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Childhood in the digital age: a socio-cultural and legal analysis of the UK's proposed virtual legal duty of care

ABSTRACT

In 2019, the UK government issued an ambitious White Paper to regulate 'online harms'. This article adopts a socio-cultural and legal approach to analyzing the proposed law in the context of children. How childhood is conceptualized influences public policy and legal interventions, including on the digital space. This remains contested terrain with different conclusions effects on the effects of the cyberspace. The biggest challenge with intermediary legal interventions on the digital realm is the need to achieve a balance between protection and participation rights of children. The dominant conception of childhood as a period of vulnerability has meant 'protection' often overrides participation rights. However, such focus is the subject of challenge, with some suggesting that regulation is the product of moral panic. A further strand is the potential of disproportionate punitive measures against internet companies against the backdrop of human rights obligations. The UK proposition is discussed within these socio-cultural and legal contexts with objective of highlighting challenges and legal pitfalls.

Key words: White Paper, duty of care, regulation, childhood, children, digital space

INTRODUCTION

Digital technology has transformed the world – and as an increasing number of children go online around the world, it is radically changing 'childhood.'¹ The pace with which networked and online media and information technologies have become embedded in children's lives 'has been overwhelming, triggering a revival of public hyperbole about media-related opportunities and risks, along with a burgeoning of argumentation and experimentation among social researchers keen to explore the significance of 'the digital age' for children and childhood'.² Young children growing up in the digital world of the twenty-first century have access to a wider range of information communication technologies (ICT) and engage with this technology at a younger age than ever before.³ In fact, technology is becoming a normal part of young children's daily existence. As such, in varying degrees, the digital space is reshaping the 'traditional interests of childhood studies – identity, friendship, learning, family, play, disadvantage, risk and beyond'.⁴

¹ UNICEF Report, *The State of the World's Children — Children in a Digital World* United Nations Children's Fund December 2017 (Hereinafter 'UNICEF Report, *Children in a Digital World*, 2017')

² S Livingstone and A Blum-Ross, 'Researching children and childhood in the digital age'. Available in LSE Research Online: January 2017, p.1

³ D Buckingham, 'New media, new childhoods? Children's changing cultural environment in the age of digital technology' in J. Kehily (Ed). *An introduction to childhood studies* (Maidenhead: Open University Press. 2004). pp. 108– 122.

⁴ S Livingstone and A Blum-Ross, 'Researching children and childhood in the digital age'. Available in LSE Research Online: January 2017, p.2

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3 ICT forms a valuable learning tool and gives children access to a world they have not previously
4 experienced⁵. However, a conflict now exists between the child's right to access the
5 opportunities it creates and the child's right to be protected from harm.⁶ There is growing body
6 of evidence on of harmful content and activity that people experience online. The UK
7 government posits that online services can be used to spread terrorist propaganda and child abuse
8 content, they can be a tool for abuse and bullying, and they can be used to undermine civil
9 discourse. Despite the many benefits of the internet, more than one in four adult users in the UK
10 have experienced some form of harm related either to content or interactions online.⁷
11 As numerous cases over the years have demonstrated, severe harm can manifest itself as much in
12 mental distress as in real physical injuries, including self-harm and suicide. Major areas of
13 concern in terms of harm include pro-eating disorder and pro-suicide websites as well as
14 cyberbullying and online child sexual abuse and exploitation.⁸

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19 In 2019, the UK government published White Paper (UK WP)⁹ which sets out a programme of
20 action to tackle content or activity that harms individual users, particularly children, or threatens
21 the way of life in the UK, either by undermining national security, or by undermining the shared
22 rights, responsibilities and opportunities to foster integration. Increasing public concern about
23 online harms has, according to the UK WP, prompted calls for further action from governments
24 and tech companies. In particular, as the power and influence of large companies has grown, and
25 privately-run platforms have become akin to public spaces, some of these companies now
26 acknowledge their responsibility to be held to norms and rules developed by democratic
27 societies.¹⁰

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31 Critically, the government intends to impose a 'duty of care' on the companies. A virtual duty of
32 care would appear to be a first in internet governance. There is currently a range of regulatory
33 and voluntary initiatives aimed at addressing these problems, but these have not gone far or fast
34 enough, or been consistent enough between different companies, to keep UK users safe online
35 The government noted that international partners were also developing new regulatory
36 approaches to tackle online harms, but none had yet established a regulatory framework that
37 tackled the range of online harms it seeks to tackle. The UK, the government claims, will tthis
38 would be seminal. The range of harms it seeks to combat is indeed quite wide. It includes child
39 sexual exploitation, terrorism and radicalisation, content illegally uploaded from prisons,
40 serious violence online, gang violence, sale of opioids, online harms suffered by children and
41 young people, cyberbullying, self-harms and suicide, underage sharing of sexual imagery

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46 ⁵ D Buckingham, 'New media, new childhoods? Children's changing cultural environment in the age of digital
47 technology' in J. Kehily (Ed.), *An introduction to childhood studies* (Maidenhead: Open University Press. 2004) pp.
48 108– 122).

49 ⁶ J Wilson & K McAloney 'Upholding the Convention on the Rights of the child: A quandary in cyberspace'.
50 *Childcare in Practice*, (2010) 16(2), pp. 167–180.

51 ⁷ Ofcom and ICO 'Internet users' experience of harm online' 2018. [https://www.ofcom.org.uk/research-and-
52 data/internet-and-on-demand-research/internet-use-and-attitudes/internet-users-experience-of-harmonline](https://www.ofcom.org.uk/research-and-data/internet-and-on-demand-research/internet-use-and-attitudes/internet-users-experience-of-harmonline)

53 ⁸ UNICEF Report, *Children in a Digital World*, 2017

54 ⁹ See 'Online Harms White Paper' Presented to Parliament by the Secretary of State for Digital, Culture, Media &
55 Sport and the Secretary of State for the Home Department by Command of Her Majesty April 2019 (hereinafter 'UK
56 Online Harms White Paper 2019')

57 ¹⁰ UK Online Harms White Paper 2019, para 13

(sexting), ‘emerging challenge of screentime’; online disinformation (fake news) online manipulation and abuse of public figures.

The new statutory duty of care is intended to make companies take more responsibility for the safety of their users and tackle harm caused by content or activity on their services.

¹¹Compliance with this duty of care will be overseen and enforced by an independent regulator.¹²

The government, nonetheless, acknowledges that this ‘novel’, ‘ambitious’ and a ‘complex’ area for public policy¹³ and it will consult further on the new regulatory framework and non-legislative package. The transnational nature of the internet poses problems in enforcing regulation, including conflicts of law, confusion about which jurisdiction applies and in seeking redress against foreign actors.¹⁴ The delicate balance between protection and observing human rights is delicate.

This paper discusses some the legal implications of the proposed law in particular the duty of care on internet companies. This paper adopts a socio-legal approach to analyzing the proposed law in the context of children. While the law proposes to protect different categories, it is evidently primarily concerned with the protection of ‘children’, a word mentioned 193 times in 102-page White Paper. How childhood is conceptualized influences public policy and legal interventions, including on the digital space. This remains contested terrain with different conclusions on the effects of the cyberspace. The biggest challenge with intermediary legal interventions is the need to achieve a balance between protection and participation rights of children. The hegemonic conception of childhood perceives it as a period of vulnerability. Resultantly, ‘protection’ often trumps participation rights. However, such focus is the subject of challenge. Others suggest the ‘media effects’ are not universal. Different children can have the similar experience online and yet experience very different outcomes.¹⁵ A further conundrum in internet governance is the potential of disproportionate punitive measures against internet companies against the backdrop of human rights obligations. The UK proposition is discussed within this context with objective of highlighting potential legal pitfalls.

The paper is organized as follows. The first section discusses the development of the relationship between children and the digital space. The second part explores the sociology of childhood in the digital age; it discusses how the cyberspace has changed the conception of childhood in the cyberspace and human rights era. The third section discusses the proposition of the ‘virtual legal duty of care’ and challenges in enforcement. The fourth section deliberates on the potential challenges of the decisions of the regulator through judicial review. Lastly, the final part gives a sample of ECHR cases on the digital space and human rights.

¹¹ UK Online Harms White Paper 2019, para 17

¹² UK Online Harms White Paper 2019, para 49

¹³ UK Online Harms White Paper 2019, paras 10.2, 40

¹⁴ House of Lords, ‘Regulating in a digital world’ Select Committee on Communications 2nd Report of Session 2017–19 HL Paper 299 published 9 March 2019

¹⁵ P Burton, ‘Risks and Harms for Children in the Digital Age’, Background paper prepared for The State of the World’s Children 2017: Children in a Digital World, United Nations Children’s Fund, (New York, 2017) 1

CHILDREN AND DIGITAL SPACE

Until recently, analysis of children's experiences, social relations and lifeworlds implicitly prioritised face-to-face, physically collocated communication as the primary means through which their everyday lives are constituted and, therefore, the primary means through which research with children is to be conducted.¹⁶ Traditionally, communication research had focused on parental efforts to mitigate deleterious effects of media on children.¹⁷ Findings suggested a limit to television viewing time, ¹⁸ cautioned that television influenced children's desires for commercial products.¹⁹ Parental role modeling was a significant component of a child's socialisation into media use. ²⁰ Researchers used the concept of "parental mediation" as the indicator that parents take an active role in managing and regulating their children's experiences with television.²¹

Digital technology has transformed the world – and as an increasing children go online around the world, it is increasingly changing the notion of 'childhood'. Thus, it has become necessary to rethink the role of media in family life.²² The parental mediation prism has been disrupted. Children and young people who have grown up with the technological innovations are popularly dubbed the 'digital natives' of a changed communication landscape that is still evolving and only partially understood.²³ As children grow, the capacity of digitalisation to shape their life experiences grows with them, offering seemingly limitless opportunities to learn and to socialize, to be counted and to be heard.²⁴ The offline/online binary has been transcended by the diversity of communicative modes and settings that now make up children's daily lives.²⁵

¹⁶ S Livingstone & A Blum-Ross, 'Researching children and childhood in the digital age' in P Christensen & A James (eds.) *Research with Children: Perspectives and Practices* (Routledge, Abingdon, UK, 2017) 54-70.

