

# ESSAY

## FLEEING THE LAND OF THE FREE

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*This Essay is the first scholarly intervention, from any discipline, to examine the number and nature of asylum claims made by U.S. citizens, and to explore the broader implications of this phenomenon. While the United States continues to be a preeminent destination for persons seeking humanitarian protection, U.S. citizens have fled the country in significant numbers, filing approximately 14,000 asylum claims since 2000. By formally seeking refuge elsewhere, these applicants have calculated that the risks of remaining in the United States outweigh the bundle of rights that accompany U.S. citizenship. Given the United States' recent flirtation with authoritarianism, and the widening fissures in the nation's social fabric, a closer study of asylum seeking is warranted—and indeed, prudent—should future political conditions generate a larger exodus of U.S. citizens.*

*This Essay opens with a quantitative overview of claims, drawing on data from the United Nations High Commissioner for Refugees and from countries that are the U.S. citizen asylum seekers' destinations. Following that statistical summary, this Essay presents a typology of claims that U.S. citizens have lodged, extracting from public sources the applicants' motivations for seeking asylum and how foreign government authorities have received those claims. Among the classes of U.S. citizens who have sought protection overseas are war resisters, political dissidents, whistleblowers, fugitives, members of minority groups, domestic violence survivors, and the U.S. citizen children of noncitizen parents. This Essay concludes by exploring the relevance of this trend to scholarly debates about asylum adjudication, international relations, forced migration, and citizenship.*

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#### INTRODUCTION

In 1997, Chere Lyn Tomayko fled her country of origin, accompanied by her daughters, Chandler and Alexandria.<sup>1</sup> Tomayko sought to escape an abusive relationship with Alexandria's father, Roger Cyprian, as tensions were continuing to escalate in the household.<sup>2</sup> Fearing that somebody might lose their life if she remained within Cyprian's reach, Tomayko traveled to Costa Rica, where, like myriad other domestic violence survivors around the globe, she sought protection in another country in the form of refugee status.<sup>3</sup> After a protracted and complex

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1. Gillian Gillers, *Fugitive Rocks U.S.-Costa Rica Relations*, Tico Times (Aug. 1, 2008), <https://ticotimes.net/2008/08/01/fugitive-rocks-u-s-costa-rica-relations> [https://perma.cc/BN6P-XVL5].

2. *Id.*

3. *Id.*

legal process, the government of Costa Rica approved Tomayko's refugee claim in 2008, citing the human rights concerns implicated in the case.<sup>4</sup>

On the surface, the case resembles many requests for refugee protection from recent times but for one distinguishing feature: Tomayko is a citizen of the United States of America.<sup>5</sup> In seeking asylum overseas as a U.S. citizen, Tomayko was part of a sizeable group, as data from the United Nations High Commissioner for Refugees (UNHCR) reveal that U.S. citizens have lodged approximately 14,000 asylum claims since 2000.<sup>6</sup> This Essay is the first scholarly intervention to distill the number and nature of refugee claims made by U.S. citizens and to explore the broader implications of this phenomenon.

Tomayko's case encapsulates many of the complicated dynamics that surround protection claims made by U.S. citizens, including the nature of the bilateral relationship between the United States and the destination country, along with social and political forces in the destination country that might buoy the asylum claim or foretell its defeat. These cases also reflect the strategic choices made by asylum seekers who, by virtue of their citizenship and access to a U.S. passport, have relatively unfettered access to many parts of the world.<sup>7</sup> For some of these claimants, the asylum process and its promise of lasting protection serve as a shield against criminal or other legal proceedings in the United States.<sup>8</sup> Notwithstanding the instrumental motives underlying some cases, many applicants genuinely believe that the United States is simply not a safe place for their families to live and have made the choice to flee the proverbial land of the free.<sup>9</sup>

The stories of these U.S. citizen asylum seekers also invite deeper reflection about how U.S. citizenship is valued in the current political moment. To be sure, the United States continues to be a preeminent destination for persons seeking humanitarian protection, receiving tens of thousands of asylum claims annually.<sup>10</sup> Nevertheless, a significant number of U.S. citizens have decided that the perceived risks of remaining in the

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4. LADB Staff, Univ. of N.M., *Costa Rica Grants Asylum to U.S. Citizen Fleeing Persecution and Denial of Human Rights* 1–2 (2008), <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=10629&context=noticen> [https://perma.cc/Z4EE-CU8F].

5. *Id.*

6. See *infra* section I.A.

7. See Henley & Partners, *The Henley Passport Index: Q3 2022 Global Ranking*, [https://cdn.henleyglobal.com/storage/app/media/HPI/HENLEY\\_PASSPORT\\_INDEX\\_2022\\_Q3\\_INFOGRAPHIC\\_GLOBAL\\_RANKING\\_220705\\_1.pdf](https://cdn.henleyglobal.com/storage/app/media/HPI/HENLEY_PASSPORT_INDEX_2022_Q3_INFOGRAPHIC_GLOBAL_RANKING_220705_1.pdf) [https://perma.cc/3U57-Y3XQ] (last visited Sept. 16, 2022) (noting that U.S. passports allow visa-free travel to 186 countries).

8. See *infra* section II.B.

9. See *infra* section II.E.

10. Kira Monin, Jeanne Batalova & Tianjian Lai, *Refugees and Asylees in the United States*, Migration Pol'y Inst. (May 13, 2021), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2021> [https://perma.cc/DF4W-WKQ7].

country outweigh the bundle of rights and protections that accompanies their citizenship. Abandonment of U.S. citizenship is not a new phenomenon, of course, as thousands renounce their U.S. citizenship each year, typically for tax-related reasons.<sup>11</sup> Yet the country's recent flirtation with authoritarianism, widening fissures in its social fabric, and growing environmental risks suggest that a closer study of asylum seeking is warranted—and indeed, prudent—should conditions generate even greater outflows of U.S. citizens.<sup>12</sup>

The Essay opens in Part I with a quantitative overview of claims, drawing from data provided by the UNHCR and destination countries. Following that statistical summary, Part II of the Essay presents a typology of claims that U.S. citizens have lodged, extracting from publicly available sources the applicants' motivations for seeking asylum and assessing how foreign government authorities have received those claims. Part III of this Essay explores the broader implications of this phenomenon. As a preliminary scholarly intervention into the topic, this Essay does not endeavor to answer the complicated array of legal questions embedded in U.S. citizen asylum claims, nor does it exhaustively tackle the range of theoretical questions—across multiple disciplines—that underlie this phenomenon. Rather, by offering a set of initial observations and theories, the Essay invites additional scholarly treatment of the matter and provides a baseline for empirical inquiry.

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11. See Jo Craven McGinty, *More Americans Are Renouncing Their Citizenship*, *Wall St. J.* (Oct. 16, 2020), <https://www.wsj.com/articles/more-americans-are-renouncing-their-citizenship-11602840602> (on file with the *Columbia Law Review*) (reporting that nearly 37,000 U.S. citizens expatriated from 2010 to 2020, typically for tax-related or other financial reasons).

12. Indeed, various commentators have penned opinion pieces in recent years about their actual or contemplated departure from the United States, given the challenging social and political conditions. See, e.g., Tiffanie Drayton, *Opinion, I'm a Black American. I Had to Get Out.*, *N.Y. Times* (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/black-america-racism-refugee.html> (on file with the *Columbia Law Review*); Wajahat Ali, *Opinion, Is It Time for Me to Leave America?*, *Daily Beast* (June 4, 2022), <https://www.thedailybeast.com/is-it-time-for-me-to-leave-america> [<https://perma.cc/S5RW-U6BT>] (last updated June 7, 2022) (advocating for “person[s] of color” to “have an exit plan” because of the “political and cultural landscape” in the United States). Several media outlets have also reported on this phenomenon. See Kim Hjelmgaard, *'I'm Leaving, and I'm Just Not Coming Back': Fed Up With Racism, Black Americans Head Overseas*, *USA Today* (June 26, 2020), <https://www.usatoday.com/story/news/world/2020/06/26/blaxit-black-americans-leave-us-escape-racism-build-lives-abroad/3234129001> [<https://perma.cc/T5HL-Q4VT>] (last updated July 1, 2020); Emily Wax-Thibodeaux, *Wearied From Political Strife and a Pandemic, Some Americans Are Fleeing the Country*, *Wash. Post* (Nov. 2, 2020), [https://www.washingtonpost.com/national/weary-from-political-strife-and-a-pandemic-some-americans-are-fleeing-the-country/2020/11/02/ee66038c-f840-11ea-89e3-4b9efa36dc64\\_story.html](https://www.washingtonpost.com/national/weary-from-political-strife-and-a-pandemic-some-americans-are-fleeing-the-country/2020/11/02/ee66038c-f840-11ea-89e3-4b9efa36dc64_story.html) (on file with the *Columbia Law Review*) (averring that Americans are leaving the United States in record numbers due to politics, racial strife, and the pandemic).

## I. U.S. CITIZEN ASYLUM SEEKERS: A STATISTICAL OVERVIEW

Granular data on refugee and asylum claims is difficult to obtain, given the confidentiality protocols that typically apply under international or domestic law.<sup>13</sup> For example, statistics regarding the nature of the asylum claims made, or the likelihood of success of particular types of U.S. citizen asylum claims, simply do not exist in aggregate form. Nevertheless, data from UNHCR and from national governments shed light on the number of claims, the countries where they are lodged, and their overall success rate. Of these sources, the UNHCR, with its publicly accessible database of international asylum statistics, is more comprehensive. To verify the UNHCR data and to provide the most accurate numbers, the author obtained available information about U.S. citizen asylum seekers from countries of asylum and adjusted the numbers reported by UNHCR to match the information provided by individual countries.<sup>14</sup>

UNHCR maintains specific data on asylum seekers (including claims made and recognized) from 2000 to the present.<sup>15</sup> The agency also maintains data from 1951 to the present on persons in “refugee” status in given countries, along with their country of origin. In many legal regimes, “asylum-seeker” and “refugee” have nearly identical substantive definitions but simply refer to different stages in the adjudicative process.<sup>16</sup> Accordingly, one would assume that the UNCHR data on “refugees” would bear some correlation to the data set on asylum claims. But owing to idiosyncrasies of reporting by the country-specific offices of UNCHR, the numbers reported under the category of “refugee” can include persons granted other forms of “complementary” protection, such as protection under the United Nations Convention Against Torture.<sup>17</sup>

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13. See, e.g., 8 C.F.R. § 208.6 (2020) (protecting the confidentiality of asylum-related information); UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR’s Mandate 20–31 (2020), <https://www.unhcr.org/4317223c9.pdf> [<https://perma.cc/D796-PYZ6>] (detailing UNHCR’s confidentiality and data-protection protocols for refugee status determinations); Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, art. 48, 2013 O.J. (L 180) 60 (requiring national authorities to follow the principle of confidentiality when considering requests for international protection).

14. Cf. Barbara Harrell-Bond & Eftihia Voutira, In Search of ‘Invisible’ Actors: Barriers to Access in Refugee Research, 20 *J. Refugee Stud.* 281, 285–87 (2007) (describing some of the barriers that researchers encounter in gathering data about refugee populations).

15. The data from this section were drawn primarily from the website of UNHCR. Refugee Data Finder, UNHCR, <https://www.unhcr.org/refugee-statistics/download> [<https://perma.cc/556F-58ZC>] (last visited Sept. 8, 2022).

16. UNCHR, UNHCR Global Report 2005: Glossary, at 441, 444, <https://www.unhcr.org/449267670.pdf> [<https://perma.cc/G4P4-DQGW>] (clarifying that an “asylum-seeker is someone whose claim has not yet been finally decided” and that “every refugee was initially an asylum-seeker”).

17. Specifically, the statistics can include persons in a “refugee-like situation” and “others of concern.” Who Is Included in UNHCR Statistics?, UNHCR, <https://www.unhcr.org/refugee->

The UNHCR data have additional limitations. First, although the agency has attempted to standardize data collection across nearly 200 countries, some variations remain in how countries report data. For example, although most countries share data that reflects the total number of individual claimants, some countries—most notably, Australia and the United States—report data by “cases,” which may include family units comprised of multiple individuals.<sup>18</sup> Moreover, since 2020, UNHCR has, for confidentiality reasons, begun rounding certain data on asylum seekers and asylum decisions to the nearest five.<sup>19</sup> This means that the numbers reported in publicly available UNHCR data often provide only an approximation of the total number of claims. For purposes of this research study, however, UNHCR provided the author with a partially unredacted dataset, containing more precise information about the numbers of asylum applications lodged by U.S. citizens from 2000 to the present.<sup>20</sup>

The section that follows presents data regarding asylum claims filed by U.S. citizens over the last twenty-one years, noting the number of claims, the most popular destination countries, and trends in asylum seeking over the years. The following section examines the recognition rate for asylum claims for U.S. citizens, outlining factors that might shape decisionmaking and identifying a disparity in UNHCR data between asylum recognition rates and refugee numbers. As explained below, this disparity might suggest that U.S. citizens are receiving other types of status in some countries of destination, short of full-fledged refugee protection.

#### A. *Data on Asylum Applications Made*

UNHCR and country-specific data reveal that from 2000 to the end of 2021, U.S. citizens filed 13,857 asylum claims in ninety-one different

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statistics/methodology/definition [https://perma.cc/WJB2-NX29] (last visited Sept. 8, 2022). This disparity between “asylum seeker” and “refugee” data was confirmed by a UNHCR Information Officer. Telephone Interview with Noha Khalifa, UNHCR (July 2, 2021) (on file with the *Columbia Law Review*).

18. Refugee Data Finder: Asylum Applications in Australia, UNHCR, <https://www.unhcr.org/refugee-statistics/download?url=f62v14> [https://perma.cc/8XY4-9QXG] (last visited Sept. 8, 2022) (reporting asylum applications made in Australia by “Cases” and not “Persons”); Refugee Data Finder: Asylum Applications in the United States, UNHCR, <https://www.unhcr.org/refugee-statistics/download?url=sA929q> [https://perma.cc/3D6Q-3Q6C] (last visited Sept. 8, 2022) (reporting asylum applications made in the United States by “Cases” and not “Persons”).

19. Data Content and Structure, UNHCR, <https://www.unhcr.org/refugee-statistics/methodology/data-content> [https://perma.cc/C3RE-CUVU] (last visited Sept. 8, 2022) (“Small numbers less than five are rounded to the nearest multiple of five. Additionally data relating to asylum decisions is rounded between five and ten.”).

20. E-mail from Edgar Scrase, UNHCR, to author (July 1, 2022, 07:46 EST) (on file with the *Columbia Law Review*).

countries.<sup>21</sup> Notably, in seventy-five of these ninety-one countries, government authorities received fewer than fifty U.S. citizen asylum claims during that period. In other words, U.S. citizen asylum claims are concentrated in a relatively small number of countries, with an overwhelming proportion of claims being filed in Canada. Table 1 below captures those countries that have registered fifty or more applications for asylum by U.S. citizens between 2000 and 2021.

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21. These countries are: Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Belarus, Belgium, Belize, Bolivia, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Cayman Islands, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Guyana, Honduras, Hong Kong SAR, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Latvia, Libya, Lichtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mauritania, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Kitts and Nevis, Serbia, Slovakia, Slovenia, Somalia, South Africa, Spain, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, and Zambia. Id.

This list of countries, the total of 13,857, and the data presented in Tables 1 and 2 below, were computed using the UNHCR dataset, adjusted for variations reflected in data reported by the following destination countries: Finland, Mexico, Norway, Sweden, and the United Kingdom. See Asylum Applications, Finnish Immigr. Serv., <https://statistik.migri.fi/#applications/23330/49> [<https://perma.cc/HF7W-QHQP>] (last updated Aug. 15, 2022); Comisión Mexicana de Ayuda a Refugiados [Mexican Commission for Refugee Assistance], Estadísticas (2017), [https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS\\_2013\\_A\\_4TO\\_TRIMESTRE\\_2017.pdf](https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf) [[https://perma.cc/5\]2N-E5TV](https://perma.cc/5]2N-E5TV)]; Statistics on Immigration, UDI [The Norwegian Directorate of Immigration], <https://www.udi.no/en/statistics-and-analysis/statistics> [<https://perma.cc/DVR9-AGQK>] (last visited Sept. 8, 2022); Asylum, Migrationsverket [Swedish Migration Agency], <https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum.html> [<https://perma.cc/86JC-BTMQ>] (last updated Sept. 1, 2022); Asylum and Resettlement Datasets, Gov.UK (Aug. 22, 2019), <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets> (on file with the *Columbia Law Review*) (last updated Sept. 23, 2022).

TABLE 1: COUNTRIES RECEIVING THE HIGHEST NUMBERS OF ASYLUM APPLICATIONS FROM U.S. CITIZENS (2000–2021)		
Country	Total Number of Claims	Proportion of Total
Canada	10,355	74.73%
United Kingdom	757	5.46%
Mexico	362	2.61%
Sweden	325	2.35%
Australia	271	1.96%
Spain	224	1.62%
Germany	184	1.33%
Netherlands	162	1.17%
Switzerland	100	0.72%
Costa Rica	99	0.71%
Ireland	81	0.58%
France	73	0.53%
Norway	69	0.50%
Finland	67	0.48%
Belgium	65	0.47%
Brazil	62	0.45%

Examining the data on asylum applicants across the years also reveals some interesting trends. As reflected in Table 2 below, asylum applications filed by U.S. citizens spiked in 2007 and 2008 and again from 2017 to 2019. As discussed more fully below, these increases likely reflect claims filed by service members in the context of the Iraq War and claims broadly linked to policies promulgated by the Trump Administration. While the more recent increases are visible across several countries, the increases in 2007 and 2008 were largely concentrated in applications filed in Canada. In each year from 2000 to the present, Canada has registered more U.S. citizen asylum seekers than any other country.



TABLE 2: TOTAL NUMBER OF ASYLUM APPLICATIONS FILED BY U.S. CITIZENS, ACROSS ALL COUNTRIES (2000–2021)	
Year	Total
2000	138
2001	139
2002	259
2003	406
2004	311
2005	288
2006	449
2007	1021
2008	1048
2009	565
2010	481
2011	435
2012	340
2013	214
2014	338
2015	370
2016	343
2017	2466
2018	1617
2019	1471
2020	651
2021	507

B. *Recognition Rates and Forms of Protection*

Since 2000, fewer than 400 asylum claims filed by U.S. citizens have been granted by the immigration or political authorities of another country.<sup>22</sup> This represents less than 3% of the applications—a rather small fraction of the overall pool.<sup>23</sup> When compared to asylum approval rates generally in countries where U.S. citizens have tended to file claims—including Canada, the United Kingdom, Mexico, and Sweden—U.S. citizens' claims are recognized (that is, approved) at a consistently lower rate. For example, in recent years, the asylum approval rate in Canada has ranged from around 65% to 71%,<sup>24</sup> though UNHCR data reveals that only 131 of the thousands of U.S. citizen asylum claims lodged since 2015 were recognized.<sup>25</sup> Along these lines, the Migration Observatory at the University of Oxford has calculated that 59% of asylum applications filed in the United Kingdom from 2017 to 2019 were ultimately approved,<sup>26</sup> while only a handful of U.S. citizen claims were recognized during that same period.<sup>27</sup>

As explored more fully in Part II below, a combination of factors, including both geopolitical and legal considerations, likely explains the high denial rates. National governments are loath to invoke the ire of the U.S. government by granting protection to a U.S. national, and the many hurdles inherent in the definition of a “refugee” likewise lead to denials.<sup>28</sup>

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22. Refugee Data Finder: U.S. Citizen Asylum Decisions in All Countries, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=ONr29u> [https://perma.cc/4DJ4-KUBV] [hereinafter U.S. Citizen Asylum Decisions] (last visited Sept. 8, 2022) (reporting that 361 asylum applications filed by U.S. citizens from 2000 to 2021 were recognized).

23. See *supra* note 21 and accompanying text (noting that 13,857 asylum claims were filed by U.S. citizens from 2000 to 2021).

