of women who had been sold into marriage and lived in a certain area of China where forced marriages were valid and enforceable.<sup>122</sup> The Second Circuit granted Gao's petition for review and vacated and reversed the decision of the Immigration Judge and the Board of Immigration Appeals Judge.<sup>123</sup> This decision has both positive and negative implications for supporters of expanding the definition of a particular social group to include persecution based solely on gender.<sup>124</sup>

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115. *Id.* (quoting spokesperson William Strassberger).

116. Baldas, *supra* note 2, at 1.

117. *Id.* at 20.

118. *Id.* Currently, at least five nations have formal regulations that recognize domestic abuse as a basis for asylum. These include: Canada, New Zealand, Spain, the United Kingdom, and Australia. Osborne, *supra* note 18, at 76.

119. Osborne, *supra* note 18, at 75.

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

121. *Id.*

122. *Id.* at 70.

123. *Id.* at 72. See also Richey, *supra* note 19.

124. See *infra* Part IV.

Gao came to the United States seeking refuge from gender-motivated persecution.<sup>125</sup> She fled to the United States seeking to avoid marrying the man to whom her parents had promised her.<sup>126</sup> Gao grew up in a rural village in the Fujian province of China.<sup>127</sup> When she was nineteen years old, her parents sold her to a man named Zhi.<sup>128</sup> Gao's parents received 18,800 RBM in exchange for the promise that their daughter would marry Zhi when she turned twenty-one;<sup>129</sup> 18,800 RBM equals about two thousand U.S. dollars.<sup>130</sup> Under pressure from her parents, Gao initially agreed to the marriage.<sup>131</sup> Gao soon realized that her future husband was abusive, and she attempted to break off the engagement.<sup>132</sup> Gao feared that if she was forced to marry the man, she would suffer a life of domestic abuse.<sup>133</sup> In response, Zhi threatened her by telling her that his powerful uncle would arrest her if she refused to marry him.<sup>134</sup> Steadfast in her determination not to marry the abusive man, Gao moved away.<sup>135</sup>

Zhi, however, did not relent.<sup>136</sup> He terrorized Gao's parents and eventually discovered where Gao was hiding.<sup>137</sup> Afraid that she would be forced to marry Zhi, Gao fled to the United States seeking asylum.<sup>138</sup> Since Gao left, the man has continued to terrorize her parents despite their moving to escape the harassment.<sup>139</sup>

At her asylum hearing, Gao testified to this information.<sup>140</sup> Her application was also accompanied by a letter from her mother and a 2001 State Department Country Report on Human Rights Practices in China.<sup>141</sup> The Country Report confirmed the widespread problem of trafficking brides and the government's failed attempts

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125. *Gao*, 440 F.3d at 64.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* 18,000 RBM is equal to about 2330 USD.

130. Petition for Writ of Certiorari, *Gao*, 440 F.3d 62 (No. 06-1264) at 7, available at <http://www.usdoj.gov/osg/briefs/2006/2pet/7pet/2006-1264.pet.aa.pdf>.

131. *Gao*, 440 F.3d at 64.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 64-65.

140. *Id.* at 65.

141. *Id.*

to prevent it.<sup>142</sup> Despite finding Gao credible, the Immigration Judge concluded that Gao did not qualify for asylum or withholding of removal.<sup>143</sup> The Immigration Judge held that "Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply 'a dispute between two families.'" <sup>144</sup> The Board of Immigration Appeals summarily affirmed the findings of the Immigration Judge.<sup>145</sup>

Gao filed an appeal claiming that the Immigration Judge had "erred in finding that she did not have a well-founded fear of forced marriage . . . ." <sup>146</sup> She claimed that she qualified for asylum based on her membership in a particular social group.<sup>147</sup> The Second Circuit agreed.<sup>148</sup>

In reviewing her claim, the court addressed the complexities of the asylum process.<sup>149</sup> They recognized the ambiguity that still surrounds the five factors under which to claim asylum, principally the factor of a particular social group.<sup>150</sup> The court stated, "[o]f the various categories, 'particular social group' is the least well-defined on its face, and the diplomatic and legislative histories shed no light on how it was understood by the parties to the Protocol or by Congress."<sup>151</sup> Despite the lack of legislative intent, the court notes that there is a substantial body of case law that has developed.<sup>152</sup>

The court in *Gao* refers to the *Matter of Acosta*,<sup>153</sup> highlighting the reference to sex: "'persecution on account of membership in a particular social group' [means] 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. . . ." <sup>154</sup> The definition of a particular social group in the Second Circuit, however, is less definitive and potentially in conflict with *Acosta*.<sup>155</sup>

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 64.

