

U.S. Asylum Eligibility: Citizenship in the Dominican Republic

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INTRODUCTION

International law recognizes that every state has a sovereign right to define its citizenry.¹ However, the right to citizenship, or lack thereof, can serve as an “agent or principle of exclusion,”² and “once the rights of citizenship have been removed, there is no authority left to protect people as human beings.”³ This Note will discuss the ways in which the Dominican Republic has created a legal structure that disadvantages its Haitian-Dominican⁴ population by depriving this population of the economic rights that only citizenship confers. This Note will argue that the economic disadvantage this community suffers amounts to persecution under the United States Ref-

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¹ See, e.g., *Sterba v. Holder*, 646 F.3d 964, 973 (6th Cir. 2011) (citing Richard C. Visek, *Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315, 346 (1997)).

² Richard T. Middleton, IV, *The Operation of the Principle of Jus Soli and Its Effect on Immigrant Inclusion into a National Identity: A Constitutional Analysis of the United States and the Dominican Republic*, 13 RUTGERS RACE & L. REV. 69, 75 (2011) (quoting Brook Thomas, *China Men*, *United States v. Wong Kim Ark, and the Question of Citizenship*, 50 AM. Q. 689, 694 (1988)).

³ *Id.* at 75 (quoting Engin F. Isin & Bryan S. Turner, *Investigating Citizenship: An Agenda for Citizenship Studies*, 11 CITIZENSHIP STUD. 4, 12 (2007)).

⁴ Throughout this essay, I will use the term “Haitian-Dominican” to describe those born in the Dominican Republic to parents of Haitian ancestry regardless of their legal status under Dominican law.

ugee Act of 1980 and that many within this community are eligible for asylum in the United States.

On September 23, 2013, the Dominican Republic's constitutional court held it constitutional to apply General Law on Migration 285-04 ("Migration Law 285-04") retroactively.⁵ The law redefined constitutional provisions so as to exclude from birthright citizenship individuals born to "non-residents,"⁶ and it is estimated that the ruling denationalized as many as 200,000 individuals born on Dominican soil to parents who were migrant workers or otherwise deemed "non-residents," under current law, at the time of their children's births.⁷ While the ruling served primarily to formalize the pervasive, de facto denials of citizenship suffered by the Haitian-Dominican population throughout the 2000s, the ruling resounded throughout the international community and finally foregrounded the deep political tensions surrounding issues of race and belonging in the Dominican Republic.⁸

In response to international pressure, the Dominican government passed *Ley de Régimen Especial y Naturalización*⁹ ("Naturalization Law 169-14") on May 22, 2014.¹⁰ The law does not reverse the court ruling — those born to migrant parents remain outside of the constitutional definition of citizenship — but instead creates paths to citizenship for those affected.¹¹ Unfortu-

⁵ See generally *Ley No. 285-04, General de Migración* Gaceta Oficial No. 10291, 27 de agosto 2004 (Dom. Rep.) [hereinafter *Migration Law 285-04*].

⁶ See Ezequiel Abiu Lopez & Danica Coto, *Dominican Republic to End Citizenship of Those Whose Parents Entered Illegally*, HUFFINGTON POST (Sept. 27, 2013, 10:28 AM), http://www.huffingtonpost.com/2013/09/27/dominican-republic-citize_n_4002844.html, archived at <http://perma.cc/3SNZ-LVWC> (noting that this decision is "overwhelmingly" felt by Haitian-Dominicans as "there are nearly 210,000 Dominican-born people of Haitian descent and roughly another 34,000 born to parents of another nationality").

⁷ Sentencia TC/0168/13, relativo al recurso de revisión constitucional en materia de amparo incoado por la señora Juliana Dequis (o Deguis) Pierre, 23 September 2013 [Constitutional Court] (Dom. Rep.); see also Kirk Semple, *Dominican Court's Ruling on Citizenship Stirs Emotions in New York*, N.Y. TIMES (Oct. 17, 2013), <http://www.nytimes.com/2013/10/18/nyregion/dominican-courts-ruling-on-citizenship-stirs-emotions-in-new-york.html>, archived at <http://perma.cc/V7Z2-5T3C>.

⁸ E.g., *The Yean and Bosico Children v. The Dominican Republic*, Judgment of September 8, 2005, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005) (ruling that the Dominican Republic's citizenship policies discriminate against Haitian-Dominicans); Lopez & Coto, *supra* note 6; Middleton, *supra* note 2, at 89–90.

⁹ See generally *Ley No. 169-14, Le que establece un régimen especial para personas nacidas en el territorio nacional inscritas irregularmente en el Registro Civil dominicano y sobre naturalización*, Congreso Canonal, 21 de mayo 2014 (Dom. Rep.) [hereinafter *Naturalization Law 169-14*].

¹⁰ See, e.g., *Dominican Republic Lawmakers Pass Citizenship Bill*, BBC (May 22, 2014, 5:34 AM), <http://www.bbc.com/news/world-latin-america-27514955>, archived at <http://perma.cc/95A-JRQZ>; Amnesty Int'l, *Open Letter to President Danilo Medina regarding law 169/14 'establishing a special regime for people who were born in the national territory and irregularly registered in the Dominican Civil Registry and on naturalization'*, AI Index AMR 27/008/2014 (June 3, 2014), <http://www.amnesty.org/en/library/info/AMR27/008/2014/en>, archived at <http://perma.cc/575W-MWQ8> [hereinafter *Open Letter to President Danilo Medina*].

¹¹ See *Naturalization Law 169-14*, *supra* note 9 ("Que la solución plasmada en la parte dispositiva de esta ley, en cuanto a regularizar actas del estado civil, no implica una negación ni un cuestionamiento a la interpretación dada por el Tribunal Constitucional a una parte de las

nately, Naturalization Law 169-14 likely will not help the majority of those rendered legally stateless by the court ruling or remedy the humanitarian crisis that preceded it. Thousands born in the Dominican Republic will continue living in poverty without status, deprived of the right to vote, access to education, legitimate employment, bank accounts, and health care.¹² For generations, the Dominican government has failed to improve the conditions or resolve the legal status of its Haitian-Dominican population. Until the Dominican government resolves these entrenched issues, the international community should look to other tools to help those living in the midst of this intergenerational crisis. Asylum law may be one tool. Asylum seekers from Hispaniola have sought refuge in the United States throughout the twentieth century, often to be refused by immigration officials and courts reasoning that the asylum seekers were simply economic migrants seeking a better economic future, not refugees escaping persecution.¹³ This Note aims to clarify that hopes for economic opportunity should not undermine asylum applications wherein the economic experiences spurring migration amount to persecution.

The United States became a signatory to the 1967 Protocol Relating to the Status of Refugees¹⁴ (“1967 Protocol”) in 1968, thereby binding it to the 1951 United Nations Convention Relating to the Status of Refugees (“1951 Convention”).¹⁵ In doing so, the United States took on the obligation to provide asylum to individuals who are “unable or unwilling to return to [their home countries] . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁶ Asylum applicants must establish that the government’s mistreatment amounts to persecution and that this mistreatment is on account of race, ethnicity, or other protected grounds.

The deliberate imposition of severe economic disadvantage is a form of mistreatment that can amount to persecution.¹⁷ Because the United States cannot offer asylum to all of the globe’s poor, asylum seekers must establish that the economic disadvantage they experience is not shared by the general population, but a disadvantage the government has deliberately imposed on a targeted group.¹⁸ The Board of Immigration Appeals (“BIA”), the authorita-

normas relativas a nacionalidad, sino más bien una respuesta a una problemática que se genera a partir de la misma y que resulta de interés nacional resolver . . .”).

¹² See *Open Letter to President Danilo Medina*, *supra* note 10, at 3–4.

¹³ See generally Carolle Charles, *Political Refugees or Economic Immigrants?: A New “Old Debate” Within the Haitian Immigrant Communities but with Contestations and Division*, 25 J. OF AM. ETHNIC HIST. 190 (2006).

¹⁴ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

¹⁵ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

¹⁶ 8 U.S.C. § 1101(a)(42)(A) (2012).

¹⁷ See *infra* Part IV.

¹⁸ See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (“Generally harsh conditions shared by many other persons [do] not amount to persecution.”); David A. Mar-

tive administrative body interpreting U.S. immigration laws, has not taken the position that denationalization amounts to persecution, however, denationalization on account of race may help to support asylum claims based on economic persecution.¹⁹ For example, the Dominican government uses citizenship as the basis for a legal framework that excludes the Haitian-Dominican population from various economic rights, and denationalization is the legal tool through which economic deprivation is imposed. The act of denationalization indicates that the government has targeted a particular group for an impoverished existence not shared by the general population.

Additionally, the Dominican Republic has imposed this severe economic disadvantage on account of race or ethnicity. Discrimination in the Dominican Republic against ethnic Haitians has a long and ignoble history, and the rights of Haitian-Dominicans have been repeatedly and systematically restricted. Haitians, whom many Dominicans view as “blacker,” have a “distinctive cultural identity”: “[a]s speakers of a [French Creole], they are linguistically separate from large Spanish- or English-speaking communities,” and “the practice of *vodou*, long vilified by mainstream Churches and the media, singles them out for further suspicion and fear.”²⁰ Migration from Haiti to the Dominican Republic has been a point of conflict on Hispaniola since the beginning of the twentieth century, when international invest-

tin, *Major Developments in Asylum Law Over the Past Year: A Year of Dialogue Between Courts and Agencies*, 84 INTERPRETER RELEASES 2069, 2072–73 (2007) (“Unless we are prepared to use asylum to protect the globe’s poor, it is hard to see why imposition of an ‘impoverished existence’ on the formerly well-to-do, short of threatening their lives or freedom, calls for this form of protection.”).

¹⁹ The BIA has not taken the position that denationalization on account of a protected ground is per se persecution. However, circuit courts have remanded asylum appeals to the BIA to consider the issue. For example, the Seventh Circuit has strongly suggested that denationalization without more amounts to persecution. See *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010) (“[T]o 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.”). Most circuit courts that have reviewed the issue and ruled in favor of the asylum applicant have relied on other mistreatment without speaking directly to the issue. See, e.g., *Sterba v. Holder*, 646 F.3d 964, 973 (6th Cir. 2011) (finding economic persecution and noting that “ethnically targeted denationalization of people who do not have dual citizenship may be persecution”); *Mengstu v. Holder*, 560 F.3d 1055, 1059 (9th Cir. 2009) (noting that a “program of denationalization and deportation” is a form of persecution); *Giday v. Gonzales*, 434 F.3d 543, 554–56 (7th Cir. 2006) (involving a case of denationalization, detention, and deportation). See generally Stewart E. Forbes, “*Imagine There’s No Country*”: *Statelessness As Persecution in Light of Haile II*, 61 BUFF. L. REV. 699, 704 (2013) (“When courts did grant asylum for stateless refugees, they ignored the applicant’s statelessness and based the grant of asylum on some other outward manifestation of persecution.”). Haitian-Dominican asylum-seekers from the Dominican Republic may not have to rely entirely upon economic persecution; there are other widespread practices, particularly on the *bateyes*, that may support a claim of physical persecution. These practices include forced labor, physical violence, and systematic rape. See generally Barbara L. Bernier, *Sugar Cane Slavery: Bateyes in the Dominican Republic*, 9 NEW ENG. J. INT’L & COMP. L. 17 (2003).

²⁰ JAMES FERGUSON, MINORITY RIGHTS GRP. INT’L, MIGRATION IN THE CARIBBEAN: HAITI, THE DOMINICAN REPUBLIC AND BEYOND 7 (2003), available at <http://www.oas.org/atip/regional%20reports/migrationinthecaribbean.pdf>, archived at <http://perma.cc/QR35-MQUM>.

ment, particularly U.S. investment, created a fluctuating need in the Dominican Republic for cheap labor — that is, foreign, undocumented, and non-unionized labor.²¹ During periods of recession, reduced investment, or unemployment, the Dominican citizenry has often been less welcoming of economic migrants and of those perceived as belonging to a class of economic migrants.²² In the wake of the recession beginning in the early 2000s, the Dominican government has used law and ad hoc policies to deprive Haitian-Dominicans of citizenship and the rights citizenship affords. As a result, many are living in poverty without any possibility of improving their circumstances.

