NO COUNTRY FOR SOME MEN?: STATELESSNESS IN THE UNITED STATES AND LESSONS FROM THE EUROPEAN UNION

Lisa G. Melikian*

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* J.D., University of Georgia, 2015; B.A., University of Maryland, 2010.
In a bizarre turn of events, Mikhail Sebastian found himself trapped on American Samoa in December 2011. He was not trapped because he was arrested or kidnapped, or any of the other reasons one might expect; rather, Sebastian was trapped due to his stateless status. Sebastian, who had been living in the United States for over fifteen years, took what he thought would be a four-day vacation, and ended up pleading with the U.S. to allow him to return to his home in Los Angeles.

In 2004, Ibrahim Parlak, a Kurdish man, had been living in the U.S. for over twenty years after being granted asylum in 1992. Parlak had married an American woman. They had a daughter together, and he was the proud owner of a café in a small town in Michigan. He was living the American dream. But Parlak’s idyllic world was flipped on its head in July 2004, when the Department of Homeland Security arrested Parlak, accused him of falsifying his asylum documents, and threatened to deport him to Turkey. U.S. authorities revoked Parlak’s green card, and threw him in detention pending his deportation.

Tatiana Lesnikova, a sixty-one-year-old grandmother and piano teacher, has been stateless and living in the U.S. for over twenty years. In 1992, Lesnikova escaped with her youngest son from Ukraine, where she had been

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2 Sebastian, supra note 1.
6 Swerdlow, supra note 4; see also Kotlowitz, supra note 5.
7 Swerdlow, supra note 4.
persecuted for her political beliefs, and applied for asylum in the U.S. In 1997, Lesnikova’s application was denied; however, she had nowhere to be deported, as neither Ukraine nor Russia recognized her as a national due to their post-Soviet nationality laws.

A stateless person is an individual who is not considered a national by any State under the operation of its laws. A 2013 report by the Office of the U.N. High Commissioner for Refugees (UNHCR) estimated that there are at least ten million stateless individuals in the world today, with over 600,000 in Europe and an undetermined number living in the U.S. U.S. law does not afford these individuals any protections, let alone the ability to acquire any sort of permanent status. In the European Union, nationality laws vary from country to country. Stateless persons are often denied crucial benefits of citizenship, such as access to health services, education, and legal employment. The international community has ignored such violations for far too long. With no official status, stateless persons are deprived of their basic human rights and are subject to deportation, imprisonment, or worse.

Mikhail Sebastian eventually was allowed to go back to his home in the United States—fifteen months later. By enlisting the help of attorneys and

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9 Dzubow, supra note 8.
10 Id.
15 Citizens of Nowhere, supra note 14, at 1.
17 Milbrandt, supra note 14, at 81 (“The stateless are the most vulnerable people in our world—they are the trafficked, the oppressed, and the neglected.”).
18 Sebastian, supra note 1.
various news organizations, as well as the UNHCR, Sebastian was able to convince U.S. officials to allow him to return. But Sebastian remains stateless today, living in constant fear of detainment with no available path for obtaining permanent legal status.

For Ibrahim Parlak, his American dream has become a nightmare. Turkey would not admit Parlak back into the country, and his applications for residency in other countries have been denied. Eventually, following a public outcry, Parlak was released “under a strict, supervised status.” This status comes with severe limitations on Parlak’s freedom: “He cannot go anywhere without permission. He must be on call from immigration service at all times. He cannot leave the country. He must call in whenever asked, no matter what time of the day or night.” Periodically, legislation to grant Parlak citizenship is introduced in Congress but, thus far, these efforts have been fruitless. Parlak remains in a limbo and expresses little hope of ever obtaining a legal status in the U.S. again.

Tatiana Lesnikova and her youngest son also remain stateless today. In a 2010 interview with Laura Bowman, Lesnikova remarked: “To be stateless . . . means to be nobody. We have no rights.” Lesnikova is unable to travel to see her closest family members because she cannot obtain travel documents. She is ineligible for social security even though she pays taxes. She must check in with the Department of Homeland Security by telephone once a month and in person every six months. And, on top of all of this, she says that she still lives in fear of being “arbitrarily jailed” at any moment.

In evaluating the policies of the United States and the European Union, Part II will provide additional background information on statelessness, including how it has progressed over time, the early developments in the law, and its potential impact. Part III will then provide the foundation for the

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19 Id.
20 Id.
21 Swerdlov, supra note 4.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Dzubow, supra note 8.
28 Bowman, supra note 8.
29 Dzubow, supra note 8.
30 Id.
31 Id.
32 Id.
current legal framework for both the U.S. as well as the E.U., and discuss the advantages and disadvantages of each. In conclusion, Part IV will examine the most effective legal policy for the U.S. going forward and advocate for the passage of comprehensive immigration reform.

II. BACKGROUND ON STATELESSNESS

Statelessness is a condition, caused by governments, that occurs when no state recognizes a person as its citizen under the operations of its law. Effectively, such an individual is not entitled to the protections of any state. Statelessness can happen anywhere in the world, but how statelessness effects an individual varies because legal regimes throughout the world differ considerably.

A. De Jure and De Facto Statelessness

Depending on the country, statelessness can occur in many different situations, including: birth to stateless parents; when a state ceases to exist; through transnational surrogacy agreements, which can leave a child without citizenship due to conflicts of law; as well as situations where individuals are unable to establish their nationality.

There are two categories of statelessness: de facto and de jure. De jure statelessness is when no state considers the individual to be a national based on its own laws. This can occur when a state ceases to exist and there is no successor state, a situation recognized by both the 1954 Convention on the Status of Stateless Persons (the 1954 Statelessness Convention) and the 1961 Convention on Reducing Statelessness.