147. *Id.*

148. *Id.*

149. *Id.* at 66-67.

150. *Id.*

151. *Id.*

152. *Id.*

153. 19 I. & N. Dec. 211 (BIA 1985).

154. *Id.*

155. *Id.*

In *Gomez v. INS*,<sup>156</sup> the Second Circuit held, “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”<sup>157</sup> In light of the apparent contradiction with *Matter of Acosta*, the court in *Gao* asserted the *Gomez* holding could reasonably be interpreted to apply only to situations in which applicants could not demonstrate that they risked future persecution based on their membership in a particular social group.<sup>158</sup>

Despite asserting their understanding of the *Gomez* case, the *Gao* court declined to define its exact scope.<sup>159</sup> The *Gao* court asserts that they did not need to determine the exact scope of *Gomez*, because *Gao* belongs to a particular social group that is defined by more than sex.<sup>160</sup> The court defines *Gao*’s particular social group as a group “of women who have been sold into marriage (whether or not the marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.”<sup>161</sup>

In finding this ground to grant asylum, the Second Circuit followed the leads of the Third<sup>162</sup> and Tenth<sup>163</sup> Circuits. The *Gao* court allowed for a broad interpretation of what constituted a social group but required a strong showing of the correlation between the particular social group and the persecution.<sup>164</sup> They believed emphasizing the connection would “further ‘filter[]’ those members of a broadly construed social group who may be eligible for asylum. . . .”<sup>165</sup> The court further commented the breadth of the social group would not necessarily diminish the chances of establishing persecution on account of the membership.<sup>166</sup>

#### IV. THE CONSEQUENCES OF *GAO V. GONZALES*

The *Gao* decision has numerous implications for women like *Gao* who seek asylum based on their membership in a particular social group that is largely defined by their gender. Since the Refugee

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156. 947 F.2d 660 (2d Cir. 1991).

157. *Id.* at 664.

158. *Gao v. Gonzalez*, 440 F.3d 62, 69 (2d Cir. 2006).

159. *Id.* at 70.

160. *Id.* at n.5.

161. *Id.*

162. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

163. *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005).

164. *Gao*, 440 F.3d at 68; *Dennis v. Gonzalez*, 182 Fed. Appx. 27, 28 (2d Cir. 2006); see also, Cronin & Badger, *supra* note 8, at 8.

165. Cronin & Badger, *supra* note 8, at 8.

166. *Gao*, 440 F.3d at 70 n.5.



Act of 1980 was passed, there has been an ongoing debate about the definition of a particular social group, and more specifically, whether women can seek asylum under this category for gender-motivated abuses.<sup>167</sup> Judicial decisions have perpetuated this debate.<sup>168</sup> The collective variance in the decisions reflects the ongoing debate about what constitutes a particular social group.

#### *A. The Debate About What Should Constitute a Particular Social Group*

It appears the differing decisions can be attributed to the lack of consistent precedent and legislative guidance, as well as the overall reluctance to expand the definition of a particular social group. Both judges and federal government officials seem reluctant to conclusively make gender a valid particular social group.<sup>169</sup> Some scholars posit that this reluctance is grounded in a fear that allowing a broad interpretation of a social group would significantly increase the number of people seeking and gaining asylum.<sup>170</sup>

Supporters of this belief argue that by expanding the definition of a particular social group, asylum law will lose its purpose, as anyone would be able to gain asylum.<sup>171</sup> Dan Stein, Executive Director of the Federation for American Immigration Reform (FAIR),<sup>172</sup> suggests that in order for a nation's asylum law to be successful, "it must be both practical and administratively feasible."<sup>173</sup> He argues that expanding the definition of a particular social group would make the system unworkable and would lead to a decrease in public support.<sup>174</sup>

