

# HONOR KILLINGS AND THE ASYLUM GENDER GAP

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## I. INTRODUCTION

In 1991, a young Jordanian woman fled to the United States under threats of death.<sup>1</sup> The man who sought to kill her was her father, along with every other male family member at her father's command.<sup>2</sup> She had disobeyed him and her punishment was death.<sup>3</sup> The young woman's crime was choosing a low-paid Palestinian husband, engaging in premarital sex, and leaving the country without her father's consent.<sup>4</sup> Her father believed that those actions brought dishonor to his family, and he vowed to remove the stain by shedding her blood.<sup>5</sup> According to letters from her sister, he had ordered her brothers, uncles, and cousins to kill her on sight.<sup>6</sup>

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1. More on this woman's story, including decisions and the letters from legislators can be found at Center for Gender and Refugee Studies, *Honor Killing: Ms. A's Story*, <http://cgrs.uchastings.edu/campaigns/honor.php> (last visited Oct.7, 2005).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

In Jordan, where such honor killings go largely unprosecuted and the only protection for a woman is imprisonment in a criminal facility, she would have no hope of safety.<sup>7</sup> She sought asylum in the United States, but both an Immigration Judge and the Board of Immigration Appeals denied her application.<sup>8</sup> It was not until intense pressure, including letters from at least two dozen members of Congress, that the Immigration and Naturalization Service (INS) withdrew its opposition and the Board of Immigration Appeals granted her asylum.<sup>9</sup> She was one of the lucky ones. She was fortunate to escape her home country in time, far more fortunate than hundreds of other women who are the victims of such honor killings around the world each year. She was also fortunate enough to have her story reach those with the power to influence her fate.

The asylum process in the United States has responded inconsistently to family violence, and it unfortunately continues to take something extraordinary for the United States to extend such protection to family violence victims. However, the Department of Justice proposed new regulations in 2000,<sup>10</sup> which, once codified, may change the landscape of the domestic violence asylum claim. There are also resounding calls by scholars and practitioners in the area for reforms, including the addition of gender as a sixth enumerated ground upon which an asylum claim can be based.<sup>11</sup> In this article, I will first examine honor killings, the absence of recourse for the victims in their home countries, and the existing United States case law. I will then critically analyze the proposed regulations and their probable effect on asylum applications based on threats of honor killings, as well as several of the various proposals for reform that appear to hold greater promise than the proposed regulations.

## II. HONOR KILLINGS AND GOVERNMENTAL PROTECTION

The practice of honor killings is carried out for a variety of reasons and in a variety of circumstances. Honor killings, contrary to popular belief, are not limited to specific geographic regions.

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7. *Id.*

8. *Id.*

9. *Id.*

10. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588-98 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

11. See, e.g., Tanya D. Bosi, Note, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. REV. 777, 803-12 (2003-2004); Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 248-55 (2002).

They occur in a number of countries, and the governments and societies of each country react differently and provide different levels of protection to the victims of these killings. In this section, I will describe honor killings and several governmental approaches to such killings.

### A. *Honor Killings Defined*

#### 1. *Typical Bases of Honor Killings*

In many cultures, an individual's identity is closely tied to their family unit.<sup>12</sup> In such a culture, the family's honor is viewed as a personal reflection on each member of the family.<sup>13</sup> As a result, family members may have strong responses to actions of other family members that appear to bring dishonor on the family. These strong responses sometimes lead to great violence, which is the case in the practice of honor killings.

The phenomenon referred to as honor killing typically occurs when a female family member is thought to have brought dishonor on the family.<sup>14</sup> The type of dishonor is generally sexual in nature, such as engaging in premarital sex or having an extramarital affair.<sup>15</sup> A woman may also be killed for seemingly less serious transgressions, such as socializing with males,<sup>16</sup> seeking a divorce,<sup>17</sup> or even failing to serve a meal quickly enough.<sup>18</sup> The act might not even have occurred with the female's consent, as there have been cases in which men killed women for being the victims of rape,<sup>19</sup> or for her husband dreaming that his wife had betrayed him.<sup>20</sup> The conduct also need not be verified, with many women killed based solely on rumors and speculation within the

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12. Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Laws*, 23 PENN ST. INT'L L. REV. 251, 253-54.

13. *See id.*

14. *Id.*

15. *See id.*

16. *Id.*

17. Manar Waheed, *Domestic Violence in Pakistan: The Tension Between Intervention & Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT'L L. 937, 944-45.

18. Kayla White, *Honor Killings*, The Prince of Wales Collegiate World Youth Manifesto Project (2003), [http://www.pwc.k12.nf.ca/cida/manifesto/honor\\_killings.htm](http://www.pwc.k12.nf.ca/cida/manifesto/honor_killings.htm) (last visited Oct. 7, 2005).

19. Amnesty Int'l, *Pakistan: Honour Killings of Girls and Women*, at 2, AI Index ASA 33/018/1999, Sept. 1999, <http://web.amnesty.org/library/engindex> (search "Countries" for "Pakistan"; then follow "Reports" hyperlink; then follow "Page 2" hyperlink; then follow "Pakistan: Honour killings of girls and women" hyperlink, then follow "PDF" hyperlink) [hereinafter Amnesty, *Pakistan: Honour Killings*].

20. *Id.* at 3.

community.<sup>21</sup> The typical bases for honor killings are therefore, quite varied. Likewise, the circumstances surrounding each killing vary widely.

