

SOCIAL MEDIA AND ONLINE PERSECUTION

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ABSTRACT

Are the targets of online harm on social media eligible for asylum under U.S. law? A crucial consideration in answering this question is whether online harm may be evidence of past persecution. No U.S. court has adequately addressed this issue.

On January 11, 2021, the U.S. Departments of Homeland Security and Justice added a new definition of persecution for the first time to their respective regulations. The new definition could be interpreted to exclude or limit online harm as evidence of past persecution. Such an interpretation reflects neither existing legal precedent addressing offline harms nor the realities of online harm on social media.

This Article proposes two frameworks for addressing online harm in U.S. asylum claims. Under one proposed framework, online harm is evidence of overall or cumulative past persecution. Under the other framework, online harm by itself is past persecution. Both frameworks are supported by U.S. precedents addressing offline harms and reflect the unique and novel characteristics of online harm, including its potential to amplify injury and offend an asylum-seeker's right to privacy and right to be forgotten.

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INTRODUCTION

Online harm on social media is a global phenomenon.¹ The perpetrators on social media include governments and non-state actors who may be acting on their own or in concert with a government.² The targeted individuals include “e-dissidents” who use social media to advocate for changes in their home countries.³ Others are “digital witnesses” who use social media to document events in their home countries.⁴ Some are individuals in the public sphere, such as journalists and members of non-governmental organizations,⁵ while others are ordinary citizens broadcasting their beliefs, words of protest, and fear of persecution.⁶

1. See HUMAN RIGHTS WATCH, WORLD REPORT: EVENTS OF 2020 (2021), <https://www.hrw.org/world-report/2021> [hereinafter HUMAN RIGHTS WATCH, EVENTS OF 2020] (documenting global online harm on social media in 2020); AMNESTY INT’L, *Toxic Twitter* (2018), <https://www.amnesty.org/en/latest/research/> [hereinafter AMNESTY INT’L, *Toxic Twitter 2018*] (documenting global online harm on social media targeting women). Social media refers to online platforms that allow users to create and exchange content and engage in social interactions. See Amir Gandomi & Murtaza Haider, *Beyond the Hype: Big Data Concepts, Methods, and Analytics*, 35 INT’L J. INFO. MGMT 137, 142 (2015). Social media includes social networks such as Facebook; microblogs such as Twitter, Tumblr, and Weibo; social news fora such as Reddit; video or media-sharing platforms such as Instagram, Snapchat, YouTube, and TikTok; as well as mobile messaging apps such as WhatsApp and WeChat. See *id.*

2. See ADRIAN SHABAZ & ALLIE FUNK, FREEDOM HOUSE, *Freedom on the Net 2019, The Crisis of Social Media* (2019), <https://www.freedomofthenet.org/report/freedom-on-the-net/2019/the-crisis-of-social-media> (documenting the rising use of social media by governments and non-state actors as a tool to harm others); ADRIAN SHABAZ, FREEDOM HOUSE, *Freedom on the Net 2018, The Rise of Digital Authoritarianism* (2018), <https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism> [hereinafter SHABAZ, *The Rise of Digital Authoritarianism*] (documenting the rising use of other online tools by governments to harm their citizens); see also Tamar Megiddo, *Online Activism, Digital Domination, and the Rule of Trolls: Mapping and Theorizing Technological Oppression by Governments*, 58 COLUM. J. TRANSNAT’L L. 394, 395–425, 439–40 (2020) (examining governments’ harnessing of non-state actors to fulfill their agendas of online harm).

3. See Rosemary Byrne, *The Protection Paradox: Why Hasn’t the Arrival of New Media Transformed Refugee Status Determination?*, 27 INT’L J. REFUGEE L. 625, 631–32 (2015) (defining “e-dissidents”). See, e.g., Rod Nordland, *Cellphones in Hand, Saudi Women Challenge Notions of Male Control*, N.Y. TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/world/middleeast/saudi-arabia-women-male-guardianship-activists-social-media.html> (reporting Saudi women’s use of social media to protest against laws used to restrict women).

4. See MARIE GILLESPIE, LAWRENCE AMPOFO, MARGARET CHEESMAN, BECKY FAITH, EVGENIA ILLADOU, ALI ISSA, SOUAD OSSEIRAN & DIMITRIS SKLEPARIS, THE OPEN UNIVERSITY/FRANCE MÉDIAS MONDE, *Mapping Refugee Media Journeys: Smartphones and Social Media Networks* 25–26, 35–37, 56–77 (2016) (documenting how asylum-seekers and refugees use social media as “digital witnesses”); Sam Gregory, *Ubiquitous Witnesses: Who Creates the Evidence and the Live(d) Experience of Human Rights Violations?*, 18 INFO., COMM’N & SOC’Y 1378, 1378–92 (2015) (describing such individuals as “citizen witnesses”). See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT: EVENTS OF 2019 278, 331, 373, 453 (2020), <https://www.hrw.org/world-report/2020> (reporting that videos documenting police brutality were uploaded to social media in multiple countries).

5. See UNESCO, *Intensified Attacks, New Defences: Developments in the Fight to Protect Journalists and End Impunity*, U.N. Doc. CI-2019-WTR-3, at 1–73 (2019), <https://unesdoc.unesco.org/ark:/48223/pf0000371343> [hereinafter UNESCO Report 2019] (documenting the online targeting of journalists); AMNESTY INT’L, *Toxic Twitter 2018*, *supra* note 1 (documenting the online targeting of female journalists); see also Rosine Faucher, *Social Media and Change in International Humanitarian Law Dynamics*, 2 INTER GENTES 48, 51–74 (2019) (discussing the positive role that social media may play in assisting non-governmental organizations in documenting international human rights violations).

6. See *supra* notes 3–4. See generally Maren Borkert, Karen E. Fisher & Eiad Yafi, *The Best, the Worst, and the Hardest to Find: How People, Mobiles, and Social Media Connect Migrants In(to) Europe*, SOCIAL MEDIA + SOCIETY 1, 8–9 (2018) (documenting how and why asylum-seekers use social media before, during, and after flight from their home countries); Rianne Dekker, Godfried Engbersen &

Are the targets of online harm on social media potentially eligible for asylum under U.S. law? The answer to this question is unclear: no U.S. federal court has adequately addressed this issue. Thus far, only a handful of court decisions have addressed online harm in asylum claims. These decisions have principally involved threats made via social media by government actors.⁷ No court has found that these online threats—or any other form of online harm—may by themselves rise to the level of persecution.

On December 11, 2020, the U.S. Departments of Homeland Security and Justice (hereinafter the Departments) jointly issued a final rule entitled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* (hereinafter referred to as *Final Rule*).⁸ The *Final Rule* added a definition of persecution for the first time to the Departments' respective regulations.⁹ While the Departments did not address online harm in their explanation of the regulatory changes, the new definition of persecution could be interpreted to exclude or limit online harm as evidence of past persecution.¹⁰ Such an interpretation reflects neither existing legal precedent addressing offline harms nor the realities of online harm on social media.

Online harm has unique and novel characteristics that differ from historical, offline forms of persecution. Online harm is often repetitive, permanent, searchable, widely shared, and cumulative, resulting in an amplification of injury.¹¹ Online harm both on social media and in general may also offend an asylum-seeker's right to privacy and right to be forgotten.¹² The resulting injury from online harm may be severe enough to rise to the level of persecution *on its own* without any accompanying offline harm.¹³

This Article will explore why and how online harm can be categorized as past persecution. After providing an overview of the historical concept of persecution under U.S. law and the new regulatory definition of persecution, Part I of this Article will outline the U.S. federal courts' current approach to asylum claims involving online harm. Part II will examine the forms that online harm may take, its unique characteristics, and the resulting injuries. Part III will then propose two frameworks for addressing claims in which the asylum-seeker alleges that she experienced online harm in the past. Under

Marije Faber, *The Use of Online Media in Migration Networks*, 22 POPULATION, SPACE AND PLACE 539, 539–51 (2016) (similar).

7. See discussion *infra* Part I.C.

8. See U.S. DEP'TS OF HOMELAND SEC. AND JUSTICE, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 (Dec. 11, 2020) [hereinafter *Final Rule*].

9. See *id.* at 80,385–86, 80,394–95 (adding a definition of persecution at 8 C.F.R. §§ 208.1(e) and 1208.1(e)). With a few exceptions, the *Final Rule* adopted the definition of persecution laid out in the proposed rule. Compare *id.* at 80,385–86 and 80,394–95, with U.S. DEP'TS OF HOMELAND SEC. AND JUSTICE, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264, 36,280–81, 36,291–92 (Jun. 15, 2020) [hereinafter *NPRM*].

10. See discussion *infra* Part IV.D.

11. See discussion *infra* Part II.B.

12. See discussion *infra* Part II.A.

13. See discussion *infra* Part III.C.

one proposed framework, online harm is evidence of overall or cumulative past persecution. Under the other framework, online harm *by itself* is past persecution. As will be shown, both frameworks are supported by U.S. precedents addressing offline harms. Both frameworks also reflect the unique and novel characteristics of online harm, including its potential to amplify injury and offend an asylum-seeker's right to privacy and right to be forgotten. Part IV will conclude the Article by addressing arguments that downplay the significance of online harm in asylum claims.

I. THE CURRENT LEGAL LANDSCAPE

A. U.S. Courts' Approaches to Offline Persecution

An individual may be eligible for asylum if she establishes a well-founded fear of future persecution.¹⁴ She is presumed to have a well-founded fear of future persecution if she experienced past persecution.¹⁵ The Immigration and Nationality Act (INA) does not define "persecution," even though it defines other terms.¹⁶ The Supreme Court has also not explicitly defined persecution, although it has noted that persecution may include "threats to life or freedom" *and* other harms.¹⁷ Despite the December 2020 regulatory

14. See 8 U.S.C. §§ 1101(a)(42), 1158; 8 C.F.R. §§ 208.13, 1208.13 (2021). In the United States, the Departments of Homeland Security (DHS) and Justice (DOJ) have jurisdiction over the relief of asylum. See 8 C.F.R. §§ 208.2, 1208.2 (2021). One route available in applying for asylum involves filing affirmatively with DHS and being interviewed by an asylum officer with the U.S. Citizenship and Immigration Services (USCIS). See *id.* After being placed in deportation or removal proceedings before an immigration judge, an individual may also initiate or renew a previously filed asylum application. See *id.* An appeal of an immigration judge's decision may then be filed with the Board of Immigration Appeals (hereinafter referred to as the Board or BIA). See 8 C.F.R. §§ 1003.1 *et. seq.* (2021). An appeal of a Board decision may be filed with a U.S. federal circuit court. See 8 U.S.C. § 1252.

15. 8 U.S.C. §§ 1101(a)(42), 1158; 8 C.F.R. §§ 208.13, 1208.13 (2021). If the asylum-seeker has not experienced past persecution, she is not eligible for the presumption and must prove independently that her fear of future persecution is well-founded. See *id.* An individual must also establish that she merits asylum in the exercise of discretion. See *id.*; *Kouljinski v. Keisler*, 505 F.3d 534, 541–43 (6th Cir. 2007); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137–42 (9th Cir. 2004); *Matter of Pula*, 19 I&N Dec. 467, 471 (BIA 1987). Even after establishing eligibility for asylum, an asylum-seeker may nonetheless be barred from receiving asylum due to her own actions or associations. Bars to asylum range from the failure to file the asylum application within one year of arrival in the United States to the prohibition against granting asylum to serious criminals, persecutors, or terrorists. See 8 C.F.R. §§ 208.4, 208.13, 208.14, 1208.4, 1208.13, 1208.14 (2021).

16. See 8 U.S.C. § 1101(a); see also *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000) (noting that the INA does not define persecution).

17. *INS v. Stevic*, 467 U.S. 407, 428–30, n.22 (1984) (noting that, while the United Nations' Protocol Relating to the Status of Refugees (1967 Protocol) "protected only against deportation to a territory where his 'life or freedom' would be threatened," the United States' statutory scheme that existed prior to the 1967 Protocol provided that "no alien in the United States would be deported to a country where he was likely to be 'persecuted,' a seemingly broader concept than threats to 'life or freedom.'"); see also *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (noting that "mistreatment can constitute persecution even though it does not embody a direct and unremitting threat to life or freedom") (quoting *Bocova v. Gonzáles*, 412 F.3d 257, 263 (1st Cir. 2005)); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987) (noting that the INA does not restrict asylum eligibility to a "threat of 'life or freedom,'" but rather, persecution "encompasses the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive") (citations omitted). See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol Relating to the Status of

amendments adding a new definition of persecution, the U.S. federal courts' historical approaches to persecution may still inform how adjudicators and courts will address asylum claims in the future.¹⁸ Thus, it is important to review how courts have previously defined persecution in order to understand how claims involving online harm may be addressed in the future.

Historically, the U.S. federal courts have focused on two issues to find that words or actions rise to the level of persecution. First, courts have examined the intent or motivation of the persecutor who may be either a government or a non-state actor whom the government is unable or unwilling to control.¹⁹ If the persecutor was sufficiently motivated to harm the asylum-seeker on account of one of five protected grounds—race, religion, nationality, political opinion, or membership in a particular social group—then the persecutor's words or actions may be elevated to persecution.²⁰

Second, courts have examined the severity of the harm. Courts have used different adjectives and comparisons over the years to describe the required level of severity to be classified as persecution. For example, the Ninth Circuit commented that persecution is “an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive.”²¹ The Third Circuit defined persecution as “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.”²² The Seventh Circuit has taken a different approach, noting that persecution may include harms that are “less severe than threats to life or freedom.”²³ Other courts have found that persecution is more severe than

Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (referring to threats to life or freedom).

18. See *Final Rule*, *supra* note 8, at 30,328 (noting that the rule is not intended to end case-by-case adjudications or disturb precedents holding that harms may cumulatively or in the aggregate amount to persecution).

19. U.S.C. §§ 1101(a)(42), 1158; 8 C.F.R. §§ 208.13, 1208.13 (2021).

20. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992) (requiring a connection—or nexus—between the persecutor's reasons for harming an individual and the individual's identification or association with one of the five protected grounds of asylum). A persecutor may have mixed motives for harming an asylum-seeker. See, e.g., *Sanchez-Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223, 1233 (11th Cir. 2007). However, “at least one central reason” for harming the asylum-seeker must be due to a protected ground. 8 U.S.C. § 1158(b)(1)(B)(i); see also *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009). The asylum-seeker may be eligible for asylum even if the persecutor incorrectly identifies the asylum-seeker with a protected ground. See, e.g., *Javed v. Holder*, 715 F.3d 391, 396–97 (1st Cir. 2013); *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003). Given the difficulties with inferring intent from social media actions such as forwarding, retweeting, and liking, future scholarship will need to explore how to document the persecutor's online intent and the asylum-seeker's online identification or association with a protected ground. See, e.g., Jessica L. Opila, *How Elonis Failed to Clarify the Analysis of “True Threats” in Social Media Cases and the Subsequent Need for Congressional Response*, Note, 24 MICH. TELECOMM. & TECH. L. REV. 95, 99–100 (2017) (explaining, in the context of the “true threat” exception to protected speech under the First Amendment, how the different methods of communication via social media may be relevant to determining the social media user's mental state). This Article assumes that the persecutor is sufficiently motivated to harm the asylum-seeker on account of a protected ground.

21. *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (citation and quotation marks omitted).

22. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (discussing *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985)).

23. *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000) (citation omitted).

“teasing,” “minor disadvantages,” “trivial inconveniences,” “abusive treatment,” “discrimination,” or “harassment.”²⁴

In analyzing the severity of the harm, courts have repeatedly found that certain forms of harm may rise to the level of persecution. In particular, physical violence, such as torture, beatings, rape, and female genital mutilation, are usually considered harm that rises to the level of persecution.²⁵ Deprivations of liberty, such as detention and imprisonment, are also often classified as persecution.²⁶

In addition to the consensus around certain forms of harm, courts have taken a fact-dependent approach to categorizing words or actions as persecutory, evaluating each asylum-seeker’s individual experience.²⁷ Thus, there is no requirement that an asylum-seeker have experienced physical harm or confinement for a court to find that past persecution occurred.²⁸ There is also no requirement that her physical injuries, if she has any, be of a certain level.²⁹ Additionally, there is no minimum number of incidents that must occur to justify a finding of past persecution.³⁰

24. See, e.g., *Gjetani v. Barr*, 968 F.3d 393, 397 (5th Cir. 2020) (“Persecution is often described in the negative: It is not harassment, intimidation, threats, or even assault. Persecution is a specific term that does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.”) (citations and quotation marks omitted); *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (“[P]ersecution is more than discrimination and rises above unpleasantness, harassment, and even basic suffering.”) (citation omitted); *Jarborough v. U.S. Att’y Gen.*, 483 F.3d 184, 191 (3d Cir. 2007); *Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

25. See, e.g., *Chand v. INS*, 222 F.3d 1066, 1073–74 (9th Cir. 2000) (“Physical harm has consistently been treated as persecution.”); see also *Ming Dai v. Sessions*, 884 F.3d 858, 870 (9th Cir. 2018) (physical harm); *Song v. Sessions*, 882 F.3d 837, 841 (9th Cir. 2017) (as amended) (torture and beatings); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (rape and sexual assault); *Abebe v. Gonzales*, 432 F.3d 1037, 1042 (9th Cir. 2005) (en banc) (female genital mutilation).

26. See, e.g., *Bondarenko v. Holder*, 733 F.3d 899, 908–09 (9th Cir. 2013); *Gomez-Zuluaga v. U.S. Att’y Gen.*, 527 F.3d 330, 342–43 (3d Cir. 2008); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1136 (9th Cir. 2004); *Fatin*, 12 F.3d at 1240. But see *Final Rule*, *supra* note 8, at 80,385–86, 80,394–95 (excluding “brief detentions” from the definition of persecution).

27. See, e.g., *Ordonez-Quino v. Holder*, 760 F.3d 80, 87–88 (1st Cir. 2014) (noting that “[p]ersecution is a fluid term, not defined by statute” and “courts usually assess whether harm rises to the level of persecution on a case-by-case basis”) (citations omitted); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) (noting that persecution covers a range of harms and “[t]he determination that actions rise to the level of persecution is very fact-dependent”) (citation omitted).

28. See, e.g., *Sanchez-Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223, 1233–34 (11th Cir. 2007) (finding that a drive-by shooting qualifies as past persecution even if the shooting did not result in physical harm); see also *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (per curiam) (Reinhardt, J., concurring) (“The fact that [the asylum-seeker] did not suffer physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution.”); *Kovac v. INS*, 407 F.2d at 105–07 (explaining that the legislative history of the INA indicates that Congress did not intend to limit persecution to only physical harm).

29. See, e.g., *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (finding past persecution even though the asylum-seeker did not suffer any “serious bodily injury” or require medical attention); *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998) (noting that “serious injuries” and “physical harm” are not required to demonstrate past persecution); see also U.S. CITIZENSHIP AND IMMIGR. SERV., DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION, § 3.2.3 (2019), https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf [hereinafter USCIS PAST PERSECUTION GUIDANCE] (advising asylum officers that “[p]ersecution encompasses more than just physical harm”).

30. See *Gomes v. Gonzales*, 473 F.3d 746, 754 (7th Cir. 2007) (noting that there is no requirement that multiple harms occur in order to establish past persecution); see also *Irasoc v. Mukasey*, 562 F.3d 727, 730 (7th Cir. 2008) (noting that, while frequency and intensity are variables in the persecution analysis, a single incident of harm may amount to persecution); cf. *Dandan v. Ashcroft*, 339 F.3d 567, 573 (7th

In determining whether past persecution has occurred, courts will also look at the totality of the circumstances and the asylum-seeker's experience.³¹ For example, a past threat accompanied by violence against an asylum-seeker or her family may amount to past persecution.³² A threat in the context of turmoil or human rights abuses in the home country may also qualify as past persecution.³³ In other words, courts will consider "the evidence as a whole" when determining whether an asylum-seeker has experienced past persecution.³⁴

Significantly, courts may consider the cumulative effect of harms, finding that harms that might not individually rise to the level of past persecution may, taken together, constitute persecution.³⁵ As the Ninth Circuit noted, "the severity of harm is compounded when incidents of persecution have occurred on more than one occasion."³⁶ Thus, the repetition of the same type of harm may add up to persecution.³⁷ Multiple, yet different, harms may also add up to persecution.³⁸ Escalating threats and violence may similarly amount to persecution.³⁹ Even harms spread out over many years may add up

Cir. 2003) (noting that, while multiple incidents may create a "more compelling case," the number of incidents of harm is "merely one variable" in determining past persecution); *Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir. 1997) (finding that one incident of harm amounts to past persecution but denying on other grounds). *But see* *Hao Zhu v. Gonzales*, 465 F.3d 316, 319–21 (7th Cir. 2006) (distinguishing *Vaduva v. INS* and other cases and finding that one incident of harm does not amount to past persecution).