This Note will argue that the Dominican government has deliberately imposed economic disadvantage on the Haitian-Dominican community on account of race or nationality. Moreover, the economic disadvantage reaches the level of severity necessary to sustain a claim of persecution under U.S. asylum law. Part I will discuss the factual and legal situation in the Dominican Republic. Part II will give a brief overview of U.S. asylum law. Part III will argue that the persecution many Haitian-Dominicans experience is on account of race. Part IV will explore U.S. standards for economic persecution and argue that the economic disadvantage the Haitian-Dominican community experiences rises to the level of persecution under the majority standard. It will argue that the majority standard is correct in light of BIA precedent, agency guidance, legislative history, and the broader goals of the underlying Convention.

²¹ See *id.* at 6 (“From the outset, migrants moved to areas where economic growth, usually spurred by US investment, created a labour shortage.”); see also ERIC PAUL ROORDA, *THE DICTATOR NEXT DOOR: THE GOOD NEIGHBOR POLICY AND THE TRUJILLO REGIME IN THE DOMINICAN REPUBLIC, 1930–1945*, at 69 (1998) (discussing the predominance of U.S. investment and credit in the local industries of the Dominican Republic).

²² See FERGUSON, *supra* note 20, at 6. Shifts in the economy have a huge impact on host governments’ treatment of immigrants — and those associated with the immigrant community regardless of personal migration histories — and the impact is often particularly grave when economic matters are conflated with matters of race, ethnicity, and belonging. When a particular population is repeatedly the source of cheap labor, reactions to harsh economic realities are often conflated with feelings of xenophobia, and the severity of xenophobic attitudes can shift with the labor market. See *id.* at 6–8; see also NAT’L IMMIGRATION PROJECT OF THE NAT’L LAWYERS GUILD, *1 IMMIGRATION LAW AND DEFENSE* § 2:13 (2014 ed.) (describing the U.S. “Operation Wetback” as an example of de facto governmental immigration policy that works “with almost clocklike precision to provide a source of cheap labor for the growers in boom times, while furnishing a scapegoat during downturns”). This tension is strongly present on the island of Hispaniola as Haitian citizens have continuously constituted the majority of the Dominican Republic’s migrant workers: “The Dominican economy, especially the sugar and construction industries, has long profited from a constant influx of cheap Haitian labor. More than 90% of the country’s seasonal sugar workers and two thirds of its coffee workers are Haitians or Dominicans of Haitian origin.” CLARE M. RIBANDO, *CONG. RESEARCH SERV., RS21718, DOMINICAN REPUBLIC: POLITICAL AND ECONOMIC CONDITIONS AND RELATIONS WITH THE UNITED STATES 3* (2005), available at <https://www.fas.org/sgp/cts/row/RS21718.pdf>, archived at <http://perma.cc/N8N2-G9X7>. Haitians and Haitian-Dominicans within the Dominican Republic “are both needed and widely disparaged as a migrant minority.” FERGUSON, *supra* note 20, at 4.

I. CITIZENSHIP IN THE DOMINICAN REPUBLIC

The Dominican Constitution does not grant birthright citizenship to children born to foreigners who are “in transit” at the time of the child’s birth.²³ Prior to August 2004, only persons who planned to remain in the country for fewer than ten days were considered “in transit” under Dominican law.²⁴ Although de facto denials of birth certificates due to anti-Haitian sentiment were pervasive, the Dominican Constitution formally granted citizenship to Dominican-born children of Haitian ancestry whose parents were considered migrant workers.²⁵

In August 2004, the Dominican government enacted Migration Law 285-04, which expanded the definition of “in transit” to include “non-residents” for purposes of determining citizenship.²⁶ Under the law, “non-residents” include “temporary foreign workers, migrants with expired residency visas, undocumented foreign laborers, and people otherwise unable to prove their lawful residency in the country.”²⁷ Thus, their children are excluded from birthright citizenship.²⁸ In 2005, the Dominican Republic’s Supreme Court of Justice held it constitutional to exclude children born to migrant workers from the right to citizenship.²⁹ On September 23, 2013, the Supreme Court held that the definition of “in transit” under Migration Law 285-04 applies retroactively to 1929, when the Dominican Constitution first excluded children born to individuals “in transit” from citizenship.³⁰ The

²³ See also Robert F. Kennedy Ctr. for Justice & Human Rights, *Memo: Constitutional Changes in the Dominican Republic* (Feb. 2, 2005), <http://rfkcenter.org/memo-constitutional-changes-in-the-dominican-republic>, archived at <http://perma.cc/U6ZM-LYPT>.

²⁴ See Middleton, *supra* note 2, at 87. Additionally, the Dominican Constitution specifically precluded grants of citizenship to children born to foreign diplomats who were in transit. *Id.*

²⁵ OPEN SOC’Y INST., DOMINICANS OF HAITIAN DESCENT AND THE COMPROMISED RIGHT TO NATIONALITY: REPORT PRESENTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE OCCASION OF ITS 140TH SESSION 4 (2010).

²⁶ Migration Law 285-04, *supra* note 5, § VII, art. 36, cl. 10 (“Los No Residentes son considerados personas en tránsito, para los fines de la aplicación del Artículo 11 de la Constitución de la República.”).

²⁷ OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REVIEW OF THE DOMINICAN REPUBLIC 4 (2012), available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/DOM/INT_CCPR_NGO_DOM_104_8609_E.pdf, archived at <http://perma.cc/V32D-6BS4>.

²⁸ General Law on Migration 285-04 was published in the *Gaceta Oficial* on August 27, 2007, and is available (in Spanish) at mip.gob.do/Portals/0/docs/LEY%20DE%20MIGRACION.pdf, archived at <http://perma.cc/6HQQ-R8W8>; see also OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 27, at 4.

²⁹ Middleton, *supra* note 2, at 90. Relatedly, in January 2010, the Dominican Republic amended the Constitution to specifically exclude from citizenship those born to parents illegally residing in the country. See, e.g., *id.* at 71 (citing Reforma del Estado Constitución de la República, July 25, 2002, tit. III, § 1, art. 11, cl. 1 (Dom. Rep.)).

³⁰ See Press Release, Open Soc’y Justice Initiative, Dominican Republic Court Ruling Raises Mass Statelessness Threat (Oct. 2, 2013), <http://www.opensocietyfoundations.org/press-releases/dominican-republic-court-ruling-raises-mass-statelessness-threat>, archived at <http://perma.cc/535Z-CTYU>.

2013 ruling effectively denationalized hundreds of thousands of Haitian-Dominicans.³¹

Under international pressure, President Danilo Medina proposed and the Senate approved Naturalization Law 169-14, designed to help those affected by the 2013 ruling obtain Dominican citizenship. In July 2014, President Medina signed Decreto 250-14, an executive decree enforcing the law.³² Naturalization Law 169-14 contains two sets of provisions. The first set of provisions creates procedures — a “special regime” — through which individuals previously listed in the Civil Registry³³ can restore their citizenship.³⁴ Notably, those born after 2007 — approximately 21,449 individuals — do not qualify for the special regime because the Dominican Republic began registering children born to nonresidents in the Registry of Foreigners.³⁵ The second set of provisions creates a regularization plan for those who are not listed in the Civil Registry but were born in the Dominican Republic to non-resident parents. These applicants must prove the conditions of their birth and satisfy a number of specific criteria.³⁶ While Naturalization Law 169-14 remedies some of the worst effects of the 2013 ruling, it does not reverse the ruling itself, nor does it alter the constitution’s new definition of citizenship for future generations.³⁷

The first set of provisions, which creates the special regime for those born to nonresident parents before 2007 and listed in the Civil Registry, is far more expedient than the regularization plan for those who are not listed in the Civil Registry. However, even the special regime is not automatic. The Naturalization Law requires the Central Electoral Board, the agency that oversees the Civil Registry, to “regularize” persons who qualify for the spe-

³¹ Middleton, *supra* note 2, at 90; see Randal Archibald, *Dominicans of Haitian Descent Cast into Legal Limbo by Court*, N.Y. TIMES (Oct. 24, 2013), <http://www.nytimes.com/2013/10/24/world/americas/dominicans-of-haitian-descent-cast-into-legal-limbo-by-court.html>, archived at <http://perma.cc/B5GA-HTXG>; Lopez & Coto, *supra* note 6, at 1.

³² Decreto Núm. 250-14, Danilo Medina, Presidente de la República Dominicana, 23 de julio 2014.

³³ Dominican parents can register the births of their children in the Civil Registry, administered by the Central Electoral Board. The Civil Registry issues birth certificates as well as *cédulas*, which are national identification cards adults over the age of eighteen are required to carry. Birth certificates and *cédulas* are the documentation authorities use to distinguish between citizens and noncitizens. Such documentation is required to register for Dominican schools after the sixth grade, vote, register one’s own children, apply for passports, marry, apply for employment in the formal sector, and a number of other tasks. See, e.g., OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 27, at 4.

³⁴ Naturalization Law 169-14, *supra* note 9, chs. I, II.

³⁵ Press Release, Robert F. Kennedy Ctr. for Justice & Human Rights, New Dominican Republic Naturalization Law Continues Discrimination against Thousands of Dominicans of Haitian Descent (May 22, 2014), <http://rfkcenter.org/new-dominican-republic-naturalization-law-continues-discrimination-against-thousands-of-dominicans-of-haitian-descent-2?lang=en>, archived at <http://perma.cc/786N-63DB>; see *Open Letter to President Danilo Medina*, *supra* note 10, at 4.

³⁶ Naturalization Law 169-14, *supra* note 9, ch. II.

³⁷ *Id.* pmb. (noting that the enactment of the law does not negate the court ruling, but responds to some of the problems generated by the ruling).

cial regime and to “accredit” them as Dominican nationals.³⁸ Nevertheless, the special regime seems to provide relatively simple procedures to regain citizenship.

Unfortunately, as Amnesty International notes, “[t]he beneficiaries of the ‘special regime’ could represent a minority of the people affected” by the ruling because most of those affected by the ruling were never listed in the Civil Registry.³⁹ Throughout the 1980s and 1990s Civil Registry officials and the Central Electoral Board arbitrarily refused to register the children of those who “looked like a Haitian.”⁴⁰ And since the 2000s, “Civil [R]egistry officials have admitted to using darker skin color, facial features associated with Haitians . . . , accents, and ‘Haitian-sounding names’” as proxies for determining whether a mother is “in transit,” thus excluding her children from the Civil Registry and depriving them of valid birth certificates.⁴¹

In the Dominican Republic, individuals without proper birth certificates cannot register for secondary education or a bank account, marry, vote, or obtain jobs in the formal sector. Moreover, “being caught without [an identity card afforded only to those with proper birth certificates] can result in fines, imprisonment, or in rare cases, deportation.”⁴² The consequences of these racial proxies have thus been compounded over generations. Based on estimates from a Central Electoral Board study, 13,972 of the roughly 200,000 Haitian-Dominicans affected by the Supreme Court’s 2013 ruling were actually listed in the Civil Registry.⁴³ According to such estimates, the special regime — available only to those listed in the registry — will aid less than 7% of affected Haitian-Dominicans.

Under the second set of provisions of Naturalization Law 169-14, those born within the Dominican Republic to nonresident parents and not listed in the Civil Registry must register as foreigners — itself a risky step because it forces Haitian-Dominicans without legal status to identify themselves to the government⁴⁴ — and apply for the eighteen-month National Plan of Regular-

³⁸ See *id.* chs. I, II. The special regime, though more desirable than the plan structured for individuals born to nonresident parents who were not listed in the Civil Registry, still falls short of recommendations given by the Inter-American Commission on Human Rights pushing for an automatic, not procedural, grant of citizenship. See *Open Letter to President Danilo Medina*, *supra* note 10, at 3–4.