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33 See 1954 Statelessness Convention, supra note 11; see also Milbrandt, supra note 14, at 81.
36 See discussion infra Part II.A.
37 Milbrandt, supra note 14, at 81.
38 Harvey, supra note 11, at 258.
39 Milbrandt, supra note 14, at 82.
41 Id.
42 1954 Statelessness Convention, supra note 11, art. 10.
De facto statelessness, on the other hand, occurs when a person is either denied diplomatic protection or assistance by their country once they are outside of it, or is prevented from seeking it due to practical considerations like fear of persecution. There are no real solutions for either category as of yet in international law. Because de jure statelessness occurs less frequently, de facto statelessness will be the primary focus of this Note.

B. Theories of Citizenship

A state’s nationality laws are key factors in whether or not an individual will become stateless. Each state has the power to determine its own nationality laws, but such sovereignty makes it difficult to address statelessness at an international level. In addition, this deference to states may result in intentional discrimination against a particular group.

The two most frequently used principles for granting citizenship are **jus soli** and **jus sanguinis**, with some countries using both. **Jus soli**, meaning “law of the soil,” refers to individuals who are born on state territory and are entitled to the citizenship of that state. **Jus sanguinis**, which means “law of blood,” refers to an individual who is entitled to the same citizenship of their parents. This varies from country to country—the U.S. uses somewhat of a mix of **jus sanguinis** and the rule of **jus soli**, while many European countries use **jus sanguinis**. The use of **jus sanguinis** tends to be more

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44 Price, supra note 40, at 450; Harvey, supra note 11, at 261.
45 Milbrandt, supra note 14, at 82.
47 Id. at 83.
48 Harvey, supra note 11, at 257.
49 Sawyer, supra note 46, at 70–71 (“The difficulty for international law solutions to statelessness is that nationality and citizenship are both aspects of national sovereignty to be defined by countries themselves.”).
50 Milbrandt, supra note 14, at 81.
51 Id. at 89–90.
52 Harvey, supra note 11, at 258.
53 Milbrandt, supra note 14, at 90.
54 Id.
55 Price, supra note 40, at 445.
56 Id. at 451–52.
problematic in the sense that it can lead to many generations of stateless persons, whereas *jus soli* limits statelessness to only one generation.\(^{57}\)

**C. Early Developments in International Law**

Over the years, there has been a slow and steady development of international law addressing state nationality and citizenship laws.

The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (the Hague Convention) demonstrates the emerging principle that a state determines its nationals under its own law.\(^{58}\) Article 1 of the Hague Convention asserts this principle and adds that such laws “shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”\(^{59}\) Article 2 states that the nationality of an individual “shall be determined in accordance with the law of the State.”\(^{60}\)

The Universal Declaration of Human Rights (UDHR), which was issued in 1948, asserted the right to a nationality.\(^{61}\) The Declaration recognizes that “everyone has the right to a nationality” as well as a right to not be “arbitrarily deprived” of that nationality or denied the right to change it.\(^{62}\) Further, Article 14 of the UDHR asserts the right of individuals to seek and enjoy asylum from persecution in other countries, but qualifies this right by saying that it only applies to persecution, and not genuine prosecutions arising from non-political crimes.\(^{63}\)

Subsequently, in 1950, the Office of the U.N. High Commissioner for Refugees (UNHCR) was created.\(^{64}\) The U.N. General Assembly later charged the UNHCR, through a series of resolutions, with the prevention and

\(^{57}\) *Id.* at 444–45 (“But at present this statelessness at least is limited to one generation, because under existing practices of territorial birthright citizenship, the children of unauthorized immigrants are automatically awarded U.S. citizenship at birth if born in the United States.”).

\(^{58}\) *Harvey, supra* note 11, at 257.

\(^{59}\) Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, 179 L.N.T.S. 89 (Apr. 13, 1930) [hereinafter Hague Convention].

\(^{60}\) *Id.* art. 2.


\(^{62}\) UDHR, *supra* note 61.


reduction of statelessness along with the protection of stateless individuals.\textsuperscript{65} Along with the UDHR, several other instruments have recognized the right to a nationality, including the 1989 Convention on the Rights of the Child,\textsuperscript{66} the 1966 International Covenant on Civil and Political Rights,\textsuperscript{67} and the 1965 Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{68} However, the UDHR has been criticized as having no practical validity since few of its provisions are directly enforceable.\textsuperscript{69} For instance, the right to seek asylum is unenforceable since there is no corresponding obligation on any state to grant asylum.\textsuperscript{70}

The 1954 Statelessness Convention established a definition of statelessness and enumerated several rights that stateless persons are entitled to have.\textsuperscript{71} The 1954 Statelessness Convention established “an internationally recognized status for stateless persons which extend[ed] to them specific rights . . . [including] issuance of identity and travel documents.”\textsuperscript{72} However, stateless persons in states which are not a party to the 1954 Statelessness Convention would remain unprotected.\textsuperscript{73}

Subsequently, the 1961 Statelessness Convention, which expanded on the 1954 Statelessness Convention, addressed the issues of avoiding statelessness as well as resolving conflicts concerning nationality.\textsuperscript{74} Articles


\textsuperscript{69} Sawyer, supra note 46, at 74–75.

\textsuperscript{70} Id. at 76.

\textsuperscript{71} 1954 Statelessness Convention, supra note 11; Price, supra note 40, at 448.

\textsuperscript{72} UNHCR Action to Address Statelessness, supra note 68, at 5.

\textsuperscript{73} Sawyer, supra note 46, at 80; 1954 Statelessness Convention, supra note 11 (as of November 2013, the United States is not a signatory, and the only non-signatory E.U. Member States are as follows: Cyprus, Estonia, Malta, and Poland. A complete list is available on the U.N. website at: http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-3.en.pdf).