167. See *infra* Part III.

168. See *id.*

169. Baldas, *supra* note 2, at 1, 20.

170. Dan Stein, *Gender Asylum Reflects Mistaken Priorities*, 3 HUM. RTS. BRIEF 12 (1996), available at <http://www.wcl.american.edu/hrbrief/03/3point.cfm>. Another document passed during this time expressed this same concern. "The Declaration on the Elimination of Violence against Women, adopted by the General Assembly in 1993, makes violence against women an issue of international concern but refrains from categorizing violence against women as a human rights issue in its operative provisions." Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 382 (1999). One critic claims that the refusal to make this assertion was due to the "fear that this might dilute the traditional notion of human rights." *Id.*

171. See Stein, *supra* note 170.

172. "The Federation for American Immigration Reform (FAIR) is a national, nonprofit, public-interest, membership organization of concerned citizens who share a common belief that our nation's immigration policies must be reformed to serve the national interest." About FAIR, <http://www.fairus.org> (follow "About FAIR" link) (last visited Nov. 5, 2007).

173. Stein, *supra* note 170.

174. *Id.*

In support of restricting asylum, critics cite statistics about the high number of asylum applications as compared to fifteen years ago.<sup>175</sup> Critics argue that the increased number of asylum applications has caused administrative delays that have inadvertently “created incentives for persons entering illegally to use the asylum system to delay deportation.”<sup>176</sup> Thus, they argue that if the definition of a particular social group is expanded, the number of asylum seekers will further increase and the already under-functioning asylum system will be unable to handle the increased load.<sup>177</sup>

Critics of expanding the definition of a particular social group to include victims of gender-based persecution recognize the violation of human rights suffered by these women.<sup>178</sup> They do not believe, however, that this persecution merits asylum protection in the United States.<sup>179</sup> Stein posits the question, “[as] much as we would like to see these practices halted, is asylum policy the place to fight the battle over changing broad-based civil norms, many of which have been in place for centuries?”<sup>180</sup> He supports his belief that it is not the place for social reform by offering his understanding of the asylum system and its alleged function.<sup>181</sup> Stein asserts, “[a]sylum is designed to provide people protection from governments, not prevailing cultural norms — no matter how much we dislike them.”<sup>182</sup>

Critics also question the legitimacy of the claims that would be filed in a system that allowed women to seek asylum based on persecution on account of their gender.<sup>183</sup> The fear is that claims will be difficult if not impossible to verify, allowing women the opportunity to fraudulently gain asylum in the United States.<sup>184</sup>

In contrast to this position, there is also significant support in favor of expanding the definition of a particular social group to include gender-specific claims.<sup>185</sup> Supporters of expanding the

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175. *Id.* (stating that fifteen years ago, there were several thousand asylum applications compared to today's 150,000 per year). Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 413 (2006) (claiming that there have been an unprecedented number of asylum seekers in North America and Europe and, as a result, the world's asylum system is in crisis).

176. Stein, *supra* note 170; see also, Price, *supra* note 175, at 416.

177. Stein, *supra* note 170.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Stein, *supra* note 170.

184. *Id.*

185. Osborne, *supra* note 18, at 76.

definition contend that the argument that the system will be overloaded and become unmanageable is not true, and, even if true, should not be a basis for maintaining the present approach to gender-related claims.<sup>186</sup>

Deborah Anker, a professor of law at Harvard University, asserts that the concern of overloading the system and flooding the United States with immigrants, if asylum grounds are expanded, has been a constant concern.<sup>187</sup> She recalls that during the Cold War, there was a fear that by granting political asylum to refugees of the Soviet Bloc, the United States would be overrun with people who were unhappy with Communism.<sup>188</sup> This fear never materialized.<sup>189</sup>

Recently, supporters have begun citing to Canadian immigration statistics about the number of women who have availed themselves of the opportunity to apply for asylum based on persecution on account of their gender.<sup>190</sup> Since the Canadian law passed in 1993, only two percent of women have sought asylum based on domestic abuse.<sup>191</sup>

Supporters of the expansion of the definition of a particular social group further argue that the potential increase in the number of asylum seekers is irrelevant, as "[a]sylum is an individualized remedy."<sup>192</sup> In addition, expansion of the particular social group category would not make it broader than any of the other categories.<sup>193</sup> Other categories, such as race and nationality, are all categories that include millions of people.<sup>194</sup>

The supporters of the expansion of the definition contend that those who oppose it do so "based on a fundamental misunderstanding" of asylum law.<sup>195</sup> As discussed earlier, a person must satisfy all four prongs of the test in order to be granted asylum.<sup>196</sup> Thus, even if the

186. *Id.*; see also Gomez, *supra* note 54, at 646.