¹⁷ F Barcus, 'Parental influence on children's television viewing'. *Television Quarterly* (1969) 4 63–73, J. R Brown & O Linne, 'The family as mediator of television's effects' in R Brown(ed.), *Children and television* Beverly Hills, CA: Sage. (1976) 84–198. J.M McLeod, M.A Fitzpatrick, C.J Glynn & S.F Fallis, 'Television and social relations: Family influences and consequences for interpersonal behavior' in D. Pearl, L. Bouthillet & J. Lazar (Eds.), *Television and behavior: Ten years of scientific progress and implications for the eighties* (HHS Publication No. ADM 82-1196 (Washington, DC: Government Printing Office, 1982). Vol. 2, pp. 272–286

¹⁸ E Maccoby, 'Why do children watch television' *Public Opinion Quarterly*, (1954). 18 (3),239–244

¹⁹ P Burr & R Burr Television advertising to children: What parents are saying about government control. *Journal of Advertising*, (1976) 5 (4), 37–41. A Caron & S Ward Gift decisions by kids and parents. *Journal of Advertising Research* (1974) 15 (4), 15–20

²⁰S Banks & R Gupta 'Television as a dependent variable, for a change'. *Journal of Consumer Research*, (1980). 7 (3), 327–330; J Webster, J Pearson & D. Webster, 'Children's television viewing as affected by contextual variables in the home' *Communication Research Reports* (1986) 3 (1), 1–8

²¹ Dorr, A., Kovaric, P., & Doubleday, C. (1989). Parent-child coviewing of television. *Journal of Broadcasting & Electronic Media*, 33 (1), 35–51; Nathanson, A. (1999). Identifying and explaining the relationship between parental mediation and children's aggression. *Communication Research*, 26 (6), 124–143; Valkenburg, P. M, Krmar, M, Peeters, A. L, & Marseille, N. M. (1999). Developing a scalet to assess three styles of television mediation: Instructive mediation, restrictive mediation, and social coviewing. *Journal of Broadcasting and Electronic Media* ,43 (1), 52–67

²² L S Clark, 'Parental Mediation Theory for the Digital Age' *Communication Theory* (2011)21 (4)

²³ M Prensky, 'Digital natives, digital immigrants' *On the Horizon*, (2001) 9(5), 1-2.

²⁴ UNICEF Report, Children in a Digital World, 2017'

As children's daily lives become ever more heavily mediated, and as the media themselves simultaneously converge and diversify, researchers along with policy-makers and the public are now debating whether 'the digital age' is enhancing or undermining children's rights, with current controversies centring on children's right to privacy online as offline, to information and freedom of expression, and to protection from sexual and aggressive threats variously mediated and amplified by the internet.²⁶

Scholars in media and communication, like in the 'TV era', discuss these developments in the context of 'media effects'²⁷, a contested terrain. Some of the impacts of digitalisation on children's well-being are not universally agreed. They are the subject of growing public debate among policymakers and parents alike. There does seem to be a convergence of opinion, though, on the fact that, if leveraged appropriately and made universally accessible, digital technology can be a game changer for children being left behind – whether because of poverty, race, ethnicity, gender, disability, displacement or geographic isolation – connecting them to a world of opportunity and providing them with the skills they need to succeed in a digital world.²⁸ The utility of the internet is aptly expressed in the UNICEF report *The State of the World's Children — Children in a Digital World*:

To be unconnected in a digital world is to be deprived of new opportunities to learn, communicate and develop skills for the twenty-first century workplace. Unless these gaps in access and skills are identified and closed, rather than being an equalizer of opportunity, connectivity may deepen inequity, reinforcing intergenerational cycles of deprivation.²⁹

For the so-called 'digital natives' – utilising social media for social activism is practically second nature.³⁰ The internet can be a powerful force for good. It serves humanity, spreads ideas and enhances freedom and opportunity across the world. Online services facilitate the exchange of information, goods and services. They match supply and demand with great efficiency, increase consumer choice and lower distance between participants.³¹

Nonetheless, there seems to be some acceptance that digital technology and interactivity pose significant risks to children's safety, privacy and well-being, magnifying threats and harms that many children already face offline and making already-vulnerable children even more vulnerable.³² Even as ICT has made it easier to share knowledge and collaborate, so, too, has it made it easier to produce, distribute and share 'harmful material', which exploits and abuses

²⁵ A Third, D Bellerose, U Dawkins U, E Keltie E & K Pihl, *Children's Rights in the Digital Age: A Download from Children Around the World* (2nd edn) Melbourne and New York: Young and Well Cooperative Research Centre and UNICEF (2014).

²⁶ S Livingstone, 'Reframing media effects in terms of children's rights in the digital age'. *Journal of Children and Media* (2016) 10 (1). pp. 4-12, p.3

²⁷ See eg S Livingstone, 'Reframing media effects in terms of children's rights in the digital age'. *Journal of Children and Media* (2016) 10 (1) 4-12.

²⁸ UNICEF Report, *Children in a Digital World*, 2017,

²⁹ UNICEF Report, *Children in a Digital World*, 2017, p.42

³⁰ UNICEF Report, *Children in a Digital World*, 2017, p.25

³¹ UK Online Harms White Paper 2019 para 1.2

³² UNICEF Report, *Children in a Digital World*, 2017

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3 children.³³ Their whole private lives may be exposed to the marketing machine, which will not
4 only watch and record what a child is doing but also reconstruct and manipulate the online social
5 environment in ways that impact the child's sense of self and security.³⁴ Collecting personal data
6 is now seen by companies as 'business critical'.³⁵ It has even been suggested that the most
7 valuable resource for business today is not oil but data.³⁶ Children are a highly marketed segment
8 of the consumer population, and young people often serve as information brokers for their own
9 personal information as well as data about their friends. The so-called 'Big Data' involves ways
10 in which organizations, including government and businesses, combine diverse digital datasets
11 and then use statistics and other datamining techniques to extract from them both hidden
12 information and surprising correlations.³⁷ For businesses, children can be important targets as
13 sources of data because they influence their friends' and families' consumer decisions.³⁸ Some
14 may also be significant consumers themselves – both today and, crucially, in the future, when
15 investment in securing their brand loyalty may really pay off. The gaze of cookies and Web bugs
16 that are posted during online sessions facilitate collection, storage, and data matching.³⁹
17 'Behavioural' advertising, targeting online ads to specific behaviours, as well as other
18 advertising techniques, can contribute to the growing commercialization of
19 childhood.⁴⁰

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25 These harms, which include Child Sexual Exploitation and Abuse (CSEA), have prompted
26 regulatory measures to combat their abuse. However, others suggest the 'media effects' that have
27 catalysed such action are not universal. The perception of vulnerability has held sway in
28 childhood discourse. This position has been critiqued⁴¹ and supplemented by work which
29 describes how children and young people use the internet in ways which reflects their agency.⁴²
30 Different children can have the similar experience online and yet experience very different
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38 ³³ UNICEF Report, Children in a Digital World, 2017

39 ³⁴ UNICEF Report, Children in a Digital World, 2017

40 ³⁵ Centre for Economics and Business Research, 'The Value of Big Data and the Internet of Things to the UK
41 Economy' SAS: (2016); T Cooper & R LaSalle, 'Guarding and Growing Personal Data Value', Accenture
42 Consulting Co

43 ³⁶ See 'Data Is Giving Rise to a New Economy', *The Economist*, (2017).

44 ³⁷ I. S. Rubinstein 'Big Data: The End of Privacy or a New Beginning?' *International Data Privacy Law*, (2013) 3
45 (2), 74

46 ³⁸ I Berson & R Berson, 'Children and Their Digital Dossiers: Lessons in Privacy Rights in the Digital Age'
47 *International Journal of Social Education*, (2006) 21 (1) 135-147; D Doneda & C Rossini, 'ICT Kids Online Brazil
48 2014: Survey on internet use by children in Brazil', Brazilian Internet Steering Committee, São Paulo, Brazil (2015)
49 37.

50 ³⁹ I Berson & R Berson, 'Children and Their Digital Dossiers: Lessons in Privacy Rights in the Digital Age'
51 *International Journal of Social Education*, (2006) 21 (1) 135-147;

52 ⁴⁰ J Palfrey, U Gasser & D Boyd, 'Response to FCC Notice of Inquiry 09 –94: Empowering parents and protecting
53 children in an evolving media landscape', The Berkman Center for Internet & Society at Harvard University,
54 Cambridge, Mass., (2010)

55 ⁴¹ K Facer, 'After the moral panic? Reframing the debate about child safety online. Discourse: studies in the cultural
56 politics of education, (2012) 33 (3) 397-413.