\textsuperscript{74} 1961 Statelessness Convention, supra note 43 (as of November 2013, the United States is not a signatory and the only non-signatory E.U. Member States are as follows: Cyprus, Estonia, Greece, Italy, Luxembourg, Malta, Poland, and Spain. A complete list is available on the U.N. website at: http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf); see also Jessica Parra, Note, 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, 1674 (2011).
1 through 4 of the 1961 Statelessness Convention set forth nationality laws to prevent statelessness among children.\textsuperscript{75} Specifically, Article 1 of the 1961 Statelessness Convention asserts that a “Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”\textsuperscript{76} Note that if a state employing \textit{jus sanguinis} were to adopt the 1961 Statelessness Convention, Article 1 would effectively solve the problem of statelessness carrying over to subsequent generations discussed above.\textsuperscript{77} Articles 8 and 9 address deprivation of nationality, establishing that states cannot deprive individuals of nationality based on discriminatory factors or in such a manner that would result in statelessness.\textsuperscript{78} In terms of enforceability, Article 11 envisioned the establishment of an international body for reviewing individual claims to the benefits of the 1961 Statelessness Convention.\textsuperscript{79} No such body was ever created, however, and there is no system in place today for an individual to receive assistance in obtaining a valid nationality.\textsuperscript{80}

The International Court of Justice was established in 1945 by the U.N. Charter and is the principal U.N. judicial organ.\textsuperscript{81} Even though the Court is not bound by its precedent,\textsuperscript{82} it often adheres to it, making its prior decisions relevant to analysis of the developments in international law. In the 1955 \textit{Nottebohm Case}, the Court stated that “it is for every sovereign State[ ] to settle by its own legislation the rules relating to the acquisition of its nationality. . . .”\textsuperscript{83} In other words, as the judgment in \textit{Nottebohm} put it, “nationality is within the domestic jurisdiction of the State.”\textsuperscript{84} The Court went on to define nationality as “a legal bond having as its basis a social fact


\textsuperscript{76} 1961 Statelessness Convention, \textit{supra} note 43, art. 1.

\textsuperscript{77} \textit{See supra} Part II.B.

\textsuperscript{78} 1961 Statelessness Convention, \textit{supra} note 43, arts. 8–9.

\textsuperscript{79} \textit{Id.} art. 11 (“The Contracting States shall promote the establishment within the framework of the United Nations . . . of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.”).

\textsuperscript{80} Sawyer, \textit{supra} note 46, at 80.

\textsuperscript{81} \textit{The Court, Int’l Court of Justice}, \url{http://www.icj-cij.org/court/index.php?p1=1} (last visited Nov. 18, 2013).

\textsuperscript{82} Statute of the International Court of Justice, art. 38, June 26, 1945, 3 Bevans 1179, available at \url{http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II}.

\textsuperscript{83} Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 20 (Apr. 6).

\textsuperscript{84} \textit{Id.}
30 of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." In response to the definition, Caroline Sawyer, a Senior Law Lecturer at New Zealand’s Victoria University Wellington, wrote in 2011: “Statelessness is the obverse [of nationality], describing a position of detachment, exclusion and abandonment. . . . [C]itizenship still provides the means through which [universal basic human] rights may be vindicated. The correlation of this is that those without a nationality may in practice be excluded from human rights.” A state’s decision regarding its nationality laws have a substantial impact on the number of stateless persons excluded from basic human rights that found within its borders.

III. ANALYSIS

This Note will now turn to an examination of current U.S. and E.U. laws and policy on the issue of stateless persons. Examination of the differences in the legal framework will aid in understanding the implications of the laws and policies in place.

A. U.S. Laws and Policies

The United States is an advocate for addressing the challenges of statelessness. The U.S. is the single largest donor to the UNHCR, which is tasked with protecting stateless individuals. In December 2011, then Secretary of State Hillary Clinton committed the Obama Administration to the enactment of statelessness legislation in the U.S., and a taskforce on statelessness was created by the Department of State. In addition to attempting to change domestic policies on statelessness, the U.S. has taken on the issue at the international level. Secretary Clinton “urged countries to tackle a major cause of statelessness — nationality laws that discriminate

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85 Id. at 23.
87 Sawyer, supra note 46, at 69.
90 Id.
She also has stated: “In this compromised state [of statelessness], women and children are vulnerable to abuse and exploitation, including gender-based violence, trafficking in persons, and arbitrary arrest and detention.”

Clinton’s sentiment seems to suggest that such perilous conditions must be avoided whenever possible.

Despite assertions by some Obama Administration officials of a need to resolve the statelessness problem, the U.S. has taken no concrete action. In population estimates from March 2012, the Department of Homeland Security estimated that as of 2011, 11.5 million people in the U.S. were unauthorized migrants. The number of stateless individuals is unknown. The UNHCR estimated in a 2012 report that there were several hundred stateless individuals in the U.S., but noted that the actual number could be significantly higher. For instance, U.S. Rep. Lamar Smith maintained in a 2011 hearing before the Subcommittee on Immigration Policy and Enforcement of U.S. House of Representatives Committee on the Judiciary that “between 2009 and 2011 the U.S. government released almost 10,000 deportees after their purported countries of origin refused to take them back,” making them de facto stateless.

1. Current Legal Framework

The 1958 U.S. Supreme Court case *Trop v. Dulles* concerned a person who became stateless when the U.S. revoked his citizenship as a punishment for wartime desertion. The Court condemned statelessness, and held that such a punishment was a violation of the prohibition set out in the Eighth Amendment.

