

1. JUS SOLI AND STATELESSNESS

A COMPARATIVE PERSPECTIVE FROM THE AMERICAS

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The New World is comparatively generous in the law's provision of citizenship to all persons born within national boundaries, including the children of undocumented persons and temporary visitors. A striking feature of citizenship practices in the Americas is the near uniformity of reliance on *jus soli*. Indeed, the *jus soli* principle "has primarily become a Western Hemisphere tradition" (Etzioni 2007, 353). The predominance of *jus soli* is said to account for the relatively low rate of statelessness in the Americas compared with other parts of the world.¹ Some experts claim the Western Hemisphere is "indisputably the region with the fewest people affected by statelessness" (Institute on Statelessness and Inclusion 2014, 8). But the definitions of "stateless" in international law instruments and in practice lack precision and thus confound easy measurements of political, civic, and economic status. As the introduction to this volume notes, merely possessing citizenship as a formal matter conceals the problem of governments treating their own citizens as foreigners, both deliberately and because of indifferent or incompetent administration.

As a result of decisions on the ground, even the most expansive laws mandating citizenship at birth fail to alleviate fundamental deprivations of human rights. As many chapters in this book discuss, authorities may withhold recognition and thus produce an "ineffective citizenship." Relatedly, international human rights laws on statelessness fail to address this problem. In this chapter,

I explore the limitations of the international legal definition of statelessness in order to illustrate two points. First, as explained later, what should be termed “effective statelessness” is a necessary adjunct to the concept of *de jure* statelessness. Without this conceptual pairing, we cannot judge the actual relationship between a state and those who belong to it. In the Americas, as I will show, a substantial number of persons entitled to citizenship cannot prove it, or such proof is disregarded by government officials. At the same time, these persons do not qualify for protection under international law because they are not legally “stateless.”

Second, without some measure of “effective statelessness,” claims that the Americas should be viewed as a relative success story because of the *jus soli* norm are questionable. *Jus soli* prevents statelessness only where it is accompanied by meticulous and generally recognized documentation. Effective statelessness can exist in any nation, and it is a hidden problem in the Americas, *jus soli* notwithstanding.

Effective statelessness occurs due to poor documentation of births and administrative ineptitude, as well as intentional discrimination. In the Americas, including the United States, the predominant reasons for effective statelessness include inability to prove nationality, as well as the failure of countries to document or recognize their own citizens. International treaties on statelessness fail to provide a sufficient safety net and thus offer no meaningful remedy to the problems of ineffective citizenship addressed here and in this book more generally (see esp. Lawrance, chapter 3, this volume).

Statelessness and Belonging: A Problem of Definition

Two international conventions constitute the primary framework for definitions of and responses to statelessness: the Convention Relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961).² In international legal instruments, the term “stateless” refers to “a person who is not considered as a national by any State under the operation of its law” (UNHCR 2014b, 9). States are the final arbiters of whether an individual or a group under any definition is statelessness (Harvey 2010, 257).³

Article I of the 1954 convention defines a stateless person as one “who is not considered as a national by any State under the operation of its law.” Among other obligations under that convention, contracting states must treat stateless persons the same as lawful aliens in that country, including granting access to wage-earning employment, housing, public education, and public relief. Upon request, states are also obligated to issue travel and identity documents to state-

less persons within their territory. Further, stateless persons are not to be expelled except on “grounds of national security or public order.”

The Convention on the Reduction of Statelessness (1961) attempted to strengthen international intervention by specifying the circumstances in which states should award legal status to stateless persons, including citizenship to persons born within their borders who would otherwise be stateless. The 1961 convention favors *jus soli* by stipulating that an important measure to avoid statelessness at birth is to provide nationality to children born in the territory who would otherwise be stateless. The Office of the United Nations High Commissioner for Refugees (UNHCR) is the designated organization to investigate the status of persons who may be stateless, and to assist such persons in making claims to the relevant government authorities.