## 2. *Typical Methods, Perpetrators, and Collaborators*

In cultures in which honor killings take place, the family members of the offending woman typically see her slaughter as the only solution to the taint on their family honor.<sup>22</sup> The perpetrators often feel as if they are left no choice but to kill the woman.<sup>23</sup> Each family that chooses to act on that perceived obligation approaches the situation differently, and there are many reported variations.

Male family members, such as a woman's husband, father or brother, are often the perpetrators of honor killings.<sup>24</sup> In one example, a young man in the Punjab province of Pakistan killed his sister by setting her on fire on a public street.<sup>25</sup> He reportedly killed her because of family suspicions that she had been having an improper relationship with a neighbor.<sup>26</sup> In Jordan, a man shot his twenty-year-old sister four times because she had been raped by another family member.<sup>27</sup> In a case in London, a man killed his sixteen-year-old daughter by stabbing her repeatedly and then slitting her throat.<sup>28</sup> He reportedly killed her based entirely on rumors that she had a boyfriend and "was behaving like a prostitute."<sup>29</sup> In another case in Pakistan, a man killed his wife after dreaming that she had betrayed him.<sup>30</sup> These examples are just a few incidents in which a close male family member carried out the killing.

Males, however, are not the only family members who are involved in perpetuating honor killings. Other women in a family are often involved in the act. In one example from England, a young Pakistani man strangled his sister while their mother held her down.<sup>31</sup> The victim in that killing was seven months pregnant

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21. *Id.* at 2; see, e.g., Geraldine Bedell, *Death before Dishonour*, OBSERVER, Nov. 21, 2004, available at <http://observer.guardian.co.uk/magazine/story/0,,1355883,00.html>.

22. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

23. See Bedell, *supra* note 21 (discussing a London honor killing of a young woman by her father, who subsequently explained that "he'd been forced to kill [her] because he'd been placed in an untenable position").

24. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

25. *Id.*

26. *Id.*

27. White, *supra* note 18.

28. Bedell, *supra* note 21.

29. *Id.*

30. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

31. *Id.* at 4; Bedell, *supra* note 21.

and the mother of two children.<sup>32</sup> They killed her based on her family's belief that she was having an extramarital affair.<sup>33</sup> In another case, a young woman's two aunts took her for a walk through their suburb to a patch of open land, then both suddenly stepped aside, and the teenage brother of the young woman quickly appeared and shot her five times in the head.<sup>34</sup> She was reportedly killed for refusing an arranged marriage and eloping with another man.<sup>35</sup> In one particularly well-known case from Pakistan, a young woman's mother brought a hired gunman to a meeting with the young woman in her attorney's office, where she was seeking a divorce from her abusive husband of ten years.<sup>36</sup> After entering the attorney's office, the gunman shot the young woman twice, and he and her mother left quietly, with her mother never even looking back at her child.<sup>37</sup> Thus the carrying out of honor killings is not limited to males of the family.

In addition, the immediately surrounding community may enforce an honor killing. In a case arising from Israel, after stabbing his sister to death in public in broad daylight, the perpetrator said "I didn't want to kill her. I didn't want to be in this situation. They [community members] push[ed] me to make this decision. I know what they expect from me."<sup>38</sup> Community involvement is often less subtle; however, and in some cases, tribal councils "decide that the woman should be killed and send men to carry out the deed."<sup>39</sup> The Council will nominate the killer, often forcing a young male relative, such as a son, brother or nephew, to carry out the execution.<sup>40</sup>

In addition to the complexity with regard to the perpetrators themselves, the chosen circumstances of honor killings vary widely

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32. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 4; Bedell, *supra* note 20.

33. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 4.

34. *Gendercide Watch, Case Study: "Honour" Killings and Blood Feuds*, [http://www.gendercide.org/case\\_honour.html](http://www.gendercide.org/case_honour.html) (last visited Oct. 7, 2005) [hereinafter GENDERCIDE WATCH] (citing Julian Borger, *In Cold Blood*, MANCHESTER GUARDIAN WKLY., Nov. 16, 1997).

35. *Id.*

36. *Id.* (citing Suzanne Goldenberg, *A Question of Honor*, THE GUARDIAN (UK), May 27, 1999); Bedell, *supra* note 21.

37. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 5-6 (reporting the statement of a witness of the killing, that the victim's "mother was 'cool and collected during the getaway, walking away from the murder of her daughter as though the woman slumped in her own blood was a stranger'"); Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 496 (2002); GENDERCIDE WATCH, *supra* note 34 (citing Suzanne Goldenberg, *A Question of Honor*, THE GUARDIAN (UK), May 27, 1999). The case of Samia Sarwar can be found detailed in much of the academic literature on honor killings.

38. GENDERCIDE WATCH, *supra* note 34 (citing Suzanne Zima, *When Brothers Kill Sisters*, THE GAZETTE (MONTREAL), Apr. 17, 1999).

39. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

40. Bedell, *supra* note 21.

and often by region. In Sindh, Pakistan, honor killings are often carried out by hacking the victim to pieces with axes and hatchets.<sup>41</sup> In the Punjab region, the killings are more often accomplished by shooting the victim.<sup>42</sup> As the killings are perpetuated in order to restore a family's honor within the community, the killings are often performed openly and publicly.<sup>43</sup> Many of the cases described above were carried out in public. In the case where the young Punjabi woman was burned to death by her brother, "[h]er burned and naked body reportedly lay unattended on the street for two hours as nobody wanted to have anything to do with it."<sup>44</sup> However, in regions where the killings are more likely to be carried out by immigrants then living under a government less accepting of the commission of honor killings, the killings are often kept private.<sup>45</sup>

The commission of honor killings is clearly complex in a number of ways. Government responses to the acts are similarly complex and often inconsistent, with conflicts between legislative enactments and their implementation. Social protection or lack thereof also varies widely in each affected community. To provide a fuller explanation of the situation in which these women find themselves, government responses and social protection will be discussed in the next section.