24. See Refugee Protection Claims (New System) Statistics, Immigr. & Refugee Bd. of Can., <https://irb.gc.ca/en/statistics/protection/Pages/RPDStat.aspx> (on file with the *Columbia Law Review*) (last updated Sept. 6, 2022) (reporting acceptance rates of 71.3% in 2021, 67.7% in 2020, and 64.6% in 2019, not counting abandoned or withdrawn claims).

25. Refugee Data Finder: U.S. Citizen Asylum Decisions in Canada, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=SjT0D3> [https://perma.cc/9U6V-XR3S] (last visited Sept. 29, 2022).

26. Peter William Walsh, *The Migration Observatory at the Univ. of Oxford, Briefing: Asylum and Refugee Resettlement in the UK 10* (2022), <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2022/08/MigObs-Briefing-Asylum-and-refugee-resettlement-in-the-UK.pdf> [https://perma.cc/DT9S-LGJ3].

27. *Asylum and Resettlement Datasets*, *supra* note 21 (finding that fewer than 20% of the U.S. citizens who applied for asylum in the UK between 2018 and 2019 were recognized).

28. One of the most formidable hurdles that U.S. citizen asylum seekers may face is the counterargument that they could safely relocate in another part of the country. While the 1951 Geneva Refugee Convention “does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee’s country of origin,” the possibility of internal relocation is considered by adjudicators in refugee status determinations. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the*

In particular, courts are reluctant to frame the United States as a country where the rule of law is insufficiently strong to offer meaningful protection to those at risk.<sup>29</sup> To do so would upend a longstanding narrative that positions the U.S. legal system at the top of a global hierarchy of worthiness and integrity.<sup>30</sup> Relatively few adjudicators are willing to ascribe this kind of critical flaw to U.S. government and society.

Although a grant of asylum has profound legal significance and, oftentimes, equally weighty political importance, the asylum denial statistics do not tell the full story of countries' handling of protection claims by U.S. citizens. As explained above, UNHCR maintains statistics for both asylum claims lodged by U.S. citizens, along with the number of U.S. citizens given refugee protection in particular countries. Interestingly, the asylum and refugee statistics do not always match; for some countries, refugee statistics for U.S. citizens for specific years far outpace asylum grant rates. For example, UNHCR statistics indicate that in 2006, Germany classified 349 U.S. citizens in some kind of refugee-like status, with only 87 such classifications registered for the previous year.<sup>31</sup> The following year, German data reported via UNCHR reflect 604 U.S. citizens in that category; yet UNHCR data on asylum seekers indicate that Germany did not recognize any U.S. citizen asylum claims during those years.<sup>32</sup> Similar disparities exist with respect to Canada, the United Kingdom, and, to a lesser extent, Sweden.<sup>33</sup>

UNHCR officials acknowledge this disparity and suggest the difference may be attributable to various causes, including the subsequent

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Status of Refugees 108–09 (2019), <https://www.unhcr.org/en-us/publications/legal/5ddfdcd47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [<https://perma.cc/C5EF-Y3DD>] [hereinafter UNHCR Handbook].

29. See *infra* notes 324–326 and accompanying text.

30. See, e.g., Francesca Bignami, *Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy*, 59 *Am. J. Compar. L.* 411, 460 (2011) (“The American legal system is a highly salient model and it is generally regarded as a major source of legal export to the rest of the world . . . [T]he American legal system is considered more advanced than others and therefore as the model towards which other countries will gravitate.”).

31. Refugee Data Finder: U.S. Refugees in Germany, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=4h0qEY> [<https://perma.cc/3EWT-QDX5>] (last visited Sept. 29, 2022).

32. Compare *id.* (showing 87, 349, and 604 persons from the United States classified as refugees in Germany in 2005, 2006, and 2007, respectively), with Refugee Data Finder: U.S. Citizen Asylum Decisions in Germany, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=X7f0kL> [<https://perma.cc/VL7Z-H6W6>] (last visited Sept. 8, 2022) (showing no asylum applications granted to any U.S. citizens in Germany during those years).

33. Compare Refugee Data Finder: U.S. Refugees, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=Cdtv32> [<https://perma.cc/GK8W-WCT4>] (last visited Sept. 8, 2022) (showing the “refugee” population in all countries comprised of persons originating from the United States), with U.S. Citizen Asylum Decisions, *supra* note 22 (reporting the number of recognized applications filed by U.S. citizens from 2000 to 2021).

inclusion of derivative family members in the refugee numbers, dual citizenship scenarios, or even errors in the database.<sup>34</sup> Another explanation that UNHCR deems plausible: Countries are finding other ways to offer protection or status to U.S. citizens, short of formally conferring refugee status.<sup>35</sup> Germany, for example, offers “subsidiary protection” to persons facing “serious harm caused by human rights violations,” even if such harm does not rise to the level of persecution as contemplated by the 1951 Geneva Refugee Convention.<sup>36</sup> Along these lines, Canadian law provides for a “person in need of protection” status that encompasses persons beyond those who qualify as “refugees” under Canadian law, including persons facing the risk of torture or of certain circumstances of cruel and unusual treatment or punishment.<sup>37</sup> Canadian law also allows conferral of permanent residence on “humanitarian and compassionate considerations” in exceptional cases.<sup>38</sup> In other words, domestic law may provide other categories of protection for state authorities to use in lieu of formal designation as a refugee.

## II. TYPOLOGY OF ASYLUM CLAIMS FILED BY U.S. CITIZENS

Persons residing in what is now United States territory have sought refuge in other countries since at least the eighteenth century. During the American Revolution and its immediate aftermath, loyalists fled to Canada, seeking an environment more hospitable to their political views.<sup>39</sup> In the eighteenth and nineteenth centuries, Canada also received enslaved persons from the United States who had escaped via the Underground Railroad.<sup>40</sup> While the categories below relate primarily to claims advanced from the twentieth century to the present, the threats of political persecution and racialized oppression continue to animate some asylum claims lodged by U.S. citizens.

Broadly speaking, asylum claims filed by U.S. citizens can be classified into the following six categories: (1) war resisters (including draft dodgers and military deserters); (2) whistleblowers, political dissidents, and fugitives; (3) defectors; (4) racial, religious, and sexual minorities; (5)

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34. E-mail from Chris Melzer, UNHCR, to author (July 7, 2022, 03:23 EST) (on file with the *Columbia Law Review*); E-mail from Edgar Scrase, *supra* note 20.

35. E-mail from Chris Melzer, *supra* note 34.

36. Forms of Asylum and Refugee Protection, UNHCR Germany, <https://help.unhcr.org/germany/asylum-in-germany/forms-of-asylum-and-refugee-protection> [<https://perma.cc/2ND2-P5WD>] (last visited Sept. 8, 2022).

37. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 97(1) (Can.).

38. *Id.* § 25; Humanitarian and Compassionate Grounds, Gov't of Can., <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/after-apply-next-steps/refusal-options/humanitarian-compassionate-grounds.html> [<https://perma.cc/84P7-JRN8>] (last modified Sept. 13, 2017).

39. See *infra* notes 150–153 and accompanying text.

40. See *infra* notes 246–249 and accompanying text.

domestic violence survivors; and (6) U.S. citizen minors applying along with their noncitizen parents for protection in other countries. For this sixth category, many of the noncitizen parents had previously resided in the United States but departed and sought protection elsewhere as the Trump Administration upended humanitarian immigration policies.<sup>41</sup>

As explored via the narratives below, these categories are not mutually exclusive: Members of the U.S. military have left the service because of their experience as sexual minorities; victims of private violence have also been wanted as fugitives; defectors have abandoned their military posts; and so on. Asylum applicants may also advance claims that assert multiple grounds for protection.<sup>42</sup> Nevertheless, these categories roughly mirror the types of claims that U.S. citizens have presented. Critically, within each of these categories are numerous individual claimants, whose particular motivations and stories escape facile essentialization. By exploring these accounts, one begins to see patterns in the circumstances that give rise to the claims and that allow them to gain traction in the destination country. These cases also reveal how foreign governments have approached the delicate task of reviewing claims that, by their very nature, critique a world superpower.

#### A. *War Resisters*

Although precise data is not available, one of the largest identifiable groups of U.S. citizens who have applied for asylum overseas consists of “war resisters”—current or prospective members of the U.S. military who fled the country to avoid service they found objectionable.<sup>43</sup> During the Vietnam War, tens of thousands of war resisters traveled northward to Canada, where progressive Prime Minister Pierre Trudeau welcomed them,<sup>44</sup> while many other U.S. citizens found refuge in Sweden.<sup>45</sup> More recently, members of the U.S. military have sought protection in Canada and other countries when they could no longer justify their involvement in the Iraq War.<sup>46</sup> As described below, the more recent wave of war resisters

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41. Teresa Wright, A Growing Number of People Seeking Asylum in Canada Are Americans, Statistics Show, *Globe & Mail* (Nov. 15, 2018), <https://www.theglobeandmail.com/canada/article-a-growing-number-of-people-seeking-asylum-in-canada-are-americans> (on file with the *Columbia Law Review*) [hereinafter Wright, Asylum Statistics].

42. Dree K. Collopy, *AILA’s Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* 129 (7th ed. 2015).

43. See Jessica Squires, *Building Sanctuary: The Movement to Support Vietnam War Resisters in Canada, 1965–73*, at ix (2013) (describing “war resister” as a “more inclusive” term that includes draft dodgers, deserters, and others).

44. See *infra* section II.A.1.

45. Carl-Gustaf Scott, *Swedish Sanctuary of American Deserters During the Vietnam War: A Facet of Social Democratic Domestic Politics*, 26 *Scandinavian J. Hist.* 123, 123 (2001).

46. See *infra* section II.A.2.

encountered formidable legal and political hurdles while seeking protection in Canada.<sup>47</sup>

1. *Vietnam War Draft Dodgers and Deserters*. — Approximately 50,000 young U.S. citizens traveled to Canada in opposition to the United States' involvement in the Vietnam War.<sup>48</sup> Of the men who migrated, some were military deserters, but the overwhelming majority were persons seeking to escape the draft.<sup>49</sup> At first, the Canadian government had a policy of not admitting deserters who lacked proof of discharge, but this ended in January of 1968.<sup>50</sup> Facing pressure from the public and in an effort to curb biased decisionmaking by immigration officials, in 1969 the Canadian government instructed immigration officials that asking about the military status of persons seeking immigration protection at the border was prohibited.<sup>51</sup>

Vietnam War resisters describe a simple process of arriving at the border and declaring an intent to immigrate to Canada due to refusal to serve in Vietnam: The would-be migrants filled out an application on the spot and would receive their permanent resident card only a few weeks later.<sup>52</sup> This straightforward process was enabled by a progressive Canadian government, then led by Trudeau, who reportedly referred to Canada as “a refuge from militarism,” in a thinly veiled critique of the United States' involvement in Southeast Asia.<sup>53</sup>

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47. See *infra* section II.A.2.

48. John Hagan, *Northern Passage: American Vietnam War Resisters in Canada* 3 (2001).

49. John Hagan, *Class and Crime in War-Time: Lessons of the American Vietnam War Resistance in Canada*, 37 *Crime L. & Soc. Change* 137, 141 (2002) (estimating that about three-fourths of the migrating men were draft resisters).

50. See House of Commons Debates, 28th Parl., 1st Sess., Vol. 8, at 8930 (May 22, 1969) (statement of Hon. Allan J. MacEachen) (“Our basic position is that the question of an individual's membership or potential membership in the armed services of his own country is a matter to be settled between the individual and his government, and is not a matter in which we should become involved.”).

51. Valerie Knowles, *Forging Our Legacy: Canadian Citizenship and Immigration, 1900–1977*, at 90 (2000); see also Nicholas Keung, *Iraq War Resisters Meet Cool Reception in Canada*, *Toronto Star* (Aug. 20, 2010), [https://www.thestar.com/news/insight/2010/08/20/iraq\\_war\\_resisters\\_meet\\_cool\\_reception\\_in\\_canada.html](https://www.thestar.com/news/insight/2010/08/20/iraq_war_resisters_meet_cool_reception_in_canada.html) (on file with the *Columbia Law Review*) (“On May 22, 1969, [Canada] announced that immigration officials would not and could not ask about immigration applicants' military status if they showed up at the border seeking permanent residence in Canada.”).

52. Under laws existing at the time, the deserter or draft evader would seek “landed immigrant status,” meaning the individual had been granted the right to live in Canada permanently by immigration authorities. Jonathan M. Engram, *Conscientious Objection to Military Service: A Report to the United Nations Division of Human Rights*, 12 *Ga. J. Int'l & Compar. L.* 359, 386 n.165 (1982); Ben Ehrenreich, *War Dodgers*, *N.Y. Times Mag.* (Mar. 23, 2008), <https://www.nytimes.com/2008/03/23/magazine/23wvln-essay-t.html> (on file with the *Columbia Law Review*).

53. Ehrenreich, *supra* note 52. While Trudeau's support of the war resisters was clear, some have argued that this precise phrase was misattributed to Trudeau. Sarah J.

Public opinion toward the war—and toward those who had fled—ultimately shifted in the United States. Soon after taking office on January 21, 1977, President Jimmy Carter issued a “full, complete, and unconditional” pardon to hundreds of thousands of men who had either failed to register or fled the country to avoid the Vietnam War draft.<sup>54</sup> The pardon did not apply, however, to those who had engaged in acts of violence or to military deserters.<sup>55</sup> Estimates on the number of U.S. citizens (including family members of war resisters) who chose to remain in Canada vary greatly, with estimates as divergent as 25,000 and 50,000.<sup>56</sup>

Although Canada was the primary destination for war resisters during this era, approximately 800 U.S. citizens traveled to Sweden, where they were likewise received by a government that was openly critical of the U.S. war effort in Vietnam.<sup>57</sup> Most of the war resisters who sought refuge in Sweden were already serving in the U.S. military;<sup>58</sup> the first group to capture public attention were the Intrepid Four, a group of sailors who had deserted in Japan and ultimately made their way to Sweden, where they received humanitarian asylum.<sup>59</sup> Domestic political considerations shaped the Swedish government’s policies, as the ruling Social Democrats were actively courting the anti-war youth vote.<sup>60</sup> At the same time, however, authorities remained mindful of the impact on relations with the United States.<sup>61</sup> For this reason, U.S. war resisters received only humanitarian asylum—a status comparable to that conferred upon economic refugees—as opposed to full-fledged political asylum, which included more robust protections and benefits.<sup>62</sup>

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Grünendahl, *Refuge From or Safe Haven for Militarism? U.S. War Resisters’ Diverging Experiences of Building New Lives in Canada*, 85 *Canadian Stud.* 97, 97 (2018).

54. Proclamation No. 4483, 42 Fed. Reg. 4391, 4391 (Jan. 24, 1977); Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, *Politico* (Jan. 21, 2008), <https://www.politico.com/story/2008/01/carter-pardons-draft-dodgers-jan-21-1977-007974> [<https://perma.cc/WTH4-LLRU>].

55. Proclamation No. 4483, 42 Fed. Reg. at 4391. President Carter issued an executive order to facilitate the implementation of the pardon proclamation. Exec. Order No. 11,967, 42 Fed. Reg. 4393 (Jan. 24, 1977).

56. Alison Mountz, *Seeking Status, Forging Refuge: U.S. War Resister Migrations to Canada*, 36 *Refuge* 97, 98 n.2 (2020) (“While it is believed that more than 100,000 people migrated temporarily during this time, the census records approximately 50,000 who regularized their status and remained in Canada after the war ended.”); Tamara Jones, *Over the Border, Two Generations Meet*, *Wash. Post*, Mar. 17, 2008, at C1 (on file with the *Columbia Law Review*) [hereinafter Jones, *Over the Border*] (reporting that about 25,000 draft evaders “stayed behind” after the United States granted amnesty).

57. Scott, *supra* note 45, at 123.

58. *Id.* at 123 n.1.

59. *Id.* at 124.

60. *Id.* at 124, 130.

61. *Id.* at 126–27.

62. *Id.* at 132 n.52, 134.

The overall experience of the Vietnam War resisters captures how questions of foreign policy, bilateral relations, and domestic politics can powerfully inform the experience of U.S. citizens seeking refuge in other countries. Moreover, as reflected in the Canadian and Swedish cases, states need not limit themselves to the formal apparatus of asylum but can use other tools under domestic immigration laws to provide avenues for protection.

2. *Military Deserters During the Iraq War.* — During the 2000s, hundreds of U.S. service members fled to Canada to avoid deployment or redeployment to Iraq.<sup>63</sup> Many of these persons sought formal refugee status in Canada,<sup>64</sup> others undoubtedly stayed under the radar, and a handful sought humanitarian protection in other countries.<sup>65</sup> While the backgrounds of these persons vary, all shared a common theme of disillusionment with the U.S. presence in the Middle East.<sup>66</sup> Many hailed from underprivileged backgrounds and had joined the military to stabilize their earnings and ultimately receive higher education.<sup>67</sup> Also, unlike many of the Vietnam-era predecessors who had never actually served, a substantial number of the persons who sought protection in the context of the Iraq War had already served tours of duty in the Middle East.<sup>68</sup>

Jeremy Hinzman was the first U.S. citizen to seek asylum in connection with the Iraq War.<sup>69</sup> Hinzman had served one tour in Afghanistan and after finding the emphasis on killing intolerable, he

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63. See Tamara Jones, *Deserters Find an Uncertain Haven in Canada*, Ledger (Mar. 18, 2008), <https://www.theledger.com/story/news/2008/03/18/deserters-find-an-uncertain-haven-in-canada/25862015007/> [<https://perma.cc/EZE9-AZ9W>] [hereinafter Jones, *Deserters*] (estimating that 200 Iraq War deserters had fled to Canada as of March 2008).

64. One article from 2009 put this number in the “dozens.” Sarah Lazare, *Canadian Government Continues Ouster of US War Resisters*, Common Dreams (Feb. 15, 2009), <https://www.commondreams.org/views/2009/02/15/canadian-government-continues-ouster-us-war-resisters> [<https://perma.cc/23SF-PTF4>].

65. See, e.g., Andreas Buerger, *US Army Deserter Seeks Asylum in Germany Over Iraq*, Reuters (Nov. 27, 2008), <https://www.reuters.com/article/idUSLR714461> [<https://perma.cc/2X23-TC4N>] (“A U.S. soldier who deserted his unit to avoid returning to Iraq has applied for asylum in Germany, saying the Iraq war was illegal and that he could not support the ‘heinous acts’ taking place.” (quoting André Shepherd)).

66. Megan Feldman, *Military Deserters Once Again Flock to Canada*, Dall. Observer (Mar. 12, 2009), <https://www.dallasobserver.com/news/military-deserters-once-again-flock-to-canada-6419885> [<https://perma.cc/5CTG-X6TJ>].

67. *Id.*

68. To be sure, others were younger and less experienced, “enlisted in haste, and became disillusioned as their political ideas shifted.” Wil S. Hylton, *American Deserter: Why AWOL U.S. Soldiers Are Most at Risk in Canada*, N.Y. Mag. (Feb. 25, 2015), <https://nymag.com/intelligencer/2015/02/american-military-deserters-canada.html> [<https://perma.cc/NA2G-K4X6>].

69. Feldman, *supra* note 66.



unsuccessfully applied for conscientious objector status.<sup>70</sup> Facing deployment to Iraq, Hinzman fled with his wife and young child to Canada in early 2004, just days before he was set to depart.<sup>71</sup> Like Hinzman, Phil McDowell had spent four years in the U.S. military and even spent one year in Iraq before receiving an honorable discharge.<sup>72</sup> But when troop shortages led to the implementation of the “stop-loss” program, the U.S. government rescinded McDowell’s discharge, and he received orders to return to active duty.<sup>73</sup> During his initial tour in Iraq, McDowell had lost faith in the war effort. As he observed, “It’s a hard personal realization to join the Army out of patriotism and accept your country was wrong.”<sup>74</sup> McDowell, like Hinzman, opted to flee to Canada.<sup>75</sup>

Joshua Key’s journey northward mirrors that of Hinzman and McDowell. Key was deployed to Iraq in 2003, chose to flee to another part of the United States while on furlough in 2005, and eventually made his way to Canada.<sup>76</sup> Key later recounted his experience in Iraq in a co-authored book, *The Deserter’s Tale*, wherein he described the U.S. military’s abusive and inhumane treatment of Iraqi civilians during the conflict.<sup>77</sup> Among other things, Key described participating in raids of countless Iraqi homes in which he and other soldiers would ransack properties, and even steal items, but would find no evidence of insurgency.<sup>78</sup> Key, like many

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70. Anne McIlroy, Flight From the Fight, *Guardian* (Apr. 12, 2004), <https://www.theguardian.com/world/2004/apr/13/law.iraq> [<https://perma.cc/228D-EAP7>].