187. Alex Kotlowitz, *Asylum for the World's Battered Women: International Victims of Domestic Violence Should Find a Haven in America*, N.Y. TIMES MAG., Feb. 11, 2007, § 6, at 32, 35.

188. *Id.*

189. *Id.*

190. Gomez, *supra* note 54, at 627.

191. *Id.* (indicating in 1994, 650 women claimed asylum under the new guidelines, and 304 were granted refugee status. This percentage was in line with the overall acceptance rate).

192. John Linarelli, *Women, Just Implementation of Asylum Policy, and Our Commitment to Human Dignity and Freedom*, 3 HUM. RTS. BRIEF 12 (1996) available at <http://www.wcl.american.edu/hrbrief/03/3point.cfm>.

193. Anker, *supra* note 48, at 200.

194. *Id.*

195. *Id.*

196. 8 U.S.C. § 1101(a)(42)(A) (2006); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

definition were expanded, not all women would qualify for asylum. Once a woman establishes that she belongs to a particular social group, she still has to prove that she will be, or has been persecuted on account of her membership in that group, and that the government, will not or has not protected her from the perpetrator(s) of the persecution.<sup>197</sup> These additional requirements ensure that the system is not abused.<sup>198</sup> In sum, supporters of the expansion recognize that it may lead to fraudulent admission of individuals but firmly assert that “[i]t may be that we let some people in who don’t really qualify[,] [b]ut that’s better than turning away people who do.”<sup>199</sup>

*B. How Gao Contributes to the Debate About What Constitutes a Particular Social Group*

Until the *Gao* decision, courts had only routinely recognized one other such social group, women fleeing from female genital mutilation.<sup>200</sup> The Second Circuit’s willingness to recognize another particular social group of women who suffer from gender-motivated persecution suggests that future courts may be willing to further expand the definition of a particular social group.

The two gender-motivated practices that the courts have recognized as comprising a particular social group involve cultural practices of a given region. The courts have determined that these two cultural practices, female genital mutilation<sup>201</sup> and forced marriages, are sufficient persecution to grant asylum to women attempting to escape them in the United States.<sup>202</sup> The willingness of the *Gao* court to expand the definition of a particular social group to include this subcategory of women in China gives hope to other women who seek to escape from a given cultural practice in their region or nation. One specific culturally accepted practice that many women have attempted to escape is domestic abuse, but thus far, they have been generally unsuccessful.<sup>203</sup>

In many nations, domestic abuse is considered a domestic dispute.<sup>204</sup> Some governments adopt a policy not to intervene in domestic

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197. 8 U.S.C. § 1101(a)(42)(A) (2006); *Cardoza-Fonseca*, 480 U.S. at 428.

198. Anker, *supra* note 48, at 201.

199. Osborne, *supra* note 18, at 76.

200. Cronin & Badger, *supra* note 8, at 8.

201. *Id.*

202. *Gao v. Gonzalez*, 440 F.3d 62, 70 (2d Cir. 2006).

203. While *Gao* was attempting to escape from potential domestic abuse, as she learned that her fiancé was abusive, she won her asylum by seeking refuge from the forced marriage.

204. See *Violence Against Women: Unmet Needs, Broken Promises*, in ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION STUDY OF THE SECRETARY-GENERAL (2006),

disputes, leaving women in these situations without any legal recourse.<sup>205</sup> A study conducted by the United Nations found on average, at least one in three women will face violence in her lifetime.<sup>206</sup> The study recognized the international attention and remedies that have been put in place to stop the violence, but found that many nations have not taken the necessary steps to implement the policies within their countries.<sup>207</sup> As a result of the unequal distribution of political power, women find themselves without a voice and, thus, unable to effect change in the area of domestic violence laws.<sup>208</sup>

