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Protecting Stateless Refugees in the United States

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Miliyon is a stateless, failed asylum seeker residing in the United States. He initially sought refugee protection after he fled Ethiopia, where he had faced serious abuse because of his Eritrean ethnicity. Immigration authorities denied him asylum after concluding that the Ethiopian government's deportation of his Eritrean father, the seizure of his family's land and business, and the detention and torture of Miliyon himself constituted a property dispute not protected under U.S. refugee law. Miliyon fought this denial of protection over the next decade through various appeals processes but ultimately failed. At that point, he applied for a passport at the Ethiopian embassy in Washington, D.C. and resigned himself to return home and face whatever fate awaited him. Consular officials, however, refused to issue him a passport. Despite never having set foot in Eritrea or having any other connection to the country, Miliyon was told that he was Eritrean, not Ethiopian. He was informed that he had no right to return

David Baluarte is Associate Dean for Academic Affairs and an Associate Clinical Professor of Law at Washington and Lee University School of Law, where he is the Founding Director of the Immigrant Rights Clinic (W&L IRC). He is a recognized scholar and advocate in the areas of statelessness, refugees, human rights, and migration, having published a number of articles on these topics, led research initiatives for the UN High Commissioner for Refugees (UNHCR), the Open Society Foundations, and the Equal Rights Trust on statelessness in the Americas, directed UNHCR projects to identify and protect stateless persons in the United States and the Bahamas, and coordinated international human rights litigation against the Dominican Republic to defend the right to nationality in that country. He is a Steering Committee member of the Americas Network for Nationality and Statelessness and an Advisory Council member for the Institute on Statelessness and Inclusion. At the W&L IRC, Baluarte represents stateless clients, like Miliyon Ethiopis, in their claims for protection in the United States and teaches immigration, citizenship and refugee law.

to Ethiopia, his country of birth and the only place he had ever lived. This led the United Nations High Commissioner for Refugees (UNHCR) to declare Miliyon stateless. As a victim of discriminatory denationalization, Miliyon tried to renew his application for refugee protection. Notwithstanding the fact that Miliyon had endured this persecutory treatment, U.S. authorities once again denied his claim.

Miliyon's failure to secure refugee protection in the United States reveals a series of deficiencies in U.S. asylum law and procedure as it applies to stateless persons. These deficiencies are in part related to the incomplete incorporation of international frameworks for the protection of refugees and stateless persons by the United States. Specifically, while the United States implemented its international refugee law obligations in the 1980 Refugee Act, it has neither signed the subsequent international treaties for the protection of stateless persons nor enacted any domestic laws to fill this gap. As a result, U.S. law does not provide a definition of statelessness, a procedure for the determination of statelessness, or a framework for the protection of stateless persons. While U.S. asylum protection is available to stateless persons, the gap in the law with regard to statelessness leads many asylum adjudicators to misunderstand the unique circumstances that contribute to the persecution of stateless refugees. Moreover, stateless persons are subject to the same removal procedures as migrants with a nationality, and they are ordered to be removed after an asylum denial despite the fact that they have nowhere else in the world to go.

This article proposes a more complete and nuanced consideration of statelessness in asylum adjudication procedures in the United States and the possibility of reopening previously denied asylum claims like Miliyon's for this purpose. The article proceeds in four parts, beginning with a discussion of statelessness in the United States. Next, the article describes the international protection frameworks for both refugees and stateless persons and identifies important points of intersection between these frameworks. Then the article argues that discriminatory denationalization that renders a person stateless triggers refugee protection, thereby making victims of such deprivation eligible for asylum in the United States. The article concludes that stateless refugees like Miliyon should be able to reopen their previously denied asylum claims to make these arguments and pursue protection.

Statelessness in the United States

A stateless person is one who is not a national of any country under the

operation of its laws.[1] While this is an individualized legal determination that can be technical in nature, the lived experience of a stateless person is not at all a technical matter. Untethered from the international order of nation-states, stateless persons have no home anywhere in the world. This is particularly important to understand as the tenor of global discourse about unauthorized migration has become harsh and unsympathetic.

