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"Imagine There's No Country": Statelessness as Persecution in Light of *Haile II*

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NOTE

"Imagine There's No Country": Statelessness as Persecution in Light of *Haile II*

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INTRODUCTION

Imagine there's no countries

Nothing to kill or die for[1]

The twentieth century ended not with John Lennon's dream of a stateless utopia, but with the division or disintegration of many multinational nation-states. The geopolitical chaos of the last thirty years left many ethnic, religious, and racial minorities stateless, either by law (*de jure* statelessness) or by practice (*de facto* statelessness).[2] When compared to physical forms of persecution like rape and torture, statelessness by denationalization[3] pales. Yet, statelessness might have the greatest legal consequences of any form of persecution. Statelessness deprives the individual of the basic trappings of the civilized world, often including the rights to marry, own land, and inherit

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1. JOHN LENNON, IMAGINE (Apple Records 1971).

2. U.N. High Comm'r for Refugees, Div. of Int'l Prot., *UNHCR and* De Facto *Statelessness*, 5-7, 27, LPPR/2010/01 (Apr. 2010) (by Hugh Massey) [hereinafter Massey]; *see* discussion *infra* Part I (discussing *de jure* and *de facto* statelessness).

3. Denationalization is the process whereby a country deprives a person of her nationality. This differs from denaturalization, which is the process whereby a country removes the citizenship of a naturalized citizen. Denationalization includes, by definition, both denaturalization and stripping natural born citizens of their citizenship. For the sake of consistency, I will use the term "denationalize" or "denationalization" throughout this Note. BLACK'S LAW DICTIONARY 499 (9th ed. 2009).

property.[4] In a case that focused on the legality of denationalizing a draft-dodger who fled to Mexico to avoid military service, the Supreme Court characterized American citizenship as "one of the most valuable rights in the world today."[5] Chief Justice Earl Warren said in *Perez v. Brownell* that "[c]itizenship *is* man's basic right for it is nothing less than the right to have rights."[6] Despite Chief Justice Warren's passionate dissent in *Perez*, American courts have been loath to build on his view that denationalization is persecution *per se*.[7]

Statelessness is anathema to the American ethos. Within the context of the American civic-republicanism, "citizenship" connotes a relationship of mutual obligation and benefit between the individual and the political community.[8] It represents the relationship between the state and its citizens, and the obligation of each side. Specifically it represents the obligation of the state to work on behalf of, and to protect the interests of its citizenry.[9] In contrast to the protections afforded to citizens, the stateless refugee finds herself without these same legal protections and completely reliant upon the whims of her host country to protect the few rights that state might grant her.[10]

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4. Brad K. Blitz & Maureen Lynch, *Statelessness and the Deprivation of Nationality*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 1-2 (Brad K. Blitz & Maureen Lynch eds., 2011); *see* Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT'L & COMP. L. 75, 93-95 (2011).

5. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 147, 160 (1963) (quoting PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHEN WE SHALL WELCOME 235 (1953)).

6. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

7. *See* Belov v. U.S. Attorney Gen., 397 F. App'x 530, 531-32 (11th Cir. 2010); Fedosseeva v. Gonzales, 492 F.3d 840, 845 (7th Cir. 2007); Paripovic v. Gonzales, 418 F.3d 240, 242, 244 (3d Cir. 2005).

8. *See* J.M. Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 CAL. W.L. REV. 263, 275 (2003); BLACK'S LAW DICTIONARY 278 (9th ed. 2009).

9. *See* Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232, 234-35 (1995); Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT'L L. 1141, 1150 (1998); Spectar, *supra* note 8, at 271-72.

10. *See* Trop v. Dulles, 356 U.S. 86, 101-02 (1958); Batchelor, *supra* note 9, at 234-35; Blackman, *supra* note 9, at 1152.

Because "nationality is the prerequisite for the realization of other fundamental rights,"[11] and because "[e]very man has a right to live somewhere on earth,"[12] the international community has devoted much time and energy to defining and protecting the rights of the stateless.[13] The United Nations provides a concise definition of "stateless people," which "means a person who is not considered as a national by any State under the operation of its law."[14] At first blush this may not seem an important category. Indeed, some post-national theorists—and singers like John Lennon—might look forward to a day devoid of states.[15] This blind optimism belies the difficulties faced by the stateless. One commentator described the difficulties the stateless face in this way:

> Stateless persons may be unable to go to school or university, work legally, own property, get married or travel. They may find it difficult to enter hospital, impossible to open a bank account and have no chance of receiving a pension. If someone robs them or rapes them, they may find they cannot lodge a complaint because legally they do not exist, and the police require proof that they do before they can open an investigation.[16]

In an earlier generation, Hannah Arendt put it this way: "[T]he moment human beings lacked their own

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11. Blackman, *supra* note 9, at 1148.

12. CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 248 (Kraus Reprint Co. 1971) (1934) (quoting Thomas Jefferson).

13. *See, e.g.*, Erwin Loewenfeld, *Status of Stateless Persons*, *in* 27 TRANSACTIONS OF THE GROTIUS SOCIETY 59, 60 (1962) (discussing the issues of statelessness in international law up to and including the German Nuremberg Law of Nationality); Caroline Sawyer, *Stateless in Europe: Legal Aspects of* De Jure *and* De Facto *Statelessness in the European Union*, *in* STATELESSNESS IN THE EUROPEAN UNION: DISPLACED, UNDOCUMENTED, UNWANTED 69, 74-81 (Caroline Sawyer & Brad K. Blitz eds., 2011).

14. Convention Relating to the Status of Stateless Persons art. 1, para. 1, Sept. 28, 1954 [hereinafter The 1954 Convention].

15. Linda K. Kerber, *The Stateless as the Citizen's Other: A View from the United States*, 112 AM. HIST. REV. 1, 7 (2007).

16. Laura van Waas, *Nationality and Rights*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 36-37 (Brad K. Blitz & Maureen Lynch eds., 2011). Milbrandt describes how the statelessness of women in Thailand is one of the leading causes of sexual exploitation. Milbrandt, *supra* note 4, at 77-80.

government . . . no authority was left to protect them and no institution was willing to guarantee them . . . [what was] supposedly inalienable."[17]

Understandably, scholars, diplomats, and judges have long considered statelessness undesirable;[18] however, modern international law still grants states the right to set citizenship rules, and to revoke citizenship.[19] This power allows states to divest their citizens of citizenship, or "denationalize" them, despite the work of the international community to eliminate statelessness.[20] In 1930, the issue of statelessness was one of the first considered during the First Conference on the Codification of International Law at the Hague.[21] The Universal Declaration of Human Rights took up the cause with the statement that "everyone has the right to a nationality."[22] The United Nations created the office of the United Nations High Commissioner for Refugees (UNHCR) in December 1950 to help protect the rights of refugees who found themselves in a state of *de facto* statelessness.[23] Under the auspices of the UNHCR, two conventions were concluded to reduce statelessness—the United States signed neither.[24] The United States felt that,

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17. Kerber, *supra* note 15, at 15 (quoting Hannah Arendt) (internal quotation marks omitted).

18. In *Trop v. Dulles*, Chief Justice Warren's plurality decision described denationalization as "a form of punishment more primitive than torture." 356 U.S. 86, 101 (1958).

19. U.N. High Comm'r for Refugees, Div. of Int'l Prot., *UNHCR Action to Address Statelessness: A Strategy Note*, 22 INT'L J. REFUGEE L. 297, 299 (2010) [hereinafter UNHCR Int'l Prot.] (explaining the international legal framework regarding the loss and acquisition of nationality).

20. Batchelor, *supra* note 9, at 235.

21. *Id*; *see, e.g.*, Loewenfeld, *supra* note 13, at 63 (discussing the Hague Convention and the League of Nations's efforts to address statelessness).

22. COMMITTEE OF EXPERTS ON NATIONALITY, THE AVOIDANCE AND REDUCTION OF STATELESSNESS: RECOMMENDATION NO. R (99) 18 AND EXPLANATORY MEMORANDUM 10 (2000) (making recommendations on how E.U. member-states can reduce statelessness).

23. *About Us*, UNHCR, http://www.unhcr.org/pages/49c3646c2.html (last visited Feb. 4, 2012).