³⁹ *Open Letter to President Danilo Medina*, *supra* note 10, at 3–4.

⁴⁰ OPEN SOC’Y INST., *supra* note 25, at 5.

⁴¹ Shaina Aber & Mary Small, *Citizen or Subordinate: Permutations of Belonging in the United States and Dominican Republic*, 1 J. ON MIGRATION & HUM. SEC. 76, 85–86 (2013).

⁴² *Id.* at 85.

⁴³ See *Open Letter to President Danilo Medina*, *supra* note 10, at 3 (noting that 24,392 people and 13,972 individuals of Haitian descent were deemed to be affected by the ruling as based on records from the Civil Registry). The discrepancy between the number of Haitian-Dominicans born to nonresident parents who were listed in the Civil Registry (13,972) and the total number of Haitian-Dominicans affected by the decision (200,000) is stark. The special regime will aid only those listed in the Civil Registry.

⁴⁴ *Id.* (noting that the Inter-American Commission on Human Rights “deemed [the requirement to register as a foreigner] to be unacceptable”).

ization of Foreigners with Irregular Migration Status (“Regularization Plan”).⁴⁵ The plan requires the *Ministerio de Interior y Policía* to determine whether registrants should be regularized based on four basic categories: the length of time living in the country, ties to Dominican society, employment and socioeconomic status, and the regularization of family members.⁴⁶ After the two-year regularization process, the registrant may begin naturalization.⁴⁷

The evaluative criteria from these four categories will exclude much of the affected population. First, the majority of Haitian-Dominicans who were never listed in the Civil Registry will likely have trouble meeting the Regularization Plan’s criteria regarding ties to Dominican society. Registrants can establish their ties to Dominican society by personally demonstrating an ability to speak and write in Spanish or by documenting their studies in a registered Dominican higher education institution.⁴⁸ But birth certificates are required to attend school beyond the primary grades; and since Haitian-Dominicans who are not registered in the Civil Registry often lack such documentation, many will have difficulty satisfying this criterion of the Regularization Plan.⁴⁹

Second, despite having lived in the Dominican Republic their entire lives, many affected Haitian-Dominicans will have significant difficulty establishing the length of time spent in the country. The Regularization Plan allows registrants to meet this criterion by providing certified or authenticated proof of long-term employment or receipts or contracts proving one’s residence; however, much of this population is engaged in informal trading and lives in informal housing, with employers and landlords unlikely to provide such documentation.⁵⁰

⁴⁵ Naturalization Law 169-14, *supra* note 9, chs. II, III; Decreto Núm. 327-13 Danilo Medina, Presidente de la República Dominicana, 29 de noviembre 2013, art. 3.

⁴⁶ Decreto Núm. 327-13, art. 14. Further, the Regularization Plan incorporates Decreto 327-13 by reference, which lists criteria the Minister should consider in determining suitability under each category. Naturalization Law 169-14, *supra* note 9, ch. II, art. 7.

⁴⁷ Naturalization Law 169-14, *supra* note 9, ch. II, art. 8.

⁴⁸ Decreto Núm. 327-13, art. 16(5).

⁴⁹ See Esther Kim, Note, *Smaller Steps Towards Progress in the Dominican Republic: Securing Equal Access to Education for Dominico-Haitian Children*, 31 B.U. INT’L L.J. 155, 175–76 (2013); OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 27, at 8; see also OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION: REVIEW OF THE DOMINICAN REPUBLIC 9 (2013), available at <http://www.refworld.org/pdfid/51ee489b4.pdf>, archived at <http://perma.cc/JWD9-MVLP> (“Dominicans of Haitian descent without birth certificates or mandatory identity documents (*cédulas*) cannot, in practice, attend school or any kind of secondary education.”).

⁵⁰ Decreto Núm. 327-13, art. 14, 17-20; Naturalization Law 169-14, *supra* note 9, art. 7, 8; see, e.g., FERGUSON, *supra* note 20, at 4, 8, 11. The executive also signed into law Decreto Núm. 250-14 enforcing Naturalization Law 169-14. The Regularization Plan has begun running in Santo Domingo, and the Ministry of the Interior has noted that those trying to qualify for the plan should be able to document that they can establish they fall into at least two of the three first categories, i.e., they have lived in the country for a significant period of time, have ties to Dominican society, and have a favorable socioeconomic and employment status. *Plan de Regularización de Extranjeros Inicia en la Provincia Santo Domingo*, REPÚBLICA DOMINICANA MINISTERIO DE INTERIOR POLICÍA (June 9, 2014), <http://mip.gob.do/tabid/92/itemid/557/>

Third, most affected Haitian-Dominicans will likely have difficulty establishing a “suitable socioeconomic and employment status” under the Regularization Plan. The plan allows registrants to establish such status through a providing a combination of the following: proof of college, high school, and elementary school graduation; proof of technical certification; proof of real estate ownership; proof of personalty worth more than R.D. \$10,000 (U.S. \$229); automobile ownership; a bank account with regular activity, containing at least R.D. \$10,000; proof of employment; and two letters of support from business associates.⁵¹ Noncitizens cannot register for Dominican secondary schools or university, and as a result many have not attended high school, college, or technical school.⁵² And since those without a *cédula* (a national identification card issued to those with valid Dominican birth certificates) cannot open a bank account, maintaining an active bank account with a balance of R.D. \$10,000 is a difficult feat.⁵³

Moreover, a significant portion of Haitian-Dominicans living in the Dominican Republic live in urban slums or in one of the approximately five hundred sugar plantations known as *bateyes* in impoverished conditions that make meeting the remaining factors under the Regularization Plan’s socioeconomic and employment criterion a near impossibility.⁵⁴ The Dominican sugar industry established the *batey* system in the 1950s to house migrants the Dominican government brought over from Haiti to provide cheap labor.⁵⁵ A journalist for *The New York Times* reporting on conditions in the *bateyes* wrote:

Plan-de-Regularizacin-de-Extranjeros-inicia-en-la.aspx, archived at <http://perma.cc/LLL7-2WBG>. Three days into the program, the Ministry recognized that many of those applying lack the requisite documentation. Nevertheless, they assured the registrants that they will be treated with respect. *Fadul cita inconvenientes con documentación de extranjeros; Explica las facilidades que se están ofreciendo a los inmigrantes*, REPÚBLICA DOMINICANA MINISTERIO DE INTERIOR POLICÍA (June 2014), <http://mip.gob.do/tabid/92/Itemid/555/Fadul-cita-inconvenientes-con-documentacin-de-ext.aspx>, archived at <http://perma.cc/7RGD-4QP7>.

⁵¹ Decreto Núm. 327-13, art. 21.

⁵² See OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 27, at 8; see also OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 49, at 9 (“Dominicans of Haitian descent without birth certificates or mandatory identity documents (*cédulas*) cannot, in practice, attend school or any kind of secondary education.”). Likewise, *cédulas* are required to open bank accounts. OPEN SOC’Y FOR JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 27, at 7.

⁵³ See OPEN SOC’Y JUSTICE INITIATIVE & CTR. FOR JUSTICE AND INT’L LAW, *supra* note 27, at 6–7; see also OPEN SOC’Y INST., *supra* note 25, at 9–10.

⁵⁴ FERGUSON, *supra* note 20, at 8, 14.

⁵⁵ The *batey* system began in the 1950s under Rafael Leónidas Trujillo Molina, President of the Dominican Republic from 1930 to 1938 and from 1942 to 1952, and the effective leader of the Dominican Republic from 1930 to 1961, and commonly referred to as Trujillo. During the 1950s, Trujillo contracted with François “Papa Doc” Duvalier, and later with Duvalier’s son, Jean-Claude “Baby Doc” Duvalier, both dictators of Haiti, in order to facilitate the transfer of workers from Haiti to the Dominican Republic to work on Trujillo’s plantations; the plantations were reorganized as state plantations in 1961, after Trujillo’s assassination. See FERGUSON, *supra* note 20, at 10–11.

Haitian immigrants occupy the lowest rungs of society here, and have for generations, living in urban slums or squalid sugar plantation camps where wage abuse remains common For decades, Haitians, housed in remote shantytowns known as bateys [sic], were brought over on contracts for sugar plantations to cut cane under the blistering sun. Many still labor in the fields, while others work as maids, construction workers and in other low-paying jobs.⁵⁶

According to a State Enterprise Commission report, in 2001, “32 per cent of the [state-owned] *bateyes* had no drinking water supply, 66 per cent had no proper sanitation facilities, 16 per cent had no access to medical services, and 30 per cent [had] no access to schools.”⁵⁷ Thus, it is unlikely that this community has access to proof of employment or letters from business associates.

In addition, “[t]here is a large permanent or semi-permanent Haitian population that has no connection with the traditional *bateyes*” — for example, in Mercado Modelá, Santiago, as well as “sugar districts” in close proximity to but outside of the *bateyes* in Barahona, La Romana, and San Pedro de Macorís — but that is likely to find the Regularization Plan similarly limiting.⁵⁸ Most Haitian-Dominican residents in these districts live in “tenements or shacks” and rely on a combination of informal trading, domestic service, and construction work.⁵⁹ A number of ethnic Haitian residents work in the coffee, rice, tobacco, and other agricultural industries.⁶⁰ Although better than sugar wages, they are still meager. For example, pay in the tobacco industry is U.S. \$5 per seventy-pound box picked.⁶¹

Most Haitian-Dominicans without status lack a living wage, medical care, or access to secondary education, and are relegated to menial labor that does not require a national identification card. Many lack sufficient clean food and water. It is likely that most of this population will fail to meet the criteria of the Regularization Plan by establishing ownership of an automobile or real property, or maintenance of a bank account. Furthermore, the discretionary nature of the *Ministerio*’s review is worrisome in light of the history of governmental discrimination against the Haitian-Dominican community. Advocates have argued and the Inter-American Court of Human Rights has ruled that readmission should be automatic.⁶² Not surprisingly,

⁵⁶ Archibald, *supra* note 31.

⁵⁷ See FERGUSON, *supra* note 20, at 14.

⁵⁸ *Id.* at 16.

⁵⁹ *Id.*

⁶⁰ *Id.* at 15–16.

⁶¹ *Id.*

⁶² See *Open Letter to President Danilo Medina*, *supra* note 10, at 3 (noting that the Inter-American Commission on Human Rights recommended automatic and not discretionary reinstatements of citizenship).

the Regularization Plan is off to a rocky start, as a significant number of registrants have been unable to prove even their identities.⁶³

II. ASYLUM ELIGIBILITY

Taken together, the racially motivated denials of citizenship and attendant economic mistreatment — culminating recently in the formal denationalization of Haitian-Dominicans — amount to persecution under U.S. asylum law. Following World War II, the United Nations drafted the 1951 Convention, requiring states to provide “surrogate national protection and . . . guarantee specific rights” to refugees “outside their countries of origin.”⁶⁴ Initially, the Convention limited refugee status to those displaced during the war. However, the 1967 Protocol, which supersedes the Convention, removed this limitation.⁶⁵ The United States signed on to the 1967 Protocol in 1968, thereby binding it to the obligations under the 1951 Convention.⁶⁶ The United States finally implemented the Protocol through the Refugee Act of 1980,⁶⁷ codified under the Immigration and Nationality Act (“INA” or “Act”).⁶⁸

Under the Act, the Attorney General may grant asylum to any refugee, defined as:

. . . any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion⁶⁹

⁶³ See *supra* note 50.

⁶⁴ DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:2 (West 2014). See Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT’L L. & COM. REG. 253, 260 (1995).

⁶⁵ Bockley, *supra* note 64, at 260; 1967 Protocol, *supra* note 14, art. I.