As might be expected, stateless persons without authorization to reside in the United States live in the shadows, avoiding contact with the criminal justice system and immigration authorities. If stateless migrants like Miliyon do come into contact with the immigration system, they are treated in the same manner as any other migrant; if they are found removable, they are mandatorily detained. Because they cannot actually be removed from the country, as no other nation will accept them, they may face prolonged detention, but they will eventually be released to a life on parole. Separated permanently from their families abroad, they live their lives under the constant scrutiny of immigration officials with the discretion to grant or deny their requests to work legally, and the authority to re-detain them.[2] The stateless legal limbo in the United States is a lonely and precarious existence.

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The Center for Migration Studies (CMS), a nonpartisan, New York-based think tank, recently conducted a study that estimated and profiled the population of people in the United States who may be stateless, with eye-opening results.[3] CMS recognized at the outset that U.S. law does not define statelessness and that the U.S. government does not make any specific effort to determine who is stateless or count those who fall under this category. Through a rigorous mixed method of quantitative and qualitative analysis, CMS developed a comprehensive set of profiles of migrants who are potentially stateless, or potentially at risk of statelessness, and provided an estimate of that population in the United States. CMS intentionally qualified the terms "stateless" and "at risk of statelessness" with the term *potentially* in order to capture all people of a national, ethnic, or religious background who could be stateless. CMS then used large, government-maintained databases to estimate the population of people potentially of concern.

The contributions of this important work are at least threefold. First, the comprehensive nature of the study, by first collecting the many profiles of global

statelessness and then matching them with existing databases of foreign-born persons in the United States, is quite stunning. With the increasing global awareness of statelessness in recent years, numerous marginalized ethnic and religious groups are now understood to have precarious nationality rights. For example, Syrian Kurds forced to flee the protracted conflict in Syria risk statelessness, as do Bahamians of Haitian ancestry in the Caribbean nation just 50 miles off the coast of Florida. While an exact count of the U.S. stateless population is impossible, matching these profiles with the U.S. foreign-born population provides a much clearer sense of the likely contours of the stateless population in the United States than has ever been possible before.

Second, using innovative statistical modeling, CMS was able to estimate that there are approximately 218,000 foreign-born persons in the United States who are potentially stateless or at risk of statelessness. While the actual number of stateless persons in the United States is probably much lower than 218,000, the study suggests that the population is likely larger than the previous UNHCR estimate of just 4,000 stateless people. The people identified in the CMS study live in all 50 states of the United States, and they represent every major region of the world. Notably, more than half of the estimated population were identified in Worldwide Refugee Admissions Processing System (WRAPS) data, one of the two principal data sources analyzed by CMS. This suggests that a large portion of the U.S. stateless population are recognized refugees, which means that they have immigration status and are on a path to gaining U.S. citizenship.

Finally, while most foreign-born people who are possibly stateless or at risk of statelessness are refugees and protected under U.S. law, CMS discovered that a substantial portion of the population does not appear in the WRAPS data and may have no status in the United States. This population was identified though an analysis of American Community Survey (ACS) data, collected annually by the U.S. Census Bureau. Napkin math based on the CMS data analysis provides that roughly 80,000 people who are potentially stateless or at risk of statelessness appear in the ASC data set and do not appear in the WRAPS data set.[4] This suggests that about 40 percent of the U.S. stateless population is not protected by refugee status and may be in need of international protection. This group is of particular concern because it is most in need of legislative action to define statelessness and create the protective framework that is currently absent. This realization should prompt a sustained effort to pass such legislation.

Notably, a well-developed proposal for a stateless person protection mechanism has been included in every iteration of the Refugee Protection Act (RPA), which Senator Patrick Leahy (D-VT) has introduced to the U.S. Congress nearly

every legislative cycle since 2010.[5] While the RPA has never garnered sufficient support as a stand-alone bill to reach the floor of the Senate for a vote, it was included in the bi-partisan Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (SB 744).[6] The Senate passed SB 744 in 2013, but the legislation was never presented for a vote in the lower house of Congress due to political opposition to progressive comprehensive immigration reform. That is the closest that United States has ever come to passing a stateless person protection mechanism into law.

