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The New Phenomenon: Is it time for the law to abandon its neoliberal stance towards social media platforms and confront the emergence of image-based sexual abuse?

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## Introduction

Image-based sexual abuse (IBSA) is a ‘rapidly escalating’<sup>1</sup> contemporary ‘phenomenon’<sup>2</sup> which is heavily gendered, with studies reporting 95% of victims to be women.<sup>3</sup> The term captures a broad set of offences such as ‘upskirting’,<sup>4</sup> the non-consensual taking of an image under another person’s skirt or dress and ‘cyberflashing’, the sending of unsolicited images of genitals to others without consent, to name a few.<sup>5</sup> However, this dissertation will be focusing on IBSA as the non-consensual dissemination of intimate images, commonly known as ‘revenge porn’.<sup>6</sup>

In assessing the position of the law as of December 2021, IBSA is only recognised under the criminal law in England Wales. The offence is defined as the ‘disclos[ure], or threaten[ing] to disclose, a private sexual photograph or film in which another individual appears’, without their consent and with the intent to cause distress upon them on an information service provider.<sup>7</sup> The harms arising from IBSA are wide-ranging and can be ‘life-ending’.<sup>8</sup> Victims suffer extensive psychological harm, from PTSD to depression, as well as financial harm,<sup>9</sup> with 51% contemplating suicide as an escape.<sup>10</sup> Though the criminal law has advanced its legislative shape to better protect victims from these harms,<sup>11</sup> it is viewed as a ‘bandaid solution’, meaning it is insubstantial in challenging a much larger offence that requires stronger regulative scope.<sup>12</sup> Owing to its ‘traditional masculine values’, the criminal system’s

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<sup>1</sup> Emma Bond and Katie Tyrrell, ‘Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales’ [2021] *Journal of Interpersonal Violence* 36(5-6) 2166, 2168

<sup>2</sup> Samantha Bates, ‘Revenge porn and mental health: a qualitative analysis of the mental health effects of revenge porn on female survivors’ [2017] *Feminist Criminology* 12(1) 1, 1

<sup>3</sup> Julia Davidson, Sonia Livingstone, Sam Jenkins, Anna Gekoski, Clare Choak, Tarela Ike, Kirsty Phillips, ‘Adult Online Hate, Harassment and Abuse’ Research Paper [2019] (for the UK Council for Internet Safety Evidence Group), 4 <<https://core.ac.uk/download/pdf/286713825.pdf>> accessed 6 December 2021

<sup>4</sup> *Voyeurism (Offences) Act 2019*, s.1

<sup>5</sup> Sophie Gallagher, ‘What Is Cyber Flashing – And Why Isn’t It Illegal In England And Wales?’ *Huffington Post* (London, 10 July 2019)

<sup>6</sup> Kate Walker and Emma Sleath, ‘A systematic review of the current knowledge regarding revenge pornography and non-consensual sharing of sexually explicit media’ [2017] *Aggression and Violent Behaviour* 36, 6

<sup>7</sup> *Criminal Justice and Courts Act 2015*, s.33

<sup>8</sup> Erika Rackley, Clare McGlynn, Kelly Johnson, Nicola Henry, Nicola Gavey, Asher Flynn and Anastasia Powell, ‘Seeking justice and redress for victim-survivors of image-based sexual abuse’ [2021] *Feminist Legal Studies* 293, 293

<sup>9</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.3: Harms

<sup>10</sup> Sophia Ankel, ‘Many revenge porn victims consider suicide – why aren’t schools doing more to stop it?’ *The Guardian* (London, 7 May 2018)

<sup>11</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.4: Legislative Context

<sup>12</sup> Asher Flynn, Anastasia Powell and Sophie Hinds, ‘Technology-facilitated abuse: A survey of support services stakeholders’ [2021] Australia’s National Research Organisation for Women’s Safety Ltd Research Report Issue 2, 32 <[https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2021/07/4AP.4-Flynn\\_et\\_al-TFa\\_Stakeholder\\_Survey.pdf](https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2021/07/4AP.4-Flynn_et_al-TFa_Stakeholder_Survey.pdf)> accessed 20 September 2021

response to gendered offences is inherently flawed, impairing the support victims receive and deterring them from reporting their abuses.<sup>13</sup> This combined with the criminal law's retrospective nature in confronting offences weakens its effectiveness in minimising IBSA, resulting in its lingering harms escalating while cases continue unreported and unresolved.<sup>14</sup> In accordance with Rackley and McGlynn, an *ex-ante* measure which proactively seeks to minimise IBSA offences and its subsequent harms proves necessary.<sup>15</sup>

A platforms-based approach presents itself as the most effective strategy for confronting the technologically borne offence of IBSA. Social media sites are 'widely referred to as "platforms"', being a strain of 'networking services' which facilitate the cross-border, digital conversation between users.<sup>16</sup> These platforms include Facebook, Instagram, Snapchat and Twitter.<sup>17</sup> Despite platforms' possessing the technological capacities 'to stop the spreading and sharing' of online harms 'before they affect potential victims', they fail to do so.<sup>18</sup> Platforms lack the incentives to confront online harms, such as IBSA, as developing content-moderation initiatives are considered to be 'expensive'<sup>19</sup> and a 'big job'.<sup>20</sup> Furthermore, the social media industry is 'extremely concentrated'.<sup>21</sup> Due to this, dominant platforms can prioritise maximising their profits in contrast to user safety without losing a large fraction of their users.<sup>22</sup> The UK, similarly to the USA, is seen to assist platforms' pursuit of profit through their 'intentionally laissez-faire' stance towards platform regulation,<sup>23</sup> viewing them

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<sup>13</sup> Nicola Henry, Asher Flynn and Anastasia Powell, 'Policing image-based sexual abuse: stakeholder perspectives' [2018] *Police Practice and Research* 19(6) 565, 574

<sup>14</sup> North Yorkshire Police, Fire & Crime Commissioner, 'Suffering in Silence' (*No More Naming*, 2018) <<http://www.nomore naming.co.uk/wp-content/uploads/2018/11/Suffering-in-Silence-2018.pdf>> accessed 25 April 2022

<sup>15</sup> Rackley et al. (n 8) 318

<sup>16</sup> Alex Rochefort, 'Regulating Social Media Platforms: A Comparative Policy Analysis' [2020] *Communication Law and Policy* 25(2) 225, 227

<sup>17</sup> Statista Research Department, 'Global social networks ranked by number of users 2022' (*Statista*, January 2022) <<https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>> accessed 10 April 2022

<sup>18</sup> Alex Cadzow, 'Are we designing cybersecurity to protect people from malicious actors?' *Advances in Intelligent Systems and Computing* 876 1038, 1042

<sup>19</sup> Katie Schoolov, 'Why content moderation costs billion sand is so tricky for Facebook, Twitter, YouTube and others' *CNBC* (New Jersey, 27 February 2021)

<sup>20</sup> Rande Price, 'Content moderation is serious business. Social platforms need to act like it' *Digital Content Next* (New York, 16 June 2020)

<sup>21</sup> IBIS World, 'Social Networking Sites Industry in the US- Market Research Report' (*IBIS World*, 20 July 2021) <<https://www.ibisworld.com/united-states/market-research-reports/social-networking-sites-industry/>> accessed 25 April 2022

<sup>22</sup> Jordan Lebeau, 'Social media has no incentive to fix what ails it' *Yahoo! Finance* (California, 16 May 2021)

<sup>23</sup> Robert Gorwa, 'Regulating them softly' [2019] in Centre for International Governance Innovation, 'Models for Platform Governance' A CIGI Essay Series 39, 39

as ‘mere conduits’.<sup>24</sup> In positioning platforms as conduits, platforms’ are unaccountable for their users’ activities and able to exercise their economic muscles.<sup>25</sup> This emulates a neoliberal shape of regulation, advocating for the ‘deregulat[ion]’ of markets, privatisation of firms, and limited state interference in the economy to preserve monetary prosperity.<sup>26</sup> Although platforms are economically significant<sup>27</sup> in their ability to connect ‘both business- and consumer-facing actors in one integrated digital ecosystem’,<sup>28</sup> their regulative liberties shape them into ‘double-edged swords’ which accelerate online harms.<sup>29</sup> A new shape of regulative force is necessary to rebalance platforms’ objectives and foster their proactive propensity to tackle IBSA.

The close relationship between platforms and IBSA furthers this necessity. Platforms are the primary distributors of IBSA,<sup>30</sup> ‘facilitat[ing] and intensif[ying]’<sup>31</sup> the technologically borne offence.<sup>32</sup> The COVID-19 pandemic emphasised their relationship as the platform usage rose by 52%<sup>33</sup> while IBSA offences by 87% from 2019 to 2020, both reaching record levels.<sup>34</sup> Facebook embodied this connection by its dominance<sup>35</sup> in the platform industry<sup>36</sup> alongside the facilitation of IBSA offences.<sup>37</sup> Despite this closeness, IBSA has been a particularly

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<sup>24</sup> Criminal Justice and Courts Act 2015, sch.8(3)(1)

<sup>25</sup> *ibid*

<sup>26</sup> Taylor C. Boas and Jordan Gans-Morse, ‘Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan’ [2009] *Studies in Comparative International Development* 44 137, 143

<sup>27</sup> Manuel Castells, ‘Information Technology, Globalization and Social Development’ [1999] UNRISD Discussion Paper No. 114, 3 <<https://cdn.unrisd.org/assets/library/papers/pdf-files/dp114.pdf>> accessed 10 November 2021

<sup>28</sup> Rochefort (n 16) 228

<sup>29</sup> Michael A. Cusumano, Annabelle Gawer, and David B. Yoffie, ‘Social Media Companies Should Self-Regulate. Now.’ *Harvard Business Review* (Massachusetts, 15 January 2021)

<sup>30</sup> Claire Slattery, ‘Study charts rising trend of image-based sexual abuse’ (*RMIT University*, 21 February 2020) <<https://www.rmit.edu.au/news/all-news/2020/feb/image-based-abuse>> accessed 7 December 2021

<sup>31</sup> Clare McGlynn and Erika Rackley, ‘Image-Based Sexual Abuse’ [2017] *Oxford Journal of Legal Studies* 37(3) 534, 551

<sup>32</sup> Flynn et al. (n 12) 4

<sup>33</sup> Ofcom, ‘UK’s internet use surges to record levels’ (*Ofcom*, 24 June 2020) <<https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/uk-internet-use-surges>> accessed 10 December 2021

<sup>34</sup> Revenge Porn Helpline, ‘2020 Hindsight’ (*Revenge Porn Helpline*, 23 February 2021) <<https://revengepornhelpline.org.uk/news/2020-hindsight/>> accessed 7 April 2022

<sup>35</sup> Statista Research Department, ‘Global social networks ranked by number of users 2022’ (n 17)

<sup>36</sup> Statista Research Department, ‘Meta’s (formerly Facebook Inc.) annual revenue from 2009 to 2021’ (*Statista*, February 2022) <[https://www.statista.com/statistics/268604/annual-revenue-of-facebook/#:~:text=In%202021%2C%20Meta's%20\(formerly%20Facebook,of%20income%20is%20digital%20advertising.>](https://www.statista.com/statistics/268604/annual-revenue-of-facebook/#:~:text=In%202021%2C%20Meta's%20(formerly%20Facebook,of%20income%20is%20digital%20advertising.>) accessed 10 April 2022