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92 *Id.*
95 Price, *supra* note 40, at 443.
Amendment to the Constitution against cruel and unusual punishment.\textsuperscript{99} Chief Justice Earl Warren, writing for the plurality, said that to render a person stateless is “a form of punishment more primitive than torture” and that it amounts to a “total destruction of the individual’s status in organized society.”\textsuperscript{100} The plurality went on to say that this condition of statelessness, the loss of the “right to have rights,” is “deplored in the international community,” such that the “civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”\textsuperscript{101} Surely, then, it should not be imposed on those who have committed no crime.

In two more recent judgments—\textit{Zadvydas v. Davis}, decided in 2001,\textsuperscript{102} and \textit{Clark v. Martinez}, decided in 2005\textsuperscript{103}—the Supreme Court ruled that stateless persons could not be held in detention indefinitely under the Immigration and Nationality Act.\textsuperscript{104} After six months of detention, the burden shifts to the U.S. to establish by clear and convincing evidence the likelihood of removal through deportation in the reasonably foreseeable future.\textsuperscript{105} While there is some precedent on the issue, according to a 2013 report by the Center for Migration Studies, U.S. policy on statelessness “lacks a consistent legal framework for dealing with stateless individuals, leaving many in protracted deportation proceedings and exposing many more to exploitation by employers, landlords, and law enforcement officials.”\textsuperscript{106} For Mikhail Sebastian and the many like him, living under the current U.S. legal framework for stateless persons is nothing short of a nightmare.\textsuperscript{107}

Before Sebastian found himself on American Samoa for fifteen months, another bizarre turn of events led Sebastian to the U.S. Sebastian, an ethnic Armenian, was born in Nagorno-Karabakh, a disputed territory in

\textsuperscript{99} Id. at 101.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 102.
\textsuperscript{102} 533 U.S. 678 (2001).
\textsuperscript{103} 543 U.S. 371 (2005).
\textsuperscript{105} Id.
\textsuperscript{106} Davis, 533 U.S. at 718 (citing 8 U.S.C. § 1229a(c)(3)(A)); see The Stateless in the United States, supra note 96.
\textsuperscript{107} See generally Dzubow, supra note 8 (stateless individual from former Soviet Union has been separated from her closest family members for decades and is ineligible for social security despite paying taxes for twenty years); Swerdlow, supra note 4 (stateless individual of Kurdish background under strict, supervision by U.S. Immigration and cannot travel anywhere without permission).
Azerbaijan, while it was under Soviet rule. After the collapse of the Soviet Union, both Armenia and Azerbaijan refused to recognize Sebastian as their citizen. After three years of living with what Sebastian referred to as “discrimination, harassment and fear,” Sebastian came to the U.S. on a travel visa and subsequently filed a petition for asylum, which was denied. U.S. efforts to deport him failed, however, because he was a citizen of no country and no country wanted to accept him. After spending six months in jail, Sebastian was released, given a worker’s permit, and required to report to the Department of Homeland Security every three months. During the sixteen years Sebastian lived in the United States before he found himself trapped on American Samoa, however, Sebastian was required every year to reapply for the worker’s permit, a lengthy and expensive process that entailed taking time off work and thus risking the loss of his job. Throughout all of this, Sebastian lived in fear of “being thrown into immigration detention at any time, even though [he had] broken no laws.”

Sebastian, and others like him, offer a very vivid portrayal of the deficiencies in U.S. immigration laws and policies which allow innocent people—people whose only crime is statelessness—to fall through the cracks. With respect to international law, the U.S. is neither a signatory to the 1954 Statelessness Convention nor is it a signatory to the 1961 Statelessness Convention. Thus, the United States is not bound by any of the provisions in either of these conventions. Other international conventions are also relevant here. The 1962 American Convention on Human Rights recognizes the right of every person to have a nationality in Article 20. Article 20 goes on to confer a *jus soli* right for a stateless individual, so that an individual has the right to the nationality of the state where he was born “if he does not have the right to any other nationality.” Additionally, Article 20 states: “No one shall be arbitrarily deprived of his nationality or of the

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108 Sebastian, supra note 1.
109 Id.
110 Id.
111 Id.
112 Id.; Stateless and Stranded on American Samoa, supra note 1.
113 Sebastian, supra note 1; Stateless and Stranded on American Samoa, supra note 1.
114 Sebastian, supra note 1.
116 Id.
117 Id.
118 Id.
right to change it.”119 The United States signed but never ratified the American Convention on Human Rights.120

The 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention) defines the term refugee and sets forth a “comprehensive codification of the rights of refugees at the international level.”121 Article 1 defines refugees as persons who are unwilling or unable to avail themselves to the protections of their countries of nationality or origin, due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”122 The 1951 Refugee Convention was originally limited in scope to affected persons in the aftermath of the Second World War. But the 1967 Protocol Relating to the Status of Refugees extended the scope of the 1951 Refugee Convention to eliminate the “geographical and temporal limits,” thus allowing for “universal coverage.”123 The U.S. signed the Protocol in 1967, and subsequently enacted legislation that incorporated its central provisions.124 This is significant in that the individuals who are considered to be both refugees and stateless persons receive some amount of protection—like the ability to obtain travel documents.125 Those who are only stateless, however, are left without protection.