While the harsh political landscape for immigrants in the United States today makes the near-miss reform bill of 2013 seem utopian, the statelessness provision nevertheless merits close consideration. The proposed mechanism would have created a definition for "stateless person" to mirror the definition set forth in the 1954 Convention on the Status of Stateless Persons (Statelessness Convention).[7] It would have also granted a procedure for the determination of statelessness to guide immigration authorities in identifying who is "not considered a national under the operation of the laws of any country."[8] Basic legal protection and immigration status for individuals determined to be "stateless person(s)", would also have been provided by the proposed law. Specifically, upon receiving stateless status, individuals would receive work authorization, become eligible for travel documents, have the ability to become Lawful Permanent Residents, and ultimately have the opportunity to apply for U.S. citizenship—a permanent resolution to their stateless status.[9] The proposed statelessness protection mechanism would potentially solve the situation of the vast majority of stateless persons in the United States, who are currently unprotected.

That this statelessness protection mechanism is situated in a broader legislative proposal titled the Refugee Protection Act is no coincidence—it highlights the important relationship, both legally and factually, between stateless persons and refugees. The following section will elaborate on the important relationship between these two categories of internationally protected peoples to set up a discussion of how asylum protection can be maximized to encompass the stateless population in the United States.

Refugee Protection and Statelessness

Having no nationality under the laws of any country, stateless persons lack many legal protections afforded to citizens. Refugees also lack a range of interrelated human rights protections, facing unjustifiable abuse in their home countries. The international community recognized statelessness and refugee status as two

distinct forms of international protection after World War II amid efforts to address a widespread problem of vulnerable people who lacked protection at the national level. However, there was a meaningful overlap between those who were considered stateless and those who were considered refugees in postwar Europe. For example, Jewish people stripped of their nationality in Nazi Germany were left stateless and were also considered refugees and qualified as such because they had suffered physical brutality on account of their religion. It is important to understand this historical overlap, inasmuch as it illuminates an overlap in the legal protections that have developed over time. Moreover, this observation about the overlap in legal protections serves as the foundation for the argument advanced in this article that refugee protection in the form of asylum should be interpreted to protect stateless persons in certain circumstances.

In the wake of World War II, the Conference of Plenipotentiaries charged with designing the global refugee protection framework produced the 1951 Convention on the Status of Refugees (Refugee Convention).[10] Notably, as part of that same charge, the Conference was instructed to devise a protocol for the protection of stateless persons that would operate together with the Refugee Convention. However, the protection of stateless persons was deferred at that time and ultimately led to the promulgation of the 1954 Statelessness Convention, which mirrors the Refugee Convention in most of its substantive provisions. These protection frameworks for refugees and stateless persons were refined and amplified with the 1967 Protocol to the Refugee Convention and the 1961 Convention on the Reduction of Statelessness, respectively. Notwithstanding the relatively equal treatment at the level of international normative development, nations have generally understood the problem of refugee protection to be more pressing than the challenges faced by stateless persons. Accordingly, while the Refugee Convention has steadily accrued signatories over time and become the default framework for asylum and refugee protection around the world, the Statelessness Convention has struggled to garner broad ratification. The UNHCR, which has a mandate to protect both refugees and stateless persons under these respective convention frameworks, has worked intensely in recent years to give greater visibility to global statelessness, with the ultimate goal of eradication.[11]

Both the history of the Refugee and Statelessness Conventions as well as the overall structure and specific provisions of those international treaties suggest that the refugee protection framework was developed with statelessness protection in mind. Indeed, the legal frameworks for refugees and stateless persons reinforce this understanding. For example, the refugee definition provides two parallel

paths to protection by stating that a refugee is a person who flees persecution in her country of nationality or a non-national who flees persecution in her country of last habitual residence. This second formulation, which protects refugees who have "no nationality" and flee persecution in their country of last habitual residence, was clearly envisioned to provide refugee protection to stateless persons. Naturally, stateless persons are not protected as refugees by merely establishing their statelessness; rather, they must demonstrate persecution on account of one of the five protected characteristics (race, religion, nationality, political opinion, or membership in a particular social group) just like any national seeking refugee protection. It is the Statelessness Convention that envisions protection for people based on their stateless status alone, but the relatively sluggish adoption of this form of international protection should not deter advocates for the protection of stateless persons from understanding their plight as refugees. On the contrary, because refugee protection is often the only means available for the protection of stateless persons available at the national level, advocates must look to those procedures in order to ensure the human rights of stateless persons.