31. *See* *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004).

32. *See, e.g., Sanchez-Jimenez v. U.S. Att'y Gen.*, 492 F.3d at 1233–34 (finding past persecution where the persecutors threatened and were violent towards the asylum-seeker and his daughter); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997).

33. *See Ouda v. INS*, 324 F.3d 445, 453 (6th Cir. 2003) (finding past persecution where "[t]he undisputed facts paint a grim picture of human rights violations in post-war Kuwait, for which the Oudas personally suffered"); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (finding past persecution where evidence of a threat on the asylum-seeker's life was presented in conjunction with evidence of political and social turmoil).

34. *Jiang v. Gonzales*, 485 F.3d 992, 997 (7th Cir. 2007) (citation omitted).

35. *See, e.g., Herrera-Reyes v. U.S. Att'y Gen.*, 952 F.3d 101, 112 (3d Cir. 2020) (finding that a death threat made in a "pattern of harassment encompassing property damage, threats of violence, and actual violence" in conjunction with the murder of the asylum-seeker's political compatriot cumulatively amounted to past persecution); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005) ("The combination of sustained economic pressure, physical violence and threats against the Petitioner and her close associates, and the restrictions on the Petitioner's ability to practice her religion cumulatively amount to [past] persecution."); *see also* *Vitug v. Holder*, 723 F.3d 1056, 1065–66 (9th Cir. 2013); *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1257–58 (11th Cir. 2007); *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 861–62 (11th Cir. 2007); *Mashiri*, 383 F.3d at 1121; *Korablina*, 158 F.3d at 1044; *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25–27 (BIA 1998).

36. *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2003) (citation and quotation marks omitted).

37. *See, e.g., Reyes-Guerrero v. INS*, 192 F.3d 1241, 1243, 1245–46 (9th Cir. 1999) (finding past persecution where the asylum-seekers were subjected to repeated bribe attempts, personal confrontations, and death threats); *see also* *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (noting that "repeated and especially menacing death threats can constitute a primary part of a past persecution claim") (citations omitted).

38. *See, e.g., Reyes-Guerrero*, 192 F.3d at 1243, 1245–46.

39. *See, e.g., Mejia*, 498 F.3d at 1257–58 (finding past persecution where the asylum-seeker and his wife experienced "the cumulative effects of the escalating threats and attacks") (citation omitted); *Nakibuka v. Gonzales*, 421 F.3d 473, 478 (7th Cir. 2005) (similar); *see also* *Gomez-Zuluaga v. U.S. Att'y Gen.*, 527 F.3d 330, 343 (3d Cir. 2008) (noting that past persecution may exist where "[t]he overall

to persecution.⁴⁰ Such cumulative harms may be perpetrated by the asylum-seeker's government or non-state actors whom the government is unable or unwilling to control.⁴¹

Given that online harm may involve threats, emotional or psychological harm, as well as economic harm and gendered violence, it is important to expand here upon the courts' historical treatment of these harms in an offline context.⁴² With respect to threats, courts have found that an offline threat does not need to result in physical injury to constitute past persecution.⁴³ The threat also does not need to be verbalized; rather, the threat can be implied through actions, such as driving past a person's home and pointing a gun at the individual.⁴⁴ Threats may also cumulatively add up to persecution, even over the course of years.⁴⁵ Significantly, death threats *by themselves* may be considered past persecution.⁴⁶ In other words, death threats—without any additional evidence of physical, emotional, psychological, or economic harm—may amount to past persecution.⁴⁷

Emotional or psychological harm may also rise to the level of past persecution by itself.⁴⁸ The U.S. government has specifically recognized emotional or psychological harm as persecution, advising its asylum officers who are

trajectory of the harassment" against the asylum-seeker "continued and escalated with each new incident") (citations omitted).

40. See, e.g., *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) ("Where an asylum applicant suffers such harm on more than one occasion, and, as in this case, is victimized at different times over a period of years, the cumulative effect of the harms is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution.") (citing to *Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000) (Reinhardt, J.)); *Mejia*, 498 F.3d at 1257–58 (harm over an 18-month period); see also *Carreto-Escobar v. Barr*, No. 18-71073, at *3–4 (9th Cir. Apr. 22, 2020) (harm "over a period of years").

41. See *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998).

42. See discussion *infra* Part II.B.

43. See, e.g., *Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) (finding that "the threat of death alone constitutes persecution" and the asylum-seeker "was not required to additionally prove long-term physical or mental harm to establish past persecution"); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074–75 (9th Cir. 2002), *as amended by* 290 F.3d 964 (9th Cir. 2002) (finding past persecution where the asylum-seeker was threatened with death but was not physically harmed); see also *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1294–96 (9th Cir. 1997), *as amended by* 133 F.3d 726 (9th Cir. 1998).

44. See *Sanchez-Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223, 1233–34 (11th Cir. 2007); see also *Tairou*, 909 F.3d at 707 (noting that brandishing—but not using—a knife is an "implicit death threat"); *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) ("The fact that no words were exchanged does not mean those actions were not threatening.").

45. See *Herrera-Reyes v. U.S. Att'y Gen.*, 952 F.3d 101, 107–08 (3d Cir. 2020) (noting that "threat cases are not an exception to the general rule of cumulative analysis but simply applications of it"); *Thomas v. Ashcroft*, 359 F.3d 1169, 1179–80 (9th Cir. 2004); see also USCIS PAST PERSECUTION GUIDANCE, *supra* note 29, § 3.7.3.

46. See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 126–27 (4th Cir. 2011) (finding that three death threats amount to past persecution); *Thomas*, 359 F.3d at 1179 (noting that "threats of violence and death are enough" to establish past persecution) (citation omitted); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1243–46 (9th Cir. 1999); *Garrovillas v. INS*, 156 F.3d 1010, 1016–17 (9th Cir. 1998). *But see* *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (noting that two death threats could possibly indicate past persecution but do not necessarily compel such a finding); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744–46 (9th Cir. 2006) (similar reasoning).

47. See *Tairou*, 909 F.3d at 707–08.

48. See, e.g., *Mashiri*, 383 F.3d at 1120–21 (noting that "[p]ersecution may be emotional or psychological"); *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir. 2006) (noting that "a finding of past persecution might rest on a showing of psychological harm") (citation omitted); see also *Weerasekara v. Holder*, 583 F. App'x 795, 796 (9th Cir. 2014); *Metry v. Holder*, 506 F. App'x 570, 571 (9th Cir. 2013).

tasked with adjudicating asylum applications that “[p]sychological harm alone may rise to the level of persecution.”⁴⁹

Economic harm may also amount to persecution.⁵⁰ The Board of Immigration Appeals (hereinafter referred to as Board or BIA) has explained that “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life” may amount to persecution.⁵¹ Significantly, economic harm does not need to amount to “a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution.”⁵² In addition, a finding of persecution based upon economic harm may vary depending upon the asylum-seeker’s circumstances and the facts in the case.⁵³ While the loss of a job may amount to persecution for one individual, an onerous fine for another may be sufficiently persecutory.⁵⁴

As online harm may involve gendered violence, it is important to note how courts may approach this issue.⁵⁵ In particular, some courts have recognized that gendered violence may be used as a tool to persecute an individual on account of a protected ground, such as her political opinion.⁵⁶ The U.S. government has also advised its asylum officers that individuals in the Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI) communities may be more likely to be victimized by gendered violence than other individuals.⁵⁷

Finally, in determining whether a particular past harm should be classified as persecutory, courts may also consider the asylum-seeker’s subjective perception of the harm. For example, courts have recognized that a child may perceive past harm as more pronounced than adults do, especially if the harm

49. USCIS PAST PERSECUTION GUIDANCE, *supra* note 29, § 3.7.1 (emphasis added).

50. See *Matter of T-Z-*, 24 I&N Dec. 163, 170–75 (BIA 2007).

51. *Id.* at 170–75 (adopting the language of a congressional House Report describing non-physical harms and applying the standard laid out in *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983) for evaluating non-physical forms of suffering or harm). Compare *id.*, with *Final Rule*, *supra* note 8, at 80,281, 80,386, 80,395 (providing that persecution does not include “non-severe economic harm or property damage”).

52. *T-Z-*, 24 I&N Dec. at 173–74 (citing *Kovac v. INS*, 407 F.2d 102, 106–07 (9th Cir. 1969)).

53. See *id.* at 173–75.

54. See, e.g., *Ming Dai v. Sessions*, 884 F.3d 858, 870 (9th Cir. 2018) (job loss); *Vitug v. Holder*, 723 F.3d 1056, 1065–66 (9th Cir. 2013) (inability to find a job); *T-Z-*, 24 I&N Dec. at 174 (onerous fine); *Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 2013) (obstacles to career advancement and job loss).

55. See discussion *infra* Part II.B.

56. See, e.g., *Nakibuka v. Gonzales*, 421 F.3d 473, 477 (7th Cir. 2005) (noting that a threat of rape is one way for persecutors to “express their domination and control” over an asylum-seeker and “send a message to the women about what might happen” if they continue to express their political opinions); see also *Hernandez-Chacon v. Barr*, 948 F.3d 94, 105 (2d Cir. 2020) (noting that the persecutors likely raped the asylum-seeker because of her political opinion); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (recognizing rape as a persecutory harm), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005).

57. See U.S. CITIZENSHIP AND IMMIGR. SERV., ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS, § 4.1 (2011), <https://www.uscis.gov/sites/default/files/document/guides/RAIO-Training-March-2012.pdf> (noting that individuals in the LGBTQI communities may experience unique, offline harms, such as sexualized violence, more than other asylum-seekers).

was directed at the child's family or friends.⁵⁸ The U.S. government has similarly advised its asylum officers that, when assessing whether harm rises to the level of persecution, "similar circumstances may be more severe on . . . an elderly person than they may be on others."⁵⁹

B. *New Regulatory Definition of Persecution*

While case law has developed ways of evaluating whether past persecution has occurred, the Departments have chosen, through a joint rulemaking, to add a new, narrow definition of persecution to their respective regulations.⁶⁰ The regulations went into effect on January 11, 2021.⁶¹ The regulations define persecution as "an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control."⁶² The regulations then provide a benchmark or scale for measuring harm, explaining that persecution is "an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat."⁶³ Following the definition of persecution and the placement of persecutory harm at a high-end of the spectrum of harms, the regulations then list several manifestations of harm or circumstances that will not amount to persecution.⁶⁴ The Departments note in the preamble to their joint rulemaking that asylum claims may continue to be analyzed on a case-by-case basis, cumulative harms may still add up to persecution even if individually they do not, and children's asylum claims may still warrant a different approach than adults' claims.⁶⁵ The Departments further note that threats combined with confrontation or other mistreatment are still likely to be classified as persecutory.⁶⁶

Despite these comments, the preamble also makes clear that a finding of persecution will be a rare occurrence.⁶⁷ In addition, the new definition of persecution narrows the types of threats and circumstances under which threats may amount to persecution, superseding prior federal circuit court

58. See, e.g., *Ordonez-Quino v. Holder*, 760 F.3d 80, 90–92 (1st Cir. 2014) (finding that a child's point of view must be considered in evaluating whether the past harm amounts to persecution); *Rusak v. Holder*, 734 F.3d 894, 897 (9th Cir. 2013); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045–46 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150–51 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004); *Liu v. Ashcroft*, 380 F.3d 307, 313–14 (7th Cir. 2004).

59. USCIS PAST PERSECUTION GUIDANCE, *supra* note 29, § 3.2.5.

60. See *Final Rule*, *supra* note 8, at 80,386, 80,395 (adding new paragraphs at 8 C.F.R. §§ 208.1(e) and 1208.1(e)).

61. See *id.* at 80,274.

62. *Id.* at 80,386, 80,395.

63. *Id.*

64. See *id.*

65. See *id.* at 80,328.

66. See *id.* at 80,276, 80,327.

67. See *id.* at 80,327 (emphasizing that persecution is an "extreme concept"); see also *id.* at 80,282 (emphasizing the discretionary nature of asylum).

precedents.⁶⁸ Even if the regulations are subsequently amended, this rule-making suggests how the Departments, adjudicators, and courts may address online harm in the future. As will be discussed in Part IV, this new, narrow definition of persecution provides an avenue for excluding or limiting online harm as past persecution.⁶⁹ The following section will examine the courts' treatment of online harm in asylum claims prior to the publication of the regulatory amendments.

C. *U.S. Courts' Approaches to Online Harm in Asylum Claims*

The U.S. federal courts have begun to examine asylum claims involving the online world.⁷⁰ While several decisions have focused on an asylum-seeker's online presence,⁷¹ only a handful of decisions have addressed a persecutor's online presence. Some of these cases have involved a government persecutor,⁷² while others have dealt with a non-state persecutor.⁷³ Some

68. *See id.* at 80,285, 80327–28; *NPRM*, *supra* note 9, at 36,265 n.1, 36,281 n.32 (acknowledging that the rule supersedes prior federal circuit court cases addressing threats).

69. The new definition of persecution may also affect how online harms are analyzed as evidence of future persecution. *See Final Rule*, *supra* note 8, at 80328 n.51 (flagging the likelihood of future harm based on past threats as a significant issue). This topic will require future scholarship but is beyond the scope of this Article. Future scholarship must also address how the new regulatory paragraphs addressing the nexus element of asylum—the link between the persecutor's motivation in harming the asylum-seeker and a protected ground—may affect asylum claims involving online harm. *See id.* at 80,281, 80,328–35, 80,386, 80,395 (adding new paragraphs at 8 C.F.R. §§ 208.1(f) and 1208.1(f) addressing nexus).

70. While the cases involving the online world have often involved the relief of asylum, some have focused on other forms of relief from removal, including withholding of removal and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). *See* 8 U.S.C. § 1231; 8 C.F.R. §§ 208.16, 1208.16 (2021) (withholding of removal); 8 C.F.R. §§ 208.17, 208.18, 1208.17, 1208.18 (2021) (CAT). Although the focus of this Article is on asylum, this Article will occasionally refer to cases in which the individual seeks withholding of removal or CAT protection when those cases are illustrative of the courts' treatment of online harm. This Article will also refer to multiple, non-precedential cases to show trends in the federal courts' approaches to online harm.

71. Several cases have involved the asylum-seeker's use of email, downloading of online materials, or publication of articles, posts, or photographs on websites or blogs, as well as her participation in online chat rooms. *See, e.g.,* *Matheus v. U.S. Att'y Gen.*, 757 F. App'x 803, 807 (11th Cir. 2018) (blog); *Hiang v. Lynch*, 622 F. App'x 48, 49 (2d Cir. 2015) (email forwarded to a listserv); *Weinong Lin v. Holder*, 763 F.3d 244, 245–51 (2d Cir. 2014) (website); *Rodriguez v. U.S. Att'y Gen.*, 447 F. App'x 74, 75–76 (11th Cir. 2011) (blog); *An Qing Wu v. U.S. Att'y Gen.*, 356 F. App'x 588, 589–93 (3d Cir. 2009) (email); *Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1230–33 (11th Cir. 2006) (downloading forbidden political materials); *Makhoul v. Ashcroft*, 387 F.3d 75, 79–83 (1st Cir. 2004) (chat room). Others have involved the asylum-seeker's use of social media platforms. *See, e.g.,* *Uzodinma v. Barr*, 951 F.3d 960, 965 (8th Cir. 2020) (unspecified social media and Facebook); *Compaore v. Barr*, 788 F. App'x 355, 357 (6th Cir. 2019) (unspecified social media); *Kwadjo Akyaw Osei-Wusu v. Holder*, 562 F. App'x 48, 49 (2d Cir. 2014) (Facebook); *Porras v. Holder*, 543 F. App'x 867, 870–74 & n.7 (10th Cir. 2013) (Twitter and website). Several courts have concluded that the asylum-seeker's fear of future persecution due to her online presence is not well-founded. *See, e.g.,* *Wang v. Barr*, 794 F. App'x 52, 54–55 (2d Cir. 2019); *Tao v. Sessions*, 717 F. App'x 65, 67 (2d Cir. 2018); *Sai v. Sessions*, 679 F. App'x 64, 66 (2d Cir. 2017); *Y.C. v. Holder*, 741 F.3d 324, 333–38 (2d Cir. 2013); *Rodriguez*, 447 F. App'x at 75–76; *Makhoul*, 387 F.3d at 79–83.

72. *See, e.g.,* *Guang Lin Chang v. U.S. Att'y Gen.*, 643 F. App'x 864, 868–69 (11th Cir. 2016); *Qing Chen v. U.S. Att'y Gen.*, 428 F. App'x 212, 214–15 (3d Cir. 2011).

73. *See, e.g.,* *Almeda-Guzman v. Barr*, 788 F. App'x 261, 266 & n.5 (5th Cir. 2019); *Jeudy v. U.S. Att'y Gen.*, 762 F. App'x 594, 599–600 (11th Cir. 2019); *Lara-Guzman v. Sessions*, 710 F. App'x 494, 495–96 (2d Cir. 2018).

cases have examined the persecutor's use of email or text messages or his efforts at online censorship or surveillance, while others have addressed the persecutor's use of social media.⁷⁴

Most of the social media cases have focused on the persecutor's use of the medium to threaten the asylum-seeker. These cases have focused on whether such threats are likely to materialize into future, offline persecution or torture.⁷⁵ Courts have provided a number of reasons to find that future persecution or torture is not likely: the threat does not relate to a protected ground;⁷⁶ too little is known about the author of the online threat;⁷⁷ too much time has passed since the threat was made;⁷⁸ the asylum-seeker could relocate safely within her home country to avoid future persecution;⁷⁹ there is insufficient evidence, in a request for protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), that the CAT applicant's government was involved in the threat;⁸⁰ there is insufficient evidence corroborating the likelihood of

74. See, e.g., *Uzodinma*, 951 F.3d at 964–65 (threatening text messages); *Guang Lin Chang*, 643 F. App'x at 868–69 (censorship and monitoring of the internet); *Qing Chen*, 428 F. App'x at 214–15 (same). Other cases have noted but not examined the persecutor's actual or supposed online presence. See, e.g., *Guiyue Qian v. Lynch*, 629 F. App'x 81, 83 (2d Cir. 2015) (monitoring and blocking pro-democracy activities on the internet); *Jiucheng Wen v. Holder*, 572 F. App'x 54, 56 (2d Cir. 2014) (monitoring electronic communications); *Mei Qin Zheng v. Holder*, 538 F. App'x 51, 54 (2d Cir. 2013) (monitoring the internet); *Siang Piow Liu v. Holder*, 403 F. App'x 207, 207–08 (9th Cir. 2010) (monitoring the asylum-seeker's online presence).

75. See, e.g., *Cabrera v. Barr*, 939 F.3d 379, 385 & n.4 (1st Cir. 2019) (threats made via an unnamed social media platform); *Almeda-Guzman*, 788 F. App'x at 266–67 & nn.5–6 (threat made via Facebook); *Pelaez-Castellanos v. U.S. Att'y Gen.*, 781 F. App'x 853, 855 (11th Cir. 2019) (threats made via MySpace); *Peraza v. U.S. Att'y Gen.*, 779 F. App'x 873, 875 (3d Cir. 2019) (threats made via Facebook); *Judy*, 762 F. App'x at 599–600 (same); *Romero-Donado v. Sessions*, 720 F. App'x 693, 695 (4th Cir. 2018) (same); *Lara-Guzman*, 710 F. App'x at 495–96 (same); *Porras*, 543 F. App'x at 870–74 & n.7 (threats made via Twitter); cf. *Ortez-Cruz v. Barr*, 951 F.3d 190, 198–202 (4th Cir. 2020) (contact by the persecutor via Facebook). While many cases have dealt with online threats sent directly to the asylum-seeker via social media, at least one case has involved threats sent to the asylum-seeker's family. See *Guzman-Alvarez v. Sessions*, 701 F. App'x 54, 57 (2d Cir. 2017) (message sent via Facebook to the asylum-seeker's cousin).

76. See *Uzodinma*, 951 F.3d at 964 (finding that the threatening text messages did not pertain to the asylum-seeker's political opinion).