71. McIlroy, *supra* note 70; Marty Logan, Politics: U.S. Soldiers Seek Asylum in Canada, *Inter Press Serv.* (Dec. 2, 2004), <http://www.ipsnews.net/2004/12/politics-us-soldiers-seek-asylum-in-canada> [<https://perma.cc/T6JT-SZ57>].

72. Jones, *Deserters*, *supra* note 63.

73. *Id.* The Stop Loss program is a Department of Defense “force management program” that requires service members to involuntarily continue their service beyond their previously agreed-upon separation date. Charles A. Henning, *Cong. Rsch. Serv.*, R40121, *U.S. Military Stop Loss Program: Key Questions and Answers 1* (2009). During the Iraq War, the Army consistently maintained thousands of service members through use of the program. See *id.* at 1, 15–16.

74. Jones, *Over the Border*, *supra* note 56.

75. *Id.*

76. Ashifa Kassam, Iraq War Resisters Who Fled to Canada Ask Justin Trudeau to Allow Them to Stay, *Guardian* (Aug. 2, 2016), <https://www.theguardian.com/world/2016/aug/02/iraq-war-resisters-canada-trudeau-us-military> [<https://perma.cc/8NKZ-KGLR>]; Patty Winsa, More U.S. Soldiers Could Be Sent Back for Court Martial on Desertion Charges, *Toronto Star* (Feb. 8, 2015), <https://www.thestar.com/news/gta/2015/02/08/more-us-soldiers-could-be-sent-back-for-court-martial-on-desertion-charges.html> [<https://perma.cc/LFF5-WLCE>] (last updated Feb. 9, 2015).

77. See Joshua Key as told to Lawrence Hill, *The Deserter’s Tale: The Story of an Ordinary American Soldier 105–06, 137–38* (2007) (detailing how members of the U.S. military mutilated bodies and assaulted and raped civilian women); see also Winsa, *supra* note 76 (explaining Key’s and other deserters’ decision to flee to Canada instead of continuing to serve in the Iraq War).

78. Key & Hill, *supra* note 77, at 66–74; Feldman, *supra* note 66.

others, had joined the military to escape poverty, obtain health insurance, and to pursue higher education at some point in the future.<sup>79</sup>

Among the war resisters of this era, Kimberly Rivera garnered significant attention as the first female service member from the United States to flee to Canada to avoid fighting in Iraq.<sup>80</sup> Rivera also joined the military to gain access to stable earnings and important benefits.<sup>81</sup> Unfortunately, Rivera was horrified by what she witnessed during her first tour in Iraq.<sup>82</sup> When faced with orders to deploy again, she fled to Canada in 2007.<sup>83</sup> In the Canadian news media, Rivera later described how the U.S. military in Iraq used “violence and intimidation against innocent civilians,” and she admitted that “[w]e raided their houses without cause.”<sup>84</sup>

Some of these U.S. citizen asylum seekers sought protection before actually serving in the Middle East. Brandon Hughey had signed up for the Army at age seventeen in the hopes of ultimately receiving a college education.<sup>85</sup> While in basic training, Hughey learned more about the war effort in Iraq, grew uncomfortable with the mission, and even contemplated suicide.<sup>86</sup> Hughey fled to Canada just before he was set to deploy to the Middle East.<sup>87</sup> Like Hughey, Ross Spears fled to Canada as a teenager after his experience in basic training raised concerns.<sup>88</sup> According to Spears, his training involved shooting at “practice targets shaped like women in burqas with bazookas on their shoulders,” and the basic training was laced with dehumanizing rhetoric about killing people in Iraq.<sup>89</sup>

In seeking protection in Canada, these U.S. military members advanced a range of legal arguments. The Immigration and Refugee Board (IRB) of Canada, the administrative body which adjudicates requests for asylum, initially dismissed most of the claims on the grounds that the applicants did not meet the elements of a refugee as outlined in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee*

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79. Key & Hill, *supra* note 77, at 33, 36.

80. Feldman, *supra* note 66.

81. *Id.* (“After several years of living with relatives and struggling to save for their own apartment, Rivera saw the Army as the only way out. Through the military, she could make more than \$10.50 an hour, plus get health insurance and higher education.”).

82. *Id.*

83. Female War Resister Loses Fight to Stay in Canada, CBC News (Aug. 30, 2012), <https://www.cbc.ca/news/canada/toronto/female-war-resister-loses-fight-to-stay-in-canada-1.1127356#> [<https://perma.cc/Y59W-KMG8>] [hereinafter Female War Resister].

84. Winsa, *supra* note 76.

85. McIlroy, *supra* note 70.

86. *Id.*

87. *Id.*

88. Teenage U.S. Deserter Flees to Ottawa Before Iraq Posting, CBC News (July 6, 2007), <https://www.cbc.ca/news/canada/ottawa/teenage-u-s-deserter-flees-to-ottawa-before-iraq-posting-1.689809#> [<https://perma.cc/72GG-MZDK>].

89. *Id.*

*Status*.<sup>90</sup> IRB officers relied in particular on paragraphs 170 and 171 of the UNHCR *Handbook*, which discuss desertion and draft evasion.<sup>91</sup> These provisions clarify that refusal to perform military service can, in limited circumstances, justify refugee protection. Mere disagreement with the political justifications for the action, however, is not enough. Rather, per paragraph 171, the “military action, with which an individual does not wish to be associated” must be “condemned by the international community as contrary to basic rules of human conduct.”<sup>92</sup> Only then will punishment for desertion or draft evasion “be regarded as persecution.”<sup>93</sup>

Cognizant of this language in the UNHCR *Handbook*, applicants like Hinzman and Key relied on the potential illegality of the Iraq War as a basis for their request for refugee status. They argued that their refusal to participate in an unlawful war justified international humanitarian protection.<sup>94</sup> Along these lines, Hughey argued that he would be compelled by superior officers to participate in a war that violated international law.<sup>95</sup> Another applicant, James Corey Glass, asserted that asylum as a U.S. military deserter was justified; he had been required to summarize field reports in Iraq and came to believe that war crimes were occurring.<sup>96</sup>

Canadian authorities consistently asserted that the issue of the legality of the Iraq War was irrelevant as the courts were not in a position to assess the foreign policies of the United States.<sup>97</sup> For example, in denying Hinzman’s claim, Canada’s IRB observed that its “authority does not include making judgments about US foreign policy.”<sup>98</sup> Canadian authorities also reasoned that lower-level officers like Hinzman could not argue the illegality of the Iraq War in invoking paragraph 171 of the UNHCR *Handbook*. In the courts’ view, that kind of “military action” (that is, an initial act of aggression) could be linked only to higher-level officials.<sup>99</sup> When presented with arguments that lower-level officers might

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90. UNHCR Handbook, *supra* note 28, at 17–41; Patrick J. Glen, *Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status*, 26 *Wis. Int’l L.J.* 965, 982–1020 (2009) (discussing, in detail, the denial of claims lodged by U.S. war resisters in Canada).

91. Glen, *supra* note 90, at 973–75 (“Paragraphs 170 and 171 . . . have been the central focus of the IRB and Canadian courts regarding U.S. military deserters and whether they are eligible for refugee status.”).

92. *Id.* at 975 (internal quotation marks omitted) (quoting UNHCR Handbook, *supra* note 28, at 39).

93. *Id.*

94. *J.H. (Re)*, 2005 CanLII 56991, para. 50–51 (Can. Ont.); *Key v. Canada (Citizenship and Immigration)*, 2008 FC 838, paras. 5–6 (Can. Ont.).

95. McIlroy, *supra* note 70.

96. Hylton, *supra* note 68.

97. See Glen, *supra* note 90, at 985 n.95, 997, 1005.

98. *J.H.*, 2005 CanLII 56991, at para. 17.

99. See *Hinzman v. Canada (Citizenship and Immigration)*, 2006 FC 420, paras. 141–42, 152–60 (Can. Ont.); Feldman, *supra* note 66.

be compelled to engage in humanitarian law violations during the war itself, adjudicators declined to find that the U.S. service members were definitively violating the laws of war or reasoned that the U.S. military had taken appropriate remedial action in response to isolated instances.<sup>100</sup>

Furthermore, the Canadian courts found in many cases that the applicants generally had not exhausted domestic legal remedies, given that the United States had a robust framework in place to deal with cases involving military deserters.<sup>101</sup> According to some observers, these individuals could have stayed in the military and pursued other options, such as conscientious objector status, or even a discharge.<sup>102</sup> At first, Canadian courts reviewing the IRB's denials were reluctant to find that the treatment of deported deserters might amount to persecution. The Federal Court of Appeal noted, in *Hinzman's* case, that the "United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process."<sup>103</sup> The Federal Court reached a similar conclusion in the case of Dale Landry, a veteran of the Afghanistan conflict who fled to Canada in July 2007 after a friend returned from Iraq with significant trauma and later committed suicide.<sup>104</sup> In *Landry v. Canada*, the Federal Court affirmed the existence of fair procedures and due process protections in the United States.<sup>105</sup>

Over time, as applicants amassed more evidence regarding court-martial proceedings in the United States and the treatment of deserters upon return, Canadian courts began to reason, at a minimum, that the cases deserved another look. In one high-profile case, the Federal Court

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100. See *Hinzman*, 2006 FC 420, at paras. 168–176; *Hughey v. Canada* (Citizenship and Immigration), 2006 FC 421, para. 71 (Can. Ont.) (acknowledging instances of humanitarian law violations but noting that "the military had investigated [the incidents], and had taken disciplinary action, where appropriate"); *J.H.*, 2005 CanLII 56991, at para. 121 ("[Hinzman] has not shown that the US has, either as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law.").

101. See Glen, *supra* note 90, at 986, 1002–03, 1013 (emphasizing opportunities to apply for conscientious objector status and the due process protections inherent in the U.S. judicial system and Uniform Code of Military Justice).

102. See, e.g., Mark Larabee, *Soldiers Still Go Over the Hill Even in an All-Volunteer Army*, *Oregonian* (July 17, 2008), [https://www.oregonlive.com/oregonianextra/2008/07/soldiers\\_still\\_go\\_over\\_the\\_hil.html](https://www.oregonlive.com/oregonianextra/2008/07/soldiers_still_go_over_the_hil.html) [<https://perma.cc/C96P-WHGP>].

103. *Hinzman v. Canada* (Citizenship and Immigration), 2007 FCA 171, para. 46 (Can. Ont.). The Federal Court of Appeal in Canada specifically emphasized *Hinzman's* failures to pursue domestic remedies, noting that "[r]ather than attempt to take advantage of the protections potentially available to them in the United States, the appellants came to Canada and claimed refugee status." *Id.* at para. 52.

104. *Parkdale War Resister Stuck in Limbo*, Bloor W. Villager (Apr. 7, 2009) (on file with the *Columbia Law Review*).

105. See *Landry v. Canada* (Citizenship and Immigration), 2009 FC 594, paras. 23–28 (Can. Ont.).

remanded a matter to the IRB to consider evidence regarding the impartiality of court-martial processes in the United States.<sup>106</sup> Similarly, in reviewing a request for a stay of deportation filed by Glass, the Federal Court judge found that it could “reasonably be argued that state protection does not exist in the U.S. to shelter these persons from [degrading] treatment” and remanded the case back to the agency.<sup>107</sup>

Other members of the U.S. military offered creative variations on these legal arguments but, like their peers, were ultimately unsuccessful. Peter Jemley, an Arabic linguist with a top security clearance, feared that he would be asked to participate in interrogations of persons suspected of terrorism and, in so doing, would be forced to violate international law.<sup>108</sup> Jemley cited the widespread reportage of torture of suspects by U.S. officials and argued that he would likely be asked to be involved, given his unique credentials.<sup>109</sup> Linjamin Mull, a social worker from New York City, had joined the military because of the educational benefits it offered.<sup>110</sup> After enlisting in the Army, Mull realized that he would likely be heading to Iraq and “didn’t want that blood on [his] hands,” so he fled north to Canada.<sup>111</sup> In making his case for humanitarian protection, Mull emphasized that the U.S. military recruits from marginalized communities and “preys on people that are less fortunate.”<sup>112</sup> Mull’s request for refugee protection was denied.<sup>113</sup>

According to press accounts, since 2008, Canadian federal courts sided with war resisters eleven different times.<sup>114</sup> In some instances, as in

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106. See *Tindungan v. Canada (Citizenship and Immigration)*, 2013 FC 115, paras. 74, 178, 180 (Can. Ont.). Joshua Key also successfully obtained a remand from the Federal Court on the issue of whether the state would adequately protect him. See *Key v. Canada (Citizenship and Immigration)*, 2008 FC 838, paras. 34–36 (Can. Ont.).

107. *Glass v. Canada (Citizenship and Immigration)*, 2008 FC 881, para. 34 (Can. Ont.). The Federal Court added the following embellishment regarding the U.S. war effort:

There has been no official declaration of war by the U.S. against Iraq and it is a notorious fact that the U.S. Congress has not officially authorized such war. The applicant reported human rights abuses committed by American Forces against Iraq’s civilian population which revolted him and prevented him from returning there.

*Id.* at para 36.

108. Michelle Shephard, U.S. Deserter Feared Torture Orders, *Toronto Star* (Sept. 6, 2008), [https://www.thestar.com/news/canada/2008/09/06/us\\_deserter\\_feared\\_torture\\_orders.html](https://www.thestar.com/news/canada/2008/09/06/us_deserter_feared_torture_orders.html) [<https://perma.cc/64EF-5CNX>].

109. *Id.* Along these lines, Brad McCall, another member of the U.S. military, also left for Canada because he did not want to commit “war crimes” in Iraq. See Charlie Smith, U.S. Soldier Refuses to Kill, *Geor. Straight* (Oct. 3, 2007), <https://www.straight.com/article-112621/u-s-soldier-refuses-to-kill> [<https://perma.cc/FSZ7-T4MK>].

110. Jones, *Over the Border*, *supra* note 56.

111. *Id.*

112. *Id.*

113. *Id.*

114. Winsa, *supra* note 76.

the case of Kimberly Rivera, the Federal Court remanded cases for consideration of additional arguments and evidence.<sup>115</sup> In other cases, the remands ordered consideration of the political and moral beliefs of the applicants, which are criteria relevant to a request to remain on humanitarian and compassionate grounds.<sup>116</sup> This remedy is available to persons who are not able to qualify as refugees and who otherwise do not qualify for permanent residence in Canada.<sup>117</sup> Although much touted in the media, such victories proved fleeting: The historical record reveals that none of these Iraq War deserters ever received resident status in Canada because of their opposition to the conflict.

The debate regarding the Iraq War deserters also played out in other branches of the Canadian government. By 2008, the conservative government of Prime Minister Stephen Harper, which had consistently opposed the U.S. military deserters,<sup>118</sup> started issuing deportation orders to U.S. service members who had been unsuccessful with their claims.<sup>119</sup> Jason Kenney, the Canadian Minister for Citizenship, Immigration, and Multiculturalism under Harper, referred to these U.S. war resisters as “bogus refugee claimants.”<sup>120</sup> Meanwhile, the House of Commons of the Canadian Parliament had issued a non-binding resolution in 2008 encouraging the government to allow U.S. war resisters to stay in Canada.<sup>121</sup> The resolution recommended that conscientious objectors “who have refused or left military service related to a war not sanctioned by the United Nations and do not have a criminal record” be allowed to apply for permanent resident status in Canada “and that the government should immediately cease any removal or deportation actions that may have already commenced against such individuals.”<sup>122</sup> The House of Commons approved the resolution again in March 2009, following the commencement of a new legislative session.<sup>123</sup>

Additionally, in 2009, legislators in the House of Commons introduced Bill C-440, which would have allowed U.S. war resisters to

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115. *Rivera v. Canada* (Citizenship and Immigration), 2009 FC 814, para. 102 (Can. Ont.).

116. See, e.g., *Hinzman et al. v. Canada* (Citizenship and Immigration), 2010 FCA 177, paras. 26, 40 (Can. Ont.); see also *supra* note 38 and accompanying text (providing the factors and rules for this type of request).

117. Humanitarian and Compassionate Grounds, *supra* note 38.

118. Hylton, *supra* note 68.

119. Lazare, *supra* note 64.

120. *Id.*

121. House of Commons, Standing Committee on Citizenship and Immigration, Third Report, 39th Parl., 2d Sess. (June 3, 2008). Interestingly, the Conservative Party of Canada appended a dissenting opinion to this resolution, noting that the Canadian government was in compliance with its international obligations, and that the creation of a special program was not necessary. *Id.*

122. *Id.*

123. House of Commons, Standing Committee on Citizenship and Immigration, Second Report, 40th Parl., 2d Sess. (March 30, 2009).

obtain permanent residence and remain in Canada.<sup>124</sup> The bill applied to persons who had left the armed forces or who had refused to serve based on a “moral, political or religious objection” to participate in “an armed conflict not sanctioned by the United Nations.”<sup>125</sup> It applied even more broadly to persons subject to stop-loss orders or those who might otherwise be compelled to return to service.<sup>126</sup> In a vote held in September 2010, the bill was defeated by a mere seven votes in Parliament, 143-136.<sup>127</sup>

To discourage adjudicators from granting claims of war resisters, in 2010, the Harper government issued Operational Bulletin 202. This instruction emphasized that because desertion is a crime that carries a hefty sentence under Canadian law, U.S. service members who desert might be treated as inadmissible under sections 36(1)(b) or 36(1)(c) of Canada’s Immigration and Refugee Protection Act.<sup>128</sup> Under these provisions, a person would be inadmissible if they had been convicted of, or even if they had simply “committed,” an act outside of Canada which, had it occurred in Canada, could have resulted in a prison term of at least ten years.<sup>129</sup> The Operational Bulletin also called upon adjudicators to notify the Case Management Branch of Citizenship and Immigration Canada with any updates regarding these claims, in accordance with existing “guidelines on processing high profile, contentious and sensitive cases.”<sup>130</sup>

As late as 2015, Canadian government officials continued to openly express skepticism about the validity of these claims. A spokesperson for Citizenship and Immigration Canada, Nancy Caron, opined that U.S. military deserters “are not genuine refugees under the internationally accepted meaning of the term” and that their “unfounded claims clog up our system for genuine refugees who are actually fleeing persecution.”<sup>131</sup> The election of Prime Minister Justin Trudeau in 2016, however, raised hopes that the Canadian government would create a pathway to legal status for the U.S. war resisters who continued to argue their cases.<sup>132</sup> This

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124. House of Commons, Bill C-440, An Act to Amend the Immigration and Refugee Protection Act (War Resisters), 40th Parl., 2d Sess. (Sept. 17, 2009).

125. *Id.*

126. *Id.*

127. Vote #95 on September 29th, 2010, Open Parliament, <https://openparliament.ca/votes/40-3/95> [<https://perma.cc/U7LD-3MDN>] (last visited Sept. 9, 2022).

128. Immigration, Refugees & Citizenship Canada, Operational Bulletin 202, Gov’t of Can. (July 22, 2010) (on file with the *Columbia Law Review*) [hereinafter Operational Bulletin 202] (last modified July 23, 2010).

129. Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 36(1)(b)–(c) (Can.).

130. Operational Bulletin 202, *supra* note 128.

131. Carolyn Thompson, Unlike in Sixties, Canada Provides No Sanctuary for Soldiers Avoiding War, *Wash. Post* (July 12, 2015), [https://www.washingtonpost.com/world/unlike-in-sixties-canada-provides-no-sanctuary-for-soldiers-avoiding-war/2015/07/12/1a02c352-28dc-11e5-a5ea-cf74396e59ec\\_story.html](https://www.washingtonpost.com/world/unlike-in-sixties-canada-provides-no-sanctuary-for-soldiers-avoiding-war/2015/07/12/1a02c352-28dc-11e5-a5ea-cf74396e59ec_story.html) (on file with the *Columbia Law Review*) (internal quotation marks omitted).