<sup>37</sup> Office of the eSafety Commissioner, ‘Image-Based Abuse – National Survey: Summary Report’ [2017] 6 <<https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf>> accessed 7 December 2021

underacknowledged online harm.<sup>38</sup> Further to the economic disregard for content-moderation contributing to IBSA's emergence, specific platforms have been created to profit solely from the incitement of IBSA, boasting profits of \$240,000 per year.<sup>39</sup> IBSA is seen to have 'entered a dangerous liaison with neoliberalism', being disregarded in the profit-focused society.<sup>40</sup> A shift in regulative thinking which strives to achieve a closer equilibrium in its prioritisation between platforms' profits and societal influences is necessary to confront IBSA offences.<sup>41</sup>

The UK has demonstrated an emerging recognition for online harms under the Digital Economy Act 2017 (DEA), despite its traditional impartiality to platform regulation.<sup>42</sup> It takes a soft-law shape,<sup>43</sup> attempting to motivate platforms to self-regulate their arenas for the safety of their users from online bullying and insulting.<sup>44</sup> However, in doing so, it maintains the traditional view of platforms being 'mere conduits' and unaccountable for any offences incurring on their arenas.<sup>45</sup> Beyond failing to recognise IBSA, the DEA's absence of tougher obligations upon platforms allows platforms to continue their profit-driven goals and divest from advancing their content-moderation tools.<sup>46</sup> Thus, users remain at continued risk of online harms. An acceleration of this changing perspective towards platforms is essential to better align user safety beside platform profits and confront IBSA. To achieve this, the legislature needs to recognise IBSA, beyond the criminal realm, and platforms' consequent involvement in its infliction.<sup>47</sup>

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<sup>38</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety Bill under 3.4: The Rise in Legal Recognition of Platforms under the Digital Economy Act

<sup>39</sup> Alex Morris, 'Hunter Moore: The Most Hated Man on the Internet' *Rolling Stone* (New York, 13 November 2012)

<sup>40</sup> Nancy Fraser, *Fortune of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso, 2013), 14

<sup>41</sup> Virginia Bodolica and Martin Spraggon, 'An Examination into the Disclosure, Structure and Contents of Ethical Codes in Publicly Listed Acquiring Firms' [2015] *Journal of Business Ethics* 126 459, 460

<sup>42</sup> Digital Economy Act 2017

<sup>43</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety Bill under 3.4: The Rise in Legal Recognition of Platforms under the Digital Economy Act

<sup>44</sup> Digital Economy Act 2017, s.103(3)(c)

<sup>45</sup> Criminal Justice and Courts Act 2015, sch.8(3)(1)

<sup>46</sup> Bodolica and Spraggon (n 41) 462

<sup>47</sup> Rackley et al. (n 8) 318

The question of platforms' participation in online offences is a 'less established but growing area'.<sup>48</sup> Nonetheless, the drafting of the Online Safety Bill (OSB)<sup>49</sup> confirmed the UK's shift towards this contemporary discussion and presented itself as a monumental step 'in the right direction' for platform regulation.<sup>50</sup> The Bill exhibits a strong *ex-ante* force in its imposition of a duty of care upon platforms to block specific online harms before they enter their public domain.<sup>51</sup> This duty of care standard signifies a push to minimise platforms' divergence between profit and safety objectives. Moreover, the Bill's strength paired with its intent to incorporate IBSA under its protection signals itself as supreme in minimising the offence.

In Chapter 1, the criminal law's effectiveness in minimising IBSA will be assessed in parallel to the offence's gendered dimensions and wider harms. It will be argued that the criminal law is ineffective, despite its legislative progression in appreciating IBSA. The criminal system carries systemic flaws and fails to confront the offence's harms due to its inherent *ex-post* nature. Consequently, wider legislative protections which can tackle IBSA *ex-ante* are necessary to better protect victims.

Chapter 2 will delve deeper into the offence's gendered dimensions and its conflict with platforms' pursuit of profit. It will highlight platforms' heightened focus on monetary success to impose detrimental influences upon online harms. However, this detriment disproportionately impacts IBSA offences as the excessive liberties of dominant platforms, enjoying a competitive advantage and economic praise, result in the offence being underprioritised and exploited.<sup>52</sup> Consequently, this chapter will advocate for regulation which can successfully reach an equilibrium, preserving their economic value whilst protecting women from IBSA offences.

Chapter 3 will examine the historical foundations of platform legislation. In doing so, it will present the UK's growing detachment from its traditionally strict liberal stance towards

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<sup>48</sup> Laura DeNardis and Andreea Hackl, 'Internet governance by social media platforms' [2015] Telecommunications Policy 39 761, 762

<sup>49</sup> UK Government, 'UK to introduce world first online safety laws' Press Release (*UK Government*, 8 April 2019) <<https://www.gov.uk/government/news/uk-to-introduce-world-first-online-safety-laws>> accessed 21 January 2022

<sup>50</sup> Rose Stokes 'Will the Online Safety Bill actually protect people from abuse?' *Raconteur* (London, 13 January 2022)

<sup>51</sup> See Chapter 4: The Legislative Shift to the Online Safety Bill under 4.3: The Online Safety Bill's Key Elements

<sup>52</sup> See Chapter 2: The Conflict Between Platform's Economic and Gender Influences



platforms as it begins to place a stronger focus on online harms. In illuminating the failings under the current shape of platform regulation, it will emphasise the need for further regulative enforcement directly upon platforms to better confront IBSA offences.

Building upon the previous chapters, Chapter 4 will assess the current discussion of varying platform regulation proposals and their effectiveness. Proposals range from further soft law measures to indirect enforcement and direct enforcement under the OSB, concluding the latter to be the most effective. This conclusion is owing to the Bill's chief ability to confront IBSA offences whilst also maintaining hues of the UK's traditionally liberal approach. In reaching an equilibrium between platforms' accountability for protecting IBSA alongside maintaining their economic propensity, the Bill presents itself as a sustainable piece of legislation for tackling the offence.

In conclusion, this dissertation will argue the time is 'ripe' for the English law to abandon its persisting neoliberal stance towards platform regulation in order to confront the emergence of IBSA.<sup>53</sup> It will support the OSB's proactive nature in recognising platforms' roles amidst online harms alongside its potential to effectively diminish IBSA and its subsequent harms.

## **Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse**

The criminal law has advanced its legislative figure for IBSA offences. However, these are 'just the tip of the iceberg' in eradicating IBSA.<sup>54</sup> Irrespective of the criminal law's legislative dimensions, its systemic issues in tackling gendered harms deter victims from reporting the offence.<sup>55</sup> Furthermore, the reactive nature of the criminal law, providing justice once the offence and its subsequent harms have occurred, further debilitates its capacity to confront IBSA.<sup>56</sup> Thus, further legal action in the form of *ex-ante* platform regulation, being commonplace for IBSA distribution,<sup>57</sup> alongside the criminal law has been advocated to better protect IBSA victims.<sup>58</sup>

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<sup>53</sup> McGlynn and Rackley, 'Image-Based Sexual Abuse' (n 31) 561

<sup>54</sup> Heather Brunskell-Evans, 'Want to stop revenge pornography? Then we need to overhaul mainstream porn' *The Conversation* (London, 17 July 2015)

<sup>55</sup> Claire Waxman, 'Women and girls are being failed by bias and stereotyping in our criminal justice system' *The Independent* (London, 10 March 2022)

<sup>56</sup> Michael R. Gottfredson and Don M. Gottfredson, *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion* (Springer Science and Business Media, 1987), 1

<sup>57</sup> Claire Slattery (n 30)

<sup>58</sup> Rackley et al. (n 8) 318

## 1.1: Scholarly Definitions

There is wide scholarly debate surrounding the definition of IBSA. The offence is commonly known as ‘revenge porn’, gaining its title from academics closely linking its perpetration to possess ‘an underlying motivation linked to revenge’.<sup>59</sup> However, McGlynn and Rackley strongly contended against this coining, arguing it to be inaccurate and harmful.<sup>60</sup> They adopted a broad definition of the offence, addressing it as ‘image-based sexual abuse’ which entails the taking, creating, sharing and threatening to share a nude or sexual images or videos without consent.<sup>61</sup> In doing so, they intentionally removed both ‘revenge’ and ‘porn’ from their definition. This response is due to ‘revenge’ justifying the perpetrator’s intentions at the expense of recognising the harms inflicted upon the victims.<sup>62</sup> By intentionally rejecting revenge or any confines of intent in their definition, McGlynn and Rackley acknowledged the myriad of contexts in which IBSA can arise.<sup>63</sup> Furthermore, the term’s ‘porn’ element was widely criticised for further harming victims and the public perception of the offence<sup>64</sup> as victims were viewed to be consensually acting for wider ‘sexual gratification’.<sup>65</sup> Hence, by referring to the offence as ‘abuse’, they ‘immediately and accurately convey[ed] the significant harms that may occur and reflect[ed] the experiences of victim-survivors’.<sup>66</sup> As a result, they strove for all forms of gendered abuse to be ‘examined together’ and result in a ‘holistic approach’ to confronting them.<sup>67</sup>

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<sup>59</sup> Walker and Sleath (n 6) 6

<sup>60</sup> Nicola Henry and Alice Witt, ‘Governing Image-based Sexual Abuse: Digital Platform Policies, Tools, and Practices’ in Jane Bailey, Asher Flynn, Nicola Henry, *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* (Emerald Publishing Limited, 2021) 749, 754

<sup>61</sup> Clare McGlynn, Erika Rackley, Kelly Johnson, Nicola Henry, Asher Flynn, Anastasia Powell, Nicola Gavey and Adrian J Scott, ‘Shattering Lives and Myths: A Report on Image-Based Sexual Abuse’ [2019], 2 <<https://claremcglynn.files.wordpress.com/2019/10/shattering-lives-and-myths-revised-aug-2019.pdf>> accessed 7 December 2021

<sup>62</sup> McGlynn and Rackley, ‘Image-Based Sexual Abuse’ (n 31) 536

<sup>63</sup> *ibid*

<sup>64</sup> Your Weekly Constitutional, ‘Revenge Porn’ (22 November 2013) defined by Professor Franks of University of Miami School of Law <[https://www.podomatic.com/podcasts/ywc/episodes/2013-11-22T13\\_24\\_26-08\\_00](https://www.podomatic.com/podcasts/ywc/episodes/2013-11-22T13_24_26-08_00)> accessed 6 December 2021

<sup>65</sup> McGlynn and Rackley, ‘Image-Based Sexual Abuse’ (n 31) 536

<sup>66</sup> McGlynn and Rackley, ‘Image-Based Sexual Abuse’ (n 31) 536-537

<sup>67</sup> *ibid* 537

## 1.2: Gendered Context

IBSA occurs in numerous forms, yet, in all instances, it remains a gendered harm with studies finding 95% of its victims to be women.<sup>68</sup> Ringrose et al. argued IBSA's gendered nature to stem from 'complex gender dynamics', highlighting the contrast between the genders' sexual development.<sup>69</sup> Girls are seen to be 'pressured' to send images,<sup>70</sup> whilst its obtainment embodies 'masculine heterosexual prowess' for boys.<sup>71</sup> Furthermore, the distribution of these images is described as a 'homosocial exchange'<sup>72</sup> for boys to evidence their 'digital trophies'.<sup>73</sup> This behaviour reflects the pervading tradition of men using women's bodies as 'currency' to uphold their masculine superiorities over other men.<sup>74</sup>