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The United States signed the 1967 Protocol to the Refugee Convention, and in 1980, the U.S. legislature passed the Refugee Act to codify refugee protection and bring the country into conformity with its international obligations.[12] It was the 1980 Refugee Act that created both the system for resettlement of refugees from abroad as well as the asylum system, which provides a path to refugee protection for forced migrants present in the United States.[13] While U.S. courts have established that statelessness in and of itself does not qualify a person for refugee protection, they have identified a variety of circumstances in which stateless persons may suffer harm that rises to the level of persecution on account of their stateless status. Most often, this is cast as persecution on account of race or religion, as in the cases of Roma in Europe, Palestinians in the Middle East, or even Ethiopians of Eritrean descent like Miliyon. The next section explores the specific circumstances in which U.S. courts have extended

refugee protection to forced migrants who have been discriminatorily stripped of their nationality and left stateless.

Discriminatory Denationalization as Persecution

International refugee law protects people who have been discriminatorily deprived of their nationality and left stateless.[14] In the United States, a series of cases has emerged concerning whether similar protections should be afforded domestically. Specifically, the Seventh, Sixth, and Ninth U.S. Circuit Courts of Appeal have posited that discriminatory denationalization that leaves someone stateless may constitute persecution for the purposes of obtaining asylum protection. However, such courts' interpretations of asylum law are only binding in the geographic regions in which they exercise jurisdiction, meaning their decisions do not have a national effect. In each of these three cases, the Circuit Court in question sent the case back to the Board of Immigration Appeals (BIA), the highest immigration appeals court within the Department of Justice, for further consideration of this question. However, the BIA has so far declined to issue a precedent decision on this matter, leaving many denationalized stateless persons in the United States with no clear path to protection. A review of these three cases gives a good sense of what is at stake.

The first court to take up this question was the U.S. Court of Appeals for the Seventh Circuit in *Haile v. Gonzalez (Haile I)*, which involved consolidated cases of two ethic Eritreans born in Ethiopia who sought asylum based on Ethiopia's arbitrary expulsion and denationalization of approximately 75,000 persons of Eritrean ethnicity.[15] In 2005, the Seventh Circuit observed that the same immigration judge in each case had denied asylum to the seeker based on his understanding that a country has a sovereign right to grant or deny citizenship as it sees fit, even in the case of discriminatory denationalization.[16] In both cases, the asylum seekers had escaped from Ethiopia without personally suffering any physical mistreatment, but were effectively stripped of their Ethiopian citizenship and thus left stateless.[17] The Seventh Circuit found it "arguable that such a program of denationalization and deportation is in fact a particularly acute form of persecution."[18] Because the court believed that the BIA should be the first to address this legal question, it remanded the case for further consideration.[19]

While the BIA was reconsidering the questions remanded by the Seventh Circuit in *Haile I*, the U.S. Court of Appeals for the Ninth Circuit had occasion to review a similar case in 2009. In *Mengstu v. Holder*, the Ninth Circuit reviewed the case of an ethnic Eritrean woman who fled Ethiopia during the

massive campaign of forced expulsion and who had been denationalized during her efforts to renew her identity documents.[20] While the immigration judge in that case also found that the asylum seeker had not suffered persecution, the Ninth Circuit, "[l]ike the Seventh Circuit, [found] it 'arguable that such a program of denationalization and deportation is in fact a particularly acute form of persecution,' and … remand[ed] to the agency to answer this question in the first instance.'"[21]

