'Won't Somebody Please Think of the Children!' – Online content promoting/encouraging self-harm and the law: A socio-legal study

Danial Kamal Shahreen

Abstract
With a new communication offence having been proposed by the Law Commission and adopted in the draft Online Safety Bill, this article considers how the law should deal with online content promoting/encouraging self-harm to adequately protect victims, with a particular focus on children. To do so, I consider three pertinent issues: the adequacy of existing communication offences; the need to balance freedom of expression concerns against factors weighing in favour of restrictions; and the different conceptions of the child as influences to justify protection. From these analyses, overall, I argue that the Law Commission's proposal is inadequate and insufficient as a means of protection and offer suggestions for improvement accordingly.

1 Introduction

The enhancement of technology, the ever-growing sophistication of networked environments, and the commonplace nature of online communication modalities,[1] have inarguably proliferated individuals' capacity to disseminate harmful online content and communications within the digital and online sphere.[2] Thus, the significant risks that such a development poses to the safety, privacy, and well-being of children[3] has been acknowledged,[4] raising the inevitable question of whether current regulatory provisions are suited to dealing with the nature of risks that children face online.

The impact of online harms 'causes untold damage in the real world'.[5] It is a contemporary issue requiring response, especially given the concerns within Parliament, that children are not adequately protected online.[6] Accordingly, the Law Commission's consultation paper 'Harmful Online Communications: The Criminal Offences'[7] proposes a new communication offence ('the Proposal'). This proposal requires evaluation in terms of how effectively it would protect children from online content promoting/encouraging self-harm as a particular type of

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[1] S Lindgren (ed), *Hybrid Media Culture: Sensing Place in a World of Flows* (Routledge 2014) 1.
[2] B Chesney and D Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' (2019) 107 CLR 1753, 1764; S Theil, 'The Online Harms White Paper: Comparing the UK and German Approach to Regulation' (2019) 11(1) JML 41; Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018) para 1.38.
[3] As defined in the Family Law Reform Act 1969 s 1(1); United Nations, 'The United Nations Convention on the Rights of the Child' (United Nations, 1989) <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> accessed 19 May 2022.
[4] UNICEF, 'The State of the World's Children 2017: Children in a Digital World' (UNICEF, 2017).
[5] HC Deb 13 February 2020, vol 671, col 973.
[6] HC Deb 7 October 2020, vol 681, col 151WH.
[7] Law Commission, *Harmful Online Communications: The Criminal Offences* (Law Com CP No 248, 2020) para 1.8.

online harm. However, this is a rather limited enquiry, given the Proposal is yet to become law, there is no suitable baseline by which to test it, and this type of online content is seemingly treated as a peripheral issue within the consultation paper. Instead, this article takes a more holistic approach to evaluating the issue of online content promoting/encouraging self-harm and is structured as follows.

First, I will argue that the criminal law has not appreciated the significance of, nor adequately responded to the nature, rise, and prevalence of pro-self-harm content online, with existing communications offences unsuitable as a means of protection. Second, I will argue that pro-self-harm content online should not be protected under freedom of expression because of the strengths of a harm-based argument and judicial approaches to various types of expressions. As such, this justifies restriction through the criminal law. Third, I will argue that a rights-based perspective on the protection of children should hold more influence than a vulnerability-based perspective to justify protection from pro-self-harm online, because it is less restrictive and paternalistic, and considers respect for children's dignity as rights holders and their ability to exercise agency in decision making. Finally, I will argue that overall, the Proposal is unfortunately not a sufficient means of protection for children from pro-self-harm content online, and therefore will offer suggestions as to improvements.

2 The Nature of Self-Harm Content Online, Its Rise and the Existing Communication Offences

This section will discuss what constitutes 'self-harm' and its manifestations, with a particular focus on pro-self-harm content online, before explaining the factors that have proliferated its rise and prevalence, and why it should be a concern. Evaluating the existing communication offences, I will argue that the criminal law has not

afforded due consideration to these issues and has proven inadequate as a means of protection.

2.1. What Is 'Self-Harm'?

'Self-harm' is by no means a novel concept,[8] and is a heavily contested term,[9] with various definitions offered in academia. Some consider it 'the deliberate, direct destruction or alteration of body tissue without conscious suicidal intent'.[10] Others differentiate between 'self-harm' and 'self-injury',[11] as separate terms that ought not to be conflated,[12] and consider self-harm as any act that is intentional, accidental, committed through ignorance or poor judgment that causes psychological or physical harm to oneself without suicidal intention.[13] By contrast, 'self-injury', or 'non-suicidal self-injury', is said to constitute a form of self-harm that leads to bodily injury.[14] It encompasses a wide range of behaviours/practices[15] which are not socially[16] or culturally sanctioned,[17] such as cutting, burning,

[8] M McAllister, 'Multiple Meanings of Self-Harm: A Critical Review' (2003) 13 International Journal of Mental Health Nursing 177, 178.
[9] D Boyd, J Ryan and A Leavitt, 'Pro-Self-Harm and the Visibility of Youth Generated Problematic Content' (2011) 7(1) A Journal of Law and Policy for the Information Society 1; NJ Shanahan, 'Self-Harm: Images and Text Posted on Social Media Platforms' (PhD thesis, University of Leeds 2017) 10.
[10] AR Favazza, 'The Coming of Age of Self-Mutilation' (1998) 186(5) The Journal of Nervous & Mental Disease 259.
[11] R Sebree and S Popkess-Vawter, 'Self-Injury Concept Formation: Nursing Development' (1991) 27 Perspectives in Psychiatric Care 27.
[12] McAllister (n 8).
[13] McAllister (n 8).
[14] McAllister (n 8).
[15] K Skegg, 'Self-Harm' (2005) 366(9495) Lancet 1471.
[16] ED Klonsky, SE Victor and BY Saffer, 'Nonsuicidal Self-Injury: What We Know, and What We Need to Know' (2014) 59(11) The Canadian Journal of Psychiatry 565; MK Nock and AR Favazza, 'Nonsuicidal Self-Injury: Definition and Classification' in MK Nock (ed), *Understanding Nonsuicidal Self-Injury: Origins, Assessment and Treatment* (American Psychological Association 2009).
[17] MK Nock, 'Why Do People Hurt Themselves? New Insights into the Nature and Functions of Self-Injury' (2009) 18(2) Curr Dir Psychol Sci 78.

branding, hitting, scratching, picking at skin, reopening wounds,[18] as well as disordered eating and substance abuse.[19] These examples are illuminating of the nature of the term, however the utility of the distinction has been questioned.[20] Kahan and Pattison seemingly suggest that the rather 'rudimentary' distinctions serve a negative purpose in obfuscating the term.[21] This is a plausible critique which lends itself to Shanahan's claim that definitional issues and challenges often have a wider consequence in affecting our understanding of this behaviour.[22] With that said, there is some justification for Sebree and Popkess-Vawter's definition/differentiation[23] to be adopted under the umbrella of 'self-harm', because it relates to the nature of such content typically found online. Therefore, I will proceed on that basis.

2.1.1. What is the nature of 'self-harm' content online?

In recent years, there has been a growing influx of self-harm material documented on the internet,[24] and self-harm content online can be grouped into three categories.[25] These include, firstly, factual and informative sites drawing from medical literature. These sites, often compiled by experts, are viewed as not engendering participation but

[18] PA Adler and P Adler, *The Tender Cut Inside the Hidden World of Self-Injury* (University of New York Press 2011) 1.
[19] N Shanahan, C Brennan and A House, 'Self-Harm and Social Media: Thematic Analysis of Images Posted on Three Social Media Sites' (2019) 9(2) BMJ Open 1, 3.
[20] AJ Edmondson, 'Listening with Your Eyes: Using Pictures and Words to Explore Self-Harm' (PhD thesis, University of Leeds 2013) 2.
[21] J Kahan and EM Pattison, 'Proposal for a Distinctive Diagnosis: The Deliberate Self-Harm Syndrome (DSH)' (1984) 14(1) Suicide and Life-Threatening Behaviour 17, 21.
[22] Shanahan (n 9) 11.
[23] Sebree and Popkess-Vawter (n 11).
[24] TG Baker and SP Lewis, 'Responses to Online Photographs of Non-Suicidal Self-Injury: A Thematic Analysis' (2013) 17 Archives of Suicide Research 223.
[25] Boyd, Ryan and Leavitt (n 9) 11.

rather passive consumption.[26] Second, self-help and support sites/communities, which were often in the form of personal blogs, message boards and semi-private groups.[27] These sites do engender participation as they often advocate for interpersonal connection, help-seeking and recovery towards sufferers expressing their first-person narratives, and lastly, pro-self-harm sites/communities (although the term 'pro-self-harm' is a contested category).[28] Similarly to self-help and support sites/communities, these also engender participation but do so through triggering content and the advocacy/encouragement of self-harm as a lifestyle. This article is mainly concerned with the last of these categories. Before exploring the nature of the regulatory landscape of self-harm content online, the reasons for its rise and prevalence will be considered.