Statelessness is also linked to the Convention Relating to the Status of Refugees (1951). Designed to protect persons fleeing persecution in their own countries, the convention defines persons needing protection, as well as the responsibilities of the states to which they have fled. The convention recognizes that while some refugees may have a nationality, asylum seekers are effectively stateless if they cannot return to the country of their nationality. The legal status of stateless persons, including its ambiguities, thus has important implications for refugees (Bradley 2014, 102–3).⁴

Operationalizing definitions of “statelessness” has proved difficult. Adjudicators and scholars sometimes refer to those who fall under the definition of a “stateless person” in the 1954 convention as “*de jure*” stateless persons, even though that term does not appear in the convention itself. Confusingly, the 1961 convention references “*de facto*” stateless persons, but without a definition. Nor does one exist in any other international instrument. The ambiguity matters. The UNHCR maintains that persons who are *de facto* stateless lack the protections guaranteed those otherwise recognized as stateless under the 1954 convention (UNHCR 2014b, 5). The 1961 convention on the Reduction of Statelessness references protection for *de jure* stateless persons, but it also recommends that persons who are *de facto* stateless should be protected as well, to enable them to acquire an effective nationality. Thus, statelessness exists as a matter of international law but still does not provide human rights protections to those who are effectively stateless and cannot prove it because of obstructions by officials in states from which they seek proof of either citizenship or lack thereof (a problem Lawrance pursues in detail in chapter 3 of this volume).

Attempts to define *de facto* statelessness have not solved the problem. For instance, one definition includes persons “outside the country of their nationality who are denied diplomatic protection or assistance by that country” (Blitz

and Lynch 2009, 5). Another references those who are unable to document or prove nationality, and those whom a government does not recognize as citizens despite a colorable claim to that status (Southwick and Lynch 2009). The Expert Meeting on the Concept of Stateless Persons (2010) at Prato, Italy, proposed that an individual is stateless “if all states to which he or she has a factual link fail to consider the person as a national” (Bingham, Reddy, and Köhn 2011). Unlike de jure statelessness, no formal process determines whether an individual is “de facto” stateless. Rather, it is an ad hoc classification applicable when either an individual is unable to prove his citizenship, or when his country of origin refuses to recognize his citizenship.

The definitions of stateless persons in the two international conventions have been widely recognized as deficient in recognizing the full scope of the problem for those affected (Van Waas 2008, 19–27). From the perspective of a person who cannot prove citizenship, de jure statelessness and de facto statelessness are one and the same. This chapter shows how this produces a possible “statelessness in waiting,” or, as noted in the introduction, a “statelessness in question” that bears many of the hallmarks of “citizenship in question.” Many of the contributing factors leading to a formal determination of statelessness emerge from a precarious existence, including the inability of vulnerable populations to register births and problems in acquiring documents (Fullerton 2014, 148; Sadiq 2008). The term “effective statelessness” aptly describes the political, social, and even geographic exclusions experienced by those whose own country fails to recognize them as such. My hope for the following discussion is that careful use of concepts specific to the operations of citizenship in question and statelessness in question may better inform ongoing debates about statelessness and the politics of ineffective citizenship.

Effective Statelessness: Examples in Latin America

Academic inquiry with respect to citizenship in Latin America has tended to focus on equality, participatory democracy, and access to government services rather than acquisition of citizenship status or proof thereof. As a result, statelessness in the Western Hemisphere has drawn little attention, necessitating reliance on reports by government and human rights groups.

As a general rule, de jure statelessness in the Western Hemisphere is thought to be uncommon, in large part because predominant migration patterns are into jus soli regimes from countries that also recognize citizenship status for most births occurring outside the nation. In theory, at least, a claim of citizenship as a matter of law would normally exist for the vast majority of the population.

The notable exception is the Dominican Republic, which recently changed from a *jus soli* regime to *jus sanguinis*, creating an estimated 200,000 stateless persons of Haitian descent (Fullerton 2014, 148). From 1929 until 2010, the Dominican Republic awarded citizenship to those born on its territory, with the exception of children of diplomats and those “in transit” through the country. But Dominican government officials routinely refused to register births of persons of Haitian descent on the ground that Haitian migrants in the country were “in transit,” even if they were long-term residents. The Inter-American Court of Human Rights ruled in 2005 that the Dominican Republic’s denial of nationality through its refusal to issue birth certificates violated that country’s own constitution (*Yean and Bosico v. Dominican Republic* 2005). The Senate of the Dominican Republic rejected the judgment, followed shortly by a decision of that country’s Constitutional Court upholding the previous interpretation that undocumented migrants should be considered as being “in transit.”