132. Kassam, *supra* note 76.

optimism was justified as during the campaign, Trudeau had told a crowd of supporters that “[he was] supportive of the principle of allowing conscientious objectors to stay.”<sup>133</sup> In May 2016, Trudeau indicated that the Canadian government was “looking into” the issue.<sup>134</sup> Notably, however, the Trudeau administration has been largely silent on the issue and has maintained Operational Bulletin 202. In September 2016, the Canadian government circulated a modified version of the Bulletin, effectively the same in substance, that omits specific reference to claims from the United States.<sup>135</sup>

In 2016, one news agency estimated the number of known U.S. Iraq War resisters still in Canada to be only fifteen.<sup>136</sup> Many returned to the United States and voluntarily surrendered to the military. Rivera was ordered to be deported in August 2012,<sup>137</sup> turned herself in at the border, and was transferred to U.S. Army custody. She ultimately pled guilty to desertion and served ten months in a U.S. military jail.<sup>138</sup> Robin Long, another Iraq War resister who unsuccessfully applied for refugee status in Canada,<sup>139</sup> was deported to the United States, faced a military court-martial, and was sentenced to fifteen months of confinement.<sup>140</sup>

Not all of the unsuccessful claimants simply accepted their fate and returned to the United States. After the Canadian government ordered him to depart the country, Rodney Watson sought sanctuary inside the First United Church in downtown Vancouver.<sup>141</sup> Like many others, Watson fled to Canada after he was asked to redeploy just months after a disillusioning first experience.<sup>142</sup> Watson, facing financial difficulties, had

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133. *Id.*

134. Colin Perkel, *Trudeau Looking Into Whether U.S. War-Dodgers Can Stay in Canada*, *Toronto Star* (May 6, 2016), <https://www.thestar.com/news/canada/2016/05/06/trudeau-looking-into-whether-us-war-dodgers-can-stay-in-canada.html> (on file with the *Columbia Law Review*).

135. Immigration, Refugees & Citizenship Canada, *Operational Bulletin 202 (modified)*, Gov't of Can. (Sept. 2, 2016), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2010/202-modified-september-2-2016.html> (on file with the *Columbia Law Review*).

136. Kassam, *supra* note 76.

137. *Female War Resister*, *supra* note 83.

138. Winsa, *supra* note 76.

139. Lazare, *supra* note 64.

140. Petti Fong, *U.S. Army Deserter First to Be Deported*, *Toronto Star* (July 16, 2008), [https://www.thestar.com/news/canada/2008/07/16/us\\_army\\_deserter\\_first\\_to\\_be\\_deported.html](https://www.thestar.com/news/canada/2008/07/16/us_army_deserter_first_to_be_deported.html) (on file with the *Columbia Law Review*); Lazare, *supra* note 64.

141. Hylton, *supra* note 68; Estefania Duran, *Iraq War Resister in Vancouver Seeks Government Help to Stay in Canada*, *Glob. News* (July 16, 2016), <https://globalnews.ca/news/2829294/iraq-war-resister-in-vancouver-seeks-government-help-to-stay-in-canada> [<https://perma.cc/N8NP-S56M>] (last updated July 17, 2016).

142. Rodney Watson, *Opinion, Why a Resister Chose Canada Over the War in Iraq*, *Toronto Star* (Dec. 24, 2009), [https://www.thestar.com/opinion/2009/12/24/why\\_a\\_resister\\_chose\\_canada\\_over\\_the\\_war\\_in\\_iraq.html](https://www.thestar.com/opinion/2009/12/24/why_a_resister_chose_canada_over_the_war_in_iraq.html) (on file with the *Columbia Law Review*).



signed up to be a chef for the Army but, once in Iraq, was asked to perform a range of tasks, including searching for explosives.<sup>143</sup> In a 2009 op-ed in the *Toronto Star*, Watson explained that while in Iraq, he “witnessed racism and physical abuse from soldiers towards the civilians” and described an incident where a soldier beat and insulted an unarmed civilian and then “threw his Qur’an on the ground and spat on it.”<sup>144</sup> Watson called upon the Canadian government “to honour [Canada’s] great traditions of being a place of refuge from militarism and a place that respects human rights” by supporting war resisters such as himself.<sup>145</sup>

Notably, not all of the Iraq War resisters sought protection in Canada. André Shepherd sought asylum in Germany, the country where he was stationed, after learning that he would be required to deploy for a second tour in Iraq.<sup>146</sup> Shepherd’s legal theory centered on his fear of being required to commit war crimes.<sup>147</sup> Although he received a favorable ruling from the European Court of Human Rights after an initial denial in Germany, on remand a German court denied his claim once again, arguing that he had not exhausted all available options before choosing to desert his assigned base in 2007.<sup>148</sup> As of April 2021, Shepherd was still residing in Germany, pursuing administrative appeals with the German courts.<sup>149</sup>

The experiences of these various Iraq War deserters underscore the legal and political complexity of asylum claims advanced by U.S. citizens. Given the highly sensitive subject matter, Canada’s IRB was reluctant to grant protection and instead justified denials with diverse legal rationales. The Canadian federal courts, when reviewing these claims, generally showed more concern, offering carefully worded critiques of the U.S. war effort, or at least acknowledging possible weaknesses in the rule of law in the United States. These claims also became vehicles for both conservative and progressive politicians in Canada to take a public stand about the (im)propriety of the Iraq War and the worthiness of these refugee claims. Some of the applicants strategically inserted themselves in these debates, attempting to marshal public opinion in their favor. Ultimately, however, these efforts to generate sympathy were unsuccessful in achieving the desired legal outcome.

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143. Id.

144. Id.

145. Id.

146. German Court Rejects US Soldier’s Asylum Application, Deutsche Welle (Nov. 17, 2016), <https://www.dw.com/en/german-court-rejects-us-soldiers-asylum-application/a-36428165> [<https://perma.cc/HFE4-AXPG>].

147. Id.

148. Id.

149. Michael Weiser, Alone Against the Strongest Army in the World: This Is What Deserter André Shepherd Is Doing in Achenmühle, OVB Online (Apr. 6, 2021), <https://www.ovb-online.de/rosenheim/rosenheim-land/allein-gegen-die-staerkste-armee-der-welt-so-geht-es-deserteur-andre-shepherd-in-achenmuehle-90315453.html> (on file with the *Columbia Law Review*).

B. *Whistleblowers, Political Dissidents, and Fugitives*

Some of the most well-known U.S. citizen asylum seekers fled the country because they feared retaliation due to public disagreements with the U.S. government. In many cases, the individual had publicly defied the U.S. government—via an act of whistleblowing or another action directly contrary to U.S. policy. Others in this category are criminal fugitives, fleeing high-profile prosecutions in the United States. Regardless of the precise circumstances, tensions with U.S. government authorities precipitated their flight to another country. The cases described below span a broad historical range, with several from the Cold War era, and others more recent, including a claim filed by a U.S. citizen who participated in the January 6, 2021, attack on the U.S. Capitol.

Although the focus of this section is on individuals who have applied for asylum from the mid-twentieth century to the present, there are deeper historical antecedents of persons on U.S. territory seeking refuge overseas for political reasons. During the Revolutionary War, for example, an estimated 60,000 loyalists from the American colonies fled the country,<sup>150</sup> with many heading to the colony of New Brunswick within British Nova Scotia, which had become a haven for American loyalists.<sup>151</sup> Among these loyalists was Massachusetts resident Thomas Robie, who fled with his family to Canada after facing violent attacks for resisting the boycott of British-made goods.<sup>152</sup> Given threats of this kind, organized evacuations facilitated the loyalists' departure from the American colonies. In 1783, as the Revolutionary War ended, an estimated 30,000 loyalists evacuated to Canada, according to ship logs.<sup>153</sup>

Across the twentieth century and through the present, a number of U.S. citizens have sought asylum in other countries after finding themselves at odds with federal or state authorities. Although Edward Snowden has dominated more recent headlines, perhaps the most prominent whistleblower from the twentieth century was Philip Agee. Agee had worked for twelve years at the Central Intelligence Agency (CIA), mostly in Latin America and, in 1974, he published an exposé of the agency's practices

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150. Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* 9 (2011).

151. See Ann Gorman Condon, *The Loyalist Dream for New Brunswick: The Envy of the American States* 2 (1984) (noting that approximately one-fourth of exiled loyalists settled in New Brunswick).

152. G. Patrick O'Brien, *Hoda Muthana Wants to Come Home From Syria—Just Like Many Loyalist Women Who Fled to Canada During the American Revolution*, *Conversation* (Mar. 6, 2019), <https://theconversation.com/hoda-muthana-wants-to-come-home-from-syria-just-like-many-loyalist-women-who-fled-to-canada-during-the-american-revolution-112799> [<https://perma.cc/YME3-KTKD>].

153. See *Loyalist Ships*, United Empire Loyalists Ass'n of Can., <http://www.uelac.org/Loyalist-Ships/Loyalist-Ships.php> [<https://perma.cc/FD8M-S24P>] (last visited Sept. 18, 2022).

entitled *Inside the Company: CIA Diary*.<sup>154</sup> The appendix to this book includes names of hundreds of undercover CIA agents.<sup>155</sup> In a later interview, Agee explained that the U.S. government's support of repressive Latin American regimes was a motivating factor for his whistleblowing.<sup>156</sup> Agee unsuccessfully sought status in France, Italy, the Netherlands, Norway, and the United Kingdom, before ultimately receiving asylum in West Germany, where his wife was a ballerina.<sup>157</sup> He went to live in Grenada in 1980, where a left-leaning government led by Prime Minister Maurice Bishop granted him a passport and protection until that government fell in 1983.<sup>158</sup> Agee later sought refuge in Cuba and spent his time between Hamburg and Havana until his death in Havana in 2008.<sup>159</sup> In addition to Agee, Cuba has welcomed many other U.S. dissidents and fugitives over the years, including several prominent Black liberationists.<sup>160</sup>

Another high-profile fugitive who sought asylum in other countries was Bobby Fischer, the New York-born chess champion. In 1992, Fischer violated U.S. Treasury Department sanctions by playing a for-profit chess match in Yugoslavia.<sup>161</sup> He fled to various other countries rather than face arrest. Fischer spent many years in Japan, and even sought protection there, but was ultimately arrested in July 2004 when he attempted to fly to Manila.<sup>162</sup> While Fischer was in legal limbo in Japan and facing the possibility of extradition to the United States, the government of Iceland offered asylum to Fischer—in the form of a conferral of citizenship—in recognition for the attention he had brought to Iceland via a 1972 chess

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154. See William Blum, *The All-Time Whistleblower: Philip Agee*, *LA Progressive* (June 27, 2013), <https://www.laprogressive.com/whistleblower-philip-agee> [<https://perma.cc/M4RQ-7KUK>].

155. *Id.* See generally Philip Agee, *Inside the Company: CIA Diary* (1975) (detailing his experience in the CIA and the secrets of the agency during his tenure).

156. Anthony Boadle, *CIA Whistle-Blower Philip Agee Dies in Cuba*, *Reuters* (Jan. 9, 2008), <https://www.reuters.com/article/us-cuba-usa-spy/cia-whistle-blower-philip-agee-dies-in-cuba-idUSN0959077820080109> [<https://perma.cc/LQG4-ABCU>].

157. Blum, *supra* note 154.

158. Boadle, *supra* note 156.

159. *Id.*

160. Jon Lee Anderson, *The American Fugitives of Havana*, *New Yorker* (Aug. 31, 2016), <https://www.newyorker.com/news/daily-comment/the-american-fugitives-of-havana> [<https://perma.cc/4EP4-3C93>]; see also *infra* notes 257–260 and accompanying text.

161. Joseph G. Ponterotto & Jason D. Reynolds, *The “Genius” and “Madness” of Bobby Fischer: His Life From Three Psychobiographical Lenses*, *17 Rev. Gen. Psych.* 384, 387 (2013).

162. See Anthony Faiola & Sachiko Sakamaki, *Iceland Offers Asylum to Jailed Fischer*, *Wash. Post* (Dec. 17, 2004), <https://www.washingtonpost.com/archive/politics/2004/12/17/iceland-offers-asylum-to-jailed-fischer/8e0b6ddf-140b-405f-88fb-caec460242f2> (on file with the *Columbia Law Review*).

match held there.<sup>163</sup> The Japanese government opted not to extradite and sent Fischer to Iceland instead, where he died in 2008.<sup>164</sup>

More recently, in November 2017, Christopher Mark Doyon (also known as “Commander X”), a member of the Anonymous hacking collective, sought asylum in Mexico on the grounds that he would face persecution at the hands of the U.S. government.<sup>165</sup> In December 2010, Doyon coordinated an attack on servers belonging to the city of Santa Cruz, California, shutting down those servers for approximately thirty minutes.<sup>166</sup> A few weeks later, federal agents found Doyon and sequestered him for questioning but eventually released him while retaining his laptop.<sup>167</sup> Doyon continued hacking various other sites and in September 2011 he was arrested and charged “with causing intentional damage to a protected computer.”<sup>168</sup> After securing release on bond, Doyon fled the country—first to Canada, where he spent several years in exile, and then eventually to Mexico.<sup>169</sup>

In an open letter to the Mexican government, Doyon described the possibility of unjust imprisonment, prolonged and inhumane incarceration, as well as physical harm and death if required to return to the United

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163. Justin McCurry, *Japan to Snub US and Send Fischer to Iceland*, *Guardian* (Mar. 24, 2005), <https://www.theguardian.com/world/2005/mar/24/japan.usa> [<https://perma.cc/HL4R-PNZB>]; see also Ponterotto & Reynolds, *supra* note 161, at 391 (relaying that Fischer became an Icelandic citizen via asylum).

164. See McCurry, *supra* note 163 (“The Japanese justice ministry’s decision to deport the grandmaster to Iceland, rather than to the US to face allegations that he violated UN sanctions against the former Yugoslavia, came two days after the Icelandic parliament granted him citizenship.”); Bruce Weber, *Bobby Fischer, Chess Master, Dies at 64*, *N.Y. Times* (Jan. 18, 2008), <https://www.nytimes.com/2008/01/18/obituaries/18cnd-fischer.html> (on file with the *Columbia Law Review*).

165. Ms. Smith, *Homeless, Fugitive Hacker Seeks Asylum in Mexico*, *CSO* (Nov. 6, 2017), <https://www.csoonline.com/article/3235915/homeless-fugitive-hacker-seeks-asylum-in-mexico.html> [<https://perma.cc/6BPG-3K88>]. For more information about the hacker collective Anonymous, see generally Gabriella Coleman, *Hacker Hoaxer Whistleblower Spy—The Many Faces of Anonymous* (2014) (explaining the background and headline-grabbing actions of the collective).

166. See David Kushner, *The Masked Avengers*, *New Yorker* (Sept. 1, 2014), <https://www.newyorker.com/magazine/2014/09/08/masked-avengers#> (on file with the *Columbia Law Review*) (“On December 16, 2010, Doyon, as Commander X, sent an e-mail to several reporters. ‘At exactly noon local time tomorrow, . . . Anonymous will remove from the Internet the Web site of the Santa Cruz County government,’ he wrote. ‘And exactly 30 minutes later, we will return it to normal function.’”).

167. *Id.*

168. *Id.*; Press Release, U.S. Att’y’s Off., N.D. Cal., *Former Mountain View Resident Christopher Doyon Apprehended in Mexico and Returned to the United States* (June 15, 2021), <http://justice.gov/usao-ndca/pr/former-mountain-view-resident-christopher-doyon-apprehended-mexico-and-returned-united> [<https://perma.cc/8TK8-LU8T>].

169. Ms. Smith, *supra* note 165; see also Kushner, *supra* note 166.

States.<sup>170</sup> According to a press release from the Anonymous collective, Doyon chose Mexico because of its familiarity “with the tyranny and imperialism of its despotic northern neighbor.”<sup>171</sup> By deploying this narrative, Doyon sought to align himself with Mexicans who might share his distaste for the U.S. government and its policies. While awaiting a decision on his request for asylum, however, Doyon was arrested in Mexico in June 2021 and returned to the United States to face federal criminal charges.<sup>172</sup>

Perhaps the most prominent whistleblower-fugitive in recent memory is Snowden, a former CIA employee and contractor with the U.S. National Security Agency (NSA) who leaked U.S. intelligence information to the media in 2013.<sup>173</sup> These leaks resulted in articles published in the *Guardian* and other news outlets, asserting that the U.S. and U.K. governments were engaged in widespread surveillance of the public.<sup>174</sup> By the time the articles were published, however, Snowden was already outside of the United States

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170. See Commander X, An Open Letter to the People and Government of Mexico and the World, Pastebin (Nov. 5, 2017), <https://pastebin.com/Z0CLGwd2> [<https://perma.cc/QDP6-KTUN>] (“To the Mexican Government: . . . I am in imminent danger of physical harm and death. I request immediate refugee status as a political dissident.”).

171. Press Release, Anonymous, Anonymous Operation Golden Eagle (Nov. 5, 2017), <https://pastebin.com/5sPsw7f> [<https://perma.cc/PDB6-2XQU>].

172. See U.S. Att’y’s Off., N.D. Cal., *supra* note 168. On June 28, 2022, Doyon was sentenced after pleading guilty to the charges against him, receiving one year of probation and a special assessment of \$100. Criminal Minutes at 1–2, *United States v. Doyon*, Nos. 5:11-cr-00683-BLF-1, 5:12-cr-00426-BLF-1, 5:22-cr-00099-BLF-1 (N.D. Cal. June 28, 2022), ECF No. 28 (documenting Doyon’s combined sentence including special assessments); Judgment in a Criminal Case at 1–7, *United States v. Doyon*, No. CR-12-00426-001 BLF (N.D. Cal. June 28, 2022), ECF No. 29 (documenting Doyon’s guilty plea under one indictment); Judgment in a Criminal Case at 1–6, *United States v. Doyon*, No. CR-11-00683-001 BLF (N.D. Cal. June 28, 2022), ECF No. 132 (same); Consent to Transfer of Case for Plea and Sentence at 1, *United States v. Doyon*, No. 6:13-cr-00049-RBD-LRH (M.D. Fla. Mar. 9, 2022), ECF No. 13 (same).

Another recent asylum seeker from the United States is John Robles, who sought asylum in Russia. Robles claims that the revocation of his passport due to owing child support in California rendered him stateless and prompted the asylum request. Kathy Lally, Snowden Could Follow Path of U.S. Asylum-Seekers Who Led Unhappy Lives in Russia, *Wash. Post* (July 19, 2013), [https://www.washingtonpost.com/world/europe/us-asylum-seekers-unhappy-in-russia/2013/07/18/ced32748-eee8-11e2-bed3-b9b6fe264871\\_story.html](https://www.washingtonpost.com/world/europe/us-asylum-seekers-unhappy-in-russia/2013/07/18/ced32748-eee8-11e2-bed3-b9b6fe264871_story.html) (on file with the *Columbia Law Review*).

173. See Jens Branum & Jonathan Charteris-Black, *The Edward Snowden Affair: A Corpus Study of the British Press*, 9 *Discourse & Commc’n* 199, 199–200 (2015); Press Release, DOJ, *United States Obtains Final Judgment and Permanent Injunction Against Edward Snowden* (Oct. 1, 2020), <https://www.justice.gov/opa/pr/united-states-obtains-final-judgment-and-permanent-injunction-against-edward-snowden> [<https://perma.cc/XF7U-HRXd>].