24. *See, e.g.*, The 1954 Convention, *supra* note 14 at art. 1, para. 1 (defining statelessness as "a person who is not considered as a national by any State under the operation of its law," and outlining general obligations of signatories

at least in the case of the 1954 Convention, the Convention's obligations to not deport the stateless would encourage the stateless to come to the United States with the knowledge that the United States could not deport them.[25]

The conflict between the goals of the international system and the nation-state's right to define its own rules for citizenship finds expression in the American refugee system. The United States refugee system is designed to protect those who have suffered persecution in their native countries, or, if stateless, in the country of their last habitual residence.[26] Despite Chief Justice Warren's warning that the stateless suffered from "a form of punishment more primitive than torture,"[27] historically, United States courts have not felt that the stateless suffered persecution worthy of receiving asylum.[28] Unless the asylum applicant can show persecution fitting one of the

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to these stateless individuals); Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175 [hereinafter The 1961 Convention] (requiring signatories to grant citizenship rights to children born in their territories or born to their nationals when in another country). For an in-depth discussion of the 1954 Convention, see Paul Weis, *The Convention Relating to the Status of Stateless Persons*, 10 INT'L & COMP. L.Q. 255 (1961). Weis also provided an in-depth discussion of the 1961 Convention. *See* Paul Weis, *The United Nations Convention on the Reduction of Statelessness*, 1961, 11 INT'L & COMP. L.Q. 1073, 1080-81 (1962) [hereinafter Weis, 1961 Convention].

25. Kerber, *supra* note 15, at 9.

26. 8 U.S.C. § 1101(a)(42) (2006). The idea that states can use the "last habitual residence" of the refugee as the locus for the review originates with the 1951 U.N. Refugee Convention. *See* Kate Darling, *Protection of Stateless Persons in International Asylum and Refugee Law*, 21 INT'L J. REFUGEE L. 742, 751 (2009).

27. Trop v. Dulles, 356 U.S. 86, 101 (1958).

28. *See, e.g.*, Fedosseeva v. Gonzales, 492 F.3d 840, 845 (7th Cir. 2007) (finding that statelessness is insufficient to justify asylum); Al-Fara v. Gonzales, 404 F.3d 733, 739 (3d Cir. 2005) (holding that the applicant's experience with Israeli authorities constituted discrimination, not persecution required by the statute); De Souza v. INS, 999 F.2d 1156, 1159 (7th Cir. 1993) (holding that states have the right to determine their citizenry and that persecution does not stem from a refusal to grant citizenship). *But see* Stserba v. Holder, 646 F.3d 964, 975 (6th Cir. 2011) (stating that if the denationalization is ethnically motivated, then denationalization may be persecution *per se* even absent other more overt forms of persecution).

statutorily defined categories,[29] the courts often return the stateless applicant to the country of their last habitual residence.[30] This merely exacerbates the "Kafkaesque legal vacuum" that the stateless must face and runs contrary to some international norms.[31]

The political fragmentation and emergence of new states in the last few decades of the twentieth century exacerbated and augmented the problem of the stateless.[32] During this time, millions moved into refugee camps and were rendered stateless through government action.[33] Despite this, American courts did not change their reading of United States refugee law and continued to return stateless refugees to the country in which they last resided. Often the courts returned the refugee to the country in which her refugee camp was located.[34] The courts often viewed these camps, and the countries in which they were located, as the "last habitual residence" of the refugees. When courts did grant asylum for stateless refugees, they ignored the applicant's statelessness and based the grant of asylum on some other outward manifestation of persecution.[35]

Given this background, the 2010 holding in *Haile v. Holder* (*Haile II*)[36] that divestiture of citizenship may constitute persecution and thus make the stateless refugee

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29. 8 U.S.C. § 1101(a)(42) (2006) (stating that asylum applicants must show "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

30. *See* Paripovic v. Gonzales, 418 F.3d 240, 245-46 (3d Cir. 2005).

31. *See* Kerber, *supra* note 15, at 13 (internal quotation marks omitted).

32. *See* Massey, *supra* note 2, at 27; REGINA GERMAIN, AILA's ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 23-24 (2d ed. 2000).

33. *See* Kerber, *supra* note 15, at 19.

34. *Paripovic*, 418 F.3d at 245-46 (holding that a Croatian-born ethnic Serb could be deported to Serbia where he resided in a refugee camp during the Serbo-Croat war); *see also* Sarah B. Fenn, Note, Paripovic v. Gonzales*: Defining Last Habitual Residence for Stateless Asylum Applicants*, 40 U.C. DAVIS L. REV. 1545, 1563-66 (2007) (describing in detail the persecution faced by stateless refugees); *cf.* Blitz & Lynch, *supra* note 4, at 7 (discussing the arbitrary deprivation of citizenship).

35. *See, e.g.*, Ouda v. INS, 324 F.3d 445, 453-54 (6th Cir 2003).

36. 591 F.3d 572 (7th Cir. 2010).

asylum-worthy, is highly unusual.[37] Judge Posner's decision in *Haile II* equates at least some types of statelessness, statelessness springing from denationalization, with persecution for the first time in an asylum case.[38] This stands at odds with the history of American ambivalence toward the plight of the foreign stateless.[39] Although this ruling will not open the floodgates to the world's stateless, its unique position as the first case to equate statelessness to persecution makes it worthy of analysis.[40]

In this Note, I will explain the significance of this case. I will explore the international norms and legal theories behind citizenship, and how individuals become stateless. I will outline the significant legal vulnerabilities the stateless experience. I will explain how the United States treats stateless refugees: how the United States statutory construction requires asylum applicants to prove they have experienced persecution; how the case law has interpreted these statutes; and how courts have consistently rejected the idea of statelessness as *per se* persecution. Into this background, I will show how the holdings in *Haile I* and *II* expand the definition of persecution to include the withdrawal of citizenship in certain circumstances. I will conclude by discussing the implications of this case for stateless asylum seekers in the United States, and how this ruling brings United States jurisprudence more in line with Supreme Court rulings regarding the denationalization of American citizens.

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37. Haile appeared before the Seventh Circuit three times. In the first hearing, the court remanded the case to the Board of Immigration Appeals (BIA). Haile v. Gonzales (*Haile I*), 421 F.3d 493, 497 (7th Cir. 2005). The BIA had failed to consider the effect of denationalization on the application for asylum. *Id.* After the BIA again denied his application for asylum, Haile again appealed before the Seventh Circuit. *Haile II*, 591 F.3d at 573-74. In his last appearance, which does not figure into this analysis, Haile successfully petitioned the court to order the government to pay his legal and court fees pursuant to 28 U.S.C. § 2412(d)(1) (2006). Haile v. Holder, 384 F. App'x 501, 502 (7th Cir. 2010).

38. *Haile,* 591 F.3d at 574. *But see* SECKLER-HUDSON, *supra* note 12, at 250 (stating that as a matter of international law, the cause of statelessness is immaterial).

39. Kerber, *supra* note 15, at 32.

40. *See* MARIA BALDINI-POTERIM, IMMIGRATION TRIAL HANDBOOK § 6:52 (2011).

I. STATELESSNESS AND INTERNATIONAL LAW: DEFINING CITIZENSHIP UNDER *JUS SOLI* OR *JUS SANGUINIS*

National governments determine their citizenship requirements. Although the "form and substance varies from state to state," there are two basic theories of citizenship for newly born citizens used by most states.[41] The majority of the world's citizens are endowed with their nationality at birth either due to their place of birth, *jus soli*, or due to the nationality of their parents, *jus sanguinis*.[42] The United States uses a hybrid system in which "all persons born . . . in the United States . . . are citizens of the United States and of the State wherein they reside,"[43] and where certain foreign-born children of United States citizens may automatically acquire citizenship.[44] Thus, the United States uses both theories of citizenship.[45] In considering the scope of the right to citizenship, the Supreme Court held that Congress wanted the Fourteenth Amendment "to put citizenship beyond the power of any governmental unit to destroy."[46] According to the Supreme Court, once the United States government grants an individual citizenship, that individual may only be expatriated through his conduct and will.[47]

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41. Blackman, *supra* note 9, at 1148; David Weissbrodt & Clay Collins, *The Human Rights of Stateless People*, 28 HUM. RTS. Q. 245, 254 (2006).

42. CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 91.01(3) (2011); Milbrandt, *supra* note 4, at 89-91; Weissbrodt & Collins, *supra* note 41, at 254; Fenn, *supra* note 34, at 1560.

43. U.S. CONST. amend. XIV, § 1.

44. The Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

45. The use of both theories in the United States system of citizenship is unusual when compared to many countries. Nevertheless, there are still gaps in the system that might leave children born to Americans stateless. For a hypothetical example, see Kerber, *supra* note 15, at 1-7.

46. Afroyim v. Rusk, 387 U.S. 253, 263 (1967) (holding that the Congress has no right to denationalize citizens).

47. The court in *Vance v. Terrazas* stated:

> [T]he intent of the Fourteenth Amendment, among other things, was to define citizenship; and as interpreted in *Afroyim*, that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the

Under an exclusively *jus sanguinis* theory of citizenship—an approach that is increasingly common in Europe—citizenship is limited to those with an ethnic or racial tie to the country.[48] Such laws, while giving citizenship to the foreign-born children of nationals living abroad, create statelessness amongst children born to members of minority groups and refugees.[49] Some of the most intractable statelessness, for example that found amongst the Roma and the Palestinians, can be traced to the use of *jus sanguinis*.[50] Arguably, the most egregious example of ethnic persecution in the modern era, the Holocaust, started with the promulgation of the Reich Citizenship Law.[51] This law changed German citizenship from a *jus soli* system to a *jus sanguinis* one; this had the

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> last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.

444 U.S. 252, 260 (1980); *see also* Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, 13 NEW CRIM. L. REV. 404, 415-16 (2010).

48. Although I am focusing on the role of *jus sanguinis* as a cause of statelessness, it is not the sole cause. The United Nations High Commissioner for Refugees provided a list of ten causes of statelessness: "[C]onflict of laws; transfer of territory; laws related to marriage; administrative practices; discrimination; laws related to registration of births; *jus sanguinis*; denationalization; renunciation of citizenship; and automatic loss of citizenship by operation of law." Weissbrodt & Collins, *supra* note 41, at 253 (citing UNITED NATIONS HIGH COMM'R FOR REFUGEES, INFORMATION AND ACCESSION PACKAGE: THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS AND THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS (1999)).

49. *See* Sharita Gruberg, *De Facto Statelessness Among Undocumented Migrants in Greece*, 18 GEO. J. ON POVERTY L. & POL'Y 533, 545-46 (2011); Jessica Parra, *Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty Concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness*, 34 FORDHAM INT'L L.J. 1666, 1678-82 (2011) (discussing the use of *jus sanguinis* citizenship laws in Europe that deprive the Roma of the rights afforded most native-born people).

50. *See, e.g.*, Parra, *supra* note 49, at 1679-82; *see also* Ouda v. INS, 324 F.3d 445, 453-55 (6th Cir. 2003) (where a Palestinian family never gained citizenship in Kuwait due to Kuwait's *jus sanguinis* citizenship rules); Faddoul v. INS, 37 F.3d 185, 188-89 (5th Cir. 1994) (where Saudi Arabia's denying a Palestinian citizenship because of their use of *jus sanguinis* did not constitute persecution).

51. Massey, *supra* note 2, at 3-4; Weis, 1961 Convention, *supra* note 24, at 1084.

obvious and intended side effect of stripping German Jews of their citizenship and its connected rights.[52]

The application of *jus sanguinis* citizenship during state transition can also produce large stateless populations.[53] Following the 1991 collapse of the Soviet Union, the newly independent Estonia created a legal framework requiring "new" Estonian citizens to trace their blood descent back to the period prior to Soviet occupation.[54] This effectively denationalized all of the Russians living in Estonia at the time of independence, despite the fact that most ethnic Russians were born in Estonia and comprised one-third of Estonia's total population.[55] *Jus sanguinis* states often compound the trauma to the newly stateless by extending citizenship to foreign-born ethnic nationals. For example, Croatia refused ethnic Serbs citizenship in the 1990s following the dissolution of Yugoslavia, but extended citizenship to ethnic Croats living in Bosnia.[56]

If states defined citizenship solely on a *jus soli* theory of citizenship, then statelessness would not be a problem. Under such a scenario, all of the perpetually stateless groups mentioned above would merely be citizens of the state of their birth. If Croatia or Estonia had adopted a *jus soli* rationale in promulgating their citizenship laws, then the Serbs and Russians would have automatically received Croatian and Estonian citizenship upon the creation of these states. Sadly this was not the case. Despite the integration of European states because of the European

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52. *See* Massey, *supra* note 2, at 3-4; Blitz & Lynch, *supra* note 4, at 8.

53. UNHCR Int'l Prot., *supra* note 19, at 307. The process of transferring territory from one state to another, dividing territory into two or more states, or dissolving a pre-existing state into multiple new states often results in individuals losing their citizenship without gaining a new one. *Id.*

54. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2009, at 205 (2009); Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315, 315-16, 346-47 (1997); *see also* Marc Holzapfel, Note*, The Implications of Human Rights Abuses Currently Occurring in the Baltic States Against the Ethnic Russian National Minority*, 2 BUFF. J. INT'L L. 329, 356-59 (1996) (giving a history of the conflict between ethnic minority Russians and the dominant ethnic groups in the Baltic Republics).

55. Visek, *supra* note 54, at 315, 322.

56. Blitz & Lynch, *supra* note 4, at 7.

Union, European countries are increasingly defining their citizenry in terms of *jus sanguinis* and not *jus soli*.[57]

So far I have only discussed statelessness springing from the function of law, or *de jure* statelessness.[58] It is worth mentioning that this group of stateless differs significantly from the *de facto* stateless. The latter group consists of those who because of war, discrimination, or other calamity lack an effective nationality.[59] These individuals still have a citizenship, but it has been rendered ineffectual because of conditions.[60] The conditions that create *de facto* statelessness often include persecution because of race, religion, nationality, or civil strife.[61] Because of this, the *de facto* stateless have an advantage in claiming asylum under United States law which requires the applicant to have a "well-founded fear of persecution on account of race, religion, [or] nationality."[62] The resulting divergent treatment of the two groups would not be allowed had the United States acceded to the 1954 and 1961 Conventions—each Convention recommended that states treat the *de facto* and *de jure* stateless the same.[63]

The international regime to protect the stateless and reduce statelessness is not limited to the 1954 and 1961 Conventions. As mentioned above, the U.N. created the UNHCR to oversee care of the *de facto* stateless.[64] Additionally, a variety of other instruments were created during this period to protect the rights of the stateless.[65] These agreements, coupled with the various multi-national and regional treaties, have created a wide-ranging

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57. Sawyer, *supra* note 13, at 106.

58. *See, e.g.*, UNHCR Int'l Prot., *supra* note 19, at 300.

59. Milbrandt, *supra* note 4, at 82.

60. *Id*.

61. *See* Batchelor, *supra* note 9, at 232-33.

62. 8 U.S.C. § 1101(a)(42)(A) (2006).

63. *See* U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES ON STATELESSNESS NO. 2: PROCEDURES FOR DETERMINING WHETHER AN INDIVIDUAL IS A STATELESS PERSON ¶¶ 70-71 (Apr. 5, 2012).

64. *See* UNHCR, s*upra* note 23.

65. *See* UNHCR Int'l Prot., *supra* note 19, at 300-01 (listing a range of the U.N. declarations, conventions, and agreements designed to protect the human rights of the stateless).

international system with the goal of reducing and eliminating statelessness.[66] Despite the sustained effort made by generations of diplomats to address these issues (concern about statelessness stretches back at least to the League of Nations, if not before), none of these conventions provides the stateless with real recourse.[67] Because "relatively few provisions of international law are directly enforceable, especially at the instigation of individuals," the stateless can only hope to embarrass states if they fail to meet their international obligations.[68] Even this recourse assumes that the country in which the stateless reside is a signatory to these assorted conventions (relatively few have signed on to either the 1954[69] or the 1961 Convention[70]), and that the stateless possesses the capacity to shame said nation (a tall order considering the relatively trodden-on state of most stateless). As mentioned before, the United States is not a signatory to many of these agreements and so their applicability and requirements do not control; however, one agreement which the United States did sign was largely incorporated into its refugee law.[71]

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66. *Id.* at 300; *see generally* Batchelor, *supra* note 9 (containing a detailed analysis of the scope of the international system in relation to stateless persons); Blackman, *supra* note 9 (discussing the international norms of nationality in cases of state succession).