The very next year, *Haile v. Holder (Haile II)* returned to the Seventh Circuit after the BIA again denied one of the previous petitioners' applications for asylum.[22] According to the Seventh Circuit, the BIA had denied the application after finding that "while denationalization can be 'a harbinger of persecution,' the immigration judge 'must look at the circumstances surrounding the loss of nationality or citizenship and then, on an individual basis, determine whether these circumstances rise to the level of persecution.'"[23] The Seventh Circuit found it troubling that the BIA had failed to provide any guidance on what such "circumstances" might be and that, in support of its "denationalization plus" formulation, it had given the example of Soviet citizens who were denationalized with the fall of the Soviet Union and then became Russian citizens. The Seventh Circuit acknowledged that the example of denationalization provided by the BIA would not constitute persecution but distinguished the case before it because the denationalization in question had resulted in statelessness.[24] The court found that "[i]f Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans," and concluded that "if to be made stateless is persecution, as we believe, … then to be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution even if the country will allow you to remain and will not bother you as long as you behave yourself."[25]

While this decision of the Seventh Circuit provides a clear rule for that jurisdiction, its exchange with the BIA on two separate occasions suggests that this is not a rule that the BIA is applying throughout the United States. Moreover, without any published guidance from the BIA, immigration courts and asylum officers are likely applying different rules in the variety of denationalization cases that come before them. Indeed, a case arising from a very different country context led another U.S. Circuit Court of Appeal to seek clarification from the BIA on this precise question.

In 2011, the U.S. Court of Appeals for the Sixth Circuit remanded a case to the BIA to address the specific question of "whether ethnically motivated citizenship revocation that results in statelessness is persecution" in a case in-

volving ethnic Russians from Estonia.[26] In that case, one of the petitioners lost her Estonian nationality when Estonia gained independence from the Soviet Union in 1991. The petitioner had been left stateless for a period of two years, after which she regained Estonian nationality in exchange for her vote in an election. The Sixth Circuit found that "[e]ven though the IJ did not believe that [Petitioner] Stserba had shown any adverse consequences which arose or which affected her as a consequence of her two years or less of lost citizenship, Stserba may have suffered past persecution simply because she became stateless due to her ethnicity."[27] The Sixth Circuit remanded the case for further consideration from the BIA, and whatever the resolution of that individual case, no public guidance has yet been published.

The disinclination of the BIA to exercise its authority to issue a rule of national application complicates the efforts of stateless asylum seekers in the United States who would otherwise be able to escape their legal limbo with refugee protection. The case of Miliyon, whose plea for help after he was discriminatorily denationalized by the Ethiopian government and declared stateless by the UNHCR has been ignored by the BIA, clearly evidences this disinclination. Moreover, Miliyon faces an additional legal hurdle because he must demonstrate not only that his discriminatory denationalization qualifies him for asylum, but also that this change in circumstances is sufficiently significant to reopen his long-denied claim for asylum.

Renewing a Claim for Asylum as a Stateless Person

When a stateless migrant is denied asylum by U.S. immigration authorities, the would-be refugee is ordered to be removed from the country. The order is issued despite the migrant's statelessness, which in most cases means that there is no country in the world that will accept the migrant's return. Somewhat counterintuitively, the willingness or ability of a country to readmit a migrant found removable from the United States is not a hinderance to a deportation decision.[28] This leads to some stateless persons spending extended periods of time in immigration detention as immigration officials engage in futile efforts to remove them to countries that

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will not accept them. Once released, the stateless migrant lives a life on parole at the whim of immigration authorities.[29] Similarly, when migrants discover their statelessness after they have been ordered removed, as was the case with Miliyon, they must meet a very difficult burden of proof to convince immigration authorities to reconsider their asylum claim in light of this new evidence. In order to renew a failed claim of asylum, a would-be refugee must convince the BIA that circumstances have changed in the country of nationality in a way that is material to the claim for protection. Commonly, these altered circumstances can be a change in government or an internal armed conflict that affects the socio-political situation in a manner that threatens a migrant seeking protection in the United States. While this is usually how asylum seekers demonstrate changed circumstances, there is nothing in the law that suggests that these are the only kinds of changes that merit reopening an asylum case. There should be little doubt that a deprivation of nationality that leaves someone stateless, which is the sovereign act that literally excises a citizen from the body politic, constitutes a change in circumstances in the country of nationality. Moreover, for the reasons described by the Sixth, Seventh and Ninth Circuits above, this is a change in circumstances that goes to the heart of a claim for refugee protection. While largely untested, this argument could provide stateless migrants with a path to renewed consideration of their asylum claims.