⁶⁶ The 1967 Protocol requires signatories to comply with substantive provisions of the 1951 Convention. See Bockley, *supra* note 64, at 279.

⁶⁷ Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (2012)).

⁶⁸ Bockley, *supra* note 64, at 279–81 (citing Anthony Asuncion, Note, *INS v. Cardoza-Fonseca: Establishment of a More Liberal Asylum Standard*, 37 AM. U. L. REV. 915, 922 n.49 (1988)); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968.”); ANKER, *supra* note 64, § 1:5 (citing H.R. Conf. Rep. No. 96-781 (1980)).

⁶⁹ 8 U.S.C. § 1101(a)(42)(A) (2012).

The statute thus provides two grounds for asylum eligibility: past persecution or a well-founded fear of future persecution.⁷⁰ An asylum-seeker who has suffered past persecution will be presumed to face future persecution;⁷¹ the government may rebut this presumption by showing by a preponderance of the evidence either that “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” or that “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality.”⁷²

Additionally, the Attorney General may grant asylum to an individual who has suffered past persecution “in the absence of well-founded fear of persecution” if, “in the exercise of the decision-maker’s discretion,” the past persecution was so severe that the asylum-seeker should not be returned to her home country.⁷³ An asylum-seeker who cannot establish past persecution bears the burden of establishing that “[t]here is a reasonable possibility of suffering such persecution if he or she were to return to that country” and that “it would not be reasonable for . . . him or her to relocate.”⁷⁴ An asylum-seeker establishes a well-founded fear of persecution by demonstrating a reasonable possibility of persecution;⁷⁵ a reasonable possibility can include even a 10% chance of future persecution.⁷⁶ The fear must be objectively reasonable and subjectively genuine.⁷⁷ Furthermore, “[t]he persecutor must be a government official or individuals that the government is unable or unwilling to control.”⁷⁸

The applicant must also establish two central components: that the mistreatment is on account of a protected ground — in this case, race or nation-

⁷⁰ *Id.*; see also *Matter of Chen*, 20 I. & N. Dec. 16, 17–18 (B.I.A. 1989) (distinguishing case law on “persecution” from case law on “well-founded fear of persecution”). After the applicant establishes eligibility, the Attorney General must make a discretionary determination about whether to grant asylum. Additionally, there are a number of bars to asylum, including convictions for an “aggravated felony” or a “particularly serious crime.” 8 U.S.C. § 1158(b)(2)(A)(ii) (2012). Discretionary determinations are “conclusive unless manifestly contrary to the law and an abuse of discretion.” *Id.* § 1252(b)(4)(D).

⁷¹ 8 C.F.R. § 1208.13(b)(1) (2014).

⁷² *Id.* § 1208.13(b)(1)(i)–(ii); see also *id.* § 1208.16(b)(1)–(2) (applying similar standards to deportation proceedings).

⁷³ *Id.* § 1208.13(b)(1)(iii)(A).

⁷⁴ *Id.* § 1208.13(b)(2)(i)(B), (b)(3)(i). Again, if a noncitizen can reasonably relocate within her native country, the immigration judge will not approve her application. *Id.* § 1208.13(b)(2)(C)(ii); see also *id.* § 1208.13(b)(3) (enumerating criteria for evaluating reasonableness of relocation).

⁷⁵ *Id.* § 1208.13(b)(2)(i)(B).

⁷⁶ *INS v. Cardoza-Fonesca*, 480 U.S. 421, 440 (1987).

⁷⁷ *Id.* at 450 (Blackmun J., concurring); *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986); see also *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) (adopting “common sense” framework that incorporates subjective and objective elements).

⁷⁸ *Santos-Lemus v. Mukasey*, 542 F.3d 738, 742 (9th Cir. 2008). However, the BIA has arguably applied an increasingly expansive standard to the government’s inability to control action within the jurisdiction, particularly in reference to the Mexican government’s inability to control drug cartels. See *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (noting the Mexican government’s inability to control Los Zetas and stating that the BIA must consider *ability* in addition to *willingness* of the government to control a persecutor).

ality — and that the mistreatment rises to the level of persecution. The Dominican Republic has used citizenship, or the lack thereof, to psychologically and economically subordinate those of Haitian ancestry; this mistreatment rises to the level of persecution and is on account of race or nationality. Parts III and IV will discuss two central requirements of the analysis of whether stateless individuals of Haitian ancestry living in the Dominican Republic are eligible for asylum in the United States: Part III will argue that the mistreatment of these individuals is motivated by race or nationality, and Part IV will argue that the resulting economic disadvantage rises to the level of “persecution.”

III. THE PERSECUTORY NEXUS TO RACE OR NATIONALITY

An asylum-seeker must establish that the persecution is on account of one of the statutorily protected grounds⁷⁹ — in this case, race or nationality — meaning that the protected grounds is a “central” reason for their persecution.⁸⁰ Courts have interpreted race and nationality broadly and have noted that the two are often interconnected, if not coterminous.⁸¹ Courts interpret both terms broadly to encompass their full social meaning, which contemplates “race, colour, descent, or national or ethnic origin.”⁸² Race specifically “is a physical characteristic or perceived innate characteristic beyond the control or choice of the individual,”⁸³ and the drafters of the Convention intended the term to encompass “all kinds of ethnic groups that are referred to as ‘races’ in common usage, ethnicity generally, and any social group of common descent.”⁸⁴ Under this social definition of race and nationality, Haitian-Dominicans constitute a distinct race and nationality within the meaning of the asylum statutes, especially given widespread perceptions in the Dominican Republic of Haitians as ethnically other.

Although the law requires courts to analyze separately the severity of the mistreatment (to determine whether it amounts to persecution) and the motivations behind the mistreatment (to determine whether it is on account of race, nationality, or ethnicity), courts and practitioners often conflate the two prongs. In practice, courts may be more likely to find that mistreatment rises to the level persecution when there is a perceptible basis for animus.

⁷⁹ 8 U.S.C. § 1101(a)(42)(A) (2012).

⁸⁰ *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (citing *Gebremichael v. INS*, 10 F.3d 28, 35 (1st Cir. 1993)).

⁸¹ See ANKER, *supra* note 64, § 5:81.

⁸² *Id.* (quoting International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, art. I(1)) (internal quotation marks omitted).

⁸³ *Id.*; see also *Duarte de Guinac v. INS*, 179 F.3d 1156, 1160 n.5 (9th Cir. 1999) (noting that race and nationality “may sometimes overlap”).

⁸⁴ ANKER, *supra* note 64, § 5:82 (quoting Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 68, HCR/IP/4Eng/REV.1 (1979) (reedited Jan. 1992) [hereinafter UNHCR Handbook]) (internal quotation marks omitted).

Mistreatment based on race is often viewed as the paradigmatic form of potentially persecutory conduct that must not be tolerated. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) Handbook notes: “Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights.”⁸⁵ Professor Deborah Anker has read the UNHCR Handbook’s discussion of race to stand for the proposition that courts should undertake interdependent analysis of the severity of mistreatment and motivation prongs when race is the motivation for the mistreatment, given the global history of race discrimination. Her treatise characterizes the UNHCR position as follows:

The UNHCR implies that victims of racial persecution *should* receive special consideration, so that a wider range of discriminatory harms may constitute persecution. The UNHCR Handbook instructs on the fundamental linkage between human dignity and protection from racial discrimination: “Discrimination on racial grounds will frequently amount to persecution.”⁸⁶

According to this analysis of the UNHCR position, courts *should* allow for a broader range of mistreatment to constitute persecution when the mistreatment is racially motivated, considering the historical and present pervasiveness and ignominy of racial discrimination worldwide.⁸⁷ In order to establish that governmental persecution is “on account” of race or nationality, a Haitian-Dominican asylum-seeker need not show that the protected ground was the *only* motivation behind the persecution, but that her Haitian ancestry was “central to the persecutor’s decision to act against the victim.”⁸⁸ Likewise, courts do not require that the asylum-seeker establish that the government has persecuted every member of her race or nationality, but that race or nationality was the impetus in the case before the court.⁸⁹ The BIA has adopted a mixed-motive test and allows for a combination of racial and economic motives: the fact that a government may have had a number of motives behind the mistreatment does not diminish a claim for asylum.⁹⁰ Applicants may testify to their own beliefs, provide documentation of their circumstances, or introduce expert testimony to establish a racial motive.

The Dominican Republic has a history of discriminating against Haitians and those of Haitian ancestry. The discrimination is, in part, attributa-

⁸⁵ UNHCR Handbook, *supra* note 84, ¶ 68.

⁸⁶ ANKER, *supra* note 64, § 5:82 (quoting UNHCR Handbook, *supra* note 84, ¶ 69).

⁸⁷ See ANKER, *supra* note 64, § 5:82 (citing GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 70 (3d ed. 2007)) (emphasis added).

⁸⁸ See, e.g., Niang v. Gonzales, 422 F.3d 1187, 1200 (10th Cir. 2005) (citing Gebremichael v. INS, 10 F.3d 28, 35 (1st Cir. 1993)).

⁸⁹ See, e.g., Makonnen v. INS, 44 F.3d 1378, 1384 (8th Cir. 1995); see also ANKER, *supra* note 64, § 5:82.

⁹⁰ See, e.g., Matter of S-P-, 21 I. & N. Dec. 486, 495 (B.I.A. 1996) (“In some fact situations, the evidence may reasonably suggest mixed motives, at least one or more of which is related to a protected ground.”); ANKER, *supra* note 64, § 5:82.

ble to a European colonial history and racial hierarchy that despised blackness; Dominicans sought to reaffirm a white identity by distinguishing themselves from Haitians, who are seen as black.⁹¹ Commentators have located the origins of *anti-haitianismo* — or anti-Haitian sentiment in the Dominican Republic — in Trujillo's dictatorial rule: "Trujillo's disdain for Haitians led to an increased social revolution against black identity in culture as well as an overall institutionalization of anti-blackness in Dominican society."⁹²

In 1937, Trujillo's national project of *blanqueamiento* — the whitening of the nation — began in earnest with the Dominican Vespers, a government-led genocide of thousands of Haitians living in the Dominican Republic.⁹³ One historian wrote of the Vespers:

Trujillo hated the "despised Negro aliens whose voodoo, cattle rustling, and presence on Dominican soil was the ruin of a good life for Dominicans" and "caused a weakening of the national blood." Trujillo's antidote was to begin bloodletting, and the rivers of blood that flowed were Haitian. In a massacre unparalleled in the Caribbean or North America, the Dominican National Police and Army rounded up Haitian men, women and children and systematically slaughtered them. The Dominican Vespers began on October 2 and lasted three days. Few bullets were used. Instead, 20,000 to 30,000 Haitians were bludgeoned and bayoneted, then herded in moaning, wailing droves into the sea, where sharks finished what Trujillo had begun.⁹⁴

Migration issues further complicate the racial history of Hispaniola. As stated in a report on migration in the Caribbean by advocacy organization Minority Rights Group International, the economic downturn that plagued the Caribbean in the wake of the Great Depression (during which sugar prices collapsed) was a significant contributor to Trujillo's Haitian genocide in the Dominican Republic and to other general xenophobic constraints on liberty throughout the region. The report explains:

When the depression of 1929 led to a catastrophic drop in commodity prices . . . Trujillo . . . ordered a campaign against Haitian migrant workers, and some 15,000 Haitians were massacred by the Dominican military. The atrocity again coincided with the fall in world sugar prices, making migrant labour — here largely employed in US-controlled plantations — more vulnerable to xenophobic aggression.⁹⁵

⁹¹ See, e.g., Middleton, *supra* note 2, at 83.

⁹² *Id.*

⁹³ See *id.*; ELIZABETH ABBOTT, HAITI: THE DUVALIERS AND THEIR LEGACY 49 (1988).

⁹⁴ ABBOTT, *supra* note 93, at 49.

⁹⁵ FERGUSON, *supra* note 20, at 6.