77. See *Porras v. Holder*, 543 F. App'x 867, 874 & n.7 (10th Cir. 2013) (“[E]ven if the BIA slightly overstated the case in describing the threat sources as ‘unknown’ or ‘undisclosed,’ petitioners failed to provide information about these [Twitter] users sufficient to establish the likelihood of future persecution . . .”).

78. See *Romero-Donado*, 720 F. App'x at 697 (finding that the gang members in the CAT applicant's home country were no longer interested in the CAT applicant because six years had passed since he received death threats on Facebook).

79. Compare *id.* at 696–97 (finding that the CAT applicant could safely relocate internally), with *Ortez-Cruz*, 951 F.3d at 198–202 (finding that the government had not established that the asylum-seeker could avoid harm by relocating).

80. See *Almeda-Guzman v. Barr*, 788 F. App'x 261, 266–67 & nn.5–6 (5th Cir. 2019) (finding that there was insufficient state action for a CAT claim involving a Facebook threat by a non-state actor); see also 8 C.F.R. §§ 208.18(a)(1), (7), 1208.18(a)(1), (7) (2021) (requiring that the torture be inflicted by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity). Thus far, there have been no published decisions addressing whether an asylum-seeker was unable or unwilling to avail herself of protection from her government from online harm committed by non-state actors. See 8 C.F.R. §§ 208.13(b)(2)(i), 1208.13(b)(2)(i) (2021) (providing that an individual has a well-founded fear of persecution if she is “unable or unwilling to return to, or avail herself or herself of the protection of, that country because of such fear”).

future harm,⁸¹ or the court lacks jurisdiction.⁸² Courts have also alluded to other reasons for denying a claim based on future persecution, such as noting that the online threat was made post-flight or finding that the claim is overall not credible.⁸³

Additionally, courts have determined that, despite the discovery of online harm after the proceedings have ended, the asylum-seeker's case may not merit a second look. For example, courts have declined to reopen proceedings, finding that online harm is not material evidence of changed conditions in the asylum-seeker's home country that would put her at risk of experiencing future persecution.⁸⁴ Further, in denying a motion to remand, at least one court found that the online harm does not amount to new, material, or previously unavailable evidence that would change an immigration court's prior asylum decision.⁸⁵

While courts have begun to wrestle with online harm as evidence of future persecution, they have not yet provided any substantive guidance on how to address online harm as evidence of past persecution. For example, in *Fabian-Soriano v. Barr*, in which the Board determined that the asylum-seeker's past online and offline experiences do not amount to past persecution, the First Circuit declined to address online harm directly, declaring that it did not have the authority to second guess the Board's factual determination.⁸⁶ Unpublished decisions have also not provided much guidance. For example, in *Hao v. Whitaker*, the Ninth Circuit summarily held that the asylum-seeker had not suffered past persecution because the "only harm" was the government's order requiring him to shut down his blog.⁸⁷

Courts have also not provided any substantive guidance on whether the various forms of harm that are unique to the online world may amount to past persecution. For example, there are no circuit court asylum decisions addressing doxing—also known as doxxing—which is the non-consensual online

81. See *Cabrera v. Barr*, 939 F.3d 379, 385 & n.4 (1st Cir. 2019) (finding that there is no evidence that the social media posters intend to harm the CAT applicant offline); *Jiqing Jin v. Gonzales*, 230 F. App'x 83, 84–85 (2d Cir. 2007) (finding that the asylum-seeker did not corroborate that there was a "wanted list" on the internet with his name on it).

82. See *Pelaez-Castellanos v. U.S. Att'y Gen.*, 781 F. App'x 853, 856–57 (11th Cir. 2019).

83. See *Romero-Donado v. Sessions*, 720 F. App'x 693, 697 (4th Cir. 2018) (noting that the online threat was made post-flight); *Jiqing Jin*, 230 F. App'x at 84–85 (finding that the claim was not credible).

84. See, e.g., *Qing Chen v. U.S. Att'y Gen.*, 428 F. App'x 212, 214–15 (3d Cir. 2011) (finding that proceedings should not be reopened because the online harm is a continuation or extension of the offline persecution and there has been no change in the amount of online harm); *Guang Lin Chang v. U.S. Att'y Gen.*, 643 F. App'x 864, 868–69 (11th Cir. 2016); *Feng Zheng v. U.S. Att'y Gen.*, 569 F. App'x 757, 758 (11th Cir. 2014); *Ming Chen v. Holder*, 722 F.3d 63, 67–68 (1st Cir. 2013); *Xue Hui Zhang v. Mukasey*, 303 F. App'x 9, 10 (2d Cir. 2008). See generally 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. §§ 1003.2(c)(3), 1003.23(b)(4)(i) (2021) (motions to reopen proceedings based on changed country conditions).

85. See *Almeda-Guzman*, 788 F. App'x at 266–67. See generally 8 C.F.R. § 1003.2 *et seq.* (2021) (motions to remand).

86. See *Fabian-Soriano v. Barr*, 925 F.3d 552, 554–57 (1st Cir. 2019) (threatening Facebook and phone messages and in-person visit by masked, armed individuals).

87. See *Hao v. Whitaker*, 746 F. App'x 636, 637 (9th Cir. 2018).

posting of private or personally identifying information about an individual.⁸⁸ Courts have also failed to examine whether novel forms of communication on social media may be persecutory. For example, one court noted without explanation that the persecutor's message to the asylum-seeker asking to link his Facebook account with hers—known as a Facebook friend request—does not involve a threat.⁸⁹

This is only the beginning of asylum cases involving online harm. Cases will continue to arise in which the asylum-seeker alleges that the persecutor has harmed her online. A robust understanding of the nature of online harm is crucial to addressing these cases.

II. UNDERSTANDING ONLINE HARM IN ASYLUM CLAIMS

A. *Types of Online Harm*

To appreciate how online harm may be persecutory, it is important to understand the forms that it may take, its unique characteristics, and the resulting injuries. While the forms, characteristics, and injuries listed in this Part are not exhaustive, they are a good place to start.

1. *Novel Harms*

To begin with, the online world has created new tools and forms of persecution. Some of these new tools, such as doxing, do not have any comparable offline versions.⁹⁰ Some online tools are more effective and have a greater reach than analogous offline versions of the same tool. For example, online censorship may involve restricting or forbidding the use of certain words or topics, as well as blocking users' access to the internet or certain online platforms or sites.⁹¹ Online surveillance is particularly sophisticated and includes the use of data-mining processes.⁹² Social media data can be mined to search for people or topics, determine online and offline relationships, and retrieve social media users' opinions about a given topic—such as anti-government

88. See C.S-W., *What doxing is, and why it matters*, THE ECONOMIST (Mar. 10, 2014), <https://www.economist.com/the-economist-explains/2014/03/10/what-doxing-is-and-why-it-matters>.

89. See *Godinez v. Barr*, 929 F.3d 598, 601–02 (8th Cir. 2019). See generally *Friending*, FACEBOOK.COM, <https://www.facebook.com/help/friends> (last visited Oct. 2, 2020).

90. See C.S-W., *supra* note 88. See generally Patricia R. Recupero, *New Technologies, New Problems, New Laws*, 44 J. AM. ACAD. PSYCHIATRY & L. 322, 324–25 (2016).

91. See SHABAZ, *The Rise of Digital Authoritarianism*, *supra* note 2; Elizabeth C. Economy, *The great firewall of China: Xi Jinping's internet shutdown*, THE GUARDIAN (Jun. 29, 2018), <https://www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings-internet-shutdown> (blocking internet access); David Bamman, Brendan O'Connor & Noah Smith, *Censorship and Deletion Practices in Chinese Social Media*, FIRST MONDAY, 17(3) (2012), <https://doi.org/10.5210/fm.v17i3.3943> (restricting words and topics).

92. See ADRIAN SHABAZ & ALLIE FUNK, FREEDOM HOUSE, *Social Media Surveillance* (2019), <https://freedomhouse.org/report/freedom-on-the-net/2019/the-crisis-of-social-media/social-media-surveillance> [hereinafter SHABAZ & FUNK, *Social Media Surveillance*].

sentiments—directly from a particular platform.⁹³ Significantly, there is a documented rise in governmental surveillance of social media.⁹⁴

Persecutors have also harnessed social media as a new form of persecutory communication. They threaten individuals on social media through written posts.⁹⁵ They also target individuals by creating and spreading new forms of harmful content. For example, a persecutor may target an individual through a deepfake—an altered image or video fraudulently placing an individual in a place, doing an action, or saying something.⁹⁶ He may also engage in revenge porn—also known as non-consensual pornography—which is the online distribution of nude photographs or other sexual imagery without the subject’s consent.⁹⁷ He may target an individual through a persecutory meme—a form of online communication blending written, spoken, visual, audio, and video content.⁹⁸ He may hack—impermissibly break into—her social media

93. See *id.* (documenting how governments search for and monitor individuals on social media, as well as determine relationships between social media users); see also Mirko Lai, Allesandra Teresa Cignarella, Delia Irazu Hernandez Farias, Cristina Bosco, Viviana Patti & Paolo Rosso, *Multilingual Stance Detection in Social Media Political Debates*, 63 *COMPUTER SPEECH & LANGUAGE* 1, 1–5 (2020) (describing a process for identifying topics and opinions on social media); Noura Farra, *Cross-Lingual and Low-Resource Sentiment Analysis* 1–6, 8–10, 219–23 (2019) (Ph.D. dissertation, Columbia University), <https://doi.org/10.7916/d8-x3b7-1r92> (describing a process for identifying opinions from Arabic and Chinese on social media).

94. See SHAHBAZ & FUNK, *Social Media Surveillance*, *supra* note 92.

95. See, e.g., AMNESTY INT’L, *Twitter still failing women over online violence and abuse* (Sep. 22, 2020), <https://www.amnesty.org/en/latest/news/2020/09/twitter-failing-women-over-online-violence-and-abuse/>; REPORTERS WITHOUT BORDERS, *Online Harassment of Journalists: Attack of the Trolls* 22–29 (2018), https://rsf.org/sites/default/files/rsf_report_on_online_harassment.pdf [hereinafter REPORTERS WITHOUT BORDERS, *Online Harassment of Journalists*]; Samantha Bradshaw & Philip N. Howard, *Troops, Trolls, and Troublemakers: A Global Inventory of Organized Social Media Manipulation* 10 (Oxford University Working Paper 2017.12), <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/07/Troops-Trolls-and-Troublemakers.pdf>.

96. See, e.g., Drew Harwell, *Fake-porn videos are being weaponized to harass and humiliate women: ‘Everybody is a potential target’*, WASH. POST (Dec. 30, 2018), <https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/> (discussing the emotional trauma of Rana Ayyub, an investigative journalist in India, who was subjected to a deepfake, pornographic video of her). See generally Ben Dickson, *What is a Deepfake?*, PC MAGAZINE (Mar. 4, 2020), <https://www.pcmag.com/news/what-is-a-deepfake>.

97. See, e.g., Harwell, *supra* note 96; HUMAN RIGHTS WATCH, *EVENTS OF 2020*, *supra* note 1, at 207 (documenting that media close to the Egyptian government published rape victims’ private photos and videos online without their consent). As online harm is often gendered, this Article uses the pronoun “she” for the asylum-seeker and “he” for the persecutor. See, e.g., HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, U.N. Doc. HRC/38/47 (Jun. 18, 2018) (documenting online harm directed at women and girls); AMNESTY INT’L, *Amnesty reveals alarming impact of online abuse against women* (Nov. 20, 2017), <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/> [hereinafter AMNESTY INT’L, *Online Abuse Against Women*] (documenting the prevalence in eight countries of online harm directed at women); DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 13–17 (2014) [hereinafter CITRON, *HATE CRIMES IN CYBERSPACE*] (describing the gendered nature of online harm); see also Emma Alice Jane, *‘Back to the Kitchen, Cunt’: Speaking the Unspeakable About Online Misogyny*, 28 *CONTINUUM: J. MEDIA & CULTURAL STUDIES* 558, 558–59 (2014) (advocating that academic writing reflect the gendered reality of online harm).

98. See, e.g., REPORTERS WITHOUT BORDERS, *Online Harassment of Journalists*, *supra* note 95, at 36 (documenting the use of memes in this manner). See generally LIMOR SHIFMAN, *MEMES IN DIGITAL CULTURE* 9, 12 (2014).

account and manipulate or steal her data, impersonate her, or threaten her.⁹⁹ He may use a hashtag—the pound sign symbol used on social media to tag ideas or concepts around a common name—to spread his content online.¹⁰⁰ A persecutor may even take over the individual’s hashtag and use it to promote his own persecutory content.¹⁰¹ A persecutor may also manipulate social media to spread false information and disrupt others’ online communication channels.¹⁰²

In addition to persecutors’ current methods of online harm, the online world may also bring unknown, future types of persecutory harm. For example, as social media use increases, data about individuals—as well as big-data processes for mining and using such data—will increase.¹⁰³ It is unknown how such data—even seemingly innocuous bits of data—will be weaponized in the future to persecute others.¹⁰⁴ For example, data may be correlated across multiple databases, associating the individual with other people, organizations, or ideas.¹⁰⁵ These other people, organizations, or ideas may be connected to a political opinion, religious view, or other protected ground. The persecutor may then target the individual online or offline due to the correlated data associating her with a protected ground.¹⁰⁶ The government or data controller may additionally assign the targeted individual with a profile of loyalty to the governmental or non-state persecutor based on this

99. See, e.g., Dan Goodin, *Google sent users 40,000 warnings of nation-state hack attacks in 2019*, ARSTECHNICA (Mar. 26, 2020), <https://arstechnica.com/information-technology/2020/03/google-sent-users-40000-warnings-of-nation-state-hack-attacks-in-2019/> (documenting how government-backed hackers targeted journalists and dissidents); Swati Gupta & Helen Regan, *Four dead in Bangladesh riot over offensive Facebook post*, CNN ONLINE (Oct. 21, 2019), <https://edition.cnn.com/2019/10/21/asia/riot-deaths-facebook-post-intl-hnk/index.html> (reporting that an individual’s Facebook account was hacked and used to post anti-religious content, resulting in a deadly riot).

100. See, e.g., AMNESTY INT’L, *Toxic Twitter 2018*, *supra* note 1; REPORTERS WITHOUT BORDERS, *Online Harassment of Journalists*, *supra* note 95, at 15, 36; Bradshaw & Howard, *supra* note 95, at 9–10. See generally MICHELE ZAPPAVIGNA, *SEARCHABLE TALK: HASHTAGS AND SOCIAL MEDIA METADISCOURSE* 3–4 (2018).

101. Cf. Philipp Darius & Fabian Stephany, “Hashjacking” *the Debate: Polarisation Strategies of Germany’s Political Far-Right on Twitter*, in *SOCIAL INFORMATICS, INTERNATIONAL CONFERENCE ON SOCIAL INFORMATICS* 298–308 (2019) (describing “hashjacking”—the act of coopting another’s hashtag to promote one’s agenda).

102. See Claire Wardle, *A New World Disorder*, *SCIENTIFIC AM.*, Sept. 2019, at 86 (discussing the spread of false information for disruptive purposes); Megiddo, *supra* note 2, at 412–19 (discussing the disruption of online communication channels).

103. See Molly K. Land & Jay D. Aronson, *The Promise and Peril of Human Rights Technology*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 19 (Molly K. Land & Jay D. Aronson, eds., 2019) (“Information about us that is disclosed in one context . . . [may] be combined with other data and used in ways we could not have foreseen.”) (citations omitted); VIKTOR MAYER-SCHONBERGER & KENNETH CUKIER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK* 151 (2013) (“[T]he history of the twentieth century is blood-soaked with situations in which data abetted ugly ends.”).

104. See *supra* note 103.

105. See, e.g., Anna Diamond & Larry Mitchell, *China’s Surveillance State Should Scare Everyone*, *THE ATLANTIC* (Feb. 2, 2018), <https://www.theatlantic.com/international/archive/2018/02/china-surveillance/552203/> (describing the country’s efforts at implementing “a pervasive system of algorithmic surveillance” that correlates data from multiple online and offline sources).

106. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992) (requiring a connection between the persecutor’s reasons for harming an individual and a protected ground).

correlated data, increasing the likelihood of future online and offline targeting.¹⁰⁷

Notably, it is possible that certain bits of data will be *incorrectly* correlated or attributed to an individual.¹⁰⁸ For example, when social media posts are aggregated, they may be “divorced from the conversation” in which they first appeared, and a persecutor may subsequently interpret those posts as having a different meaning than intended by the poster.¹⁰⁹ A deepfake could also be used to attribute beliefs or actions incorrectly to the individual.¹¹⁰ For example, a fake video could show the individual attending a political rally when she did not do so. As a result of data aggregation or manipulation, the individual could be incorrectly attributed with a political opinion or other protected ground. The persecutor may then target the individual online or offline due to this incorrect attribution.¹¹¹

Thus, online harm involves new, agile versions of historical forms of persecution, such as censorship, as well as novel forms of harm for which there are no offline counterparts, such as doxing. Both versions of online harm may implicate or violate an individual’s privacy.

2. *Privacy Harms*

While there is debate in the academic literature over the definition of privacy, especially as it relates to the online realm,¹¹² recognizing that a persecutor’s online conduct may implicate an asylum-seeker’s “online privacy” and result in a “privacy harm” can be helpful in determining whether persecution has occurred.¹¹³ “Online privacy” may refer to a general idea or social construct that an individual is entitled to privacy in the online realm.¹¹⁴ Online

107. See, e.g., Diamond & Mitchell, *supra* note 105.

108. See Gandomi & Haider, *supra* note 1, at 143.

109. See *id.*; see also Jasmine E. McNealy, *The Privacy Implications of Digital Preservation: Social Media Archives and the Social Networks Theory of Privacy*, 3 ELON L. REV. 133, 159 (2011) (discussing the problems with assigning meaning to social media posts when they are divorced from their original context). See generally Daniel J. Solove, *A Taxonomy of Privacy*, U. PENN. L. REV. 477, 507 (2006) (discussing how aggregated data is “often reductive and disconnected from the original context in which it was gathered”).

110. See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1776–77 (2019) [hereinafter Chesney & Citron, *Deep Fakes*].

111. See, e.g., Javed v. Holder, 715 F.3d 391, 396–97 (1st Cir. 2013) (finding that an individual may be eligible for asylum even if the persecutor incorrectly identifies the individual with a protected ground); Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003) (same).

112. See Ignacio N. Cofone & Adriana Z. Robertson, *Privacy Harms*, 69 HASTINGS L.J. 1039, 1044–49 (2018) (listing multiple conceptualizations of privacy); see also Solove, *supra* note 109, at 477 (“Privacy is a concept in disarray. Nobody can articulate what it means.”).

113. See generally Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, BOSTON U. L. REV. (forthcoming 2021) (manuscript at 18–41) (available at <https://ssrn.com/abstract=3782222>) [hereinafter Citron & Solove, *Privacy Harms*] (providing a typology of privacy harms).

114. See Judith DeCew, *Privacy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Spring 2018 ed.), <https://plato.stanford.edu/archives/spr2018/entries/privacy/> (noting that privacy in general has been conceptualized as an “interest with moral value,” as well as a “moral or legal right” requiring protection); see also PETER SWIRE & DEBRAE KENNEDY-MAYO, U.S. PRIVATE-SECTOR

privacy may also implicate an established or emerging right under U.S. or international law, such as the right to privacy or right to be forgotten.¹¹⁵

In the context of asylum, one way to conceptualize online privacy is as the “right” to be left alone online to speak, write, post, comment, and tweet as one wishes without interference from one’s government or a non-state actor.¹¹⁶ If a government or non-state actor tries to harm, silence, or manipulate an individual online or take control of her online identity, ideas, voice, data or footprint, then she may have experienced a “privacy harm” that is evidence of or amounts to persecution.¹¹⁷ Although there may be other helpful conceptualizations of online privacy and harm, this particular framework may explain how and why the asylum-seeker perceives the persecutor’s online conduct as persecutory. Moreover, as will be discussed in the next section, if the persecutor’s online conduct violates a privacy right under international law, then courts and adjudicators may also have an additional legal source or authority to support a finding of persecution.¹¹⁸

The act of doxing illustrates how an online privacy harm may also amount to persecution. If an asylum-seeker has been doxed, this means that her personal data was dumped online against her will.¹¹⁹ Her privacy has been invaded because she has lost control of her personal data.¹²⁰ But the injury is more than just the loss of control over her personal data: she may have also experienced physical, reputational, emotional, psychological, and economic harm due to the loss of that control.¹²¹ Thus, she has suffered multiple injuries which may separately or cumulatively be severe enough to be classified as persecutory.¹²² If the persecutor’s motivation to dox the asylum-seeker was,

PRIVACY: LAW AND PRACTICE FOR INFORMATION PRIVACY PROFESSIONALS (3d ed.), International Association of Privacy Professionals, chaps. 1 and 3 (2020) (defining online privacy).