57 ⁴² D Boyd, *It's Complicated: the Social Lives of Networked Teens* (New Haven: Yale University Press 2014)

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3 outcomes.⁴³ What also remains contested is the action to be taken given the benefits and harms
4 of the cyberspace, and if enacted, balancing the rights of parties involved.
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7 It is against this backdrop that this article analyses White Paper published by the UK government
8 in April 2019 proposing the regulation of the internet. Notably, the UK already has some
9 regulation which covers the internet.⁴⁴ Criminal and civil law generally applies to activity on the
10 internet in the same way as elsewhere. For example, section 1 of the Malicious Communications
11 Act 1988 prohibits the sending of messages which are threatening or grossly offensive; it applies
12 whether the message is through the post or through any form of electronic communication. There
13 is also legislation which specifically targets online behaviour, such as the Computer Misuse Act
14 1990. Several regulators have responsibilities for activities which are particularly relevant to the
15 online environment. But no regulator has a remit for the internet in general and there are aspects
16 of the digital environment, such as user-generated content, for which no specific regulator is
17 responsible.⁴⁵ The government also has a ‘Digital Charter’, an ongoing programme of work
18 aiming to make the UK the safest place in the world to be online.⁴⁶ The UK WP notes that the
19 current range of regulatory and voluntary initiatives aimed at addressing online problems, has not
20 gone far or fast enough, or has it been consistent enough between different companies, to keep
21 UK users safe online. In another report, the House of Lords Committee points out that in the
22 long-term, regulatory fragmentation threatens the cohesiveness and interoperability of the
23 internet, which has developed as a global and borderless medium.⁴⁷
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29 The UK legal initiative is backed by an impressive weight of authority and data drawn from
30 interest groups researchers and scholars as well as justificatory moral claims. Nearly nine in ten
31 UK adults are online and adult users spend around one day a week on the internet.⁴⁸ This is also
32 true for children and young people, with 99% of 12-15-year-olds going online, spending an
33 average of twenty and a half hours a week on the internet.⁴⁹ The paper noted a growing threat
34 presented by online CSEA. In 2018, there were over 18.4 million referrals of child sexual abuse
35 material by US tech companies to the National Center for Missing and Exploited Children
36 (NCMEC).⁵⁰ Of those, there were 113, 948 UK-related referrals in 2018, up from 82,109 in
37 2017. In the third quarter of 2018, Facebook reported removing 8.7 million pieces of content
38 globally for breaching policies on child nudity and sexual exploitation.⁵¹ Not only is the scale of
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43 ⁴³ P Burton ‘Risks and Harms for Children in the Digital Age’, Background paper prepared for The State of the
44 World’s Children 2017: Children in a Digital World, United Nations Children’s Fund, (New York, 2017) 1

45 ⁴⁴ For detailed analysis, see L Edwards *Law, Policy and the Internet*, by Law, Policy and the Internet (Hart 2019)

46 ⁴⁵ House of Lords, ‘Regulating in a digital world’ Select Committee on Communications 2nd Report of Session
47 2017–19 HL Paper 299 published 9 March 2019

48 ⁴⁶ DCMS, Digital Charter (25 January 2018): <https://www.gov.uk/government/publications/digitalcharter>

49 ⁴⁷ House of Lords, ‘Regulating in a digital world’ Select Committee on Communications 2nd Report of Session
50 2017–19 HL Paper 299 published 9 March 2019, para 18

51 ⁴⁸ Ofcom Adults’ Media Use and Attitudes Report (2018). https://www.ofcom.org.uk/_data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf

52 ⁴⁹ Ofcom ‘Children and parents: media use and attitudes’ report 2018. Available at: <https://www.ofcom.org.uk/research-and-data/media-literacy-research/childrens/children-and-parents-media-use-and-attitudes-report-2018>

53 ⁵⁰ NCMEC report. Available at: <http://www.missingkids.com/footer/media/vnr/vnr2>

54 ⁵¹ See ‘Facebook Transparency Report’. (2018) Available at: <https://transparency.facebook.com/community-standardsenforcement#child-nudity-and-sexual-exploitation>
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3 this offending increasing, so is its severity. The internet Watch Foundation (IWF) estimates that
4 55% of the child sexual abuse material they find online contains children aged ten or under, and
5 33% of this imagery is in the most serious category of abuse.⁵² In 2017, the IWF assessed 80,319
6 confirmed reports of websites hosting or linking to images of child sexual abuse. A total of 43%
7 of the children in the images were aged 11-15 years old, and 57% were ten years old or younger.
8 Two per cent were aged two or younger.⁵³
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11 It has become far much easier for bullies, sex offenders, traffickers and those who harm children
12 to contact potential victims around the world, share images of their abuse and encourage each
13 other to commit further crimes. The cyberspace has made children more accessible through
14 unprotected social media profiles and online game forums. It also allows offenders to be
15 anonymous – reducing their risk of identification and prosecution – expand their networks,
16 increase profits and pursue many victims at once. Terrorist groups are finding new ways to
17 spread propaganda and evade government and law enforcement efforts. These threats are not
18 only restricted to the largest, best-known services, but are prevalent across the internet. Terrorist
19 groups and their supporters constantly diversify their reliance on the online services they use to
20 host their material online.⁵⁴
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24 Rival gangs, the paper notes, utilise social media to glamourise weapons and gangsterism, as
25 well as to directly depict or incite acts of violence. Apart from the illegal sale of weapons to
26 young people online, online gangsterism is seen as a contributing factor to incidents of serious
27 violence, including knife crime, in the UK. The latest police recorded crime figures, for the year
28 ending September 2018, show an 8% increase in knife crime (to 39,818 offences) compared with
29 the previous year. Homicide figures have risen by 14% (excluding terrorist attacks) over the
30 same period.⁵⁵ These misdemeanors have been linked to the cyberspace.
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34 The UK government notes that many companies claim to hold a strong track record on online
35 safety. However, in actuality, there is limited transparency about how they implement or enforce
36 their policies. There is a persistent mismatch with users' experiences: 70% of Britons believe
37 that social media companies do not do enough to curtail illegal or unethical behaviours on their
38 platforms.⁵⁶ About 60% of respondents to the government's Internet Safety Strategy Green Paper
39 consultation claimed they had witnessed inappropriate or harmful behaviour online; only 41%
40 thought their reported concerns were taken seriously by social media companies.⁵⁷ The
41 government thus found sound justification to intervene by stabling a statutory duty of care to be
42 enforced by an independent regulator.
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48 ⁵² See Internet Watch Foundation Annual Report 2017. Available at: <https://annualreport.iwf.org.uk/>

49 ⁵³ See Internet Watch Foundation Annual Report 2017. Available at: <https://annualreport.iwf.org.uk/>

50 ⁵⁴ UK Online Harms White Paper 2019, para 1.14.

51 ⁵⁵ See ONS Crime in England and Wales, Year Ending September 2018 (2019 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2018>)

52 ⁵⁶ See 'Edelman Trust Barometer – UK Findings' (2018): <https://www.edelman.co.uk/magazine/posts/edelman-trust-barometer-2018/>

53 ⁵⁷ See 'HM Government Response to the Internet Safety Strategy Green Paper' (May 2018)
54 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708873/](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708873/Government_Response_to_the_Internet_Safety_Strategy_Green_Paper_-_Final.pdf)
55 [Government_Response_to_the_Internet_Safety_Strategy_Green_Paper_-_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708873/Government_Response_to_the_Internet_Safety_Strategy_Green_Paper_-_Final.pdf)
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3 While the new regulator would be reposed with authority to produce codes of practice, the
4 government expected companies to take action immediately to tackle harmful content or activity
5 on their services. For those harms where there is a risk to national security or to the physical
6 safety of children, the government would publish interim codes of practice⁵⁸ The scope to use the
7 regulator's findings in any claim against a company in the courts on grounds of negligence or
8 breach of contract. And, if the regulator has found a breach of the statutory duty of care, that
9 decision and the evidence that has led to it will be available to the individual to use in any private
10 legal action.
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13 14 SOCIOLOGY OF CHILDHOOD IN DIGITAL AGE

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16 The notion of 'childhood' is at the centre of the protective impulses. How childhood is
17 conceptualized in a society shapes regulatory policies. On 193 occasions, the UK WP mentions
18 'children' undoubtedly revealing that they were at the centre of the policy formulation. The
19 publication of the UK WP followed a report by the House of Lords committee on the subject. It
20 stated that its earlier report, *Growing up with the internet*, had found that children were
21 particularly vulnerable to online harms and that, although they were often early adopters of new
22 technology, their welfare is very little considered by tech entrepreneurs.⁵⁹ The House Lords
23 argued that this should change to make the internet work better for children.⁶⁰ Consideration of
24 children should not just focus on protection. It was also necessary to consider how the internet
25 could meet their needs and be accessible to them. Any principle-based approach to regulation
26 had to recognise children's rights, their legal status and the concept of childhood.⁶¹ However,
27 childhood is not singular or linear conception. Socio-cultural approaches help in understanding
28 the relationship between lad and culture.
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33 Phillip Aries claimed in the medieval society, the idea of childhood did not exist.⁶² . After seven
34 year, the 'child' was recognized a mini-adult. B y about the 15th and 17th century, a child began
35 to be perceived as member of the family who deserved nurturing and protection. Over the last
36 thirty years, researchers have demonstrated how 'childhood' is produced not only through the
37 practices of family, schooling, medicine and law, but through the management of children's
38 participation in or exclusion from different spaces.⁶³ Still, there are different conceptions of
39 childhood.⁶⁴ Different cultures construct childhood variously. Vygotsky theorized that children
40 became enculturated into the social world as they interacted with their parents and with other
41 significant people in their lives.⁶⁵ Children's potential for cognitive development depended upon
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46 ⁵⁸ UK Online Harms White Paper 2019, para 7.3

47 ⁵⁹ House of Lords, 'Regulating in a digital world' Select Committee on Communications 2nd Report of Session
48 2017–19 HL Paper 299 published 9 March 2019

49 ⁶⁰ House of Lords, 'Regulating in a digital world' Select Committee on Communications 2nd Report of Session
50 2017–19 HL Paper 299 published 9 March 2019 para 54

51 ⁶¹ House of Lords, 'Regulating in a digital world' Select Committee on Communications 2nd Report of Session
52 2017–19 HL Paper 299 published 9 March 2019 para 54

53 ⁶² P Ariès, *Centuries of Childhood* (Harmondsworth: Penguin Books 1960).

54 ⁶³ P Ariès, *Centuries of Childhood* (Harmondsworth: Penguin Books 1960).