Economic downturn can foment racial animus, and present racial discrimination may be partly attributable to the xenophobia that has been exacerbated by the economic recession of the 2000s.

Under asylum law, the overwhelming and disproportionate effect the law has had on the Haitian-Dominican community and historical patterns of confining the rights of this ethnic population in times of economic downturn are relevant to the question of whether the current mistreatment of Haitian-Dominicans is racially motivated.⁹⁶ While asylum law does not provide protection for those facing social discrimination, it provides protection from state-sponsored mistreatment or mistreatment the government is “unwilling or unable to control.”⁹⁷ This racial history supports the claim that ad hoc discriminatory acts pre-dating Migration Law 285-04 and formal denationalization are equally attributable to purposeful government inaction and animus, and asylum eligibility should be equally available for those affected by either or both.

IV. THE ECONOMIC PERSECUTION STANDARD

Under U.S. law, an asylum applicant must demonstrate that past mistreatment or expected future mistreatment rises to the level of “persecution.” Courts have struggled to determine what mistreatment, including economic mistreatment, counts as persecution. Economic persecution does not include “generalized conditions of hardship which affect entire populations” and requires the deliberate imposition of harm.⁹⁸ Beyond that, courts have diverged on the standard of economic mistreatment that amounts to economic persecution, particularly since the standard has been complicated by congressional amendments to the INA in 1965 and 1980 and the United States’ signing of the United Nations Protocol in 1968. In 2007, the BIA attempted to clarify the standard in *Matter of T-Z*.⁹⁹ Although circuit courts recognize that Congress did not directly define “persecution” in the INA, and that circuit courts must afford *Chevron* deference¹⁰⁰ to reasonable BIA interpretations of the term “persecution,” circuit court rulings interpreting the 2007 BIA decision on the economic persecution standard differ.¹⁰¹

⁹⁶ See *supra* notes 8, 20 and accompanying text.

⁹⁷ See, e.g., *Santos-Lemus v. Mukasey*, 542 F.3d 738, 742 (9th Cir. 2008).

⁹⁸ See, e.g., *Koval v. Gonzales*, 418 F.3d 798, 805 (7th Cir. 2005); see also *Zhi Wei Pang v. Holder*, 665 F.3d 1225, 1231 (10th Cir. 2012) (“Mere denigration, harassment, and threats are insufficient.” (internal quotation marks omitted)); *Mei Fun Wong v. Holder*, 633 F.3d 64, 72 (2d Cir. 2011); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

⁹⁹ 24 I. & N. Dec. 163, 170 (B.I.A. 2007).

¹⁰⁰ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

¹⁰¹ *Mirzoyan v. Gonzales*, 457 F.3d 217, 221 (2d Cir. 2006) (noting that the BIA is entitled to *Chevron* deference because the INA is silent on the meaning of “persecution,” thus “economic persecution” is an ambiguous term). BIA decisions must comply with statute and agency regulations. E.g., *Matter of Anselmo*, 20 I. & N. Dec. 25, 30 (B.I.A. 1989) (“A regula-

The majority of circuits hold that the deliberate imposition of severe economic disadvantage — severe limitations on job opportunities, education opportunities, and access to health care, for example — on account of race, or other protected grounds, amounts to persecution.¹⁰² However, the Fourth, Eighth, and Tenth Circuits have maintained a more stringent standard wherein confinement to menial labor rarely amounts to economic persecution.¹⁰³ The minority standard may not encompass the circumstances experienced by the majority of the Haitian-Dominican population, as much of that population is able to earn a living, albeit a substantially inadequate living. The majority standard, which recognizes that economic disadvantage may still be persecutory even when the economic disadvantage does not amount to a complete withdrawal of economic opportunity, is supported by the Refugee Act's legislative history and Congress's intent to align U.S. asylum law with international obligations under the 1967 Protocol.¹⁰⁴ This section will argue that the majority standard is the correct interpretation of binding BIA precedent and should govern all applications for U.S. asylum.

Section IV.A will provide an overview of the evolution of the early economic persecution standard. Section IV.B will discuss the BIA's attempts to clarify the standard in *Matter of T-Z-*. Section IV.C will discuss the majority reading of *Matter of T-Z-* and argue that this interpretation of "economic persecution" encompasses the economic disadvantage a substantial portion of Haitian-Dominicans living in the Dominican Republic have suffered on account of their race or nationality. Section IV.D will argue that, given the BIA's language in *Matter of T-Z-*, the general understanding of Congressional intent, and the legislative history, the majority reading of *Matter of T-Z-* reaches a better result. Thus, the Fourth, Eighth, and Tenth Circuits should conform their understanding of the BIA interpretation to the majority stance.

tion promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer."). See generally 8 C.F.R. § 1003.1(b) (2014). BIA decisions are binding on other agency actors, while the decisions of immigration judges ("IJs") are not precedentially binding. The Attorney General can also designate its opinions as precedentially binding. Circuit courts may review BIA decisions, and circuit court decisions are binding on the BIA "when [the BIA is] adjudicating cases arising within the circuit court's territorial jurisdiction." See ANKER, *supra* note 64, § 1:4 (quoting U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING COURSE PARTICIPANT WORKBOOK: SOURCES OF AUTHORITY 8 (2009), available at <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf>, archived at <http://perma.cc/84K9-9Q8R>). Ultimately, circuit courts must defer to agency interpretation unless Congress's intent was ambiguous and the agency interpretation was unreasonable.

¹⁰² See *infra* section IV.C.

¹⁰³ See *infra* section IV.D.

¹⁰⁴ *Id.*

A. Early Economic Persecution Standard

The minority circuits' more stringent standard, requiring a near-complete deprivation of economic opportunity, stems from early economic persecution standards and does not properly account for intervening statutory and doctrinal changes.¹⁰⁵ A brief discussion of early standards may help explain the present analysis of the economic persecution standard and circuit split.

Prior to 1980, the United States did not have specific provisions governing asylum, and the earliest case law articulating a standard for economic persecution emerged from a statute that authorized the Attorney General to "withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to *physical persecution*."¹⁰⁶ In *Dunat v. Hurney*,¹⁰⁷ the Third Circuit held for the first time that severe economic deprivation could amount to physical persecution, qualifying an individual for withholding of removal.¹⁰⁸ The Third Circuit reasoned that "the denial of an opportunity to earn a livelihood . . . is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual."¹⁰⁹ In subsequent cases, the BIA expounded on *Dunat* by requiring economic deprivation so severe as to deprive the asylum-seeker of all ability to earn a livelihood.¹¹⁰

In 1965, Congress amended the withholding statute and removed the physicality requirement, and in response, in 1969, the Ninth Circuit broadened the mistreatment that could amount to economic persecution.¹¹¹ In

¹⁰⁵ See, e.g., *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1091–92 (10th Cir. 2008) (suggesting that under the minority "threat to life or freedom" standard, systemic job and education restrictions leading to poverty do not amount to persecution); *Beck v. Mukasey*, 527 F.3d 737, 740 (8th Cir. 2008) (suggesting that under the threat to life standard, relegation to low-level employment does not indicate persecution).

¹⁰⁶ Jonathan L. Falkler, *Economic Mistreatment as Persecution in Asylum Claims: Towards a Consistent Standard*, 2007 U. CHI. LEGAL F. 471, 478 n.52 (2007) (quoting INA § 243(h), Pub. L. No. 82-414, 66 Stat. 163, 214 (1952)). At the end of World War II, the United States did not have formal provisions governing the admission of refugees fleeing political persecution. Bockley, *supra* note 64, at 260–61. At that time, the Immigration Act of 1917 was the controlling statute and it provided asylum only for those fleeing from religious persecution. *Id.*

¹⁰⁷ 297 F.2d 744 (3d Cir. 1961).

¹⁰⁸ *Id.* at 746.

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., *Matter of Nagy*, 11 I. & N. Dec. 888, 889 (B.I.A. 1966); *Matter of Bufalino*, 11 I. & N. Dec. 351, 361–62 (B.I.A. 1965); *Matter of Eusaph*, 10 I. & N. Dec. 453, 454 (B.I.A. 1964) (citing *Dunat*, 297 F.2d at 749) ("[E]conomic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution."); see also, *Matter of Perez*, 10 I. & N. Dec. 603, 605 (B.I.A. 1964) (citing *Dunat*, 297 F.2d at 753 (per curiam)); *Matter of Vardjan*, 10 I. & N. Dec. 567, 575 (B.I.A. 1964) (citing *Dunat*, 297 F.2d 744) (observing that "[o]nly total proscription" and not "subsistence at a low level" amounts to physical persecution).

¹¹¹ E.g., *ANKER*, *supra* note 64, § 4:28; Falkler, *supra* note 106, at 478 n.53 (citing Act of Oct. 3, 1965 § 11(f), Pub. L. No. 89-236, 79 Stat. 911, 918 (1965) ("Section 324(h) is

Kovac v. INS,¹¹² the Ninth Circuit reasoned that Congress intentionally removed the word “physical” and that the older doctrine — “economic proscription so severe as to deprive a person of all means of earning a livelihood” — no longer applied because the statute no longer limited decisions to a finding of bodily harm.¹¹³ While noting that “minor disadvantage or trivial inconvenience” would not amount to persecution, the Ninth Circuit held that the “deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion” would.¹¹⁴ Subsequently, the BIA alternatively applied the *Kovac* and *Dunat* standards, and circuit courts split on the issue of which should prevail.¹¹⁵

Additionally, the 1980 Refugee Act, which created an asylum provision distinct from withholding of removal, further confused court doctrine; and in 1985, the BIA arguably created a third standard in *Matter of Acosta*¹¹⁶ stating in a decision that economic deprivation “consist[s] of economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom.”¹¹⁷ The BIA arguably combined the language of new provisions for withholding of removal that replaced “persecution” with a “threat to life or freedom” with pre-1965 economic persecution standards.¹¹⁸

Following this decision, circuits split on the proper standard.¹¹⁹ A number of circuits held that *Acosta* articulated a new standard for economic persecution applicable to all future asylum cases, seemingly more stringent than the *Kovac* standard.¹²⁰ Others applied the *Kovac* standard, reasoning that the

amended by striking out ‘physical persecution’ and inserting in lieu thereof ‘persecution on account of race, religion, or political opinion.’”).

¹¹² 407 F.2d 102 (9th Cir. 1969).

¹¹³ *Id.* at 105–06.

¹¹⁴ *Id.* at 107.

¹¹⁵ *E.g.*, *Matter of H-M-*, 20 I. & N. Dec. 683, 687, 691 (B.I.A. 1993) (accepting *Kovac* standard); *Matter of Barrera*, 19 I. & N. Dec. 837, 847 (B.I.A. 1989) (applying *Kovac* standard to deny asylum where applicant failed to allege denial of “employment, education, housing, permission to travel, or other benefits of this sort”); ANKER, *supra* note 64, § 4:28 (citing *Matter of D-L- & A-M-*, 20 I. & N. Dec. 409, 414 (B.I.A. 1991) (applying *Dunat* standard)); *Matter of Nagy*, 11 I. & N. Dec. at 890 (citing *Dunat*); *see, e.g.*, *Guan Shan Liao v. U.S. Dep’t of Justice*, 293 F.3d 61 (2d Cir. 2002) (applying *Kovac* standard); *Yong Hao Chen v. INS*, 195 F.3d 198, 204 (4th Cir. 1999) (citing *Kovac*); *Borca v. INS*, 77 F.3d 210, 216 (7th Cir. 1996) (applying *Kovac* standard); *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992) (noting “potential job loss” or “generalized economic disadvantage” does not amount to persecution); *Berdo v. INS*, 432 F.2d 824, 845–46 (6th Cir. 1970) (applying *Kovac* standard in withholding of removal petition).

¹¹⁶ 19 I. & N. Dec. 211 (BIA 1985).

¹¹⁷ *See id.* at 221.

¹¹⁸ *See Falkler, supra* note 106, at 509–10.