### *B. Government and Social Protection*

Although many believe that honor killings are a phenomenon unique to certain regions, honor killings have occurred around the world.<sup>46</sup> Ancient Roman and French law both allowed a man to murder his wife or daughter for illicit sexual relationships under certain circumstances.<sup>47</sup> Many countries have such laws in force to this day. Haiti, for example, implemented the French law, which remains in force.<sup>48</sup> Honor killings were also legal in Brazil until 1991,<sup>49</sup> and have been reported in such countries as India,

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41. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 3.

42. *Id.*

43. *Id.* at 5.

44. *Id.* at 3.

45. See generally Bedell, *supra* note 21 (detailing occurrences in England).

46. Rana Lehr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters*, 26 S. ILL. U. L.J. 403, 418 (2002).

47. *Id.* (citing Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 229 n.252 (1986)).

48. *Id.* (citing HUMAN BUREAU OF DEMOCRACY, U.S. DEPT. OF STATE, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SECTION 5, WOMEN (2000)).

49. *Id.*

Pakistan, Lebanon, Turkey, Egypt, and Jordan.<sup>50</sup> Occurrences of honor killings have been reported in England recently, as well.<sup>51</sup> In addition, a number of countries allow for mitigated sentences for men who kill their wives or girlfriends who are suspected of being unfaithful.<sup>52</sup> A number of scholars point to the doctrines of “provocation” in Brazil and “heat of passion” in the United States as remnants of such common law mitigations.<sup>53</sup> In this section, however, I will focus primarily on the protections available in Jordan and Pakistan.

Jordan has a particular problem with honor killings. Such killings are the most frequent form of murder in the country, constituting a quarter of all murders in Jordan.<sup>54</sup> Jordan retains legislation, however, that allows for exemptions from penalty or mitigated sentences for honor killings under certain circumstances.<sup>55</sup> Article 340 of the Jordanian penal code specifically allows for an exemption if a man catches his wife or female relative actively engaging in adultery.<sup>56</sup> Article 98 provides an additional so-called “fit-of-fury” defense, providing a reduction in penalty if a man injures or kills due to an unacceptable act of the victim.<sup>57</sup> This defense allows relief for perpetrators of honor killings that cannot qualify for Article 340 protection because they did not catch the victim in the midst of the adulterous or illicit act.<sup>58</sup> Although the former and present Kings and Queens of Jordan have urged their parliament to repeal or amend Article 340, parliament has refused.<sup>59</sup> As a result, persons actually prosecuted and convicted of honor killings continue to receive sentences of only several months to several years, despite the typical conviction of first-degree murder in Jordan carrying a sentence of death.<sup>60</sup> In one case, a man who stabbed his wife six times could not meet the statutory criteria of either Article 340 or 98, but the court nonetheless reduced his sentence for second-

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50. *Id.* (citing Douglas Jehl, *For Shame: A Special Report; Arab Honor's Price: A Woman's Blood*, N.Y. TIMES, June 20, 1999, at A1).

51. *See* Bedell, *supra* note 21.

52. Lehr-Lehnardt, *supra* note 46, at 405 (discussing the United States and Arab countries generally).

53. Coomaraswamy, *supra* note 37, at 497 (discussing feminist interpretation of the Brazilian doctrine of provocation); Lehr-Lehnardt, *supra* note 46, at 405 n.10; Victoria F. Nourse, *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L.J. 23, 41-43 (2002) (describing “provoked killings” and the U.S. doctrine of heat of passion as “a partial honor defense”).

54. Lehr-Lehnardt, *supra* note 46, at 421.

55. *Id.* at 419-20 (discussing Articles 340 and 98).

56. *Id.* at 420.

57. *Id.*

58. *Id.* 420-21.

59. *Id.* at 420.

60. *Id.* at 421-22.

degree murder by half because the man testified that he had suspected his wife of infidelity.<sup>61</sup> The lack of punishment for honor killings in Jordan, in addition to being “offensive to the murdered women and to women worldwide,”<sup>62</sup> demonstrates the Jordanian government’s acknowledgement and acceptance of the practice.

Honor killings are also a particular problem in Pakistan, where hundreds of women are killed each year.<sup>63</sup> Many cases likely go unreported, and most go unpunished.<sup>64</sup> The police almost always take the side of the perpetrator, and in the rare event of prosecution, the judiciary typically ensures a light sentence.<sup>65</sup> In fact, rather than providing protection to women from such killings, “[f]requently, fathers use police to recover or unlawfully arrest and detain their adult daughters who have married men of their choice.”<sup>66</sup> The police often fail to act even when a man directly reports to them that he has killed a female family member, clearly demonstrating their preference of enforcing custom over law.<sup>67</sup> Even in the well-publicized case of Samia Sarwar, who was gunned down in her attorney’s office, the perpetrators were never arrested.<sup>68</sup> As in Jordan, the leadership of Pakistan has spoken out against honor killings. Pakistani President Musharraf has reportedly “said that Pakistani men needed to change their attitude towards women, and urged those in authority to deal with cases of honour killing and not allow them to fall through cracks in the legal system.”<sup>69</sup> However, Amnesty International has called for greater action on Musharraf’s part, because Pakistan’s current criminal law allows the families of victims to forgive the perpetrator in lieu of prosecution, and the laws therefore often do not lead to punishment.<sup>70</sup> Pakistan has recently passed a law to

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61. *Id.*

62. *Id.* at 422.

63. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2. Some sources provide higher numbers. See Press Release, Amnesty International, Pakistan: Action as Well as Words Needed on So-Called “Honour” Killings, (Feb. 13, 2004), <http://web.amnesty.org/library/engindex> (search “Countries” for “Pakistan”; then follow “News” hyperlink; then follow “Pakistan: Amnesty International calls for action not words against “honour crimes” hyperlink, then follow “<http://news.amnesty.org/mav/index/ENGASA3313022004>” hyperlink located in the text) (last visited Oct. 7, 2005). [hereinafter Amnesty, Press Release] (reporting that around 1,000 women die in honor killings each year in Pakistan).

64. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

65. *Id.*

66. *Id.* at 13-14.

67. *Id.*

68. *Id.* at 11 (Samia Sarwar’s case was discussed in greater detail in Part I.A.ii.).

69. Amnesty, Press Release, *supra* note 63.

70. *Id.*

execute those convicted of honor killings,<sup>71</sup> but its effect has yet to be seen. Generally, in Pakistan the lack of support from the police and judiciary is so complete that women are left with little hope for protection or redress.

Governmental protection is unfortunately quite lacking in a number of countries. The penal codes of Lebanon and Syria provide nearly identical exemptions from penalty for perpetrators of honor killings.<sup>72</sup> Men who kill their wives are provided an honor defense in Kuwait, Tunisia, and Egypt.<sup>73</sup> Reduced sentences for male perpetrators of honor killings in cases of adultery are available in Egypt, Tunisia, Libya, Iraq, and Kuwait.<sup>74</sup> Algeria alone provides the honor defense to women who kill adulterous husbands.<sup>75</sup> Honor killings are also legally sanctioned in Morocco.<sup>76</sup> In addition to the lack of official protection, women in many countries also face a profound lack of social support. As discussed above, female family members of the victims regularly participate in the killings, and the immediately surrounding community often actively encourages the acts. In the case described above, while a man stabbed his sister to death in the street, a crowd of more than 100 people gathered “who—approving, urging him on—chanted, ululated, danced in the street, . . . cheered her killer, ‘Hero, hero! You are a real man!’”<sup>77</sup> In fact, because the Pakistani court system permits the family members of a victim to forgive the perpetrator, providing him a complete criminal pardon, families often agree in advance to forgive the perpetrator because of their overriding concern for the family honor.<sup>78</sup> With no police protection and very few women’s shelters, “[t]he isolation of women is completed by the almost total absence of anywhere to hide.”<sup>79</sup> In Jordan, the only official protection provided to surviving and potential victims of honor killings is indefinite incarceration in a criminal facility.<sup>80</sup> The Jordanian Women’s Union has established ten women’s shelters throughout Jordan since 1945, but report ongoing public

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71. Alasdair Soussi, *Women Challenge ‘Honor’ Killings*, THE CHRISTIAN SCI. MONITOR, Mar. 2, 2005, at 15, available at <http://www.csmonitor.com/2005/0302/p15s01-wome.html> (last visited Oct. 7, 2005).

72. Nesheiwat, *supra* note 12, at 273.

73. Lehr-Lehnardt, *supra* note 46, at 423.

74. *Id.*

75. *Id.*

76. Aili Mari Tripp & Ladan Affi, *Domestic Violence in a Cultural Context*, 27 FAMILY ADVOCATE 32, 35 (Fall 2004).

77. *Gendercide Watch*, *supra* note 34 (citing Suzanne Zima, *When Brothers Kill Sisters*, THE GAZETTE (MONTREAL), Apr. 17, 1999).

78. Waheed, *supra* note 17, at 964.

79. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

80. Nesheiwat, *supra* note 12, at 259.

condemnation of their work.<sup>81</sup> With the absence of official and unofficial protections, according to Amnesty International, “[f]or some women suicide appears the only means of escape.”<sup>82</sup> Asylum may be their only alternative.

### III. U.S. ASYLUM APPROACHES TO GENDER-BASED AND FAMILY VIOLENCE

The United States has demonstrated inconsistent responses to asylum applications based on domestic violence or violations of social norms. Many cases necessarily framed in gender-related terms have met with failure. This trend has developed in large part because of the asylum requirements laid out in the Refugee Act of 1980.<sup>83</sup> To qualify for asylum, an applicant must show that she is seeking protection “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>84</sup> The alleged persecution must be on account of one of those enumerated grounds, but gender is noticeably absent from that list. As a result, many of those seeking asylum because they have been persecuted or threatened with persecution in some way for their gender or violation of gender-based norms are forced to try to fit their claim into an existing enumerated ground. Sometimes applicants successfully convince an immigration judge or Board of Immigration Appeals that the reason for their persecution overlaps with an enumerated ground, such as religion.<sup>85</sup> Often, however, women must instead attempt to substantiate their application based on the vague category of “membership in a particular social group.” A “Particular social group,” as a category, was never defined in the United Nations Convention Relating to the Status of Refugees<sup>86</sup> or in the Refugee Act of 1980, which has allowed it to be a malleable catch-all category for claims not falling squarely

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81. Soussi, *supra* note 71.

82. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

83. 8 U.S.C. §§ 1157-1159 (2002).

84. 8 U.S.C. § 1101(a)(27) (2004).

85. See, e.g., *In re S-A-*, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000). In *In re S-A-*, a young Moroccan woman who had been physically abused by her father was granted asylum. *Id.* at 1332-33, 1337. The Board was able to justify her grant of asylum by finding that the abuse she suffered was perpetuated not because of her gender or her violation of gender-based social mores, but instead on religion because of differing levels of religious fundamentalism between she and her father. *Id.* at 1336.

86. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The Convention is where most asylum law is rooted. Danette Gómez, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 961 (2004).

within one of the other enumerated grounds.<sup>87</sup> However, that lack of definition has also “le[ft] room for the exclusion of certain cases according to the whims of the judiciary.”<sup>88</sup> That room for judicial interpretation has led to widely varying application and results.

*In re Kasinga*<sup>89</sup> yielded a decision that provided optimism to supporters of recognition of gender-based claims for asylum. The applicant in that case was a young woman from the Tchamba-Kunsuntu Tribe of Togo.<sup>90</sup> The persecution she was fleeing was that of female genital mutilation (FGM).<sup>91</sup> The Immigration Judge denied her application, but the Board of Immigration Appeals sustained her appeal and granted her asylum.<sup>92</sup> The Board found that Kasinga would be persecuted for being a member of the particular social group of “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>93</sup> Scholars at the time proclaimed that “[t]he *Kasinga* ruling represents a long overdue effort by the INS to expand antiquated laws to afford women protection from gender-related persecution.”<sup>94</sup> Generally, *Kasinga* was viewed as “offer[ing] a small glimmer of hope to those seeking asylum from gender-based persecution.”<sup>95</sup> However, critics condemned the narrowness of the recognized social group and the opinion’s failure to provide rules for similar future cases, instead allowing inconsistent rulings to continue.<sup>96</sup>

Three years later, the optimism inspired by *In re Kasinga*, was dramatically tempered by the decision issued in *In re R-A*.<sup>97</sup> In *In re R-A*, the asylum applicant was a woman who had been badly abused by her husband in Guatemala.<sup>98</sup> The Immigration Judge granted her application, which had been based on political opinion and her membership in a particular social group<sup>99</sup>, but the Board reversed.<sup>100</sup> The Board disagreed with her claim that the persecution she suffered was due to an imputed political opinion because the Board did not believe that there was “any ‘opinion’ the

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87. Gómez, *supra* note 86, at 965.

88. *Id.*

89. 21 I. & N. Dec. 357 (B.I.A. 1996) (en banc).

90. *Id.* at 358.

91. *Id.* at 367.

92. *Id.* at 357.

93. *Id.* at 358.

94. Mary M. Sheridan, Comment, *Fauziya Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN’S L. REV. 433, 460 (1997).

95. *Id.* at 462.

96. *Id.* at 460.

97. 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc).

98. *Id.* at 908.

99. *Id.* at 907, 911.

100. *Id.* at 907.

respondent could have held, or convinced her husband [that] she held, that would have prevented the abuse she experienced.”<sup>101</sup> Similarly, the Board did not believe that the applicant was abused by her husband because of her membership in the social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>102</sup> The Board criticized the Immigration Judge’s ruling, saying that the social group appeared to have been created entirely for the purposes of the case.<sup>103</sup> Instead, the Board stated that a particular social group must be one that is recognized in Guatemala as a group, consistent with the ways in which Guatemalan individuals might identify social subdivisions within their culture.<sup>104</sup> The Board insisted that the persecutor must be aware of the social group in order to persecute based on membership within the group, and did not believe that the applicant had shown that her husband targeted her for her membership in such a group.<sup>105</sup> As a result, the Board reversed the Immigration Judge’s grant of asylum.<sup>106</sup>

There is a dramatic gap between the Board opinions in *In re Kasinga* and *In re R-A-*, and the different outcomes are difficult to explain. Both cases were argued on the grounds of particular social group, and both applicants defined the group very narrowly. In each case, the group appeared to be narrowly defined in order to aid the Board in granting asylum by alleviating fears of a potential slippery slope. The application was granted in *In re Kasinga* and not in *In re R-A-* despite similar circumstances and similar social groups. In addition, the social group in *Kasinga* probably would not have met the stricter standard applied in *In re R-A-*, as it is unlikely that members of the Tchamba-Kunsuntu Tribe of Togo recognize the social group described and accepted in *In re Kasinga*. These cases exemplify the disparate treatment of gender-based violence in asylum claims, and illustrate the difficulties a woman persecuted because of her gender will face. An even more alarming disparity is evident when the gender-related claims of women are compared with those of men.<sup>107</sup> In response to the

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101. *Id.* at 917.

102. *Id.*

103. *Id.* at 918.

104. *Id.*

105. *Id.* at 918-19.

106. *See id.* at 923.

107. *See, e.g.,* Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1099 (9th Cir. 2000) (granting asylum to Mexican man who suffered persecution because of his membership in the particular social group of gay men in Mexico with female sexual identities); Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990) (recognizing sexual orientation as the basis for a particular social group for a Cuban man); Matter of Tenorio, No. A72-093-558 (IJ

decision in *In re R-A-*, however, the Department of Justice proposed new regulations “designed to ‘aid in the assessment of claims made by applicants who have suffered or fear domestic violence.’”<sup>108</sup> Then-Attorney General Janet Reno vacated the case of *In re R-A-* in anticipation of the codification of the new regulations,<sup>109</sup> and that case remains on hold today, as do many other gender-based applications.