Two later developments in the Dominican Republic greatly exacerbated the problem of *de jure* statelessness. In 2010, the amended Dominican Constitution denied citizenship to children born in the Dominican Republic to parents in the country illegally (U.S. Department of State 2012a). In 2013, the Constitutional Court ruled that this new provision could be applied retroactively. According to human rights groups, more than 200,000 persons of Haitian descent are now stateless; the government insists that this number is less than 25,000. The Inter-American Commission on Human Rights issued a strongly worded press release expressing its “deep concern” over the court’s ruling (Organization of American States 2013). In October 2014, the Inter-American Court of Human Rights called for the Dominican Republic to provide redress for human rights abuses, illegal deportations, denial of identity documents, and arbitrary deprivation of nationality, a ruling the Dominican Republic formally rejected.

The Dominican government continues to assert that even children born of Haitian parents who were legal permanent residents cannot be registered as Dominican nationals. Government officials have taken strong measures against providing citizenship to persons of Haitian descent born in the country whose parents were unable to document their legal stay in the country. These measures included refusals to renew Dominican birth and identity documents. The government stated that such refusals were based on evidence of fraudulent documentation, but advocacy groups alleged that the moves targeted persons whose parents were Haitian or whose names sounded Haitian and constituted acts of denationalization. Thousands of Dominican-born persons of Haitian descent lack citizenship or identity documents. The U.S. Department of State characterizes these persons as “effectively stateless,” adopting the favored modern

terminology while avoiding the *de facto* and *de jure* categorizations from the earlier round of conventions related to nationality (Fullerton 2014; U.S. Department of State 2012a).

Elsewhere in the Americas, examples of “effective statelessness” include individuals who lack any documentation to prove the location of their birth, and those who migrate to or seek refuge in another country that does not recognize them. Indigenous populations within Latin America are particularly susceptible to these problems. Civil conflicts exacerbate such problems, with large numbers of persons displaced by civil conflicts facing effective statelessness, despite eligibility for protection as refugees (see Lawrance, chapter 3, this volume).⁵ Several nations in Latin America have encountered significant numbers of refugees fleeing civil conflicts in Colombia and elsewhere. Some of these displaced persons seek regularization of their status by refugee applications in host countries, but many do not. In Brazil, for example, 17,500 unregistered Colombian refugees were thought to be living in the country’s Amazon region (U.S. Department of State 2008b). An estimated 4,000 Haitian immigrants entered the country, making their way through Peru, Colombia, and Bolivia via the Dominican Republic and Panama in hope of securing employment in one of the large infrastructure projects (U.S. Department of State 2011c).

Effective statelessness can occur when displaced persons are neither recognized as refugees nor assisted by their home country’s consulates where they are located. The number of asylum and refugee claims recognized by Brazil and other countries lags behind the number of applicants, sometimes substantially. In Bolivia, for example, UNHCR reported in 2008 a recognized refugee population of more than six hundred persons that was “steadily increasing.” But in that year the government completed processing and agreed to provide refugee protection in only thirty cases, with older cases still under review and new applications yet to be considered (U.S. Department of State 2008a). While these persons wait, many of them have no proof of citizenship from their country of origin and no formal status where they are.

Ecuador and Costa Rica present starker numbers. The Ecuadorian government received nearly eight thousand applications for refugee status in the first nine months of 2008 alone, adding to a backlog of several thousand pending cases. Both UNHCR and the Ecuadorian government reported difficulty in dealing with the number of applications. In 2011, UNHCR estimated that there were more than 55,000 recognized refugees in Ecuador. An additional 133,000 persons were “in need of international protection,” 92 percent of whom were thought to be Colombians. Various nongovernmental organizations reported that the Civil Registry did not always cooperate in registering refugee

children or registering children of refugees born in the country, despite legal requirements to do so (U.S. Department of State 2008a, 2011f). Many of these persons fled their homes without proof of nationality, if they had such documents at all.

As of 2009, UNHCR also reported 12,298 recognized refugees in Costa Rica, the majority of whom were from Colombia. The large influx led to a significant backlog of refugee applications, many from individuals who will wait years for a determination of status. Of those claims that have been considered, a high percentage have been rejected while refugees have used the asylum request process to obtain documentation to allow them to transit through a country to the United States (e.g., U.S. Department of State 2010a, 2011e).