2.1.2. What Has Facilitated the Representation/Communication of 'Self-Harm' Content Online?

The internet, in addition to being a pertinent source of information, is a space for conversation.[29] In enabling different modes of communication,[30] and greater anonymity,[31] it has arguably facilitated one's greater ability for self-expression. To this point, the internet is one of the factors accounting for the flourishing representation and

[26] Z Alderton, *The Aesthetics of Self Harm and the Visual Rhetoric of Online Self-Harm Communities* (Routledge 2018) 2; Adler and Adler (n 18) 110.
[27] Adler and Adler (n 18) 111–112.
[28] A Johannson, 'Hybrid Embodiment: Doing Respectable Bodies on Youtube' in S Lindgren (ed), *Hybrid Media Culture: Sensing Place in a World of Flows* (Routledge 2014) 25.
[29] Boyd, Ryan and Leavitt (n 9) 11.
[30] Adler and Adler (n 18) 111; SM Dunlop, E More and D Romer, 'Where Do Youth Learn About Suicides on the Internet, and What Influence Does This Have on Suicidal Ideation?' (2011) 52(10) Journal of Child Psychology 1073.
[31] JA Bargh, KYA Mckenna and GM Fitzsimons, 'Can You See the Real Me? Activation and Expression of the "True Self" on the Internet' (2002) 58(1) Journal of Social Issues 33, 35.

communication of self-harm online.[32] This is unsurprising given that, as Baker and Lewis point out, self-harm is highly stigmatised as an embodied practice,[33] and one which Westerlund and Wasserman recognise has long been held as strongly taboo.[34] This in turn is arguably reflective of the preference of the internet as a means of communicating self-harm,[35] with the internet serving as a fertile location for the rise of virtual communities,[36] and, it has been claimed, dramatically changing the way that self-harm is depicted and publicly accessed today.[37] This may indicate that the stigmatising of self-harm is a potential factor driving these forms of content onto online spaces.

Such notions are furthered in the modern age because of the shift of such content towards more dynamic spaces,[38] such as social networking sites. These dynamic spaces facilitate better user engagement in being able to articulate and exchange thoughts[39] through functionalities such as comments, reblogging and liking

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[32] Y Seko and SP Lewis, 'The Self-Harmed, Visualized and Reblogged: Remaking of Self-Injury Narratives on Tumblr' (2018) 20(1) New Media & Society 180, 181.

[33] Baker and Lewis (n 24) 233–234; D Boyd and others, 'The Conundrum of Visibility Youth Safety and the Internet' (2009) 3(4) Journal of Children and Media 410, 412.

[34] M Westerlund and D Wasserman, 'The Role of Mass-Media in Suicide Prevention' in D Wasserman and C Wasserman (eds), *Oxford Textbook of Suicidology and Suicide Prevention: A Global Perspective* (OUP 2009).

[35] G Campaioli and others, 'The Dual Value of the Web: Risks and Benefits of the Use of the Internet in Disorders with A Self-Destructive Component in Adolescents and Young Adults' (2017) 39 Contemporary Family Theory 301, 306; SP Lewis and others, 'Nonsuicidal Self-Injury, Youth and the Internet: What Mental Health Professionals Need to Know' (2012) 6(3) Child and Adolescent Psychiatry and Mental Health 1.

[36] PA Adler and P Adler, 'The Cyber Worlds of Self-Injurers: Deviant Communities, Relationships and Selves' (2008) 31 Symbolic Interaction 33, 34.

[37] F Arendt, S Scherr and D Romer, 'Effects of Exposure to Self-Harm on Social Media: Evidence From a Two-Wave Panel Study Among Young Adults' (2019) 21(11–12) New Media & Society 2422, 2423; K Rodham and others, 'An Investigation of the Motivations Driving the Online Representations of Self-Injury: A Thematic Analysis' (2013) 17 Archives of Suicide Research 173.

[38] Alderton (n 26) 3.

[39] Alderton (n 26) 4.

appealing content.[40] Thus, it would seemingly account for the rise in the use of social networking sites for representing, exploring, and discussing self-harm online,[41] which is reflected in its popularity among youth.[42]

2.1.3. Why should pro-self-harm content online be a concern?

According to the Office for National Statistics, 100 per cent of households with children in the UK had internet access in 2020.[43] Internet access and use shape conditions for opportunities but also shape the conditions in which children are exposed to increased risks online,[44] including exposure to harmful online content.

The sheer volume of pro-self-harm content online, particularly on social networking sites, that is readily accessible[45] and potentially

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[40] Seko and Lewis (n 32) 182–183.
[41] Shanahan (n 9) 19.
[42] M Anderson and J Jiang, 'Teens, Social Media & Technology 2018' (Pew Research Center, 2018).
[43] Office for National Statistics, 'Internet Access – Households and Individuals, Great Britain Statistical Bulletins: 2020' (ONS, 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2020> accessed 19 May 2022.
[44] D Smahel and others, 'EU Kids Online 2020: Survey Results from 19 Countries' (London School of Economics and Political Science, 2020) <https://www.lse.ac.uk/media-and-communications/assets/documents/research/eu-kids-online/reports/EU-Kids-Online-2020-10Feb2020.pdf> accessed 19 May 2022, 18; S Livingstone and E Hesper, 'Balancing Opportunities and Risks in Teenagers' Use of the Internet: The Role of Online Skills and Internet Self-Efficacy' (2010) 12(2) New Media & Society 309, 310; A Oksanen, 'Young People Who Access Harm-Advocating Online Content. A Four-Country Survey' (2016) 10(2) Journal of Psychosocial Research on Cyberspace <https://cyberpsychology.eu/article/view/6179/5909> accessed 19 May 2022.
[45] Campaioli and others (n 35) 303; The Berkman Center for Internet and Society at Harvard University, 'Enhancing Child Safety & Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social

available to children,[46] arguably reflects the reality represented in the literature. For example, in 2020, Facebook acted on 6,410,000 pieces of content that encouraged suicide or self-injury, by removing the content or covering it with warnings. Similarly, Instagram acted on 6,303,600 pieces of content of the same nature.[47] This is by no means representative of the extent of all pro-self-harm content online available on the internet but highlights the issue of accessibility to pro-self-harm content online as a potential concern for children. Thus, the regulatory landscape must offer an adequate means of protection.

2.2. The regulatory landscape of pro-self-harm content online

This section assesses the regulation of pro-self-harm content online through the criminal law, as the law can serve as a regulatory means to restrict behaviour[48] and, more importantly, as a means of protection and redress for victims. The existing communication offences under section 1 of the Malicious Communications Act 1988 (MCA 1988) and section 127(1) of the Communications Act 2003 (CA 2003) are avenues for regulating harmful content online through criminal law. Considering that these are the provisions which the Proposal is seeking to replace, it is instructive to evaluate their adequacy as a means of protection, before making a comparison with the Proposal later in the article.

Networking of State Attorneys General of the United States' (The Berkman Center for Internet and Society at Harvard University, 2008) 7 <https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf> accessed 19 May 2022; Oksanen (n 44).

[46] Campaioli and others (n 35).

[47] Facebook, 'Community Standards Enforcement Report' (Facebook, 2020) <https://transparency.facebook.com/community-standards-enforcement#suicide-and-self-injury> accessed 19 May 2022.

[48] J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation and Governance 137, 139.