IBSA predominantly occurs subsequent to an intimate relationship with a partner, reported in 63% of cases.<sup>75</sup> This continuance is recognised as a form of domestic abuse in which platforms are seen to offer abusers the 'weapon' to 'continue to exert control over their victims'.<sup>76</sup> The weapon, in this case, stems from platforms' lack of initiative to advance the effectiveness of content-moderation tools to preclude the distribution of harmful content.<sup>77</sup> As a result, social media has made domestic abusers' threats and intimidations 'more commonplace'.<sup>78</sup> Furthermore, platforms exacerbate the infliction of harm upon victims in

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<sup>68</sup> Davidson et al. (n 3) 4

<sup>69</sup> Jessica Ringrose, Kaitlyn Regehr and Betsy Milne, 'Understanding and Combatting Youth Experiences of Image-Based Sexual Harassment and Abuse' (*UCL Institute of Education*, 2021), 11 <[https://discovery.ucl.ac.uk/id/eprint/10139669/1/Ringrose\\_Understanding%20and%20combatting%20youth%20experiences%20of%20image-based%20sexual%20harassment%20and%20abuse%20-%20full%20report%20%284%29.pdf](https://discovery.ucl.ac.uk/id/eprint/10139669/1/Ringrose_Understanding%20and%20combatting%20youth%20experiences%20of%20image-based%20sexual%20harassment%20and%20abuse%20-%20full%20report%20%284%29.pdf)> accessed 27 February 2022

<sup>70</sup> *ibid* 6

<sup>71</sup> *ibid* 41

<sup>72</sup> Jessica Ringrose and Laura Harvey, 'Boobs, back-off, six packs and bits: Mediated body parts, gendered reward, and sexual shame in teens' sexting images' [2015] *Continuum Journal of Media and Cultural Studies*, 29(2) 205, 210

<sup>73</sup> Kristina Hunehall Berndtsson and Ylva Odenbring, 'They don't even think about what the girl might think about it': students' views on sexting, gender inequalities and power relations in school' [2021] *Journal of Gender Studies* 30(1) 91, 96

<sup>74</sup> Ringrose et al. (n 69) 41 2

<sup>75</sup> Cyber Civil Rights Initiative, 'CCRI's 2013 Nonconsensual Pornography (NCP) Research Results' [2016] <<https://www.cybercivilrights.org/wp-content/uploads/2016/11/NCP-2013-Study-Research-Results-1.pdf>> accessed 7 December 2021

<sup>76</sup> Akhila Kolisetty, 'How image-based sexual abuse is a form of domestic violence' (*End Cyber Abuse*, 13 October 2019) <<https://endcyberabuse.org/how-image-based-sexual-abuse-is-a-form-of-domestic-violence/>> accessed 28 February 2022

<sup>77</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety under 3.3: The Technoliberal Foundations of Platform Regulation

<sup>78</sup> Adam Dodge, 'Threats Of Revenge Porn: A New Way To Silence Survivors Of Domestic Violence' *Huffpost* (New York, 10 March 2016) <[https://www.huffpost.com/entry/threats-of-revenge-porn-a-new-way-to-silence-survivors\\_b\\_5798e8a8e4b0b3e2427d76b9](https://www.huffpost.com/entry/threats-of-revenge-porn-a-new-way-to-silence-survivors_b_5798e8a8e4b0b3e2427d76b9)> accessed 28 February 2022

their ‘ero[sion] [of] temporal and spatial barriers’, creating a sense of close proximity between the abuser and the abused.<sup>79</sup> This closeness is referred to as an ‘omnipresence’ in which victims endure their online presence with an unceasing pre-emptive fear of abuse.<sup>80</sup>

Police reports show IBSA to be most noteworthy amongst women aged twenty-one to twenty-nine, forming 47% of proceedings.<sup>81</sup> However, police reports fail to reflect the offence’s prolific nature, owing to the institutional defects of criminal law enforcement. Firstly, with only 1.2% of police officers and staff in England and Wales having ‘excellent understanding’ of IBSA,<sup>82</sup> and police training being found deficient, there is a large lack of knowledge and expertise in responding to the offence.<sup>83</sup> Secondly, combined with police culture reflecting ‘traditional masculine values’, the criminal system is further undermined in confronting gendered offences.<sup>84</sup> The flawed culture of law enforcement is a growing issue, in which female victims are blamed for their abuses and left responsible for saving themselves.<sup>85</sup> The attrition rate of IBSA reflects this systemically flawed response as only 11% of cases are even prosecuted.<sup>86</sup> As a result, women are substantially losing trust in the criminal system, failing to report and rely on the law<sup>87</sup> in fear of ‘embarrassment’ or ‘humiliation’.<sup>88</sup>

The gendered nature of IBSA plays a significant role in the criminal law’s ineffectiveness. While legislative changes in defining IBSA can be advocated for, the entrenched distrust in the criminal system to protect women from the abuses of their commonly ‘ex-male partners’ can continue to undermine its effectiveness.<sup>89</sup>

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<sup>79</sup> Elizabeth Yardley, ‘Technology-Facilitated Domestic Abuse in Political Economy: A New Theoretical Framework’ [2020] *Violence Against Women* 27(10) 1479, 1480

<sup>80</sup> *ibid*

<sup>81</sup> Ministry of Justice, ‘Criminal Justice System statistics quarterly: December 2018’ Outcome by Offence Data Tool (*UK Government*, 16 May 2019) Offence 8.19

<sup>82</sup> Bond and Tyrrell (n 1) 2174

<sup>83</sup> *ibid* 2177

<sup>84</sup> Henry et al. (n 13) 574

<sup>85</sup> *ibid* 574

<sup>86</sup> Peter Sherlock, ‘Revenge pornography victims as young as 11, investigation finds’ *BBC News* (London, 27 April 2016)

<sup>87</sup> Waxman (n 55)

<sup>88</sup> Bond and Tyrrell (n 1) 2169

<sup>89</sup> Matthew Hall and Jeff Hearn, ‘Revenge pornography and manhood acts: A discourse analysis of perpetrators’ accounts’ [2019] *Journal of Gender Studies* 28(2) 158, 158

### 1.3: Harms

Due to the criminal law's *ex-post* nature,<sup>90</sup> victim-survivors of IBSA would have already suffered the offence's 'life-ending' impacts.<sup>91</sup> Consequently, irrespective of the extent of protection or revising the criminal law introduces regarding IBSA, its effectiveness is weakened. Thus, further regulative action is required to compensate for the criminal law's absence, protecting victims before they can be harmed.

IBSA is strongly tied to the infliction of psychological harm upon victims.<sup>92</sup> With respect to perpetrators threatening to commit IBSA, victims are seen to be disproportionately harmed.<sup>93</sup> The root of this magnification is due to platforms being 'force multiplier[s]', in which they heighten the comparatively minimal efforts of abuse from perpetrators to further psychologically harm victims.<sup>94</sup> This intensification is under platforms' 'omnipresen[t]' nature, resulting in victims suffering a ceaseless fear of an impending upload.<sup>95</sup> Consequently, threats to commit IBSA can result in significant mental health impacts, such as PTSD, depression, anxiety and higher substance use due to victims' hypervigilance.<sup>96</sup> Additionally, the fulfilling of IBSA offences present further harms in its connection with 'doxing'. Douglas defines 'doxing' to be 'the intentional public release onto the internet of personal information about an individual by a third party'.<sup>97</sup> It is viewed as 'even more harmful'<sup>98</sup> than other IBSA-related harms as victims become easily attributable, contributing to their exposure to secondary victimisation and abuse.<sup>99</sup> Subsequently, victims are forced offline and further isolated from society.<sup>100</sup> IBSA and doxing possess a close synergy as over half of IBSA victims are also victims of doxing.<sup>101</sup> However, this synergy is at further risk as

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<sup>90</sup> Gottfredson and Gottfredson (n 56) 1

<sup>91</sup> Rackley et al. (n 8) 293

<sup>92</sup> Renée Danziger, 'The Impact of Revenge Porn' *PESI* (Wisconsin, 7 July 2021)

<sup>93</sup> Majid Yar, 'The novelty of "cybercrime": An assessment in light of routine activity' [2005] *European Journal of Criminology* 2(4) 407, 411

<sup>94</sup> *ibid*

<sup>95</sup> Delanie Woodlock, 'The Abuse of Technology in Domestic Violence and Stalking' [2017] *Violence Against Women* 23(5), 584, 592

<sup>96</sup> Flynn et al. (n 12) 10

<sup>97</sup> David M. Douglas, 'Doxing: a conceptual analysis' [2016] *Ethics and Information Technology* 18 199, 199

<sup>98</sup> Erica Souza, 'For His Eyes Only': Why Federal Legislation Is Needed to Combat Revenge Porn' [2016] ', *UCLA Women's Law Journal* 23 101, 107

<sup>99</sup> Davidson et al. (n 3) 46

<sup>100</sup> McGlynn and Rackley, 'Image-Based Sexual Abuse' (n 31) 551

<sup>101</sup> Souza (n 98) 107

platforms, the primary distributors of the offence<sup>102</sup> have accelerated the sharing of personal information,<sup>103</sup> placing victims in a highly vulnerable position of doxing.<sup>104</sup>

Furthermore, IBSA bears potential financial loss and professional damage for victims. Research has presented IBSA to result in job losses for victim-survivors as well as wider harms in the workplace, such as harassment from colleagues and embarrassment.<sup>105</sup> Women face disproportionate detriments from IBSA, in comparison to their male colleagues, as ‘sexual double standards online’ contribute to their sexualisation.<sup>106</sup> This relates to McGlynn’s view of IBSA’s gendered dimensions rotating around ‘lad culture’ in which men are praised<sup>107</sup> and bolstered by humour whilst women are degraded and ‘slut sham[ed]’<sup>108</sup>

IBSA’s significance goes beyond solely its act, with its subsequent harms being long-term, extensive and ‘life-ending’.<sup>109</sup> With 51% of IBSA victims contemplating suicide,<sup>110</sup> a ‘proactive’ strategy which seeks to minimise its severe harms and compensate for the criminal law’s reactive nature is necessary to protect potential victims.<sup>111</sup>

#### **1.4: Legislative Context**

The Criminal Justice and Courts Act 2015 (CJCA) was the first legislation to explicitly make IBSA a criminal offence.<sup>112</sup> Under the CJCA, IBSA offences were limited solely to the disclosure of private content. However, this was later amended by the Domestic Abuse Act 2021 to include threats to disclose under the offence.<sup>113</sup> Prior to the CJCA, IBSA was sought under the Malicious Communications Act 1988<sup>114</sup> and Communications Act 2003,<sup>115</sup> both

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<sup>102</sup> Claire Slattery (n 30)

<sup>103</sup> Marry Madden, Amanda Lenhart, Sandra Cortesi, Urs Gasser, Maeve Duggan, Aaron Smith and Meredith Beaton, ‘Teens, Social Media, and Privacy’ [2013] PEW Research Centre <[https://www.pewresearch.org/wp-content/uploads/sites/9/2013/05/PIP\\_TeensSocialMediaandPrivacy\\_PDF.pdf](https://www.pewresearch.org/wp-content/uploads/sites/9/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf)> accessed 10 April 2022

<sup>104</sup> Office of the eSafety Commissioner (n 37) 1

<sup>105</sup> Flynn et al. (n 12) 26

<sup>106</sup> *ibid* 11

<sup>107</sup> McGlynn et al., ‘Shattering Lives and Myths: A Report on Image-Based Sexual Abuse’ (n 61) 13