Internal displacement presents similar problems. For several decades Colombia has faced a guerrilla uprising, which has resulted in more than 300,000 deaths (Mapping Militant Organizations 2012). The turmoil in Colombia has displaced more than 5 million people within that nation's borders since 1985. The estimate greatly exceeds the government's registered number of 3.9 million due to the high number of indigenous and Afro-Colombian groups affected by displacement (U.S. Department of State 2011d). These groups disproportionately lack access to citizenship documents.

Even where civil strife is not an issue, widespread failure to register births poses a significant problem of effective statelessness. For example, several hundred thousand persons in Bolivia lack citizenship documents, preventing them from obtaining international travel documents and accessing other government services (U.S. Department of State 2011b). Persons who were born in Nicaragua also have difficulty obtaining documentation of that fact, especially in rural areas. The local civil registries should register births within twelve months, upon the presentation of either a medical or a baptismal certificate. But many persons lack such certificates, and one estimate indicates that 250,000 children and adolescents still in Nicaragua lacked legal documentation (U.S. Department of State 2012b).

Persons without a registered birth are unable to obtain a *cedula* (national identity card) in Nicaragua. As the report explains, these persons had difficulty participating in the legal economy, conducting bank transactions, and voting. Persons who lacked a *cedula* also were subject to other restrictions in employment, access to courts, and land ownership. Women and children lacking citizenship documents were reportedly more vulnerable to sexual exploitation by traffickers. The government did not effectively implement laws and policies to provide persons the opportunity to obtain nationality documents on a nondiscriminatory basis. Apart from equality of treatment and access to citizenship rights

within Nicaragua, migrants outside of the country face problems proving that they are Nicaraguan citizens (U.S. Department of State 2012b).

Recent data suggest the registration problem may grow worse. In 2012, approximately 12.5 percent of the eligible population was thought to lack proof of citizenship. The government also raised the cost of a *cedula* (including renewal of an expired card) to approximately fourteen dollars, when almost half of all citizens live on less than one dollar per day (U.S. Department of State 2011g).

Migration is also a cause of failure to register a birth. The U.S. Department of State has identified problems of statelessness in the border areas Costa Rica shares with Panama and Nicaragua, including this example: “Members of the Ngobe-Bugle indigenous group from Panama came to work on Costa Rican plantations, and sometimes their children were born in rudimentary structures on the plantations. In these cases the children were not registered as Costa Rican citizens because the families did not think it necessary to register the births, but when the families returned to Panama, the children were not registered there either” (U.S. Department of State 2011e). A similar problem occurred with other Nicaraguan families who migrated to work on Costa Rican coffee plantations (U.S. Department of State 2010a). There is no indication that these births have since been registered in either Costa Rica or Nicaragua.

Peru has also experienced problems documenting births. In 2008, more than 1 million citizens lacked identity documents and thus could not fully exercise their civil, political, and economic rights as citizens. An estimated 15 percent of births were unregistered. As of 2011, that number had grown to an estimated 4.7 million Peruvians. Without documents, these individuals are profoundly marginalized both economically and politically. A recent report states that “poor and indigenous women and children in rural areas were disproportionately represented among those lacking identity documents” due to the absence of a birth certificate (U.S. Department of State 2011h).

In Mexico, although there are no official governmental statistics, non-governmental organizations estimate that up to 30 percent of the children in Mexico are unregistered (Asencio 2012), with one group estimating the total number of unregistered persons at more than ten million (Center for Migration Studies 2012). Street children, children from single-parent homes in rural areas, indigenous children, and children of internally displaced person or refugees are often unregistered. Unauthorized migrants and minorities tend to have the highest percentages of unregistered children. When the children grow up, the lack of citizenship or identity documents prevents them from entering the formal labor market, obtaining a driver’s license or voter registration documents, opening bank accounts, marrying legally, or even registering the birth

of their own children. This problem becomes compounded when the unregistered travel to the United States and become “doubly undocumented.” Once in the United States, they are ineligible for a Mexican *matricula consular* or U.S. identification. In effect, they are invisible to both the United States and Mexico (Asencio 2012).

The citizenship documentation problems identified by the U.S. Department of State likely underreport the scope of the problem throughout the region. Worldwide, an estimated forty million births go unregistered each year (UNICEF 1998, 662). Furthermore, these instances of effective statelessness are problematic beyond the borders of any single nation. Interregional migration within Latin America, apart from migration provoked by civil disorder or natural disaster, is a significant phenomenon (Durand and Massey 2010, 27).