Within the internet context, section 1 of the MCA 1988 provides that a person is guilty of an offence if one sends an electronic communication that is in whole or in part indecent or grossly offensive with the purpose of causing distress or anxiety to the recipient or other persons that he/she intended the content or its nature should be communicated.[49] The focus of the offence, as *Director of Public Prosecutions v Collins* demonstrates, lies in the *sending* of the indecent or grossly offensive electronic communication with the requisite *mens rea*.[50] Section 127(1) of the CA 2003 provides that a person is guilty of an offence if he/she sends a message over a public electronic communications network that is grossly offensive, of an indecent, obscene, or menacing character.[51] The focus of the offence similarly lies in the *sending* of a grossly offensive, indecent, obscene or menacing communication over a public electronic communications network, which following *Chambers v Director of Public Prosecutions* includes social media platforms such as Twitter that operate through the internet as a public electronic network.[52]

One issue with both offences stems from their focus on the sending of the communication. As Bakalis observes, these offences do not consider the impact of the communication to the victim — it is seemingly treated as inconsequential.[53] Whilst Bakalis writes about section 1 of the MCA 1988, her point is similarly applicable to section 127(1) of the CA 2003, which requires no intended recipient or recipients in general. This is problematic in that it is arguably reflective of children not being adequately protected from pro-self-harm content online. By not considering the effect of the behaviour on the victim, it undermines one of the strong bases for criminalisation,

[49] Malicious Communications Act 1988 s 1.
[50] *Director of Public Prosecutions v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 [2227] [7] (Lord Bingham).
[51] Communications Act 2003 s 127(1).
[52] *Chambers v Director of Public Prosecutions* [2012] EWHC 2157, [2013] 1 WLR 1833 [1839] [21] (Lord Judge CJ).
[53] C Bakalis, 'Rethinking Cyberhate Laws' (2018) 27(1) Information and Communications Technology Law 86, 98.

namely the need for harm under the harm principle —[54] it undervalues the fact that it is by reason of the harm that the conduct has caused that it is criminalised. To this point, Von Hirsch contends that the state has a duty in resource protection. 'Resources' as per Von Hirsch and Simester, are things which people have a normative claim over, of which the maintenance of physical, psychological, and physiological health would arguably qualify.[55] The state has arguably failed to fulfil its duty[56] to maintain the physical, psychological, and physiological health of children (resources which children arguably have a normative claim over) by insufficiently protecting them from pro-self-harm content online in a way that would adequately consider the impact of such a communication.

Another more fundamental issue that accentuates this criticism is that the offences seemingly criminalise based on gross offensiveness and indecency, an aspect which Bakalis and the Law Commission have recognised and questioned.[57] In practice, guidance as to the meaning of these two terms is limited. The leading case of *Connolly* simply provides that they are to be given their ordinary English meaning,[58] and the CPS guidelines on social media communication prosecutions seem to appear a rather derivative source,[59] in that it simply repeats that gross offensiveness and indecency are ordinary English words.[60]

[54] H Stewart, 'The Limits of the Harm Principle' (2010) 4 Criminal Law and Philosophy 17, 18. The harms of pro-self-harm content online will be further explored in the third section of the article.

[55] A Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) 37.

[56] A von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Criminal Law and Philosophy 245, 250.

[57] Bakalis (n 53) 99; Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 3.133.

[58] *Connolly v Director of Public Prosecutions* [2007] EWHC 237, [2008] 1 WLR 276 280 [10] (Dyson LJ).

[59] L Bliss, 'The Crown Prosecution Guidelines and Grossly Offensive Comments: An Analysis' (2017) 9(2) JML 173, 180.

[60] Crown Prosecution Service, 'Social Media – Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media' (Crown Prosecution Service,

It is therefore difficult to conceive how the courts would approach pro-self-harm content online, given this lack of clarity. Whether various forms of pro-self-harm content online can be considered 'grossly offensive' or 'indecent' is an inherently subjective exercise,[61] based arguably on subjective value judgments. The Law Commission recognises this as an area of under-criminalisation,[62] and I would contend it is further reflective of the inadequacy and unsuitability of the existing law as a means of protection and redress from pro-self-harm content online.

This section has argued that the law has not afforded due consideration to these important issues, reflected in the inadequacy and unsuitability of the existing communication offences as a means of protection for children from pro-self-harm content online. The next section addresses the possible implications that greater regulation in this area could have on freedom of expression, and whether its harms play a pivotal role in tipping the balance.

3 Implications of Regulating Pro-Self-Harm Content Online on Freedom of Expression

The regulation of pro-self-harm content online through the criminal law raises pertinent questions, particularly whether such content should be protected under freedom of expression ('FOE'). This is important because FOE is considered as an integral pillar to society,[63] that serves the intrinsic value of facilitating the discovery of truth, enabling the proper functioning of a democratic society, and self-

2018) <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> accessed 19 May 2022.

[61] G Reed and T White, 'Social Media Offences' (2014) 178 Criminal Law and Justice Weekly 539, 540.

[62] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020).

[63] *Handyside v United Kingdom* [1976] 1 EHRR 737 (App no 5493/72) 754.

fulfilment/autonomy.[64] This section argues that pro-self-harm content online should not be protected based on FOE, because of the weight of countervailing factors supporting regulation.

3.1. Can Pro-Self-Harm Content Online Constitute 'Expression', and If So on What Basis Should Protection Be Justified?

Does pro-self-harm content online constitute 'expression'? An implied interpretation of 'expression', proposed by Pitaksantayothin, derived from Article 10(1) ECHR,[65] Article 19 UDHR,[66] and Article 19(2) ICCPR,[67] denotes the communication of ideas, opinions, and messages irrespective of the medium used.[68] Content online that encourages or advocates self-harm as a lifestyle may conceivably be regarded as an 'expression', as it satisfies the supposed need for a communicative ability.[69] Thereafter in the rest of this section, pro-self-harm content online will be referred to as pro-self-harm expressions online ('PSHEO').

Taking it further, it may also be viewed[70] as a form of expression that is 'performative' in the sense that to say something is to do

[64] F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982). Judicial weight given to freedom of expression can be seen reflected in Lord Steyn's dicta in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 125–26 and in Knowles J's dicta in *R(Miller) v College of Policing* [2020] EWHC 225 [2]–[3].
[65] European Conventions on Human Rights.
[66] Universal Declaration of Human Rights.
[67] International Covenant on Civil and Political Rights.
[68] J Pitaksantayothin, 'Regulating Sexually Explicit Content on the Internet: Towards Reformation of the Thai Regulatory Approach' (PhD thesis, University of Leeds 2013) 15.
[69] Schauer (n 64) 94–95; ibid 14.
[70] Similar to Langton's argument in the context of hate speech: R Langton, 'The Authority of Hate Speech' in J Gardner, L Green and B Leiter (eds), *Oxford Studies in the Philosophy of Law*, vol 3 (OUP 2018) 123.

something;[71] a 'speech act', as coined by MacKinnon.[72] As Waldron argues, speech acts may be harmful in themselves, or may have harmful consequences.[73] To this point, the Law Commission suggests that if the inherent nature of an expression is harmful or has the potential to cause harm, then the interference with freedom of expression will be easier to justify.[74] In considering whether PSHEO should be protected under the FOE, it is prudent to analyse these aspects and to consider two of the approaches towards the regulation of FOE.[75] The first approach is a balancing approach — this emphasises the importance of FOE but recognises its importance can ultimately be outweighed by considerations relating to the harm it causes. The second is a more content-based restriction approach, where the character of an expression may deprive it of the protection deriving from the FOE.[76]

A content-based approach may be appealing to those like Raz, who may adopt a moralistic view towards expression (as a proper form of exercising personal autonomy),[77] and to governments who are worried about an expression's communicative impact on the public.[78] However, one can appreciate the benefits of the balancing approach as propounded by Waldron — namely its inherent candour in involving a trade-off and in specifying the nature and importance of the values of each side of the balance —[79] in allowing a fairer appraisal of the issue case-by-case. Moreover, the balancing approach in part mirrors Mill's

[71] JL Austin, *How to Do Things with Words*, vol 1 (OUP 1976) 6, 12.
[72] C MacKinnon, *Only Words* (Harvard University Press 1993) 17.
[73] Whilst Langton makes this point in the context of hate speech, it is similarly applicable to pro-self-harm expressions online: J Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 38.
[74] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 2.14.
[75] Waldron (n 73) 145–46.
[76] ibid.
[77] J Raz, *The Morality of Freedom* (OUP 1988) 379–80.
[78] GR Stone, 'Content Neutral Restrictions' (1987) 54 University of Chicago Law School Chicago Unbound 46, 47, 57.
[79] Waldron (n 73) 147.

view on the principles that justify coercive interference with conduct (and therefore expression),[80] one of which is the requisite 'harm principle'. This denotes that coercive powers are rightfully exercised and thus justifiable only when their purpose is to prevent harm to others.[81] Given these considerations, I will proceed using the balancing approach, outlining respective considerations to be accounted for when balancing FOE with the necessity to regulate PSHEO.