115. See SWIRE & KENNEDY-MAYO, *supra* note 114, at chaps. 1 and 3. While the United States does not have a federal statute governing privacy, individuals may seek legal redress for privacy violations under constitutional theories, federal and state statutes, tort law, and contract law. See *id.* Under international law, individuals have treaty-based avenues to redress privacy violations. See discussion *infra* Part II.A.3.

116. Cf. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (conceptualizing privacy as the “the right to be let alone”) (citation omitted); see also Alan F. Westin, *PRIVACY AND FREEDOM* 7 (1967) (conceptualizing privacy as the freedom to choose the circumstances and degree to which an individual exposes her ideas and behaviors). This concept of privacy can also be found in international law. See discussion *infra* Part II.A.3.

117. See generally Citron & Solove, *Privacy Harms*, *supra* note 113, at 18–41.

118. See discussion *infra* Part II.A.3.

119. See C.S.-W., *supra* note 88.

120. See Citron & Solove, *Privacy Harms*, *supra* note 113, at 34–35 (conceptualizing the loss of control over the extent to which personal information is circulated as a cognizable privacy harm).

121. See Julia M. MacAllister, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2452–61 (2017) (describing potential injuries resulting from doxing); Svana M. Calabro, *From the Message Board to the Front Door: Addressing the Offline Consequences of Race- and Gender-Based Doxing and Swatting*, 51 SUFFOLK U. L. REV. 55, 57–60 (2018) (similar); Stine Eckert & Jade Metzger-Riftkin, *Doxing*, in THE INTERNATIONAL ENCYCLOPEDIA OF GENDER, MEDIA, AND COMMUNICATION 1–5 (2020) (describing the online and offline injuries experienced by women from doxing).

122. See discussion *supra* Part I.A (examining the circumstances under which harms may be classified as persecutory under U.S. asylum law).

in part, on account of a protected ground, then his act may meet the definition of persecution.¹²³

As another example, let us assume that the persecutor has posted a meme mocking the asylum-seeker and her religious beliefs. In this example, the asylum-seeker's injury is a privacy harm because she has lost control of her own image and reputation.¹²⁴ She may also have experienced emotional and psychological harm due to the loss of that control or the continued presence of the meme.¹²⁵ The meme may even result in economic harm if, due to the asylum-seeker's increased online visibility, she loses her job or is denied career advancement.¹²⁶ Similar to the doxing example, she has suffered multiple injuries that may separately or cumulatively amount to persecutory harm.¹²⁷ Moreover, as the meme was based on the asylum-seeker's religion, it may amount to persecution.¹²⁸

As Tamar Megiddo has proposed, it may also be helpful to frame the injury resulting from online harm not just as a privacy violation but also as an attack on an individual's freedom.¹²⁹ For example, if the asylum-seeker's government requires a social media platform to track and delete all references to the asylum-seeker's religion, then the asylum-seeker will not be able to post quotes from her religion's texts or discuss her religious beliefs online. In that scenario, the asylum-seeker's government has restricted her religious freedom because she is no longer able to express her religious beliefs in a manner, through a medium, and with an audience of her choosing.¹³⁰ Under U.S. asylum law, restrictions on religious freedom are persecutory.¹³¹ In this

123. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992) (requiring a connection between the persecutor's reasons for harming an individual and a protected ground).

124. See Citron & Solove, *Privacy Harms*, *supra* note 113, at 22–23, 34–35 (conceptualizing the loss of control over personal information, as well as reputational harm, as cognizable privacy harms).

125. See *id.* at 23–25, 35 (describing the emotional harm from privacy violations, including the loss of control over personal information).

126. See *id.* at 21–22 (discussing the economic harms from privacy violations, including direct financial injuries and the loss of important opportunities); see also Daniel Trottier, Qian Huang & Rashid Gabbulhakov, *Mediated Visibility as Making Vitriol Meaningful*, in *VIOLENCE AND TROLLING ON SOCIAL MEDIA: HISTORY, AFFECT, AND EFFECTS OF ONLINE VITRIOL* 28 (Sara Polak & Daniel Trottier, eds., 2020) (“An amplification of the target's [online] visibility leads to an amplification of any potential abuse.”).

127. See discussion *supra* Part I.A.

128. See *Elias-Zacarias*, 502 U.S. at 481–82.

129. See Megiddo, *supra* note 2, at 400–01; see also Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 962–71 (1964) (conceptualizing privacy as involving the protection of an individual's individuality and human dignity).

130. See Megiddo, *supra* note 2, at 400–01 (explaining that e-dissidents and others active online purposefully seek others' online engagement); see also Citron & Solove, *Privacy Harms*, *supra* note 113, at 27 (“Privacy violations can produce harm by inhibiting people from engaging in certain civil liberties such as free speech, political participation, religious activity, free association, freedom of belief, and freedom to explore ideas.”).

131. See, e.g., *Guo v. Sessions*, 897 F.3d 1208, 1216 (9th Cir. 2018) (finding that governmental actions that force an asylum-seeker to abandon his religious worship amount to past persecution); *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1357 (11th Cir. 2009) (Marcus, J., concurring) (noting that “any requirement that Kazemzadeh abandon his faith or practice in secret in order to conceal his conversion amounts to religious persecution under our asylum laws”); see also *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1236 (11th Cir. 2013) (citing to *Kazemzadeh*, 577 F.3d at 1358–60). In this example, the individual may also view the online censorship or surveillance as the suppression of her freedom of speech or expression, which is protected as a human right under international law. See discussion *infra* Part II.A.3.

example, online surveillance and censorship are the tools that were used to violate the asylum-seeker's privacy and limit her religious freedom.¹³²

In the above examples, the persecutor's online act is more than just a privacy harm or violation that falls outside the asylum legal regime. It is quite the opposite: the persecutor's online act has restricted the asylum-seeker's freedom to identify with a protected ground. Thus, recognizing online privacy harms can be useful in identifying persecutory harms.

3. *Persecutory Harms under International Law*

Online harm may also implicate the violation of rights protected under international law. Under the human rights-based approach to persecution formulated by James C. Hathaway, the source of an individual's eligibility for asylee or refugee status includes rights under the United Nations Convention Relating to the Status of Refugees (Refugee Convention) *and* any other rights formally protected under international human rights law.¹³³ Under this approach, international human rights standards can help to define or identify when harms are persecutory.¹³⁴ This approach can be extended to online harm: if the online harm violates a right protected under international human rights law, then the individual may be eligible for asylum.

Although the human rights-based approach to persecution has not been universally adopted under U.S. asylum law, several U.S. courts have acknowledged that international human rights standards can help in assessing whether persecution has occurred, as well as explaining congressional intent underlying the enactment of immigration laws.¹³⁵ The U.S. government has also advised its asylum officers that violations of international human rights may amount to persecution.¹³⁶

The human rights-based approach could be applied to violations of privacy rights protected under international human rights law. If the persecutor's online conduct violates a provision of international human rights law protecting privacy, then his conduct may amount to persecutory harm. Several

132. See Megiddo, *supra* note 2, at 400–01.

133. See JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 184 (2d ed. 2014) (defining “being persecuted” as involving the “sustained or systemic denial of basic human rights demonstrative of a failure of state protection”) (citations omitted).

134. See *id.* at 194 (arguing that “widely ratified standards of international human rights law” must provide the benchmark for assessing whether harm is persecutory).

135. See, e.g., *Stenaj v. Gonzales*, 227 F. App'x 429, 433 (6th Cir. 2007) (noting, in dicta, that “[w]hether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists.”) (citations omitted); *Matter of S-L-L-*, 24 I&N Dec. 1, 5 (BIA 2006) (noting that Congress' intent in amending the INA was “to afford refugee status to persons whose fundamental human rights were violated by a government's application of its coercive family planning policy”), *overruled on other grounds by Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008); *Abay v. Ashcroft*, 368 F.3d 634, 638–39 (6th Cir. 2004) (noting that female genital mutilation is a violation of international law); *Mansour v. Ashcroft*, 390 F.3d 667, 677–82 (9th Cir. 2004) (Pregerson, J., concurring in part and dissenting in part) (looking to international human rights law to inform an analysis of persecution).

136. See USCIS PAST PERSECUTION GUIDANCE, *supra* note 29, § 3.3.

international human rights treaties recognize the right to privacy.¹³⁷ For example, Article 12 of the Universal Declaration on Human Rights (Universal Declaration) provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation” and that “[e]veryone has the right to the protection of the law against such interference or attacks.”¹³⁸ Under the human rights-based approach, the persecutor’s online censorship may amount to a persecutory harm because it violates this treaty provision protecting privacy.¹³⁹

Other treaties outside the standard canon of human rights law, but which help to complement and contextualize established human rights, may also help to identify online harms as persecutory.¹⁴⁰ For example, while the right to be forgotten is still an emerging right under international law,¹⁴¹ a violation of that right may help to identify persecution.¹⁴² The right to be forgotten includes the right to erasure—the general right to delete information about oneself from the online world.¹⁴³ It also includes the right to delisting—the specific right to remove information about oneself from search engine results, such as those provided by Google.¹⁴⁴ Under the European Union’s General Data Protection Regulation (GDPR), an individual has the right to compel a social media platform, which is subject to the GDPR, to remove content pertaining to her.¹⁴⁵ For example, an individual who has been the victim of a deepfake has the legal right to compel the platform to remove it.¹⁴⁶ If the platform fails to take down the deepfake, it has violated the individual’s right to be forgotten under the GDPR.¹⁴⁷

137. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 12 (Dec. 10, 1948) [hereinafter UNIVERSAL DECLARATION]; International Covenant on Civil and Political Rights, U.N. DOC. A/6316 art. 17 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, acceded to by the United States of America Jun. 8, 1992; Convention on the Rights of the Child art. 16, Nov. 20, 1989, 28 I.L.M. 1448, 1577 U.N.T.S. 3 (Dec. 16, 1996); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter EUROPEAN CONVENTION].

138. UNIVERSAL DECLARATION, *supra* note 137, at art. 12.

139. See HATHAWAY & FOSTER, *supra* note 133, at 200–01 (arguing that the international human rights standards that inform or help to define persecution must be based on the Universal Declaration, among other international human rights agreements).

140. *Cf. id.*, at 201 (noting that the newer generation of human rights treaties complement and contextualize the general rights set out in the Universal Declaration and prior international human rights agreements).

141. *Cf. Andrew Neville, Is it a Human Right to be Forgotten? Conceptualizing the World View*, 15 SANTA CLARA J. INT’L L. 157, 168–72 (2017) (arguing that the emerging right to be forgotten should be considered a human right under international law).

142. See General Data Protection Regulation (GDPR) (EU) 2016/679, art. 17 [hereinafter GDPR] (enshrining the right to be forgotten in the European Union); see also *Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD)*, ECLI:EU:C:2014:616 (May 13, 2014) (addressing the right to be forgotten in the context of the European Union’s Data Protection Directive, 95/46/EC (Oct. 1995)).

143. See Ignacio N. Cofone, *Online Harms and the Right To Be Forgotten*, in THE RIGHT TO BE FORGOTTEN chap. 1 (2020) (defining the right to be forgotten).

144. See *id.*

145. See GDPR, *supra* note 142, at art. 17 (providing that an individual has the right to compel a data controller, such as a social media platform, to erase her personal data without undue delay).

146. See *id.*

147. See *id.*

If the persecutor's online conduct violates the right to be forgotten, then that conduct may be persecutory. For example, an asylum-seeker's right to be forgotten may be violated if she is unable to have memes mocking her and her religious beliefs promptly removed from a social media platform or search engine. She may not be able to have the meme removed, for example, because her government operates or exerts control over the platform or search engine.¹⁴⁸ In such a scenario, the harm—the continued online presence of the meme—may be persecutory under U.S. law because it causes additional harms, such as emotional or economic injuries. The failure to remove the meme may also amount to persecutory harm under international law. Under the human rights-based approach, persecution involves “serious harm” to the individual and a government's failure to protect the individual from a serious denial of human rights.¹⁴⁹ Thus, under this example, if the failure to remove the meme involves a failure of state protection and the individual experiences “serious harm,” then the individual may have been persecuted.

In addition to the right to privacy and the right to be forgotten, online conduct that violates other international human rights may also amount to persecution. For example, a restriction on an asylum-seeker's ability to tweet about her religion may violate Article 18 of the Universal Declaration, which protects an individual's freedom of religion.¹⁵⁰ A restriction on tweeting may also violate Article 19 of the Universal Declaration, which protects an individual's “freedom to hold opinions without interference and to seek, receive and impart information and ideas *through any media and regardless of frontiers.*”¹⁵¹

Similarly, online conduct that violates the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) may also qualify as persecution.¹⁵² For example, a deepfake may violate several articles of the European Convention, including Article 3, which prohibits inhumane or degrading treatment, as well as Article 8, which protects the right to respect for private life and correspondence.¹⁵³ Online surveillance may violate the right to freedom of expression found in Article 10, which

148. See SHABAZ, *The Rise of Digital Authoritarianism*, *supra* note 2; Irina Shklovski & Nalini Kotamraju, *Online Contribution Practices in Countries that Engage in Internet Blocking and Censorship*, 1109–18, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems (2011), <https://doi.org/10.1145/1978942.1979108> (documenting how governments coerce online platforms into online surveillance and censorship and the limited actions that platforms take in response to the coercion). An individual may also have difficulty in having the image removed if she is unable to identify the site's ownership, location, or search host. See Melody Lee Rood & John Schriener, *The Internet Never Forgets: Image-Based Sexual Abuse and the Workplace*, in HANDBOOK OF RESEARCH ON CYBERBULLYING AND ONLINE HARASSMENT IN THE WORKPLACE 118 (Leslie Ramos Salazar ed., 2020).

149. See HATHAWAY & FOSTER, *supra* note 133, at 184 (conceptualizing “being persecuted” as comprising two essential elements—“serious harm” and a “failure of state protection”—and providing an in-depth explanation of these two elements).

150. UNIVERSAL DECLARATION, *supra* note 137, at art. 18.

151. *Id.* at art. 19 (emphasis added).

152. See EUROPEAN CONVENTION, *supra* note 137.

153. *Id.* at arts. 3, 8. See, e.g., *Buturugă v. Romania*, App. No. 56867/15, ¶¶ 55, 60–63, 74 (Eur. Ct. H.R. Feb. 11, 2020), <http://hudoc.echr.coe.int/eng?i=001-201342> (finding that breaches of online privacy,

includes the right “to receive and impart information and ideas without interference by public authority and *regardless of frontiers*.”¹⁵⁴ Blocking access to the internet may similarly violate Article 10 because it prevents individuals from both receiving and imparting information and ideas.¹⁵⁵

In addition to an outright recognition that violations of international human rights may amount to persecution, online harm that violates international human rights standards can also serve as supporting evidence of persecution.¹⁵⁶ Viewing online harm through the lens of international human rights law may, thus, be helpful in assessing whether an individual has experienced persecution. Regardless of whether the online harm is novel in form, implicates an individual’s privacy, or violates international human rights standards, it has several characteristics that may elevate it to persecution under U.S. law.

B. *Characteristics of Online Harm*

Online harm has unique characteristics that may cause an asylum-seeker to experience injuries rising to the level of persecution: online harm may have offline origins and effects, reinforce offline power dynamics, amplify injury, and be difficult to avoid.

1. *Entanglement of the Online and Offline Realms*

The origins and effects of online harm are not limited to the online world.¹⁵⁷ A persecutor may threaten or harm an asylum-seeker online for her online presence,¹⁵⁸ but he may also threaten her online for her offline words, actions, or identity.¹⁵⁹ Similarly, a persecutor may threaten or harm an asylum-seeker offline for her online presence.¹⁶⁰ The persecutor’s words or

including intrusion into a domestic partner’s computer and the manipulation and sharing of her online data and images, violate Articles 3 and 8).

154. EUROPEAN CONVENTION, *supra* note 137, at art. 10 (emphasis added). *Cf.* Youth Initiative For Human Rights v. Serbia, App No. 48135/06, ¶¶ 16, 22–26 (Eur. Ct. H.R. Jun. 25, 2013), <http://hudoc.echr.coe.int/eng?i=001-120955> (finding that online surveillance implicates Article 10).

155. EUROPEAN CONVENTION, *supra* note 137, at art. 10. *See, e.g.,* Cengiz and Others v. Turkey, App No. 48226/10, 14027/11, ¶¶ 59–66 (Eur. Ct. H.R. Dec. 1, 2015), <http://hudoc.echr.coe.int/eng?i=001-159188> (finding that blocking university academics’ access to YouTube violates Article 10); Ahmet Yıldırım v. Turkey, No. 3111/10, ¶¶ 46–69 (Eur. Ct. H.R. Dec. 18, 2012), <http://hudoc.echr.coe.int/eng?i=001-115705> (noting that blocking access to one individual’s website as a result of a wholesale blocking of all sites hosted by Google violates Article 10).

156. *See, e.g.,* Mansour v. Ashcroft, 390 F.3d 667, 677–82 (9th Cir. 2004) (Pregerson, J., concurring in part and dissenting in part); *see also* Stenaj v. Gonzales, 227 F. App’x 429, 433 (6th Cir. 2007).

157. *See* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 102 (“When we connect to the Internet . . . we do not enter a separate space. Networked interactions are embedded in real life . . . [P]osts are situated where individuals are who view them. They profoundly influence victims’ on- and offline lives.”) (citations omitted).

158. *See, e.g.,* Porras v. Holder, 543 F. App’x 867, 870–74 & n.7 (10th Cir. 2013) (family threatened offline and online due to their offline and online identities).

159. *See id.*

160. *See, e.g.,* Mathews v. U.S. Att’y Gen., 757 F. App’x 803, 807 (11th Cir. 2018) (CAT applicant threatened with physical violence after refusing to censor anti-government comments posted on his blog); Vallenilla v. U.S. Att’y Gen., No. 17–10263, at *2–5 (11th Cir. Mar. 2, 2018) (journalist threatened

actions may then influence or inspire others to threaten or harm the asylum-seeker online or offline.¹⁶¹ For example, some individuals could interpret a persecutor's tweet making bomb threats at an asylum-seeker as a call to engage in offline violence.¹⁶² This entanglement of the online and offline realms means that the asylum-seeker may be harmed on two fronts. For example, an act of doxing or revenge porn that includes the asylum-seeker's home address may result in individuals showing up at her door to harm her, as well as emotional or psychological trauma stemming from the anticipation of their arrival.¹⁶³ The resulting mixture of online and offline harms may, taken together, amount to persecution.

2. Reinforcement of Offline Power Dynamics and Societal Divisions

Another important aspect of the online realm is that a persecutor may use online harm to reinforce offline power dynamics and societal divisions.¹⁶⁴ For example, a persecutor may send a bigoted tweet about a religious minority already experiencing offline mistreatment. An asylum-seeker may perceive such a tweet as persecutory *because* it is based on and reinforces religious divisions.¹⁶⁵ To the asylum-seeker, the tweet is more than just tasteless or offensive language: it is another tool used to reinforce offline religious persecution.

3. Amplification of Injury

One of the most significant characteristics of social media is that it can amplify injury due to its repetition, permanence, searchability, and ability to reach a wide and varied audience.¹⁶⁶ To appreciate how social media may amplify injury, it is first necessary to understand how social media works.

offline due to her social media presence); *see also* HUMAN RIGHTS WATCH, EVENTS OF 2020, *supra* note 1, at 188 (documenting that, due to their anti-government publications, bloggers and social media influencers are routinely subject to offline and online harm in Cuba, including violence, arrests, travel restrictions, and cuts to internet access); HUMAN RIGHTS WATCH REPORT, VENEZUELA: EVENTS OF 2018, <https://www.hrw.org/world-report/2019/country-chapters/venezuela> (documenting the death of one individual and the detention of three children following their anti-government posts on social media).

161. *See, e.g.*, HUMAN RIGHTS WATCH, EVENTS OF 2020, *supra* note 1, at 543 (documenting that the military, national security agencies, and the police in the Philippines have actively used social media to threaten and label individuals as communists, putting those individuals at a heightened risk for offline harm and resulting in many of their deaths).

162. *See* Laura Smith-Spark, *Calls for Action as Female Journalists Get Bomb Threats on Twitter*, CNN ONLINE (Aug. 2, 2013), <https://www.cnn.com/2013/08/01/world/europe/uk-twitter-threats>.