67. *See* Loewenfeld, *supra* note 13, at 63-65.

68. Sawyer, *supra* note 13, at 75

69. At last count, there are seventy-seven nation-states who are party to the 1954 Convention. *See* United Nations, *Treaty Collection*, 1-2 (Apr. 7, 2013), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf. This constitutes just over 39% of the 195 countries recognized by the United States. *See Independent States in the World*, U.S. DEP'T OF ST., http://www.state.gov/s/inr/rls/4250.htm (last visited Mar. 16, 2012).

70. The 1961 Convention has had less success than its predecessor in attracting signatories. Fifty-one nation-states are party to it. *See* United Nations, *Treaty Collection*, 1-2 (Apr. 7, 2013), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf. This constitutes 26% of the 195 countries recognized by the United States. *See* U.S. DEP'T OF ST., *supra* note 69.

71. *See* Mulanga v. Ashcroft, 349 F.3d 123, 134 (3d Cir. 2003) (citing United Nations Convention Relating to the Status of Refugees, July 5, 1951, 189 U.N.T.S. 150).

II. GRANTING ASYLUM UNDER UNITED STATES LAW

A. *Statutory Requirements for Asylum Applicants*

The Refugee Act of 1980 codified the international obligation the United States had contracted under the United Nations Convention Relating to the Status of Refugees.[72] Under the reforms, any alien present in the United States can apply for asylum within specific constraints.[73] As the focus of the refugee law is to provide relief from persecution,[74] the asylum applicant has the burden to prove that she is a refugee who suffered or will suffer persecution.[75] She must pass a multipronged test to prove herself a refugee. She must first show a demonstrated unwillingness to return to her country of citizenship, or the country of her last habitual residence—the latter in the case of stateless refugees.[76] This unwillingness must be based upon actual past or a fear of future persecution in that country;[77] this fear might be based on real experience of persecution, or a well-founded fear of future persecution.[78] In all cases, the persecution must be due to the applicant's race, religion, nationality, membership in a particular social group, or political opinion.[79] For stateless individuals, the statute implies that the locus for the persecution must be the place of her "last habitual resid[ence]."[80] As with most matters in an asylum proceeding, the designation of the country of last habitual residence may be rebutted by the

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72. *Id.* (discussing obligations of the United States vis-à-vis an asylum applicant).

73. 8 U.S.C. § 1158(a) (2006).

74. Fenn, *supra* note 34, at 1549.

75. 8 U.S.C. § 1158(b)(1)(B)(i) (2006); Asylum Procedures, 8 C.F.R. § 208.5 (2006).

76. 8 U.S.C. § 1101(a)(42)(A) (2006).

77. *Id.*

78. *Id.*

79. *Id.* The idea is that persecution renders citizens of a nation *de facto* stateless insofar as they cannot exercise the rights and benefits of citizenship.

80. *Id.*; 8 C.F.R. § 208.13 (2006); *see* Fenn, *supra* note 34, at 1550-52 (discussing the difficulty in designating the country of last habitual residence for refugees, and the standard the court uses to determine this location).

asylum officer or immigration judge.[81] Once the applicant has established that she is indeed a refugee, then the Secretary of Homeland Security or the Attorney General may grant her asylum.[82]

Multiple difficulties exist when applying the statute to the stateless, especially those who have fled from one country to another prior to seeking asylum in the United States. Courts must determine which state to consider the locus of the persecution. For example, in *Paripovic v. Gonzales* the Third Circuit took up an asylum claim from a Serb who lived in Croatia when Yugoslavia dissolved.[83] Paripovic fled from Croatia to Serbia because of Croat persecution toward Serbs; he lived in a refugee camp in Serbia for two years following his expulsion.[84] This scenario begs the question of what constitutes the "last habitual residence." If Paripovic's "last habitual residence" was in Croatia, then the Croatian authority's discrimination against him would constitute persecution.[85] If, on the other hand, his two years living in a Serbian refugee camp constituted his "last habitual residence," then he would neither have faced nor had reason to fear persecution.[86] This determination is essential only if the court defines persecution in terms of physical or psychological trauma. Denationalization qua persecution would render moot the "last habitual residence" prong of the statute because denationalization is a persecution that transcends national boundaries.

Congress provided no clear definition of the term "persecution" when it drafted the statute.[87] The code merely allows that the refugee must establish a history of persecution or "a well-founded fear of persecution."[88] This persecution, or fear thereof, must be due to the applicant's "race, religion, nationality, membership in a particular

81. *See* Paripovic v. Gonzales, 418 F.3d 240, 244-45 (3d Cir. 2005).

82. 8 U.S.C. § 1158(b)(1)(A) (2006).

83. *Paripovic*, 418 F.3d at 242.

84. *Id.* at 242-43.

85. *Id.* at 243.

86. *Id.* at 242-43.

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

88. *Id.*

social group, or political opinion."[89] The burden of proving past or potential persecution rests with the applicant[90] and may be rebutted by a finding of the asylum officer or immigration judge.[91] With Congress leaving the definition of "persecution" ambiguous,[92] the courts have necessarily evaluated claims on a case-by-case basis.[93]

B. *Defining Persecution in United States Asylum Case Law*

Just as the facts and circumstances of each case vary, so will the theories used by the courts in their rulings vary from circuit to circuit. That said, generally the courts will not find persecution in actions where: the state apparatus is performing its normal function;[94] the persecution springs from the actions of private actors;[95] or if the threats made against the applicant are simple harassment.[96] For example, the Seventh Circuit denied the asylum application in *Fedosseeva* because the applicant's experiences—she had been mugged and had her utilities shut off—failed to rise to the level of a systematic, government-supported endeavor to rid Latvia of ethnic Russians.[97] Instead they were mere "unpleasant incidents."[98] Courts have found none of the following to constitute persecution without other indicia: compulsory military service;[99] loss of employment;[100]

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89. *Id.*

90. 8 C.F.R. § 208.5 (2006).

91. 8 C.F.R. § 1208.13(b)(1) (2006).

92. *Id*; *see* 8 U.S.C. § 1101(a)(42).

93. *See* Fenn, *supra* note 34, at 1553-54; *see also* GERMAIN, *supra* note 32, at 31-33 (giving examples of various strategies the courts have taken to define "persecution").

94. *See, e.g.*, De Souza v. INS, 999 F.2d 1156, 1159 (7th Cir. 1993) (holding the performance of normal police functions does not constitute persecution).

95. *See, e.g.*, Hor v. Gonzales, 421 F.3d 497, 501-02 (7th Cir. 2005) (finding that there is no basis for asylum because of persecution for acts by private groups that are not sanctioned by the government).

96. Fedosseeva v. Gonzales, 492 F.3d 840, 847 (7th Cir. 2007).

97. *Id*. at 846-47.

98. *Id.* at 844 (internal quotation marks omitted).

99. *See, e.g.*, Foroglou v. INS, 170 F.3d 68, 69, 72 (1st Cir. 1999) (finding that compulsory military service is not persecution, despite the draftee's objection to it because of his belief in Ayn Rand's Objectivism).

menacing telephone calls;[101] prosecution for evading military laws,[102] deprivation of the right to work;[103] or conscription by guerrilla groups.[104] In addition, courts have stated that statelessness itself is neither persecution nor grounds for asylum.[105]

Despite applicants' attempts to gain asylum protection because of these experiences, the courts have tended to grant asylum only for acts of a more physical nature. Severe physical trauma, systematic genocide, torture, and slavery all fall under the rubric of persecution.[106] With the increased reporting of the use of rape in various conflicts, there is now

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100. *See, e.g.*, *Fedosseeva*, 492 F.3d at 846-47; Gormley v. Ashcroft, 364 F.3d 1172, 1177-80 (9th Cir. 2004) (holding that the South African state had the right to terminate white South Africans from their jobs in order to provide jobs for black South Africans given that country's history).