<sup>108</sup> Davidson et al. (n 3) 11

<sup>109</sup> Rackley et al. (n 8) 293

<sup>110</sup> Ankel (n 10)

<sup>111</sup> Rackley et al. (n 8) 318

<sup>112</sup> Criminal Justice and Courts Act 2015, s.33

<sup>113</sup> Domestic Abuse Act 2021, s.69

<sup>114</sup> Malicious Communications Act 1988, s.1

<sup>115</sup> Communications Act 2003, s.127

acknowledging crimes on the technological scene.<sup>116</sup> The former made the sending of a threatening, ‘indecent or grossly offensive’ letter or electronic communication an offence.<sup>117</sup> Similarly, the latter made the sending of a ‘message or other matter that is grossly offensive or of an indecent, obscene or menacing character’ an offence.<sup>118</sup> Nonetheless, these prior routes were ‘limited’ in tackling IBSA, as many victims struggled to satisfy the criteria of ‘indecent’ or ‘grossly offensive’.<sup>119</sup> Thus, explicit legislation, specific to IBSA, was presented as necessary. The CJCA confronted these hurdles by removing the thresholds of grossly offensive and defining the image or film to be ‘private’ and ‘sexual’.<sup>120</sup> McGlynn and Rackley supported these terms in their definition, viewing it to provide victims with a higher standard of protection.<sup>121</sup> They viewed ‘sexual’ to be less subjective in comparison to ‘grossly offensive’ or ‘indecent’ categories under the previous legislations, providing stronger protections for victims.<sup>122</sup> Furthermore, ‘private’ equally protected redress for defendants by effectively ‘delineat[ing]’ from individuals who ‘voluntarily’ share their sexual material.<sup>123</sup> Thus, the CJCA presented a positive signalling for IBSA victims in its emerging awareness of the offence.

Although the CJCA’s explicit introduction of IBSA offences initially seemed successful due to prosecution cases rising by 56% from 2015-16 to 2016-17, this did not equate to greater justice in the criminal system.<sup>124</sup> Following the Act, regional newspapers increasingly emphasised their legal concerns for IBSA cases across the nation<sup>125</sup> due to convictions dropping by 30% between 2017 and 2018.<sup>126</sup> This discrepancy is expected to intensify as

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<sup>116</sup> Davidson et al. (n 3) 65

<sup>117</sup> Malicious Communications Act 1988, s.1

<sup>118</sup> Communications Act 2003, s.127 (1)(a)

<sup>119</sup> Nicola Henry, Asher Flynn and Anastasia Powell, ‘Responding to Revenge Pornography: Prevalence, Nature and Impacts’, Australian Research Council [2019], 54 <[https://www.aic.gov.au/sites/default/files/2020-05/CRG\\_08\\_15-16-FinalReport.pdf](https://www.aic.gov.au/sites/default/files/2020-05/CRG_08_15-16-FinalReport.pdf)> accessed 6 December 2021

<sup>120</sup> Criminal Justice and Courts Act 2015, s.33(1)

<sup>121</sup> McGlynn and Rackley, ‘Image-Based Sexual Abuse’ (n 31) 541

<sup>122</sup> *ibid*

<sup>123</sup> *ibid*

<sup>124</sup> Henry et al. (n 119) 54

<sup>125</sup> Claire Miller and Rachel Stretton, ‘Fewer people are being prosecuted for revenge porn (and there weren’t that many to begin with)’ *Coventry Live* (Birmingham, 25 Nov 2019); Claire Miller and Samuel Jones, ‘Revenge porn is on the rise- but Teesside saw just two convictions last year’ *Teesside Live* (Middlesbrough, 24<sup>th</sup> Nov 2019); Claire Miller, ‘Hardly anyone is being prosecuted for revenge porn in Devon and Cornwall’ *Plymouth Live* (Plymouth, 21 Nov 2019); Claire Miller and David Bentley ‘Revenge porn prosecutions fall despite rise in cases- but law could change to help victims’ *Birmingham Live* (Birmingham, 20<sup>th</sup> November 2019); Alexandra Topping and Caelainn Barr, ‘Rape Convictions fall to record low in England and Wales’ *The Guardian* (London, 30<sup>th</sup> July 2020)

<sup>126</sup> Ministry of Justice (n 81)

Revenge Porn Helpline noted 2020 to be its busiest year with cases rising twofold from 2019.<sup>127</sup> Thus, the relationship between IBSA convictions and reports still presented a negative trajectory; communicating the persistence of legal and institutional defects. The CJCA's shortcomings were stressed to lay under its failure to consider perpetrators' threats to commit IBSA and limiting the offence's *mens rea* to causing distress.<sup>128</sup> The exclusion of threats under IBSA was critical, comprising nearly 50% of the offence's reports and bearing significant psychological arising from its 'omnipresence'.<sup>129</sup> Furthermore, limiting IBSA convictions narrowly to the intent to cause distress has been criticised due to the offence's ability to possess wide-ranging reasons.<sup>130</sup> Motives of perpetrators can extend beyond distress to include control, financial gain, a 'laugh' and bolstering 'lad culture' to name a few.<sup>131</sup> These discrepancies, paired with victims' lack of anonymity in the press regarding their cases, have presented as strong disincentives for IBSA victims to rely on the CJCA.<sup>132</sup> Thus, the CJCA's noteworthy flaws and widespread concern in confronting IBSA offences necessitated further legislative action to protect victims.

This legislative necessity was sought under the present Domestic Abuse Act which amended the CJCA in order to 'keep [the criminal law] up with the constant changes in online communication technology and the use of social media in all its forms'.<sup>133</sup> The Domestic Abuse Act developed the criminal law by introducing threats to commit IBSA under its definition of the offence, shielding a significantly higher portion of victims from harm.<sup>134</sup> Furthermore, the Act presented stronger capabilities to protect victims in trial stages as it removed the duties of the prosecution to prove the existence of the photograph or video, as

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<sup>127</sup> Alexandra Topping, 'UK's revenge porn helpline registers busiest year on record' *The Guardian* (London, 16<sup>th</sup> Sept 2020)

<sup>128</sup> Henry et al. (n 119) 54

<sup>129</sup> McGlynn et al., 'Shattering Lives and Myths: A Report on Image-Based Sexual Abuse' (n 61) 3

<sup>130</sup> UK Parliament, 'Domestic Abuse Bill: Written evidence submitted by Dr. Craig A. Harper and Dr. Dean Fido', Session 2019-21 Public Bill Committee (*UK Parliament*, 18 June 2020)

<<https://publications.parliament.uk/pa/cm5801/cmpublic/DomesticAbuse/memo/DAB91.htm>> accessed 6 December 2021

<sup>131</sup> McGlynn et al., 'Shattering Lives and Myths: A Report on Image-Based Sexual Abuse' (n 61) 4

<sup>132</sup> Henry et al. (n 119) 54

<sup>133</sup> Home Office and Ministry of Justice, Letter from Baroness Williams of Trafford and Lord Wolfson of Tedegar to Lord Rosser, 'Domestic Abuse Bill: Government Amendments for Report' (*UK Government*, 1 March 2021)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/965820/Lord\\_Rosser\\_DA\\_Bill\\_Letter\\_01.03.21.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965820/Lord_Rosser_DA_Bill_Letter_01.03.21.pdf)> accessed 2 November 2021

<sup>134</sup> McGlynn et al., 'Shattering Lives and Myths: A Report on Image-Based Sexual Abuse' (n 61) 3



well as its private and sexual nature.<sup>135</sup> This extension indicated an appreciation for the psychological scale of the harm arising from the offence.

Despite the Domestic Abuse Act signalling a development, there remain ‘significant deficiencies’.<sup>136</sup> The Act is primarily undermined in its continuance of neglecting the anonymity of victims and its *mens rea* limitations. Despite Women’s Aid<sup>137</sup> and the Law Commission campaigning for victim anonymity in the press to protect them from further trauma and invasion of privacy under doxing, the CJCA’s weaknesses persist under the Domestic Abuse Act.<sup>138</sup> However, the anonymity of victims is crucial. It is a significant disincentive for victim-survivors to report their abuses and thus, continues to obstruct their reliance on the criminal system.<sup>139</sup> Furthermore, the Domestic Abuse Act retains the CJCA’s failures to expand IBSA offenders’ intentions beyond causing distress. Although including threats to commit the offence, the large range of motives behind perpetrators remain disregarded and impair victims’ standing in prosecutions.<sup>140</sup> Thus, the Act presents itself as unwholly receptive to recommendations to abandon its motive requirement under IBSA to better protect victims.<sup>141</sup> Though the Domestic Abuse Act is an advancement from the CJCA, it still does not go far enough to compensate for the systemic deficiencies of the criminal law. As a result, the current position of the criminal law regarding IBSA remains weak.

## 1.5: Summary

The severity of harm from IBSA is nuanced and momentous. While the criminal law strives to safeguard victims from IBSA offences, there are justice gaps which necessitate further legislative action. Though this could be addressed under criminal law, its effectiveness is limited. The criminal law’s *ex-post* enforcement nature paired with its systemic problems impairs its effectiveness to tackle IBSA. Women possess a litany of fears and disincentives from reporting their abuses to the criminal system. An *ex-ante* force is necessary to safeguard

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<sup>135</sup> Domestic Abuse Act 2021, s.69 (5)

<sup>136</sup> Jenny Beck, ‘The Domestic Abuse Act’ [2021] Law Society’s Gazette 118(22) 24, 24

<sup>137</sup> Women’s Aid, ‘Briefing on the Domestic Abuse Bill’ *Women’s Aid* (Bristol, March 2021)

<<https://www.womensaid.org.uk/wp-content/uploads/2021/03/Womens-Aid-Briefing-for-Domestic-Abuse-Bill-Lords-Report-Stage.pdf>> accessed 7 December 2022

<sup>138</sup> Law Commission, ‘Reforms to laws around intimate image abuse proposed to better protect victims’ (*Law Commission*, February, 2021) <<https://www.lawcom.gov.uk/reforms-to-laws-around-intimate-image-abuse-proposed-to-better-protect-victims/>> accessed 7 December 2021

<sup>139</sup> McGlynn et al., ‘Shattering Lives and Myths: A Report on Image-Based Sexual Abuse’ (n 61) 13

<sup>140</sup> *ibid* 4

<sup>141</sup> *ibid* 5

the diffusion of harm arising from IBSA alongside ensuring victims are automatically protected, despite the criminal system's inherent deficiencies.

## **Chapter 2: The Conflict Between Platform's Economic and Gender Influences**

Social media platforms are at the intersection between business and community, attractive for both entrepreneurial ventures and personal communications.<sup>142</sup> Subsequently, they bear considerable influence in both economic and social, especially gendered, dimensions. However, this chapter will present the conflict between them. Despite platforms transforming into the new playground for economic interaction,<sup>143</sup> gaining large-scale revenues,<sup>144</sup> it has been at the detriment of gendered dimensions.<sup>145</sup> This discrepancy is strongly emphasised by IBSA offences transforming into a 'disturbingly big business'<sup>146</sup> as certain platforms boast profits of \$240,000 per year from their incitement of the offence.<sup>147</sup> The growing economic interest for IBSA, despite its harms, exhibits the hierarchy between profits and the safety of women online.<sup>148</sup> Thus, platforms' economic prosperity must be re-evaluated and rebalanced in consideration of their wider gendered harms when assessing the need for regulative change.