#### IV. PROBABLE RESULT OF APPLICATION OF THE PROPOSED REGULATIONS TO HONOR KILLING-BASED ASYLUM CLAIMS

##### A. Description of the Regulations

Proposed in December of 2000 in response to *In re R-A-*, the amendments to the INS’ Asylum and Withholding Definitions are intended to “restate[] that gender can form the basis of a particular social group” and to “aid in the assessment of claims made by applicants who have suffered or fear domestic violence.”<sup>110</sup> The proposed rule is intended to “remove[] certain barriers that the *In re R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.”<sup>111</sup> The rule codifies the approach found in *Matter of Acosta*, wherein the Board of Immigration Appeals required that the members of a particular social group share an immutable trait.<sup>112</sup> The rule also specifically recognizes gender as an immutable trait.<sup>113</sup> Rather than “set[ting] forth what the precise characteristics of the particular social group might be[,]” however, the rule “states generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors.”<sup>114</sup> The Department of Justice chose to use general principles rather than precise characteristics based on their belief that a victim’s perception of her social group will be

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July 26, 1993) (recognizing sexual orientation as the basis for a particular social group for a Brazilian man).

108. Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the “Cultural Hook” for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1592 (2001) (quoting Asylum and Withholding Definitions, 65 Fed. Reg. at 76,588).

109. *In re R-A-*, 22 I. & N. Dec. 906 at 906.

110. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,588-98.

111. *Id.* at 76,589.

112. *Id.* at 76,593 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (1985)).

113. *Id.*

114. *Id.* at 76,589.

influenced by the social conditions in her home country, which would require subtle factual analysis in each case.<sup>115</sup>

The proposed rule contains a total of six factors drawn from the relevant case law. *Sanchez-Trujillo v. INS*<sup>116</sup> provided the first three factors, and *In re R-A-* provided the final three.<sup>117</sup> The proposed new factors are as follows:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;
- (iii) A voluntary associational relationship exists among the members;
- (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) Members view themselves as members of the group; and
- (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.<sup>118</sup>

The rule emphasizes that the additional factors are merely for consideration and are not necessarily determinative in any given case.<sup>119</sup>

#### *B. Application of Proposed Factors in Honor Killing Asylum Cases*

As noted above, the first three of the proposed new factors are drawn from *Sanchez-Trujillo v. INS*.<sup>120</sup> In that case, the Ninth Circuit listed those three factors as what should be considered when attempting to determine whether an asylum applicant has identified a cognizable particular social group.<sup>121</sup> The Court went on to hold that “young, working class, urban males who have failed to serve in the military or actively support the government” of El Salvador was not a cognizable particular social group for asylum purposes.<sup>122</sup> The Court felt that that group lacked close affiliation with other group members, drive toward common purposes, and “voluntary associational relationship” between members, the elements that now comprise the proposed new factors.<sup>123</sup>

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115. *Id.*

116. 801 F.2d 1571 (9th Cir. 1986).

117. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

118. *Id.* at 76,598.

119. *Id.*

120. 801 F.2d 1571 at 1576; Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

121. *Sanchez-Trujillo*, 801 F.2d at 1576.

122. *Id.* at 1577.

123. *See id.*

One of the issues the *Sanchez-Trujillo* Court took with the identified social group was that it included such a large demographic segment of the Salvadorian population, one that was not otherwise affiliated with each other.<sup>124</sup> Operating under the assumption that the *Sanchez-Trujillo*-derived factors will be implemented as they were in *Sanchez-Trujillo*, those who have been threatened with honor killings would not fare much better than the applicants in *Sanchez-Trujillo* if they attempt to establish the social group of women threatened with honor killing. Honor killings affect women, and sometimes men, across many different countries.<sup>125</sup> The victims have been shown to be of all ages, and the killings carried out for a variety of reasons in a variety of circumstances.<sup>126</sup> As such, immigration officials operating under the proposed new rule would likely look to *Sanchez-Trujillo* and find that a characterization that includes such a broad and diverse demographic could not constitute a cognizable particular social group.

The remaining three factors proposed by the Department of Justice, drawn from *In re R-A*,<sup>127</sup> could also be difficult for applicants to satisfy. Those factors include that the group be recognized as a societal faction or segment of the home country's population, that members recognize themselves as group members, and that group members are distinguished by the home society for different treatment or status than other members of that society.<sup>128</sup> In *In re R-A*, the Board listed those factors as reasons why the applicant's identified group failed as a particular social group for asylum purposes.<sup>129</sup> As discussed above, the group articulated by the applicant in *In re R-A* was that of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," which encompasses a broad section of people who are indeed unlikely to either recognize themselves as members of that group or recognize that it is a group within the society.<sup>130</sup> Applicants attempting to base an asylum claim on a social group defined as women threatened with an honor killing would very likely face the exact same obstacles in meeting those factors. Those threatened with honor killing exist outside of that sphere for

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124. *Id.*

125. *See supra* Part I.A.

126. *See supra* Part I.A.

127. 22 I. & N. Dec. at 917-19; Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

128. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,598.

129. *In re R-A*, 22 I. & N. Dec. at 917-19.

130. *Id.* at 918.

the vast majority of their lives, until receiving such a threat by a family member who most likely views the applicant as his only target.<sup>131</sup> She is as outside of the practice and as suddenly and solitarily thrust into the situation as a victim of spousal abuse, and her claim based on particular social group would face the same obstacles.