Less than fifty years ago, the United States faced a similar imbalance of political power and policies regarding domestic abuse.<sup>209</sup> In the last half-century, however, the laws have changed, and attitudes toward domestic abuse have evolved.<sup>210</sup>

Early American common law doctrines allowed for men to chastise their wives, so long as they inflicted no permanent damage.<sup>211</sup> Eventually, feminist groups persuaded the government to declare that husbands no longer had the right to beat their wives.<sup>212</sup> For nearly a century after this declaration, criminal laws still made accommodations for wife beating, treating it as a lesser offense than stranger assault.<sup>213</sup> Further hindering the end of this previously culturally acceptable practice was the lax enforcement and minimal prosecution.<sup>214</sup> In the late 1970s, however, feminists once again prevailed in changing the laws.<sup>215</sup>

Current American laws draw no distinction between assaulting a stranger and assaulting a spouse;<sup>216</sup> law enforcement officers are trained to intervene in domestic abuse situations.<sup>217</sup> Recognizing this evolution and understanding the changes that the United States has implemented is critical to expanding the definition of a particular social group. The United States has changed its laws to reflect the

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<http://www.un.org/womenwatch/daw/vaw/launch/english/v.a.w-unmetE-use.pdf>.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 2129-30.

217. *Id.* at 2171.

belief that a woman has the right to be protected from her abusive husband.<sup>218</sup> The United States now has to decide whether women around the world who seek refuge from their abusive husbands in the United States have the same right to be protected.<sup>219</sup>

Under the current interpretation of a particular social group, women who suffer abuse at the hands of their spouses do not qualify for asylum in the United States, because they do not suffer persecution on any of the five enumerated grounds.<sup>220</sup> The only ground that offers hope is the particular social group. If courts continue to expand the definition of a particular social group with decisions such as the *Gao* decision, women seeking asylum from domestic abuse may have a better chance of gaining asylum.

The most efficient way for this policy to take effect would be by including gender alone as a particular social group.<sup>221</sup> If this policy were implemented, women suffering from domestic abuse, or any other culturally approved practice of abusing women, could claim asylum based on the persecution they face as a result of simply being a woman. This is distinguishable from what is currently available.

Under current law, asylum seekers must be able to prove that they suffer persecution based on their membership in a particular social group.<sup>222</sup> If the woman is unable to identify a particular social group to which she belongs, she is unable to apply for asylum.<sup>223</sup> Alternately, some women are able to identify their membership in a particular social group, but are unable to draw the connection between their membership and the persecution they are seeking to escape.<sup>224</sup> Both of these situations would be preventable if the United States asylum law recognized gender as a particular social group.

Women suffering persecution based on their gender would be able to identify being female as their particular social group. Additionally, a woman would be able to draw the nexus between her persecution and her particular social group, because the cultural practices of the respective countries are documented in country reports compiled by the United States Department of State.<sup>225</sup> Thus, a woman suffering

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218. *Id.* at 2196.

219. See Kotlowitz, *supra* note 187.

220. *Matter of Acosta*, 19 I. & N. Dec. 211, 213 (BIA 1985).

221. See *supra* note 110 and accompanying text. The United States has created a policy, but three attorney generals have declined to approve it.

222. 8 U.S.C. § 1101(a)(42)(A) (2006).

223. Unless she qualifies for asylum under one of the other four categories.

224. *Yadegar-Sargis v. INS*, 297 F.3d 596, 600 (7th Cir. 2002) (holding that while Ms. Sargis, as a Christian, had experienced harassment and discrimination by the Iranian government, it did not constitute persecution based on one of the four categories).

225. U.S. Dep't of State Bureau of Democracy, Human Rights, and Labor, Human Rights, <http://www.state.gov/g/drl/rls/hrrpt/> (last visited Nov. 5, 2007). The Country

from domestic abuse would be able to gain refuge in this country — a country that has recognized that domestic abuse is something the government should be actively involved in preventing.<sup>226</sup>

The *Gao* court did not rule out the possibility that gender could be a particular social group. In a footnote to its decision, the court states, “[w]e note, additionally, that our definition of *Gao*’s social group . . . does not reflect any outer limit of cognizable social groups.”<sup>227</sup> As a result of the decision, supporters of making gender a particular social group celebrated.<sup>228</sup> They understood the decision and the aforementioned footnote to indicate a trend toward expanding the definition of a particular social group.<sup>229</sup> The ‘victory,’ however, is qualified.