### **2.1: Platforms from an Economic Perspective**

Platforms have traditionally been revered as 'essential' to economic advancement due to their large-scale monetary benefits and business connectivity.<sup>149</sup> They have been perceived as creating a 'fundamentally new' shape of capitalism as their geographically boundless nature has facilitated unprecedented productivity.<sup>150</sup> By platforms encouraging transnational

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<sup>142</sup> Rochefort (n 16) 228

<sup>143</sup> Daniel Ku, 'The Importance of Social Media Marketing in 2022' *PostBeyond* (Toronto, 8 November 2021)

<sup>144</sup> Statista Research Department, 'Revenue of selected social media companies from 2014 to 2019' (*Statista*, April 2020) <<https://www.statista.com/statistics/271582/revenue-of-selected-social-media-companies/>> accessed 9 April 2022

<sup>145</sup> Azmina Dhrodia, 'Social media and the silencing effect: why misogyny online is a human rights issue' *The New Statesman* (London, 23 November 2017)

<sup>146</sup> Clare McGlynn, Erika Rackley and Ruth Houghton, 'Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse' [2017] *Female Legal Studies* 25 25, 29

<sup>147</sup> Morris (n 39)

<sup>148</sup> *ibid*

<sup>149</sup> Castells (n 27) 3

<sup>150</sup> Castells (n 27) 2

correspondence,<sup>151</sup> corporations have gained access to greater choice and higher quality.<sup>152</sup> This embracing of globalisation has benefitted national economies,<sup>153</sup> illustrated by the digital sector contributing £130.5 billion in gross value to the UK in 2017.<sup>154</sup> The COVID-19 pandemic exacerbated the economic reliance on platforms as they led market growth during unprecedented times and necessitated businesses to innovate.<sup>155</sup> Businesses principally ‘need to be where their users are’ to respond effectively to the market.<sup>156</sup> Correspondingly, following the rise of social media during the pandemic,<sup>157</sup> businesses have integrated further into platforms’ e-markets.<sup>158</sup> Moreover, platforms proved essential for inter-business connectivity during this time.<sup>159</sup> The video communications platform, Zoom, for instance, gained 190 million users within the five months following the pandemic’s emergence to unite organisations.<sup>160</sup> Zoom’s strengthening was drastic in comparison to the rest of the economy, its stock prices rising by 26% in comparison to the S&P 500 falling by 32%.<sup>161</sup> Platforms are seen to play a vital role in supporting markets during unprecedented times, enabling businesses to advance their exposure and business relationships.<sup>162</sup> It is this strong private performance of platforms, supporting markets even in unprecedented times, which founds nations’ neoliberal support and remote stance to platform regulation. As a result, platforms’ economic dimensions are prioritised despite their wider social detriments.<sup>163</sup>

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<sup>151</sup> HM Government, ‘Online Harms White Paper’ (*UK Government*, April 2019) 11  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/973939/Online\\_Harms\\_White\\_Paper\\_V2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973939/Online_Harms_White_Paper_V2.pdf) accessed 5 November 2021

<sup>152</sup> Castells (n 27) 9

<sup>153</sup> *ibid* 2

<sup>154</sup> Department for Digital, Culture, Media and Sport, ‘DCMS Sectors Estimates 2017 (Provisional): Gross Value Added’ (*UK Government*, 5 February 2018), 1

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/959053/DCMS\\_Sectors\\_Economic\\_Estimates\\_GVA\\_2018\\_V2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959053/DCMS_Sectors_Economic_Estimates_GVA_2018_V2.pdf) accessed 10 November 2021

<sup>155</sup> Qilin Tang, Kai Zhang, Yan Li, ‘The Important Role of Social Media During the Covid-19 Epidemic’ [2021] *Disaster Medicine and Public Health Preparedness* 15(4) E3, E3

<sup>156</sup> Sudeshna Negi, ‘The Importance of Social Media in Remote Work’ (*Saviom*, 12 May 2020)

<https://www.saviom.com/blog/the-importance-of-social-media-in-remote-work/> accessed 16 February 2022

<sup>157</sup> Ofcom, ‘Online Nation 2021’ Report (*Ofcom*, 9 June 2021)

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0013/220414/online-nation-2021-report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0013/220414/online-nation-2021-report.pdf) accessed 6 December 2021

<sup>158</sup> Andrew N. Mason, John Narcum and Kevin Mason, ‘Social Media Marketing Gains Importance after Covid-19’ [2021] *Cogent Business and Management* 8(1) 3

<sup>159</sup> Katherine A. Karl, Joy V. Peluchette and Navid Aghakhani, ‘Virtual Work Meetings During the Covid-19 Pandemic: The Good, Bad and Ugly’ [2021] *Small Group Research*, 1

<sup>160</sup> Paul Marks, ‘Virtual Collaboration in the Age of the Coronavirus’ [2020] *Communications of the ACM* 63(9) 21, 22

<sup>161</sup> Jordan Novet, ‘Why Zoom has become the darling of remote workers during the Covid-19 crisis’ *CNBC* (New Jersey, 21 March 2020)

<sup>162</sup> Sarah Asio and Sasan Torabzadeh Khorasani, ‘Social Media: A Platform for Innovation’ [2015] *Proceedings of the 2015 Industrial and Systems Engineering Research Conference* 1496, 1501

<sup>163</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety Bill under 3.3: The Technoliberal Foundations of Platform Regulation

Though platforms flaunt themselves as a free service,<sup>164</sup> in return, users are stripped from their ownership of the ‘most valuable resource’ in the world: data.<sup>165</sup> Data is heavily relied upon in the ‘new digital society’<sup>166</sup> as it is key for cost-effective advertising.<sup>167</sup> Facebook collects a million gigabytes of data each day, placing them in a leading role in data collection and advertising.<sup>168</sup> Platforms’ access to Big Data combined with their use of algorithmic capabilities enables them to manipulate a narrower, specific group of consumers from their userbase.<sup>169</sup> It is this tailored approach of platforms which enhances business’ market traction.<sup>170</sup> Platforms’ success in advertising is reflected by 93% of US businesses relying on them to save costs and enhance their exposure strategies.<sup>171</sup> It is the sacrificing of users’ rights over their data which feeds platforms’ advertising and consequently, economic success. For example, Facebook recorded 97.9% of its \$115 billion global revenue to derive exclusively from advertising in 2020.<sup>172</sup> However, with users and their data being the primary provider of platforms’ profits, users are at the frontlines of potential exploitation. The Facebook-Cambridge Analytica scandal confirmed this danger in which Facebook exploited millions of its users’ data without permission to profit from political advertising.<sup>173</sup> While IBSA has entered a clash with neoliberalism, it appears to stem from platforms’ entrenched reliance upon their users as a source of profit. Users are at the forefront of exploitation, resulting in campaigns for users to pay subscription fees for platform usage in order to protect their data rights.<sup>174</sup>

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<sup>164</sup> Arife Kazim Kirtis and Filiz Karahan, ‘To Be or Not to Be in Social Media Arena as the Most Cost-Efficient Marketing Strategy after the Global Recession’ [2011] *Procedia Social and Behavioural Sciences* 24 260, 261

<sup>165</sup> The Economist, ‘The world’s most valuable resource is no longer oil, but data’ *The Economist* (London, 6 May 2017)

<sup>166</sup> Hakima Chaouchi and Thomas Bourgeau, ‘Internet of Things: Building the New Digital Society’ [2018] *Interest of Things Journal* 1, 1

<sup>167</sup> Lori Andrews, ‘Facebook is Using You’ *The New York Times* (New York, 4 February 2012)

<sup>168</sup> Nathan Bronson and Janet Wiener, ‘Facebook’s Top Open Data Problems’ (*Meta*, 22 October 2014) <<https://research.facebook.com/blog/2014/10/facebook-s-top-open-data-problems/>> accessed 28 March 2022

<sup>169</sup> Brighton Nyagadza, ‘Search engine marketing and social media marketing predictive trends’ [2020] *Journal of Digital Media and Policy*, 10

<sup>170</sup> Brighton Nyagadza (n 169) 10

<sup>171</sup> Sweta Chaturvedi Thota, ‘Social Media: A Conceptual Model of the Whys, Whens and Hows of Consumer Usage of Social Media and Implications on Business Strategies’ [2018] *Academy of Marketing Studies Journal* 22(3), 1

<sup>172</sup> *ibid*

<sup>173</sup> Margaret Hu, ‘Cambridge Analytica’s black box’ [2020] *Big Data and Society* (July 1), 1

<sup>174</sup> Andrew Hutchinson, ‘Would People Pay to Use Social Media Platforms to Avoid Data-Sharing?’ (*Social Media Today*, 14 April 2020) <<https://www.socialmediatoday.com/news/would-people-pay-to-use-social-media-platforms-to-avoid-data-sharing-info/575956/>> accessed 26 April 2022; Cornelia Sindermann, Daria J. Kuss, Melina A. Throuvala, Mark D. Griffiths and Christian Montag, ‘Should We Pay for Our Social Media/Messenger Applications? Preliminary Data on the Acceptance of an Alternative to the Current Prevailing Data Business Model’ [2020] *Frontiers in Psychology* 11(1415) 1, 4

Dominant platforms enjoy a strong economic standing due to their competitive advantages in the platform industry. However, these advantages bear a risk on user safety. Dominant platforms possess a ‘network effect’ which facilitates their competitive advantage over smaller platforms.<sup>175</sup> Network effects entail a firm’s competitive advantage to rise proportionally with its size.<sup>176</sup> Particularly in the case of platforms, their size and value ‘is directly correlated with’<sup>177</sup> their user growth as a larger user-base advances the utility of its users.<sup>178</sup> Utility is an economic concept which is ‘synonymous with “satisfaction”’.<sup>179</sup> Hence, mass-scale platforms, such as Facebook which possesses nearly three billion users,<sup>180</sup> are able to advance their dominance upon smaller platforms with greater ease.<sup>181</sup> This advancement sparks a causal sequence as dominant platforms’ stronger positioning in the market provides them with the high-scale profits required to conduct ‘killer acquisitions’ and eradicate any competition.<sup>182</sup> Killer acquisitions entail the taking over of smaller, innovative firms.<sup>183</sup> Consequently, the platform market will experience an increased concentration which places users in danger of being harmed.<sup>184</sup> This is due to dominant platforms’ competitive strength and users’ lack of choice lessening platforms’ need to compete on ‘moral or social’ factors, seen under content-moderation.<sup>185</sup> Thus, dominant platforms such as Facebook are able to boast revenues on par with Sri Lanka’s gross domestic product whilst only reinvesting 5% of it back into safety and security initiatives.<sup>186</sup> While platforms’ scale of users provides them with a strong economic advantage, it is that advantage which bears the risk of harming a

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<sup>175</sup> Catherine E. Tucker, ‘Network Effects and Market Power: What Have We Learned in the Last Decade?’ [2018] *Antitrust* 32(2) 72, 72

<sup>176</sup> *ibid*

<sup>177</sup> Cascade, ‘Network effects and the performance of social media companies’ (*Cornell University Course Blog*, 9 November 2012) <<https://blogs.cornell.edu/info2040/2012/11/09/network-effects-and-the-performance-of-social-media-companies/>> accessed 17 February 2022