2. Attempted Legislation

   a. Comprehensive Immigration Reform

In June of 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (Immigration Modernization Act).126 The bill awaited consideration by the House of

119 Id.
120 Id.; Price, supra note 40, at 448.
123 UNHCR INTRODUCTORY NOTE, supra note 121, at 2.
124 Price, supra note 40, at 449.
Representatives, but was never brought to the floor for a vote.\textsuperscript{127} Stateless persons and their status are mentioned in § 3405 of the Immigration Modernization Act, which is designed to amend 8 U.S.C. § 1151.\textsuperscript{128} This amendment, if enacted, would allow stateless persons to apply for conditional lawful status at the discretion of either the Secretary of the Department of Homeland Security or the Attorney General.\textsuperscript{129} This discretion includes situations involving humanitarian issues and family unity.\textsuperscript{130} One year after the granting of conditional status, the stateless individual may apply for lawful permanent residence in the U.S., subject to other prerequisites.\textsuperscript{131}

Whether Congress will pass comprehensive immigration reform remains uncertain. Further, it is unclear if such a reform would include the Immigration Modernization Act’s statelessness language, if any language at all. If the Immigration Modernization Act or a similar bill were to pass in a “piecemeal” fashion,\textsuperscript{132} statelessness could be left out entirely. Note that Senator Charles Grassley, the current chairman of the Senate Judiciary Committee, which has jurisdiction over the Act, offered an amendment to the Immigration Modernization Act with the stated purpose of striking the stateless provision from the bill.\textsuperscript{133} In addition, President Obama expressed willingness to accept the “piecemeal” approach suggested by House Republicans for passing the immigration reform.\textsuperscript{134} Either scenario would be detrimental for stateless persons in the U.S. Striking the statelessness provision would leave countless stateless individuals without any path to citizenship or to a lawful status. Similarly, using a piecemeal approach will lower the likelihood of a statelessness provision like § 3405 passing on its own, as opposed to as part of a package deal.

\textsuperscript{127} Immigration Modernization Act, supra note 126.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{134} Matthews, supra note 132.
b. Refugee Protection Act

In March 2013, Sen. Patrick Leahy (D-VT) reintroduced the Refugee Protection Act (S. 645) in the U.S. Senate and Rep. Zoe Lofgren (D-CA) introduced a companion bill in the U.S. House of Representatives. The statelessness protection provision of the Immigration Modernization Act is almost identical to Section 7 of the Refugee Protection Act. Both allow for the possibility of stateless persons attaining conditional lawful status with the potential of eventually receiving lawful permanent residence after a year, if certain conditions are met. The Refugee Protection Act is intended to pass as part of the comprehensive immigration reform, and would improve U.S. protections for refugee and asylum seekers.

c. Problems with Proposed Language

There are several problems with § 3405 of the Immigration Modernization Act that need to be addressed. First, the language of the bill is very broad and leaves too much discretion in the hands of government authorities. For example, § 210A(a)(2) gives the Secretary of the Department of Homeland Security the discretion to designate specific groups of individuals as stateless for purposes of the section. Section 210A(b)(1) gives discretion to the Secretary of the Department of Homeland Security and the Attorney General to provide the conditional lawful status discussed above if certain conditions are met. Other portions of § 210A assert that the Secretary of the Department of Homeland Security “may authorize an alien . . . to engage in employment in the United States,” “may issue appropriate travel documents,” and, most importantly, “may adjust the status of an alien granted conditional lawful status . . . to that of an alien lawfully admitted for permanent residence.”

136 The Stateless in the United States, supra note 96.
137 Leahy Press Release, supra note 135.
138 Immigration Modernization Act, supra note 126.
139 Id.
140 Id. (emphasis added).
Along these same lines, the bill fails to define certain key terms. For instance, there is no definition for the term “conditional lawful status” or “lawful permanent residence” in the text of § 3405 or elsewhere in the bill. Furthermore, § 3405 is the only section in which the term “conditional lawful status” is used. Such failure can result in a lack of clarity as to the rights a stateless individual has under a conditional lawful status and when that status can be converted into a lawful permanent residence, also known as a “green card.”

Lastly, the path to citizenship in § 3405—namely, acquiring conditional lawful status, followed by lawful permanent residence—is unique. No other class of people is required to follow such path. This can arguably lead to arbitrary application of the section and a lack of information for stateless persons regarding their rights under the conditional lawful status propounded by the bill.

B. E.U. Laws and Policies

The European Union was created after the Second World War by the Treaty of Paris founding the European Coal and Steel Community in 1952, and today consists of twenty-eight member states. In 1992, the Treaty of Maastricht, also known as the Treaty on European Union, created European citizenship. The Treaty on European Union was subsequently amended by both the Treaty of Amsterdam in 1997 and the Treaty of Lisbon in 2007, but the basic features, rights, and benefits of E.U. citizenship were preserved in each. There are several rights that E.U. citizenship confers on its citizens: the right to freely move and reside within the member states, the right to vote and stand in municipal elections in the member state where the citizen resides, regardless of whether he is a national of that state, the right to the diplomatic and consular protection of other member states within the

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141 See id.
145 HORSPOOL & HUMPHREYS, supra note 143, at 26–27.
147 Maastricht Treaty, supra note 144, art. 8a.
148 Id. art. 8b.
territory of a third country, as well as the right to petition the European Parliament. However, in order to be considered a citizen of the E.U., you must first be a citizen in one of the member states. This means that since there is a lack of uniformity in nationality laws throughout the E.U., states can essentially decide whether an individual enjoys both the privileges of citizenship of their state as well as E.U. citizenship, or neither. The potential implications of this member state sovereignty in making their own nationality and citizenship laws on stateless persons is vast—each individual state is free to decide whether or not stateless persons will have a path to citizenship.

1. European-Specific Treaties

In the 1950 European Convention on Human Rights (ECHR), Article 3 of Protocol 4 establishes the right of an individual to enter the country of that individual’s nationality. Article 4 further prohibits the collective expulsion of foreigners. By the 1980s, with the emergence of mass migration, and as unwanted immigration became politicized, the application of the 1951 Refugee Convention and the ECHR in European states became more contested in cases dealing with non-nationals.