101. *See, e.g.*, Sepulveda v. U.S. Attorney Gen., 401 F.3d 1226, 1232 (11th Cir. 2005) (holding that threats to the applicant and her family, including threatening phone calls, do not rise to the level of persecution necessary for asylum).

102. *See, e.g.*, Djedovic v. Gonzales, 441 F.3d 547, 549 (7th Cir. 2006) The court held that an ethnic Bosnian who was conscripted by Serbian forces during the Kosovar war did not face persecution if deported. *Id.* This happened despite the fact he would assuredly be prosecuted for desertion during the war. *Id.*

103. *See, e.g.*, El Assadi v. Holder, 418 F. App'x 484, 486-87 (6th Cir. 2011) (holding that Saudi Arabia's laws limiting employment to women were not persecution even though the petitioner's employment options would be limited following deportation there).

104. *See, e.g.*, INS v. Elias-Zacarias, 502 U.S. 478, 481-82 (1992) (holding that fear of guerilla groups is not sufficient and does not meet the persecution based on political belief prong to qualify for asylum).

105. Aburuwaida v. U.S. Attorney Gen., No. 11-11068, 2011 U.S. App. LEXIS 22456, at *5-6 (11th Cir. Nov. 3, 2011) (quoting *Fedosseeva*, 492 F.3d at 845 (stating that even the stateless must show a history of persecution in order to establish grounds for asylum)); Maksimova v. Holder, 361 F. App'x 690, 693 (6th Cir. 2010) (stating that statelessness is not grounds for asylum, and that "[a] stateless applicant must show the same well-founded fear of persecution as an applicant with a nationality"); Ahmed v. Ashcroft, 341 F.3d 214, 218 (3d Cir. 2003) (stating that "statelessness alone does not warrant asylum"); Faddoul v. INS, 37 F.3d 185, 189-90 (5th Cir. 1994) (stating that states have a right to set laws determining who can attain citizenship and that statelessness itself is insufficient grounds for asylum).

106. GERMAIN, *supra* note 32, at 28.

a presumption that it constitutes persecution.[107] Severe economic deprivation,[108] beatings,[109] abusive detentions,[110] and the inability to earn a livelihood, coupled with forced expulsion, all qualify as persecution according to the courts.[111] Members of minority religious communities may qualify for asylum when their group is subject to persecution generally, even if the individual seeking asylum has not suffered any personal persecution.[112]

Given this backdrop, the Seventh Circuit's rulings in *Haile II*, and its predecessor *Haile I*, open the door to the courts considering statelessness via denationalization as persecution *per se*.[113] In so finding, the Seventh Circuit reversed course on the issue of statelessness qua persecution and created new grounds for asylum. Specifically, this ruling opened the possibility that United States courts will consider the denationalization of foreign citizens by sovereign powers as persecution *per se* if the denationalization springs from issues of ethnicity.

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107. *See* Shoafera v. INS, No. 98-70565, 2000 U.S. App. LEXIS 31361, at *12-15 (9th Cir. Sept. 7, 2000) (holding that the victim was raped because of her ethnicity and that this act constituted persecution); *see also* Tanya Domenica Bosi, Yadegar-Sargis v. INS*: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. REV. 777, 778-80 (2004) (discussing the need to expand current asylum laws to provide greater protection for women seeking asylum). *But see* Suketu Mehta, *The Asylum Seeker*, NEW YORKER, Aug. 1, 2011, at 32.

108. *See, e.g.*, Koval v. Gonzales, 418 F.3d 798, 806 (7th Cir. 2005) (granting asylum to a Ukrainian Mormon couple that had been denied work commensurate with their education because of their faith).

109. *See, e.g.*, Montoya-Ulloa v. INS, 79 F.3d 930, 931 (9th Cir. 1996) (holding that a man beaten by a government-supported Sandinista gang is eligible for asylum because the beating stemmed from his political opinions).

110. Phommasoukha v. Gonzales, 408 F.3d 1011, 1015 (8th Cir. 2005) (holding that the government's abusive detention of the prisoner in a concentration camp constituted persecution).

111. *See, e.g.*, Ouda v. INS, 324 F.3d 445, 448-49, 453-55 (6th Cir. 2003) (holding that the petitioner's family, stateless Palestinians, faced persecution when they were forced to abandon their business, faced physical persecution in Kuwait after the First Gulf War, and had to flee to Bulgaria).

112. Sahi v. Gonzales, 416 F.3d 587, 589 (7th Cir. 2005) (holding that the persecution of the Ahmadi religious sect in Pakistan constituted sufficient grounds for the petitioner to have a fear of persecution if returned to Pakistan).

113. Haile v. Holder (*Haile II*), 591 F.3d 572, 574-75 (7th Cir. 2010); Haile v. Gonzales (*Haile I*), 421 F.3d 493, 495-96 (7th Cir. 2005).

III. STATELESSNESS AS *PER SE* PERSECUTION—*HAILE V. GONZALES* AND *HAILE V. HOLDER*

An understanding of the history of Eritrea and Ethiopia is necessary to frame the two *Haile* cases. Following World War II, the two countries were joined by a United Nations resolution.[114] Although nominally self-governing, Eritrea's hopes for post-war independence came to naught.[115] In 1962, Ethiopian emperor Haile Sellassie dissolved the Eritrean parliament unilaterally and annexed the country into Ethiopia, a situation that continued following the 1974 Ethiopian military junta that ended Sellassie's reign.[116] As a result, Eritrean rebels sought an independent state during a thirty-year civil war between the two sides.[117] Eritrea finally gained its independence after a 1993 plebiscite.[118] This did not end hostilities between the two sides.[119] The nations fought a three-year border war from 1998–2000.[120] This war included the indiscriminate expulsion from Ethiopia of "some 75,000 Ethiopian citizens of Eritrean ethnicity."[121] Since 2006, Eritrea has provided arms to ethnic Somalis resisting Ethiopian rule.[122] Despite the violence, the historical interconnectedness has resulted in many ethnic Eritreans living and working in Ethiopia.[123]

The life of Temesgen Haile, the asylum applicant in these two cases, mirrors the history of these two belligerent

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114. *Eritrea*, U.S. DEP'T OF STATE, (Jan. 20, 2012), http://www.state.gov/outofdate/bgn/eritrea/194937.htm.

115. *Id.*

116. *Id.*

117. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF ST., 2009 HUMAN RIGHTS REPORT: ERITREA (Mar. 11, 2010), http://www.state.gov/j/drl/rls/hrrpt/2009/af/135952.htm.

118. *Id.*

119. *Id.*

120. CENT. INTELLIGENCE AGENCY, *supra* note 54, at 211.

121. Haile v. Holder (*Haile II*), 591 F.3d 572, 573 (7th Cir. 2010) (citing *The Horn of Africa War*, HUM. RTS. WATCH (Jan. 29, 2003), http://www.hrw.org/en/node/12364/section/1). Milbrandt puts the number at 70,000. Milbrandt, *supra* note 4, at 95.

122. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 117.

123. *Id.*

nations. He was born in the Ethiopian capital Addis Ababa in 1976 at a time when Eritrea was still part of Ethiopia and the civil war was ongoing.[124] His parents were Ethiopian citizens of Eritrean descent; under the Ethiopian laws at the time, Haile received Ethiopian citizenship at birth.[125] After the plebiscite for Eritrean independence, Haile's parents moved from Ethiopia to Eritrea in 1992[126] and became Eritrean citizens upon independence in 1993.[127] Haile stayed behind in Ethiopia despite the fact that he was a minor.[128] As mentioned before, the 1998 resumption of hostilities produced a mass deportation of ethnic Eritreans from Ethiopia to Eritrea.[129] Unlike many of his fellow Eritreans, Haile fled to Kenya in 1998 before he could be detained by Ethiopian forces.[130] He left behind his Ethiopian passport in his haste to escape.[131] He arrived in the United States sometime thereafter and applied for asylum.[132]

Despite his circumstances, the immigration judge (I.J.) denied Haile's asylum request.[133] The I.J. found that Haile had not suffered persecution because he had fled before Ethiopian forces could deport him to Eritrea or otherwise persecute him.[134] The judge maintained that Haile faced no prospect of persecution upon return to Ethiopia because Haile had not participated in the independence process.[135] Haile asserted that Ethiopia had rendered him effectively stateless and would no longer recognize him as a citizen.[136]

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124. Haile v. Gonzalez (*Haile I*), 421 F.3d 493, 495 (7th Cir. 2005).