3.1.1. The Prima Facie Case for Protecting PSHEO Expression

As a starting point, there is a prima facie case for protecting PSHEO as 'expression'. Of significant weight in this regard is the importance of respecting autonomy. Baker submits that respecting autonomy entails allowing each person to present themselves to others and, in turn, influence them as to their values, knowledge, or emotions.[82] Expressions, particularly speech, are integral in embodying people's power and capacity to present themselves —[83] expression performs a self-disclosing function.[84] Consequently, Baker posits that in any case where the law denies a person to use their expression to embody their views or values, the law does not treat them as having formal autonomy. Formal autonomy is a notion that encompasses, among other things, a person having the right over their minds (and thus

[80] LW Sumner, 'Criminalizing Expression: Hate Speech and Obscenity' in J Deigh and D Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011) 20–21.
[81] JS Mill, *On Liberty* (E Alexander (ed), Broadview Press 1999) 52.
[82] C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70(4) S Cal L Rev 979, 992.
[83] C Edwin Baker, 'Autonomy and Informational Privacy or Gossip: The Central Meaning of the First Amendment' (2004) 21(2) Soc Phil & Pol'y 215, 218–19.
[84] Waldron (n 73) 164.

being able to decide what to say), if it does not interfere with the rights of others.[85]

PSHEO are reflective of the values of those who subscribe to advocating and encouraging self-harm as a lifestyle. To not afford it protection would be, according to Baker's autonomy argument, to not provide respect for their formal autonomy. To this point, Baker also argues that the legitimacy of the state is dependent on their respect for people's autonomy.[86] This argument is compelling, especially given that FOE is seen as serving the value of autonomy. Regardless, the protection of PSHEO under FOE must be considered in light of the harm it can cause.

3.1.2. Countervailing Factors Negating Protection Based on the Harms of PSHEO

Building further on the earlier argument that PSHEO should be of concern, internet use and accessibility to PSHEO perpetuate the normalisation of self-harming behaviours.[87] Through the process of social modelling, observed behaviours online are imitated[88] through the exchange of practices, techniques, and methods of concealment,[89] commonly known as the 'social contagion' effect.[90] This may entice individuals to take on more injurious methods of self-harm.[91] A factor

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[85] Edwin Baker (n 83) 223, 225; C Edwin Baker, 'Autonomy and Hate Speech' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 142.
[86] Edwin Baker, 'Autonomy and Hate Speech' (n 85) 142.
[87] N Jacobs, R Evans and J Scourfield, 'The Influence of Online Images on Self-Harm: A Qualitative Study of Young People Aged 16–24' (2017) 60 Journal of Adolescence 140, 1411–2; Boyd, Ryan and Leavitt (n 9) 14–15.
[88] A Khasawneh and others, 'Examining the Self-harm and Suicide Contagion Effects of the Blue Whale Challenge on Youtube and Twitter: Qualitative Study' (2020) 7(6) JMIR Mental Health 1, 2.
[89] Jacobs, Evans and Scourfield (n 87) 141.
[90] S Jarvi and others, 'The Impact of Social Contagion on Non-Suicidal Self-Injury: A Review of the Literature' (2013) 17 (1) Archives of Suicide Research 1, 2.
[91] Jacobs, Evans and Scourfield (n 87) 142–43.

that amplifies this social contagion effect arguably lies in the functionalities of common social networking sites such as the hashtag, which acts as a descriptor for individual content.[92] As Moreno's study indicates, self-harm related terms on social networking sites such as Instagram were often found to overlap with existing unrelated terms,[93] which could therefore facilitate accidental exposure.[94]

Feinberg says that a harmful act bears the tendency to cause harmed conditions in people,[95] with the notion of 'harm' encompassing, in part, the setting back, thwarting or defeating of a person's interest.[96] For example, consider an individual who posts PSHEO on social media to an audience which may be considered more vulnerable, such as children (an aspect which will be discussed and scrutinised in the following section). The audience then acts on the actions advocated by the PSHEO post on social media, resulting in physical injury. Following Feinberg, the act of the individual in posting PSHEO can be considered a 'harmful act' because it has the tendency to cause 'harmed conditions' — the injury to the audience's physical state. Harmed conditions in this example are not limited to physical injury but also arguably encompass impacts on the audience's psychology and physiology. To this point, as Feinberg defines a person's interest in '*X*' as being one's stake in '*X*'s well-being' (that is inseparable from the person's own well-being), it could be argued that PSHEO causes harm in the sense that it sets back one's welfare interest in maintaining one's physical health,[97] psychological health, and physiological health. However, if taken on its own, it is doubtful

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[92] JA Fulcher, '#selfharn on Instagram: Understanding Online Communities Surrounding Non-Suicidal Self-Injury Through Conversations and Common Properties Among Authors' (2020) 6 Digital Health 1.

[93] MA Moreno and others, 'Secret Society 123: Understanding the Language of Self-Harm on Instagram' (2016) 58 Journal of Adolescent Health 78, 81.

[94] ibid.

[95] J Feinberg, *The Moral Limits to the Criminal Law Volume One Harm to Others* (OUP 1984) 31.

[96] ibid 33–34.

[97] ibid 37.

whether this would outweigh the importance of FOE as put forward in the autonomy-based argument. This is because adopting only harm-based considerations in this way lacks the nuances needed to appreciate the nature and issue of PSHEO holistically. Therefore, if one were to ground the argument based on harm further in philosophical considerations, particularly through a Millian perspective, then it could perhaps be afforded more weight.

Mill contends that if an opinion or idea is expressed in certain circumstances which cause that expression to represent a 'positive instigation to some mischievous act' — 'mischievous' seemingly in the sense of causing harm to others —[98] then restrictions on such expressions are justifiable.[99] Marshall contends that Mill distinguishes between 'discussions' and 'instigations', the latter denoting a 'speech act' that is closely connected with the act, so as to be considered a part of it.[100] According to Blasi, such a speech act encompasses the character of the speech, the intentions of the speaker and the propensity of the speech to induce listeners to act.[101]

This reading of Mill is relevant when considering why PSHEO should not be protected under FOE, upon applying Waldron's balancing approach. Taking first the distinction between 'discussions' and 'instigations', real-life examples prove instructive here. Illuminating examples, akin to those given in the Proposal,[102] include 'if you ate today shame on you dumb fuck',[103] accompanied by pictures of skinny and seemingly anorexic women. Others include 'literally how hard is it to understand that you're not supposed to eat? LIKE HOW HARD

[98] Mill (n 81) 101.
[99] V Blasi, 'Shouting Fire in a Theatre and Vilifying Corn Dealers' (2011) 39(3) Cap U L Rev 535, 542.
[100] G Marshall, *Constitutional Theory* (OUP 1980) 157.
[101] Blasi (n 99) 539.
[102] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 6.190.
[103] The user's account has been recently suspended by Twitter therefore I am unable to cite accordingly.

IS IT TO UNDERSTAND ARE YOU DUMB OR SOMETHING YOU FAT COW STOP EATING YOU UGLY HAG'.[104] I was able to easily locate these tweets through the use of pro-self-harm search terms such as 'promia' and 'proana'. These pro-anorexic expressions are indicative of a Millian 'instigation' rather than a 'discussion'. Those sending the tweets instigate to their followers, and others who may have discovered the tweets using such search terms as the above, to not eat and to stop eating. This is particularly evident in the way that the rhetorical questions, coupled with the demeaning adjectives used as linguistic devices, set out to induce and advocate listeners to (re-)engage in self-harming behaviour. Therefore, on a Blasi-Millian/Marshall-Millian interpretation, restrictions on such instigative expressions would be justifiable.

Lowe, however, suggests that demarcating the line between 'discussions' and 'instigations', especially within the digital realm, is a difficult task as the distinctions can be blurred.[105] He attributes this to the availability of mass communications, the ease with which ideas can be expressed, and the instantaneous nature of social networking sites.[106] Whilst Lowe's comments may be pertinent in challenging the use of the 'instigation/discussion' distinction above, I argue that, where PSHEO features characteristics like those in the examples provided, demarcating the line between 'discussions' and 'instigations' would not prove a difficult task, given the rather unambiguous meaning that it typically expresses. Regardless of these critiques, I nevertheless argue that it does not dilute the extent of harms caused by PSHEO. While I agree with Rowbottom's sentiment that some thought should be given to the 'low-level' nature of PSHEO in necessitating appropriate restrictions — 'low-level' in the sense they are expressed by a sole person or small group with little

[104] The user's account has been recently suspended by Twitter therefore I am unable to cite accordingly.
[105] JGG Lowe, 'Freedom of Artistic Expression Under Article 10 of the European Convention on Human Rights' (PhD thesis, University of Edinburgh 2016) 30.
[106] ibid.

preparation, little prior thought about the risks, and lacking in external oversight to smaller audiences —[107] it is debatable whether this is sufficient to warrant FOE protection. This is especially so when considering the countervailing factors negating protection based on the harms of PSHEO as discussed above.