In sum, for a variety of reasons, a significant but unknown number of persons residing in Latin America possess uncertain nationality. These reasons include widespread failures to register existing citizens at birth, migrants who have difficulty obtaining proof of citizenship, and civil disorders that overwhelm another country’s ability to process claims for asylum and refugee status.

Effective Statelessness: Examples in the United States

In the United States, as well, it is sometimes difficult to prove one’s citizenship or the location of one’s birth. Such instances illustrate the many evidentiary problems associated with proof of citizenship, even with comparatively well-organized systems for recording births, as Rachel Rosenbloom shows is the case for births in Texas adjudicated in recent years (chapter 7, this volume).

Another problem occurs when parents fail to register their children’s birth at all. Although this is uncommon in the United States, it does happen. In 2011, for example, two sisters in Kentucky sued in federal court over eligibility for Social Security, resulting in a settlement in which the sisters were issued documentation by the State Department to establish their citizenship. One sister was born at a home in Kentucky, and the other was delivered in the back of a van in Alabama. The births were recorded in a family Bible but were otherwise not documented (Barrouquere 2011). Proof of citizenship for Social Security benefits, in fact, is a fertile area of litigation, with these two Kentucky sisters serving as just one example.

Another example of the problems that can result from a missing or non-existent birth certificate is the case of Sazar Dent, who was nearly deported to Honduras in 2010 because he could not prove the citizenship of his U.S.-born adoptive mother, a key fact for establishing his own U.S. citizenship. Dent’s

statement to the immigration judge noted the absence of his mother's birth certificate: "I believe I inherited U.S. citizenship through this adoption, now I seem to meet all of the I.N.S. requirements for qualifying for it, except . . . for her birth certificate, because she was born in 1904 and records started being kept on files only since 1911." The immigration judge ruled against Dent, and in Dent's first appeal to the Board of Immigration Appeals, he asked for assistance obtaining government records related to his mother's citizenship "because he was in jail and his adoptive mother was dead." Based on his mother's earlier application for a Social Security number, in which she provided the date and place of her birth, and the intervention of pro bono counsel, Dent was ultimately successful in his claim to have derived citizenship (*Dent v. Holder* 2010).

Birth certificates, however, are susceptible to fraud, and a black market in birth documents exists in the United States.⁶ We know about fraudulent birth documents most commonly through cases of passport fraud, in which a false birth record is used in an attempt to acquire U.S. citizenship. In 2001, Usama S. Abdel Whab, a citizen of Egypt, applied for a U.S. passport, stating that he was born in Brooklyn. In support of this claim, Whab submitted false affidavits from persons supposedly with knowledge of his birth in Brooklyn. When asked for additional supporting documents, Whab submitted a forged baptismal certificate. Whab was convicted of making a false statement in an application for a U.S. passport and deported (*Abdel-Whab v. Orthopedic Association of Duchess* 2006).

A passport applicant must establish both personal identity and U.S. citizenship. As Whab's case indicates, the absence of a birth certificate is not necessarily fatal to obtaining a U.S. passport, as one can submit other (nonfraudulent) proof of birth in the United States. If an individual is unable to produce a birth certificate, he or she must produce, among other things, proof that no official birth certificate exists. The applicant may also submit "birth affidavits" from persons with knowledge of the birth, such as the doctor who performed the delivery or a relative who personally witnessed the birth. But as Sazar Dent's case makes clear, the passage of time can make such proof extremely difficult—either to produce or to verify. Indeed, lack of proof of citizenship is the key factor in some mistaken deportations by the U.S. government of its own citizens (da Silva 2008). In 2010, as many as four thousand U.S. citizens were detained or deported as aliens. The total since 2003 is estimated to be more than twenty thousand (Stevens 2011a).

Another manifestation of effective statelessness is the existence of a U.S. population of migrants whom the United States is unable to deport. Deportation from the United States requires the agreement of the recipient country to

accept the person, along with issuance of travel documents by that country prior to deportation. International law and numerous treaties, including the Pan-American Treaty (1928), require countries to accept return of their nationals.