An individual applying for asylum due to being threatened with an honor killing would have great difficulty in satisfying the factors proposed in the new asylum rule if basing such a claim on membership in the particular social group of those threatened with honor killings. However, the *Sanchez-Trujillo* Court indicated an alternative characterization that is promising for many asylum applicants threatened with honor killings, and which the Court recognized as a particular social group satisfying each of the three *Sanchez-Trujillo* factors incorporated into the proposed rule.<sup>132</sup> The characterization is also very likely to satisfy each of the *In re R-A*-factors, and has in fact already been recognized as a cognizable particular social group in another case.<sup>133</sup> The *Sanchez-Trujillo* Court explained that “[p]erhaps a prototypical example of a ‘particular social group’ would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational [sic] concerns and common interests for most people.”<sup>134</sup> The Court went on to note “that a family was ‘a small, readily identifiable group.’”<sup>135</sup> Those threatening honor killings are typically family members of the intended victim,<sup>136</sup> and it is this familial association that could be used by those threatened in order to successfully argue persecution due to membership in that particular family group. It seems clear that a potential honor killing victim would have a significantly higher prospect of success in being granted asylum if she based her claim on membership in her particular family than on membership in the broader group of those threatened with honor killings.

As a brief example of potential application, consider the story of Alissar Rawashdeh.<sup>137</sup> Rawashdeh was a young Jordanian woman living in Ohio with her husband, his mother, and his two

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131. See *supra* Part I.A.

132. *Sanchez-Trujillo*, 801 F.2d at 1576.

133. *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1175-77 (9th Cir. 2001) (recognizing the immediate family, all abused by one family member, as a cognizable particular social group), *vacated*, 273 F.3d 1220 (9th Cir. 2001) (en banc).

134. *Sanchez-Trujillo*, 801 F.2d at 1576.

135. *Id.* (quoting *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985)).

136. See *supra* Part I.A.

137. See generally Ellen Miller, “They’ll Throw Rocks ‘Til I Die”: Jordanian Woman Fears She’ll Be Killed If She Is Sent Home, DENVER ROCKY MOUNTAIN NEWS, May 16, 2003, at 5A (describing the background and circumstances of Rawashdeh).

siblings.<sup>138</sup> He was allegedly abusive toward her, so she left him.<sup>139</sup> She was living with her uncle in California while attempting to obtain a refugee visa when she was detained in May of 2003.<sup>140</sup> Rawashdeh claimed that her family would stone her to death for leaving her husband if she were returned to Jordan in order to clear the family name.<sup>141</sup> In an application for asylum, if Rawashdeh based her claim on membership in the particular social group of those facing possible honor killing in their home country, even under the proposed new rule she would be unlikely to prevail. Such a social group would fail to satisfy at least four of the six factors under the proposed rule. She is not closely affiliated with any other member of that group by a voluntary associational relationship or otherwise. The group is also unlikely to be recognized as a societal faction or segment of the Jordanian population, nor are members likely to view themselves as group members. The members may be seen to share a common motive or interest in individual freedom to escape abuse or simply survive. The sixth factor would be easily satisfied, as those threatened with honor killings, particularly in Jordan, are distinguished from other potential victims of crime by lack of governmental protection and societal approval of their victimization.<sup>142</sup> While these factors are not considered determinative, an immigration official would be unlikely to use their discretion to grant asylum to someone whose social group satisfies only one of the six factors, particularly with the preexisting resistance to claims based on family violence. However, Rawashdeh could fall back on the social group of her immediate family. As discussed above, officials and courts have recognized the particular social group of an immediate family, so such a claim would begin with a much greater chance of success. One difficulty Rawashdeh, and others facing possible honor killing, could face is the limitation seen in *Sanchez-Trujillo*<sup>143</sup> and *Aguirre-Cervantes* to persecution by immediate family members.<sup>144</sup> Honor killings are often carried out by the male members of a victim's extended family.<sup>145</sup> In fact, Rawashdeh's uncle in California, with whom she had been living, was also trying to return her to Jordan on her family's behalf.<sup>146</sup> This aspect of honor killings renders

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See supra* Part I.B.

143. *Sanchez-Trujillo*, 801 F.2d at 1576.

144. *Aguirre-Cervantes*, 242 F.3d at 1176.

145. Amnesty, *Pakistan: Honour Killings*, *supra* note 19, at 2.

146. Miller, *supra* note 137.

asylum applicants particularly at the mercy of official and judicial discretion. At this point and under the proposed rule, however, it appears as if basing her claim on the particular social group of her immediate family is her strongest option.

No matter how the applicant characterizes her particular social group, however, the proposed rule continues to contain an aspect of the current policy that has proven problematic: discretion.<sup>147</sup> The new rule lays out factors, but they are only factors for consideration, and are said to not be dispositive in any particular case.<sup>148</sup> The uncertainty associated with the application of the factors provides little guidance to either asylum applicants or immigration officials. The result is that asylum applicants are still operating on guesswork and immigration officials are free to decide claims based not on firm principles, but instead on their personal prejudices, the problem which initially led to such inconsistent decisions as *In re Kasinga* and *In re R-A*.<sup>149</sup> As a result, many scholars and practitioners have called for alternative solutions to the disparate treatment of gender-based asylum claims.

#### IV. CALLS FOR REFORM

Many commentators have called for reform in the treatment of gender-based claims. Ideas for reform have come in many forms, each with their own strengths and weaknesses. The most uniform call appears to be the addition of gender as an enumerated ground. I will address this concept, as well as several other proposals that seem to hold even greater promise.

There is a popular drive to add gender to the enumerated grounds in the asylum and refugee definitions.<sup>150</sup> There is wide academic support for this proposition. The idea is that immigration officials and courts would then be pressured to grant more claims based on forms of persecution to which women are more often subject.<sup>151</sup> Although I agree that gender belongs in the enumerated grounds as much as any of those currently appearing in the rule and should be added, I believe that at this point its addition would be purely symbolic. Immigration judges would continue to use their discretion to deny women's claims, similar to how they have

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147. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,589.

148. *Id.* at 76,598.