174. Branum & Charteris-Black, *supra* note 173, at 199–200; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, *N.Y. Times* (June 9, 2013), <https://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html> (on file with the *Columbia Law Review*).

in Hong Kong.<sup>175</sup> That same month, federal prosecutors in the United States charged Snowden with theft and two counts under the 1917 Espionage Act.<sup>176</sup> Facing the possibility of extradition, Snowden fled to Moscow.<sup>177</sup> After seeking asylum from over twenty different countries, in August 2013 Snowden obtained temporary asylum in Russia,<sup>178</sup> and, in 2014 and 2017, he received three-year extensions on his permission to remain in Russia.<sup>179</sup> In 2020, Snowden received permanent residency for an indefinite period of time.<sup>180</sup> Russian President Vladimir Putin has occasionally spoken publicly about Snowden, declining to label him a traitor and suggesting he was right to do what he did given the U.S. government's surveillance practices.<sup>181</sup> In September 2022, Putin issued a public decree granting Russian citizenship to Snowden and other foreign nationals.<sup>182</sup>

More recently, Evan Neumann, one of the participants in the storming of the U.S. Capitol on January 6, 2021, fled to Belarus and ultimately applied for asylum there.<sup>183</sup> Neumann had been accused of using a metal barricade to assault multiple police officers during the attack, and he was indicted on fourteen criminal counts, leading to his flight from the United States.<sup>184</sup> He first traveled from his home in California to Italy, made his way to Ukraine, and then crossed the border

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175. Jacob Stafford, Gimme Shelter: International Political Asylum in the Information Age, 47 *Vand. J. Transnat'l L.* 1167, 1169 (2014).

176. Specifically, prosecutors charged Snowden with "theft, unauthorized communication of national defense information" and "willful communication of classified communications intelligence information to an unauthorized person." Peter Finn & Sari Horwitz, U.S. Charges Snowden With Espionage, *Wash. Post* (June 21, 2013), [https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc\\_story.html](https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html) (on file with the *Columbia Law Review*).

177. Stafford, *supra* note 175, at 1169.

178. *Id.*

179. Joel Williams & Konstantin Toropin, Russia Extends Edward Snowden's Asylum to 2020, *CNN* (Apr. 4, 2017), <https://www.cnn.com/2017/01/18/europe/russia-snowden-asylum-extension/index.html> [<https://perma.cc/YTS8-RXJT>].

180. Anton Troianovski, Edward Snowden, in Russia Since 2013, Is Granted Permanent Residency, *N.Y. Times* (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/world/europe/russia-putin-snowden-resident.html> (on file with the *Columbia Law Review*).

181. Reuters Staff, Putin Says Snowden Was Wrong to Leak Secrets, but Is No Traitor, *Reuters* (June 2, 2017), <https://www.reuters.com/article/us-russia-putin-snowden/putin-says-snowden-was-wrong-to-leak-secrets-but-is-no-traitor-idUSKBN18T1T4> [<https://perma.cc/GYH3-CS48>].

182. Alan Yuhas, Edward Snowden Is Granted Russian Citizenship, *N.Y. Times* (Sept. 26, 2022), <https://www.nytimes.com/2022/09/26/world/europe/edward-snowden-russia-citizenship.html> (on file with the *Columbia Law Review*).

183. Tommy Taylor & Melissa Koenig, Bay Area Man Who Fled to Belarus After Attacking Cops During January 6 Riot Is Hit With 14 Criminal Charges in His Absence, *Daily Mail* (Dec. 12, 2021), <https://www.dailymail.co.uk/news/article-10301497/Capitol-rioter-fled-Belarus-facing-14-criminal-charges.html> [<https://perma.cc/KNU4-HMTJ>].

184. *Id.*

into Belarus.<sup>185</sup> Neumann has given media interviews in Belarus, asserting that he is a victim of “political persecution” and that law and order no longer prevails in the United States.<sup>186</sup> He expressed a fear of being tortured by U.S. government authorities, if forced to return.<sup>187</sup> In late March 2022, a state-owned media agency confirmed that Neumann had been granted refugee status in Belarus.<sup>188</sup>

A final case involving a U.S. fugitive—one that is less well-known—is that of Denise Harvey, who received asylum in Canada after being convicted of a sex offense in Florida in 2008.<sup>189</sup> Harvey had been convicted of five counts of unlawful sexual activity with a minor—a sixteen-year-old who played on her son’s baseball team—and was sentenced to a thirty-year jail sentence.<sup>190</sup> In 2010, while Harvey was still out on bail and pursuing an appeal of the conviction, she and her husband fled to Canada.<sup>191</sup> The gist of Harvey’s protection claim was that her lengthy sentence constituted cruel and unusual punishment, entitling her to “person in need of protection” status under Canada’s Immigration and Refugee Protection Act.<sup>192</sup> Under Canadian law, Harvey’s acts would not constitute a crime, as sixteen-year-olds *can* consent to sex with an adult in most circumstances.<sup>193</sup> Given that

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185. Id.

186. Id.

187. Thomas Colson, A Capitol Riot Suspect Who Fled to Belarus Seeking Asylum Said He Was Afraid the US Would Torture Him, *Bus. Insider* (Nov. 12, 2021), <https://www.businessinsider.com/capitol-riot-suspect-evan-neumann-fled-belarus-claims-us-torture-2021-11> [<https://perma.cc/5TGT-KN3V>].

188. U.S. Citizen Granted Refugee Status in Belarus, *BeTA* (Mar. 22, 2022), <https://eng.belta.by/society/view/us-citizen-granted-refugee-status-in-belarus-148853-2022> [<https://perma.cc/9DAD-MNKF>]; see also Isabella Kwai & Valeriya Safronova, California Man Accused in Capitol Riot Granted Asylum in Belarus, *N.Y. Times* (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/world/europe/evan-neumann-capitol-riot-belarus.html> (on file with the *Columbia Law Review*).

189. Florida Sex Offender Granted Asylum in Canada, *CBC News* (May 16, 2014), <https://www.cbc.ca/news/canada/saskatchewan/florida-sex-offender-granted-asylum-in-canada-1.2646061> [<https://perma.cc/V2CH-4TQT>] (last updated May 17, 2014).

190. Katrina Clarke, Florida Sex-Offender Who Had Relations With 16-Year-Old Granted Refugee Status in Canada, *Nat’l Post* (May 15, 2014), <https://nationalpost.com/news/canada/florida-sex-offender-who-had-relations-with-16-year-old-granted-refugee-status-in-canada> [<https://perma.cc/9PA7-ZSGN>]; Working the System: American Refugees in Canada, *Foreign Worker Can.: Canadian Immigr. Blog* (June 11, 2014), <https://www.canadianimmigration.net/news-articles/11062014-working-system-american-refugees-canada> [<https://perma.cc/74SJ-4ERL>] [hereinafter *Canadian Immigration Blog*].

191. *Canadian Immigration Blog*, *supra* note 190.

192. Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 97(1)–(2) (Can.).

193. See Criminal Code, R.S.C. 1985, c C-46, §§ 153(1)–(2) (Can.) (specifying that persons sixteen years of age or older may consent).

Harvey's specific actions were not illegal per Canadian law, the Canadian government could not extradite Harvey on grounds of criminality.<sup>194</sup>

Canada's IRB granted Harvey protected person status,<sup>195</sup> which, as noted above, is given to individuals who establish that removal to their home country or country of residence "would subject them personally to a danger . . . of torture . . . or to a risk to their life or to a risk of cruel and unusual treatment or punishment."<sup>196</sup> Notably, the Canadian Minister of Citizenship and Immigration twice sought review of the favorable ruling, but Canadian courts upheld the decision.<sup>197</sup> Then-Minister Chris Alexander expressed frustration and disdain at the ruling, offering that he found it "mind-boggling that individuals from the United States . . . think it is acceptable to file asylum claims in Canada."<sup>198</sup> Alexander added that these U.S. citizens "have no understanding of what true persecution is, and what it means to be a genuine refugee."<sup>199</sup>

These cases involving political dissidents, whistleblowers, and other fugitives illustrate the strategic choices that asylum seekers make—including the country of asylum and the messaging around their need for protection. Agee, Doyon, Snowden, and Neumann all sought to invoke the sympathies of foreign governments that have openly expressed disagreements with the United States. Several of these asylum seekers attempted to generate public support for their claims by deploying rhetoric critical of the United States and by questioning the integrity of the U.S. government. In other cases, as exemplified by Denise Harvey's experience in Canada, small but significant differences in law provided a pathway to protection, even when higher-level foreign government officials were disinclined to grant relief.

### C. *Defectors*

Since the Founding of the nation, numerous U.S. citizens have defected to a hostile foreign power, often after having colluded with that country's government. Some of these defections were transactional, with refuge being the reward bestowed upon U.S. military members, government officials, or civilian spies who shared sensitive information, often during the Cold War era. In other cases, the U.S. citizen, disillusioned with government policies or the state of American society, simply sought an ideologically and politically hospitable environment in another country. In many instances, the historical record is unclear as to

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194. See Tackling Violent Crime Act, S.C. 2008, c 6, § 13 (Can.) (raising the age of consent from fourteen to sixteen); Canadian Immigration Blog, *supra* note 190.

195. Clarke, *supra* note 190.

196. Immigration and Refugee Protection Act § 97(1) (Can.).

197. Florida Sex Offender Granted Asylum in Canada, *supra* note 189.

198. *Id.*

199. *Id.*



the precise status the defector received in their country of destination—whether it was asylum, permanent residence, or another option available under domestic law.

Martin James Monti holds the ignominious distinction of being the only U.S. soldier known to have defected to Germany during World War II.<sup>200</sup> In late 1944, Monti made his way from his original posting in Karachi to an airfield near Naples, where he flew a plane into German-occupied Milan and surrendered to the Nazis.<sup>201</sup> Monti helped the Germans produce English-language propaganda, and at the end of the war, the U.S. Army apprehended him in Milan.<sup>202</sup> Following his return to the United States, Monti ultimately pled guilty to treason before a U.S. district court and served over a decade in prison before his release on parole in 1960.<sup>203</sup> Although Monti's defection predated the establishment of the international refugee law regime,<sup>204</sup> his experience foretold similar acts that would transpire following the end of World War II.

Beginning in the late 1940s, a number of U.S. citizens defected, at times temporarily, to countries beyond the Iron Curtain. Perhaps the most notorious among these was Lee Harvey Oswald, who defected to the Soviet Union from 1959 to 1962.<sup>205</sup> Another prominent defector, Noel Field, had worked for the U.S. government, spied for the Soviets, and eventually sought political asylum in Hungary.<sup>206</sup> As noted above, historical accounts do not always specify whether these defectors received asylum, but a subset of them appear to have. Among those are two NSA employees, William Hamilton Martin and Bernon F. Mitchell, who departed the United States in 1960 and made their way to the Soviet Union, where they defected, were granted asylum, and ultimately became Soviet citizens.<sup>207</sup> Martin and

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200. Blake Stilwell, Here's the Only American Soldier to Defect to the Nazis in World War II, *Military.com*, <https://www.military.com/history/heres-only-american-soldier-defect-nazis-world-war-ii.html> [<https://perma.cc/PC5Q-2CM2>] (last visited Sept. 9, 2022).

201. Fred L. Borch, A Deserter and a Traitor: The Story of Lieutenant Martin J. Monti, Jr., *Army Air Corps, Army Law*, Feb. 2018 (Special Edition), at 31–32 (on file with the *Columbia Law Review*).

202. *Id.* at 32.

203. *Id.* at 32–33.

204. The international refugee law system that exists today was formally established in 1951. See UNHCR Handbook, *supra* note 28, at 13 (describing the 1951 Convention as adopting a “general definition of who was to be considered a refugee”).

205. See Peter Savodnik, *The Interloper: Lee Harvey Oswald Inside the Soviet Union*, at xi (2013).

206. See Mária Schmidt, Noel Field—The American Communist at the Center of Stalin's East European Purge: From the Hungarian Archives, 3 *Am. Communist Hist.* 215, 228, 240 (2004) (discussing Field's spying for the Soviet Union, tenure with the State Department, and decision to seek asylum in Hungary).

207. Rick Anderson, Before Edward Snowden: “Sexual Deviates” and the NSA, *Salon* (July 1, 2013), [https://www.salon.com/2013/07/01/before\\_edward\\_snowden\\_sexual\\_deviates\\_and\\_the\\_nsa](https://www.salon.com/2013/07/01/before_edward_snowden_sexual_deviates_and_the_nsa) [<https://perma.cc/NAB6-J4VG>].

Mitchell's work at the NSA had involved encoding and deciphering communiques, and after defecting they expressed that they hoped to expose U.S. government lies.<sup>208</sup> Martin and Mitchell lived out the remainder of their lives outside of the United States.<sup>209</sup> A study on defectors prepared by the U.S. House of Representatives in 1979 suggests that a few other U.S. citizens—including Morris and Mollie Block and Vladimir Sloboda—sought Soviet asylum in the 1950s and 1960s.<sup>210</sup>

Similar defections occurred during the 1980s, as the Cold War dragged on. Edward Howard, who had worked at the CIA from 1981 to 1983, defected to the Soviet Union in the mid-1980s, apparently after selling information to the rival power.<sup>211</sup> In August 1986, the Soviet Union acknowledged that it had granted asylum to Howard based on “humanitarian considerations.”<sup>212</sup> According to the press release from the Soviet news agency *Tass*, Howard had sought asylum “to hide from the U.S. secret services, which were persecuting him without foundation.”<sup>213</sup>

Along these lines, Glenn Michael Souther, a naval reservist who had worked on satellite intelligence, also defected to the Soviet Union in 1986 and acknowledged in 1988 that he had received political asylum there.<sup>214</sup> In a televised interview carried by the Soviet news agency, Souther explained that he had defected after facing questioning and “harassment” by the FBI, which had begun to suspect Souther of treasonous conduct.<sup>215</sup> Not long thereafter, in June 1989, Souther died by apparent suicide.<sup>216</sup>

The Soviet Union was not the sole destination for U.S. citizen defectors in the 1980s. In 1982, while stationed in the Korean Demilitarized Zone as a member of the U.S. Army, Joseph White

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208. *Id.* As the defections occurred soon after the “Lavender Scare” and the height of McCarthyism, U.S. government officials attempted to smear Martin and Mitchell by suggesting they were homosexual, despite the lack of any concrete evidence to support that assertion. *Id.*

209. *Id.* Martin left Russia for Tijuana, Mexico in January 1987 and died there within the month. Mitchell died in 2001 in St. Petersburg, Russia.

210. Staff of H. Select Comm. on Assassinations, 95th Cong., *The Defector Study* paras. 16, 78 (2d Sess. 1979).

211. Philip Taubman, *Ex-C.I.A. Agent Given Asylum in Soviet Union*, *N.Y. Times* (Aug. 8, 1986), <https://www.nytimes.com/1986/08/08/world/ex-cia-agent-given-asylum-in-soviet-union.html> (on file with the *Columbia Law Review*).

212. *Id.*

213. *Id.*

214. Esther B. Fein, *Defector to Moscow Is Dead; Work for K.G.B. Is Lauded*, *N.Y. Times* (June 28, 1989), <https://www.nytimes.com/1989/06/28/world/defector-to-moscow-is-dead-work-for-kgb-is-lauded.html> (on file with the *Columbia Law Review*).

215. *Id.*

216. *Id.* Nigel West has compiled a list of U.S. defectors to the Soviet Union. See Nigel West, *Cold War Intelligence Defectors*, in *Handbook of Intelligence Studies* 226, 234 (Loch K. Johnson ed., 2006).

surrendered to North Korean authorities and sought political asylum.<sup>217</sup> Although his precise motivations were unknown, White later confirmed in a letter to his parents that he had defected voluntarily.<sup>218</sup> A few years later, in 1984, Jeffrey Carney, an Air Force intelligence specialist who had been sharing information with the East German security agency, sought permanent refuge in that country.<sup>219</sup> After the fall of the Berlin Wall, U.S. authorities apprehended Carney, and he eventually served a prison sentence in the United States.<sup>220</sup>

These cases involving U.S. citizen defectors reveal how the asylum system has been used as a blunt political instrument by the country of defection, which seeks to benefit from the presence of the defector and use the conferral of status to publicly humiliate the United States. Multiple factors underlie the defectors' decisions to leave the United States, including disillusionment, a desire to evade investigation and prosecution, and even a greater sense of allegiance to the rival power. Some defectors, of course, also relished the opportunity to criticize the United States via the act of defection and the media coverage that inevitably followed. Interestingly, most of these cases were concentrated during the decades of the Cold War. In more recent times, as illustrated in the previous section, whistleblowers and political dissidents in the United States have similarly gravitated toward hostile powers, but have stopped short of formally aligning themselves with, or declaring allegiance, to those powers.

#### D. *Domestic Violence Survivors*

Asylum adjudicators in the United States routinely encounter claims of women who are fleeing domestic abuse and feel that state authorities simply cannot protect them.<sup>221</sup> In at least two cases, adjudicators overseas have granted asylum to U.S. citizen women who fled the country with their children to escape intimate partner violence. Both of these women successfully obtained asylum, notwithstanding pending criminal charges

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217. North Korea Says G.I. Seeks Asylum, N.Y. Times (Aug. 29, 1982), <https://www.nytimes.com/1982/08/29/world/no-headline-116435.html> [<https://perma.cc/S5XZ-KHMX>].

218. Paul Hendrickson, Alleged Defector to North Korea Writes Parents, Wash. Post (Feb. 14, 1983), <https://www.washingtonpost.com/archive/politics/1983/02/14/alleged-defector-to-north-korea-writes-parents/96512f57-eadc-49f5-9037-ea8f49c90633> [<https://perma.cc/Q72P-YTPT>].

219. Alison Gee, Jeff Carney: The Lonely US Airman Turned Stasi Spy, BBC World Serv. (Sept. 19, 2013), <https://www.bbc.com/news/magazine-23978501> [<https://perma.cc/V66C-9NUA>].

220. *Id.*

221. See Sarah Hinger, Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims, 19 Colum. J. Gender & L. 367, 367 (2010) ("Within the United States and globally, gender and sexual orientation form the basis of an increasing number of rights claims and protections. Both grounds . . . have been incorporated into United States asylum law with varying success.").

in the United States for kidnapping their children. This subset of asylum seekers overlaps with fugitives, but the gender-based nature of the claims adds a unique and resonant dimension.

One of these women, Holly Ann Collins, fled the United States in 1994 along with her three children: Zachary, Jennifer, and Christopher.<sup>222</sup> Holly had had a rocky, five-year marriage with Mark Collins, who, according to Holly, “beat, threatened, and raped her on numerous occasions.”<sup>223</sup> Holly later obtained a protective order against Mark and after they formally divorced in 1990, Holly received full physical custody of Zachary and Jennifer; Mark received visitation rights.<sup>224</sup> Over the years that followed, battles regarding custody and visitation ensued, with ongoing claims made regarding Mark’s abusive behavior toward both Holly and the children.<sup>225</sup> In late 1992, a judge reversed the custody decision, granting full physical custody of the children to Mark.<sup>226</sup> And in June 1994, the two older kids left their father’s residence and met up with Holly, who fled with all three children.<sup>227</sup> Holly ultimately decided to leave the country. During a layover in the Netherlands, after being threatened with removal by Dutch authorities due to lack of proper paperwork, she requested asylum.<sup>228</sup> The Netherlands granted Holly refugee status in 1997 based on the abuse that she and her children suffered at the hands of Mark.<sup>229</sup> Her flight from the United States triggered both federal and local criminal charges, including kidnapping,<sup>230</sup> but prosecutors dropped most of these charges in 2007.<sup>231</sup> After prosecutors dropped the charges, the family returned to the United States in 2008.<sup>232</sup>

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222. Alison Bowen, U.S. Mom in Dutch Haven Told Face Trial, Cede Kids, Women’s eNews (July 7, 2008), <https://womensenews.org/2008/07/us-mom-in-dutch-haven-told-face-trial-cede-kids> [<https://perma.cc/4H9M-E2NY>]; Jennifer Collins, American Family Receives Asylum in Europe, Am. Child. Underground, <http://americanchildrenunderground.blogspot.com> [<https://perma.cc/P2S9-2MM9>] (last visited Sept. 9, 2022).

223. Beth Walton, Battered Woman Becomes American Refugee in Amsterdam, City Pages (July 30, 2008) (on file with the *Columbia Law Review*).

224. *Id.*

225. See *id.* (“Fearing for their safety, Holly at times defied the court and refused to let the children go to Mark’s house. They came home with stories of how their father had hit and kicked them, she remembers. There was at least one incident where Zachary required medical care.”).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Bowen, *supra* note 222.