55 ⁶⁴ D Archard, *Children : rights and childhood* (Routledge, London 1993)

56 ⁶⁵ L Vygotsky, *Mind in society: The development of higher psychological processes* (Cambridge, MA: Harvard
57 University Press 1978)
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3 access to what he termed the ‘zone of proximate development,’ or the opportunity for children to
4 engage in experimentation beyond their current capabilities.⁶⁶
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6 A dominant feature of western ideas of childhood since the 19th century has been its association
7 with private rather than public space and the construction of public and adult space as a site of
8 threat to children.⁶⁷ Adult perspectives focus on what children will be and not what they are⁶⁸
9 Children are viewed as passive consumers of a culture already established by adults⁶⁹ (id)
10 through socialisation. Parental mediation theory posits that parents utilize different interpersonal
11 communication strategies in their attempts to mediate and mitigate the negative effects of the
12 media in their children’s lives. It also assumes that interpersonal interactions about media that
13 take place between parents and their children play a role in socializing children into society.⁷⁰
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17 The international legal imagination construes children as ‘faultless, passive victims’ lacking
18 agency.⁷¹ This perception, in which the parent has a central role, has informed informs social
19 policy perspectives at domestic level. The regulation of access to playgrounds or city streets, to
20 bars or cinemas according to age, all served to construct different ideas of childhood and of
21 adult-child relations.⁷² An authoritarian approach set out to compel and prohibit certain family
22 behavior.⁷³ On the other end of the scale is the laissez faire model which eschews state
23 intervention and regards family life as private not warranting legal intervention. The ‘welfare
24 model’ is where ‘the state intervenes, at least with coercive techniques, when clear dysfunctions
25 are evident.’⁷⁴
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29 The quarantining of children into specific spaces such as homes and schools is central to the
30 production and maintenance of the ‘standard model’ of adult-child relations. This model
31 produces specific identities for children, as dependent and vulnerable, and also specific identities
32 for adults as protectors and as competent actors in public space. The welfarist model aims at
33 protecting children who are seen as vulnerable members of society in need of guidance and
34 control. The role of parents, schools, social services and the State is to protect, nurture and
35 provide fulfilling opportunities for children’s development.⁷⁵ At the heart of this idea of
36 childhood is the construction of public space as potentially dangerous for children.⁷⁶
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44 ⁶⁶ Vygotsky, L. (1978). *Mind in society: The development of higher psychological processes*. Cambridge, MA:
45 Harvard University Press.

46 ⁶⁷ K Facer, ‘After the moral panic? Reframing the debate about child safety online’ *Discourse: studies in the*
47 *cultural politics of education*, (2012) 33 (3). pp. 397-413.

48 ⁶⁸ T. Buck *International Child Law* (Routledge 2014)

49 ⁶⁹ T. Buck *International Child Law* (Routledge 2014)

50 ⁷⁰ Lynn Schofield Clark Parental Mediation Theory for the Digital Age Communication Theory ISSN 1050-3293

51 ⁷¹ M. Drumbi *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012)

52 ⁷² S Holloway & G Valentine (eds) *Children’s Geographies: Playing, living, learning* (London: Routledge 2000)

53 ⁷³ L Harding, *Family, Sate and Social Policy* (Macmillan 1996)

54 ⁷⁴ T. Buck *International Child Law* (Routledge 2014) 9

55 ⁷⁵ T. Buck *International Child Law* (Routledge 2014)

56 ⁷⁶ K Facer, ‘After the moral panic? Reframing the debate about child safety online’ *Discourse: studies in the*
57 *cultural politics of education*, (2012) 33 (3). pp. 397-413
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3 Throughout 1997, parents were being advised, through advertisements and enticed by special
4 offers, on what computers to buy.⁷⁷ The purchasing of computers was portrayed as a natural
5 articulation between children and technology. Children were repeatedly presented as adept at
6 using new technologies and at risk of being disadvantaged by not having access to the Internet.
7 What began as a means of electronic information transmission—room-sized computer to room-
8 sized computer—soon transformed into an omnipresent and endlessly multifaceted outlet for
9 human energy and expression.⁷⁸ New gadgets such as laptops and mobile phones were
10 introduced through which they could explore the digital space without effective governance. As
11 Schmidt put it ‘The Internet is the largest experiment involving anarchy in history’.⁷⁹ Hundreds
12 of millions of people are, each minute, creating and consuming an untold amount of digital
13 content in an online world that is not truly bound by terrestrial laws.⁸⁰

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18 The emergence of the ‘cyberspace’ dislocated the parent-child relationship even further. As an
19 inevitable consequence of this, there was increasing public anxiety about how children’s
20 participation in digital spaces might be managed. Given the dominant narrative in which children
21 were seen as technologically competent, parents were seen as naïve, and in which the Internet
22 was constructed as a distinctive adult space characterised by the right to complete ‘anything
23 goes’ freedom of speech.⁸¹ This anxiety could be understood as the source of an explosion of
24 discourse surrounding children and the Internet at the turn of the century as the news media
25 identified a potential source of endless concerns with which they might attract and retain their
26 readers.⁸² Digital technology is increasingly changing childhood.⁸³ In varying degrees, the
27 digital space is reconfiguring the traditional interests of childhood studies – identity, friendship,
28 learning, family, play, disadvantage, risk and beyond.⁸⁴

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32 Although there are increasingly more examples of child-centred initiatives that embed children’s
33 insights and experiences at their core, current debates in many parts of the world continue to
34 focus almost exclusively on the risks associated with children’s digital media engagements.
35 debate results in an overwhelmingly protection-oriented approach to children’s use of
36 technology.⁸⁵ However, the rights-based model is designed to support children’s own
37 participation in decision-making and is based on a conception of children having distinct rights
38 that can be asserted, both morally and legally. This approach resonates with the dominant
39 sociological image of the child as a competent, autonomous and active social agent. The UNCRC
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44 ⁷⁷ K Facer, ‘After the moral panic? Reframing the debate about child safety online’ *Discourse: studies in the*
45 *cultural politics of education*, (2012) 33 (3). pp. 397-413

46 ⁷⁸ E Schmidt *The New Digital Age* (Hodder & Stoughton, 2013) 3

47 ⁷⁹ E Schmidt *The New Digital Age* (Hodder & Stoughton, 2013)

48 ⁸⁰ E Schmidt *The New Digital Age* (Hodder & Stoughton, 2013)

49 ⁸¹ K Facer, ‘After the moral panic? Reframing the debate about child safety online’ *Discourse: studies in the cultural*
50 *politics of education*, (2012) 33 (3). pp. 397-413

51 ⁸² K Facer, ‘After the moral panic? Reframing the debate about child safety online’ *Discourse: studies in the*
52 *cultural politics of education*, (2012) 33 (3). pp. 397-413

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54 ⁸⁴ S Livingstone & A Blum-Ross, ‘Researching children and childhood in the digital age’. Available in LSE
55 Research Online: (January 2017) 2

56 ⁸⁵ A Third, D Bellerose, U Dawkins, E Keltie, & K Pihl, *Children’s Rights in the Digital Age: A Download from*
57 *Children Around the World* Melbourne and New York Young and Well Cooperative Research Centre (2014)

places emphasis on children's agency and, therefore, their access to information, participation, freedom of thought and expression, and freedom of association. The emergence of the rights-based approach and the cyberspace have created a challenge to the traditional familial, welfarist model.

The UK government's White Paper of 2019 attempts to achieve a delicate balance between the welfarist and human right-based approaches. It expresses recognition the benefits of the digital experience for young people⁸⁶ and rights to free expression and privacy⁸⁷ while justifying protection because of the hazards posed the digital space. The intended imposition of a 'legal duty of care' on internet companies is the confirmation of childhood as vulnerable protection. The UK WP posits that the government is considering ways of ensuring digital products and services were designed in a responsible way, with their users' well-being in mind.⁸⁸

However, the presumed effects of digital media are sometimes conflicting, bringing into question the relevance of internet governance or the character of the regulatory measures. As children spend more and more time on digital devices, families, educators and children's advocates are growing more concerned – if not more confused – by the lack of consensus among experts on the rewards and risks of connectivity.⁸⁹ Parents struggle with conflicting messages on limiting screen time, on the one hand, or getting the latest device so their children can keep up, on the other.⁹⁰ A recent research by internet Matters found that seven in ten parents thought screen time was essential for their children's learning development while two thirds felt that devices gave their children another outlet for creativity, particularly so for children aged 6-10.⁹¹ Yet an Ofcom's *Children and parents: Media use and attitudes* report 2018⁹² notes that parents and carers were increasingly concerned about the internet, and were finding controlling screen time harder. Fifty per cent of parents were concerned about the data companies are collecting on children and young people's online activities. They were also worried about children damaging their reputations, the pressures of children to spend money and the possibility of children being radicalised online.⁹³ The children's commissioner for England accused social media companies of losing control of the content carried on their platforms, telling them that recent teen suicides should be a "moment of reflection" for the way they operate.⁹⁴

⁸⁶ UK Online Harms White Paper 2019, Box 7

⁸⁷ UK Online Harms White Paper 2019, Box 5

⁸⁸ UK Online Harms White Paper 2019 para 1,31

⁸⁹ See 'Chapter 4: Digital childhoods: Living online' in *The State of the World's Children — Children in a Digital World* United Nations Children's Fund (UNICEF, 2017)

⁹⁰ See 'Chapter 4: Digital childhoods: Living online' in *The State of the World's Children — Children in a Digital World* United Nations Children's Fund (UNICEF, 2017)

⁹¹ Internet Matters (2018). *Look Both Ways: Practical Parenting in the Age of Screens*. Available at: <https://www.internetmatters.org/about-us/screen-time-report-2018/>

⁹² See Ofcom 'Children and parents: Media use and attitudes' report (2018). https://www.ofcom.org.uk/data/assets/pdf_file/0024/134907/Children-and-Parents-Media-Use-and-Attitudes-2018.pdf

⁹³ UK Online Harms White Paper 2019, para 9.14

⁹⁴ Richard Adams Social media urged to take 'moment to reflect' after girl's death *The Guardian* UK 30 January 2019 <https://www.theguardian.com/media/2019/jan/30/social-media-urged-to-take-moment-to-reflect-after-girls-death>

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3 However, some observers note that these articulatory practices, which seek to produce a new
4 common sense about childhood in the face of rapidly changing technological environments, are
5 in evidence both in the spectacular eruptions of the moral panic⁹⁵ and in the day to day workings
6 of the new media and policy spheres.⁹⁶ Thus in public policy regarding children, the right to
7 protection tends to take priority in theory, policy and practice, now online as, traditionally,
8 offline.⁹⁷ But online, once parents have provided access to the hardware and connectivity,
9 protection tends to trump participation in their minds too, especially in risk-averse cultures where
10 even children 'have inherited a popular discourse that is characterized primarily by fear – if not
11 moral panic [which] potentially inhibits their capacity to imagine and articulate the opportunities
12 digital media affords them' ⁹⁸.