125. *Haile II*, 591 F.3d at 573.

126. *Id.*

127. *Id.*

128. *Id.* For information on contemporary Ethiopian citizenship laws, see John R. Campbell, *The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Courts (Re)Define Nationality*, 23 INT'L J. REFUGEE L. 656, 658-59 (2011).

129. *Haile II*, 591 F.3d at 573.

130. Haile v. Gonzales (*Haile I*), 421 F.3d 493, 495 (7th Cir. 2005).

131. *Id.* at 495.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

The I.J. dismissed this claim as irrelevant.[137] Instead, the I.J. relied on the notion that all states have the right to determine citizenship rules and to denationalize their citizens as they see fit.[138] The Board of Immigration Appeals affirmed without comment.[139]

The first time Haile appeared before the Seventh Circuit, the court found it problematic that a nation could merely divest its citizens of their citizenship without such an act falling into the definition of persecution.[140] Judge Rovner, who wrote for the court, pointed out that the I.J.'s holding depended upon authority from *Faddoul*[141] and *De Souza*,[142] wherein the courts held that the denial of citizenship was not persecution.[143] These two decisions dealt with *de jure* stateless individuals who had never held legal citizenship.[144] By contrast, Haile held Ethiopian citizenship at the time of the war's outbreak.[145] Judge Rovner concluded that there was nothing in the case law to suggest that a sovereign possesses the "right to strip citizenship from a class of persons based on their ethnicity."[146]

Having brought into question the right of states to denationalize their citizens, the court next turned to whether such divestment constituted persecution *per se*.[147] Judge Rovner concluded that not only was a "program of denationalization and deportation" persecution, but that

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137. *Id.*

138. Haile v. Holder (*Haile II*), 591 F.3d, 572, 573 (7th Cir. 2010).

139. *Haile I*, 421 F.3d at 495.

140. *Id.* at 496.

141. Faddoul v. INS, 37 F.3d 185, 189-90 (5th Cir. 1994). *Faddoul* involved an application of a stateless Palestinian claiming asylum from Saudi Arabia. *Id.* at 187-88. The court stated that it would not find citizenship by *jus sanguinis* as persecution *per se* and that statelessness without more is not persecution. *Id.* at 188-89.

142. De Souza v. INS, 999 F.2d 1156, 1159 (7th Cir. 1993) (denying the asylum request of a stateless ethnic Indian born in Kenya where the asylum stemmed largely from Kenya's denial of the petitioner's citizenship request).

143. *Haile II*, 591 F.3d at 574; *Haile I*, 421 F.3d at 496.

144. *Haile I*, 421 F.3d at 496.

145. *Id.*

146. *Id.*

147. *Id.*

such programs almost invariably constitute, or are "precursor[s] to even worse things."[148] The court compared the use of denationalization as a "political weapon" in Africa with "the Reich Citizenship Law of 1935, which stripped German Jews of their citizenship."[149] In so doing, the court strongly implied that divesting individuals of their citizenship constituted persecution and that the Board of Immigration Appeals should consider this upon remand.[150]

The Board of Immigration Appeals (BIA) denied Haile asylum when it reconsidered the matter on remand.[151] The Board failed to take the hint offered by the Seventh Circuit and ruled that courts must weigh the totality of the circumstances in determining if an asylum-applicant experienced persecution.[152] The BIA felt that even though "denationalization can be a harbinger of persecution," without further action, it does not meet the definition of persecution under United States law.[153] The BIA also held that even if the state denationalized the asylum-applicant because of a statutorily "protected ground," this still would not amount to persecution.[154] Based upon this logic the BIA rejected Haile's application for asylum for a second time.[155]

The Seventh Circuit reversed the BIA again; this time Judge Posner wrote for the court.[156] Although he agreed with the BIA's assessment that not "*all* denationalizations are instances of persecution," Posner disagreed with the logic used by the BIA's counsel.[157] The BIA's counsel argued that denationalization can never be persecution without

148. *Id.* (internal citation omitted).

149. *Id.* (citing LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS, 1933–1945, at 67-69 (1975)); Open Society Justice Initiative, *Statelessness, Discrimination and Denationalization: Emerging Problems Requiring Action*, Statement to the African Commission on Human and Peoples' Rights (Apr. 29, 2005).

150. *Haile I*, 421 F.3d at 496-97.

151. Haile v. Holder (*Haile II*), 591 F.3d 572, 573 (7th Cir. 2010).

152. *Id.*

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

154. *Id.* at 573-74 (internal quotation marks omitted).

155. *Id.* at 573.

156. *Id.* at 575-76.

157. *Id.* at 573.

additional overt acts.[158] This position was supported by years of American jurisprudence that rejected asylum claims based solely on the statelessness of the applicant.[159] During the hearing, the judges of the Seventh Circuit asked the BIA's attorney whether its argument would support the notion that the United States would have legal justification to denationalize all American-Muslims following the 9/11 terrorist attacks.[160] Much to the chagrin of the court, the BIA attorney responded in the affirmative.[161] The court concluded that the BIA's "denationalization plus" requirement to prove persecution was untenable.[162] The court concluded that under the BIA's logic, the United States would not have had grounds to grant asylum for Jewish applicants after the Reich's Nuremberg Laws divested them of their citizenship.[163] The obvious absurdity of this position leads to the conclusion that denationalization, while it may also be a predicate to more blatant acts of persecution, is persecution in itself.[164] The experience of the Jews in Nazi Germany shows that denationalization can justify a multitude of harmful, but legal, acts against a discrete population of ethnic or religious minorities.[165] The court then concluded that Haile's denationalization constituted persecution, absent reasons to the contrary offered by the BIA.[166]

A. *Analysis-Implication of* Haile I *and* Haile II *in Current Jurisprudence Regarding Stateless Refugees*

As should be clear, the Seventh Circuit took a step away from the established jurisprudence regarding denationalized stateless refugees in the *Haile* cases.[167] As

158. *Id.* at 574.

159. *See* discussion *supra* Part II.B.

160. *Haile II*, 591 F.3d at 574.

161. *Id.*

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

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 574-75.

167. *See* discussion *supra,* Part II.B.

discussed earlier, courts had up to that point almost universally rejected the idea that any form of statelessness could constitute persecution.[168] By showing that Ethiopia used denationalization as a weapon against Haile, the Seventh Circuit turned to the view of denationalization that Chief Justice Warren expressed in *Trop*—where he described the use of denationalization as a weapon or punishment that is worse than torture.[169] The Seventh Circuit circumscribed its analysis to denationalization that occurs to disadvantage a specific group of a given state's citizenry.[170] By circumscribing the *Haile II* ruling as it did, the Seventh Circuit's holding will only reach those cases dealing with applicants whose right of citizenship has been infringed upon by their country of origin.[171] Ergo, this will not open the floodgates for all the world's stateless to seek asylum in the United States.[172]

Two weeks after *Haile II*, the Sixth Circuit took a case with a similar fact pattern in *Maksimova v. Holder*, but with a different outcome.[173] Maksimova was a Russian Jew living in Estonia at the time of the Soviet collapse.[174] With independence, Estonian policymakers revived the 1938 citizenship laws that were in place prior to the Soviet occupation and annexation.[175] During the Soviet period, citizenship vested in the individual constituent republics and not the U.S.S.R.; thus, a citizen living in Estonia would be citizen of the Estonian Soviet Socialist Republic.[176] By returning to the pre-annexation laws, the Estonian

168. *See, e.g.*, Fedosseeva v. Gonzales, 492 F.3d 840, 845 (7th Cir. 2007); Al-Fara v. Gonzales, 404 F.3d 733, 739 (3d Cir. 2005); Faddoul v. INS, 37 F.3d 185, 190 (5th Cir. 1994); De Souza v. INS, 999 F.2d 1156, 1159 (7th Cir. 1993).

169. *See* Trop v. Dulles, 356 U.S. 86, 101-02 (1958); *Haile II*, 591 F.3d at 573.