There are some indications that the E.U. does not give all its member states complete sovereignty over their nationality laws. As the 1997 European Convention on Nationality establishes in Article 4, each state’s rules on nationality shall be based on certain principles—including the principle that “statelessness” shall be avoided. Article 6, which discusses the acquisition of nationality in member states, asserts that the internal law of said member states shall provide a means for acquiring nationality for individuals found in its territory that would otherwise be stateless. Article 8 further states that each state shall allow renunciation of its nationality as

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149 Id. art. 8c.
150 Id. art. 8d.
151 Id. art. 8.
154 Id. art. 4.
156 European Convention on Nationality art. 4, Nov. 6, 1997, 37 I.L.M. 44.
157 Id. art. 6.
long as that renunciation does not result in statelessness,\(^{158}\) and Article 9
go on to say that the states shall allow recovery of nationality in their
internal law for its former nationals who are “lawfully and habitually”
residing in the state.\(^{159}\)

In the 2006 Treaty Establishing the European Community (the EC
Treaty), Article 12 prohibits any discrimination based on nationality.\(^{160}\)
Article 13 of the EC Treaty authorizes the European Union to take action to
combat discrimination based on racial or ethnic origin, among other
things.\(^{161}\) This could potentially give the E.U. authority to protect those that
are stateless in their member states.

The Race Directive of 2000 arose out of Article 13 of the EC Treaty,
which deals with combating various forms of discrimination.\(^{162}\) The Race
Directive’s stated purpose is to help to combat racial and ethnic
discrimination.\(^{163}\) The Directive does not, however, apply to “difference[s]
of treatment based on nationality” and to “any treatment which arises from
the legal status of the third-country nationals and stateless persons
concerned.”\(^{164}\) This means that member states can refuse to grant individuals
nationality on the basis of race or ethnicity.\(^{165}\)

In the 2010 case \textit{Rottman v. Bayern}, the European Court of Justice held
that Germany’s deprivation of nationality, in a case in which nationality had
been obtained by deception, was legal under E.U. law, even if it resulted in
statelessness and loss of E.U. citizenship.\(^{166}\) This reaffirmed Article 7 of the
1997 European Convention on Nationality discussed above, which states that
a member state’s internal law cannot result in the loss of nationality such that
a person would become stateless, except if the nationality was acquired by
“fraudulent conduct, false information or concealment of any relevant fact
attributable to the applicant.”\(^{167}\) Other than this single exception, however,
Article 7 states that such internal laws, including those that lead to
statelessness, are prohibited.\(^{168}\)

\(^{158}\) Id. art. 8.

\(^{159}\) Id. art. 9.

\(^{160}\) Consolidated Version of the Treaty Establishing the European Community art. 12, 2006
O.J. C 321 E/37.

\(^{161}\) Id. art. 13.

\(^{162}\) Parra, \textit{supra} note 74, at 1676–77.


\(^{164}\) Id. art. 3.

\(^{165}\) See Parra, \textit{supra} note 74, at 1677–78.

\(^{166}\) Case C-135/08, Rottman v. Bayern, 2010 E.C.R. I-1467; Parra, \textit{supra} note 74, at 1683–84.

\(^{167}\) European Convention on Nationality, \textit{supra} note 156, art. 7.

\(^{168}\) Id.
2. Differences in Nationality Laws Among EU Member States

Several countries, including Germany, Austria, and Italy, determine nationality based on *jus sanguinis* rather than *jus soli*.169 This *jus sanguinis* framework implies that there is a potential for multiple generations of stateless persons.170 A closer look into the nationality laws of France, the United Kingdom, Slovenia, and Estonia will illustrate the broad range of differences and the impact of such differences on the stateless individuals in each of the countries respectively.

a. France: Double Jus Soli and the Expulsion of Roma

France currently has a “double *jus soli*” system along with its *jus sanguinis* system.171 The “double *jus soli*” system requires two generations in order to establish nationality based on *jus soli*.172 In a pure “double *jus soli*” system, statelessness would be limited to two generations instead of one. Under the *jus sanguinis* system in France, a child, regardless of where he is born, can claim French nationality if one parent is French at the time of their birth.173 France goes even further than this by allowing for citizenship when an individual is born in France and is still living there once they reach eighteen years of age.174 For foreigners, naturalization is technically possible after five years of residence, but is more reliable in such a short period if the foreigner’s spouse is a French national.175 Further, a newer citizen can be deprived of citizenship if he or she commits certain crimes within ten years of his or her naturalization.176 French law also allows renunciation of citizenship as long as such renunciation does not leave the individual stateless.177

French law and policy, however, are not without its problems. In 2003, two laws were passed that restricted naturalization by allowing for exclusion

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172 *Id.* at 254.
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.* at 256.
of undesirable foreigners from the naturalization process. This policy of "selective immigration" led to the requirement of a "reception and integration contract" in 2008, which fundamentally is just an agreement to assimilate. In addition to the fact that language qualifications for naturalization were strengthened in 2003 and 2005, the "integration contract" codified these requirements in 2007.