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16 While the government's reaction might be regarded as a 'moral panic', the UK WP summons a
17 great weight of evidence to justify the proposed intervention. These are not outlandish concerns.
18 There are, indeed, very real and potentially serious risks associated with children's use of digital
19 media, particularly for those children who are most marginalised or vulnerable in their
20 communities.⁹⁹ Children have been radicalized online, notably the well-publicised case of
21 Shamima Begun who travelled to join the Islamic State in Syria when she was 15. Breck Bednar,
22 a 14-year-old boy who loved gaming, was groomed online and murdered in 2014.¹⁰⁰ Fourteen-
23 year-old Hannah Smith killed herself because of online bullying, according to her father.¹⁰¹
24 Molly Russell, 14, took her own life in 2017. When her family looked into her Instagram account
25 they found distressing material about depression and suicide. Molly's father said he believed
26 Instagram was partly responsible for his daughter's death.¹⁰² There are numerous other tragic
27 incidents linked to the internet.

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31 However, observers caution that a narrow focus on risk and safety can negatively impact
32 children's right to participation and undermine their ability to access the benefits of digital
33 media. Accounts that focus unduly on the dangers posed by the internet frame children as
34 passive, vulnerable consumers of digital culture endangered by the risks of the medium.¹⁰³ This
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40 ⁹⁵K Facer, 'After the moral panic? Reframing the debate about child safety online' *Discourse: studies in the cultural*
41 *politics of education*, (2012) 33 (3). pp. 397-413 citing S. Cohen, *Folk Devils and Moral Panics: The Creation of the*
42 *Mods and Rockers*, (London: MacGibbon and Kee 1972)

43 ⁹⁶ R Silverstone *Why Study the Media?* (Sage: London, Thousand Oaks, New Delhi 1999)

44 ⁹⁷ S Livingstone & A Third, 'Children and young people's rights in the digital age: an emerging agenda'. Available
45 in LSE Research Online: January 2017

46 ⁹⁸ A Third, D Bellerose, U Dawkins, E Keltie & K Pihl, *Children's Rights in the Digital Age: A Download from*
47 *Children Around the World* (2nd edn). Melbourne and New York: Young and Well Cooperative Research Centre
48 and UNICEF (2014) 40

49 ⁹⁹ S Livingstone & E Helsper, 'Balancing Opportunities and Risks in Teenagers' Use of the Internet: The Role of
50 Online Skills and Internet Self Efficacy', *New Media and Society*, 2010, 12(2): 309-29.

51 ¹⁰⁰ A Moore 'I couldn't save my child from being killed by an online predator' *The Guardian* UK 23 January 2016

52 ¹⁰¹ Press Association, 'Teenager Hannah Smith killed herself because of online bullying, says father' *The Guardian*
53 UK <https://www.theguardian.com/society/2013/aug/06/hannah-smith-online-bullying>

54 ¹⁰² A Crawford 'Instagram 'helped kill my daughter' BBC, 22 January 2019 <https://www.bbc.co.uk/news/av/uk-46966009/instagram-helped-kill-my-daughter>

55 ¹⁰³ K Facer, 'After the moral panic? Reframing the debate about child safety online' *Discourse: studies in the*
56 *cultural politics of education*, (2012) 33 (3). pp. 397-413

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3 discourse portrays children as powerless victims rather resourceful participants¹⁰⁴, denying
4 children agency and overlooking the ways in which children use the internet to establish their
5 identities and participate in and extend their social worlds.¹⁰⁵
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7
8 A common assumption is that time spent online will detract from other activities thought to be
9 more valuable, such as face-to-face socializing, reading books or exercising. This is sometimes
10 referred to as the ‘displacement theory’¹⁰⁶ The displacement theory offers the idea that online
11 interaction supplants face-to-face interaction, resulting in children and young people having
12 lower social capital and fewer personal acquaintances.¹⁰⁷ While this hypothesis initially received
13 some support, new evidence suggests that it may be simplistic or even inaccurate today. One
14 reason for this shift is the growing recognition that digital technologies offer many opportunities
15 for children to pursue developmentally valuable activities, and these opportunities are both
16 increasing and improving. For example, some video games positively influence cognitive,
17 motivational, emotional and social development.¹⁰⁸
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21 Substantial research shows that risk does not equate with harm and, moreover, that some level of
22 exposure to risk enables children to develop the digital literacy that is necessary to both minimise
23 the potentially negative impacts of their online engagements, as well as unlock more of the
24 benefits.¹⁰⁹ A UNICEF Report summarized evidence on screen time and its impact on mental
25 well-being, social relationships and physical activity, the debate over digital dependency and,
26 finally, the effects digital experiences have on children’s brains.¹¹⁰ The report states:
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29 As the debates continue, one thing is clear: unlimited – and especially unsupervised –
30 connectivity has the potential to cause harm, just as access to the wealth of information,
31 entertainment and social opportunity has the potential to benefit children around the
32 world. So the task is to find ways to provide children with the support and guidance they
33 need to make the most of their online experiences.¹¹¹
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41 ¹⁰⁴ E Staksrud & S Livingstone, ‘Children and Online Risk: Powerless victims or resourceful participants?’
42 *Information, Communication & Society* (2009) 12 (3) pp. 364–387

43 ¹⁰⁵ D Boyd, *It’s Complicated: the Social Lives of Networked Teens* (New Haven: Yale University Press 2014)

44 ¹⁰⁶ J Byrne & S Livingstone, ‘Parenting’s New Digital Frontier’ in *The State of the World’s Children — Children in*
45 *a Digital World* United Nations Children’s Fund (UNICEF, 2017) 105; vol. 58, no. 1, 2002, pp. 49–74. P
46 Valkenburg & P Jochen, ‘Online Communication and Adolescent Well-Being: Testing the stimulation versus
47 displacement hypothesis’, *Journal of Computer-Mediated Communication*, (2007) 12 (4,) pp. 1169–1182

48 ¹⁰⁷ See ‘Chapter 4: Digital childhoods: Living online’ in *The State of the World’s Children — Children in a Digital*
49 *World* United Nations Children’s Fund (UNICEF, 2017) p. 99

50 ¹⁰⁸ I Granic, A Lobel, C Rutger & E. Engels, ‘The Benefits of Playing Video Games’, *American Psychologist*, 69,
51 no. 1, 2014, pp. 66–78.

52 ¹⁰⁹ L Green, D Brady, K Olafsson, J Hartley & C Lumby, ‘Risks and Safety for Australian Children on the Internet:
53 Full Findings from the AU Kids Online Survey of 9-16 Year Olds and Their Parents. Melbourne’ ARC Centre for
54 Creative Industries and Innovation (2011)

55 ¹¹⁰ UNICEF Report, *Children in a Digital World*, 2017

56 ¹¹¹ See ‘Chapter 4: Digital childhoods: Living online’ in *The State of the World’s Children — Children in a Digital*
57 *World* United Nations Children’s Fund (UNICEF, 2017) p. 106
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3 While the evidence is mixed, recent research shows that children's use of digital tech has a
4 mostly positive effect.¹¹² While parents and caregivers may think they are protecting their
5 children by restricting the time spent on digital technology, this may not be the case. Common
6 measures to restrict internet use – by governments, businesses, parents and others – usually take
7 the form of parental controls, content blocking and internet filters.¹¹³ While well-meaning,
8 restrictions may not always achieve their desired objective but may even create unintended
9 negative effects. For example, such measures could cut adolescents, especially, off from their
10 social circles, from access to information and from the relaxation and learning that come from
11 play. Tension around these restrictions can also damage trust between parents and children. And
12 extreme restrictions can hold children back from developing the digital literacy skills needed to
13 critically evaluate information and communicate safely, responsibly and effectively through
14 digital technology – skills they will need for their future.¹¹⁴

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19 A report by a government-appointed researcher, Tanya Byron, a psychologist, noted that as a
20 society that adopted a risk-averse approach to childhood, she believed that there was a perception
21 that most children and young people were going to encounter harm online.¹¹⁵ 'This is not true.
22 This skewed and unhelpful perception must continually be challenged so that we concentrate our
23 efforts on both helping those who do encounter harm online and developing risk awareness and
24 resilience in all children and young people.'¹¹⁶

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26
27 Equally, different children can have the same experience online and yet experience very different
28 outcomes.¹¹⁷ One 2009 pan- European survey found a range of responses among children to
29 pornographic content. Some children were not concerned about it, some thought it was funny and
30 others wished they had never seen it.¹¹⁸ When faced with these types of risks, most children in
31 the study responded with strategies that were either positive (seeking help from others) or neutral
32 (ignoring the risk). Others seemed less able to diminish the risk and ended up, in turn,
33 perpetrating other 'conduct' risks themselves.¹¹⁹

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36 It is evident the screen time of the TV era has been supplanted by screen time on modern
37 gadgetry; so has the parental mediation approach. However, media and policy debate 'shows
38 how profoundly disturbing the unsettling of familiar roles remains, and how alluring the idea of
39 the familiar, nostalgic role transposed to online public space continues to be.'¹²⁰ In the new era,
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44 ¹¹² A Third, D Bellerose, U Dawkins, E Keltie & K Pihl, *Children's Rights in the Digital Age: A Download from*
45 *Children Around the World* (2nd edn). Melbourne and New York: Young and Well Cooperative Research Centre
46 and UNICEF (2014)

47 ¹¹³ UNICEF Report, *Children in a Digital World*, 2017

48 ¹¹⁴ UNICEF Report, *Children in a Digital World*, 2017

49 ¹¹⁵ T Byron 'Safer Children in a Digital World. The Report of the Byron Review', (2008) 8

50 ¹¹⁶ T Byron 'Safer Children in a Digital World. The Report of the Byron Review', (2008) 8

51 ¹¹⁷ P Burton, 'Risks and Harms for Children in the Digital Age', Background paper prepared for *The State of the*
52 *World's Children 2017: Children in a Digital World*, United Nations Children's Fund, (New York, 2017) 1

53 ¹¹⁸ E Staksrud & S Livingstone, 'Children and Online Risk: Powerless victims or resourceful participants?'
54 *Information, Communication & Society* (2009) 12 (3) 364–387

55 ¹¹⁹ Ibid

56 ¹²⁰ K Facer, 'After the moral panic? Reframing the debate about child safety online. Discourse: studies in the
57 cultural politics of education, (2012) 33 (3) 397-413.