But in recent years, the United States has been confronted by upward of hundreds, possibly thousands, of cases of aliens with final orders of removal for whom deportation is not possible due to failure to obtain agreement with a recipient country. In some instances, it may be that repatriation is refused on a specious ground of lack of nationality because the deportee is deemed undesirable by that nation. An unknown but likely substantial percentage is due to disputed nationality.⁷

Other sources shed light on the scope of the problem. From 2001 to 2004, the Department of Homeland Security (DHS) Office of the Inspector General reported that nearly 134,000 immigrants with final orders of removal instead had been released because of the inability of the U.S. government to repatriate them to their alleged countries of origin (*Hearing before the House Committee on the Judiciary* 2011). Congressional testimony by a former Justice Department official, Thomas H. Dupree Jr., indicates one cause is that “his country of origin may simply be unknown” (Dupree 2011).

Failing resolution at the diplomatic level, an investigation abroad becomes necessary to determine the validity of the claim that a deportee is not a citizen of that country. In *jus soli* regimes, a birth record will suffice. In *jus sanguinis* regimes, the inquiry is more complicated, as proof of location of birth in that country is generally insufficient to establish citizenship. Furthermore, the deportee may not have lived in his alleged country of citizenship for many years, making it less likely that that country would have evidence of citizenship such as a passport application. All these investigations, moreover, require the cooperation of foreign government officials.

Another difficulty in establishing nationality may be that the country from which the alien arrived and the country of his or her citizenship are different. This is an issue particularly with persons crossing without documentation at Mexico’s southern border, the major conduit through which undocumented migrants flow from Central America into Mexico and eventually the United States (Castillo 2006).

Recently, the United States has used access to temporary worker visas as a mechanism to ensure cooperation for the repatriation of deportees. Under DHS regulations, H-2A and H-2B nonimmigrant visas may be issued only to persons from countries designated by the DHS secretary. Countries included on the list are those that have cooperated with U.S. deportations. Interestingly, participating countries must accept deportation orders against “residents” of

a sending nation, in addition to those it would claim as citizens. The sending countries in the program, therefore, have an incentive to receive noncitizen migrants who had been living there, including unauthorized migrants (Price 2013).

But even in those cases in which the United States is unable to deport a person for reasons other than disputed nationality, U.S. law does not require the award of U.S. or any other nationality. These persons have no clear immigration status in the United States. Thus, the 134,000 persons whom the United States allegedly could not deport between 2001 and 2004—and the unknown number before and after them—are effectively stateless. No nation will take them, and they have no immigration status in the United States.⁸

The Generational Promise of Jus Soli: A Perilous Reliance

Given that potentially large populations in the Americas have a precarious citizenship, what is the significance of a shared jus soli in the Western Hemisphere? Jus soli is often held up as the preferred regime for ascriptive citizenship because statelessness does not extend beyond one generation. But as we have seen, poor documentation and related issues can negate formal legal status within one's own country. There are two other ways that nationality laws in the region contribute to effective statelessness, by complicating documentation efforts even when the home country cooperates in the repatriation process.

First, with restrictions on jus sanguinis in many countries in the region, it is possible for second-generation emigrants to lack citizenship in the parents' country, even if the parents' citizenship status there is secure. Thus, the issue of statelessness concerns not only parents who would have difficulty proving their own nationality but also the laws of other nations with respect to awarding citizenship to children born abroad.

This path to effective statelessness is in consequence of jus sanguinis rules of other nations that already fail to provide a fallback nationality at birth. All states incorporate at least some form of jus sanguinis into their citizenship rules (Spiro 2008, 10–11). Most nations have generational limits and registration requirements for the transmission of nationality by descent to persons born outside of that country. In Peru, for example, children born to Peruvian parents outside of the country must be registered by their parents by age eighteen in order for the child to obtain citizenship (U.S. Department of State 2011h). While some of these registration requirements direct the parents to the nearest consulate or embassy for the citizenship to be recognized (e.g., Haiti), others are a form of residency requirement, requiring travel to the home country in order to register the birth. Uruguay, for example, awards citizenship for

children born abroad to a Uruguayan parent only if the child is registered in person at that country's Civic Register for Vital Records (U.S. Office of Personnel Management 2001, 90, 210).

In some countries, a child born abroad must return in order to maintain citizenship. In Chile, a child born abroad to at least one parent who is a citizen of Chile must establish a residence in that country before the age of twenty-one. Similarly, Colombia requires that a child born abroad must establish residency in Colombia for citizenship by descent. Ecuador allows a child born abroad to a native-born Ecuadorian father or mother to become a citizen only if the child becomes a resident of that country. Panama limits citizenship by descent from a naturalized Panamanian parent to children who declare their intention to elect Panamanian nationality no later than one year after reaching the age of eighteen. In Venezuela, the parents must return with the child to reside in that country before the child reaches the age of eighteen. Further, the child born abroad must declare Venezuelan nationality before reaching the age of twenty-five (U.S. Office of Personnel Management 2001, 50, 53, 68, 155, 213).