163. *See* MacAllister, *supra* note 121, at 2454; Calabro, *supra* note 121, at 55.

164. *See* Chesney & Citron, *Deep Fakes*, *supra* note 110, at 1780–81 (describing how deepfakes may reinforce offline societal divisions); *see also* Reem Ramadan, *Questioning the Role of Facebook in Maintaining Syrian Social Capital During the Syrian Crisis*, 3 HELIYON 1, 8–9, 11–12 (2017) (finding that, during war, individuals extended offline societal divisions to Facebook).

165. *See* Imran Awan & Iren Zempi, *The Affinity Between Online and Offline Anti-Muslim Hate Crime: Dynamics and Impacts*, 27 AGGRESSION AND VIOLENT BEHAVIOR 1, 13, 21–22 (2016) (explaining that, in a victim's mind, there is no boundary between online and offline harms and that all harms directed at a core part of the victim's identity have a greater effect than other harms).

166. *Cf.* Wanda Cassidy, Chantal Faucher & Margaret Jackson, *Cyberbullying Among Youth: A Comprehensive Review of Current International Research and Its Implications and Application to Policy and Practice*, 34 SCHOOL PSYCH. INT'L 575, 578–83 (2013) (documenting that several characteristics of

At its core, social media allows people to share content.¹⁶⁷ For example, on Twitter, a user shares content by “tweeting”—or sending a short post—to his followers.¹⁶⁸ He may also share another’s content by “retweeting” the other individual’s tweet or embedding it in his own tweet with or without additional commentary.¹⁶⁹ Other platforms similarly allow and encourage content sharing.¹⁷⁰ There are many reasons that people share content online. For example, some individuals use social media to share false, novel news.¹⁷¹ Others share content that echoes their point-of-view.¹⁷² Individuals may also share content because doing so gives them clout with other social media users.¹⁷³ Significantly, individuals may compete with like-minded social media users to be the most offensive or abusive poster.¹⁷⁴

There are several ways to describe content that is shared online. The content may be described as repetitive if the original content is shared multiple times by the original author or his followers.¹⁷⁵ The content may also be referred to as “viral” if others have shared it quickly and to broader audiences.¹⁷⁶ If it is riddled with extreme ideas or purposefully incorrect information, the shared content may have “polluted” the online realm.¹⁷⁷

Repetitive sharing of content by one or more individuals may compound and escalate—in other words, amplify—the asylum-seeker’s injury.¹⁷⁸ For

cyberbullying, including repetitiveness, permanence, and the potential for dissemination to a wide audience, amplify injury).

167. See Gandomi & Haider, *supra* note 1, at 142.

168. See *How to Tweet*, TWITTER, <https://help.twitter.com/en/using-twitter/how-to-tweet> (last visited Dec. 3, 2020).

169. See *How to Retweet*, TWITTER, <https://help.twitter.com/en/using-twitter/how-to-retweet> (last visited Dec. 3, 2020); see also Dhiraj Murthy, *Towards a Sociological Understanding of Social Media: Theorizing Twitter*, 46 SOCIOLOGY 1059, 1067 (2012) (explaining how content is shared on Twitter through the use of embedding).

170. See, e.g., *Send a Snap*, SNAPCHAT, <https://support.snapchat.com/en-US/a/send-snap> (last visited Dec. 3, 2020).

171. Cf. Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146–51 (2018) (finding that false, novel news is more likely to be shared).

172. See Pablo Barberá, John T. Jost, Jonathan Nagler, Joshua A. Tucker & Richard Bonneau, *Tweeting From Left to Right: Is Online Political Communication More Than an Echo Chamber?*, 26 PSYCH. SCIENCE 1531, 1531–42 (2015) (finding that content that echoes the sharer’s political point-of-view is more likely to be shared).

173. See Kaitlyn Tiffany, *Why Kids Online Are Chasing ‘Clout’*, THE ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/technology/archive/2019/12/clout-definition-meme-influencers-social-capital-youtube/603895/> (explaining how and why people share online content to increase their clout with other online users).

174. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 4–5, 29, 51–55.

175. See Julian J. Dooley, Jacek Pyzalski & Donna Cross, *Cyberbullying Versus Face-to-Face Bullying: A Theoretical and Conceptual Review*, 217 JOURNAL OF PSYCHOLOGY 182, 183 (2009) (describing the repetitive nature of online harm).

176. See KARINE NAHON & JEFF HEMSLEY, GOING VIRAL 15–40 (2013).

177. See RYAN M. MILNER & WHITNEY PHILLIPS, YOU ARE HERE: A FIELD GUIDE FOR NAVIGATING POLARIZED SPEECH, CONSPIRACY THEORIES, AND OUR POLLUTED MEDIA LANDSCAPE 7 (2021) (using ecological metaphors to describe online content); see also Abby Olheiser, *Maybe it’s time to retire the idea of “going viral,”* MIT TECHNOLOGY REVIEW (May 17, 2020), <https://www.technologyreview.com/2020/05/17/1001809/maybe-its-time-to-retire-the-idea-of-going-viral/> (explaining different ways to describe online content other than as viral).

178. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63, 66–67 (2009) [hereinafter Citron, *Cyber Civil Rights*] (discussing the aggregative nature of the internet); see also Citron &

example, the original, persecutory tweet may be retweeted multiple times by the persecutor or his followers. Even after being removed from the original platform, persecutory content may be reposted.¹⁷⁹ Individuals may compete to one-up each other in being persecutory, posting uglier forms of the original content.¹⁸⁰ As a result, the number of individuals engaged in online attacks may increase.¹⁸¹ The persecutor may even capitalize on the ease of online sharing for his persecutory benefit, allowing others to perpetuate, manipulate, and amplify the online content.¹⁸² The shared, persecutory content results in a repetitive revictimization of the asylum-seeker: she may be targeted with multiple copies of the persecutor's original content, as well as altered and possibly more offensive versions of the content.¹⁸³

However, even if the persecutory tweet or meme is not repetitively shared, the asylum-seeker's injury may still be amplified due to the permanence and searchability of online content. Search engines, such as Google, social media platforms themselves, and third-party sites often index online content—that is, permanently archive content in order to make it searchable by third parties.¹⁸⁴ For example, the Internet Archive's Way-Back Machine has archived 431 billion web pages going back to May 1996.¹⁸⁵ Multiple archived copies lead to a seeming permanence of searchable online content.¹⁸⁶ Tracking down and erasing multiple copies of data in the custody of multiple third parties is difficult in general.¹⁸⁷ Compelling multiple data custodians or third

Solove, *Privacy Harms*, *supra* note 113, at 43–44 (discussing the effects of the aggregation of many, small online privacy harms on an individual and society).

179. See Katlyn M. Brady, *Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn*, 28 HASTINGS WOMEN'S L.J. 3, 10, 18 (2017) (describing the difficulties in removing revenge porn); J. Nathan Matias, Amy Johnson, Whitney Erin Boesel, Brian Keegan, Jaclyn Friedman & Charlie DeTar, *Reporting, Reviewing, and Responding to Harassment on Twitter*, WOMEN, ACTION, AND THE MEDIA 9–24 (May 13, 2015), <https://arxiv.org/ftp/arxiv/papers/1505/1505.03359.pdf> (describing the difficulties in removing content on Twitter).

180. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 4–5, 29, 51–55; see also Jane, *supra* note 97, at 560–61.

181. See Matias et al., *supra* note 179, at 10 (describing the phenomenon of “dog-piling” on Twitter in which many users concurrently attack the victim, often as a part of a campaign or coordinated attack).

182. See Citron, *Cyber Civil Rights*, *supra* note 178, at 100.

183. See, e.g., Harwell, *supra* note 96 (discussing the emotional trauma of Rana Ayyub, an investigative journalist in India, who was subjected to a deepfake, pornographic video of her that was spread “by the thousands across Facebook, Twitter, and WhatsApp”).

184. See, e.g., *How Search organizes information*, GOOGLE SEARCH, <https://www.google.com/search/howsearchworks/crawling-indexing/> (last visited Dec. 4, 2020) (explaining indexing on Google).

185. See *Internet Archive Wayback Machine*, THE INTERNET ARCHIVE, <https://archive.org/web/> (last visited May 11, 2020); *What is the oldest page on the Wayback Machine?*, THE INTERNET ARCHIVE, <https://archive.org/post/60275/what-is-the-oldest-page-on-the-wayback-machine> (last visited May 11, 2020); *Why'd You Push that Button?*, hosted by Ashley Carman, THE VERGE (Oct. 17, 2018), <https://www.theverge.com/2018/10/17/17984896/tweet-delete-max-read-brianna-wu-whyd-you-push-that-button-podcast> (including partial transcript from interview with Mark Graham, Director of the Wayback Machine, Internet Archive, full interview available on webpage recording from 36:30 to 48:28).

186. See *supra* notes 184 and 185.

187. See, e.g., Seth Fiegerman, *I tried to delete myself from the internet. Here's what I learned*, CNN ONLINE (May 21, 2020), <https://edition.cnn.com/2020/05/21/tech/deleting-personal-data-online/index.html> (describing the difficulties with erasing online content); see also Abby Olheiser, *Erasing yourself from the Internet is nearly impossible. But here's how you can try*, WASH. POST (Feb. 10, 2017), <https://>

parties to erase content authored by another individual or group is even more challenging.¹⁸⁸

Due to the permanence and searchability of online content, a persecutor's words and actions may be found by the asylum-seeker and others long after they were first posted. A quick perusal of Google or Twitter can demonstrate the ease of searching for online content—even content that is seemingly old or may have been erased on the original platform.¹⁸⁹ Even when there is only one act of persecutory content, the permanence of that act and the ease with which it can be found mean that the asylum-seeker's injury is ongoing.¹⁹⁰ She may repeatedly encounter the persecutor's online content, resulting in emotional and psychological trauma far into the future.¹⁹¹

The possibility of widespread dissemination of persecutory content also amplifies injury.¹⁹² The asylum-seeker may experience reputational, emotional, and psychological damage because many individuals have seen the persecutory content.¹⁹³ She may also fear that, due to the potentially large audience for the persecutor's online content, there is a greater likelihood of individuals acting in response to or in support of the persecutor's content, including further harming her online or offline.¹⁹⁴ For example, if the online acts involve pictures or videos, she may be more easily identified, increasing the likelihood of offline harm.¹⁹⁵ The asylum-seeker may thus experience emotional and psychological distress, fearing that she may be attacked by a persecutory cybermob, as well as by offline, in-person assailants.¹⁹⁶

A victim's injury may also be amplified because of how persecutors use social media. For example, persecutors may use sexually violent vitriol and imagery, as well as threaten sexual violence and rape against women and individuals in the LGBTQI communities.¹⁹⁷ Such words and actions may be

www.washingtonpost.com/news/the-intersect/wp/2017/02/10/erasing-yourself-from-the-internet-is-nearly-impossible-but-heres-how-you-can-try/.

188. See, e.g., Matias et al., *supra* note 179, at 9–24 (describing victims' difficulties in removing other individuals' offensive content from Twitter).

189. See *Help with Google search visibility*, TWITTER, <https://help.twitter.com/en/safety-and-security/remove-twitter-profile-from-google-search> (last visited May 12, 2020); *How to use advanced search*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-advanced-search> (last visited on May 10, 2020).

190. See Dooley et al., *supra* note 175, at 183.

191. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 4; Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY L. 359, 362 (2016).

192. See Trotter et al., *supra* note 126, at 28; CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 4–5; Dooley et al., *supra* note 175, at 183.

193. See Chesney & Citron, *Deep Fakes*, *supra* note 110, at 1771–75; Calabro, *supra* note 121, at 55–58; Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–51 (2014).

194. See Dooley et al., *supra* note 175, at 183.

195. See *id.*

196. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 5–8.

197. See, e.g., HUMAN RIGHTS WATCH, EVENTS OF 2020, *supra* note 1, at 398 (documenting that high-ranking politicians in Kosovo continue to direct homophobic comments and hate speech towards activists and members of the LGBTQI communities on social media); Elisa Lees Munoz, *Beyond Anecdotal Reports: Some Hard Data About the Online Abuse of Women Journalists*, in NEW

used to intimidate and threaten individuals, not just on account of their gender, but also on account of other protected grounds.¹⁹⁸ An asylum-seeker may find online harm to have severe effects because it is misogynistic, gendered, or sexually violent or invasive.¹⁹⁹ The resulting injuries may include emotional and psychological trauma, as well as online self-censorship.²⁰⁰

Amplification of injury may also occur if the targeted individual is a child.²⁰¹ Due to their youth, children may perceive online harm as having a heightened impact relative to offline harm.²⁰² The child may feel as though she must comply with the persecutor's online and offline demands.²⁰³ The result of the online harm to a child is often devastating, leading to long-lasting emotional and psychological trauma, disruption in development, impaired relationships, self-harm, and suicide.²⁰⁴

4. *Difficulty in Avoiding Past Online Harm*

An asylum-seeker may also have difficulty in avoiding past online harm, further amplifying her injury. She may be limited in her ability to compel others, including the social media platform, to remove the persecutor's content.²⁰⁵ Even if the persecutor's content is removed from one user's posts or on one platform, it may be reposted by other individuals and in other fora.²⁰⁶

CHALLENGES TO FREEDOM OF EXPRESSION: COUNTERING ONLINE ABUSE OF FEMALE JOURNALISTS 27–29 (2016) (documenting online harm directed towards female journalists).

198. See Calabro, *supra* note 121, at 69 (gender and race); Awan & Zempi, *supra* note 165, at 9 (gender and religion); Munoz, *supra* note 197, at 26–29 (gender and political opinion); see also AMNESTY INT'L, *Online Abuse Against Women*, *supra* note 97 (conducting a survey of women across eight countries and finding that 58% of the survey participants had experienced online harm that included racism, sexism, homophobia, or transphobia).

199. See, e.g., Harwell, *supra* note 96 (reporting that Ms. Ayyub felt that the pornographic, deepfake video of her was “uniquely visceral, invasive and cruel” and caused her to be hospitalized for anxiety). See generally Danielle Keats Citron, *Sexual Privacy*, 128 YALE L. J. 1870, 1924–28 (2019).

200. See UNESCO Report 2019, *supra* note 5, at 49–54.

201. See, e.g., Peraza v. U.S. Att’y Gen., 779 F. App’x 873, 875 (3d Cir. 2019) (juvenile asylum-seeker received death threats via Facebook); Romero-Donado v. Sessions, 720 F. App’x 693, 695 (4th Cir. 2018) (juvenile CAT applicant received death threats via Facebook); see also Matter of Jimenez-Cedillo, 27 I&N Dec. 782, 784–85 (BIA 2020) (recognizing the exponential growth of online sexual predation perpetrated against children); UNICEF, *More than a third of young people in 30 countries report being a victim of online bullying* (Sept. 3, 2019), <https://www.unicef.org/press-releases/unicef-poll-more-third-young-people-30-countries-report-being-victim-online-bullying>.

202. See, e.g., Cassidy et al., *supra* note 166, at 580–81; see also Dooley et al., *supra* note 175, at 183.

203. See Malin Joleby, Sara Landström, Carolina Lunde & Linda S. Jonsson, *Experiences and Psychological Health Among Children Exposed to Online Child Sexual Abuse—A Mixed Methods Study of Court Verdicts*, 27 PSYCH., CRIME & L. 159, 170 (2021) (documenting that children felt threatened by and compelled to comply with the online perpetrator's demands).

204. See *id.* at 170–175.

205. See, e.g., Lorelai Laird, *Victims are taking on ‘revenge porn’ websites for posting photos they didn’t consent to*, ABA JOURNAL ONLINE (Nov. 1, 2013), https://www.abajournal.com/magazine/article/victims_websites_photos_consent (noting that some websites require victims to pay a fee for removal of the content); Matias et al., *supra* note 179, at 9–24 (describing the difficulties in removing content on Twitter).

206. See, e.g., Laird, *supra* note 205 (comparing the removal of online revenge porn to the carnival game, whac-a-mole: “as soon as photos are gone from one site, they pop up in two or three other places”).

As online harm is not confined by domestic or intrastate boundaries,²⁰⁷ changing physical locations or internally relocating within her home country may not protect the asylum-seeker from seeing—and re-experiencing—*past* online harm.²⁰⁸ The asylum-seeker may feel as though she cannot escape the persecutor's *past* online actions and words. This cycle of constant revictimization—seeing and experiencing the persecutor's past content as it is regenerated by the persecutor and others—as well as the emotional and psychological burdens of not being able to escape the online harm through the passage of time or physical relocation, may amplify the asylum-seeker's injury.²⁰⁹ Given how profoundly online harm may affect an individual, it is imperative to develop a framework for addressing asylum claims involving online harm.

III. FRAMEWORKS FOR RECOGNIZING PAST ONLINE HARM IN ASYLUM CLAIMS

A. *A History of Recognizing Novel Harms*

As illustrated in Part II, persecutors may manipulate social media to harm individuals. Accepting online harm as persecutory is not a radical idea but, rather, fits with the U.S. legal regime's history of recognizing different or novel forms of harm as persecutory. Some harms that are now accepted as falling on the spectrum of persecutory harms were not always accepted or recognized as such. For example, the scope of persecution has expanded over time to include harms such as emotional and psychological injuries, economic deprivation, and gender-based harms, such as rape and female genital mutilation.²¹⁰ While courts have taken the lead in recognizing many of these harms as persecution, Congress has also stepped in. Notably, Congress specifically amended U.S. asylum law to recognize that experiencing or fearing a forced abortion or involuntary sterilization due to a country's coercive population control program qualifies as persecution.²¹¹

207. See, e.g., Goodin, *supra* note 99.

208. See, e.g., Robert Slonje & Peter K. Smith, *Cyberbullying: Another Main Type of Bullying?* 49 SCANDINAVIAN J. PSYCHOL. 147, 148 (2008) (noting that, despite a change in physical location, a cyberbullying victim may continue to receive harmful online communications).

209. An asylum-seeker may also have difficulty avoiding future online harm. For example, she may not be able to conceal, minimize, or eradicate her own online presence to avoid detection by the persecutor. See, e.g., Fiegerman, *supra* note 187 (describing the difficulties with erasing one's online presence); see also Byrne, *supra* note 3, at 642 (“[T]he electronic traces of cyber dissent may indeed be permanent. . .”).

210. See, e.g., Mashiri v. Ashcroft, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (recognizing emotional and psychological harm as persecutory); Matter of T-Z-, 24 I&N Dec. 163, 170–75 (BIA 2007) (recognizing economic harm as persecutory); Hernandez-Montiel v. INS, 225 F.3d 1084, 1097 (9th Cir. 2000) (recognizing rape as persecutory), *overruled on other grounds* by Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005); Abebe v. Gonzales, 432 F.3d 1037, 1042 (9th Cir. 2005) (en banc) (recognizing female genital mutilation as persecutory).

211. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. 3610, 104th Cong. § 103–04 (1996) (amending 8 U.S.C. § 1101(a)(42) to recognize such harms as persecution on account of a political opinion); see also Matter of S-L-L-, 24 I&N Dec. 1, 5–7 (BIA 2006) (applying the congressional amendments).

Similar to the United States' approach, international human rights law has taken an open-ended or non-exhaustive approach to recognizing new forms of harm as persecution. For instance, the United Nations High Commissioner for Refugees noted that there is "no universally accepted definition of persecution" and whether harms will amount to persecution "will depend on the circumstances of each case."²¹² Some international human rights scholars have also supported an open-ended or non-exhaustive list, arguing that there may be some unforeseen or yet unknown mode of persecution. For example, noting that the preamble to the 1967 Protocol accompanying the Refugee Convention calls for the accommodation of "new refugee situations," James C. Hathaway and Michelle Foster argue that the drafters of the Refugee Convention declined to define persecution because "they recognized the impossibility of enumerating in advance all of the forms of maltreatment that might legitimately entitle persons to benefit from international protection."²¹³

Since both U.S. and international human rights law have been historically open to recognizing new harms as persecution, the next step is to decide whether we, as an American society, are willing to recognize that online harm can be persecutory. As T. Alexander Aleinikoff noted, in accepting certain forms of harm as persecutory, we have made a normative judgment that the harm is severe and not justified.²¹⁴ We have also acknowledged that the individual seeking protection due to her experience or fear of that harm is worthy of protection.²¹⁵ Similar to other harms that are now recognized as potentially persecutory, online harm may also be severe and unjustified, raising it to the level of persecution, even if it is not tied to offline harms or events. Certainly, an individual who has experienced online harm is no less worthy of protection than an individual who has experienced offline harm. While we, as an American society, could decide that online harm is not severe, such a decision is fundamentally a normative judgment and would neither reflect how novel harms have been historically recognized under U.S. asylum law nor how online harm is or may be experienced by asylum-seekers. Excluding or minimizing online harm as evidence or a form of persecution also does not reflect the intent behind the Refugee Convention to provide flexibility in recognizing "new refugee situations."²¹⁶

212. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 51–53 (1979) [hereinafter UNHCR Handbook].