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3 the presumption is that parents who are frequent internet users are more likely to mediate their
4 children's use than are non-using parents.¹²¹
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6 The UNICEF report cautions that without consensus on screen time, it is important for parents,
7 policymakers, researchers and the media not to jump to conclusions about what is healthy or
8 unhealthy digital use.¹²² Considering the full context of a child's life – together with an emphasis
9 on content and experiences rather than screen time – may prove more useful for understanding
10 the effects of digital connectivity on children's well-being. Rather than utilising the dominant
11 representation of children as naïve¹²³ and assuming they need to be protected from the internet,
12 policymakers need to understand that children have agency¹²⁴ and that their use of the internet is
13 purposeful and informed.
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16 17 VIRTUAL LEGAL DUTY OF CARE 18

19 To be clear, internet governance and safeguarding children's well-being is generally a noble
20 agenda. The introduction of a 'duty of care' and making companies duty-holders on digital space
21 is a novelty. Until 1932, there was no precedent that held businesses accountable for the well-
22 being of the users of their products. This changed with the historic "Snail in the Bottle" case.¹²⁵
23 In 1928, May Donoghue was given a bottle of ginger beer by a friend. Unbeknownst to her, the
24 bottle contained a dead snail. She drank most of the beverage before she found the snail, and
25 consequently suffered gastroenteritis. Donoghue sued David Stevenson, the ginger beer's
26 manufacturer, for £500 damages.
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29 This was an unprecedented case. Up to this point, plaintiffs were responsible for proving that
30 negligence breached a contractual agreement. However, because Donoghue hadn't purchased the
31 beverage for herself, she technically hadn't entered into an agreement with Stevenson. By ruling
32 in favour of Donoghue, the House of Lords laid the groundwork for legal principles such as
33 negligence and duty of care.
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36 Nowadays, the duty of care manifests in different ways. In different spheres. For instance,
37 employers have a duty of care for their employees; universities have a duty of care for students,
38 health workers for patient and so on. Where children and young people are under the care and/or
39 control of one or more adults, the adult(s) have a duty to take reasonable care to ensure their
40 safety. In 1995, the Young Persons Safety Act 1995 made provision for the regulation of centres
41 and providers of facilities where children and young persons under the age of 18 engage in
42 adventure activities, including provision for the imposition of requirements relating to safety. In
43 1999 the Protection of Children Act was implemented with a view to increase the level of
44 protection for children by screening those wishing to supervise children. Children Act 1989
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49 ¹²¹ S Livingstone & L Haddon, 'EU Kids Online: Final report'. LSE, London: EUKids Online, EC Safer Internet
50 Plus Programme Deliverable D6.5, (2009)

51 ¹²² UNICEF Report, Children in a Digital World, 2017

52 ¹²³ K Facer, 'After the moral panic? Reframing the debate about child safety online. Discourse: studies in the
53 cultural politics of education, (2012) 33 (3) 397-413.

54 ¹²⁴ A James, 'Agency,' in J Qvortrup, W Corsaro & M.S Honig MS (eds) *The Palgrave Handbook of Childhood
55 Studies* (Basingstoke: Palgrave Macmillan 2009) 34–45.

56 ¹²⁵ *Donoghue v Stevenson* [1932] AC 562
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3 Section 47 places a duty on the local authority to make an investigation if they believe a child in
4 their area is suffering or is likely to suffer from significant harm. The local authority must also
5 decide whether to seek an order, provide services and/or review the case at a later date. Section
6 17 places a duty on local authorities to provide a range of services for children in need. This
7 means all of the local authority services and includes the provision of daycare services for the
8 under 8's, as well as support for children who have suffered abuse.
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11 Section 11 of the Children Act 2004 places responsibility on key agencies to safeguard all
12 children and promote their welfare. The act encourages agencies to share early concerns about
13 the safety and welfare of children and to ensure preventative action before a crisis develops. The
14 Childcare Act 2006 provides a legal framework for inspection and regulation of childcare; this
15 includes the Early Years Foundation Stage (EYFS) for early years and childcare provision from
16 birth to 31 August following their fifth birthday and the Childcare Register for services provided
17 for older children and young people. Working Together to Safeguard Children 2018 applies to all
18 organisations and agencies who have functions relating to children. It should be read and
19 followed by strategic and senior leaders and frontline practitioners of all organisations and
20 agencies therein.
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24 There is currently a range of regulatory and voluntary initiatives aimed at addressing these
25 problems, but these have not gone far or fast enough, or been consistent enough between
26 different companies, to keep UK users safe online. In 2019, the UK government published a
27 White Paper which sets out a programme of action to tackle content or activity that harms
28 individual users, particularly children, or threatens our way of life in the UK, either by
29 undermining national security, or by undermining our shared rights, responsibilities and
30 opportunities to foster integration.
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34 A new statutory 'duty of care' is designed to make companies take more responsibility for the
35 safety of their users and tackle harm caused by content or activity on their services. Imposing a
36 virtual duty of care while groundbreaking is fraught with challenges. And the UK WP duly
37 recognizes that the introduction of a duty of care for cyber activity is indeed nettlesome.¹²⁶ The
38 transnational nature of the internet poses problems in enforcing regulation, including conflicts of
39 law, confusion about which jurisdiction applies and in seeking redress against foreign actors.¹²⁷
40 The delicate balance between protection and observing human rights of both children and the
41 companies is problematic. The potential for tortuous litigation by well-heeled internet companies
42 is ever looming.
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46 The UK WP insists that the private sector – especially in the technology and telecommunication
47 industries – has a special responsibility and a unique ability to shape the impact of digital
48 technology on children. Such power and influence should be leveraged to advance industry-wide
49 ethical standards on data and privacy, as well as other practices that benefit and protect children
50 online. Technology and internet companies were expected to take steps to prevent their networks
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54 ¹²⁶ UK Online Harms White Paper 2019, para 49

55 ¹²⁷ House of Lords, 'Regulating in a digital world' Select Committee on Communications 2nd Report of Session
56 2017–19 HL Paper 299 published 9 March 2019
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3 and services from being used by offenders to collect and distribute child sexual abuse images or
4 commit other violations against children.
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6 As part of the new duty of care, companies will be expected, where appropriate, to have effective
7 and easy-to-access user complaints functions. Companies will need to respond to users'
8 complaints within an appropriate timeframe and to take action consistent with the expectations
9 set out in the regulatory framework.¹²⁸ All companies in scope of the regulatory framework will
10 be required to show that they are fulfilling their duty of care.¹²⁹ The 'ombudsman' will assess how
11 effectively these terms are enforced as part of any regulatory action. The regulator will have a
12 suite of powers to take effective enforcement action against companies that have breached their
13 statutory duty of care. This may include the powers to issue substantial fines and to impose
14 liability on individual members of senior management.¹³⁰ The regulator will set out how to do
15 this in codes of practice. Compliance with this duty of care will be overseen and enforced by an
16 independent regulator.¹³¹
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20 **Enforcing virtual duty of care: possibilities and challenges**

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22 The introduction of a legal duty presupposes "negligence": companies which fail to fulfil the
23 duty of care would presumably be regarded as negligent. While the matters will be decided by a
24 regulator, some principles can be drawn from well-established areas of law. In any case, the
25 decisions will be subject to judicial review or, instead of a regulator, a tribunal could be established
26 instead.¹³² It is then possible that time-honoured legal principles will be applied to the
27 regulator's decisions. It is evident that the proposed law draws some of its precepts from other
28 legislation, for example, on health and safety. The regulator will take a risk-based and
29 proportionate approach across the broad range of business types on the internet. The regulator's
30 initial focus will be on those companies that pose the biggest and clearest risk of harm to users,
31 either because of the scale of the platforms or because of known issues with serious harms.¹³³
32 Under the current liability regime derived from the EU's e-Commerce Directive, platforms are
33 protected from legal liability for any illegal content they 'host' (rather than create) until they
34 have either actual knowledge of it or are aware of facts or circumstances from which it would
35 have been apparent that it was unlawful, and have failed to act 'expeditiously' to remove or
36 disable access to it. In other words, they are not liable for a piece of user-generated illegal
37 content until they have received a notification of its existence, or if their technology has
38 identified such content, and have subsequently failed to remove it from their services in
39 good time.¹³⁴ Under the UK WP proposals, failure to fulfil the legal duty will be construed as a
40 dereliction of duty.
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47 Where 'harm' or 'injury' is caused by such failure, it is possible to draw from the tort of
48 negligence, again within the realm of health and safety. The tort of negligence could give some
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51 ¹²⁸UK Online Harms White Paper 2019, para 25