Most nations also have complicated rules to determine nationality for out-of-wedlock births abroad, particularly to establish paternity. Some nations even require "legitimate" births in order to transmit citizenship abroad. In the Bahamas, a child born abroad legitimately to a father who is a citizen becomes a citizen by descent. Registration is required for any person (eighteen years or older) born in wedlock outside the Bahamas to a Bahamian mother. The Bahamas appears to have no process at all for an unwed father to establish paternity (U.S. Office of Personnel Management 2001, 26). The U.S. State Department asserts that this citizenship policy, together with the fact that Bahamas is one of the rare Western Hemisphere nations without *jus soli*, has resulted in "several generations" of stateless persons living in that country and elsewhere (U.S. Department of State 2011a). Like the Bahamas, Barbados allows fathers to pass their citizenship by descent only if married to the mother. Children born out of wedlock to a Barbadian mother may inherit her citizenship. In both instances the child must be registered with the nearest diplomatic representative. In Argentina, *both* parents must be Argentine citizens in order for a child born abroad to be a citizen of Argentina (U.S. Office of Personnel Management 2001, 19, 29).

Several nations in the Western Hemisphere—including Mexico and Canada—have tightened *jus sanguinis* rules for children born outside of those nations. By constitutional amendment in 1997, Mexico limited the award of its nationality to the first generation born abroad (Fitzgerald 2005, 176). Similarly, Canada amended its citizenship laws to limit citizenship by descent to one

generation born outside Canada. For Canada, this change was said to “protect the value of citizenship” (Citizenship and Immigration Canada 2013). For both Canada and Mexico, the result would be statelessness for the second generation born in the United States, even though the parents would remain Canadian and Mexican citizens.

Mexico is of special interest because its nationals are thought to constitute the highest percentage of the undocumented population in the United States. While Mexico has generational limits on citizenship, it is otherwise relatively generous with respect to awarding Mexican citizenship to the first generation born abroad. A parent who is a native-born or naturalized Mexican is required to register the child at the nearest Mexican consulate, followed by a birth registration in Mexico (U.S. Office of Personnel Management 2001, 133). Proving paternity to satisfy Mexican nationality law, however, remains complicated, both legally and because of the relative scarcity of genetic tests for paternity. It is also unclear how many parents can themselves prove their own Mexican nationality. De jure Mexican nationals may arrive in the United States without proof of *any* nationality.

In the United States, extended residence abroad can mean the inability to pass on U.S. citizenship to children. These children could be stateless at birth if born in a country that relies upon *jus sanguinis* for citizenship. Under U.S. law, in order for the child to acquire citizenship, the citizen parent must have been physically present in the United States for a specified period prior to the child’s birth (United States Code 8, §§ 1401, 1409). The aim of the physical presence requirement is to prevent the transmission of citizenship by descent through generations of expatriates who have had no connection to the United States, but for U.S. citizens born abroad, proving this may require proving the residency of their parents, or even their own parents’ U.S. citizenship, which itself may require proving U.S. residency of a respondent’s grandparents, thus posing evidentiary hurdles that are impossible to overcome for those unable to pay fees for attorneys, much less investigators (Stevens 2011a).

In sum, effectively stateless migrants or undocumented citizens, even in *jus soli* regions, can become parents of a new class of stateless children outside of their countries as well as inside. An unauthorized migrant with a clear nationality can return to his country of origin and pursue life where political, economic, and social participation is possible. Stateless people cannot. Illegal immigrants with a firm nationality can also receive consular assistance in matters including protection, travel documents, and judicial proceedings. A stateless immigrant cannot. Absent political action, children could live their entire lives in a coun-

try without the possibility of full membership in the polity. They would have no other home and would indeed become a permanent underclass.

Conclusion

Jus soli is endorsed in international agreements as the preferred mechanism to avoid de jure statelessness. But a nearly universal jus soli in the Americas fails to resolve nationality in significant instances. When those numbers are large, disruptions to social and political cohesion cannot be ignored. In this chapter, I described the existence of what I term “effective” statelessness in the Americas as one way to illustrate deficiencies in international treaties designed to protect rights of citizenship. A narrow understanding of statelessness leaves the concept of citizenship largely meaningless.