¹¹⁹ *E.g.*, *Koval v. Gonzales*, 418 F.3d 798, 806 (7th Cir. 2005) (“[A] showing of a ‘probability of deliberate imposition of substantial economic disadvantage’ can be sufficient.”) (quoting *Borca v. INS*, 77 F.3d 210, 216 (7th Cir. 1996)); *Ahmed v. Ashcroft*, 396 F.3d 1011, 1014 (8th Cir. 2005) (requiring a threat to life or freedom).

¹²⁰ Lauren Michelle Ramos, *A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees*, 44 VAND. J. TRANSNAT’L L. 499, 508–09 (2011).

Acosta standard was neither exhaustive nor binding. Yet others continued to apply the *Dunat* standard.

B. The Board of Immigration Appeals' Precedent Ruling

In 2007, the BIA strove to clarify the economic persecution standard after the Second Circuit remanded an asylum application because the circuit court could not clearly discern the BIA's position.¹²¹ The BIA had neither cited any relevant cases in its decision nor formulated a consistent standard in prior rulings. The case involved Mirzoyan, an asylum applicant from the Republic of Georgia who was economically persecuted on account of Armenian ethnicity.¹²² Mirzoyan's case, like that of Haitian-Dominicans described above, turned on whether a restriction of job prospects and substantial economic disadvantage, but not a total withdrawal of all economic opportunity, amounts to persecution.¹²³ Mirzoyan's job prospects were limited to working as a menial clothing maker.¹²⁴ Mirzoyan — who like much of the Haitian-Dominican community was able to find some employment — was likely to be eligible for asylum only under the broader *Kovac* standard; however, as the Second Circuit noted on appeal, the BIA needed to clarify the correct standard to apply to the economic deprivation analysis.¹²⁵

The BIA sought to settle the issue in *Matter of T-Z-*, which it designated a precedent decision.¹²⁶ *Matter of T-Z-* involved a native citizen of China who argued that the government forced his wife to undergo two abortions, and that forced abortions amounted to persecution on account of political opinion.¹²⁷ Forced abortions amount to persecution on account of political opinion by statute,¹²⁸ but an abortion is “forced” only if the asylum-seeker or his or her spouse “would have faced harm rising to the level of persecution if [she] had failed or refused to undergo the procedure.”¹²⁹ The asy-

¹²¹ *Mirzoyan v. Gonzales*, 457 F.3d 217, 219 (2d Cir. 2006).

¹²² *Id.*

¹²³ *See id.* at 223; *Kovac v. INS*, 407 F.2d 102, 107–08 (9th Cir. 1969).

¹²⁴ *Mirzoyan*, 457 F.3d at 219.

¹²⁵ *Id.*

¹²⁶ *See Matter of T-Z-*, 24 I. & N. Dec. 163, 170 (B.I.A. 2007) (noting that the Second Circuit asserted in *Mirzoyan* that it was “unable to determine the standard . . . applied for assessing when economic harm amounts to persecution”). The BIA publishes some decisions as precedent opinions that are binding on the immigration judges and subject to *Chevron* deference. *See, e.g.*, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, *supra* note 22, § 13:21; GERALD SEIPP, ASYLUM CASE LAW SOURCEBOOK § 3:68 (14th ed. 2014).

¹²⁷ *See Matter of T-Z-*, 24 I. & N. Dec. at 164.

¹²⁸ 8 U.S.C. § 1101(a)(42)(B) (2012) (stating that a person or spouse thereof “who has been forced to abort pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion”).

¹²⁹ *Matter of T-Z-*, 24 I. & N. Dec. at 168 (quoting Memorandum from the Office of the General Counsel to INS Officials (Oct. 21, 1996), *reprinted in* 73 INTERPRETER RELEASES, No. 43, Nov. 11, 1996, app. I at 1597, 1600) (internal quotation marks omitted).

lum-seeker testified that the Chinese government coerced the abortions by threatening the asylum-seeker's wife's job. The issue was whether his wife's job loss would have amounted to economic persecution.¹³⁰

The BIA stated that persecution includes "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life," and adopted a standard it articulated in a 1978 House Report.¹³¹ This standard diverged from *Kovac* only to the extent that *Kovac* required a finding of "substantial economic hardship"; the House Report required a finding of "severe economic hardship." The BIA explained that "[t]he House Report's use of the term 'severe' as the benchmark for the level of harm is consistent with the principle that persecution is an 'extreme concept that does not include every sort of treatment our society regards as offensive.'" ¹³² Under the BIA's new standard, persecution is "intolerable," encompasses "more than mere economic discrimination," and is "above and beyond [the deprivation] generally shared by others in the country."¹³³ The BIA added that persecution is "more than a mere loss of social advantages or physical comforts. . . . Rather, the harm must be 'of a deliberate and severe nature and such that it is condemned by civilized governments.'" ¹³⁴

At the same time, the BIA emphasized that "an applicant . . . need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity":

Government sanctions that reduce an applicant to an impoverished existence may amount to persecution even if the victim retains the ability to afford the bare essentials of life. A particularly onerous fine, a large-scale confiscation of property, or a sweeping limitation of opportunities to continue to work in an established profession or business may amount to persecution even though the applicant could otherwise survive.¹³⁵

While mistreatment that meets the *Acosta* standard will always amount to persecution, an applicant does not have to meet this standard to qualify for asylum. Lastly, the BIA added that any or all of the following conditions might constitute "severe economic disadvantage which could threaten the family's freedom if not their lives": the lack of "availability of other sources of income," blacklisting from government employment "and from most other forms of legitimate employment," and the loss of health benefits,

¹³⁰ *Id.* at 164–65, 169.

¹³¹ *Id.* at 171 (quoting H.R. REP. NO. 94-1452, at 5, *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704).

¹³² *Id.* at 172 (quoting *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003)).

¹³³ *Id.* at 173.

¹³⁴ *Id.* at 173–74 (quoting H.R. REP. NO. 94-1452, at 7, *reprinted in* 1978 U.S.C.C.A.N. 4700, 4706).

¹³⁵ *Id.*

school tuition, and food rations.¹³⁶ The Fourth, Eighth, and Tenth Circuits have seemingly read this portion of the case to indicate either that the BIA had reduced the *Kovac* articulation to the *Acosta* standard or to indicate that the *Acosta* standard must be met in some circumstances.

C. *The Majority Standard and Its Application*

The majority of circuits interpreted *Matter of T-Z-* to mean that economic persecution does not require “a total deprivation of livelihood or a total withdrawal of all economic opportunity,” although a total deprivation of the means to earn a livelihood would always amount to economic persecution.¹³⁷ Under the majority standard, which looks to the factors noted above, Haitian-Dominicans facing the circumstances described in Part III are likely eligible for asylum. Under this standard, no single factor is dispositive, and the various facts of a case will be examined cumulatively.¹³⁸

As noted above, courts will not find persecution where the general population shares in the economic deprivation.¹³⁹ For this reason, a significant factor in the economic persecution analysis is the intentionality of the deprivation because it evidences particularity. Evidence of the intent to affect a particular group suggests that the mistreatment is experienced by a specific community and not by the general population. In some ways this factor is comparable to the nexus analysis requiring a racialized intent, although it serves a different analytical purpose specific to the economic persecution analysis.

Traditionally, courts looked to the intent of the immigrant to determine whether immigrants were economic migrants (those looking to make better lives because of generalized poverty in their countries of origin) or economic refugees (those escaping particularized mistreatment). However, this distinction was hard to maintain, and scholars have slowly eroded the theoretical distinction between one who migrates because of “economic persecution” and one who migrates seeking better economic opportunities.¹⁴⁰

Instead of focusing on the intent of the immigrants, courts increasingly focus on the intent of the government actors and on whether the state has

¹³⁶ *Id.* at 174–75 (citations and internal quotation marks omitted).

¹³⁷ *Stserba v. Holder*, 646 F.3d 964, 972 (6th Cir. 2011) (internal quotation marks omitted).

¹³⁸ These circuits “evaluate evidence of past persecution in the aggregate, as a collection of harmful events because even though the events may not qualify individually as persecution, they may qualify as persecution when taken together.” *Id.* (citations and internal quotation marks omitted).

¹³⁹ *See, e.g., Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (“Generally harsh conditions shared by many other persons [do] not amount to persecution.”).

¹⁴⁰ *See generally* MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION (2007); Fatma E. Marouf & Deborah Anker, *Socioeconomic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, 103 AM. J. INT’L L. 784 (2009) (reviewing FOSTER, *supra*).

taken identifiable action to undermine the economic integrity of a particular group.¹⁴¹ In *Stserba v. Holder*,¹⁴² the Sixth Circuit found that the invalidation of the asylum-seeker's medical degree on account of ethnicity was per se economic persecution as it was a "sweeping limitation" of job opportunities in one's chosen profession.¹⁴³ Before reaching this decision, the court discussed the fact that the invalidation of her medical degree was coupled with denationalization on account of ethnicity.¹⁴⁴ The court was able to find economic persecution, arguably, without finding that the resulting conditions were sufficiently severe.¹⁴⁵ The case suggests that an identifiable act, such as denationalization, strengthens claims of economic persecution by showing that the government economically targeted a class of individuals. Such evidence creates a strong case for asylum if the state's deliberate targeting was on account of a protected ground.¹⁴⁶

Circuit courts look to a number of other factors when considering the economic persecution standard, including blacklisting from "legitimate employment" and restrictions on access to healthcare and education.¹⁴⁷ Irrational blacklisting of a group of people from government jobs contributes to a finding that a state action was deliberate, although courts scrutinize the facts to determine if alternative employment was nevertheless possible.¹⁴⁸ In *Li v. Attorney General*,¹⁴⁹ the Third Circuit emphasized that "blacklisting from any government employment and from most other forms of legitimate employment," particularly coupled with heavy fines or "the loss of health benefits, school tuition, and food rations," suggests a "deliberate imposition of severe economic disadvantage."¹⁵⁰ Likewise, a prohibition on working in one's specialization contributes to a finding of economic persecution.¹⁵¹ A reduction to menial labor is also a significant factor.¹⁵² International courts have additionally focused heavily on deprivations of "other fundamental economic rights, including education and health care"; access to education is a significant consideration among courts in the United States, and academics

¹⁴¹ See, e.g., *Chen v. Holder*, 604 F.3d 324, 333 (7th Cir. 2010).

¹⁴² 646 F.3d 964 (6th Cir. 2011).

¹⁴³ *Id.* at 976 (quoting *Matter of T-Z-*, 24 I. & N. Dec. 163, 174 (B.I.A. 2007)).

¹⁴⁴ *Id.*

¹⁴⁵ Compare *Stserba*, 646 F.3d at 973–77 with *Daneshvar v. Ashcroft*, 355 F.3d 615, 624 n.9 (6th Cir. 2004).

¹⁴⁶ *Stserba*, 646 F.3d at 973–75. *Stserba* is a case involving Estonian citizens of Russian descent whose Estonian citizenship was revoked when Estonia regained independence from the U.S.S.R.

¹⁴⁷ See *Matter of T-Z-*, 24 I. & N. Dec. at 173–75; see also ANKER, *supra* note 64, at § 4:33.

¹⁴⁸ See *Stserba*, 646 F.3d at 977.

¹⁴⁹ 400 F.3d 157 (3d Cir. 2005).

¹⁵⁰ *Id.* at 169.

¹⁵¹ See, e.g., *Borca v. INS*, 77 F.3d 210, 215–17 (7th Cir. 1996) (remanding to BIA to reconsider asylum denial where a certified radiologist was largely blacklisted from government employment).