3.1.3. Countervailing factors negating protection based on judicial approaches

It is also pertinent to consider the approaches that the courts have taken with regards to the FOE and protection from harm. A useful starting point is to consider the supposed implicit hierarchy of protection placed upon different types of expression and the 'value' of the different types of expression,[108] and to determine where PSHEO would fit within the hierarchy. There is value in an academic typology and hierarchy of different forms of expression in serving as a useful guide to assess the relative position of expressions, including PSHEO, and thereby inform assessments of the extent to which regulation of types of expression is appropriate or acceptable. This is despite the lack of an explicit *court-endorsed* typology and hierarchy,[109] with Article 10 ECHR instead employing the simple and non-differentiating term of 'information and ideas'.

A common hierarchy of the different type of expressions typically sees political expressions ranking the highest,[110] followed by artistic

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[107] J Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) CLJ 355, 371–76.

[108] ibid 368; D Harris and others, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 629–30, 633, 636.

[109] R Clayton and H Tomlinson (eds), *The Law of Human Rights*, vol 1 (2nd edn, OUP 2009) 1459–60.

[110] *R (ProLife Alliance) v British Broadcasting Corporation* [2002] EWCA Civ 297, [2003] UKHL 23, [2004] 1 AC 185 224 [6] (Lord Nicholls); *TV Vest AS and Rogaland Pensjonistparti v Norway* [2009] 48 EHRR 51 [59]; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 499, 500 [148] (Baroness Hale).

expressions,[111] commercial expressions,[112] gossip,[113] pornography,[114] and hate speech.[115] On its surface, PSHEO does not seem to obviously fit within any of the 'higher' value expressions that are afforded varying degrees of protection. With that said, however, there is potential scope for PSHEO to be regarded as a relatively high value expression, given that the hierarchy and typology highlighted is by no means determinative. As Voorhoof highlights, jurisprudence concerning Article 10 ECHR has a general tendency to be inclusive of broader types of expressions and thus broader levels of protection.[116] Furthermore, in *Handyside v the United Kingdom*,[117] the court emphasised that expressions protected under Article 10(1) are not limited to information or ideas that are inoffensive but also includes those that 'offend, shock or disturb', which certainly engages PSHEO.[118] This does challenge my argument that PSHEO should not be protected, because of the possibility that it could be included in the protection afforded by FOE within a broader scope of expression than the typology outlined. However, this does not necessarily defeat the overall argument that PSHEO should not be protected, because of the court's approach towards balancing FOE and protection from harm, as will be explored below.

Regarding the courts' approach towards balancing FOE and protection from harm, PSHEO have yet to be considered. Therefore, it would not be prudent to analyse the European Court of Human Rights'

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111 *Müller and others v Switzerland* [1991] 19 EHRR 212 225 [27]; *Otto-Preminger Institute v Austria* [1995] 19 EHRR 34 44 [50]; Harris and others (n 108) 633.
112 *Markt Intern and Beermann v Germany* [1990] 12 EHRR 161; Harris and others (n 108) 636.
113 *Campbell v Mirror Group Newspapers Ltd* (n 110) [149] (Baroness Hale).
114 *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 1430 [28] (Lord Rodger).
115 *Norwood v United Kingdom* [2005] 40 EHRR SE 111.
116 D Voorhoof, 'Freedom of Expression under the European Human Rights System – From Sunday Times (No 1) v. U.K. (1979) to Hatchette Filipacchi Associes (Ici Paris) v. France (2009)' (2009) 2 Int Am & Eur Hum Rts J 3, 3–4.
117 *Handyside* (n 63) 754.
118 ibid 754.

assessment criteria with regards to compliance with Article 10.[119] Rather, a more useful indicium to explore how the courts would deal with such an issue would be to assess how the courts treat FOE and the legitimate aims that in part exempt protection.

The most pertinent aims in this context would arguably be, as the Law Commission suggests, the protection of health and the protection of the rights of others.[120] Regarding the latter, cases such as *Editorial Board of Pravoye Delo and Shtekel v Ukraine*[121] and *Delfi AS v Estonia*[122] indicate that the courts recognise the increased risk of harm posed by content on the internet to the exercise of the rights and freedom of others, comparative to the risk of harm posed by content on other mediums such as print media in the press. As this is an aspect which the court recognises, it could be said that, if the courts were to consider the preceding analysis as to the harms that such expressions pose, and the support derived from philosophical perspectives such as Blasi's and Marshall's reading of Mill,[123] the position that PSHEO should not be protected on the basis of freedom of expression through a harm-based argument would be strengthened.

The courts' approach to assessing whether any interference with expression is justified further supports this argument. This is because the court takes into account the nature and content of the expression, and the impact of the speech.[124] Concerning the nature and content of

[119] *Official Judgment Transcript of Karácsony and others v Hungary* [2016] 64 EHRR 10 (App no 42461/13) [13]–[16], [46]–[59].
[120] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 2.51.
[121] *Official Judgment Transcript of Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) [17], [63].
[122] *Official Judgment Transcript of Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [57], [157].
[123] Blasi (n 99); Marshall (n 100).
[124] European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights: Freedom of expression' (European Court of Human Rights, 2020) <https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf> accessed 19 May 2022, 97–8.

expression, the main criteria of whether interference with such expression is justified is dependent on whether the expression contributes to a debate of general interest.[125] Only where the expression does contribute to a debate of general interest will this have the effect of reducing the margin of appreciation.[126] Having regard to the nature of PSHEO, it is possible that it does not contribute to a debate of general interest, given the public health and internet safety concerns, especially in the context of children. When addressing the impact of the speech, the courts consider the vulnerability of the intended readership and those who have access to the expression. In *Handyside*, the Court assessed the justification for the interference of the publication of the *Little Red Schoolbook*, a book that was controversial because of the nature of its content (including sections on sex, masturbation, orgasm, intercourse and petting as well as pornography among others) against which action was brought under the Obscene Publications Act 1959 (as amended by the Obscene Publications Act 1964). In doing so, the Court placed particular importance to its intended readership, namely children and adolescents.[127] The Court reasoned that due to the direct style of the publication and certain sections advocating intercourse and petting as well as the benefits of pornography, children could interpret it 'as an encouragement to indulge in precocious activities harmful for them'.[128] Applying this to the present context, it is arguably indicative of how the courts might approach the issue of PSHEO. As the real-life examples above showcase, PSHEO can exhibit similar qualities to the publication in *Handyside*, as instigative speech acts with the capacity to encourage harm.

Therefore, taken cumulatively, the harm-based arguments against pro-self-harm expressions online being afforded protection on the basis of freedom of expression, and the courts' treatment of expression in

[125] ibid 97.
[126] ibid 96.
[127] *Handyside* (n 63) [52].
[128] *Handyside* (n 63) [52].

similar contexts, the hierarchal standing of different expressions, and the legitimate aims that exempt protection in part, outweigh the initially attractive appeal of the autonomy-based argument in favour of protection.

4 Conceptions of 'the Child' and the Legitimacy of Regulation?

The following section considers the basis on which children need protection from harm, and which conception of the child ought to be given precedence in justifying protection. I will argue that a rights-based conception of children ought to be a weightier influence in justifying protection compared with a vulnerability-based conception. While aspects to the vulnerability approach should be given due consideration as an influence to justify protection, its paternalistic conception is problematic compared to a rights-based conception, which ought to be afforded greater weight.

4.1. Conception of the Child as 'Vulnerable'

The concept of a 'child' varies temporally and is dependent on cultural and social perspectives. However, as Lansdown highlights, there is a consistency among these perspectives, in that children are viewed as 'vulnerable'.[129] It is a key feature in the Western conception,[130] rooted in the sixteenth–seventeenth-century protectionist model.[131] Today,

[129] G Lansdown, 'Children's Rights' in B Mayall (ed), *Children's Childhoods: Observed and Experienced* (The Falmer Press 1994) 33–4.
[130] PH Christensen, 'Childhood and the Cultural Construction of Vulnerable Bodies' in A Prout (ed), *The Body, Childhood and Society* (Macmillan 2000).
[131] F Kelly, 'Conceptualising the Child Through an "Ethic of Care": Lessons for Family Law' (2005) 1(4) Int JLC 375, 376.

this conception is most often found in policy frameworks.[132] For instance, the preamble of the United Nations Convention on the Rights of the Child (UNCRC) employs the notions that children are 'entitled to care and assistance'[133] and requiring 'special safeguards'.[134] This arguably reflects an emphasis on the vulnerability conception of the child and is indicative, to an extent, of the influence that this conception has had on the adoption of the UNCRC.[135] Such an emphasis is also reflected in case law. For example, Latey J in *re X (a Minor) (Wardship: Jurisdiction)* stated that children are particularly vulnerable and require 'especial protection' as 'they have not formed the defences inside themselves which older people have'.[136] The importance of the concept of vulnerability is therefore apparent, and perhaps accounts in part for its use as a justificatory tool for the range of extensive child protection laws, as well as criminal offences.[137] While appreciating and acknowledging that this is paramount, such claims ought to be explored beyond their face-value considerations. First, it is necessary to consider what is meant by the concept of 'vulnerability'.