213. HATHAWAY & FOSTER, *supra* note 133, at 181; *see also* A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 193 (1966) (noting that "[i]t seems as if the [Refugee Convention] drafters [may] have wanted to introduce a flexible concept which might be applied to circumstances as they might arise").

214. *See* T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 12–13, 27 (1991) (discussing the normative aspect of assessing the degree and justification for a harm imposed on an individual or group).

215. *See id.* The international human rights and refugee law regimes also make normative judgments about the severity of harm and who is worthy of protection. *See* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 152–53 (2002).

216. *See* HATHAWAY & FOSTER, *supra* note 133, at 181.

The next sections will propose two frameworks for evaluating asylum claims in which the asylum-seeker alleges that she was harmed online in the past. Under one framework, online harm may be treated as evidence of overall or cumulative past persecution. Under the other framework, online harm is conceptualized as persecution *by itself*—that is, as online persecution.²¹⁷ Both frameworks are supported by U.S. precedents addressing offline harms and reflect the realities of online harm.

B. *Framework 1: Evidence of Overall or Cumulative Persecution*

Under the first framework, online harm may be evidence of overall or cumulative past persecution. Within this approach, an adjudicator or court would consider online harm in conjunction with the conditions in the asylum-seeker's home country and any other offline harms experienced by the asylum-seeker, her family, her friends, or individuals with whom she shares a protected ground to determine if the asylum-seeker experienced past persecution. Put another way, if the asylum-seeker or others have experienced offline harm or there is offline turmoil in the asylum-seeker's home country, then the online harm may be additional evidence that the asylum-seeker has been persecuted. Taken together, this mixture of online and offline harms and events may amount to past persecution.²¹⁸ For example, if an asylum-seeker's government doxed her, leading to economic hardship, and she has experienced other offline harm, such as detention, those harms together may amount to overall or cumulative past persecution.²¹⁹

This framework is simply a recognition that online harm may be evidence of overall or cumulative persecution. There is no valid reason to exclude online harm as a category of potential evidence. First, there are no restrictions

217. Under the regulations, only harm in the asylum-seeker's home country or country of last habitual residence may be considered past persecution. *See* 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2021). Given this limitation, the two proposed frameworks assume that the past online harm occurred while the asylum-seeker was still in her home country or last habitual residence. *See id.* However, if the online harm occurred while the asylum-seeker was in the United States or a third country, the online harm may be evidence of future persecution. *See id.*

218. As with asylum claims based purely on offline harms, past persecution involving a mixture of online and offline harms would also require evidence that the persecutor was motivated to harm the asylum-seeker on account of her identification or association with a protected ground. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992).

219. *See* discussion *supra* Part I.A (examining the courts' historical recognition that threats and harms may amount to overall or cumulative past persecution); *see also* Final Rule, *supra* note 8, at 80,328 (explaining that the new regulatory definition of persecution is not intended to conflict with prior case law explaining that harms must be considered in the aggregate and cumulatively). It is important to note that, even if the asylum-seeker has not experienced past persecution or fails to meet her evidentiary burden of establishing past persecution, online harm may still be relevant evidence of future persecution. *See* U.S.C. §§ 1101 (a)(42), 1158; 8 C.F.R. §§ 208.13, 1208.13 (2021). For example, even if a court or adjudicator were to determine that an online threat is not evidence of past persecution, it may nonetheless be evidence of a well-founded fear of future persecution. *See, e.g.,* Canales-Vargas v. Gonzales, 441 F.3d 739, 744–45 (9th Cir. 2006) (finding that threats are evidence of future persecution); Kaiser v. Ashcroft, 390 F.3d 653, 658–59 (9th Cir. 2004) (same). *But see* Peraza v. U.S. Att'y Gen., 779 F. App'x 873, 875 (3d Cir. 2019) (affirming an asylum denial involving offline and online death threats); Romero-Donado v. Sessions, 720 F. App'x 693, 697 (4th Cir. 2018) (upholding a denial of CAT protection despite online death threats).

on which types of harms may be considered when determining overall or cumulative persecution. Rather, courts have recognized that persecution is a fluid term and the determination of which harms amount to persecution requires an individualized analysis.²²⁰ Consequently, courts have recognized that a wide variety of harms may be relevant to an assessment of overall or cumulative persecution.²²¹ By extension, there must be no limitation on the types of online harms that may be considered in determining persecution. Online threats, online censorship, online surveillance, doxing, and other online harms may all be relevant evidence of persecution.

Second, there are also no inherent cut-offs for the timing or age of evidence of past persecution. Rather, individual instances of offline harm that occur at different times over a period of years may be relevant evidence of overall or cumulative past persecution.²²² The same approach must apply to online harms. Thus, a doxing that occurred five years ago or a series of death threats made on Twitter over the course of five years could be relevant to a finding of overall or cumulative persecution.

It is important to emphasize that courts have specifically held that an offline threat may be relevant evidence of overall or cumulative persecution, especially if there was turmoil in the asylum-seeker's home country or the threat was coupled with other harms directed at the asylum-seeker or others.²²³ The same approach must be taken with online threats. For example, governmental tweets ordering the asylum-seeker's co-religionists to leave the country, which were made in the context of offline mistreatment of her co-religionists, could amount to past persecution.²²⁴

C. *Framework 2: Online Persecution*

As persecution is neither a static concept in society nor under U.S. asylum law, the law must evolve to recognize the new ways that governments and others may target people in the online realm.²²⁵ Thus, a second framework for addressing online harm recognizes that online harm may qualify as

220. See, e.g., *Ordonez-Quino v. Holder*, 760 F.3d 80, 87–88 (1st Cir. 2014) (noting that “[p]ersecution is a fluid term, not defined by statute” and “courts usually assess whether harm rises to the level of persecution on a case-by-case basis”) (citations omitted); *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) (noting that persecution covers a range of harms and “[t]he determination that actions rise to the level of persecution is very fact-dependent”) (citation omitted).

221. See, e.g., *Ordonez-Quino*, 760 F.3d at 87–88; *Cordon-Garcia*, 204 F.3d at 991.

222. See, e.g., *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (finding that harms over many years may add up to persecution) (citing to *Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000)).

223. See, e.g., *Sanchez-Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223, 1233–34 (11th Cir. 2007) (finding that a threat accompanied with violence against a family member amounts to past persecution); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (finding that a threat in conjunction with evidence of political and social turmoil in the home country cumulatively amounts to past persecution).

224. See *Ouda v. INS*, 324 F.3d 445, 454 (6th Cir. 2003) (noting, in the context of overall mistreatment of members of the same nationality, that “[t]he mere fact that the Oudas were ordered by the government to leave Kuwait because they were perceived enemies of their country is sufficient alone to establish past persecution”).

225. See discussion *supra* Part III.A (discussing U.S. asylum law’s history of recognizing novel harms as persecution).

persecution *by itself*. Under such a framework, online harm may be severe enough, even if it is not accompanied by additional offline words, acts, or events. For example, being threatened on social media could be classified as persecution *by itself*. Being doxed may amount to persecution *by itself*. In other words, online harm may amount to online persecution.

1. *As the Equivalent to the Offline Version of Harm*

There are several ways to recognize online harm as persecution by itself. Under the first approach, online harm is recognized as persecution if the offline version is recognized as persecution. For example, if an offline threat of death or violence may, by itself, amount to past persecution, then an online threat of death or violence may, by itself, amount to past persecution.²²⁶ Under this approach, a death threat is still a death threat, regardless of the medium of communication.²²⁷ By extension, if a court were to find that the offline version of the threat does not rise to the level of past persecution but, rather, is indicative of future persecution, then the online threat would also be treated as evidence of future persecution, rather than past persecution.²²⁸

Similarly, if emotional and psychological suffering rooted in the offline world may amount to past persecution by itself, then so too must mental trauma originating from online words, actions, or events.²²⁹ Just as a threat of rape or death in-person or on the phone may lead to emotional and psychological suffering that amounts to persecution, an online threat may result in similar trauma.²³⁰ Other online harms, such as online economic or financial harms, should also be considered persecution if their offline versions are so treated.²³¹

If this approach is adopted, the online version of the harm must be granted at least the same potential evidentiary weight and relevance as the offline version of the harm. If there is no minimum number of offline threats that must occur in order to find past persecution, then there should also be no minimum

226. See, e.g., *Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) (finding that “the threat of death alone constitutes persecution” and the asylum-seeker “was not required to additionally prove long-term physical or mental harm to establish past persecution”); *Thomas v. Ashcroft*, 359 F.3d 1169, 1179 (9th Cir. 2004) (noting that “threats of violence and death are enough” to establish past persecution) (citation omitted).

227. See, e.g., *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (finding that non-verbal threats may amount to persecution).

228. See, e.g., *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744–45 (9th Cir. 2006) (finding that threats are evidence of future persecution); *Kaiser v. Ashcroft*, 390 F.3d 653, 658–59 (9th Cir. 2004) (same).

229. See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (finding that emotional and psychological harm may amount to past persecution).

230. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 16–18 (providing examples of the emotional and psychological harm from online threats of rape and death).

231. See, e.g., *Matter of T-Z-*, 24 I&N Dec. 163, 170–75 (BIA 2007) (finding that economic harms may amount to persecution).

number of online threats to accomplish the same.²³² Just as cumulative threats of violence and death in the offline world may amount to past persecution, the same may hold true for cumulative threats made in the online world.²³³ If an implied, non-verbal threat made offline may amount to persecution by itself, then a meme or Instagram post could possibly rise to the level of persecution by itself as well.²³⁴ Even a persecutor's friend request on Facebook could be an implied, persecutory threat in some circumstances.²³⁵

However, there are drawbacks to equating online harm with its offline version. While this approach makes online harm relevant in asylum adjudications, it assumes that there is an equivalent or analogous offline counterpart which, in the case of some online harms, may not exist. For example, there is no equivalent to doxing in the offline world. Revenge porn—such as having one's head plastered onto another's naked body and reposted thousands of times in an online forum—is also new and would be challenging, if not impossible, to duplicate in the offline realm.

Further, this approach does not fully account for the potential amplification of injury that occurs online. For example, a death threat on Twitter could be viewed as analogous or, even, equivalent to an in-person death threat if the tweet's effect or severity were only measured by its written content. Yet, due to repetition or widespread dissemination, for example, the severity of an online threat may be even greater than that of an offline threat.²³⁶ In this scenario, the online threat is neither equivalent nor analogous to the offline threat. Thus, another approach is needed to account for the novel forms and unique characteristics of online harm.

2. *As a New Form of Persecution*

In a second conceptualization, online harm is recognized as a new, unique form of persecution in its own right. Thus, being doxed is recognized as a new form of persecution, just as coercive family planning was recognized as a new form of persecution.²³⁷ In the case of doxing, this conceptualization is logical. While there is no equivalent to doxing in the offline world, the result

232. *See, e.g.*, *Gomes v. Gonzales*, 473 F.3d 746, 754 (7th Cir. 2007) (noting that there is no requirement that multiple harms occur in order to establish persecution); *see also* *Irasoc v. Mukasey*, 562 F.3d 727, 730 (7th Cir. 2008) (noting that a single incident of harm may amount to persecution).

233. *See, e.g.*, *Herrera-Reyes v. U.S. Att'y Gen.*, 952 F.3d 101, 107–08 (3d Cir. 2020) (noting that “threat cases are not an exception to the general rule of cumulative analysis but simply applications of it”); *see also* *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (noting that “repeated and especially menacing death threats can constitute a primary part of a past persecution claim”) (citations omitted).

234. *See, e.g.*, *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (finding that non-verbal threats may amount to persecution). *But see* *Lara-Guzman v. Sessions*, 710 F. App'x 494, 496 (2d Cir. 2018) (denying, due to a lack of corroborating evidence, an asylum claim involving a Facebook message accompanied by a picture of a dead body).

235. *But see* *Godinez v. Barr*, 929 F.3d 598, 601–02 (8th Cir. 2019) (assuming that a friend request is not threatening).

236. *See* discussion *supra* Part II.B (discussing the effects of repetitive and widespread dissemination of online harm).

237. *See, e.g.*, *Matter of S-L-L-*, 24 I&N Dec. 1, 5–7 (BIA 2006) (recognizing coercive family planning as persecution).

of doxing—having one’s entire personal and financial life dumped online—could lead to severe economic deprivation, which is recognized as persecution in the offline context.²³⁸ As another example, a tweet containing a threatening meme, which has no equivalent in the offline realm, would be recognized as a new form of persecution. As will be discussed in the next sub-section, many of these new online harms are unique because they amplify injury.

3. *As Online Harm that Amplifies Injury*

A third approach conceptualizes online persecution as online harm that amplifies injury. In this conceptualization, online persecution is a new, unique form of persecution whose chief characteristic is the potential to amplify injury. Recognizing social media’s unique amplification of injury is supported by current U.S. case law. Courts have repeatedly recognized that cumulative injuries arising from the offline world may amplify injury, resulting in a finding of past persecution.²³⁹ Likewise, international refugee law has similarly recognized that cumulative offline harms may amount to persecution.²⁴⁰ There is no reason—other than one based on a purely normative judgment—not to recognize that cumulative injuries may occur through social media and that these cumulative, online-originating injuries, by themselves, may amount to past persecution.

In the online realm, online harm can be repeated—retweeted, reposted, and forwarded multiple times across multiple platforms.²⁴¹ The repetitive or widespread sharing by multiple individuals may compound and even escalate the asylum-seeker’s reputational, emotional, or psychological injuries.²⁴² Just as courts have recognized with offline harms, multiple or repetitive harms in the online realm should also be recognized as potentially amounting to cumulative persecution.²⁴³ Similarly, just as courts have recognized with offline harms, incidents of online harm that occur over the course of many years could potentially amount to cumulative persecution.²⁴⁴ For example, a doxing that occurred five years ago coupled with a subsequent doxing two days ago

238. See, e.g., *Matter of T-Z-*, 24 I&N Dec. 163, 170–75 (BIA 2007) (finding that economic harms may amount to persecution).

239. See discussion *supra* Part I.A (examining the courts’ historical recognition that threats and harms may cumulatively amount to past persecution).

240. See UNHCR Handbook, *supra* note 212, ¶ 53 (recognizing that individual harms may cumulatively amount to persecution); see also Rebecca Dowd, *Dissecting Discrimination in Refugee Law: An Analysis of Its Meaning and Its Cumulative Effect*, 23 INT’L. J. REFUGEE. L. 28, 28–53 (2011) (arguing that it is consistent with principles of international human rights and refugee law to recognize the cumulative effects of individual instances of discrimination as persecution).

241. See discussion *supra* Part II.B (discussing the modes and effects of sharing content online).

242. See *id.*

243. See, e.g., *Herrera-Reyes v. U.S. Att’y Gen.*, 952 F.3d 101, 112 (3d Cir. 2020) (finding that multiple offline harms cumulatively amounted to past persecution); *Krotova v. Gonzales*, 416 F.3d 1080, 1087 (9th Cir. 2005) (similar).

244. See, e.g., *Ahmed v. Keisler*, 504 F.3d 1183, 1194 (9th Cir. 2007) (finding that harms over many years amounted to past persecution) (citing to *Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000)).

may constitute persecution. Significantly, just as with multiple offline threats, multiple online threats could cumulatively amount to persecution *by themselves*, especially if the online words threaten death or violence against the individual.²⁴⁵ In these scenarios, the online harm has an aggregative quality that amplifies the asylum-seeker's injury.

However, persecution is more than just the aggregation of cumulative harms.²⁴⁶ In evaluating asylum claims involving online harm, the focus should not be limited to whether a threshold number of tweets or Facebook posts have been reached to constitute online persecution.²⁴⁷ Rather, like offline persecution, online persecution is contextual.²⁴⁸ Thus, an incident of online harm that occurs in conjunction with other online harms perpetrated against the asylum-seeker or others may amount to persecution.²⁴⁹ For example, persecution may have occurred if an asylum-seeker and her co-religionists were simultaneously doxed. Being subjected to online harm while there was turmoil in her home country or as the persecutor commits other online human rights abuses may also amount to persecution.²⁵⁰ For example, an academic in political science who was surveilled on a messaging app while the government also cut off the university's access to the internet during a contested election may have experienced persecution.²⁵¹ In these scenarios, the context in which the online harm occurred adds potency to the persecutor's online conduct.

Contextual amplification may also occur because the online harm involves escalating threats and violence. Just as courts have recognized that escalating threats and violence occurring offline may amount to persecution, escalating threats and violence occurring online may also amount to persecution.²⁵² For

245. See, e.g., *Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) (finding that “the threat of death alone constitutes persecution” and the asylum-seeker “was not required to additionally prove long-term physical or mental harm to establish past persecution”); *Thomas v. Ashcroft*, 359 F.3d 1169, 1179 (9th Cir. 2004) (noting that “threats of violence and death are enough” to establish past persecution) (citation omitted).

246. See Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 288 (2013) (arguing that “mere aggregation overlooks the context of the events in a manner that can skew the true extent of harm”).

247. Cf. *id.* (making this argument with respect to harms in general).

248. See, e.g., *Cordon-Garcia v. INS*, 204 F.3d 985, 991 (9th Cir. 2000) (noting that “[t]he determination that actions rise to the level of persecution is very fact-dependent”) (citation omitted).

249. See, e.g., *Sanchez-Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223, 1233–34 (11th Cir. 2007) (finding past persecution where the persecutors threatened and were violent towards the asylum-seeker and his daughter); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004) (finding past persecution where, in addition to forced portrage on one occasion, the asylum-seeker experienced anguish due to the arrest, torture, and killing of a fellow preacher).

250. See, e.g., *Ouda v. INS*, 324 F.3d 445, 453 (6th Cir. 2003) (finding past persecution in the context of human rights violations); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (finding past persecution in the context of political and social turmoil in the home country).

251. Cf. *Cengiz and Others v. Turkey*, App. No. 48226/10, 14027/11, ¶¶ 59–66 (Eur. Ct. H.R. Dec. 1, 2015), <http://hudoc.echr.coe.int/eng?i=001-159188> (finding that blocking university academics' internet access violated Article 10 of the European Convention protecting the freedom of expression).

252. See, e.g., *Mejia v. U.S. Att’y Gen.*, 498 F.3d 1253, 1257–58 (11th Cir. 2007) (finding that escalating threats and violence may amount to persecution); *Nakibuka v. Gonzales*, 421 F.3d 473, 478 (7th Cir. 2005) (similar).

example, escalation may occur when a doxing that includes the asylum-seeker's home address is then followed by a Facebook post calling for an attack on the asylum-seeker. As another example, a tweet mocking the asylum-seeker's religion may be followed by one calling for the expulsion of all adherents of that religion from the country. Both scenarios involve actions with increasingly severe consequences for the asylum-seeker.

Amplification of injury may also occur because of the potential permanence, searchability, and widespread dissemination of online content. As a result of these factors, the asylum-seeker may continue to experience the online and offline effects of the persecutor's online content long after it was initially posted. She may also experience reputational, emotional, and psychological harm because others have and will continue to encounter the persecutor's online act or words. She may also live in fear and anguish that other individuals will act online or offline in the future in response to the persecutor's online conduct. Thus, due to the unique characteristics of the online realm, the asylum-seeker's injury may be ongoing.²⁵³

Online gendered violence may also amplify injury. Sexual violence is often used specifically as a tool to intimidate and silence individuals online, resulting in acute emotional and psychological trauma.²⁵⁴ Just as it occurs offline, gendered violence may also be used online to persecute women and individuals in the LGBTQI communities on account of a protected ground.²⁵⁵ Such online harm—amplified through gendered violence—may amount to persecution. In all the scenarios discussed above, due to the amplification of the asylum-seeker's injury, the online harm may be sufficiently severe to qualify by itself as persecutory harm under U.S. asylum law.