<sup>178</sup> Peter Fisk, ‘Metcalfe’s Law explains how the value of network grows exponentially... exploring the “network effects” of businesses like Apple, Facebook, Trulia and Uber’ (*Peter Fisk*, 17 February 2020) <<https://www.peterfisk.com/2020/02/metcafes-law-explains-how-the-value-of-networks-grow-exponentially-there-are-5-types-of-network-effects/>> accessed 17 February 2020

<sup>179</sup> Arie Kapteyn, ‘Utility and Economics’ [1985] *De Economist* 133, 1

<sup>180</sup> Statista Research Department, ‘Countries with the most Facebook users 2022’ (*Statista*, 23 February 2022) <<https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/#:~:text=With%20around%202.9%20billion%20monthly,most%20popular%20social%20media%20world wide.>> accessed 24 February 2022

<sup>181</sup> Fred Vogelstein, ‘Network Effects and Global Domination: The Facebook Strategy’ *Wired* (San Francisco, 17 May 2012)

<sup>182</sup> Frank Pasquale, *The Black Box society- The Secret Algorithms that Control Money and Information* (Harvard University Press, 2018), 82

<sup>183</sup> *ibid*

<sup>184</sup> IBIS World (n 21)

<sup>185</sup> *ibid*

<sup>186</sup> Chris Stokel-Walker, ‘Taming Big Tech’ [2021] *New Scientist* 250(3332) 34, 34

larger scale of users. This detrimental relationship is emphasised by Facebook's positioning as the most dominant platform, in profits<sup>187</sup> and users,<sup>188</sup> alongside the primary facilitator of IBSA.<sup>189</sup>

Though platforms' private economic strength founds the UK's neoliberal stance on protecting platforms from stricter regulations, this stance needs to be abandoned. Users are already at the frontlines of potential exploitation, and this is merely intensified by platforms' supreme competitive advantages. Platforms are not in need of legislative protections, seen as 'too powerful'<sup>190</sup> and sparking campaigns under competition law<sup>191</sup> and public utilities<sup>192</sup> approaches to limit their supremacy.<sup>193</sup>

## 2.2: Platforms from a Gendered Perspective

Although platforms have offered value to society, assisting the transfer of information and expertise in healthcare<sup>194</sup> and education,<sup>195</sup> their gendered advantages are not as apparent as they are economically.<sup>196</sup> Their lack of legal accountability for online harms<sup>197</sup> has facilitated the escalation of IBSA and as a result, women have been subjugated to disproportionate harm.<sup>198</sup> Whilst there is strong feminist support for this new digital world, liberating women from their societal constraints,<sup>199</sup> others view it as static,<sup>200</sup> or even destructive to women's

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<sup>187</sup> Statista Research Department, 'Meta's (formerly Facebook Inc.) annual revenue from 2009 to 2021' (n 36)

<sup>188</sup> Statista Research Department, 'Global social networks ranked by number of users 2022' (n 17)

<sup>189</sup> Office of the eSafety Commissioner (n 37) 6

<sup>190</sup> Sonia Hickney, 'Have Social Media Companies Become Too Powerful?' (*Lexology*, 22 January 2021) <<https://www.lexology.com/library/detail.aspx?g=d6baed8e-570e-4a00-87ac-660e6f8e55da>> accessed 26 April 2022; Reece Goodall, 'Social media has become too powerful and too destructive' (*The Boar*, 11 November 2020) <<https://theboar.org/2020/11/social-media-5/>> accessed 26 April 2022

<sup>191</sup> Nilay Patel, 'It's Time to Break Up Facebook' *The Verge* (Washington, 4 September 2018)

<sup>192</sup> K. Sabeel Rahman, 'The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept' [2018] 39 *1621*, 1672

<sup>193</sup> See Chapter 4: The Legislative Shift to the Online Safety Bill under 4.2: Indirect Proposals for Platform Regulation

<sup>194</sup> Anne Salonen, Anne M. Ryhanen, Helena Leino-Kilpi, 'Educational benefits of Internet and computer-based programmes for prostate cancer patients: A systematic review' [2014] *Patient Education and Consulting* 94 10, 11

<sup>195</sup> Mateja Ploj Virtič, 'The Role of the Internet in Education' in 9<sup>th</sup> International Scientific Conference on Distance Learning in Applied Informatics [2012] 248

<sup>196</sup> Bodhi Haringe, 'Does Social Media Benefit Society?' (*Asia & The Pacific Policy Society*, 23 October 2020) <<https://www.policyforum.net/does-social-media-benefit-society/>> accessed 17 February 2022

<sup>197</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety Bill under 3.4: The Rise in Legal Recognition of Platforms under the Digital Economy Act

<sup>198</sup> Joint Committee on the Draft Online Safety Bill (n 198) 13

<sup>199</sup> Ulrich Beck, *Risk society: Towards a new modernity* (SAGE, 1992); Sadie Plant, *Zeros + ones: Digital women + new technoculture* (Doubleday, 1997)

<sup>200</sup> Raymond Williams, *Television: Technology and Cultural Form* (Fontana, 1974), 130

freedoms in society.<sup>201</sup> Nonetheless, their relationship must be assessed as ‘technology itself cannot be fully understood without reference to gender’, both being socially constructed and interlinked.<sup>202</sup>

The term ‘technofeminism’ was formed by Wajcman in 2004 to entail an analysis of the intersection between gender and technology,<sup>203</sup> despite being a mature debate.<sup>204</sup> Haraway underlined its foundations in 1987,<sup>205</sup> viewing the relationship between women and information technology to provide women with ‘fresh sources of power’.<sup>206</sup> She argued technology to ‘blu[r]’ the biological elements of users from their mechanical identities.<sup>207</sup> As a result, users became ‘cyborgs’, a ‘hybrid of a machine and organism’ and a mixture of ‘social reality’ with fiction.<sup>208</sup> This hybrid, arguably, transforms itself into ‘a crucial tool’ in liberating women from their biological confines.<sup>209</sup> Although published years before the emergence of social media, its link is ‘prescient’<sup>210</sup> to our current age in which identities are skewed more than ever amongst platforms.<sup>211</sup> Furthering this, Beck argued technology’s facilitation of globalisation to breakdown gender constructs, freeing women from ‘traditional forms and ascribed roles’.<sup>212</sup>

Henry and Powell, however, contended against these optimistic perceptions of social networking platforms, viewing them to ‘obscure’ the persistent gendered harms women face in cyberspace.<sup>213</sup> They proposed the digital arena to be one which is exploited by

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<sup>201</sup> Nicola Henry and Anastasia Powell, ‘Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence’ [2015] *Violence Against Women* 21(6) 758; Chuck Huff, Keith William Miller and D.G. Johnson, ‘Virtual Harms and Real Responsibility’ *IEEE Technology and Society Magazine* 22(2) 12

<sup>202</sup> Cynthia Cockburn, ‘The circuit of technology: Gender, identity and power’ in Roger Silverstone and Eric Hirsch (Eds.), *Consuming technologies: Media and information in domestic spaces* (Routledge, 1992), 32

<sup>203</sup> Judy Wajcman, *Technofeminism* (Polity Press, 2004)

<sup>204</sup> Henry and Powel (n 201) 761

<sup>205</sup> Donna Haraway, ‘A manifesto for cyborgs: Science, technology, and socialist feminism in the 1980s’ [1987] *Australian Feminist Studies* 2(4) 1

<sup>206</sup> *ibid* 21

<sup>207</sup> *ibid* 20

<sup>208</sup> *ibid* 1

<sup>209</sup> *ibid*, 8

<sup>210</sup> Moira Weigel, ‘Feminist cyborg scholar Donna Haraway: ‘The disorder of our era isn’t necessary’ *The Guardian* (London, 20 June 2019)

<sup>211</sup> Bill Toulas, ‘Social media phishing attacks are at an all time high’ *Bleeping Computer* (New York, 4 March 2022); Jonathon Chadwick, ‘Russian trolls are busted trying to undermine President Zelensky by creating FAKE Facebook profiles for AI-generated Ukrainian citizens who ‘want to escape their country’s neo-Nazi dictatorship’ *Mail Online* (London, 3 March 2022); David Cohen, ‘LinkedIn Stopped 11.6 Million Fake Accounts at Registration in the First Half of 2021’ *Adweek* (New York, 18 March 2022)

<sup>212</sup> Beck (n 199) 105

<sup>213</sup> Henry and Powel (n 201) 761



perpetrators, predominantly male, to reinforce gender inequalities.<sup>214</sup> Wajcman<sup>215</sup> and Faulkner developed this argument, pointing to the heavy influence of men in the makeup of platforms to occasion platforms serving men.<sup>216</sup> The supremacy of men is evident with ‘only 5% of leadership positions in the [UK’s] technology industry’ being held by women,<sup>217</sup> and global female representation for leading technology firms being predicted at 33%.<sup>218</sup> Men predominantly occupying director roles signifies a top-down structure in which platforms’ influential decision-making is dictated by men. Consequently, Faulkner argued platforms to serve a male audience<sup>219</sup> and place women’s unique online experiences ‘very remote’ from their design.<sup>220</sup> IBSA emphasises this remoteness, being a deeply gendered and technology-borne offence<sup>221</sup> to which platforms are viewed as the most inadequate source of protection in its confrontation.<sup>222</sup> Despite platforms signifying a fresh arena of liberties for women, they remain socially constructed, facilitating the extension of gendered offences upon the virtual realm.

The economic and legal liberties of platforms cause further detriment to the safety of women online, being overlooked at the prospect of monetary gain. Despite feminist support for the neoliberal foundations of technologies,<sup>223</sup> Yardley argued ‘neoliberalism [to embrace] patriarchal power structures’.<sup>224</sup> Neoliberalism has traditionally dominated the UK’s regulative stance,<sup>225</sup> striving for economic prosperity.<sup>226</sup> However, Yardley views neoliberalism to impose a correlative relationship between the deprivation of women and the

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<sup>214</sup> Henry and Powel (n 201) 763

<sup>215</sup> Wajcman (n 203) 13

<sup>216</sup> Wendy Faulkner, ‘The Technology Question in Feminism: A View From Feminist Technology Studies’ [2001] *Women’s Studies International Forum* 24(1) 79

<sup>217</sup> PwC, ‘Women in Tech: Time to close the gender gap’ A PwC UK Research Report (PwC, February 2017), 1 <<https://www.pwc.co.uk/women-in-technology/women-in-tech-report.pdf>> accessed 25<sup>th</sup> April 2022

<sup>218</sup> Susanne Hupfer, Sayantani Mazumder, Ariane Bucaille and Gillian Crossan, ‘Women in the tech industry: Gaining ground, but facing new headwinds’ (*Deloitte*, 1 December 2021) <<https://www2.deloitte.com/uk/en/insights/industry/technology/technology-media-and-telecom-predictions/2022/statistics-show-women-in-technology-are-facing-new-headwinds.html>> accessed 20 April 2022

<sup>219</sup> Faulkner (n 216) 85

<sup>220</sup> Faulkner (n 216) 91

<sup>221</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.2: Gendered Context

<sup>222</sup> Flynn et al. (n 12) 30

<sup>223</sup> Beck (n 199) 105

<sup>224</sup> Yardley (n 79) 1480

<sup>225</sup> Laurie Laybourn-Langton and Michael Jacobs, ‘Moving beyond neoliberalism: An assessment of the economic systems change movement in the UK’ (*Friends Provident Society*, 2017), 5 <<https://www.friendsprovidentfoundation.org/wp-content/uploads/2017/11/Michael-Jacobs-LLL-Moving-Beyond-Neoliberalism-Report-5-Oct-2017.pdf>> accessed 17 April 2022

<sup>226</sup> Boas and Gans-Morse (n 26) 143



surge in profit.<sup>227</sup> The highly profitable pornography industry illustrates this relationship, reigning as a major use of the internet<sup>228</sup> and appealing to its dominantly ‘male audience’.<sup>229</sup> In doing so, it simultaneously instils gender imbalances and ‘privilege[s] men over women’.<sup>230</sup> Though the pornography industry may seem consensual, in comparison to IBSA, it is closely tied with violence against women, with gendered harm being ‘endemic’ in its production.<sup>231</sup> Despite this, the leading platform, Pornhub, boasts annual revenues of \$98 billion<sup>232</sup> from its dramatically male-dominated user base, with 72% of its UK users being men.<sup>233</sup> Neoliberalism is exhibited to possess a conflicting relationship with gendered harms, as women’s online injuries are undermined and overlooked in the trance of platforms’ monetary successes.