4.1.1. Defining 'vulnerability'

Vulnerability as a concept is 'notoriously vague',[138] and the existing literature does little to elucidate the nature of vulnerability.[139] Yet the way that the concept tends to be presented rarely reflects this — often

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[132] B Fawcett, 'Vulnerability. Questioning the Certainties in Social Work and Health' (2009) 52(4) International Social Work 473.
[133] United Nations, 'The United Nations Convention on the Rights of the Child' (n 3).
[134] ibid.
[135] J Tobin, 'Understanding Children's Rights: A Vision Beyond Vulnerability' (2015) 84(2) Nord J Int'l L 155.
[136] *Re X (a Minor) (Wardship: Jurisdiction)* [1975] Fam 47 [52] (Latey J).
[137] L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010).
[138] J Herring, 'Vulnerability, Children and the Law' in M Freeman (ed), *Law and Childhood Studies: Current Legal Issues*, vol 14 (OUP 2012) 244.
[139] LA Weithorn, 'A Constitutional Jurisprudence of Children's Vulnerability' (2017) 69 Hastings LJ 179, 189.

vulnerability is presented as a concept with a fixed and universally applicable meaning.[140]

Schroder and Gefenas propose that vulnerability is the state in which one faces a significant probability of incurring identifiable harm while substantially lacking the ability and means to protect oneself.[141] The two facets of this definition (likelihood of harm materialising, and the capacity to protect oneself from harm) provide a sensible normative framework for determining whether third-party intervention is necessary for protection, especially within the digital realm. It reflects, in part, the theoretical development within nursing, of an 'etic' (externally evaluated) perspective to vulnerability;[142] where an individual's vulnerability is assessed in terms of the risk facing that individual, and any such intervention is justified on the basis that it constitutes a means of managing those risks by an objective standard.[143] The framework proposed by Schroeder and Gefenas does, though, have certain shortcomings. It lacks the requisite elements constituting the legal framework of the criminal law, namely the need for an *actus reus* and most importantly, *mens rea*. However, this should not detract from its potential use as a normative framework in supplementing the criminal law to facilitate adequate protection. This view can be supported when considering the forms of vulnerability typically considered by the courts, as distinguished by Weithorn.[144] These include (1) harm-based vulnerability — greater susceptibility to physical/psychological harm as a result of exposure to certain

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[140] Fawcett (n 132).

[141] D Schroeder and E Gefenas, 'Vulnerability: Too Vague and Too Broad?' (2009) 18(2) Cambridge Quarterly of Healthcare Ethics 113, 117.

[142] J Spiers, 'New Perspectives on Vulnerability Using Emic and Etic Approaches' (2000) 31(3) Journal of Advanced Nursing 715, 716.

[143] MC Dunn, ICH Clare and AJ Holland, 'To Empower or to Protect – Constructing the Vulnerable Adult in English Law and Public Policy' (2008) 28(2) LS 234, 245; Spiers (n 142) 717.

[144] Appreciably Weithorn makes this point in an American context, however, following the sentiments like those of Justice Latey in *re X (a Minor) (Wardship Jurisdiction)*, it could similarly apply to a UK context: Weithorn (n 139) 179.

stimuli;[145] (2) influence-based vulnerability — greater susceptibility to external influences, pressures or coercion;[146] and (3) capacity-based vulnerability — children having an immature decision-making capacity which hinders their capability to protect themselves from potential harms/dangers.[147]

It is not difficult to see how these categories could apply to children in the digital realm, especially given the added dimension of internet use and accessibility to pro-self-harm content online and the nature of such content. Another facet that arguably adds to these categories of vulnerability relates to the different roles that children adopt on the internet (which bears weight in the concerns of children's participation online).[148] Hasebrinks and others set out that these include the role as (1) a recipient of content and communication; (2) a participant — engaging in personal/peer communication and other materials; and (3) an actor in offering content or engaging in personal contact.[149] This enhances the argument in favour of vulnerability as a weighty influence because it contextualises children's multifaceted roles in the digital realm, which is pertinent when considering how regulation ought to protect children from PSHEO in practice.

Therefore, to an extent, it can be seen how definitional frameworks of vulnerability, the distinct types of childhood vulnerabilities, their applicability to children within the digital realm, and the different roles children adopt, may bear some significance in favour of the

[145] Weithorn (n 139) 203.
[146] Weithorn (n 139) 206.
[147] Weithorn (n 139) 209.
[148] JE Wilson and K McAloney, 'Upholding the Convention on the Rights of the Child: A Quandary in Cyberspace' (2010) 16(2) Child Care in Practice 167, 168.
[149] U Hasebrink, S Livingstone and L Haddon, 'Comparing Children's Online Opportunities and Risks Across Europe: Cross-National Comparisons for EU Kids Online' (EU Kids Online, 2008) 8 <http://eprints.lse.ac.uk/21656/1/D3.2_Report-Cross_national_comparisons.pdf> accessed 19 May 2022.

argument that vulnerability is a weightier influence to justify and necessitate protection.[150]

4.1.2. Problematising the conception of the child as vulnerable

Yet the perception of the child as vulnerable has certain consequences. This conception seemingly renders the child as an object rather than a subject, being subjected to an array of regulatory devices,[151] including the law, that through the development of social policies, shape the spheres of childhood.[152] Childhood has thus been regarded by some as 'the most intensively governed sector of personal life'.[153] The application of such regulatory devices to children can be rather paternalistic, albeit benevolently, in that they seek to protect children not from themselves but from harms caused by others — this is a 'presumptively non-blameable' kind of paternalism.[154] To an extent, the Proposal reflects this kind of paternalism by focusing on the harms that have been or are likely to be caused by a defendant's actions in sending or posting a communication online. With regards to whether this consideration ought to weigh against vulnerability, one must consider whether such paternalism can be justified and if so, what countervailing factors are in play.

Godwin proposes that for paternalism to be morally justifiable, the benefits accrued by children as 'subjects' — or indeed as 'objects' —

[150] G Lansdown, 'The Realisation of Children's Participation Rights' in B Percy-Smith and N Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge 2010) 16.
[151] NS Rose, *Governing the Soul: The Shaping of the Private Self* (Free Association 1999) 121.
[152] A James, P Curtis and J Birch, 'Care and Control in the Construction of Children's Citizenship' in A Invernizzi and J Williams (eds), *Children and Citizenship* (SAGE Publications 2007).
[153] Kelly (n 131) 377.
[154] Feinberg (n 95) 5.

must outweigh any detriment to their interests.[155] The main benefit of legally protecting children from PSHEO based on their perceived vulnerability is that it safeguards their physical, physiological, and psychological welfare. While normatively appealing, it is contestable whether this outweighs the potential detriments to children's interests. Most significantly, regulation denies children's agency by asserting that they do not possess comparable decision-making capacities and executive capacities to protect themselves from such harms that PSHEO poses and causes.[156]

These considerations are arguably weighty, as decision-making, and the executive capacities of children are influential factors that impact the balancing act,[157] and as Boyd observes, children often use the internet in ways that reflect their agency.[158] Therefore, omitting to include these capacities in a balancing assessment would fail to reflect a true assessment of the issue. It is nonetheless prudent to adopt a degree of caution in querying the extent to which children's digital literacy — while it might reflect their agency — can be relied upon for judicious navigation of the internet and to ensure they effectively protect themselves from the harm that PSHEO poses.[159] This is an issue beyond the purview of this article.