In evaluating whether online harm amounts to online persecution, another helpful approach is to consider whether online harm creates a persecutory social environment. Matthew Scott has proposed that, in the context of international refugee law, persecution should not be framed as a singular event resulting in the serious denial of human rights under international law.²⁵⁶ Rather, an individual is “being persecuted” if she inhabits a persecutory social environment—a condition of existence in which her government may fail to protect her from the denial of a human right.²⁵⁷

Drawing from Mr. Scott's approach, online persecution should not be defined by the occurrence of one online event or act but, rather, the persecutory social environment that the online event or act has created for the

253. See discussion *supra* Part II.B (discussing how and why injuries are amplified on social media).

254. See *id.*

255. See, e.g., *Hernandez-Chacon v. Barr*, 948 F.3d 94, 105 (2d Cir. 2020) (discussing how gendered violence is used as a tool to persecute on account of a protected ground); *Nakibuka*, 421 F.3d at 477 (same); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (same).

256. See MATTHEW SCOTT, *CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION* 110 (James Hathaway ed., Cambridge Univ. Press 2020) (defining “being persecuted” as “a condition of existence entailing (a real chance of being exposed to) serious denials of human rights demonstrative of a failure of state protection”).

257. See *id.* at 107–110.

targeted individual. In other words, the persecutor's online words or actions may have created a persecutory social environment for the asylum-seeker. Framing online harm this way may be particularly helpful for cases in which there are only a few or, perhaps, only one online event or act, such as one tweet or doxing. For example, a tweet that includes the asylum-seeker's home address with an embedded message calling to kill her because of her religion could be categorized as one event or act. While seemingly only one event or act, that one tweet could amount to past persecution under U.S. law if it caused the asylum-seeker severe emotional and psychological trauma.²⁵⁸ Yet, with that one tweet, the asylum-seeker may also find herself in a persecutory social environment: she must potentially choose between her life and her religion. She may, thus, no longer be able to practice her religion—which is a serious denial of human rights under international law and a severe injury amounting to persecution under U.S. law.²⁵⁹ Moreover, the online harm may give rise to ongoing emotional and psychological trauma: in addition to suffering anguish because she can no longer practice her religion, she may be distraught, fearing that she may be killed if she tries to do so.²⁶⁰

Finally, in contextualizing online harm and the severity of an asylum-seeker's injury, it is important to consider an asylum-seeker's perception of the online harm. Just as an asylum-seeker's subjective perception of an offline harm may be relevant in determining whether a harm should be classified as persecutory, an asylum-seeker's perception of the online harm may be just as significant.²⁶¹ For example, as acknowledged under U.S. asylum law, a child may perceive offline harm perpetrated against her family more acutely than an adult would so perceive.²⁶² Similarly, a child may have a more acute response to online harm than an adult.²⁶³ Just as the asylum-seeker's subjective perception of harm is considered in the offline context, the same must be allowed for online harms.²⁶⁴

258. See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (finding that emotional and psychological harm may amount to past persecution).

259. See, e.g., UNIVERSAL DECLARATION, *supra* note 137, at art. 18 (protecting the freedom of religion as a human right); see also *Guo v. Sessions*, 897 F.3d 1208, 1216 (9th Cir. 2018) (finding that governmental actions that force an asylum-seeker to abandon his religious worship amount to past persecution); *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (noting that “having to practice religion underground to avoid punishment is itself a form of persecution”) (citation omitted).

260. See *Rempell*, *supra* note 246, at 289, 319–23 (proposing that, in evaluating whether offline harm amounts to persecution, it is helpful to consider whether the asylum-seeker experiences continuous suffering).

261. See, e.g., *Ordonez-Quino v. Holder*, 760 F.3d 80, 90–92 (1st Cir. 2014) (finding that a child's point of view must be considered in evaluating whether harm amounts to persecution); USCIS PAST PERSECUTION GUIDANCE, *supra* note 29, §3.2.5 (recommending consideration of an elderly individual's point of view when evaluating whether harm amounts to persecution).

262. See, e.g., *Ordonez-Quino*, 760 F.3d at 90–92.

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

264. Cf. *Cengiz and Others*, App. No. 48226/10, 14027/11, ¶ 49 (noting that the effects of restricting access to a website will depend on the individual).

Additionally, even if one individual does not perceive a particular online harm as severe, another may have a different perception.²⁶⁵ This is particularly important to keep in mind when the online harm involves a novel harm, such as doxing. In other words, one individual may perceive a particular online harm—such as doxing or revenge porn—or the resulting amplification of injury more acutely than another would. For example, women and individuals in the LGBTQI communities may perceive online harm as persecutory *because* it involves gendered violence, while heterosexual men may not perceive similar online words and actions directed toward them in the same way.²⁶⁶ As another example, the repetitiveness, permanence, searchability, and widespread dissemination of online harm may impact some more than others.²⁶⁷

Although this Part has proposed two frameworks for evaluating online harm in asylum claims, there is likely to be future resistance to recognizing online harm as persecutory. The final Part of this Article will address several arguments that downplay the significance of online harm in asylum claims.

IV. REFUTING ARGUMENTS AGAINST RECOGNIZING ONLINE HARM AS PERSECUTION

A. *Declaring Asylum as an Inappropriate Remedy for Online Harm*

There are several potential arguments that can be made against recognizing online harm as persecution.²⁶⁸ One potentially significant argument rejecting online harm as persecution goes as follows: online harm may be unpleasant, discriminatory, misogynistic, racist, or even involve threats of physical harm,

265. See, e.g., USCIS PAST PERSECUTION GUIDANCE, *supra* note 29, § 3.7.1 (“Evidence of the applicant’s psychological and emotional characteristics, such as the applicant’s age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.”); see also UNHCR Handbook, *supra* note 212, ¶ 53 (noting that harms may cumulatively “produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution” that will “depend on all the circumstances, including the particular geographical, historical and ethnological context”).

266. See, e.g., *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (advising that “[t]he unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal, or CAT claim”).

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

268. This Article does not cover all potential issues surrounding the recognition of online harm as persecution. While courts have begun to explore many of these unresolved issues, future scholarship will need to address potential concerns over fraud and manufactured claims (see, e.g., *Y.C. v. Holder*, 741 F.3d 324, 338 (2d Cir. 2013)); an increase in the number of claims (see, e.g., *id.*); the asylum-seeker’s credibility and sincerity (see, e.g., *Erepadei v. Barr*, 772 F. App’x 321, 322–23 (6th Cir. 2019); *Pelaez-Castellanos v. U.S. Att’y Gen.*, 781 F. App’x 853, 856–57 (11th Cir. 2019); *Weinong Lin v. Holder*, 783 F.3d 244, 250 (2d Cir. 2014)); meeting evidentiary burdens and requirements for corroborating evidence with respect to social media (see, e.g., *Lara-Guzman v. Sessions*, 710 F. App’x 494, 496 (2d Cir. 2018); *Xu v. Lynch*, 644 F. App’x 73, 75 n.1 (2d Cir. 2016); *Kwadjjo Akyaw Osei-Wusu v. Holder*, 562 F. App’x 48, 49 (2d Cir. 2014)); determining the weight to be afforded to the corroborating evidence (see, e.g., *Dun Lin Wang v. Holder*, 379 F. App’x 105, 106–07 (2d Cir. 2010)); and, whether an individual’s online presence may be a characteristic of a particular social group (see, e.g., *Rong Chen v. Holder*, 395 F. App’x 93, 95 (5th Cir. 2010)).

but it is not appropriate to address such harm through the relief of asylum.²⁶⁹ The corollary to this approach is that other forms of redress or relief may be more appropriate for addressing online harm, such as recourse through the criminal justice system, relief from the social media platform itself, or redress under laws governing defamation, cyberbullying, or hate speech. An additional corollary is that an asylum-seeker at least *should* or even *must* first seek out or exhaust other remedies through the social media platform or her government before seeking asylum.

This argument is flawed for a few reasons. First, rejecting asylum as a remedy for online harm runs afoul of the principle of *non-refoulement* under international law and incorporated into U.S. asylum law. This principle provides that an individual will not be returned to a place where her life or freedom would be threatened on account of one of the five protected grounds for asylum.²⁷⁰ If online harm includes a threat to an individual's life or freedom on account of a protected ground, then returning the asylum-seeker to that country violates the principle of *non-refoulement* and U.S. asylum law. In such a scenario, asylum is an appropriate form of relief in response to online harm.

Second, this argument incorrectly assumes that other forms of redress or relief are available and effective. Yet, effective legal remedies may not exist in the asylum-seeker's home country for online harms.²⁷¹ Even where existing laws could be applied to online threats or harm, obtaining protection from law enforcement agencies may be nonetheless difficult.²⁷² Likewise, it may be challenging to obtain relief directly from the social media platform.²⁷³

269. See, e.g., *Final Rule*, *supra* note 8, at 80,332, 80,385–86, 80,394–95 (stating that “[a]sylum law is not meant to provide redress for every victim of crime no matter how sympathetic those victims may be” and adding at 8 C.F.R. §§ 208.1(e) and 1208.1(e) that “[p]ersecution does not encompass . . . all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional”).

270. See Refugee Convention, *supra* note 17, at art. 33(1); UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, ¶ 5 (2007) (noting that the principle of non-refoulement is the cornerstone of international refugee protection), <https://www.unhcr.org/4d9486929.pdf>; Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981) (explaining that the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980), incorporates the international definition of refugee into U.S. asylum law).

271. See, e.g., *Buturugă v. Romania*, App. No. 56867/15, ¶ 73 (Eur. Ct. H.R. Feb. 11, 2020), <http://hudoc.echr.coe.int/eng?i=001-201342> (discussing the inadequacy of a domestic tort action to address the online harm); Sarai Chisala-Tempelhoff & Monica Twesiime Kirya, *Gender, Law and Revenge Porn in Sub-Saharan Africa: A Review of Malawi and Uganda*, PALGRAVE COMMUN. 2 (Oct. 7, 2016) (discussing the inadequacy of domestic laws to address revenge porn), <http://link.springer.com/10.1057/palcomm.2016.69>; Miriam Berger, *Brazilian 17-Year-Old Commits Suicide after Revenge Porn Posted Online*, BUZZFEED NEWS (Nov. 20, 2013), <https://www.buzzfeednews.com/article/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-porn-pos> (discussing draft legislation to respond to revenge porn in the wake of a teenager's suicide).

272. See, e.g., *Beizaras & Levickas v. Lithuania*, App. No. 41288/15, ¶¶ 16–18 (Eur. Ct. H.R. Jan. 14, 2020), <http://hudoc.echr.coe.int/eng?i=001-200344> (detailing the government's refusal to launch an investigation into online harm directed at two members of the LGBTQI community); Harwell, *supra* note 96 (detailing Ms. Ayyub's difficulty in reporting the deepfake video to police).

273. See Laird, *supra* note 205, at 25 (noting that some online sites require victims to pay a fee for removal of the content); Matias et al., *supra* note 179, at 9–24 (describing the difficulties in removing content on Twitter).

Even if a platform suspends an offending account, a new account may quickly replace the one recently suspended.²⁷⁴ Sometimes, social media platforms are even complicit in the online harm, allowing, for example, government persecutors to censor, surveil, or data-mine their users.²⁷⁵ Some platforms are even purposefully set up to facilitate online harm.²⁷⁶

Moreover, even assuming that other forms of redress or relief are available and effective, these avenues do not preclude the appropriateness of also seeking asylum or refugee status. Crucially, with the possible exception of laws and platform policies addressing hate speech,²⁷⁷ other available forms of relief are not predicated on the idea that the individual is being targeted *on account of* a protected ground and that the harm amounts to a threat to her life or freedom. A tweet calling for an individual's death if she does not remove her religious head covering certainly may offend a platform's discrimination policies or violate a foreign country's laws governing cyberbullying, but it also may be evidence of persecution that should allow victims to gain protection under U.S. asylum law.

Finally, an absolute requirement to seek other assistance first from the platform or authorities conflicts with current U.S. asylum law and would require an asylum-seeker to do more than the law requires of those who have experienced offline harm.²⁷⁸ Under U.S. asylum law, if the government is the persecutor, an asylum-seeker is not required to demonstrate that she affirmatively sought the assistance or protection of the police, her government, or a third party.²⁷⁹ Rather, she is only required to establish that the government is the persecutor.²⁸⁰ In the case of a non-state persecutor whom the government is unable or unwilling to control, an asylum-seeker is not required to report the persecution to the authorities if doing so would have been futile or subjected her to additional harm.²⁸¹ Moreover, requiring her to seek the assistance

274. See Matias et al., *supra* note 179, at 9–10 (describing the phenomenon on Twitter of “chaining” in which users replace suspended accounts with new ones).

275. See, e.g., Jeb Su, *Confirmed: Google Terminated Project Dragonfly, Its Censored Chinese Search Engine*, FORBES (Jul. 19, 2019), <https://www.forbes.com/sites/jeanbaptiste/2019/07/19/confirmed-google-terminated-project-dragonfly-its-censored-chinese-search-engine/> (discussing Google's prior project facilitating online censorship in China).

276. See Michael L. Pittaro, *Cyber Stalking: An Analysis of Online Harassment and Intimidation*, 1 INT'L J. CYBER CRIMINOLOGY 180, 184 (2007) (providing examples of such sites).

277. See, e.g., Alexander Brown, *Models of Governance of Online Hate Speech*, COUNCIL OF EUR. 46–51 (2020) (discussing countries' and platforms' definitions of hate speech); *Hateful conduct policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Dec. 5, 2020) (prohibiting certain online conduct based on race, religion, and “ethnicity/national origin,” among others).

278. See, e.g., *Villalta-Martinez v. Sessions*, 882 F.3d 20, 33 (1st Cir. 2018) (“We have never held . . . that asylum seekers must have sought assistance from authorities in order for them to be able to prove that they have suffered past persecution.”).

279. See, e.g., *Ayala v. U.S.*, 605 F.3d 941, 950–51 (11th Cir. 2010) (finding that there is no reporting requirement when the government is responsible for the persecution); *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (same).

280. See, e.g., *Ayala*, 605 F.3d at 950–51.

281. See, e.g., *Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019) (holding that there is no reporting requirement in the case of a non-state persecutor if reporting would have been futile or subjected the asylum-seeker to further abuse) (citing to *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir.

of the social media platform incorrectly assumes that the platform is not beholden, controlled, or influenced by the government or non-state persecutor.²⁸²

B. *Treating Online Harm as a Continuation of Offline Harm*

Another way to downplay the significance of online harm is to treat it as a continuation or extension of the persecutor's offline persecution.²⁸³ However, this approach ignores the possibility that the persecutor may be using online harm to amplify other persecutory acts that occur offline. An analogy is in order here. Let us assume that a government has historically burned down the homes of a particular religious group. If the government also starts to imprison that group, then the overall persecution has increased. In other words, the threat or act of imprisonment amplifies the historical, religious persecution. Similarly, if that same government now tweets to its two million followers calling for the deaths of members of that religious group, then the government's tweet amplifies the offline persecution, increasing the overall persecution. In other words, the online harm is more than a continuation of offline harm: it is a tool used to enforce offline persecution more stringently or harshly.²⁸⁴

Recognizing that the online and offline worlds are intertwined, some may argue that online harm is relevant to an overall assessment of persecution but should not be considered persecution on its own. An obvious problem with this argument is that there are new forms of online harm for which there are no comparable forms of offline harm, such as doxing and revenge porn.²⁸⁵ Additionally, this argument fails to appreciate that, due to amplification, online harm by itself may result in a severe enough injury to be classified as persecutory.²⁸⁶ For example, as previously discussed, online harm may result in severe emotional and psychological harm, even in the absence of corresponding offline harm.²⁸⁷

2006)); *see also* Lopez v. U.S. Att'y Gen., 504 F.3d 1341, 1345 (11th Cir. 2007) (noting that reporting may be excused if the government would be unable or unwilling to protect the asylum-seeker and for that reason she could not rely on them); Matter of S-A-, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding that, even if the asylum-seeker had sought help, the government would have been unable or unwilling to protect her, thereby subjecting her to additional harm).

282. *See, e.g.*, Su, *supra* note 275.

283. *See, e.g.*, Ming Chen v. Holder, 722 F.3d 63, 67–68 (1st Cir. 2013) (“The Internet has emerged as an effective tool for dispersing ideas in authoritarian societies, and the Chinese government’s purported desire to control that medium is entirely consistent with its general approach toward pro-democracy activism.”); Qing Chen v. U.S. Att’y Gen., 428 F. App’x 212, 215 (11th Cir. 2011) (noting that the government’s “efforts to control activism via the internet is merely part of its ongoing history of suppressing dissent and controlling the dissemination of barred ideas and material”).

284. *Cf.* Jiang v. U.S. Att’y Gen., 568 F.3d 1252, 1258 (11th Cir. 2009) (finding that the asylum-seeker’s case merited reopening because China’s family planning laws were being more stringently enforced, leading to more forced sterilizations).

285. *See* discussion *supra* Part II.A.

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

287. *See id.*

C. *Requiring Avoidance of Online Harm*

Some may argue that online harm could and should be avoided or ignored. This statement can be broken down into three distinct arguments: (1) the asylum-seeker could and should have avoided or ignored *past* online harm *in the past*; (2) the asylum-seeker could and should avoid or ignore *past* online harm *in the future*; or (3) the asylum-seeker could and should avoid *future* online harm *in the future*. These statements include a normative judgment that the asylum-seeker is responsible for her own safety and incorrectly place an affirmative duty on her to avoid or ignore past or future online harm.

Proponents of avoidance might suggest ways that the asylum-seeker should respond to past or future online harm. They might suggest that the asylum-seeker avoid the online harm by staying off a particular social media platform or the internet entirely.²⁸⁸ Others might invalidate her emotional response to and subjective fear of the online harm, advising her to “get over it.”²⁸⁹ Still, others may add the sentiment that she brought it upon herself by being online.²⁹⁰ Others might even argue that she could and should physically relocate within her home country to avoid the online harm,²⁹¹ even though online harm crosses domestic and intrastate boundaries.²⁹²

There are several ways to counter the argument that an asylum-seeker has an affirmative duty to avoid past or future online harm. To begin with, U.S. asylum law does not require an individual to have taken measures to avoid past persecution. As the Eleventh Circuit noted, a determination of past persecution “cannot be discharged by asking whether the applicant could have somehow avoided the past persecution.”²⁹³ Similarly, an individual should not be required to have taken measures to avoid past online harm.

With respect to avoiding future online harm in the future, U.S. asylum law does not require an individual to hide her identification with a protected ground to avoid future persecution.²⁹⁴ Just as an individual is not required to hide her identification with a protected ground in the offline realm, she should not be required to withdraw, even partially, from the online world to avoid online

288. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 19–20, 29, 73–92.

289. See *id.*

290. See *id.* See, e.g., Qing Yun Lin v. U.S. Att’y Gen., 429 F. App’x 889, 891–92 (11th Cir. 2011) (discussing the underlying decision that noted that any change in the government’s mistreatment of the asylum-seeker was specifically due to her online publicization of her political opinion and religious activities).

291. See 8 C.F.R. §§ 208.13(b), 208.16(b), 1208.13(b), 1208.16(b) (2021) (providing that, if it is reasonable under all circumstances, an individual may be denied asylum if she could internally relocate in her home country).

292. See Goodin, *supra* note 99 (documenting that online harm crosses geographical boundaries).

293. Antipova v. U.S. Att’y Gen., 392 F.3d 1259, 1265 (11th Cir. 2004).

294. See Velasquez-Banegas v. Lynch, 846 F.3d 258, 262 (7th Cir. 2017) (noting that asylum-seekers fearing future persecution are not required “to hide characteristics like religion or sexual orientation, and medical conditions, such as being HIV positive”) (citation omitted).

harm if doing so amounts to hiding her identification with a protected ground.²⁹⁵

Requiring future avoidance of past online harm is also not tenable. Such a requirement fails to recognize that the past online harm may be an ongoing injury. Requiring an individual to stay off a particular platform also incorrectly assumes that the past online harm might not be forwarded to the asylum-seeker or found on other platforms.²⁹⁶ In other words, avoidance of one platform will not prevent the asylum-seeker from experiencing the ongoing injury of finding or fearing that she might find the content on another platform. Similar to the analysis of future online harm, an individual should also not be required to avoid past online harm in the future if doing so hinders her identification with a protected ground. Finally, it is simply unfair in the modern era to require someone to stay off a particular platform or the internet entirely to avoid either past or future harm.