149. See Shanyn Gillespie, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of In re R-A*, 71 GEO. WASH. L. REV. 131, 132-33 (2003).

150. See, e.g., Bosi, *supra* note 11; Condon, *supra* note 11.

151. See Condon, *supra* note 11, at 249.

largely ignored the Department of Justice Guidelines<sup>152</sup> for handling women's applications due to their preexisting biases.<sup>153</sup> Adding gender as an enumerated ground would be an important symbolic victory, but it would ultimately prove insufficient to remedy the problem.<sup>154</sup>

Laura Adams advocates an alternative approach.<sup>155</sup> She suggests a combination of the use of the family as the particular social group,<sup>156</sup> similar to the potential approach suggested in *Sanchez-Trujillo*, but with a twist. She would also alter the nexus requirement, focusing on "the state's failure to protect and the victim's membership in a particular social group, . . . view[ing] the state's failure to protect as persecution in itself."<sup>157</sup> The state would therefore, be the persecutor through the lack of protection provided to the group members, eliminating the need for an asylum applicant to demonstrate the motivating forces of her abuser or potential killer.<sup>158</sup> Adams explains that "[d]omestic violence is more than a private harm because the state fails to protect victims of violence within families for the reason that these victims are members of a particular social group—the family."<sup>159</sup> Such an approach appears as if it would be particularly helpful in overcoming the hurdle of judicial discretion, because it takes the conduct out of the private and into the public sphere,<sup>160</sup> where there is more solid evidence and fewer personal biases. There is ample evidence, as discussed above, that many countries fail to protect potential victims of honor killings, and will sometimes even assist in their commission. A number of countries also do not punish honor killings, thus failing to even provide a deterrent

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152. Memorandum from Phyllis Coven, Office of International Affairs, U.S. Department of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995) reprinted in Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 794-816 (1995). The Guidelines "suggested that gender could provide the basis for membership in a particular social group," among other gender-sensitive recommendations. Christina Glezakos, Comment, *Domestic Violence and Asylum: Is the Department of Justice Providing Adequate Guidance for Adjudicators?*, 43 SANTA CLARA L. REV. 539, 551 (2003). The Guidelines also "emphasize that persecution based on political opinion in the form of a woman's belief that a man should not control her may also serve as a basis for asylum, regardless of whether the belief is actual or imputed." Gillespie, *supra* note 149, at 141.

153. See Glezakos, *supra* note 153, at 554-55; Gómez, *supra* note 86, at 962-63.

154. Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002).

155. Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287, 295-99 (2003).

156. *Id.* at 295-98.

157. *Id.* at 296.

158. See *id.* at 295-99.

159. *Id.* at 298.

160. *Id.* at 298-99.

effect.<sup>161</sup> The state persecution approach to domestic violence may be able to bridge the gap between what was lacking in *In re R-A* and what made the difference in *In re Kasinga*. Adoption of this policy modification would prove enormously helpful for asylum applicants based on domestic violence or honor killings.

Shanyn Gillespie also has an excellent proposal specifically for reducing the hurdles inherent in judicial discretion in the asylum process.<sup>162</sup> She agrees that adding gender as an enumerated ground “may not be the panacea that it appears because biased adjudicators will find other ways to manipulate the asylum definition to deny battered women protection. . . . [I]t would fail because it does not address the attitudes that are the source of the problem.”<sup>163</sup> Specifically, Gillespie proposes implementation of gender-sensitivity training for all asylum adjudicators, intended to “attack the specific source of the problem: gender stereotypes and misconceptions about domestic violence.”<sup>164</sup> She recognizes that judges would perhaps be adverse to such a program, so the program should instead be framed in terms of substantive law.<sup>165</sup> Such a sensitivity training program, particularly if focused on policy modifications like those suggested by Adams, could go far to remove the judicial discretion hurdles standing between some asylum seekers and the protection they so desperately need.

Gillespie also advocates an approach expressly rejected in *In re R-A*, granting asylum to domestic violence victims on the basis of political opinion.<sup>166</sup> She asserts that policy should be changed to “make it clear that a woman’s resistance to her husband’s desire to subordinate her qualifies as political opinion.”<sup>167</sup> Despite its rejection in *In re R-A*, this is an extremely strong argument, which should be subject to much more study and would be appropriately included in any gender sensitivity training program like the one advocated above. That full argument, however, is beyond the scope of this article.<sup>168</sup>

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161. See *supra* Part I.B.

162. See Gillespie, *supra* note 149, at 150.

163. *Id.* at 147.

164. *Id.* at 156.

165. *Id.*

166. *Id.* at 154-55.

167. *Id.* at 154.

168. For more information on this topic, see generally Gillespie, *supra* note 149; Patricia A. Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804 (1997).

## V. CONCLUSION

Honor killings are a problem in a number of countries around the world. Neither home countries nor general communities protect those threatened with honor killings. The victims have few alternatives, so asylum is a particularly important remedy that must be opened up to them. The proposed new gender rule arising from *In re R-A-* is intended to assist those seeking asylum due to domestic violence, but they are ultimately flawed, providing little guidance to asylum applicants and continuing to leave them at the mercy of judicial discretion. It is such judicial discretion that led to the past inconsistent rulings that the proposed rule was intended to remedy. A number of other solutions have been advocated. The strongest of these suggestions are gender sensitivity training for asylum adjudicators and the use of the particular social group of the family with a readjustment of the nexus requirement with the focus on the state's choice not to protect victims as the persecution. The policy that is finally enacted to help those threatened with honor killings and other domestic violence will only be effective if it is able to overcome the exercise of judicial discretion that has been seen in prior cases.