Thus far, this section has considered the consequences of, and issues with, perceiving children as vulnerable, and whether the resulting paternalism is justified. I argued that the potential detriments, including the paternalistic objectification of children, weigh against it, although it is by no means determinative of the normative debate. In

[155] S Goodwin, 'Children's Capacities and Paternalism' (2020) 24 The Journal of Ethics 307, 311.
[156] ibid 312.
[157] ibid 312.
[158] D Boyd, *It's Complicated the Social Lives of Networked Teens* (Yale University Press 2014).
[159] S Livingstone, 'Regulating the Internet in the Interests of Children: Emerging European and International Approaches' in R Mansell and M Raboy, *The Handbook on Global Media and Communications Policy* (OUP 2011) 506.

turn, this casts doubt as to whether it should be the preferred basis upon which children need protection from harm. Thus, it calls into question whether other conceptions should be considered as weightier influences.

4.2. A Rights-Based Conception of the Child

In recent years, there has been a gradual shift towards a conception of the child informed by a rights-based perspective.[160] This model emphasises that, instead of seeing children solely as vulnerable and lacking capacity, children have distinct independent rights,[161] which support their participation as active agents in influencing their lives.[162] As Nyamutata highlights, this model is reflective of one of the features of the emergent paradigm of childhood:[163] the important need for children to be seen as actively involved in how their own social lives are constructed, instead of being passive subjects of structural determinations.[164] This conception is similarly embedded within policy frameworks. The UNCRC represents the primary reference point for considering children's rights in the digital age —[165] Article 12 provides, inter alia, that state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child.[166] This is a clear

[160] C Barton and G Douglas, *Law and Parenthood* (Butterworths 1995).
[161] Kelly (n 131) 378.
[162] C Nyamutata, 'Childhood in the Digital Age: A Socio-Cultural and Legal Analysis of the UK's Proposed Virtual Legal Duty of Care' (2019) 27(4) IJLIT 311, 322; Lansdown (n 150) 16.
[163] Nyamutata (n 162).
[164] A James and A Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge 2015) 4.
[165] M Bulger and others, 'Where Policy and Practice Collide: Comparing United States, South Africa and European Union Approaches to Protecting Children Online' (2017) 19(5) New Media and Society 750, 751–52.
[166] United Nations, 'The United Nations Convention on the Rights of the Child' (n 3).

formulation of this rights-based philosophy,[167] which is pertinent to children's rights in the digital sphere for reasons explored below.

Among proponents of a rights-based conception of the child, there is a lack of a consensus as to its conceptual foundation.[168] This may bring into question whether it is prudent to consider this conception of the child, with academics in the children's rights literature hesitant to recommend regulating children's legal situations through a rights-based conception because of this lack of consensus.[169] I argue that the rights-based conception does warrant exploration as a counter to the conception of the child as vulnerable. This aligns with Quennnerstedt's call for a critical approach towards 'the consensus issue' — that is, the prevalent idea that there is a true norm, valid in all circumstances, that frames research concerning children's rights in a particular direction, thereby excluding or discouraging other avenues.[170] Using the rights-based approach as a counter to this tendency of consensus could, in turn, somewhat ameliorate the supposed propensity for rights-based conceptions to be viewed as a mere rhetorical device, as it has at times in the realm of human rights.[171] This is because of its capacity to serve an important expressive purpose and to draw out varying values compared to a vulnerability-based conception. Therefore, a useful starting point is to explore the strength of the case for a rights-based conception of the child.

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[167] M Freeman, 'Towards a Sociology of Children's Rights' in M Freeman (ed), *Law and Childhood Studies* (n 138) 31.
[168] Tobin (n 135) 396.
[169] MR Arce, 'Maturing Children's Rights Theory from Children, With Children, Of Children' (2015) 23 International Journal of Children's Rights 283, 286.
[170] A Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 International Journal of Children's Rights 233, 237.
[171] D Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101.

As Ferguson notes, the rights-based conception of the child can be argued to serve an expressive purpose.[172] This is because it recognises that children and their dignity as rights-holders are entitled to respect, and that children have agency as decision-makers.[173] This argument reflects an intrinsic belief in the value of the expressive purpose of a rights-based conception, derived from individuals' interest in integrity.[174] This subsequently could explain in part the rhetorical power which the discourse of rights is said to hold.[175] This is not to say that the conception of the child as vulnerable, in contrast, does not carry an expressive purpose. It arguably does so in signalling that aspects of children's vulnerabilities form a justifiable reason for the inclusion of vulnerability in the debate — although, as discussed above, this is not unproblematic. The conception of the child as vulnerable has been heavily relied upon in the development of law, policy, and practice,[176] arguably obscuring the utility of differing perspectives, which a rights-based conception of the child can offer. According to Bainham, a rights-based perspective has greater capacity to draw out and consider varying values than compared with a conception based on vulnerability.[177] In the context of children in the digital realm, akin to the argument made by Choudhry and Herring,[178] I would argue that this indicates the rights-based approach may justify protection more convincingly, as it is a comparatively less

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[172] L Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) International Journal of Children's Rights 177, 183.
[173] M Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15(1) International Journal of Children's Rights 5, 7–8.
[174] CR Sunstein, 'On the Expressive Function of the Law' (1996) 144(5) U Pa L Rev 2021, 2026.
[175] Kelly (n 131) 382; M Freeman, *The Rights and Wrongs of Children* (Frances Pinter 1983) 32.
[176] Lansdown (n 129) 35.
[177] A Bainham, 'Can we Protect Children and Protect Their Rights' (2002) Fam Law 279, 288.
[178] S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25(3) OJLS 453, 454.

constraining conception than a view of children founded on paternalistic grounds.

To this point, however, Ferguson has argued that the value of the expressive purpose in conceiving the child as a rights holder is contingent on evidence of improved outcomes for children in practice.[179] Paré in response emphasises that the relative effectiveness of a rights-based perspective does not detract from its supposed utility as one of the many tools used to improve children's lives.[180] While one can appreciate Paré's holistic perspective, a need for evidence of the effectiveness of the rights-based perspective's expressive purpose holds weight, to the extent that it demands more than just a rhetorical impact. Moreover, a measure of improved outcome provides a framework to judge the supposed utility of a rights-based perspective. In the context of children in the digital realm, providing such evidence of improved outcomes is not forthcoming as there are yet to be studies in this area. This deficiency however should not take away from the seeming influence of the expressive purpose of a rights-based perspective in the courts, albeit in a non-criminal law context. In the Commonwealth case of *Niu and Maple*, which concerned a child-residence dispute, Cleary J gave weight to the child's view of her ability to manage different parenting arrangements using technology and social media.[181] Simpson comments that this judgment sends the message that the use of technology permits children to claim agency, and he posits that digital communicative behaviour may play a part in shifting the boundaries of how judgments concerning children and children's decision making are made.[182] This aspect ought to count in favour of a rights-based perspective as a weightier influence, however, it does not hold the same normative force as empirical evidence of improved outcomes, which has not yet been forthcoming. It remains

[179] L Ferguson (n 172) 177, 186.
[180] M Paré, 'Children's Rights Are Human Rights and Why Canadian Implementation Lags Behind' (2017) 4(1) Canadian Journal of Children's Rights 24, 31.
[181] *Niu and Maple* [2014] FamCA 421 138–39 (Cleary J).
[182] B Simpson, *Young People, Social Media and the Law* (Routledge 2018) 54.

instructive in allowing us to consider how the Law Commission should approach the issue, but it remains wise to adopt a degree of caution for the same reasons given in the context of the conception of the child as vulnerable.

There is definite merit in Nyamutata's sentiment that striking a balance between the different conceptions of the child would be one way to resolve the issue of which conception should be a weightier influence in justifying protection from pro-self-harm content/expressions online. This is by no means simple, but is especially prudent given the issues with both conceptions, and the consequences that an imbalance between the two would pose,[183] as this section demonstrates. That is, whilst an overreaching and paternalistic approach of the vulnerability-based conception accounts for children's vulnerability — an especially pertinent aspect given the landscape and nature of PSHEO — it serves to undermine their autonomy and agency regarding their decision-making capacities. By contrast, sole focus on a rights-based conception, while respecting children's autonomy and agency, might result in children exposing themselves to harm and abuse.[184] Yet taken as a whole, there remains a strong case for the rights-based conception of the child to be considered as a weightier influence given its advantages relative to the conception of children as vulnerable.