At present, the U.S. Court of Appeals for the Fourth Circuit is considering Miliyon's case; examining his argument that his discriminatory denationalization and resulting statelessness constitute a change in circumstances in Ethiopia that warrants reopening his claim for asylum. While this case is specifically about Miliyon, it should be understood in the broader context of the BIA's resistance to an interpretation of U.S. law that would provide stateless migrants with a clearer path to refugee protection. Miliyon is a member of the organization "United Stateless," the first affinity group whose membership is made up of stateless migrants in the United States who have come together to expose the injustices they endure and advocate for a more humane existence for stateless persons.[30] For this group, Miliyon's case represents a hope that asylum could provide a significant proportion of stateless migrants with a path out of their legal limbo. Should the Fourth Circuit recognize the validity of Miliyon's argument to reopen his case as well as his underlying claim for asylum, the United States would take a meaningful step towards fulfilling its duty, as a member of the global community, to eradicate statelessness. WA

Notes

1. Convention Relating to the Status of Stateless Persons, Art. I.1., Sept. 28, 1954, 360 U.N.T.S. 117.
2. UNHCR, "Citizens of Nowhere: Solutions for the Stateless in the U.S.," 25–27, December 2012, https://www.refworld.org/docid/50c620f62.html.
3. Donald Kerwin et. al., "Statelessness in the United States: A Study to Estimate and Profile the US Stateless Population," (Center for Migration Studies, January 2020), https://cmsny.org/wp-content/uploads/2020/01/ StatelessnessReportFinal.pdf.
4. Ibid., 63.
5. Senator Patrick Leahy (D-VT) made the first legislative proposal to protect stateless persons in his Refugee Protection Act (RPA) of 2010, a section of which would provide for the "Protection of Stateless Persons in the United States." S. 3113, 111th Cong. § 24 (2010). A hearing on the RPA provided important visibility for this legislation. *Reviewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010: Hearing on S. 3113 Before the S. Committeee on the Judiciary*, 111th Cong. (May 19, 2010), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111shrg58223/pdf/CHRG-111shrg58223.pdf.
6. Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong. § 3405 (2013), https://beta.congress.gov/bill/113th-congress/senate-bill/ 744/text.
7. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.
8. S. 744, 113th Cong. § 3405 (proposed INA§ 210A(a)(1)). Notably, the definition proposed in the 2013 legislation is nearly identical to the language found in the 1954 Convention which defines a stateless individual as any "person who is not considered a national by any State under the operation of its laws."
9. S. 744, 113th Cong. § 3405.
10. Convention Relating to the Status of Refugees, July 28, 1951.
11. More on the UNHCR's work with statelessness can be found at https://www.unhcr.org/ibelong/.
12. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437–38 (1987).
13. Compare INA § 207; 8 U.S.C. § 1157 and INA § 208; 8 U.S.C. § 1158.
14. Hélène Lambert, "Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status," I*nternational and Comparative Law Quarterly* 64, (2015) 1–37.
15. *Haile v. Gonzalez (Haile I)*, 421 F.3d 493 (7th Cir. 2005).
16. Ibid., 494.
17. Ibid., 494–95.
18. Ibid., 496.
19. Ibid., 496–97.
20. *Mengstu v. Holder*, 560 F.3d 1055, 1056–57 (9th Cir. 2009).
21. Ibid., 1059.
22. *Haile v. Holder (Haile II)*, 591 F.3d 572 (7th Cir. 2010). It is unclear from the opinion of the court what happened in the case of the second petition in *Haile I* on remand.
23. Ibid., 573.
24. Ibid. (noting that when Czechoslovakia split into the Czech Republic and Slovakia, citizens of Czechoslovakia lost their citizenship in Czechoslovakia and had to choose to become citizens of either Slovakia or the Czech Republic it was not persecution).
25. Ibid., 574.
26. *Stserba v. Holder*, 646 F. 3d 964, 976 (6th Cir. 2011).
27. Ibid., 7.
28. *Jama v. ICE*, 125 S. Ct. 694 (2005).
29. See "Citizens of Nowhere," 1; "Life after Limbo," 5.
30. For more information about this organization visit https://www.unitedstateless.org.