In another footnote, the court stated that the decision in this case was based on *Gao*’s unique circumstances.<sup>230</sup> They asserted that the decision did not automatically make “young, unmarried women in rural China” a particular social group that could seek asylum based on their fear of being forced into a marriage.<sup>231</sup> This qualification suggests that gender may not be understood as a particular social group any time in the near future.

## CONCLUSION

Regardless of the conflicting messages in the decision, as one Second Circuit Judge stated, “important cases such as *Gao* are helping to add clarity to evolving concepts of asylum law in the context of social change and human rights.”<sup>232</sup> In fact, since the court’s decision in *Gao*, there have been several Second Circuit cases that have cited

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Reports on Human Rights Practices are submitted annually by the U.S. Department of State to the U.S. Congress. The reports cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights.

226. 8 U.S.C. § 1101(a)(42)(A) (2006). *See generally* Siegel, *supra* note 209 (applying the three factors that an asylum seeker must meet to a woman seeking refuge from her abusive husband in a country that considers domestic abuse to be a private matter. First, the woman would be unable to avail herself of the protections of the country, because the government considers domestic abuse to be a private matter. Second, the woman would show that she has been persecuted by recounting her abuse. And third, the woman would be able to show that the persecution was based on her membership in the particular social group consisting of women).

227. *Gao v. Gonzales*, 440 F.3d 62, 70 n.6 (2d Cir. 2006).

228. Baldas, *supra* note 2, at 20.

229. Cronin & Badger, *supra* note 8, at 8.

230. *Gao*, 440 F.3d at 70 n.6.

231. *Id.*

232. Cronin & Badger, *supra* note 8, at 8.

the holding.<sup>233</sup> Through these decisions, the Second Circuit is reaffirming its commitment to granting Gao asylum based on her membership in a particular social group and continuing to expand the definition of the factor.

Taking the lead of the Second Circuit, other circuits should continue to expand the definition of a particular social group with the hopes that the Department of Homeland Security will also follow suit. In pursuit of expanding the impact of the Second Circuit's decision, the World Organization for Human Rights USA<sup>234</sup> has filed briefs in several cases hoping to "advocate for widespread application of the principles advanced by the Second Circuit in Gao."<sup>235</sup> Until the Department of Homeland Security's proposed regulations become law, however, judges will be forced to continue to make their own decisions about whether a woman fearing culturally-approved practices will be granted refuge in a country that recognizes these practices as abuse.<sup>236</sup>

As several members of Congress stated in a letter addressed to then Attorney General John Ashcroft in 2003, "[t]he United States has had a tradition of protecting women from violence outside of their control."<sup>237</sup> It is time the United States lives up to that tradition in the realm of asylum law and recognizes that throughout the world women suffer persecution simply for being women.<sup>238</sup>

CARA GOELLER\*

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233. See *Bao Yuei Chen v. Gonzales*, 175 Fed. Appx. 492, 493 (2d Cir. 2006); *Chen v. U.S. Dep't of Justice*, 195 Fed. Appx. 16, 17-18 (2d Cir. 2006); *Himanje v. Gonzales*, 184 Fed. Appx. 105, 107 (2d Cir. 2006); *Tang v. Gonzales*, 200 Fed. Appx. 68, 70 (2d Cir. 2006).

234. The World Organization for Human Rights USA, founded in 1996 as the World Organization Against Torture USA, is a non-governmental human rights organization dedicated to the prevention of torture and other human rights abuses. The World Organization for Human Rights USA, Breaking News, <http://humanrightssusa.org> (last visited, Nov. 5, 2007).

235. *USA: Human Rights Provides Legal Briefs on Trafficking and Forced Marriage Following Appeal Decision*, 66 WOMEN'S ASYLUM NEWS, Jan./Feb. 2007 at 15, 15, available at <http://www.asylumaid.org.uk/data/files/publications/1/Issue%20No.%2066%20JanFeb%202007.pdf> (emphasis removed).

236. See *supra* note 108-111 and accompanying text.

237. Meeks & Conyers, *supra* note 46.

238. *Id.*

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