5 Analysis of the Law Commission's Proposal

The preceding sections have examined the various issues pertaining to PSHEO. Yet to address such issues in a practical sense, they must be considered through an analysis of the Law Commission's Proposal. Therefore, this final section analyses whether the Proposal deals with the issues previously discussed in relation to the existing

[183] J Savirimuthu, *Online Child Safety Law, Technology and Governance* (Palgrave 2012) 3.
[184] ibid 4.

communication offences and could thus be regarded as a better and more sufficient means of protection for victims of PSHEO. It assesses whether the different conceptions of the child are considered in the Proposal as influences in justifying protection. While the Proposal appears to have addressed the inadequacies of the existing communication offences in some regard, I argue that it still falls short of being a sufficient means of protection for children. This is because of a lack of consideration towards the wider type of harms pertaining to PSHEO, the impact of harms on victims and the influence that different conceptions of the child could have on the overall assessment. Suggestions for improvement to the Proposal are therefore offered to ensure these concerns are addressed when considering legislative reform. It is important to note that the Law Commission has since published their final report, 'Modernising Communication Offences'.[185] The updated Proposal, among other recommendations, will be brought into law by the UK Government through the Online Safety Bill.[186] Thus, the following analysis will highlight areas where the updated Proposal differs from its original form.

The Proposal provides that: 'a defendant is guilty of an offence if he/she sends or posts a communication without reasonable excuse that was likely to cause harm to a likely audience and he/she intended to harm or was aware of a risk of harming a likely audience'.[187]

The focus of the offence on the propensity of communications to cause harm appears a positive step in ameliorating the deficiencies of section 1 of the MCA 1988 and section 127(1) of the CA 2003, in that it does not require the communication to be of a particular character

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[185] Law Commission, *Modernising Communications Offences A Final Report* (Law Com No 399, 2021).
[186] Chris Philp, 'Update on the Law Commission's Review of Modernising Communications Offences' (UK Parliament, 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-02-04/hcws590> accessed 19 May 2022.
[187] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.49.

(neither grossly offensive, indecent or menacing). This is a better reflection of the state fulfilling its duty in resource-protection.[188] Yet the lack of consideration towards the impact of the communication on victims remains an aspect that leaves much to be desired, for the same reasons argued in relation to the existing offences. The updated Proposal in this regard has largely remained the same, except for the removal of the requirement that the defendant is 'aware of a risk of harming'. As such, the comments and criticisms similarly apply.

The Proposal also leaves much to be desired if one considers the harms, particularly physiological harms, that PSHEO causes to susceptible children. As highlighted in the article's second section, these include incidences of self-harm and suicide facilitated through the 'social contagion' effect and enhanced by social media platforms and functionalities. Cases like that of Molly Russell indicate that these harms are a considerable reality. Russell was a teenager who was known to have consumed PSHEO and who committed suicide in 2017, with her death linked to PSHEO and the social media algorithms on Instagram which perpetuate it.[189] To this point, however, the type of harms covered by the Proposal limits the extent to which such harms can be taken into consideration. While the Law Commission recognises that incidences of self-harm and suicide form part of physiological harms that can arise from harmful communications, the Proposal only covers emotional or psychological harms.[190] The Law Commission in their final report has sought to justify the narrow scope of harms covered (in the updated Proposal now only covering 'psychological harm amounting to serious emotional distress') on the basis that such harms represent the common denominator of harmful communications online and the concerns surrounding the increasing of scope of harms in this area of

[188] See von Hirsch (n 56).
[189] BBC, 'Instagram "helped kill my daughter"' (BBC, 2019) <https://www.bbc.co.uk/news/av/uk-46966009> accessed 19 May 2022.
[190] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.49.

criminal law and its impact on the foreseeability of harms as a consequence of a defendant's action.[191] The Law Commission's reasoning is appreciable to the extent that the updated Proposal looks to cover a wide range of harmful communications online and not only PSHEO.

With that said, as Barker and Jurasz put it, this aspect of the Proposal (and arguably of the updated Proposal as well), in adopting such a narrow approach to the type of harms, ignores the online-offline transference of harms.[192] I would argue that such criticism holds great weight in relation to the particular nature of PSHEO. As discussed in the third section, PSHEO represent 'instigations' that seek to induce/advocate behaviours to susceptible children, which arguably facilitates and amplifies such online-offline transference. While the updated Proposal falters in this regard, the Law Commission's proposal of a new offence that specifically targets the encouragement or assisting of self-harm amounting to serious harm, requiring proof that the defendant intended a specific result, is seemingly more reflective of the reality of especially extreme PSHEOs.[193] An in-depth analysis of this is beyond the scope of this article, however further scrutiny into this particular proposal ought to be considered. This consideration as to the narrow focus of the proposed offence is not to say that emotional or psychological harms are any less deserving of consideration than physiological harms. Rather, the current category of harms under the Proposal should be broadened to include physiological harms posed and caused by PSHEO, to improve the Proposal as a means of protection.

In relation to whether the Proposal considers the vulnerability and rights-based conceptions of the child as influences in justifying

[191] Law Commission, *Modernising Communications Offences Report* (Law Com No 399, 2021) 26.
[192] K Barker and O Jurasz, 'Reform of the Communication Offences – Consultation Response to the Law Commission' (2020) Open University 1, 4.
[193] Law Commission, *Modernising Communications Offences Report* (Law Com No 399, 2021) 216.

protection, section 5 appears the most pertinent part of the Proposal to this issue. It provides that the courts take into account the context of the communication sent or posted, which includes the characteristics of a likely audience when assessing whether the communication was likely to cause harm.[194] These characteristics include age,[195] which is certainly relevant to children.

The Law Commission, in the initial report, put forward that this is an encouraging facet of the Proposal as it acknowledges the importance of contextual factors in elucidating the harmful nature of a communication.[196] In their final report, the Law Commission echoed similar sentiments and took into consideration consultee responses to the effect that recognising and addressing context is crucial for ensuring the offence can effectively address the harms that victims experience. I agree with this stance. However, regarding children and PSHEO, I suggest that a more nuanced approach ought to be adopted. As argued in the fourth section, the rights-based conception of the child should be given more weight as an influence in justifying protection, although the conception of the child as vulnerable should not be overlooked in its entirety. This is an aspect that the Law Commission should consider and enunciate as part of their explanations for this section in relation to children and PSHEO. This is because first, it will signify that due appreciation and recognition is given to children as rights-holders, having the capacity to exercise agency in protecting themselves from PSHEO. Second, it also indicates that children's vulnerabilities as a likely 'characteristic of a likely audience' are also being considered because of the different types of vulnerabilities of children, children's internet use/accessibility, the different roles that children adopt online, and the strong influence that PSHEO has as a Marshall-Millian 'instigation'. I

[194] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.49.
[195] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.126.
[196] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.120.

appreciate that other contextual factors might also impact the assessment of whether PSHEO is likely to cause harm. Nonetheless, I would argue that accounting for both conceptions in the assessment under section 5 of the Proposal, with more weight given to the rights-based conception, would serve as a useful framework to address any overly paternalistic predispositions when it comes to children. If not, it is likely to realise and affirm the concerns of some consultees, including the Law Society, that there is potential for inconsistency in the courts' decision making.[197]

To summarise, the Proposal, in its initial and updated form, does address some issues with the existing communication offences. In this sense, it appears as a justifiable positive step towards protecting children from PSHEO. However, upon closer analysis I argue that its failure to adopt a more nuanced and expansive outlook on issues such as the type of harms, the impact of harms on victims, and the influence of different conceptions of the child indicate that, while it is a better means of protection, it is nonetheless insufficient.

6 Conclusion

The main aim of this article was to holistically address how the law should deal with PSHEO to effectively ensure appropriate protection for children. First, it analysed the inadequacies of the current existing communication offences as a means of protection from PSHEO, suggesting that further consideration to PSHEO needs to be given and that the Proposal ought to ameliorate such deficiencies. Drawing from this, it then argued that PSHEO should not be protected under freedom of expression. The article then demonstrated that the rights-based conception of the child should act as a weightier influence in

[197] The Law Society, *Law Society Response to the Law Commission Consultation Paper on Communications Offences* (The Law Society, 2020) <https://www.lawsociety.org.uk/campaigns/consultation-responses/law-commission-consultation-on-communications-offences-law-society-response> accessed 19 May 2022.

justifying protection from PSHEO, as it provides a more nuanced outlook to the wider issue beyond paternalistic grounds. The final section then encapsulated the previous discussions in assessing the Proposal as the current vehicle for reform, concluding that the Proposal is not currently a sufficient means of protection for children from PSHEO. The article suggested improvements to rectify these deficiencies. Therefore, the article has explored what the law should do to address the issue of PSHEO and how this should be achieved. Ultimately, the suggestions offered ought to only act as one piece to a much larger and incomplete puzzle of PSHEO and the protection of children, as it is an issue that necessitates a wider range of private actors working together in a pluralistic endeavour.