While jus soli can avoid creating statelessness at birth, government policy and practice can create a permanent underclass of noncitizens—a moral wrong in any democratic nation. These children will not have chosen their situation. As such, they have a special claim in a liberal society (Bosniak 2007, 394). Jus soli is democratically superior because it creates the presumption that populations living within a nation’s borders are members of the political community, absent proof of nonmembership by birth elsewhere. Place of birth is a burden of proof issue that should be relatively easy to resolve. Yet it is not, and the blame lies with poor government structures, political inattention, and, all too often, intentional discrimination against vulnerable groups.

In areas where migration is common, the prevention of statelessness relies on careful recording of births and easy access to those records, as well as the commitment of the country of origin to accept return of or render aid to its emigrants. Migration, displacement, and poor administrative reach in rural areas and indigenous communities in the Americas counter much of the benefit of a common reliance on jus soli to assign nationality at birth. As this chapter has portrayed, movement among jus soli regimes may produce statelessness even where law would dictate otherwise. “Effective statelessness” is a hidden problem that the shared tradition of jus soli in the region does not prevent.

NOTES

1. In late 2014, the Institute on Statelessness and Inclusion compared regional differences in stateless populations in its report, *The World’s Stateless*. The report credits the prevalence of the jus soli form of ascriptive citizenship as the preferred practice to prevent statelessness: “The Americas currently reports the lowest number of stateless persons. . . . This demonstrates the advantages of a jus soli approach to nationality (i.e., conferral of

nationality at birth to all children born in the territory), the norm in the Americas” (Institute on Statelessness and Inclusion 2014, 58).

2. There are a number of related conventions. The Convention on the Rights of the Child (1989) obligates signatory states to ensure that every child acquires a nationality. Several regional human rights treaties also address statelessness, including the American Convention on Human Rights. The American Convention states: “Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality” (Organization of American States 1969). Article 26 of the International Covenant on Civil and Political Rights (1966) also sets out a nondiscrimination clause that applies very broadly, including to nationality legislation and how it is implemented.

3. At least ten million persons are believed to be stateless throughout the world, but it is impossible to know whether this number is accurate or underlying trends (Institute on Statelessness 2014, 7).

4. Megan Bradley explores the “persistent and un-nuanced conflation of refugeehood and statelessness,” in part by examining Hannah Arendt’s view that “the core of statelessness . . . is identical with the refugee question” (Bradley 2014, 102, 105).

5. The link between refugees and the problem of statelessness has long been recognized in the Americas. The Brazil Declaration and Plan of Action, adopted by twenty-eight Latin American and Caribbean countries in December 2014, is an agreement “to work together to uphold the highest international and regional protection standards, implement innovative solutions for refugees and displaced persons and end the plight of stateless persons in the region” (UNHCR 2014a). The Brazil Declaration builds on the Cartagena Declaration on Refugees (1984), which broadened the refugee definition to encompass displaced and stateless persons.

6. The unique form of federalism in the United States complicates determination of place of birth because no national birth registry exists. The individual states issue birth certificates in a variety of forms, with no agreed upon standard for these documents.

7. The Department of Homeland Security does not provide data on deportees who are released or continued in detention while immigration officers seek a recipient country. We know these situations occur, however, through reported decisions following *Zadvydas v. Davis* (2001) and *Clark v. Martinez* (2005). These cases established that aliens who have been ordered removed from the United States may not be detained indefinitely once removal is no longer foreseeable or when there is no reasonable likelihood of their being deported (Canty 2004; Martin 2001). Such cases provide at least limited data about the existence of persons with no effective nationality.

8. The United States maintains a paradoxical and complex stance with respect to statelessness. The nation is not a signatory to either the 1954 or the 1961 conventions on statelessness. The United States nonetheless agrees that statelessness is undesirable, and it pursues diplomatic efforts around the globe to remedy statelessness. It is also the single largest donor to the United Nations agency tasked with protecting stateless individuals, UNHCR (Price 2013). The United States also defines “refugee” more expansively than is required by the Convention Relating to the Status of Refugees (1951), including deprivation of nationality as persecution (Fullerton 2014).