In parallel to the pornography industry, IBSA reflects capitalist traction. Currently, there are over 3,000 websites whose business models solely rest on the incitement of IBSA.<sup>234</sup> These websites are able to profit from the exploitation of vulnerable women through advertising and even via ‘payments for the removal of the image’.<sup>235</sup> A formerly notorious platform for IBSA distribution, IsAnyoneUp?, highlighted this, grossing \$20,000 per month and over 300,000 new viewers per day<sup>236</sup> during its 16-month existence.<sup>237</sup> However, the owner, Hunter Moore, defended his enterprise, arguing ‘if it wasn't me, somebody else was going to do it. All I did was really perfected the way to monetise people’s naked pictures’.<sup>238</sup> This defence reflects a Marxist feminist approach in which the capitalist-driven society prioritises moneymaking

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<sup>227</sup> Yardley (n 79) 1480

<sup>228</sup> Wajcman (n 203) 62

<sup>229</sup> *ibid*

<sup>230</sup> Karen Gabriel, ‘Notes on the Sexual Economy, Homosocial Patriarchy and the Porn Industry’ [2011] GEXcel Work in Progress Report Volume XV, ‘Proceedings from GEXcel Theme 9: Gendered Sexualed Transnationalisations, Deconstructing the Dominant: Transforming men, “centres” and knowledge/policy/practice’, 141-142

<sup>231</sup> Amanda Cawston, ‘The feminist case against pornography: a review and re-evaluation’ [2019] *Inquiry* 62(6) 624, 627

<sup>232</sup> Michelle Thompson and Laurence Dollimore, ‘Owner of \$98Bn Porn Hub is named in Pandora Papers and defends investment in two shell companies, saying all ‘tax obligations were handled in accordance with the law’ *Daily Mail* (London, 5 October 2021)

<sup>233</sup> Pornhub, ‘Gender distribution of pornhub.com visitors in selected European countries in 2019’ (*Statista*, 7 July 2021) <<https://www.statista.com/statistics/661314/gender-distribution-of-pornhubcom-website-traffic-in-selected-european-countries/>> accessed 25 February 2022

<sup>234</sup> McGlynn et al., ‘Beyond ‘Revenge Porn’: The Continuum of Image-Based Sexual Abuse’ (n 146) 29

<sup>235</sup> Amanda L. Cecil, ‘Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography’ [2014] *Washington and Lee Law Review* 71 2513, 2545

<sup>236</sup> Dave Lee, ‘IsAnyoneUp’s Hunter Moore: ‘The net’s most hated man’ *BBC News* (London, 20 April 2012) <<https://www.bbc.co.uk/news/technology-17784232>> accessed 24 February 2022

<sup>237</sup> Morris (n 39)

<sup>238</sup> Lee (n 236)

businesses and disregards their harmful inflictions upon women.<sup>239</sup> The police reflect themselves as akin, commonly dismissing victims' harms by simply advising them to remove themselves from platforms and consequently, leaving them vulnerable.<sup>240</sup> Yardley viewed the overlooking of women's harm to be 'symptomatic of the neoliberal injunction' in which the very structures which facilitate the harm are protected.<sup>241</sup> The tackling of IBSA and wider gendered harms necessitates 'a reprioriti[sation] of women's well-being over capital'.<sup>242</sup> Platforms' prevailing male influence combined with their unregulated nature presents their ability to accelerate and exploit gendered offences, such as IBSA, in pursuit of large-scale profits.

### 2.3: Summary

Realignment between platforms' economic and gendered dimensions is necessary. Whilst users are already the source of platforms' profits, women have been the primary target for monetary exploitation. This disparity is exhibited most intensely by specific platforms utilising IBSA offences as a business model for profit. Yet, despite platforms facilitating the offence's 'life shattering' harms, they are celebrated for their economic prosperity and shielded from accountability.<sup>243</sup> However, platforms are not detached from the physical world, being echoes of our current culture and merely 'ratif[ying] the society [...] we have now'.<sup>244</sup> As a result, platforms' socially constructed dimensions are able to contribute to the furthering of gender imbalances in the virtual realm, not merely being conduits.<sup>245</sup> Thus, regulation must hold platforms accountable for their competitive complacency to align their focus on gendered harms and effectively confront IBSA.

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<sup>239</sup> Martha E. Gimenez, 'Capitalism and the Oppression of Women: Marx Revisited' [2005] *Science and Society* 69(1) 11, 13

<sup>240</sup> Yardley (n 79) 1491

<sup>241</sup> *ibid* 1490

<sup>242</sup> *ibid* 1494

<sup>243</sup> End Violence Against Women, 'New committee report fails to recommend naming VAWG in online safety law' (*End Violence Against Women*, 24<sup>th</sup> January 2022) <<https://www.endviolenceagainstwomen.org.uk/news/>> accessed 1 February 2022

<sup>244</sup> Raymond Williams, *Television: Technology and Cultural Form* (Fontana, 1974), 130

<sup>245</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L17, Article 12

## Chapter 3: The Development of Platform Legislation Prior to the Online Safety Bill

Despite platforms' profits being at the expense of user-safety<sup>246</sup> and the criminal law deficient in minimising IBSA,<sup>247</sup> the regulation of platforms has been traditionally remote under liberal thinking.<sup>248</sup> Platforms have, thus, been perceived as 'private intermediaries', merely being neutral service providers for users.<sup>249</sup> However, this laissez-faire stance<sup>250</sup> has failed to acknowledge IBSA offences and demonstrated ineffective following the escalation of online harms.<sup>251</sup>

### 3.1: Legislative Background of Platforms

The legal position towards internationally connected platforms has traditionally been a challenging task due to the foundations of jurisdiction. English jurisdiction was clarified by Lord Russel, being 'based upon the principle of territorial dominion' in *Carrick v Hancock*.<sup>252</sup> However, this decision dated to 1895. Thus, once the early stages of platform connectivity began spurring in the 1970s,<sup>253</sup> the law surrounding jurisdiction began to present 'ambiguity'.<sup>254</sup> This stemmed from the internet removing 'conventional borders' of legal jurisdiction, which previously relied on the geographical precincts of nations.<sup>255</sup> The English legislature 'largely'<sup>256</sup> commits itself to matters within its national territory<sup>257</sup> due to external affairs being seen as 'more controversia[l]'.<sup>258</sup> However, the English law's rigidity to jurisdiction has shown flexibility to better address increasing cross-border cybercrimes. The Computer Misuse Act of 1990 signalled this shift, extending jurisdiction to when a 'significant link' with the 'home country' could be proven.<sup>259</sup> Consequently, the Act widened

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<sup>246</sup> See Chapter 2: The Conflict Between Platform's Economic and Gender Influences under 2.2: Platforms from a Gendered Perspective

<sup>247</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.4: Legislative Context

<sup>248</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.3: Harms

<sup>249</sup> DeNardis and Hackl (n 48) 766

<sup>250</sup> Bodolica and Spraggon (n 41) 460

<sup>251</sup> Tobias Kretschmer and Sven Werner, 'Regulating Platforms as Utilities? A Business Model Perspective' [2021] Centre for Economic Policy Research Discussion Papers 16106, 2

<sup>252</sup> *Carrick v Hancock* (1895) 12 TLR 59

<sup>253</sup> Paschal Preston, *Reshaping Communications: Technology, Information and Social Change* (SAGE, 2001) 24

<sup>254</sup> Joel Reidenberg, 'Technology and Internet Jurisdiction' [2005] University of Pennsylvania Law Review 153 1951, 1951

<sup>255</sup> Bernhard Maier, 'How Has the Law Attempted to Tackle the Borderless Nature of the Internet?' [2010] International Journal of Law and Information Technology 18(2) 142, 143

<sup>256</sup> Julia Hornle, *Internet Jurisdiction: Law and Practise*, (1<sup>st</sup> edn, OUP 2021) 132

<sup>257</sup> *ibid*

<sup>258</sup> Alex Mills, 'Rethinking Jurisdiction in International Law' [2014] The British Yearbook of International Law 84(1) 187, 196

<sup>259</sup> Computer Misuse Act 1990 s.4(2)

the legislative scope, recognising English jurisdiction where the accused, the victim of the offence or the virtual activity was located in the home country or its national servers. *R v Perrin*<sup>260</sup> reaffirmed this flexibility as offences occurring beyond English borders were found sufficient in establishing jurisdiction if the criminal content was able to be downloaded internally.<sup>261</sup> Thus, despite difficulties in establishing jurisdiction, the English judiciary has exhibited a rising awareness in its flexible approach to online, cross-border offences.

However, despite jurisdictional agility in tackling technology-facilitated harms, the international element of IBSA continues to undermine its legal enforcement. International communications platforms have been found reluctant to provide the police and law enforcement with further information on the offences ongoing on their sites.<sup>262</sup> This has been emphasised as a significant hurdle to providing victims justice in their claims.<sup>263</sup> Furthermore, Henry and Powell point to IBSA's legislative differences across jurisdictions to hinder the law's cross-border enforcement.<sup>264</sup> The differences between IBSA's definition across jurisdictions are underlined between the state of California and Malta, with the former<sup>265</sup> narrowing intent to cause distress, similarly to English law, whilst the latter accepts harm of any nature to be sufficient.<sup>266</sup> Despite the rising awareness of IBSA across jurisdictions, the varying jurisdictional definitions complicate the international effectiveness in tackling the cross-border element of IBSA.<sup>267</sup> This places greater importance on the domestic law's effectiveness in shielding potential victims.