231. Adam Taylor, Can an American Become a Refugee? Yes, and Some Already Have, Wash. Post (Jan. 20, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/01/20/can-an-american-become-a-refugee-yes-and-some-already-have/> (on file with the *Columbia Law Review*).

232. *Id.*

A similar case is that of Chere Lyn Tomayko, who, as noted in the Introduction, fled to Costa Rica. Tomayko was in a tumultuous relationship with Roger Cyprian, who, according to Tomayko, was abusive toward her, their daughter Alexandria, and Chandler, Tomayko's older daughter from a previous relationship.<sup>233</sup> In 1996, a state court judge in Texas granted joint custody to Tomayko and Cyprian but ordered Tomayko to keep Alexandria in Tarrant County, Texas.<sup>234</sup> Five months later, Tomayko fled to Costa Rica with her two daughters, prompting federal charges for international parental kidnapping.<sup>235</sup> In September 2007, Costa Rican authorities arrested Tomayko and detained her in a Costa Rican women's prison.<sup>236</sup> Although Tomayko unsuccessfully applied for asylum twice, in July 2008, the Constitutional Chamber of the Supreme Court of Costa Rica accepted an appeal.<sup>237</sup> Less than a week later, the Costa Rican Public Security Ministry, citing Tomayko's fear of persecution, granted refugee status to her and reversed the immigration agency's decision.<sup>238</sup> In rendering this decision, Minister Janina del Vecchio noted the following: "To ignore domestic violence as a cause for granting refuge implies ignoring the basic doctrine of the international rights of refugees."<sup>239</sup>

In defending the grant of asylum, then-president of Costa Rica Oscar Arias echoed del Vecchio, emphasizing that Costa Rica "is a sovereign country, and we have the right and obligation to make decisions that we think are fitting. In this case, we tried to protect human rights."<sup>240</sup> The decision prompted the U.S. government to issue a public statement "expressing disappointment in the Minister's decision, defending U.S. commitment to human rights, and raising concern about the implications of the legal precedent being set."<sup>241</sup> The U.S. Embassy in Costa Rica also circulated a diplomatic cable to the U.S. Department of Justice and entities within the U.S. Department of State, summarizing what had transpired

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233. Gillers, *supra* note 1.

234. *Id.*

235. *Id.*

236. LADB Staff, *supra* note 4, at 1.

237. Gillers, *supra* note 1.

238. LADB Staff, *supra* note 4, at 2.

239. *Id.* (internal quotation marks omitted).

240. *Id.* at 3 (internal quotation marks omitted).

241. Costa Rica Grants Refugee Status to Chere Lyn Tomayko; May Set Precedent for Future Claims, *WikiLeaks* (Aug. 26, 2008), [https://wikileaks.org/plusd/cables/08SANJOSE695\\_a.html](https://wikileaks.org/plusd/cables/08SANJOSE695_a.html) [<https://perma.cc/MJC9-MSRE>] [hereinafter *Costa Rica Grants Refugee Status to Chere Lyn Tomayko*] (providing the text of a leaked U.S. Department of State diplomatic cable from the U.S. ambassador in Costa Rica); see also Allison Hugi, *A New Weight on the Scale: Strengthening International Human Rights Law by Relying on Treaties in US Asylum Cases*, 17 *Santa Clara J. Int'l L.* 1, 18 (2019).

and suggesting, once again, that the Minister's decision had set a problematic precedent.<sup>242</sup>

The Costa Rican government arguably used the case to gently shame the United States while boosting its own human rights credentials. Minister del Vecchio observed, in the context of Tomayko's case, that persons who flee their countries in search of protection elsewhere do so "because . . . their human rights are at risk."<sup>243</sup> In other words, the United States had failed to adequately protect the rights of one of its own citizens. President Arias offered a similarly oblique critique of the United States when describing the Tomayko decision as a "very small thing" compared to larger human rights deficits of the United States, including the country's failure to sign the Kyoto Protocol or to accept the jurisdiction of the International Criminal Court.<sup>244</sup> The Tomayko case also allowed Costa Rica to burnish its human rights reputation, which was tarnished after receiving criticisms for how the Central American Free Trade Agreement would affect indigenous communities in the country.<sup>245</sup>

The Collins and Tomayko cases underscore the possibility, however remote, of obtaining asylum as a U.S. citizen based on harm that one fears at the hands of a nonstate actor in the United States. In both decisions, foreign adjudicators confirmed, whether subtly or explicitly, that U.S. authorities failed to sufficiently protect the applicants. These cases also highlight the interplay between claims for relief and extradition processes, particularly in the context of politically charged requests for humanitarian status. Although these decisions might be seen as outliers, it is not necessarily the case that the diplomatic power and legal maneuvering of the U.S. government will override the asylum process in another country. Indeed, as reflected in the trajectory of Tomayko's case, foreign governments may use the asylum process quite intentionally to scold the United States or to advance their own domestic objectives.

#### E. *Members of Minority Groups*

At its core, refugee law aims to protect individuals, typically members of minority groups, who face the threat of persecution in their country of nationality because of an immutable identity characteristic or group membership. Although the United States is often described in popular discourse as having enough legal and societal safeguards to protect its minority populations, the lived experience of many U.S. citizens, since the very founding of the nation, reveals significant gaps in protection. Whether this failure of protection is pervasive enough to warrant a grant of asylum is debatable. Objectively speaking, however, it should be no surprise that the concept of asylum would appeal to U.S. citizens who have

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242. Costa Rica Grants Refugee Status to Chere Lyn Tomayko, *supra* note 241.

243. LADB Staff, *supra* note 4, at 3.

244. *Id.*

245. *Id.* at 4.

experienced identity-based harms. Indeed, the historical record confirms that racial, religious, and sexual minorities in the United States have fled the land of the free in search of less oppressive environments.

1. *Claims Filed by Racial Minorities.* — Racial subjugation and the assertion of white supremacy have been defining threads in U.S. history. There is, therefore, a correspondingly long history of racial minorities fleeing the United States to seek refuge elsewhere. In the decades preceding the Civil War, Canada was popularized in the imagination of enslaved Americans as a type of promised land, free from the oppressive conditions of the United States.<sup>246</sup> An estimated 30,000 fugitive enslaved persons fled northward via the Underground Railroad,<sup>247</sup> which included several Canadian stations.<sup>248</sup> The largest settlement was in Ontario, but other destinations included New Brunswick, Montreal, and Vancouver Island.<sup>249</sup>

Nearly a century later, conditions in the United States led Ollie Harrington, a prominent African American cartoonist, to seek asylum in East Germany. Harrington was a cartoonist for *People's Voice*, one of two leading African American newspapers in New York City in the 1940s.<sup>250</sup> Harrington's work tackled the African American experience, World War II, Nazism, and other topics, with incisive and acerbic wit.<sup>251</sup> As the United States sunk deeper into the Cold War, Harrington moved to Paris in 1951, where he formed part of a community of expatriate Black artists and activists, which included author Richard Wright.<sup>252</sup> Wright died in Paris in November 1960 at the age of fifty-two,<sup>253</sup> and Harrington believed that the U.S. government was responsible for his murder given Wright's leftist allegiances.<sup>254</sup> The following year, Harrington successfully obtained

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246. Renford Reese, Canada: The Promised Land for U.S. Slaves, 35 *W.J. Black Stud.* 208, 209–10 (2011).

247. Underground Railroad, CBC, <https://www.cbc.ca/history/EPCONTENTS/EIEP8CH1PA3LE.html> [<https://perma.cc/TDY7-PKM6>] (last visited Sept. 24, 2022).

248. See Reese, *supra* note 246, at 210–11, 214.

249. See Abigail B. Bakan, Reconsidering the Underground Railroad: Slavery and Racialization in the Making of the Canadian State, 4 *Socialist Stud.* 3, 10 (2008); Michael Wayne, The Black Population of Canada West on the Eve of the American Civil War: A Reassessment Based on the Manuscript Census of 1861, 28 *Soc. Hist.* 465, 466 (1995) (arguing that estimates of fugitive enslaved persons in Canada West, now the province of Ontario, were overstated).

250. James Smethurst & Rachel Rubin, The Cartoons of Ollie Harrington, the Black Left, and the African American Press During the Jim Crow Era, 59 *Am. Stud.* 121, 121 (2020).

251. See *id.* at 123 (explaining that Harrington won over his audience with his “humor, recognizable landscapes and personalities, and sharp social criticism”).

252. *Id.* at 127.

253. Richard Wright, *Encyc. Britannica*, <https://www.britannica.com/biography/Richard-Wright-American-writer> [<https://perma.cc/8H3T-NCQM>] (last updated Aug. 31, 2022).

254. Smethurst & Rubin, *supra* note 250, at 127.

political asylum in the German Democratic Republic and lived in Berlin for four decades, until his death.<sup>255</sup> It is fitting that Harrington once quipped, “Black people are all refugees, unless they are African people living in Africa.”<sup>256</sup>

In the same year that Harrington received asylum in East Germany, prominent African American radicals began seeking refuge in Cuba. Mabel and Robert Williams, who had organized a Black gun club to defend against white supremacist violence, and who subsequently faced federal criminal charges, made their way to Cuba, where they received both a warm welcome from Prime Minister Fidel Castro and asylum.<sup>257</sup> Along these lines, Eldridge Cleaver, Minister of Information for the Black Panther Party, sought refuge in Cuba in 1968 while facing criminal charges that would likely have resulted in a return to prison.<sup>258</sup> Among the most prominent U.S. exiles still living in Cuba is Assata Shakur, a former Black Panther and member of the Black Liberation Army, who escaped from criminal confinement in New Jersey in 1979.<sup>259</sup> Shakur surfaced in Havana several years later, having received political asylum.<sup>260</sup>

More recently, in the midst of growing public attention and scrutiny of police killings of African American men, a new subtype of asylum claim has emerged. Kyle Canty, an African American U.S. citizen, applied for asylum in Canada based on the harassment and targeting he experienced as a Black man in various U.S. states.<sup>261</sup> In the evidence submitted to Canada’s IRB, Canty included multiple video recordings of his interactions with the police.<sup>262</sup> Canty had been charged in the United States with crimes including jaywalking and disorderly conduct—a criminal history which, according to Canty, was premised on false arrests and which exemplifies how police in the United States disproportionately target people of color.<sup>263</sup> The IRB ultimately denied Canty’s claim, finding that he had not established a well-founded fear of persecution, nor had he demonstrated that he was personally at risk of suffering cruel and unusual

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255. *Id.*

256. *Id.* at 131.

257. See Teishan A. Latner, “Assata Shakur Is Welcome Here”: Havana, Black Freedom Struggle, and U.S.–Cuba Relations, 19 *Souls* 455, 460 (2017).

258. See Ruth Reitan, Cuba, the Black Panther Party and the US Black Movement in the 1960s: Issues of Security, 21 *New Pol. Sci.* 217, 217, 227 (1999).

259. See Latner, *supra* note 257, at 455–56.

260. *Id.* at 456.

261. Janell Ross, A Black American Is Applying for Refugee Status in Canada, Citing Police Racism. Don’t Laugh., *Wash. Post* (Nov. 2, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/02/a-black-man-is-applying-for-refugee-status-in-canada-citing-police-racism-dont-laugh/> (on file with the *Columbia Law Review*).

262. *Id.*

263. *Id.*



treatment or punishment.<sup>264</sup> While the IRB acknowledged that Black Americans are subject to disproportionate police stops, they noted that harassment does not equate with persecution and that Canty himself had not had interactions with the police that “resulted in assault, excessive detention or lack of due process.”<sup>265</sup>

Just prior to Canty’s decision to apply for asylum, lawyer and law professor Raha Jorjani penned an opinion editorial in the *Washington Post*, suggesting that Black people in the United States might qualify as refugees.<sup>266</sup> Jorjani emphasized that the types of mistreatment that Black Americans have experienced at the hands of police—including “unjust imprisonment, rape, assault, beatings and confinement”—have been found by courts to constitute “persecution” under refugee law.<sup>267</sup> Jorjani argued that the voluminous evidence of mistreatment based on race—including both intentional acts and structural racism—strengthen the case for a refugee claim.<sup>268</sup>

Although Canty’s case received significant media attention, he is not alone in seeking asylum based on his experience as a person of color in the contemporary United States. In an interview posted to YouTube, an African American man named Sean describes himself as the first African American to seek refugee status in the Dominican Republic.<sup>269</sup> Sean, a veteran of the U.S. Navy, describes an encounter with the Metropolitan Police Department in Washington, D.C. that left him bloodied.<sup>270</sup> He explains that he filed for refugee status in the Dominican Republic, citing police violence in the United States, and was given permission to stay for eighteen months.<sup>271</sup> When invited to give advice to viewers, Sean offered the following:

We don’t have to take it . . . The way my country is set up, we’ve begun to accept so many things as the status quo, as the norm, the new norm. And it’s not required. Here, I don’t have to raise my son or my daughter to fear police violence. I don’t have

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264. Black U.S. Citizen Kyle Canty Denied Refugee Status in Canada, CBC News (Jan. 8, 2016), <https://www.cbc.ca/news/canada/british-columbia/black-us-citizen-kyle-lydell-canty-denied-refugee-status-in-canada-1.3396511> [<https://perma.cc/PP27-RCB4>] (last updated Jan. 9, 2016).

265. *Id.* (internal quotation marks omitted).

266. Raha Jorjani, Opinion, Could Black People in the U.S. Qualify as Refugees?, *Wash. Post* (Aug. 14, 2015), [https://www.washingtonpost.com/opinions/could-black-people-in-the-us-qualify-as-refugees/2015/08/14/b97a628a-406c-11e5-bfe3-ff1d8549bfd2\\_story.html](https://www.washingtonpost.com/opinions/could-black-people-in-the-us-qualify-as-refugees/2015/08/14/b97a628a-406c-11e5-bfe3-ff1d8549bfd2_story.html) [<https://perma.cc/2BA8-85EZ>].

267. *Id.*

268. *See id.*

269. Educated Traveler, Meet the First African American to Obtain Refugee Citizenship in DR—Here’s Why . . . , YouTube, at 00:11–00:24 (Oct. 18, 2020), [https://www.youtube.com/watch?v=g2EiYcT-5\\_E](https://www.youtube.com/watch?v=g2EiYcT-5_E) (on file with the *Columbia Law Review*).

270. *Id.* at 00:51–01:04.

271. *Id.* at 01:54–02:20.

to have that talk that every Black man, every Black family in America has to have with their child about how not to die from the police, from the people who are supposed to serve you and protect me. I've grown tired of contributing my tax dollars and contributing my efforts to a cause that is trying to kill me.<sup>272</sup>

For Sean, therefore, the daily indignities of life as an African American man had simply become too much to bear and outweighed the benefits of his membership in U.S. society.<sup>273</sup>

2. *Claims Filed by Sexual Minorities.* — In addition to African Americans, sexual minorities in the United States have sought asylum overseas due to mistreatment they have endured and their fear of future harm. One such case, which also involves an act of military desertion, is that of Skyler James (a/k/a Bethany Smith), a lesbian who served in the U.S. Army under the “Don’t Ask, Don’t Tell” (DADT) policy, which was later rescinded by President Barack Obama.<sup>274</sup> James had been outed as a lesbian by a fellow soldier and expected that she would be discharged under DADT; that discharge never happened, and instead, James reported that she experienced “harassment and persecution,” including “hate letters and death threats.”<sup>275</sup> James alleged that she received anonymous hate mail, including a letter warning that she would be suffocated in her sleep.<sup>276</sup> As the mistreatment continued, James and a fellow soldier decided to go absent without leave (AWOL) and fled to Canada.<sup>277</sup> James’s petition before Canada’s IRB was denied in 2008, and with the assistance of her

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272. *Id.* at 03:34–04:25.

273. Note that white Americans have also sought asylum overseas, arguing that their racial identity puts them at a disadvantage. In a reported decision from Australia, a family sought refugee status, arguing that the U.S. government would not provide them support and that “[w]hite American middle aged citizens are not offered equal opportunity against minorities and immigrants, both legal and illegal.” 1608643 (Refugee) [2018] AATA 3630 (27 August 2018) 4 (Austl.) (Lamont, J., Member). In affirming a prior denial, the adjudicator concluded that they were “unable to find any country information showing that white people in the United States are persecuted or discriminated against due to their race.” *Id.* at 9.

274. Jesse Lee, *The President Signs Repeal of “Don’t Ask, Don’t Tell”: “Out of Many We Are One,”* *The White House of President Barack Obama: Blog* (Dec. 22, 2010), <https://obamawhitehouse.archives.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one> [<https://perma.cc/UUJ8-JEAK>].

275. Natalie, *Lesbian Soldier Denied DADT Discharge Now Seeking Canadian Asylum: Autostraddle Interviews Pte. Skyler James*, *Autostraddle* (Oct. 8, 2009), <https://www.autostraddle.com/lesbian-soldier-denied-dadt-discharge-now-seeking-canadian-asylum-autostraddle-interviews-pte-skyler-james-16167> [<https://perma.cc/WW74-N87Y>] [hereinafter Natalie, *Lesbian Soldier Denied DADT Discharge*].

276. Queerty Staff, *Pte. Bethany Smith Fled to Canada to Avoid Soldiers’ Death Threats. Will They Let Her Stay?*, *Queerty* (Sept. 9, 2009), <https://www.queerty.com/pte-bethany-smith-fled-to-canada-to-avoid-soldiers-death-threats-will-they-let-her-stay-20090909> [<https://perma.cc/HC9P-8MVN>].

277. Natalie, *Lesbian Soldier Denied DADT Discharge*, *supra* note 275.

attorneys, she pursued appeals and other forms of protection.<sup>278</sup> Although James did win one appeal, requiring the IRB to reconsider her case,<sup>279</sup> the DADT policy was repealed while her case was pending.<sup>280</sup> She ultimately elected to surrender herself at Fort Campbell, the base she had deserted, in May 2012.<sup>281</sup> James was permitted to complete a discharge form instead of being court-martialed and was released.<sup>282</sup>

More recently, a Seattle-based transgender rights activist, Danni Askini, sought asylum in Sweden after experiencing threats and harassment in the United States.<sup>283</sup> Askini had been at the forefront of the fight for transgender rights, including helping to lead a challenge against the Trump Administration's transgender military ban and combating proposed legislation in the state of Washington that would limit transgender persons' access to bathrooms.<sup>284</sup> After waging these battles, the threats and hostility—including 12,000 hate emails in a two-week period—began to pour in.<sup>285</sup> Askini's mother and brother received death threats, and once while driving, Askini was run off the road by another vehicle, whose occupants yelled at Askini about her transgender status.<sup>286</sup> Askini contends that she sought help from federal authorities, who declined to intervene.<sup>287</sup>

Fearing for her life, Askini decided to travel to Sweden, where her ex-husband resides.<sup>288</sup> In the process of obtaining a U.S. passport, Askini

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278. *Id.*

279. Natalie, *Lesbian Soldier Skyler James Won Her Appeal: The Follow-Up Interview*, Autostraddle (Jan. 14, 2010), <https://www.autostraddle.com/skyler-james-follow-up-27465> [<https://perma.cc/GKY4-VTLK>]. Specifically, the Canadian Federal Court agreed that this denial was unreasonable based on the previous death of a soldier and known discrimination against LGBTQ+ soldiers at Fort Campbell. *Smith v. Canada (Citizenship and Immigration)*, 2009 FC 1194, at para. 87 (Can. Ont.). The Court allowed another board member to review the case, but the IRB denied James's claim once again, and a subsequent appeal to the Federal Court was unsuccessful. Shauna Labman & Catherine Dauvergne, *Evaluating Canada's Approach to Gender-Related Persecution: Revisiting and Re-Embracing 'Refugee Women and the Imperative of Categories,' in Gender in Refugee Law: From the Margins to the Centre* 264, 277 (2014) (Efrat Arbel, Catherine Dauvergne & Jenni Millbank eds., 2014).