¹⁵² See, e.g., *id.* at 215.

are pushing courts to weigh other economic, social, and cultural rights more heavily.¹⁵³

While courts consider the cumulative effect of the factors listed above, noting that no single factor is dispositive in establishing persecution, an absence of an “impoverished existence” is dispositive in negating it. An asylum-seeker cannot sustain a claim of economic persecution without establishing that she has been or will be subjected to poverty. A finding of economic persecution requires a reduction “to an impoverished existence.”¹⁵⁴

Haitian-Dominicans without citizenship are systematically deprived of “legitimate employment” and reduced to menial labor, whether on sugar plantations, in agriculture, in domestic service, or in construction in urban areas.¹⁵⁵ As a result of blacklisting and employment restrictions, they are commonly forced into poverty.¹⁵⁶ Those without citizenship often lack access to health care or higher education, and those living in the *bateyes* often do not have access even to elementary education.¹⁵⁷ If *bateyes* do have elementary schools, they are usually substandard.¹⁵⁸ Most *bateyes* do not have running water and the conditions are rarely sanitary.¹⁵⁹ One visitor to the *bateyes* reported:

Most of the four hundred bateyes have no running water, no electricity, no cooking facilities, no bathrooms and no school facilities for the children. The people sleep four to six in a small room on bare floors. Although they are paid for their work, one would agree that two dollars for every ton of sugar cane is an impossible wage for anyone to maintain a subsistence level of living. The worker is paid in coupons rather than currency, which is discounted at the state store by some twenty percent. So, if a worker could have earned possibly sixty to seventy dollars a month after

¹⁵³ ANKER, *supra* note 64, § 4:33 (citing *Chen v. Holder*, 604 F.3d 324, 328, 334 (7th Cir. 2010) (finding restrictions on elementary school and higher education “in the aggregate constituted persecution”); *Zhang v. Gonzales*, 408 F.3d 1239, 1247 (9th Cir. 2005) (“Denial of access to educational opportunities available to others . . . can constitute persecution.”); *Ouda v. INS*, 324 F.3d 445, 453–54 (6th Cir. 2003) (focusing on deprivation of professional employment); see also UNHCR Handbook, *supra* note 84, ¶ 54 (noting that persecution may include “serious restrictions” on a person’s “access to normally available educational facilities”); FOSTER, *supra* note 140, at 103 n.68 (recognizing that “one important development in recent years is that courts have begun to recognize claims based on the denial of the right to education, most importantly in the case of children” and observing that “[i]n many cases deprivation of education is considered in conjunction with a number of other violations of socio-economic rights”).

¹⁵⁴ See, e.g., *Xing Hui Dong v. Att’y Gen. of United States*, 538 F. App’x 881, 883 (11th Cir. 2013); *Shao v. Mukasey*, 546 F.3d 138, 161 n.21 (2d Cir. 2008).

¹⁵⁵ See, e.g., FERGUSON, *supra* note 20, at 8, 14–19; see also *supra* Part I.

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* Part I; Bernier, *supra* note 19, at 18.

¹⁵⁸ See Bernier, *supra* note 19, at 18.

¹⁵⁹ See *id.*

the various adjustments and discounts, he is barely left with fifteen dollars at the end of a month.¹⁶⁰

While conditions for ethnic Haitians outside of the *bateyes* are often slightly better, they are also severely substandard.¹⁶¹

Moreover, the deliberateness of the disadvantage is clear, and the general population does not share the disadvantage the community suffers. Government actors have repeatedly taken affirmative action against this particular community — from ad hoc discrimination to statutes to court rulings denationalizing thousands — and recent efforts to ameliorate the resulting humanitarian crisis fall short.

D. *The Majority Standard is the Correct Standard*

Despite the BIA's efforts to establish a consistent economic persecution standard in *Matter of T-Z*, the Fourth, Eighth, and Tenth Circuits have adopted distinct readings of the case. The Fourth and Eighth Circuits, at least nominally, still apply the more stringent *Acosta* standard — although the Eighth Circuit has held that it would reconsider its standard if presented with a compelling case — and the Tenth Circuit has held that the *Acosta* standard applies in situations where there is an allegation of consistent poverty as opposed to a sudden reduction to poverty.¹⁶² Under the *Acosta* standard, confinement to low-level employment where there is nevertheless

¹⁶⁰ *Id.*

¹⁶¹ See FERGUSON, *supra* note 20, at 15–16.

¹⁶² In *Mirisawo v. Holder*, 599 F.3d 391 (4th Cir. 2010), the Fourth Circuit held that “the harm amounting to ‘economic persecution’ must be so severe that it threatens the life or freedom of the applicant.” *Id.* at 396. However, the Fourth Circuit also cited *Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005), a pre-*Matter of T-Z* case, that acknowledged that persecution may include “actions less severe than threats to life or freedom.” *Id.* at 177. In *Makatengkeng v. Gonzales*, 495 F.3d 876 (8th Cir. 2007), the Eighth Circuit upheld the threat to life standard for defining persecution in asylum claims. *Id.* at 882. However, the Eighth Circuit noted that “in the proper case, it might be appropriate for our court to revisit the standard for proving economic persecution,” but it also noted that it would continue to use the “threat to life standard” until a proper case presented itself. *Id.* at 884. The Tenth Circuit created a disjunctive test, asserting that the *Kovac* standard, requiring a deliberate imposition of severe economic disadvantage, applies only when there is a “severe loss of an existing economic/vocational advantage,” such as a large-scale fine or a restriction on the right to practice in one’s specialized field. *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1088–89 (10th Cir. 2008). In situations where there is an allegation of consistent poverty, “the focus is on whether conditions for an alien have been or will be so impoverished as to support a finding of persecution, and *Acosta*’s ‘threat to life or freedom’ test naturally applies” and that this ongoing “[e]mployment discrimination . . . does not, without more, constitute persecution.” *Id.* at 1089, 1091. *But see* *Zhi Wei Pang v. Holder*, 665 F.3d 1226, 1232 (10th Cir. 2012) (applying solely “threat to life test” to a case where a fine and economic sanctions were suddenly imposed). The Tenth Circuit’s rationale for taking a disjunctive approach is unclear, but it is quite likely that the court was trying to encompass the distinction between general poverty and poverty that is caused or endorsed by the government. However, if that is the case, it did so in a manner that may often undermine that goal.

some employment and where the asylum seeker retains the bare necessities of life is unlikely to amount to persecution.¹⁶³

The majority of circuits have correctly interpreted *Matter of T-Z-*, holding that persecution can encompass nonphysical mistreatment “such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”¹⁶⁴ Contrary to the Fourth and Eighth Circuits, the BIA clarified that while the relevance of the *Acosta* standard may be more apparent in some factual circumstances,¹⁶⁵ the two formulations are not coterminous. The BIA explicitly stated that “[a]n applicant need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution.”¹⁶⁶

The Tenth Circuit’s claim that the *Acosta* standard governs in certain circumstances is also misguided. While the BIA suggested that there may be certain factual situations that are more readily framed or analyzed under the *Acosta* standard and provided examples of the usefulness of the *Acosta* standard, the BIA certainly did not go so far as to mandate the application of the *Acosta* standard when the economic deprivation is a sudden change.¹⁶⁷ If this were the BIA’s position, it would have clearly stated that certain applicants do bear the burden of demonstrating “a total deprivation of livelihood,” but the BIA, to the contrary, made clear that no applicant bears this burden.¹⁶⁸ Moreover, the Tenth Circuit’s formulation will often result in inequities where those who have suffered over the course of their lives will face a more stringent economic persecution standard than those suddenly burdened.

Additionally, the majority approach is better aligned with congressional intent to broaden the level of mistreatment that merits refuge and to conform U.S. law to international standards. Circuit courts must defer to reasonable

¹⁶³ See *Matter of Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

¹⁶⁴ *Matter of T-Z-*, 24 I. & N. Dec. 163, 171 (B.I.A. 2007) (citing H.R. REP. NO. 95-1452, at 5 (1978), reprinted in 1978 U.S.C.A.N. 4700, 4704).

¹⁶⁵ The BIA states: “In one sense, economic persecution may involve the deliberate deprivation of basic necessities such that life or freedom is threatened. This form of persecution is described by *Matter of Acosta* and the second clause of the sentence from the House Report quoted above with emphasis. Alternatively, there may be situations in which, for example, an extraordinarily severe fine or wholesale seizure of assets may be so severe as to amount to persecution, even though the basic necessities of life might still be attainable.” *Id.*

¹⁶⁶ *Id.* at 173.

¹⁶⁷ *Id.* at 171.

¹⁶⁸ *Id.* at 173. It is also worth noting the inequity that would follow from the Tenth Circuit’s interpretation. Two similarly situated individuals subjected to the same economic disadvantage for the same purposes could be treated differently under the Tenth Circuit’s interpretation. Those who had been subjected to the disadvantage their entire lives would face a higher standard than those suddenly reduced to the same circumstance. In essence, the Tenth Circuit seems to be struggling to distinguish pure economic disadvantage from economic disadvantage that can be attributed to government sanction or the government’s deliberate imposition of economic disadvantage. However, the Tenth Circuit’s focus is misplaced. While in some cases the timing may be a relevant factor to consider, it is not dispositive and the distinction on its own carries little weight.

agency interpretations,¹⁶⁹ but in interpreting and assessing agency positions, circuit courts should recognize that agency positions were not created in a vacuum. To the extent that agencies are working to fulfill congressional motives, congressional intent should inform circuit courts' understanding of agency positions.

Congress has been working to broaden the United States' standards for persecution and economic persecution since the mid-twentieth century. It is widely accepted that Congress intended to broaden the economic persecution standard derived from the 1965 *Dunat* decision.¹⁷⁰ In 1978, shortly before Congress enacted the Refugee Act, the House of Representatives largely endorsed the *Kovac* standard for economic persecution, and stated in a 1978 Report that economic persecution required the "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life," mirroring the Ninth Circuit's language but substituting the Ninth Circuit's threshold of "substantial" economic deprivation with "severe" economic deprivation.¹⁷¹

Most scholars agree that in enacting the Refugee Act of 1980, Congress intended to align the U.S. with international standards by incorporating the language of the Protocol and Convention almost verbatim.¹⁷² By enacting the statute, Congress intended to conform U.S. law to the broader international asylum standards arising out of the Convention and the Protocol, both of which encompass a definition of "persecution" that is informed by the larger international human rights framework.

Although international documents are not binding, agencies and courts should look to international norms as a part of the analysis of congressional intent, and when choosing between two permissible statutory interpretations, courts should "constru[e] federal statutes in a way to ensure the U.S. is in compliance with the international obligations it has voluntarily undertaken."¹⁷³ The UNHCR Handbook provides guidance on the meaning and practical application of the word "persecution" and "may be a useful interpretive aid" in assessing U.S. obligations under the Convention and Proto-

¹⁶⁹ *CHEVRON, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

¹⁷⁰ See ANKER, *supra* note 64, § 4:28.

¹⁷¹ H.R. REP. NO. 95-549, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700; *see also Matter of T-Z*, 24 I. & N. Dec. at 171.

¹⁷² *E.g.*, Falkler, *supra* note 106, at 502; Bockley, *supra* note 64, at 278–82; *see also* *INS v. Cardoza-Fonesca*, 480 U.S. 421, 436 (1987).