D. *Redefining Persecution to Exclude Online Harm*

Some may argue that persecution should be defined to exclude online harm. The *Final Rule* provides an example of how persecution could be redefined to exclude or limit online harm. As noted in Part I, the *Final Rule* adds to the Departments' regulations a narrow definition of persecution, a scale for assessing the severity of harm, and several manifestations of harm or circumstances that are categorically excluded as persecution.²⁹⁷ The Departments explain in the *Final Rule's* preamble that, in making the regulatory amendments, they are clarifying what they characterize as the federal courts' wide-ranging definitions of persecution, as well as aligning the definition of persecution with what they interpret as Congress' intent to provide a high standard for the "extreme concept" of persecution.²⁹⁸ Underlying the *Final Rule* is the normative judgment that certain harms—and, perhaps even, individuals²⁹⁹—do not warrant relief.³⁰⁰

While the Departments' *Final Rule* does not specifically discuss the online realm, two labels—"interpersonal" and "private"—which were added to the asylum regulations, could foreseeably apply to the online world, even if it is

295. See *Antipova*, 392 F.3d at 1264–65 (noting that asylum-seekers who have been persecuted in the past and fear future persecution are not required "to avoid signaling to others that they are indeed members of a particular race, or adherents of a certain religion, etc.>").

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

297. See *Final Rule*, *supra* note 8, at 80,385–86, 80,394–95 (adding new paragraphs at 8 C.F.R. §§ 208.1(e) and 1208.1(e) (2021)).

298. See *id.* at 80,281, 80,327–28.

299. See, e.g., *id.* at 80,281, 80,335–38, 80,385, 80,395 (adding regulatory text at 8 C.F.R. §§ 208.1(f)(8) and 1208.1(f)(8) indicating that the U.S. government "will not favorably adjudicate the claims of aliens who claim persecution based on . . . gender").

300. See *id.* at 80,327 (noting that "it is well established that not every harm that befalls an alien, even if it is unfair, offensive, unjust, or even unlawful, constitutes persecution").

incorrect or inaccurate to do so.³⁰¹ Notably, the regulations were amended to designate “interpersonal animus or retribution” as a reason that would generally not satisfy the nexus element.³⁰² It is easy to imagine a persecutor’s motivation for his online conduct being labeled as “interpersonal,” especially if the persecutor is a non-state actor.³⁰³ The regulations were also amended to limit when “private actors” are categorized as government or government-sponsored persecutors for the purposes of determining the reasonableness of internal relocation.³⁰⁴ It is not farfetched to imagine online trolls—actors engaged in online activities aimed to create disruption or conflict³⁰⁵—being categorized as “private actors” who are not acting as government-sponsored persecutors.

Significantly, the *Final Rule’s* new definition of persecution could be used to exclude or limit online harm as past persecution. The regulatory text provides that “[f]or purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat.”³⁰⁶ This text requires that a harm reach a threshold of severity to qualify as persecutory. As Human Rights Watch noted, “exigent” assumes a “gun to the head” level of threat.³⁰⁷ In addition, as written, the “exigent threat” portion of the regulatory language could be interpreted as a requirement. If, for example, the regulatory language had been written as “a severe level of harm that *may* include actions so severe that they constitute an exigent threat” or as “a severe level of harm that includes actions so severe that they *may* constitute an exigent threat,” the “exigent threat” portion could be read as an *example* of the required level of severity.

301. See Sarah Ford, *Public and Private in the Blogosphere* 18–26 (July 2019) (Ph.D. dissertation, University of Massachusetts, Amherst), https://scholarworks.umass.edu/dissertations_2/1575 (providing an overview of theories rejecting the idea that the online world is divided into distinct public and private spheres).

302. Compare *Final Rule*, *supra* note 8, at 80,281, 80,330–31, 80,386, 80,395 (adding 8 C.F.R. §§ 208.1(f)(1), (2) and 1208.1(f)(1), (2) to designate “interpersonal animus or retribution” as a reason that would generally not satisfy the nexus element), with *id.* at 80,334 (leaving open that “in rare circumstances, given the fact-specific nature of such determinations, such facts could be the basis for finding nexus”).

303. See *Final Rule*, *supra* note 8, at 80,331 (“[‘I]nterpersonal’ is not a meaningless modifier. The Departments use the term ‘interpersonal’ to differentiate instances of animus and dispute between two private parties from instances of animus and dispute between a private individual and a government official.”).

304. See *id.* at 80,281–22, 80,387, 80,396 (adding 8 C.F.R. §§ 208.13(b)(3)(iv), 208.16(b)(3)(iv), 1208.13(b)(3)(iv), and 1208.6(b)(3)(iv) to address when “private actors” are government or government-sponsored persecutors for purposes of determining the reasonableness of internal relocation for asylum, withholding of removal, and CAT claims).

305. See Megiddo, *supra* note 2, at 423 (defining online trolls).

306. 8 C.F.R. §§ 208.1(e), 1208.1(e) (2021); see also *Final Rule*, *supra* note 8, at 80,386, 80,395.

307. See Bill Frelick, *Comment on FR Doc # 2020-12575, Comment on procedures for asylum and withholding of removal; credible fear and reasonable fear*, HUM. RTS. WATCH (July 21, 2020), available at <https://www.regulations.gov/comment/EOIR-2020-0003-4755> (making this argument with respect to offline harm). While the discussion here is about past persecution, it is important to keep in mind that a well-founded fear of future persecution only requires a *likelihood* of future persecution, not a *certainty* or *immediacy*. See *Herrera-Reyes v. U.S. Att’y Gen.*, 952 F.3d 101, 108 (3d Cir. 2020); *Kone v. Holder*, 596 F.3d 141, 149 (2d Cir. 2010); cf. *Ortez-Cruz v. Barr*, 951 F.3d 190, 200 (4th Cir. 2020).

However, the final regulatory language does not make exigency optional: to be classified as sufficiently severe to qualify as past persecution under the new definition of persecution, the online harm *must* have involved an immediate threat to the asylum-seeker's life. It is possible that this regulatory language will be used to find that tweets that did *not* announce an intention to kill the asylum-seeker do *not* amount to past persecution. In contrast, under prior case law, even if the persecutor's conduct did not involve an immediate threat to the asylum-seeker's life, it may still amount to past persecution.³⁰⁸

In addition to requiring a threshold of severity, the *Final Rule* also lists categories of harm excluded as persecution that could be used to exclude or limit online harm as past persecution. A prime example is the category of "intermittent harassment."³⁰⁹ Although "intermittent harassment" is neither defined in the preamble nor the regulatory amendments, the preamble cites to case law generally holding that "harassment" is not persecution.³¹⁰ It is possible to imagine the argument being made that tweets—even ones attacking a protected ground—might be labeled as "intermittent harassment" if they were to happen every few months or years.

Such a characterization, however, ignores that multiple online harms—even a few over the course of many years—may cause an individual to experience severe emotional and psychological trauma due to the repetition, permanence, searchability, widespread dissemination, and cumulative nature of online harm.³¹¹ In other words, the asylum-seeker may experience the online harm and resulting emotional and psychological trauma as more than "intermittent harassment." Thus, due to its unique qualities, online harm may be legally distinguishable from "intermittent harassment."

In addition to "intermittent harassment," the *Final Rule* also limits when threats may amount to persecution.³¹² The *Final Rule* notes that threats will rarely fall into the universe of persecutory harms, despite prior case law acknowledging threats as persecution.³¹³ In describing which threats may be excluded, the *Final Rule* focuses on vague threats,³¹⁴ threats that are not likely to be carried out,³¹⁵ threats without

308. See, e.g., *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (noting that "mistreatment can constitute persecution even though it does not embody a direct and unremitting threat to life or freedom") (quoting *Bocova v. Gonzáles*, 412 F.3d 257, 263 (1st Cir. 2005)); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987) (noting that the INA does not restrict asylum eligibility to a "threat of 'life or freedom'").

309. 8 C.F.R. §§ 208.1(e), 1208.1(e) (2021).

310. See *Final Rule*, *supra* note 8, at 80,327 (citing *Gjetani v. Barr*, 968 F.3d 393, 397 (5th Cir. 2020)).

311. See discussion *supra* Part II.B (discussing the characteristics of online harm).

312. See 8 C.F.R. §§ 208.1(e), 1208.1(e) (2021).

313. See *Final Rule*, *supra* note 8, at 80,276; cf. *NPRM*, *supra* note 9, at 36,265 n.1., 36,281 n.32 (acknowledging that the rule supersedes prior federal circuit court cases addressing threats).

314. See *Final Rule*, *supra* note 8, at 80,276, 80,327 (noting that "cases with threats *alone*, particularly anonymous or vague ones, rarely constitute persecution") (emphasis in the original) (citations omitted); see *also id.* at 80,276, 80,281, 80,386, 80,395 (adding the adjective "particularized" to describe the threats).

315. See *id.* at 80,281, 80,295, 80,326–28, 80,386.

other accompanying harms,³¹⁶ repeated threats,³¹⁷ and anonymous threats.³¹⁸ The focus on these types of threats suggests a concern that an individual will obtain asylum even though the threats did or do not result in actual suffering or are unlikely to materialize into future persecution.³¹⁹ There may also be an underlying fear that asylum will be granted even though the threats are insincere, incredible, fraudulent, or manufactured.³²⁰ In addition, there may be the fear that there will be an uptick in such cases in the future.³²¹ Many of these concerns have already been raised before the federal circuit courts with respect to online threats as evidence of future persecution.³²²

How, then, might an online threat be excluded or limited as evidence of past persecution under the new definition of persecution? The regulatory text states that persecution does not include “threats with no actual effort to carry out the threats, except that particularized threats of a severe harm of immediate and menacing nature made by an identified entity may constitute persecution.”³²³ The first clause generally excludes as persecution threats “with no actual effort to carry out the threats.”³²⁴ Under this regulatory language, a tweet that threatens the asylum-seeker with rape, but is not accompanied by attempted or actual rape, might be excluded as persecution. However, this approach runs counter to existing case law finding that a threat does not need to result in actual or attempted physical injury to qualify as past persecution.³²⁵ Minimizing an online threat of rape as “unfulfilled” also does not

316. See *id.* at 80,328 n.51 (commenting that “it is difficult to understand how anyone could predict whether future threats will occur and difficult to conceive of a claim in which an alien alleges a fear of future threats but not a fear of future physical, mental, or economic harm”).

317. See *id.* at 80,327 (noting that “repeated threats would not constitute persecution absent ‘actual effort to carry out the threats’”). While the *Final Rule* removed the reference in the regulatory language to “repeated threats” that was proposed in the *NPRM*, the preamble to the *Final Rule* notes that the revised regulatory language is still intended to exclude repeated threats. Compare *id.* at 80,327, with *NPRM*, *supra* note 9, at 36,280–81, 36,291–92 (“repeated threats with no actions taken to carry out the threats”).

318. See *Final Rule*, *supra* note 8, at 80,276, 80,327 (noting that “cases with threats *alone*, particularly anonymous or vague ones, rarely constitute persecution”) (emphasis in the original) (citations omitted).

319. See *id.* at 80,276 (noting that “death threats alone can constitute persecution . . . in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm”) (quoting *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (internal quotation marks omitted); see also *id.* at 80,326–28 (noting that threats without accompanying actions may not demonstrate a likelihood of future persecution).

320. See *Final Rule*, *supra* note 8, at 80,327 (noting “the difficulty associated with assessing the credibility of an alleged threat, especially in situations in which the threat was made anonymously and without witnesses or the existence of other corroborating evidence”); cf. *Y.C. v. Holder*, 741 F.3d 324, 338 (2d Cir. 2013) (fearing a deluge of claims based on the asylum-seeker’s post-flight, online presence, especially claims that may be fraudulent or manufactured).

321. Cf. *Y.C.*, 741 F.3d at 338.

322. See discussion *supra* Part I.C (discussing courts’ concerns regarding online threats as evidence of future persecution).

323. 8 C.F.R. §§ 208.1(e), 1208.1(e) (2021).

324. *Id.*

325. See, e.g., *Tairou v. Whitaker*, 909 F.3d 702, 707–08 (4th Cir. 2018) (finding that “the threat of death alone constitutes persecution” and the asylum-seeker “was not required to additionally prove long-term physical or mental harm to establish past persecution”); see also *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (per curiam) (Reinhardt, J., concurring) (“The fact that [the asylum-seeker] did not suffer

reflect the profound emotional and psychological impact that the online threat can have on an individual, including the mental purgatory of anticipating violent offline harm.³²⁶

Notably, the preamble to the *Final Rule* emphasizes that “repeated threats” would also be excluded unless there was an actual effort to carry out what was threatened.³²⁷ Thus, it seems likely that, even if the tweet discussed above were retweeted thousands of times, it might also be excluded as persecution unless it were accompanied by attempted or actual rape. However, excluding threats in this manner conflicts with courts’ current recognition that repetitive threats may cumulatively—by themselves—amount to past persecution.³²⁸ Moreover, a threat of rape—even *one* tweet threatening rape—may cause severe emotional and psychological trauma.³²⁹

Continuing with an examination of the new regulatory language, the clause—“particularized threats of a severe harm of immediate and menacing nature made by an identified entity may constitute persecution”—may also significantly affect asylum claims involving online threats.³³⁰ While the clause permissively recognizes that threats *may* be persecution, it contains several caveats that may disqualify online threats as persecutory. Significantly, the use of “particularized” to describe the threats means that the threats cannot be vague. Thus, a tweet addressed to the asylum-seeker that reads “fumigate the cockroaches” might be deemed too vague.³³¹ However, such a tweet could be interpreted as a call for the persecutor’s followers to commit a violent, off-line act—such as genocide—against a group who shares a protected ground with the asylum-seeker. In this hypothetical, the tweeted threat could be evidence of future persecution.³³² Due to the violent imagery, it could also amount to past persecution if it caused the asylum-seeker severe emotional and psychological trauma.³³³ Moreover, excluding such a threat conflicts with existing case law that has correctly recognized that threats may be implied rather than overt.³³⁴

physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution.”)

326. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 16 (discussing the effects of online threats of rape).

327. See *Final Rule*, *supra* note 8, at 80,327.

328. See, e.g., *Herrera-Reyes v. U.S. Att’y Gen.*, 952 F.3d 101, 107–08 (3d Cir. 2020) (noting that “threat cases are not an exception to the general rule of cumulative analysis but simply applications of it”); see also *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (noting that “repeated and especially menacing death threats can constitute a primary part of a past persecution claim”) (citations omitted).

329. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 97, at 16; see also *Nakibuka v. Gonzales*, 421 F.3d 473, 477 (7th Cir. 2005) (discussing how the threat of rape is uniquely used to harm women).

330. 8 C.F.R. §§ 208.1(e), 1208.1(e) (2021).

331. Jane, *supra* note 97, at 564 (quoting an actual, online comment directed at the journalist, Jude Ellison Sady Doyle).

332. See, e.g., *Final Rule*, *supra* note 8, at 80,328 & n.51.

333. See, e.g., *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120–21 (9th Cir. 2004) (finding that emotional and psychological harm may amount to past persecution).

334. See, e.g., *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (finding that non-verbal threats may amount to persecution).

The qualification in the new regulatory language that the threats be of a “severe harm of immediate and menacing nature” could also be particularly problematic for online harms. Let us assume that the persecutor tweeted a meme of a video game character sexually assaulting the asylum-seeker.³³⁵ As there is certainly no possibility of a fictional character harming the asylum-seeker, this regulatory language could disqualify the tweeted meme as persecution. However, the meme contains an implied threat of sexual assault, and implied threats may amount to persecution under existing case law.³³⁶ Moreover, just as with the tweet threatening rape discussed above, the meme’s violent imagery may be persecutory if it caused the asylum-seeker severe emotional and psychological trauma.³³⁷

Finally, the *Final Rule*’s requirement that the threat be made by an “identified entity” could result in the denial of asylum for individuals who are victimized by online threats.³³⁸ The regulatory text uses the term “identified entity.” But, in discussing this new, regulatory text, the preamble also refers to an “identified . . . person.”³³⁹ Neither term is defined in the *Final Rule*.³⁴⁰ However, it seems logical that this language was intended to exclude threats made anonymously by “unknown” individuals or individuals whom it is difficult, although not necessarily impossible, to identify.³⁴¹ Requiring that threats be made by an identified entity or person potentially excludes a lot of online activity, especially on platforms dedicated to preserving the anonymity of its users or posters.³⁴² Putting aside whose burden it is to establish the online actor’s identity, this regulatory language could also be used to exclude threats in which the asylum-seeker did not present sufficient evidence of the online actor’s identity or that she attempted to ascertain his online identity. Given that the anonymity and pseudonymity of the online world is purposefully used to amplify persecutory content,³⁴³ excluding online harm when the online persecutor’s identity is not definitively established may result in meritorious asylum claims being denied.

335. Jane, *supra* note 97, at 562 (describing an actual meme circulated online directed at the author, Anita Sarkeesian).

336. *See, e.g., Aldana-Ramos*, 757 F.3d at 17.

337. *See, e.g., Mashiri*, 383 F.3d at 1120–21.

338. 8 C.F.R. §§ 208.1(e), 1208.1(e) (2021).

339. *Compare Final Rule*, *supra* note 8, at 80,386, 80,395 (regulatory text), *with id.* at 80,276 (preamble).

340. *See Final Rule*, *supra* note 8, at 80,276, 80,386, 80,395.

341. *See, e.g., Porras v. Holder*, 543 F. App’x 867, 874 & n.7 (10th Cir. 2013) (“[E]ven if the BIA slightly overstated the case in describing the threat sources as ‘unknown’ or ‘undisclosed,’ petitioners failed to provide information about these [Twitter] users sufficient to establish the likelihood of future persecution. . . .”).

342. *See e.g., Helen Lewis, The Joke’s on Us*, THE ATLANTIC (Oct. 4, 2020) (providing examples of online platforms dedicated to anonymity). *See generally* Emily van der Nagel, *From Usernames to Profiles: The Development of Pseudonymity in Internet Communication*, INTERNET HISTORIES 1(4) (2017) (tracing the development of online anonymity and pseudonymity).

343. *See* Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEWS RES. CTR. (Mar. 29, 2017), available at <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> (discussing how online anonymity and pseudonymity are used to commit online harm).

As this final section illustrates, the *Final Rule* diverges from existing precedent addressing offline harms and threats, including the recognition that, due to the amplification of injury, harms and threats may be sufficiently severe to qualify as persecution. It is likely that this new, restrictive definition of persecution will be applied in the future to online harms and threats—to the detriment of asylum-seekers. We must carefully consider whether we wish to deny such individuals asylum simply because their persecutors chose online tools as the weapons of persecution.

V. CONCLUSION

This Article has discussed emerging ideas about how online harm may affect an asylum-seeker and the merits of her asylum claim, as well as proposed two frameworks that could serve as a jumping-off point for addressing such claims. While the emphasis in this Article has been on assessing the impact of online harm on an asylum-seeker, a few closing words are in order regarding the persecutor's intent. As Judge Posner noted with respect to offline religious persecution, “[o]ne aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population.”³⁴⁴ A persecutor may have the very same goal with his online words and actions: to drive the asylum-seeker and others similar to her off the internet and underground, preventing them from sharing their beliefs and views.

Significantly, as a result of the persecutor's online harm, an asylum-seeker may conceal or abandon her identification or association with a protected ground. Requiring concealment or abandonment of one's identification or association with a protected ground is itself a form of persecution.³⁴⁵ It does not matter whether the asylum-seeker identifies with her protected ground in the town square, in a mosque, or on Instagram: requiring her to stop expressing her offline *or* online identification with a protected ground is tantamount to persecution. Just as being relegated to a basement-bound “house church” may amount to persecution, being forced into a hidden corner of the internet or off the internet entirely may also amount to persecution.

Thus, due to the profound ramifications of online harm, we, as Americans, must wrestle with whether and how to address online harm in asylum claims. As both law and technology are constantly evolving, we must remember that there is nothing fixed about how U.S. law must address asylum claims involving social media.³⁴⁶ We must also remember that whether or not we choose to recognize online harm as persecutory, that choice is a normative judgment, not an application of an immutable, legal rule.

344. *Muhur v. Ashcroft*, 355 F.3d 958, 961 (7th Cir. 2004) (Posner, J.); *see also* *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (citing to *Muhur*, 355 F.3d at 960–61 and noting that “having to practice religion underground to avoid punishment is itself a form of persecution”).

345. *See Muhur*, 355 F.3d at 960–61; *Kazemzadeh*, 577 F.3d at 1354.

346. *See generally* Robin Feldman, *Historic Perspectives on Law & Science*, 2009 STAN. TECH. L. REV. 1, ¶¶ 83–101 (2009) (discussing the evolutionary nature of and interplay between law and science).