Most notably, President François Hollande’s Administration continued to "forcibly evict Roma from settlements as well as expel Roma of foreign origin from France." The Roma, commonly referred to as "gypsies," have been subjected to discrimination throughout history and today the Roma are often targets of violence. Tens of thousands of Roma live in Europe with no rights and no nationality. Many of them are stateless. Many contend that France’s evictions of the Romani people violate their human rights and “fail to comply with both French and European Union law.” Despite these pressures, it is unlikely that the Hollande Administration will change its policy because the expulsion of migrant Roma “remains a politically popular policy in France.”

b. The United Kingdom: Revoking Citizenship from Terror Suspects

The United Kingdom, in April 2013, adopted a new statelessness procedure in Part 14 of the Immigration Rules. It allows stateless individuals a route to having their stateless status recognized as well as legalizing their presence. According to statements made by UNHCR spokesperson Melissa Fleming at a 2013 press briefing, a key feature of the new procedure

178 Id.
179 Id. at 257.
180 Id.
182 Parra, supra note 74, at 1671.
184 Id. at 20.
185 Stewart, supra note 181, at 247–48.
186 Id. at 255.
is that it allows for the determination of whether or not the individual is in fact stateless.\textsuperscript{188} The new procedure does not apply to the de facto stateless. Once that person has taken sufficient steps to gain recognition as a national under the laws of their state, however, they are then considered to be de jure stateless rather than de facto stateless and fall within the new protections of Part 14.\textsuperscript{189} Thus, a person who is de jure stateless and present in the U.K. can benefit from the new rule, as long as they meet the international definition of a stateless person as set forth by the 1954 Statelessness Convention and are not excluded.\textsuperscript{190} The stateless individual may be excluded for a number of reasons, including: individuals who are already receiving U.N. assistance, individuals believed to have committed war crimes, the existence of reasonable grounds to believe the individual is a security threat to the U.K., or there is another country in which they would be admitted.\textsuperscript{191} No legal aid is available to help individuals with their stateless application.\textsuperscript{192} When applying for a grant of leave to remain in the U.K. with stateless status, an individual is given a leave period of thirty months and can apply for extension.\textsuperscript{193} After five years of leave to remain, an individual may apply for indefinite leave to remain and, eventually, may apply for naturalization, provided that the necessary requirements are met.\textsuperscript{194} If an individual’s stateless application is refused, there is no specific right to appeal but the refusal may be subject to judicial review in some instances.\textsuperscript{195}

In October 2013, the U.K. Supreme Court decided the case of Secretary of State for the Home Department v. Al-Jedda, concerning a December 2007 order by the Secretary of State purporting to deprive Al-Jedda of his U.K. citizenship.\textsuperscript{196} In September 2004, Al-Jedda traveled from the U.K. to Iraq where he was arrested by U.S. forces in October 2004.\textsuperscript{197} He was held in Iraq for three years by British forces due to his suspected involvement with a terrorist organization.\textsuperscript{198} The 1981 British Nationality Act states that “[t]he

\textsuperscript{188} UK’s New Determination Procedure to End Legal Limbo for Stateless, supra note 187.
\textsuperscript{189} IMMIGRATION LAW PRACTITIONERS’ ASSOCIATION, supra note 187.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{198} Id.
Secretary of State may not make an order... if he is satisfied that the order would make a person stateless.”¹⁹⁹ The U.K. Supreme Court examined the UDHR, and the 1954 and 1961 Statelessness Conventions, along with other instruments of international law, recognizing the “evil of statelessness” and the right to a nationality.²⁰⁰ The Court eventually held that the order violated the 1981 British Nationality Act and rejected the Secretary of State’s argument that it was Al-Jedda’s failure to apply to regain his Iraqi citizenship, not the order, which caused Al-Jedda to be stateless.²⁰¹

More recently, Theresa May, who is the Home Secretary, expressed a desire to bring legislation that would allow the confiscation of U.K. citizenship from any suspected terrorist whose conduct is “seriously prejudicial to the interests of the UK,” without regard for those U.K. citizens without dual nationalities that would be left stateless.²⁰² Under current law, the Home Secretary has the power to strip individuals of U.K. citizenship if they are dual-nationals, but May wants to find a way around domestic and international rules in order to strip terror suspects of their U.K. citizenship, even if doing so would leave those individuals stateless.²⁰³ In the 1950s and 1960s, when most western countries denounced denaturalization, Britain did not do so, although it rarely utilized this power.²⁰⁴ Post-9/11, however, there was an increase in the utilization of this power, and in 2006 an act was passed lowering the requirements for revocation of citizenship from both naturalized and native-born citizens.²⁰⁵

²⁰¹ Id.
²⁰⁴ Id. supra note 203 (noting that only twenty-five individuals lost their citizenship between 1945 and 2001).
²⁰⁵ Id.
c. Slovenia: A State in Transition

The recently established Republic of Slovenia (1991) provides an interesting case study because of the problems stemming from the unusually high number of state transitions occurring in a relatively short period of time. Some 200,000 people became de facto stateless after the transition from the Socialist Federal Republic of Yugoslavia (SFRY) to the Republic of Slovenia because their personal documents were destroyed or invalidated, leading to their expulsion. Article 40 of the Citizenship of the Republic of Slovenia Act sets forth the conditions for naturalization in Slovenia, stating that if a citizen of another republic that registered permanent residence in Slovenia on the day of the plebiscite of independence and has actually been living in Slovenia, and has filed an application within six months of the Act’s entry into force, then he shall acquire citizenship in the Republic of Slovenia. After gaining independence, citizenship and alien policies left 25,671 long-term immigrants from other SFRY republics without citizenship and denied them status as legal aliens. Once the six month window set forth in Article 40 closed, not all who applied for citizenship under the Article were accepted—some were rejected and others did not apply due to a number of reasons, mainly false information about the application process. The Aliens Act of 1991 laid out various policies applicable to foreigners entering Slovenia, but did not address those who became stateless due to secession. Those that did not become citizens in 1991 were “secretly erased from the register of permanent residents,” an action that became known as “erasure.” Under the 1991 Aliens Act, erased persons were treated as any other foreign citizen and many could not meet the required