¹⁷³ *See, e.g.*, *United States v. Esquenazi*, 752 F.3d 912, 924 (11th Cir.) *cert. denied*, 135 S. Ct. 293 (2014) (applying the *Charming Betsy* doctrine of federal statutory interpretation); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *see also* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1061 (2011) (discussing the limits of *Chevron* deference in fulfilling congressional purpose of conforming asylum law to international practice); Ramos, *supra* note 120, at 502 ("U.S. courts should look to developments in international law to evaluate and further develop their approach to economic asylum claims. Congress explicitly amended the U.S. Immigration and Nationality Act to bring it into accordance with international law dealing with refugee status.").

col; it may also serve as a reference point to help create uniformity within U.S. asylum law.¹⁷⁴

The UNHCR Handbook clearly states that persecution is broader than the “threat to life or freedom” formulation¹⁷⁵ and that “[o]ther serious violations of human rights . . . would also constitute persecution.”¹⁷⁶ The UNHCR Handbook also emphasizes that the Convention expressly incorporates a broader human rights framework by referencing the Universal Declaration of Human Rights in its preamble.¹⁷⁷ Among the rights listed in the Universal Declaration are: “the right to a nationality” and the right to be free from the arbitrary deprivation of one’s nationality;¹⁷⁸ “the right to work, to free choice of employment, . . . to just and favourable remuneration ensuring . . . an existence worthy of human dignity”;¹⁷⁹ the right to a standard of living adequate for the health and well-being of [oneself] and of [one’s] family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”;¹⁸⁰ the right to elementary education,¹⁸¹ and the right to equal access to secondary education.¹⁸²

The Handbook notes that the United States’ obligations under the Convention and the Protocol should be read to incorporate these rights into U.S. asylum law. Consistent with the analysis applied in the majority of circuit courts, deprivation of a right to education, deprivation of “legitimate employment” and just subsistence, relegation to substandard living, and denationalization all evidence persecution. The Handbook offers UNHCR’s final

¹⁷⁴ See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the [Board of Immigration Appeals], or United States courts.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987) (“In interpreting the Protocol’s definition of ‘refugee’ we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.” (citation omitted)); *ANKER*, *supra* note 64, § 1:5 (“[O]ne of the most noteworthy developments in U.S. asylum law has been the weight given by U.S. authorities — including the USCIS Asylum Office, the Board, and the federal courts — to the UNHCR’s interpretation of the refugee definition contained in its 1979 Handbook on Procedures and Criteria for Determining Refugee Status.”). Cf. *Negusie v. Holder*, 555 U.S. 511, 518 (2009) (“[C]oncepts of international law . . . may be persuasive in determining whether a particular agency interpretation [of the asylum statute] is reasonable” even if “they do not demonstrate that the statute is unambiguous.”).

¹⁷⁵ UNHCR Handbook, *supra* note 84, ¶ 51.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* annex II (“The High Contracting parties[, c]onsidering that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . . [h]ave agreed [to the enumerated articles of the Convention].” (quoting 1951 Convention, *supra* note 15, pmb1.)).

¹⁷⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 15 (Dec. 10, 1948).

¹⁷⁹ *Id.* art. 23(1), (3).

¹⁸⁰ *Id.* art. 25(1).

¹⁸¹ *Id.* art. 26(1).

¹⁸² *Id.*

thoughts on economic persecution: "Where economic measures destroy the economic existence of a particular section of the population . . . the victims may according to the circumstances become refugees on leaving the country."¹⁸³

Consistent with the analysis applied by the majority of U.S. circuit courts, economic persecution is distinguished from economic disadvantage by the presence of severely destructive governmental acts that harm a particular community on account of race or nationality. The majority interpretation of the BIA decision is better aligned with these norms, and to the extent that there is confusion surrounding the BIA's position on the matter, the ambiguity should be resolved in favor of conforming to international norms. The Fourth, Eighth, and Tenth Circuits should adopt the majority interpretation in *Matter of T-Z-* for the sake of fulfilling congressional purpose, complying with reasonable agency interpretation, upholding the United States' obligations under international law, and ensuring that similarly situated individuals face the same legal standards for asylum eligibility regardless of their location.

Lastly, although agency training material or memoranda are not binding and do not authoritatively interpret BIA precedent, they may be insightful sources of guidance for policy purposes or for gaining a practical perspective on a particular issue. The United States Citizenship and Immigration Services ("USCIS") Asylum Division lays out its policy in its training manual on interviewing asylum-seekers. The manual states that "[p]ersecution encompasses more than threats to life or freedom."¹⁸⁴ It is the "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive"¹⁸⁵ and "oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."¹⁸⁶ The manual notes that, while "actions must rise above the level of mere 'harassment' to constitute persecution," persecution encompasses "actions less severe than threats to life or freedom."¹⁸⁷ The manual explains:

To rise to the level of persecution economic harm must be deliberately imposed and severe. Severe economic harm must be harm above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts. However, the applicant does not need to demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity.¹⁸⁸

¹⁸³ UNHCR Handbook, *supra* note 84, ¶ 63.

¹⁸⁴ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *supra* note 101, at 17.

¹⁸⁵ *Id.* (quoting *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)).

¹⁸⁶ *Id.* (quoting *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985)).

¹⁸⁷ *Id.* (citation omitted).

¹⁸⁸ *Id.* at 28 (alteration in original) (internal quotation marks omitted).

Thus, by not requiring the total deprivation of economic opportunity, the administrative guidance is consistent with the majority standard.

CONCLUSION

To be eligible for asylum, applicants must “show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is ‘on account of’ one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either ‘unable or unwilling’ to control.”¹⁸⁹ As noted in Part IV, in most circuits, sweeping limitations on employment, when coupled with deprivations of “other fundamental economic rights, including education and health care,” amount to economic persecution and likely encompass much of the suffering of the Haitian-Dominican community.¹⁹⁰ On the other hand, the Fourth and Eighth Circuits’ standards requiring a complete withdrawal of all economic opportunity are less likely to encompass the mistreatment the Haitian-Dominican community suffers. And the Tenth Circuit standard, treating differently those who have experienced consistent poverty and those suffering a sudden infliction of poverty (perhaps due to denationalization of those who were listed in the Civil Registry), will likely only encompass the mistreatment suffered by those who, in fact, enjoyed the rights of citizenship prior to the *de jure* denationalization.

As explained in Part III, this economic deprivation is on account of race, and the government, through its present laws and discriminatory application of past laws, has committed the persecution. Because the government’s attempt to improve the situation through Naturalization Law 169-14 is likely to prove inadequate, at the very least it can be said that the government is unable to control the persecution.

Lastly, it is worth noting that “persecution” and a “well-founded fear of persecution” are two separate grounds for asylum,¹⁹¹ although the methods of proof may be the same.¹⁹² A court will presume that an applicant who

¹⁸⁹ *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000) (footnotes omitted); *see also Mengstu v. Holder*, 560 F.3d 1055, 1058 (9th Cir. 2009).

¹⁹⁰ *ANKER*, *supra* note 64, § 4:33 (citing *Chen v. Holder*, 604 F.3d 324, 328, 334 (7th Cir. 2010)) (focusing on restrictions on elementary school and higher education); *Zhang v. Gonzales*, 408 F.3d 1239, 1247 (9th Cir. 2005) (“Denial of access to educational opportunities available to others . . . can constitute persecution.”); *Ouda v. INS*, 324 F.3d 445, 453–54 (6th Cir. 2003) (focusing on deprivation of professional employment); *see also* UNHCR Handbook, *supra* note 84, ¶ 54 (noting that persecution may include “serious restrictions” on a person’s “access to normally available educational facilities”); *FOSTER*, *supra* note 140, at 103 (“[O]ne important development in recent years is that courts have begun to recognize claims based on the denial of the right to education, most importantly in the case of children,” and “[i]n many cases deprivation of education is considered in conjunction with a number of other violations of socio-economic rights.”).

¹⁹¹ *See* 8 U.S.C. § 1101(a)(42)(A) (2012); *see also* *Matter of Chen*, 20 I. & N. Dec. 16, 17–18 (B.I.A. 1989) (distinguishing case law on “persecution” from case law on a “well-founded fear of persecution”).

¹⁹² The methods of proof may vary largely from case to case. Evidence can rest primarily or wholly upon personal testimony, although corroborating evidence, including national re-

has suffered persecution in the past will face future persecution upon return to the country of origin. The asylum officer can rebut this presumption by proving by a preponderance of the evidence that the asylum-seeker could relocate to another part of the country where she would face no risk of persecution, or by proving that “[t]here has been a fundamental change in circumstances” within the country of origin so that the applicant no longer has reason to fear mistreatment.¹⁹³ Courts will presume that Haitian-Dominicans who experienced “severe economic deprivation” before seeking asylum will face such persecution upon return to the Dominican Republic. Those who have long been subject to economic deprivation stemming from the ad hoc denial of citizenship and the sweeping limitations on economic opportunity that follow will likely be able to establish past persecution. However, those who have not experienced past persecution can still succeed on an asylum claim by establishing a well-founded fear of future persecution that is both “subjectively genuine and objectively reasonable.”¹⁹⁴ Individuals recently affected by the 2013 ruling can establish a fear of future persecution by pointing to the described patterns and practices in the Dominican Republic that are likely to severely constrain their economic opportunities.¹⁹⁵

ports, are helpful. “The UNHCR Handbook explains . . . that an applicant [for refugee protection] may not be able to support his statements by documentary or other proof. . . . Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.” ANKER, *supra* note 64, § 2:1 n.14 (internal quotations omitted). An applicant bears the burden of establishing persecution or a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(1) (2014); *see also* Makatengkeng v. Gonzales, 495 F.3d 876, 881 (8th Cir. 2007) (“To satisfy the objective element, the petitioner must produce ‘credible, direct, and specific evidence that a reasonable person in [his] position would fear persecution if returned.’”) (quoting Mamana v. Gonzales, 436 F.3d 966, 968 (8th Cir. 2006)); Matter of T-Z-, 24 I. & N. Dec. 163, 166 (B.I.A. 2007) (noting the judge relied primarily on applicant’s testimony). Additionally, a noncitizen may also be granted asylum “in the absence of well-founded fear of persecution” if, “in the exercise of the decision-maker’s discretion,” the past persecution was so severe that the noncitizen should not be returned to her home country. 8 C.F.R. § 1208.13(b)(1)(iii) (2014).

¹⁹³ 8 C.F.R. § 208.13(b)(1)(i) (2014).

¹⁹⁴ *E.g.*, Mirisawo v. Holder, 599 F.3d 391, 396 (4th Cir. 2010) (“[T]he applicant must demonstrate that (1) a reasonable person in the circumstances would fear persecution; and (2) that the fear has some basis in the reality of the circumstances and is validated with specific, concrete facts. . . . In other words, an asylum applicant must demonstrate a subjectively genuine and objectively reasonable fear of future prosecution. . . .”) (internal quotations omitted); *see also* 8 C.F.R. § 208.13(b)(2)(iii) (2014). An asylum-seeker has a well-founded fear of persecution if there is a 10% likelihood that she will face persecution. *E.g.*, INS v. Cardoza-Fonesca, 480 U.S. 421, 440 (1987).

¹⁹⁵ Typically, an applicant can prove this reasonable likelihood of future persecution in one of two ways. She can prove either that she has been singled out for persecution or that there is a pattern or practice in her home country of persecuting similarly situated individuals. *See* 8 C.F.R. §§ 208.13(b)(2)(iii), 1208.13(b)(2)(iii) (2014). In the present case, the two prongs are interrelated. To an extent, those who have been recently denationalized have been “singled out” for persecution; as a result of this act, they are far more likely to suffer economic effects that amount to persecution. However, they may still need to establish that similarly situated individuals — those of Haitian ancestry living in the Dominican Republic without status — have faced economic disadvantages that amount to persecution as a result of denationalization. Other ethnic Haitians without status are precluded from pursuing higher education, obtaining official employment, or creating bank accounts, and a vast majority of

Until courts further develop case law addressing when and if denationalization qualifies as persecution under the asylum statute, economic persecution standards will be central to determining whether Haitian-Dominicans born in the Dominican Republic to parents with no intention of immediately leaving the country — deprived of Dominican citizenship and resultantly living in extreme poverty — are eligible for asylum in the United States. Courts should look to the recent denationalization of hundreds of thousands of Haitian-Dominicans and the impoverished reality in which this population has lived for decades as evidence of the Dominican Republic's deliberate imposition of severe economic deprivation on this community.

these individuals live in conditions of dire poverty. An asylum-seeker may ground her claim of a well-founded fear of persecution in the experience of others. There is strong evidence that denying ethnic Haitians citizenship is intended to, and does in fact, impose upon these individuals a grave economic reality.