280. Lee, *supra* note 274.

281. Bob Meola, *The Journey of War Resister Skyler James, Courage to Resist* (Sept. 28, 2012), <https://couragetoresist.org/skyler-james-journey> [<https://perma.cc/2QS9-QWQR>].

282. *Id.*

283. Melissa Hellmann, *Danni Askini Seeks Asylum in Sweden*, *Seattle Wkly.* (Nov. 22, 2018), <https://www.seattleweekly.com/news/danni-askini-seeks-asylum-in-sweden> [<https://perma.cc/QU7W-V36K>].

284. *Id.*

285. *Id.*

286. Rupa Shenoy, *A US Transgender Activist Is Stuck in Sweden. The UN Wants to Investigate.*, *World* (Jan. 21, 2019), <https://theworld.org/stories/2019-01-21/us-transgender-activist-stuck-sweden-un-wants-investigate> [<https://perma.cc/WHV2-TDNZ>].

287. *Id.*

288. *Id.*

claims that officials alleged she had fraudulently obtained a prior passport by failing to include information about her gender at birth—an allegation which, in Askini’s eyes, was motivated by anti-transgender bias.<sup>289</sup> Askini was ultimately able to receive a temporary passport and, once in Sweden, applied for asylum, fearing both the threats that led her to flee, as well as the possibility of legal proceedings relating to the passport.<sup>290</sup> As Askini put it, “I am a Trump refugee.”<sup>291</sup> In a media interview, she added that “[f]iling for asylum in Sweden was absolutely the right thing to do . . . I can be myself in Sweden without fear of violence or discrimination.”<sup>292</sup> Askini acknowledged, however, that her chances of being granted asylum were slim, given Sweden’s perception of the United States as a “functioning democracy.”<sup>293</sup> According to Askini’s Twitter account, she was ultimately deported from Sweden.<sup>294</sup>

3. *Other Minority-Based Claims and General Trends.* — In addition to racial and sexual minorities, religious minorities—including Muslims who alleged human rights abuses in the United States—are among the U.S. citizens who have sought asylum in other countries.<sup>295</sup> When examining this corpus of claims advanced by minorities in the United States, a few distinct trends emerge. First, the decision to seek asylum appears to be at least partially motivated by a genuine fear of state violence, or of the state’s unwillingness to offer meaningful protection. Canty and Sean had themselves experienced the force of the state through their interactions with police.<sup>296</sup> James argued that the persecution was unavoidable, even when directly serving the U.S. government as a member of the military.<sup>297</sup> In many of these cases, the citizen’s lack of confidence in the country’s ability to fulfill its basic obligations is palpable.

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289. Hellmann, *supra* note 283.

290. *Id.*

291. *Id.*

292. Pauline Park, Trump’s First Trans Refugee Seeking Asylum in Sweden, *Wash. Blade* (Nov. 23, 2018), <https://www.washingtonblade.com/2018/11/23/trumps-first-trans-refugee-seeking-asylum-in-sweden> [https://perma.cc/LS94-FSMV].

293. *Id.*

294. Danni Askini (@danniaskini), Twitter (Sept. 30, 2020, 5:02 PM), <https://twitter.com/danniaskini/status/1311411105500221440> (on file with the *Columbia Law Review*).

295. McIlroy, *supra* note 70. In another reported decision, a Mennonite family from the United States sought asylum in Canada, in part because of feared mistreatment on account of their religious beliefs. *Canada (Citizenship and Immigration) v. Hund*, 2009 FC 121, paras. 33–41 (Can. Que.).

296. See *supra* notes 261–265 and accompanying text.

297. See *Smith v. Canada (Citizenship and Immigration)*, 2009 FC 1194, para. 82 (Can. Ont.) (“[T]he heart of the applicant’s claim is that she is a lesbian member of the U.S. Army, who was harassed and threatened at the same base where a gay member of the Army was beaten to death, and who feels she could not rely on her superiors [for] protection.”); *supra* notes 273–282 and accompanying text.

These cases also illustrate that the decision to seek asylum is embedded within a complex web of considerations, including a genuine assessment of risk, weighing of other difficulties in the individual's life (including the possibility of facing legal proceedings), and consideration of other pathways for remaining outside of the United States. For many of the applicants, applying for asylum provided an off-ramp for the dignitary deprivations they experienced in the United States. Some of these applicants, including Canty and Askini, vociferously announced their pursuit of asylum via the media, presumably to garner public support and possibly to influence decisionmakers in the destination country.<sup>298</sup> In some instances, as reflected in the Cuban cases of the 1960s and 1970s, foreign authorities warmly embraced the asylum seekers and the accompanying opportunity to advance Cuba's own strategic interests.<sup>299</sup>

Ultimately, however, several of these U.S. citizen asylum applicants were unsuccessful in their pursuit of protection overseas, particularly in more recent times. Although adjudicators have been willing to acknowledge the existence of an inhospitable environment for certain minority groups in the United States, they are reluctant to characterize the rule of law in a way that would permit a grant of asylum. Such hesitance in the context of a bilateral relationship is not surprising, especially given the socially sensitive nature of the claims, and the likelihood that destination states themselves are struggling with complaints about discrimination and structural inequality.

#### F. *U.S. Citizen Children of Noncitizen Parents*

A final category of U.S. citizen asylum seekers consists of the minor children of noncitizens who are accompanying their parents in seeking humanitarian protection outside of the United States. When the noncitizen parent(s) pursue asylum claims, their U.S. citizen children are listed as part of the family unit seeking asylum, forcing adjudicators to grapple with a unique type of claim. While this phenomenon has likely arisen in various countries, it captured media attention during the Trump Administration, as noncitizens facing upheaval by U.S. government policies fled northward to Canada, with their U.S. citizen children in tow.

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298. See *supra* notes 261–268 and accompanying text (referencing three news articles discussing Canty's desire for asylum); *supra* notes 283–294 and accompanying text (noting three news articles, and Askini's own Twitter posts, discussing Askini's pursuit of asylum).

299. Latner, *supra* note 257, at 457 (positing that Cuba's asylum grants to African American radicals showed support for freedom struggles “while simultaneously advancing its project of anti-imperialism vis-à-vis Washington” and “deploy[ing] scathing critiques of Washington's claims to moral superiority in the arena of human rights”).

According to UNHCR data, in 2017, U.S. citizens lodged 2,097 asylum claims in Canada.<sup>300</sup> This total represented an enormous increase from the previous year, when Canada registered only 128 claims by U.S. citizens.<sup>301</sup> Canadian immigration authorities confirmed that the majority of these applicants were children born in the United States to noncitizen parents of Haitian or Nigerian nationality.<sup>302</sup> The Trump Administration's efforts to end Temporary Protected Status for Haiti appears to have contributed to the northward flow of migrants.<sup>303</sup> As one Haitian migrant who fled to Canada with his spouse and U.S. citizen daughter explained, "We left because President Trump said he wanted to deport people."<sup>304</sup> After 2017, the numbers gradually shifted downward: 1,311 U.S. citizen asylum applicants in 2018; 1,076 applicants in 2019; and 345 applicants in 2020.<sup>305</sup>

Reported decisions from Canada reveal that immigration authorities artfully dodged the possibility of labeling the United States as a site of persecution, while acknowledging the hardships these children and their families might face. Although Canadian officials were sympathetic to the importance of keeping families together, they insisted that the principle of family unity could not, standing alone, justify a grant of asylum. Yet the authorities often acknowledged the reality that most of these children would not actually be separated from their families—at least not by the Canadian government.

In a 2018 decision, for example, the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada considered the appeal of the denial of a claim for refugee protection by three U.S. citizen minors, whose Sudanese parents had received refugee protection in Canada.<sup>306</sup> The minors argued "that they would face a risk of cruel and unusual treatment were they to be removed to the United States and separated from their parents."<sup>307</sup> The RAD challenged the contention that the children would actually be removed to the United States, noting that the parents had an opportunity to include the children in an application for permanent residence in Canada.<sup>308</sup> More generally, the RAD declined to

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300. Refugee Data Finder: U.S. Asylum Applications in Canada, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=K88bZS> [<https://perma.cc/C6CQ-ARMQ>] [hereinafter U.S. Asylum Applications in Canada] (last visited Sept. 9, 2022).

301. *Id.*

302. Wright, Asylum Statistics, *supra* note 41.

303. *Id.*

304. Martin Patriquin, Canada Registers Sixfold Increase in US Citizens Seeking Asylum in 2017, *Guardian* (Nov. 14, 2018), <https://www.theguardian.com/world/2018/nov/14/us-citizens-seeking-asylum-canada-increases-immigration-refugees> [<https://perma.cc/7M2V-UNJC>] (internal quotation marks omitted).

305. U.S. Asylum Applications in Canada, *supra* note 300.

306. X (Re), 2018 CanLII 142993, para. 1 (Can. Ont.).

307. *Id.* at para. 2.

308. *Id.* at paras. 10–13.

incorporate into the refugee status determination process consideration of family unity, noting that the broad objective of family reunification “do[es] not allow [the Canadian government] to confer of refugee or protected person status.”<sup>309</sup> In a 2019 case involving a seventeen-year-old U.S. citizen whose parents (both of whom were Turkish citizens) were granted refugee status in Canada, the RAD similarly acknowledged that “[t]here are mechanisms in the Act that allow the preservation of the family unit and could allow the Appellant to avoid being removed to the US, but they are not within the purview of the RAD.”<sup>310</sup> The RAD once again emphasized that “the concept of family unity does not exist in Canadian refugee law.”<sup>311</sup>

In yet another case, in 2017, the RAD considered an appeal lodged by a young child, born in the United States in 2012 to parents who are citizens of Haiti.<sup>312</sup> His refugee protection claim in Canada was based on that of his mother.<sup>313</sup> The Refugee Protection Division (RPD) denied the mother’s claim based on credibility considerations; as for the U.S. citizen child, the arguments before the RPD had focused on separation from the mother as opposed to a specific fear vis à vis the United States.<sup>314</sup> Thus, his claims for refugee and protected person status were also denied.<sup>315</sup> On appeal, counsel for the minor child emphasized “the right to family unity and the best interests of the child” as bases for granting the appeal.<sup>316</sup> The appellant argued that Canada had breached its obligations under Article 3 of the Convention on the Rights of the Child by failing to consider the appellant’s best interests.<sup>317</sup> In response, the RAD noted as a “starting point for the analysis” that a “claimant cannot claim international protection if he can be protected in his country of nationality.”<sup>318</sup> The RPD noted that it does not have authority to make decisions “based on humanitarian and compassionate considerations” but rather must limit its inquiry to the likelihood of persecution, torture, or cruel and unusual treatment.<sup>319</sup> The RPD declined to affirmatively address whether Canada would be in breach of its international obligations, noting the low likelihood that the child would actually be returned to the United States.<sup>320</sup> The RPD, echoing similar decisions from that body, noted that family unity

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309. *Id.* at para. 7.

310. X (Re), 2019 CanLII 134803, para. 5 (Can. Que.).

311. *Id.* at para. 7.

312. X (Re), 2017 CanLII 142905, para. 1 (Can. Que.).

313. *Id.* at para. 2.

314. *Id.* at paras. 5–10.

315. *Id.* at para. 3.

316. *Id.* at para. 10 (internal quotation marks omitted).

317. *Id.* at para. 37.

318. *Id.* at para. 40.

319. *Id.* at para. 43.

320. *Id.* at para. 44.

alone is not a basis for granting refugee status and that no evidence was offered regarding the threat of persecution in the United States.<sup>321</sup>

Along these lines, RAD has declined to find in other cases that removal to the United States, should it actually occur, would result in mistreatment justifying protection under Canadian law. To support this finding, Canadian authorities have examined both the impact of separation and the treatment the children would experience as members of minority groups in the United States. Regarding the impact of separation, in the 2018 case involving the children of Sudanese descent, the RAD also found unavailing the suggestion that the children would face psychological harm if separated from the parents, noting that the studies cited involved U.S. citizen children whose parents were legally vulnerable in the United States, and thus in a position distinct from the parents in that case.<sup>322</sup> The tribunal also declined to find that the possibility of being placed in the child welfare system would amount to cruel and unusual punishment.<sup>323</sup> The RAD also engaged with arguments about the harm the children would experience as Muslims of African descent. Here, the RAD acknowledged that “[a]lthough recent years have seen some erosion of rights and freedoms in the United States, its citizens still benefit from democracy, a strong rule-of-law tradition, robust freedom of expressions and religion.”<sup>324</sup> In the Turkish case, the appellant had argued that he feared return to the United States, *inter alia*, “because of the anti-Muslim sentiment of the current administration.”<sup>325</sup> In dismissing the appeal, the RAD upheld the previous finding that the appellant “would benefit from adequate state protection” in the United States.<sup>326</sup>

In some instances, Canadian authorities have simply avoided any discussion of the merits of the claim advanced by the U.S. citizen child. In a case considered by the RAD in 2019, a family of five appealed the denial of refugee protection to the RAD.<sup>327</sup> The family consisted of: two parents with Haitian citizenship, their twenty-one-year-old daughter with Haitian citizenship, and two minor children—one a Haitian citizen and the other

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321. *Id.* at paras. 49, 52.

322. *X (Re)*, 2018 CanLII 142993, para. 15 (Can. Ont.).

323. See *id.* at para. 18. In a similar vein, the IRB determined in a 2008 case that the possibility that a U.S. citizen minor might become a ward of the state was insufficient to justify refugee protection. *X (Re)*, 2008 CanLII 88057 (Can. Ont.).

324. *X (Re)*, 2018 CanLII 142993, at para. 16.

325. *X (Re)*, 2019 CanLII 134803, para. 1 (Can. Que.). Note that the very first sentence of the decision states that the appellant is a “citizen of Turkey” and from the context of the decision, including a later reference to nationalities (plural) in paragraph 9, it appears he may be a dual citizen of Turkey and the United States. *Id.* at paras. 1, 9.

326. *Id.* at para. 6. Along these lines, in a 2010 decision involving the U.S. citizen children of nationals of Kosovo, the IRB found that “there is nothing in evidence that would dispute the assumption that the United States is capable of protecting its own citizens, especially its children.” *X (Re)*, 2010 CanLII 98073, para. 2 (Can. Ont.).

327. *X (Re)*, 2019 CanLII 132327, paras. 1, 5 (Can. Ont.).



a U.S. citizen.<sup>328</sup> The RAD ultimately dismissed the family's appeal and in its decision it detailed why the denial of refugee protection was justified.<sup>329</sup> With respect to the U.S. citizen child, the RAD simply noted that since the parents "are neither Convention Refugees nor persons in need of protection, the minor U.S. citizen Appellant's claim must also fail."<sup>330</sup>

This sliver of cases from Canada highlights the complexity of claims advanced by mixed-status families, along with the delicate approach foreign authorities have taken toward characterizing the rule of law in the United States. Adjudicators in Canada deftly avoided any direct critiques of the United States, occasionally noting some wearing of the social fabric, while generally emphasizing the availability of state protection. As a tactic to avoid directly confronting the question, adjudicators occasionally noted the likelihood that the minors would be allowed to remain in Canada or defaulted to citing Canadian precedent that limited their ability to consider the principle of family unity in this context. Perhaps most intriguingly, however, the cases raise questions about the relative impotency of U.S. citizenship and the value ascribed to it by the families seeking protection in Canada. While status in the United States remains a highly valued commodity worldwide, it was insufficient to keep the family safely anchored within the United States and was worth sacrificing in search of stability elsewhere.

### III. OBSERVATIONS AND AVENUES FOR FUTURE RESEARCH

This initial survey of asylum-seeking by U.S. citizens reveals the variegated nature of the claims, including the highly diverse circumstances that lead to flight, and the complex, multilayered environments in which the claims are presented and adjudicated. Notwithstanding the diverse taxonomy of claims, certain themes consistently rise to the surface, as do opportunities for empirical exploration to better understand this phenomenon. What follows is a preliminary set of observations, situated in the relevant literature, and designed to provide a roadmap for future work. As described below, numerous dimensions of this trend merit further exploration, including the geopolitical context in which the asylum claims are presented and the implications of these cases for bilateral government relations; the possible influence of other independent variables on the outcomes of asylum cases lodged by U.S. citizens; the strategic choices made by the asylum seekers regarding where to file and how to navigate the process; the use, by some countries, of distinct legal categories for U.S. citizens seeking protection; and the implications of these cases for our understanding of how U.S. citizenship is perceived and valued by the asylum seekers and their families.

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328. *Id.* at para. 1.

329. *Id.* at paras. 11–29.

330. *Id.* at para. 30.

A. *Geopolitical Context and Bilateral Relations*

In many of the cases described above, geopolitical factors or concerns about bilateral relations have shaped the trajectory of the cases and decisions. Some destination countries—including Russia and Cuba—may view these cases as prime opportunities to embarrass the United States. Others, as encapsulated by the Costa Rican government’s handling of the Tomayko case, might use the case as a vehicle to publicly assert their country’s commitment to human rights principles or shame the United States.<sup>331</sup> In Canada, these cases feed into a long-standing national identity, which is defined, in part, by distinguishing itself from the United States via a more steadfast adherence to universal rights and humanitarianism.<sup>332</sup> Claims of U.S. citizens have gained some traction in these contexts.

Marc Rosenblum and Idean Salehyan have examined this precise set of foreign relations considerations in the opposite scenario: the decisions made by the U.S. government to grant asylum to foreign nationals.<sup>333</sup> Specifically, Rosenblum and Salehyan have explored the relationship between humanitarian considerations and strategic interests, noting that asylum grants “can strain diplomatic relations with countries of origin.”<sup>334</sup> Using an empirical analysis, the authors concluded that instrumental considerations continued to significantly influence asylum decisionmaking in the United States, notwithstanding predictions about the ascendance of humanitarian norms.<sup>335</sup>

Michael Teitelbaum has similarly described how foreign policy decisions have shaped migration flows and, conversely, how states have used the mass migration of people as foreign policy tools.<sup>336</sup> Asylum and refugee policies, in particular, can be used to advance national ideological interests, or to “embarrass and discredit adversary nations.”<sup>337</sup> Along these lines, Myron Weiner has written about how refugee decisions can be used to condemn foreign powers, and even to foment regime change in the country of origin.<sup>338</sup> Weiner also acknowledged, however, that grants of refugee status can create an adversarial relationship between states,

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331. See *supra* notes 233–245 and accompanying text.

332. See David Scott FitzGerald, *Refugee Beyond Reach: How Rich Democracies Repel Asylum Seekers* 127 (2019); Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* 130 (2006).

333. Marc R. Rosenblum & Idean Salehyan, *Norms and Interests in US Asylum Enforcement*, 41 *J. Peace Rsch.* 677, 677–78 (2004).

334. *Id.* at 678.

335. *Id.* at 693.

336. Michael S. Teitelbaum, *Immigration, Refugees, and Foreign Policy*, 38 *Int’l Org.* 429, 433–41 (1984).

337. *Id.* at 439, 445.

338. Myron Weiner, *Security, Stability, and International Migration*, 17 *Int’l Sec.* 91, 106–07 (1992).

whether intended or not.<sup>339</sup> Building upon this literature, Nora Hamilton and Norma Stoltz Chinchilla have described, in the context of Central American migration, how a receiving country's involvement in activities contributing to outflows from the sending country may affect their handling of refugee claimants from that country.<sup>340</sup> And naturally, a sending country may simply object to a grant of asylum because it does not want the receiving country to legitimize dissidents or protect fugitives.<sup>341</sup>

Domestic politics necessarily interact with these international relations considerations. As Salehyan and Rosenblum explored in subsequent work, the policies and preferences of the executive and legislative branches, along with public opinion, are likely to shape asylum decisionmaking.<sup>342</sup> The authors' empirical analysis of the ecosystem of asylum adjudication in the United States found that public and media attention contributed to a greater focus on humanitarian considerations, while the influence of the legislative branch was not uniform.<sup>343</sup> Mary Crock and Daniel Ghezelbash have similarly observed that asylum decisionmaking—specifically, asylum denials in the Australian context—is designed to garner domestic political support.<sup>344</sup> All of these theories are ripe for deeper analysis, exploration, and refinement in the context of U.S. citizen asylum seekers.