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207 Id. at 195–96; Riley Arthur, This Rap Song Turned Something Tragic into Something Artistic, Nat’l Geographic (Nov. 7, 2013), http://newswatch.nationalgeographic.com/2013/11/07/this-rap-song-turned-something-tragic-into-something-artistic/ (noting that “200,000 non-ethnic Slovenian residents . . . were not automatically granted citizenship after the country split from Yugoslavia . . . A decade later, the community is still fighting for documentation”).
209 Zorn, supra note 206, at 196.
210 Id. at 201–02.
212 Zorn, supra note 206, at 204.
The result was a very significant detriment to the rights of the individuals who were subject to erasure—they lacked valid documents for identification and often their legal status was revoked, leaving them without access to the most basic rights.

d. Estonia: Where the Stateless Have Rights

Estonia is also worthy of examination since de jure statelessness is relatively common there due to its nationality laws. Between 1992 and 2009, about 150,000 persons were naturalized in Estonia, with about 100,000 remaining stateless non-citizens. Compared to other member states of the E.U., Estonia’s citizenship policies are much more restrictive. Generally, stateless non-citizens enjoy the same rights and free access to social protection as citizens in Estonia. Most of the discrimination that occurs against stateless non-citizens is based on their Russian cultural background, rather than their legal status.

3. Statelessness Determination Procedures

Some E.U. member states are moving towards establishing determination procedures to ascertain the status of stateless individuals within their borders. Some states delegate the determination authority to already existing authorities. For instance, France, Spain, and the U.K. have delegated statelessness determination to their asylum authorities. Additionally, these member states do not require lawful presence of a stateless individual before they are entitled to a status determination.
procedure. This is positive because it encourages efficiency in status determination and does not negatively impact or deter individuals who may not have any lawful status.

C. Lessons from the European Union

There are lessons that the United States can take away from this examination of various European Union member states. First, the U.S. is already better situated to eradicate statelessness due to its use of *jus soli* for acquiring citizenship. However, this does not mean that the United States should ignore the current stateless population simply because the problem is limited to one generation. Rather, it should recognize the limited burden of providing these law-abiding individuals with a legal presence so that they no longer have to be treated as second-class citizens.

Second, as we see with France and the United Kingdom, statelessness can be a serious problem, even in the most developed western nations. Of course, the U.S. is not expelling stateless individuals in a discriminatory way as the French are doing to the Romani people, nor is it purposely revoking citizenship from individuals suspected of terrorism like in the U.K. However, many stateless persons in the U.S. are still being deprived of their most basic and fundamental human rights. The U.S. should serve as an example for both developing and developed nations alike by, at the very least, establishing status determination procedures and granting stateless persons some kind of path to obtaining legal status so that they can enjoy basic human rights such as access to healthcare, education, and the freedom of movement.

Lastly, as alluded to above, it is important to realize that this is an international legal issue. Statelessness exists in developed and developing countries alike, and the far-reaching consequences of statelessness impact more than just the nations that are allowing it. Many of the individuals who are stateless in the U.S. and the E.U. are valuable members of their communities. If those individuals were granted the rights to travel and work, they would benefit their respective countries economically as well as socially.

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223 *Id.* at 14.
224 *Id.*
A. Implications of Proposed Legislation Passing

Congress should pass comprehensive immigration reform that includes a statelessness provision. While the language in the Immigration Modernization Act is incomplete in some areas, passing a comprehensive immigration reform bill including § 3405 or something comparable would be a step in the right direction; it would relieve some of the pressure on the stateless population in the United States since it would at least allow stateless individuals to obtain a permanent legal status. Ideally, the broad and deferential language in the legislation would be reworded so as to minimize confusion and endow stateless individuals with clear and discernible rights. If nothing else, the term “conditional lawful status” needs to be further defined so that it is clear what rights it confers onto individuals who are granted that status.

B. Implications of Proposed Legislation Not Passing and the Alternatives

If comprehensive immigration reform legislation does not pass, the prospect for stateless persons receiving any lawful status in the U.S. is slim, at best. But the most plausible course of action seems to be legislation, which will be unlikely to make it through Congress if it is not presented in conjunction with an immigration reform package.

One alternative is to separate the legislation on statelessness from the greater immigration reform bill and try to pass it on its own. With this alternative, a bill with language similar to that of § 3405 is unlikely to garner enough support in Congress. Congressional Democrats greatly favor comprehensive immigration reform, recognizing that many of the current issues in immigration law are greatly intertwined.

A second alternative is U.S. accession to the 1954 and 1961 Statelessness Conventions. However, it is not enough to just sign on to these Conventions—the United Kingdom is a signatory of both but that has not stopped it from acting in contradiction to those conventions recently, as discussed above. The U.S. would have to ratify the treaty and enact enabling legislation before being bound by the terms of these Conventions.

A third alternative is the adoption of something similar to the 1997 European Convention on Nationality—a law that would construe nationality laws so as to avoid statelessness and would provide a means for acquiring citizenship for those individuals who would otherwise be stateless, except in cases of fraud. Effectively, this kind of law would do the same thing as the
Immigration Modernization Act would if it were enacted, but would most likely have a harder time finding approval from Congress on its own as opposed to when presented in a package of comprehensive immigration reform.

Another alternative would be to create stateless determination procedures like those that exist in the E.U. The authority to make status decisions could potentially be delegated to immigration courts. This new authority, however, would likely need Congressional approval as well.

Because deep uncertainties are inherent in these other alternatives, passage of a comprehensive immigration reform bill is the best chance for stateless persons to obtain a path to citizenship. The four alternatives listed above would be viable if they could pass through Congress standing alone, but this seems unlikely. While the language of the bill is somewhat ambiguous, the ability to obtain a conditional lawful status and lawful permanent residence thereafter is better than the current state of affairs, which does not allow for stateless persons to ever be granted citizenship. Thus, at this point in time, the passage of a comprehensive immigration reform bill, ideally with more favorable language, is the most viable solution for beginning to solve the problem of statelessness in the United States.