170. *Haile II*, 591 F.3d at 574 (discussing how both the Third Reich and contemporary African nation-states have used denationalization as a form of persecution).

171. *See* Holzapfel, *supra* note 54, at 332-33 (discussing the fear of ethnic minorities that their rights will be infringed on by the majority of the population).

172. *Cf. Al-Fara*, 404 F.3d at 739.

173. Maksimova v. Holder, 361 F. App'x. 690, 693 (6th Cir. 2010).

174. *Id.* at 691.

175. Visek, *supra* note 54, at 332.

176. Stserba v. Holder, 646 F.3d 964, 975 n.6 (6th Cir. 2011).

government attempted to reinvigorate Estonian nationality; these policies rendered the 400,000 Russians living in Estonia stateless, including Maksimova.[177] Despite the obvious intent on the part of the Estonian government to target the Russian minority, the I.J., BIA, and Sixth Circuit all agreed that Maksimova failed to show that Estonian policy divesting her of citizenship constituted persecution.[178] Applying the pre-*Haile II* standard, the Sixth Circuit concluded that statelessness alone is an insufficient ground to grant asylum.[179]

If the principles of *Haile II* had applied to the facts of this case, then the outcome would have been much different. Estonia had denationalized Maksimova by setting stringent language and ethnic qualifications as part of their post-independence citizenship requirements.[180] As mentioned above, these policies succeeded in divesting nearly all of Estonia's ethnic Russian population of the citizenship they had inherited from the Soviet era.[181] A similar ethnic animus motivated Ethiopia's denationalization policy of Eritreans living in Ethiopia following partition according to the Seventh Circuit.[182] If in these cases, as well as the historic example of the Jews during the Third Reich, the denationalization is motivated by ethnic, political, or religious affiliation, and the denationalization policy has a goal of persecuting one group while benefiting anther, then, according to Posner's logic, denationalization is *prima facie* persecution. Ethiopia, Estonia, and Nazi Germany each set a policy to remove the recourse that a normal citizen would have against further government discrimination. Accordingly, had the BIA accepted that denationalization is persecution, it should have granted Maksimova asylum.

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177. *See Maksimova*, 361 F. App'x at 693; *Stserba*, 646 F.3d at 975.; *see also* Brad K. Blitz & Caroline Sawyer, *Analysis: The Practical and Legal Realities of Statelessness in the European Union*, *in* STATELESSNESS IN THE EUROPEAN UNION: DISPLACED, UNDOCUMENTED, UNWANTED 281, 287-88 (Caroline Sawyer & Brad K. Blitz eds., 2011) (discussing stateless Russians in Estonia); Holzapfel, *supra* note 54, at 356-57.

178. *Maksimova*, 361 F. App'x 690, 692-93 (6th Cir. 2010).

179. *Id.* at 693.

180. *Id.* at 691-92; Visek, *supra* note 54, at 332-342.

181. Visek, *supra* note 54, at 332.

182. Haile v. Holder (*Haile II*), 591 F.3d 572, 574 (7th Cir. 2010).

A year later in *Stserba v. Holder*,[183] the Sixth Circuit reversed course and applied *Haile II* to a fact pattern almost identical to *Maksimova*. This is the only case in any Circuit applying the *Haile* court's holding that denationalization constitutes persecution *per se* to date.[184] As in *Maksimova*, the court reviewed the case of an ethnic Russian living in Estonia.[185] Stserba held an "Estonian" citizenship from the Soviet period like many of his fellow Russians in Estonia, but post-independence Estonian policies resulted in his denationalization.[186] Unlike in *Maksimova*, the Sixth Circuit applied the logic of *Haile II*.[187] The court found that Estonia purposely designed its citizenship laws to strip ethnic Russians of the citizenship rights they held in the Estonia Soviet Socialist Republic prior to independence.[188] In other words, the applicant "did not switch citizenship due to the dissolution of her country of prior citizenship or as an incident of changed boundaries. Rather, she was an Estonian citizen who was stripped of citizenship and became stateless."[189] As was the case with Haile and the German Jews under the Nuremberg laws, the Estonian government used denationalization as a way of discriminating against Stserba because of her ethnicity.[190] Because the denationalization was obviously motivated by ethnic considerations, the Sixth Circuit remanded the case to review if the petitioner's statelessness was of sufficient duration to qualify as "persecution" under the statute.[191]

The Sixth Circuit's *El Assadi v. Holder* shows the limits of *Haile*'s statelessness qua persecution. El Assadi, a Palestinian refugee, was born and raised in Saudi Arabia.[192] Whereas both Haile and Stserba were born with a

183. 646 F.3d 964 (6th Cir. 2011).

184. *Id.* at 974-75.

185. *Id.* at 269-71; *see supra* notes 159-65 and accompanying text.

186. *Stserba*, 646 F.3d at 974-75.

187. *Id.* at 974-75 (indicating that the Estonian laws were designed purposely to disadvantage Russian minorities in meeting the citizenship requirements).

188. *Id*. at 974-75.

189. *Id.* at 975.

190. *Id.* at 973, 976.

191. *Id.*

192. El Assadi v. Holder, 418 F. App'x 484, 485 (6th Cir. 2011).

citizenship, El Assadi never possessed a citizenship of any kind.[193] Saudi Arabia uses a *jus sanguinis* rule of citizenship, thus disqualifying her of any claim to Saudi citizenship.[194] El Assadi was *de jure* stateless from birth.[195] The perpetual failures to create a Palestinian state since 1948 have rendered most Palestinians part of that group of peoples with no nation-state to call their own.[196] Thus, they have no political entity that can confer upon them a legally enforceable Palestinian citizenship.[197] As such, El Assadi could not claim her statelessness was a result of persecutory denationalization, and the court did not consider statelessness alone as sufficient grounds for her asylum claim.[198]

The distinction between the withdrawal of a pre-existing citizenship and the nonexistence of any pre-existing citizenship holds the key in understanding the applicability of *Haile II*. The circuit courts did not want to throw open the flood gates of asylum to every stateless individual. Instead, *Haile II* stands for the possibility that those who have their citizenship stripped from them due to ethnicity or some other protected class, and thus become *de jure* stateless, will be able to successfully apply for asylum protection. This is because the withdrawal of citizenship in such a manner is persecution *per se*. This holding reinforces the interest in protecting those who suffered persecution by being expelled from "a community willing and able to guarantee any rights whatsoever."[199]

IV. *HAILE* AND SUPREME COURT JURISPRUDENCE ON DENATIONALIZATION

Justice Posner's decision applies the same reasoning to asylum law that the United States Supreme Court used to

193. *Id.*

194. *See* Faddoul v. INS, 37 F.3d 185, 189 n.3 (5th Cir. 1994).

195. *See El Assadi*, 418 F. App'x at 485.

196. *Faddoul*, 37 F.3d at 189-90.

197. *Id.*

198. *El Assadi*, 418 F. App'x at 486-87.

199. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 (1963) (quoting HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 294 (1951)) (internal quotation marks omitted).

prohibit the practice of Congressional denationalization. This is a connection that the Seventh Circuit did not make in *Haile II*. However, the Sixth Circuit decision in *Stserba* bridged the gap by connecting the holding in *Haile II* with the established Supreme Court jurisprudence regarding denationalization.[200] It is important to give a brief history of the Supreme Court's treatment of denationalization in order to fully understand how *Haile* and *Stserba* bring the question under asylum law of denationalization qua persecution in line with Supreme Court's view of denationalization and statelessness.

The right of the government to denationalize American citizens has always been hotly debated in the halls of Congress. Congress considered and rejected three pieces of denationalization legislation between 1794 and 1865.[201] It was only in 1865 that Congress passed an act that "was later viewed as the first denationalization statute."[202] More denationalization laws followed.[203] The common current in these laws was that certain behavior justified the use of denationalization as punishment.[204] Often these laws justified stripping an individual of her citizenship based on the idea that the prescribed behavior amounted to an affirmative abandonment of American citizenship.[205] Put in other terms, the laws were justified under the idea that the individual's behavior amounted to expatriation.[206] It was the use of denationalization as punishment that provoked the passionate response of Chief Justice Warren in *Trop v. Dulles*.[207]

Chief Justice Warren wrote for the Court's plurality in *Trop v. Dulles* and overruled the denationalization of an army private who deserted during the North African

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200. *See* Stserba v. Holder, 646 F.3d 964, 973-74 (6th Cir. 2011).