#### B. *Other Independent Variables Informing Asylum Outcomes*

In addition to analyzing the foreign relations dimensions of decisionmaking, various other independent variables might explain asylum outcomes, including the political leanings of the destination country, economic conditions in the country at the time the case is decided, general perceptions of the United States in that country, and other, more granular factors relating to the adjudicator and the adjudicative process. The existing scholarship on each of these variables could be extended to the study of asylum claims lodged by U.S. citizens.

The cases described above suggest that the nature of the government in the destination country—whether it is more progressive or conservative—is likely to shape the handling of claims filed by U.S.

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339. *Id.* at 107.

340. See Nora Hamilton & Norma Stoltz Chinchilla, *Central American Migration: A Framework for Analysis*, 26 *Latin Am. Rsch. Rev.* 75, 78, 105 (1991).

341. See, e.g., *Costa Rica Grants Refugee Status to Chere Lyn Tomayko*, *supra* note 241 (publicizing the U.S. government's concerns about the grant of refugee status to a fugitive and the resulting stoppage of the extradition process).

342. Idean Salehyan & Marc R. Rosenblum, *International Relations, Domestic Politics, and Asylum Admissions in the United States*, 61 *Pol. Rsch. Q.* 104, 107–08 (2008).

343. *Id.* at 115.

344. Mary Crock & Daniel Ghezelbash, *Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals*, 19 *Griffith L. Rev.* 238, 241, 274 (2010).

citizens. The treatment of war resisters in Canada perfectly exemplifies this trend, with warmer reception during the progressive Trudeau government and harsher treatment under the conservative Harper government.<sup>345</sup> Meredith Winn uncovered a similar tendency in her analysis of asylum decisions in Europe, finding that as far-right parties become more successful, the asylum recognition rate decreases.<sup>346</sup> Frøy Gudbrandsen reached a comparable conclusion in studying Norway, finding that refugee admissions are significantly lower during conservative rule, controlling for other variables.<sup>347</sup>

Other factors worth exploring include the nature of the political party in power in the United States (Republican versus Democrat) and measures of the respect for civil and political rights in a country. As Linda Camp Keith and Jennifer Holmes found in their empirical study of U.S. asylum seekers, the lack of adherence to core rights in the country of origin, as measured by Freedom House, was associated with a greater likelihood of receiving asylum.<sup>348</sup> Moreover, even perceptions about dynamics in the origin state—however stilted or stereotyped—can affect how asylum claims are received. As Susan Akram has explored in her work, neo-Orientalist framing of the Muslim world influences not only how Islamic countries are perceived but also ultimately undermines the success of asylum claims made by persons from those countries.<sup>349</sup> In the same way, given the oversized role that the United States plays in the global public imagination, nuance-free portrayals, whether favorable or critical, are likely to shape the outcome of claims filed by U.S. citizens.

Economic conditions at the time in the country of destination may also affect approval rates, as migration policy is often intertwined with domestic economic and labor market imperatives. In a detailed study of asylum decisionmaking in Germany, Gerard Schneider and his research team found that socio-economic factors shaped outcomes at the subnational level, with prosperous regions deporting fewer asylum seekers.<sup>350</sup> This conclusion aligns with earlier research finding that higher GDP levels are typically

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345. See *supra* section II.A.2.

346. Meredith Winn, *The Far-Right and Asylum Outcomes: Assessing the Impact of Far-Right Politics on Asylum Decisions in Europe*, 22 *Eur. Union Pol.* 70, 87 (2021).

347. Frøy Gudbrandsen, *Partisan Influence on Immigration: The Case of Norway*, 33 *Scandinavian Pol. Stud.* 248, 264 (2010).

348. Linda Camp Keith & Jennifer S. Holmes, *A Rare Examination of Typically Unobservable Factors in US Asylum Decisions*, 22 *J. Refugee Stud.* 224, 239 (2009) (discussing conditions in the country of origin, such as military rule or a lack of civil rights that make applicants more likely to be granted asylum).

349. See Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 *Int'l J. Refugee L.* 7, 10–39 (2000) (examining the damage done to refugee rights by neo-Orientalist stereotypes of the Muslim world).

350. Gerald Schneider, Nadine Segadlo & Miriam Leue, *Forty-Eight Shades of Germany: Positive and Negative Discrimination in Federal Asylum Decision Making*, 29 *German Pol.* 564, 575 (2020).

associated with higher recognition rates, although concerns about unemployment may lead to decreased rates in certain countries.<sup>351</sup>

When granular data is available, researchers could examine any number of additional variables, including identity characteristics of the applicant or decisionmaker (such as gender), the time of day of the hearing, and even the weather on a given day.<sup>352</sup> Several scholars have chosen to focus on the role of gender in asylum adjudication, noting that the gender of both the judge and the applicant, and the gender distribution among cases generally, can affect outcomes.<sup>353</sup> In their landmark study of asylum adjudication disparities across the United States, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag similarly examined the effect of a judge's gender on asylum outcomes, while also analyzing the impact of the adjudicator's prior work experience and the availability of legal representation.<sup>354</sup>

### C. *Strategic Use of the Asylum Process by Applicants*

Given the potency of a U.S. passport, and the relative ease with which U.S. citizens can enter other countries, the decision to seek asylum is often an intentional and highly strategic act. Consistent with the considerations outlined just above, U.S. citizen asylum applicants are often deliberate about the chosen country of asylum, weighing the likelihood that a government or its people might be sympathetic to their claim. Many applicants use the asylum process—and the media attracted to the novelty of a U.S. citizen asylum applicant—to emphasize their grievances toward the United States, underscore their fear of return, and to make their case in the court of public opinion.<sup>355</sup>

As with any other migration decision, the flight of U.S. asylum seekers should be understood to follow an analysis of relative costs, where the risks of remaining in the United States are weighed against the anticipated hardships of the migration process.<sup>356</sup> Once an asylum seeker has made

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351. Patricia C. Rodda, *Decision-Making Processes and Asylum Claims in Europe: An Empirical Analysis of Refugee Characteristics and Asylum Application Outcomes*, 23 *Decyzje* 23, 29 (2015).

352. See generally Daniel L. Chen & Jess Eigel, *Can Machine Learning Help Predict the Outcome of Asylum Adjudications?*, 16th Int'l Conf. on A.I. & L. 237 (2017) (offering a predictive model to determine success rates for asylum seekers based on these variables).

353. See, e.g., Alejandro Ecker, Laurenz Ennsner-Jedenastik & Martin Haselmayer, *Gender Bias in Asylum Adjudications: Evidence for Leniency Toward Token Women*, 82 *Sex Roles* 117, 124 (2020).

354. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.* 295, 342–49 (2007).

355. See, e.g., *supra* notes 186–187 and accompanying text.

356. See Eric Neumayer, *Bogus Refugees? The Determinants of Asylum Migration to Western Europe*, 49 *Int'l Stud. Q.* 389, 391 (2005) (“An individual weighs the cost of staying in his/her country of origin versus the costs of migrating to the country of destination. If

the decision to depart, various factors shape their choice in destination. As Eric Neumayer has explored in his research, factors such as geographic proximity, language ties, and the presence of asylum seekers from the same country are strong determinants.<sup>357</sup>

Furthermore, as Vaughan Robinson and Jeremy Segrott have detailed, asylum seekers' decisions are shaped, at least in part, by the images they have received regarding the country of destination, including its political climate and the nature of the people.<sup>358</sup> These perceptions operate in tandem with other factors—including the presence of family or friends in the destination country and language considerations—to guide asylum seekers to particular nations.<sup>359</sup> Even within the destination country, applicants may travel to particular localities if they believe they will get a more favorable result on their claim.<sup>360</sup>

As these cases reveal, the U.S. citizen asylum seekers cannot be regarded as passive participants in a legal process. Rather, their flight from the United States and their experiences overseas are defined by strategic, often difficult, decisions at every turn. A deeper examination of agentic action by these asylum seekers will undoubtedly enrich understanding of this phenomenon by highlighting a dialectic between individual choices and the broader forces at play in a given case.

#### D. *Reliance on Other Types of Protection*

A close analysis of UNCHR data reveals that while relatively few U.S. citizens are granted refugee status, a significant number may be funneled into other categories of protection under domestic law that are less politically charged than the category of “refugee” or “asylee.” The United States, itself, in recent decades has placed hundreds of thousands of individuals in liminal but long-term statuses because the conferral of full membership rights is not politically feasible. Cecilia Menjivar has explored how Central American migrants in the United States have navigated long-term uncertainties in their legal statuses, including their placement in temporary protection categories that require constant renewals and fall

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the costs of staying exceed the cost of migrating, then the individual . . . will decide to migrate and file an application for asylum.”).

357. Eric Neumayer, *Asylum Destination Choice: What Makes Some West European Countries More Attractive Than Others?*, 5 *Eur. Union Pol.* 155, 173–74 (2004).

358. Vaughan Robinson & Jeremy Segrott, *Home Office Research Study 243: Understanding the Decision-Making of Asylum Seekers* 27–37, 62–63 (2002).

359. *Id.* (noting that respondents from certain countries were more interested in the United Kingdom because of linguistic and colonial ties).

360. Andy J. Rottman, Christopher J. Fariss & Steven C. Poe, *The Path to Asylum in the US and the Determinants for Who Gets in and Why*, 43 *Int'l Migration Rev.* 3, 29 (2009) (“Persons of differing national origins believe their chances are greater in certain locations around the country and as a result have been known to travel to a particular place to file their claims . . .”).

short of formal refugee protection.<sup>361</sup> Benjamin Roth has explored similar themes vis-à-vis the Deferred Action for Childhood Arrivals (DACA) program, demonstrating through qualitative analysis how DACA beneficiaries are placed in a “double bind” by receiving a valuable benefit that is also fragile and impermanent.<sup>362</sup>

In some instances, the reliance on these other categories stems not from a calculated political decision but from the narrowness of the refugee definition and its inability to capture many legitimate reasons for flight. As Elizabeth Keyes has explored, the strictures of the Refugee Convention have presented challenges for the United States and other countries as they receive varying types of contemporary migrant flows that the Convention’s mid-twentieth-century framers simply did not contemplate.<sup>363</sup> The threat of displacement caused by nonstate actors and environmental forces ranks among the most vexing challenges for the global refugee law regime.

The phenomena described above are certainly not unique to the United States, as scholars across the globe have described and critiqued the use of temporary protection measures and the inadequacy of the refugee definition.<sup>364</sup> It should come as no surprise, therefore, that other countries, such as Canada and Germany, appear to be shuttling U.S. citizen applicants into other categories, whether for domestic political purposes, failure to comport with legal definitions, or simply to avoid a political fallout with the United States. By identifying distinct pathways to permanent residence or resorting to other forms of humanitarian protection, adjudicators render somewhat invisible their acquiescence with the applicant’s request for protection.

The case law from Canada, in particular, underscores how adjudicators have struck a delicate balance by acknowledging the potential hardships faced by the applicants, studiously avoiding a strident critique of the United States, and justifying their decisions by deploying legal precedent. This trio of approaches allows adjudicators to sidestep the messy political and moral dimensions of these claims. Further exploration of these dynamics, through a systematic empirical analysis of decisions or via interviews with government officials, would undoubtedly generate more insights into the decisionmaking process. Such analysis would also permit further theorizing into how adjudicators handle refugee claims from the United States and other countries with substantial political and economic power.

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361. Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 *Am. J. Soc.* 999, 1000–01 (2006).

362. Benjamin J. Roth, *The Double Bind of DACA: Exploring the Legal Violence of Liminal Status for Undocumented Youth*, 42 *Ethnic & Racial Stud.* 2548, 2549–50 (2019).

363. See Elizabeth Keyes, *Unconventional Refugees*, 67 *Am. U. L. Rev.* 89, 92, 94 (2017).

364. See, e.g., Liliana Lyra Jubilut, Camila Sombra Muiños de Andrade & André de Lima Madureira, *Humanitarian Visas: Building on Brazil’s Experience*, 53 *Forced Migration Rev.* 76, 78 (2016) (describing the challenge inherent in Brazil’s use of humanitarian visas).

E. *Implications for U.S. Citizenship*

This preliminary exploration of U.S. citizen asylum seekers suggests at least two interesting trends with respect to U.S. citizenship. First, all of these applicants have determined that their reasons for flight outweigh the bundle of rights, benefits, and protections that they receive as U.S. citizens. For political dissidents or persons fleeing criminal prosecutions, the decision to seek asylum overseas might be perceived, by some, as a convenient escape for someone evading accountability. Yet the United States itself routinely recognizes asylum applicants who themselves are political dissidents and those who have been subject to targeted or pretextual prosecutions.<sup>365</sup> This is not to suggest that the prosecutions of U.S. citizen asylum seekers necessarily lack integrity, or are equivalent to the retaliatory actions of a more repressive regime. Rather, at a minimum, scholars from the developed world must be open to the possibility that some U.S. citizens will encounter treatment that, had it occurred elsewhere, would create a colorable claim for asylum in the United States.

Moreover, other U.S. citizen asylum applicants, including racial and sexual minorities, may simply feel that the state can no longer protect them, or indeed, is complicit in harm they are experiencing. Scholars have long written about the paradoxes inherent in U.S. citizenship, including the superficial rhetoric of equality among citizens, belied by the reality of structural subordination.<sup>366</sup> African Americans, Asian Americans, Latinos, other racial minorities, women, intellectually disabled persons, and people convicted of a felony have all experienced (and continue to experience) forms of second-class citizenship in the United States.<sup>367</sup> Often, the

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365. See, e.g., Michael English, *Distinguishing True Persecution From Legitimate Prosecution in American Asylum Law*, 60 Okla. L. Rev. 109, 129–55 (2007) (describing circumstances under which prosecution by government authorities may be treated as persecution).

366. See, e.g., Patricia Hill Collins, *Like One of the Family: Race, Ethnicity, and the Paradox of US National Identity*, 24 *Ethnic & Racial Stud.* 3, 3 (2001) (describing the dual treatment of African American women as both like a family member and a second-class citizen).

367. See, e.g., Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 *Critical Socio.* 447, 468 (2006) (noting a pattern “of immigration law-enforcement practices” that “place Mexican Americans at risk before the law and designate them as second-class citizens with inferior rights”); Irene Scharf, *Second Class Citizenship: The Plight of Naturalized Special Immigrant Juveniles*, 40 *Cardozo L. Rev.* 579, 605–29 (2018) (describing how racial minorities, felons, women, and the intellectually disabled have been denied full and equal citizenship rights in the United States); Takeyuki Tsuda, *‘I’m American, not Japanese!’: The Struggle for Racial Citizenship Among Later-Generation Japanese Americans*, 37 *Ethnic & Racial Stud.* 405, 406–07 (2014).



experience of second-class citizenship is felt most acutely in interactions with law enforcement and in the criminal legal system.<sup>368</sup>

This scholarly project raises an important set of questions vis-à-vis second-class citizenship in the United States: Can it reach a tipping point, such that the hardships associated with second-class status are no longer bearable? And when one's experience reaches that point, is flight from the United States a reasonably predictable outcome? The literature already suggests that treatment as a second-class citizen, including microaggressions and exoticization, can lead to negative mental health outcomes.<sup>369</sup> A study among African American men revealed the association between microaggressions (including assumptions of criminality) and mental health strain, leading to effects such as depressive symptoms.<sup>370</sup> Unsurprisingly, the highly publicized acts of anti-Black violence, including the killings of George Floyd and Michael Brown, have caused mental distress among Black Americans, resulting in a higher incidence of mental health days.<sup>371</sup> These studies aptly describe the difficulties that minority groups endure in the United States, but the existing literature does not explore when conditions reach a point such that flight from the country is contemplated. The case of U.S. asylum seekers provides a unique opportunity, therefore, to explore some of the extreme sequelae of second-class citizenship.

Another dimension of U.S. citizenship also merits further inquiry. Specifically, the large number of U.S. citizen children, who are themselves asylum applicants alongside their noncitizen parents, raises intriguing questions about the relational dimensions of U.S. citizenship. Leisy Abrego has explored how mixed-status families navigate complicated intra-familial dynamics when citizenship offers privileges to U.S. born children, leading those U.S. citizens to take on more responsibility and even to resist some of the privileges associated with U.S. citizenship out of solidarity with fellow

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368. See generally Amy Lerman & Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (2014) (describing how carceral treatment of second-class U.S. citizens calls into question American democratic ideals).

369. Kevin L. Nadal, Katie E. Griffin, Yinglee Wong, Sahran Hamit & Morgan Rasmus, *The Impact of Racial Microaggressions on Mental Health: Counseling Implications for Clients of Color*, 92 *J. Counseling & Dev.* 57, 62 (2014) ("Individuals who perceive and experience racial microaggressions in their lives are likely to exhibit negative mental health symptoms, such as depression, anxiety, negative affect (or negative view of the world), and lack of behavioral control.").

370. Lucas Torres, Mark W. Driscoll & Anthony L. Burrow, *Racial Microaggressions and Psychological Functioning Among Highly Achieving African-Americans: A Mixed-Methods Approach*, 29 *J. Soc. & Clinical Psych.* 1074, 1092-95 (2010).

371. David S. Curtis, Tessa Washburn, Hedwig Lee, Ken R. Smith, Jaewhan Kim, Connor D. Martz, Michael R. Kramer & David H. Chae, *Highly Public Anti-Black Violence Is Associated With Poor Mental Health Days for Black Americans*, 118 *Proc. Nat'l Acad. Sci. U.S.A.* 1, 3 (2021).

family members.<sup>372</sup> In some instances, U.S. citizens in mixed-status families may feel they are undeserving of the legal rights afforded to them.<sup>373</sup> Along these lines, Mary Romero has documented how U.S. citizen children, through their own experiences with law enforcement and by witnessing the treatment of their noncitizen relatives, come to understand that their own citizenship may be called into question and that authorities may treat them unfairly.<sup>374</sup> How these experiences shape the U.S. citizens' sense of the "worth" of their U.S. citizenship, and also the mixed-status families' decisions to seek asylum elsewhere, merit further inquiry.

While these individuals will very likely retain their U.S. citizenship, the denial of refugee status overseas (as has been the recent trend in these cases) can leave them in a unique, and perhaps precarious, legal situation in the country of asylum. Moreover, this phenomenon is creating a class of U.S. citizens who may be "lost," whether temporarily or on a permanent basis, as a result of asylum processes that their parents are pursuing. This may simply be an unavoidable consequence in a global environment where the paradox of rigid border control and pluralistic citizenship is the norm. Yet, the U.S. citizens who find themselves overseas are likely to remain in liminal status in both their country of residence and country of birth. Should they return to the United States at some point, as Deborah Boehm eloquently observed, their "membership and place in the nation will likely be compromised, far from what it could have been."<sup>375</sup> While scholars like Boehm have begun to explore this dynamic in the context of the families of noncitizen deportees, the inquiry could be extended to families of asylum seekers that include U.S. citizens.

#### CONCLUSION

For some, stories of U.S. citizens seeking asylum are a source of amusement—a curious news event, likely involving someone looking to evade responsibility or garner media attention. Casual dismissal of these claims, however, precludes our understanding of a phenomenon that could possibly grow in the coming years. As this preliminary exploration reveals, U.S. citizens are applying for asylum in significant numbers and are driven from the country by a complex set of forces, often mediated by their own strategic decisionmaking. The reception of these claims in countries of destination is similarly nuanced and implicates questions of

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372. Leisy J. Abrego, *Relational Legal Consciousness of U.S. Citizenship: Privilege, Responsibility, Guilt and Love in Latino Mixed-Status Families*, 53 *Law & Soc'y Rev.* 641, 657–63 (2019).

373. *Id.* at 652.

374. Mary Romero, *The Inclusion of Citizenship Status in Intersectionality: What Immigration Raids Tells Us About Mixed-Status Families, the State, and Assimilation*, 34 *Int'l J. Socio. & Fam.* 131, 140–47 (2008).

375. Deborah A. Boehm, *Returned: Going and Coming in an Age of Deportation* 135 (2016).

foreign relations along with many other variables. U.S. citizenship is perhaps the most coveted status in the world, but its limitations and fragility—as evidenced by flight from the land of the free—merit careful and ongoing attention.