52 ¹²⁹ UK Online Harms White Paper 2019, para 18, 38

53 ¹³⁰ UK Online Harms White Paper 2019, para 20

54 ¹³¹ UK Online Harms White Paper 2019, para 17

55 ¹³² UK Online Harms White Paper 2019, para 6.13

56 ¹³³ UK Online Harms White Paper 2019, para 31

57 ¹³⁴ UK Online Harms White Paper 2019, para 2.6

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3 guidance, or influence how the regulator would handle cases. For a plaintiff to succeed in a
4 negligence case, the defendant must have owed a duty of care to the plaintiff. Secondly, the
5 defendant must have breached that duty of care. Thirdly, the defendant must have caused the
6 harm to occur, and fourthly, that causation must have resulted in damages. Liability for failing to
7 meet the legal duty of care would only arise if an incident occurs and it can be proved that the
8 risk was foreseeable but no action had been taken to avoid it.
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11 The UK WP observes that under current arrangements, individuals can, in principle, obtain
12 remedies in court against companies where they are negligent or breach their contract with the
13 individual but such legal actions can face difficulties.¹³⁵ For example, difficulties in establishing
14 the company's duty of care to the person bringing the claim, showing a causal link between their
15 activities and harm caused, or obtaining factual evidence. The proposed regulatory model will
16 provide evidence and set standards which may increase the effectiveness of individuals' existing
17 legal remedies.
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20 If legal action is taken under the tort of negligence, the following criteria would be used to
21 decide if an organisation or individual should be held responsible: injury is reasonably
22 foreseeable and not too remote; and that it is fair, just and reasonable to impose a duty of care.
23 The claimant would have to show: that they were owed a duty of care, that the defendant
24 breached this duty and that they suffered damage as a result of the breach.
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27 It has long been recognised that the imposition of a duty of care in respect of particular conduct
28 depends upon whether it is just and reasonable to impose it¹³⁶. Over vast areas of conduct one
29 can generalise about the circumstances in which it will be considered just and reasonable to
30 impose a duty of care: that is a consequence of *Donaghue v Stevenson* [1932] AC 562. Across
31 most grounds of liability, whether in tort, contract or by statute, it is possible to generalise about
32 causal requirements.¹³⁷ They represent what in ordinary life would normally be regarded as the
33 reasonable limits for attributing blame or responsibility for harm: for example, that the
34 defendant's conduct was a necessary condition for the occurrence of the harm (the "but for"
35 test).¹³⁸ The UK WP evinces that it is just and reasonable to impose the online duty of care.
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39 However, 'virtual causation' presents a Herculean legal challenge. For instance, the UK WP
40 suggests that all five terrorist attacks in the UK during 2017 had an online element.¹³⁹ Under the
41 proposed law, it would have been proven that "but for" the online content, the terrorist attacks
42 would not have occurred. The evidential threshold for such litigation is extremely high. The
43 evidential conundrums for causation extend to other harms identified in the UK WP.
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46 The UK WP also proposes invoking a new form of vicarious liability, that is, where one person
47 is held liable for the torts of another, even though that person did not commit the act itself.
48 Under the proposals, this would mean individual senior managers would be held personally
49 accountable in the event of a major breach of the statutory duty of care. This could involve
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52 ¹³⁵ UK Online Harms White Paper 2019, para 3.29

53 ¹³⁶ *Fairchild (suing on her own behalf) etc. v. Glenhaven Funeral Services Ltd and others etc.* [2002] UKHL 22

54 ¹³⁷ [2002] UKHL 22 para 57, citing Hart and Honoré *Causation in the Law*, (2nd ed 1985).

55 ¹³⁸ [2002] UKHL 22 para 57,

56 ¹³⁹ UK Online Harms White Paper 2019, para 1.9
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3 personal liability for civil fines, or could even extend to criminal liability¹⁴⁰. The government, in
4 justifying its feasibility, notes that the introduction of the Senior Managers & Certification
5 Regime has driven a culture change in risk management in the sector. Another recent example of
6 government action is establishing corporate offences of failure to prevent the criminal facilitation
7 of tax evasion. With regard to this, the Government believes that relevant bodies should be
8 criminally liable where they fail to prevent those who act for, or on their behalf from criminally
9 facilitating tax evasion. The new offences will be committed where a relevant body fails to
10 prevent an associated person *criminally* facilitating the evasion of a tax, and this will be the case
11 whether the tax evaded is owed in the UK or in a foreign country.¹⁴¹ Recent changes to the
12 Privacy and Electronic Communications Regulations (PECR) also provide powers to assign
13 liability to a specific person or position within an organisation.
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17 However, it also observes that this is as yet largely untested. Difficulties with this include
18 identifying which roles should be prescribed and whether this can be proportionate for small
19 companies. Some managers and companies do not have a legal presence in the UK. On this, the
20 government envisages close collaboration between government bodies, regulators and law
21 enforcement overseas, in the EU and further afield, will be required. The government intends to
22 design the regulator's powers to ensure that it can take action against companies, including
23 disrupting the business activities of a non-compliant company¹⁴² or blocking platforms from
24 being accessible in the UK as a last resort.¹⁴³
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28 JUDICIAL REVIEW: POTENTIAL CHALLENGES THROUGH ADMINISTRATIVE 29 JUSTICE 30

31 The regulator will set out expectations for companies to do what is 'reasonably practicable' to
32 counter harmful activity or content, depending on the nature of the harm, the risk of the harm
33 occurring on their services, and the resources and technology available to them.¹⁴⁴ This test that
34 has underpinned the success of health and safety legislation.¹⁴⁵ However, all companies within
35 scope will be required to take reasonable and proportionate action to tackle harms on their
36 services.¹⁴⁶ Companies will have the ability to seek judicial review of the regulator's actions and
37 decisions through the High Court, ruling out the potential of an 'ouster clause.' The government
38 will, however, seek views through the consultation about whether there should be another
39 statutory mechanism of review, which would allow the use of a tribunal other than the High
40 Court, and what bar should be set for appeals through this route.¹⁴⁷ It has to be noted,
41 nonetheless, that appeals and judicial review are different. Judicial review only focuses on the
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48 ¹⁴⁰ UK Online Harms White Paper 2019, para 6.5

49 ¹⁴¹ Government guidance: Tackling tax evasion: Government guidance for the corporate offences of failure to
50 prevent the criminal facilitation of tax evasion. 1st September 2017

51 ¹⁴² UK Online Harms White Paper 2019, para 40

52 ¹⁴³ UK Online Harms White Paper 2019, para 6.9

53 ¹⁴⁴ UK Online Harms White Paper 2019, para 35

54 ¹⁴⁵ UK Online Harms White Paper 2019, para 5.7

55 ¹⁴⁶ UK Online Harms White Paper 2019, para 5.7

56 ¹⁴⁷ UK Online Harms White Paper 2019, para 6.13
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3 process by which the courts review the lawfulness of a decision (or lack of a decision) or action
4 taken (or failure to act) by a public body whereas appeals will delve into the merits of a case.
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6 In the UK, the grounds for judicial review are well-expounded. Decision-makers ought to
7 comprehend the law that regulates them. Otherwise failure to follow the law properly, will result
8 in their (non)decision, action or failure to act being declared 'illegal'. Thus, an action or
9 decision may be deemed illegal on the basis of public body acting beyond its powers or *ultra*
10 *vires*. It is possible cases under the proposed law could be brought for judicial review under the
11 rubric of "illegality" if the regulatory board transcends its powers.
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14 Secondly, the courts may also intervene to quash a decision if they consider it to be so
15 demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the
16 decision maker. The benchmark decision on this principle of judicial review was made in the
17 *Wednesbury* case: 'If a decision on a competent matter is so unreasonable that no reasonable
18 authority could ever have come to it, then the courts can interfere... but to prove a case of that
19 kind would require something overwhelming...' ¹⁴⁸ This threshold is extremely difficult to meet,
20 which is why the *Wednesbury* ground is usually argued alongside other grounds, rather than on
21 its own. The onus is also on the claimant to establish irrationality or perversity. Thirdly,
22 complaints can also be made, not merely in respect of the decision taken, but the procedure by
23 which the decision was made. These include: failure to give each party to a dispute an
24 opportunity to be heard, bias, failure to conduct a consultation properly, failure to give adequate
25 reasons and legitimate expectation.
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30 Following the entry into force of the Human Rights Act (HRA), victims of unlawful acts by
31 public authorities are able to raise Convention issues in the domestic courts. Section 6(1) of the
32 Act provides that: It is unlawful for a public authority to act in a way which is incompatible with
33 a Convention right. Section 3 of the HRA 1998, in effect, permits judicial review of Acts of
34 Parliament. ¹⁴⁹ The use of the HRA has introduced different concepts like "proportionality" and
35 the court has acknowledged that these might yield different results to traditional grounds of
36 review. ¹⁵⁰ 'Proportionality' had previously been considered a facet of 'irrationality'. ¹⁵¹ In general
37 terms, the concept of 'proportionality' requires a balancing exercise between, on the one hand,
38 the general interests of the community and the legitimate aims of the state and, on the other, the
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43 ¹⁴⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL.

44 ¹⁴⁹ See for example Richard Gordon QC, "Principles for Judicial Deference", [2006] JR 109 for a discussion of the
45 Constitutional Status of the Human Rights Act and a consideration of "judicial supremism". In particular he
46 indicates that Section 3 of the Act represents "a radical change to the conventional view of Parliamentary
47 sovereignty [... representing] a significant change from the views expressed by Lord Reid in *Pickin v British*
48 *Railway Board* [1974] AC 765

49 ¹⁵⁰ *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, in which Lord
50 Steyn indicated that "The differences in approach between the traditional grounds of review and the proportionality
51 approach may therefore sometimes yield different results. It is therefore important that cases involving convention
52 rights must be analysed in the correct way. This does not mean that there has been a shift to merits review". He also
53 reiterated that "[T]he intensity of review in a public law case will depend on the subject matter in hand [...] That is
54 so even in cases involving Convention rights. In law context is everything"

55 ¹⁵¹ For example, in the case of *R v Secretary of State for Transport ex p. Pegasus Holdings (London) Ltd* [1988] 1
56 WLR 990 Mr Justice Schiemann observed that "one aspect of reasonableness is proportionality: that is, that the
57 means adopted should be reasonable, having regard to the aim to be achieved and the effects of any course adopted"
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3 protection of the individual's rights and interests. It has become 'significantly more difficult to
4 do so in the online world, especially considering that every action to restrict access to content is
5 potentially in conflict with the right to freedom of expression and information as enshrined in
6 Article 10 of the European Convention on Human Rights' (ECHR)¹⁵². This fundamental right
7 and freedom is a primary objective of the Council of Europe and its member states.
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10 The Council recognizes that states also have a legitimate right, and even an obligation, to protect
11 children from content which is unsuitable or inappropriate.¹⁵³ Perhaps the most draconian
12 proposition in the UK WP is that in the event of extremely serious breaches, such as a company
13 failing to take action to stop terrorist use of their services, it may be appropriate to force third
14 party companies to withdraw any service they provide that directly or indirectly facilitates access
15 to the services of the first company, such as search results, app stores, or links on social media
16 posts. The government notes however, that these measures would need to be compatible with the
17 ECHR¹⁵⁴
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20 Under the ECHR, a restriction placed on a freedom guaranteed by the Convention has to be
21 'proportionate to the legitimate aim pursued.'¹⁵⁵ If a Convention right is to be subject to a
22 restriction, any measure will satisfy the proportionality test only if it meets three criteria: (a) the
23 legislative objective must be sufficiently important to justify limiting a fundamental right; (b) the
24 measures designed to meet the legislative objective must be rationally connected to that objective
25 – they must not be arbitrary, unfair or based on irrational considerations and (c) the means used
26 to impair the right or freedom must be no more than is necessary to accomplish the legitimate
27 objective.¹⁵⁶
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31 The dangers of censorship, when internet intermediaries are used to implement government
32 policy, are well recognised; a 'standard' application of Article 10 of the ECHR (the right to
33 freedom of expression and information) case law may ensure the proportionality of any such
34 State requirements, bearing in mind the risk of collateral censorship.¹⁵⁷ In *Yildirim v Turkey*, the
35 European Court of Human Rights (ECtHR) held that Turkey violated Article 10 when it blocked
36 access to all Google sites because of one Internet site facing criminal proceedings for insulting
37 the memory of a former Turkish president. The court wrote that the right to freedom of
38 expression is two-fold, encompassing not only the right to transmit but also to receive
39 information, and that although Article 10 does not afford absolute protection against prior
40 restraint, restrictions on freedom of expression do require strict judicial scrutiny.¹⁵⁸
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45 ¹⁵² Council of Europe Recommendation CM/Rec(2009)5 para I (7)