201. Spectar, *supra* note 8, at 280-81.

202. *Id*. at 281.

203. *Id.*

204. *Id*. at 281-82.

205. *Id.*

206. J.P. Jones, Comment, *Limiting Congressional Denationalization After* Afroyim, 17 SAN DIEGO L. REV. 121, 130-32 (1979). Expatriation is the process whereby an individual renounces or otherwise rejects her citizenship.

207. 356 U.S. 86, 94 (1958).

campaign in World War II.[208] The law at the time allowed for denationalization as a punishment for desertion.[209] Chief Justice Warren denounced the law stating that "the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."[210] Because Congress designed the denationalization to penalize bad behavior,[211] and because the Court considered denationalization to be "a form of punishment more primitive than torture,"[212] the Court held that denationalization violated the Eighth Amendment prohibition against "cruel and unusual punishments."[213]

The Court revisited the issue of denationalization in a 1963 decision also dealing with military service, *Kennedy v. Mendoza-Martinez*.[214] The Court reviewed the cases of two individuals who fled the United States in order to avoid service in World War II.[215] An earlier law passed by Congress allowed for the denationalization of individuals leaving or remaining outside of the United States during a time of war "for the purpose of evading or avoiding training and service" in the military.[216] The statute automatically stripped an American avoiding his military obligations of "his citizenship, with concomitant deprivation 'of all that makes life worth living.'"[217] Just like in *Trop*, the Court found that the divesture of citizenship was designed as a punitive measure and a violation of the Eighth Amendment's ban on "cruel and unusual punishments."[218]

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208. *Id.* at 87-88.

209. *Id*. at 92-93.

210. *Id.*

211. *See id*. at 97-99.

212. *Id*. at 101.

213. *Trop*, 356 U.S. at 101; *see* U.S. CONST. amend. VIII.

214. 372 U.S. 144, 147-48 (1963).

215. *Id.*

216. *Id*. at 146 (internal quotation marks omitted).

217. *Id*. at 166 (citation omitted).

218. *See id*. at 166-70.

This line of cases culminated in the 1966 decision in *Afroyim v. Rusk*.[219] Unlike the punitive statutes at issue in *Trop* and *Mendoza-Martinez*, this case addressed the question of whether Congress can designate specific acts that will automatically result in denationalization.[220] The law in question provided that an American citizen would automatically lose his citizenship upon voting in the election of a foreign state.[221] Afroyim voted in the 1951 Israeli Knesset election and upon applying to renew his American passport was refused on the grounds that his vote amounted to a voluntary relinquishment of his citizenship.[222] After going through a history of denationalization and expatriation laws, the Court found that the Fourteenth Amendment held supreme and that Congress lacked the power to strip an individual of his citizenship.[223] Justice Black stated that "[c]itizenship is no light trifle to be jeopardized any moment Congress decides to do so."[224] Since the Supreme Court's decision in *Afroyim*,[225] it has become an article of faith in United States domestic law that Congress lacks the legal authority to unilaterally denationalize American citizens.[226] The Fourteenth Amendment "was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship."[227]

The *Afroyim* Court also looked to the ideas of civic-republicanism to justify the prohibition against

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219. 387 U.S. 253 (1967).

220. *See id.* at 256.

221. *Id.* at 254. The law was codified at 8 U.S.C. § 801(e) (1946) (repealed 1952).

222. *Afroyim*, 387 U.S. at 254.

223. *See id.* at 267-68.

224. *Id.*

225. *Id.* at 267.

226. Elwin Griffith, *Expatriation and the American Citizen*, 31 HOW. L.J. 454, 468-70 (1988); *see also* Lavi, *supra* note 47, at 415. However, the issue of unilateral denationalization has come up several times since, most recently in the context of United States citizens fighting with Al Qaeda and the Taliban. *See* Nora Graham, Note, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593, 605-07 (2004).

227. *Afroyim*, 387 U.S. at 268.

denationalization: "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."[228] Even though *Afroyim* was based on Fourteenth Amendment jurisprudence and not the Eighth Amendment like *Trop*, the effect is the same; citizenship is a right that cannot be stripped by the state. This conclusion ties directly to the question in asylum law of whether a foreign power persecutes its population by use of denationalization. Certainly, the Supreme Court puts a heavy premium on American citizenship, but underlying all of the rhetoric is the idea that once an individual is a citizen of a nation, the rights inherent in that citizenship are inalienable. When a government strips that citizen of "the right to have rights,"[229] that government has started the process of persecuting its now-former citizen.

CONCLUSION

That is not to say that individuals cannot expatriate themselves. The United States long ago abandoned the common law prohibition against expatriation and accepted the right of individuals to relinquish their citizenship.[230] As Justice White stated in *Vance v. Terrazas*, "expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of [the citizen's] conduct."[231] Thus, whether or not an individual remains a citizen rests squarely on the shoulders of that individual, and not the government of the state in which they live.

This does not mean that citizenship is immutable; as we have seen, state succession, renunciation, and dissolution of a state can change an individual's citizenship. Short of any of these circumstances, a citizen has a "right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."[232] The value the Supreme Court has placed

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228. *Id*.

229. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

230. *See* Jones, *supra* note 206, at 123-27.

231. Vance v. Terrazas, 444 U.S. 252, 260 (1980).

232. *Afroyim*, 387 U.S. at 268.

on citizenship cannot be denied.[233] Perhaps the Court's view stems from American Particularism; however, it seems equally likely that the High Court considers citizenship as a fundamental right.[234] The fact that the Supreme Court has consistently rejected the effort to use denationalization as a punishment supports this latter interpretation.

In the realm of refugee law, the BIA and the circuit courts have largely undervalued the importance of citizenship despite the importance the Supreme Court has placed on it in terms of America's denationalization laws. Instead of viewing citizenship as Chief Justice Earl Warren did, these courts have largely dismissed claims of statelessness as irrelevant in determining if an asylum applicant suffered persecution. In contrast, the Supreme Court has protected citizenship as the most important bundle of rights available.[235]

Haile II not only breaks from decades of understating the harms posed by denationalization as a type of persecution, but it also brings the logic of the Supreme Court regarding citizenship to bear on the question of statelessness qua persecution. Prior rulings that focused solely on the physical manifestations of persecution missed the most telling historical analogue of issues of denationalization, the Jews of Nazi Germany. Nazi Germany used the denationalizing Nuremberg Laws as the first step in the Holocaust. Once faced with this apt analogy, there is no question that denationalization constitutes persecution. Further, the *Haile II* decision reconciles the disparity between the Supreme Court's view of the importance of citizenship and the lower courts' unwillingness to protect those who have had their citizenship stripped from them.

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233. *See* Batchelor, *supra* note 9, at 235.

234. *See* SECKLER-HUDSON, *supra* note 12, at 248 (quoting Thomas Jefferson: "Every man has a right to live somewhere on the earth").

235. As a side note, it's interesting that the laws in question in both *Trop* and *Mendoza-Martinez* included the death penalty and denationalization as possible punishment. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 172-74 (1963); Trop v. Dulles, 356 U.S. 86, 98-99 (1958). It was the threat of denationalization that the Court found a violation of the Eighth amendment. *See supra* notes 207-17 and accompanying text. This should provide some perspective on the importance the Supreme Court puts on citizenship.

While it expands protections, the limitations of *Haile II* are well thought out. The international community's concern for the stateless is well-founded, but it is not the job of the United States government to protect all of the stateless. Given America's already strapped immigration infrastructure, a declaration by the Sixth Circuit that all statelessness constituted persecution could potentially open the floodgates to asylum seekers. It would create a precedent that would likely overwhelm the system and lead to short-cut asylums through citizenship renunciations.[236] Instead, by extending the definition of persecution to those stateless individuals who have had their citizenship stripped from them, the Sixth Circuit created a workable definition of persecution that reconciles United States asylum law with the value that the Supreme Court has placed on citizenship.

236. *Cf.* Mehta, *supra* note 107, at 32-37.