46 ¹⁵³ Council of Europe Recommendation CM/Rec(2009)5 para I (7)

47 ¹⁵⁴ UK Online Harms White Paper 2019, para 6.5

48 ¹⁵⁵ *Handyside v United Kingdom* (1976) 1 EHRR 737

49 ¹⁵⁶ Lord Lester and Lord Pannick, *Human Rights Law and Practice*, (2nd Edition, Lexis Nexis Butterworth 2004),
50 para 3.10 and see also Richard Clayton, *Proportionality and the HRA 1998: Implications for Substantive Review*
51 *Judicial Review* (2002)124; M Elliot, 'The HRA 1998 and the Standard of Substantive Review' *Judicial Review*
52 (2002) 97 N Blake, 'Importing Proportionality: Clarification or Confusion' *European Human Rights Law Review*
53 (2002)19.

54 ¹⁵⁷ See Information Law and Policy Centre, Institute for Advanced Legal Studies – written evidence (IRN0063) to
55 the House of Lords Committee

56 ¹⁵⁸ *Yildirim v. Turkey*– 3111/10 – HEJUD [2012] ECHR 2074
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3 The task of balancing children’s digital participation with their protection is enormously
4 complex.¹⁵⁹ While the protection of children is paramount, it is critical that regulatory actions are
5 legal. When considering situations where an individual is blocked from a particular service, the
6 difference between implementation of State policy and the exercise of the service provider’s own
7 rights must be recognised.¹⁶⁰ The test for what is ‘reasonably practicable’ is potential ground for
8 contestation. In other words, the law will not be absolute on the legal duty. Such expression
9 provide duty holders with a defence against a duty. The definition set out by the Court of Appeal
10 is:
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14 Reasonably practicable’ is a narrower term than ‘physically possible’ ... a computation must be
15 made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved
16 in the measures necessary for averting the risk (whether in money, time or trouble) is placed in
17 the other..¹⁶¹
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19 The UK WP notes that the regulator’s decision will depend on the nature of the harm, the risk of
20 the harm occurring on a company’s services, and the resources and technology available to them.
21 It is not inconceivable that if the government’s intention to disrupt the business activities of a
22 non-compliant company¹⁶² or block platforms from being accessible in the UK¹⁶³ crystallise into
23 statute, such measures could also be gauged against judicial review precept of “irrationality”.
24 Given the contrasting evidence on the effects of the internet on children and their utility, such
25 platform could be in lawful and beneficial use by others¹⁶⁴. Such decisions could be regarded
26 irrational and disproportionate.
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29 DIGITAL SPACE AND HUMAN RIGHTS: A SAMPLE OF CASES

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31 There is limited case law in this area, except decisions relating to different forms of publications,
32 including the internet, by individuals.¹⁶⁵ Rights claims, in general, are against the State not
33 private actors. Even here, however, the State may have obligations to take any necessary
34 measures to safeguard a right, including enacting legislation to protect rights based on the
35 substantive rights and Article 1 of the ECHR (the states’ obligation to protect human rights).¹⁶⁶
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40 ¹⁵⁹ A Third, D Bellerose, U Dawkins, E Keltie & K Pihl, *Children’s Rights in the Digital Age: A Download from*
41 *Children Around the World*, Young and Well Cooperative Research Centre (2014).

42 ¹⁶⁰ Information Law and Policy Centre, Institute for Advanced Legal Studies – written evidence (IRN0063) to the
43 House of Lords Committee

44 ¹⁶¹ *Edwards v. National Coal Board*, [1949] 1 All ER 743)

45 ¹⁶² UK Online Harms White Paper 2019, para 40

46 ¹⁶³ UK Online Harms White Paper 2019, para 6.9

47 ¹⁶⁴ See eg *Cengiz and Others v. Turkey* (applications nos. 48226/10 and 14027/11), the Ankara Criminal Court of
48 First Instance ordered the blocking of access to YouTube on the ground that the website contained some ten videos
49 which, under the legislation, were insulting to the memory of Atatürk. ECtHR ruled that the applicants, all
50 academics in different universities, had been prevented from accessing YouTube for a lengthy period of time and
51 that, as active users, and having regard to the circumstances of the case, they could legitimately claim that the
52 blocking order in question had affected their right to receive and impart information and ideas.

53 ¹⁶⁵ See eg *Perrin v. the United Kingdom* (dec.) (no. 5446/03, ECHR 2005-XI; *Akdas v. Turkey* no 41056/04;
54 *Yildirim v Turkey* no 3111/10; *Kharitonov v. Russia* no [10795/14](https://www.echr.coe.int/ViewDoc.aspx?i=000000014079514); *Cengiz and Others v. Turkey* nos. 48226/10 and
55 14027/11,

56 ¹⁶⁶See Information Law and Policy Centre, Institute for Advanced Legal Studies – written evidence (IRN0063) to
57 the House of Lords Committee
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3 While the court recognizes the protection of morals, interference with a right of freedom
4 expression must be proportionate and the result of a social need and necessary in a democratic
5 society, within the meaning of Article 10.¹⁶⁷ In *Perrin v UK*, the applicant complained under
6 Article 10 of the Convention about his conviction and sentence for publishing an obscene article
7 on an internet site. He argued that these constituted interferences with his right to freedom of
8 expression which were not prescribed by law and/or were not necessary in a democratic society.
9 Further, he contended he was exempt as the site was run by an external host. However, the
10 Court was satisfied that the applicant's criminal conviction could be regarded as necessary in a
11 democratic society in the interests of the protection of morals and/or the rights of others. It
12 follows that this part of the application is manifestly ill-founded within the meaning of Article 35
13 § 3 of the Convention.¹⁶⁸

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17 As regards the protection of minors, the ECtHR has explained that an individual of a young age
18 is vulnerable. In *K.U. v Finland*¹⁶⁹, applicant's father requested the police to identify a person
19 who had placed the advertisement purporting his 12-year-old son was seeking a gay partner, in
20 order to prefer charges against that person. The service provider, however, refused to divulge the
21 identity of the holder of the so-called dynamic IP address in question, regarding itself bound by
22 the confidentiality of telecommunications as defined by law.¹⁷⁰ The applicant complained under
23 Article 8 of the Convention that an invasion of his private life had taken place and that no
24 effective remedy existed to reveal the identity of the person who had put a defamatory text on the
25 Internet in his name, contrary to Article 13 of the Convention. The police then asked the Helsinki
26 District Court to oblige the service provider to divulge the said information pursuant to section
27 28 of the Criminal Investigations Act (Act no. 449/1987). Both the District Court and Supreme
28 Court declined the application.

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33 The ECtHR, however, ruled that practical and effective protection of the applicant required that
34 effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed
35 the advertisement. In the instant case such protection was not afforded.¹⁷¹

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38 An effective investigation could never be launched because of an overriding requirement of
39 confidentiality. Although freedom of expression and confidentiality of communications are
40 primary considerations and users of telecommunications and Internet services must have a
41 guarantee that their own privacy and freedom of expression will be respected, such guarantee
42 cannot be absolute and must yield on occasion to other legitimate imperatives, such as the
43 prevention of disorder or crime or the protection of the rights and freedoms of others.¹⁷²

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45 In *C.A.S. and C.S. v. Romania*, the ECtHR ruled that as a matter of principle, measures must
46 exist at the national level to guarantee respect for human dignity and the protection of the best
47 interests of the child.¹⁷³ In that judgment the Court clearly acknowledges that the States have an

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51 ¹⁶⁷ See eg *Akdas v. Turkey* no 41056/04

52 ¹⁶⁸ *Perrin v. the United Kingdom* (dec.) no. 5446/03, ECHR 2005-XI

53 ¹⁶⁹ *K.U. v. Finland* no. 2872/02

54 ¹⁷⁰ Para 35

55 ¹⁷¹ Par 49

56 ¹⁷² Para 49

57 ¹⁷³ *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012

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3 obligation under Articles 3 and 8 to ensure that an effective criminal investigation is carried out
4 in cases of violence against children. The Court also refers expressly to the international
5 obligations of States and in particular the United Nations Convention on the Rights of the Child.
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7 8 CONCLUSION

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10 This article discussed the proposed UK law on online harms, highlighting some of the potential
11 challenges and pitfalls with internet governance, with a focus on children. The proposition comes
12 the backdrop of contested notions of childhood. A socio-cultural and legal approach is useful in
13 shoring up the context of the regulatory environment. The digital space has ruptured
14 conventional family dynamics. Unquestionably, the cyberspace has the potential for hazards for
15 children while on the other hand, it is a useful space for young people for a variety of reasons
16 discussed. This makes regulation a complicated, if not a contested affair. Clearly, there are
17 potential challenges and pitfalls in introducing a new legal obligation to a virtual world. The
18 proposed introduction of legal duty of care, while necessary, would come against a background
19 of conflicting evidence on the media effects on children. It would appear legislation is necessary
20 However, it would require a balance between protecting children and regulating the internet.
21 Draconian and disproportionate measures would be regarded as illegal, perverse and conflicting
22 with the rights of all parties involved on the digital space.
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