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<sup>260</sup> *R v Perrin* [2002] EWCA Crim 747

<sup>261</sup> Obscene Publications Act 1959

<sup>262</sup> Flynn et al. (n 12) 14

<sup>263</sup> *ibid*

<sup>264</sup> Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' [2016] *Social and Legal Studies* 25(4) 397, 402

<sup>265</sup> California Penal Code, 647(j)(4)

<sup>266</sup> Maltese Criminal Code 2016, 208E

<sup>267</sup> Hanna Kozłowska, 'The World Hasn't Figured Out How to Stop 'Revenge Porn'' *The Fuller Project* (New York, 28 June 2021)

### 3.2: The Beginnings of Internet Regulation under Data Protection

The Data Protection Act 1984 marked the UK's genesis of legal intervention upon the rising power of platforms.<sup>268</sup> However, discussions predated this with Lord Mancroft proposing a bill 'to protect a person from any unjustifiable publication relating to his private affairs' in 1961.<sup>269</sup> Despite this being withdrawn, discussions on data privacy prevailed throughout the 1970s with the Younger Report on Privacy introducing recommendations for dealing with personal data.<sup>270</sup> This resulted in the Lindlop Report on Data Protection in 1978; yet, the main driver of the Data Protection of 1984 was international pressure.<sup>271</sup> The UK's lack of data legislation gave rise to its reputation as a 'data haven',<sup>272</sup> causing countries to ban the distribution of their data to the nation for their own safety.<sup>273</sup> Thus, finding itself at the 'crossroads of the information highway', the UK was pushed to introduce data legislation.<sup>274</sup> The Act was later amended under the Data Protection Act 1998.<sup>275</sup> The current Data Protection Act of 2018<sup>276</sup> fuses the 1998 version together with the EU's General Data Protection Act of 2016<sup>277</sup> under UK law.<sup>278</sup>

The current Data Protection Act ensures personal data is used lawfully, fairly and in a transparent manner.<sup>279</sup> Despite its focus on data, it highlights the beginnings of recognising internet platforms to possess unprecedented power and demanding greater commercial responsibility. With data being more valuable than oil,<sup>280</sup> this legislation sought to 'empower'

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<sup>268</sup> David White and Tom Morrison 'Mind the GDPR' [2017] *New Law Journal* 167 8,8

<sup>269</sup> UK Parliament, 'Right Privacy Bill' HL Debate 15 June 1961 232(289), 289

<sup>270</sup> House of Lords, 'Privacy: Younger Committee's Report' HL Debate 6 June 1973 343(104)

<sup>271</sup> Adam Warren and James Dearnley, 'Data protection legislation in the United Kingdom' [2005] *Information, Community and Society* 8(2) 238, 238

<sup>272</sup> *ibid* 244

<sup>273</sup> Colin Mellors and David Pollitt, 'The slow emergence of data protection in Western Europe' [1985] Joint session of workshops of the European consortium for political research on 'Confidentiality, Privacy and Data Protection', 10

<sup>274</sup> Patrick D. Griffis, 'At the Crossroads of the Information Highway: New Technology Directions in Consumer Electronics' [1994] *The Institute of Electrical and Electronics Engineers* 82(4) 459, 463

<sup>275</sup> Data Protection Act 1998

<sup>276</sup> Data Protection Act 2018

<sup>277</sup> European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119

<sup>278</sup> Data Protection Act 2018, s.6

<sup>279</sup> Data Protection Act 2018 s.26(2)(a)(i)

<sup>280</sup> Kiran Bhageshpur, 'Data is the New Oil- And That's a Good Thing' *Forbes* (Washington, 15 November 2019)

users from commercial exploitation.<sup>281</sup> Whilst this legislation did not acknowledge IBSA, it demonstrated the growing demands of platform transparency and honest commercial practice with their users; an increasing pattern throughout the development of internet law.

Nonetheless, the Data Protection Act merely created wider responsibilities for platforms in their inner workings of data usage and did not surpass to any wider accountability for the abusive communications and harms occurring between their users. Despite its push for platform transparency, the law failed to address the wider impacts of platforms upon society. Thereby, the UK legislature exhibited itself to be remote from confronting the psychological and physical harms of online harms directly via platforms in the near future.

### 3.3: The Technoliberal Foundations of Platform Regulation

Since their inception, ‘Anglo-Saxon, Northern and Central European countries’<sup>282</sup> have particularly maintained platform neutrality perspectives, viewing them as ‘private intermediaries’.<sup>283</sup> As a result, they have ‘intentionally’ adopted laissez-faire approaches in which the private practice of platforms was protected from government intervention.<sup>284</sup> Consequently, self-regulative approaches were prioritised.<sup>285</sup> This regulative stance echoes technoliberalism; a strain of neoliberalism concentrated in the digital arena, seeking to shield platforms from regulation in order to upkeep their economic potential.<sup>286</sup> Technoliberalism was emphasised in Barlow’s ‘Declaration of the Independence of Cyberspace’, opposing the USA government’s emerging involvement in online affairs and standing for its freedom.<sup>287</sup> Barlow viewed the cyber interface as ‘untouchable’,<sup>288</sup> ‘a special place’ which was detached ‘from the brick and mortar world’.<sup>289</sup> A similar technoliberalist standpoint is reflected in the

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<sup>281</sup> Information Commissioner’s Office, ‘An overview of the Data Protection Act 2018’ (*ICO*, January 2019), 4 <<https://ico.org.uk/media/for-organisations/documents/2614158/ico-introduction-to-the-data-protection-bill.pdf>> accessed 1 February 2022

<sup>282</sup> Jos de Haan, Simone van der Hof, Wim Bekkers and Remco Pijpers, ‘Self-regulation’ in: Brian O’Neill, Elisabeth Staksrud and Sharon McLaughlin, *Towards a Better Internet for Children: Policy Pillars, Players and Paradoxes* (Nordicom, 2013), 112

<sup>283</sup> DeNardis and Hackl (n 48) 766

<sup>284</sup> Gorwa (n 23) 39

<sup>285</sup> Department for Digital, Culture, Media & Sport, ‘Government response to the Internet Safety Strategy Green Paper’ (*UK Government*, May 2018) 13 <[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](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)> <accessed 1 February 2022>

<sup>286</sup> Damien Smith Pfister and Misti Yang, ‘Five theses on technoliberalism and the networked public sphere’ [2018] *Communication and the Public* 3(3) 247, 250

<sup>287</sup> John Perry Barlow, ‘A Declaration of the Independence of Cyberspace’ [2019] *Duke Law & Technology Review* 18(1) 5, 7

<sup>288</sup> Alex Kozinski and Josh Goldfoot, ‘A Declaration of the Dependence of Cyberspace’ [2008] *Columbia Journal of Law and the Arts* 32(4) 365, 365

<sup>289</sup> *ibid* 368

UK's regulation of platforms, exhibiting a strong dependence on platforms to confront online harms under their own business practice, in attempts to maintain economic flexibility and embrace efficiencies.<sup>290</sup> Consequently, the furthest UK legislation has gone to confronting platforms has been under codes of conduct, encouraging platforms to take independent action while maintaining their 'neutral' and unaccountable position.<sup>291</sup>

Beyond economic efficiencies, technoliberalism relies on free speech grounds to defend platforms from regulation.<sup>292</sup> The USA specifically maintained a strictly traditional position under Section 230 of the Communications Decency Act of 2012, which stated 'no provider [...] of an interactive computer service' is to be 'treated as the publisher or speaker of any information provided by another'.<sup>293</sup> By rejecting platforms to be publishers of user-generated content, the Act sought to provide them with 'far-reaching immunity' to serve free speech.<sup>294</sup> Sheir viewed the English law to possess a 'mirror[ing]'<sup>295</sup> of the US's Section 230 under its retention of the European Union's e-Commerce Directive 2000<sup>296</sup> under the European Union (Withdrawal) Act 2018, following their departure.<sup>297</sup> Whilst the Directive specified platforms must 'act expeditiously to remove or to disable access' to any illegal activity they become aware of on their sites, its effectiveness was 'limited'.<sup>298</sup> The Directive maintained the view of platforms as 'mere conduit[s]',<sup>299</sup> not being required to monitor the content across their platforms.<sup>300</sup> In doing so, platforms could exercise voluntary ignorance of their users' activity in order to avoid liability.<sup>301</sup> Both the Directive and Section 230 presented technoliberalism at its centre, being 'intentionally laissez-faire' due to economic considerations of innovation being supported by social considerations of free speech.<sup>302</sup> As a

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<sup>290</sup> de Haan et al. (n 282) 118

<sup>291</sup> Digital Economy Act 2017, s.103

<sup>292</sup> Gorwa (n 23) 39

<sup>293</sup> Communications Decency Act 2012

<sup>294</sup> Cecil (n 235) 2517

<sup>295</sup> Stephanie Sheir, 'Simulacrum: The Emerging Politics and Discourse of Online Harms' [2021] London School of Economics Undergraduate Political Review 4(1) 80, 84

<sup>296</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178

<sup>297</sup> European Union (Withdrawal) Act 2018 s.2-4

<sup>298</sup> *ibid*

<sup>299</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L17, Article 12

<sup>300</sup> *ibid*. Article 15

<sup>301</sup> Piotr Tereszkievicz, 'Digital Platforms: Regulation and Liability in the EU Law' [2018] European Review of Private Law 26(6) 903, 907

<sup>302</sup> Gorwa (n 23) 39

result, IBSA offences remained at the remote intersection between platforms' profit and safety dimensions. Thus, further regulative discussion persisted necessary to oppose IBSA's intensification upon platforms.<sup>303</sup>

### **3.4: The Rise in Legal Recognition of Platforms under the Digital Economy Act**

The DEA is the UK's current position on platform regulation, and it reveals a shift in the legislative discussion by addressing the role of platforms in online harms.<sup>304</sup> In doing so, the DEA heightens the legislative awareness of online harms from the EU Directive by setting out standards expected of platforms. Although the Act primarily focuses on matters such as improving national infrastructural connectivity,<sup>305</sup> it attempts to better protect users in its insertion of a code of practice for platforms under Section 103.<sup>306</sup> Section 103 is a response to the government's Internet Safety Strategy Green Paper, in which online harms were sought to be diminished through platforms' own initiatives.<sup>307</sup> Accordingly, the code stands as 'guidance' rather than hard law.<sup>308</sup> It advises online social media platform providers to intervene when user-to-user conduct 'involves bullying or insulting' through messages and statements.<sup>309</sup> The guidance encourages platforms to do so through the creation of notification tools which users can utilise to report harmful content to platforms for action.<sup>310</sup> Furthermore, the Section motivates platforms to stipulate their reporting system on their terms and conditions in order to provide the public with clear information on how they tackle such harms.<sup>311</sup>

The DEA's soft law approach to self-regulation has been advocated by liberal scholars due to it not limiting platforms' private business standing. Ailwood and Vittins argued self-regulation to provide platforms with 'the opportunity' to adopt their own efficient methods of confronting online harms before the imposition of potentially inefficient government

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<sup>303</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.4: Legislative Context

<sup>304</sup> Digital Economy Act 2017

<sup>305</sup> Digital Economy Act 2017 s.4

<sup>306</sup> Digital Economy Act 2017, s.103

<sup>307</sup> Department for Digital, Culture, Media & Sport, 'Government response to the Internet Safety Strategy Green Paper' (n 285) 13

<sup>308</sup> Digital Economy Act 2017, s.103(4)

<sup>309</sup> *ibid* s.103(3)(c)

<sup>310</sup> *ibid* s.103(5)

<sup>311</sup> *ibid* s.103(5)



intervention.<sup>312</sup> Furthermore, Witt et al. recognised the challenges of imposing obligations beyond self-regulation upon platforms.<sup>313</sup> They appreciated platforms' need to utilise general moderation tools, instead of individual moderation techniques, to tackle harmful content at the expense of inaccuracy.<sup>314</sup> The necessity of a wider approach is owing to the mass scale of users platforms serve, making individual content-moderation methods too costly.<sup>315</sup> In understanding platforms' private business models, they conceded to 'errors [being] inevitable'<sup>316</sup> in content-moderation processes and recommended platforms improve other areas such as their transparency<sup>317</sup> with users.<sup>318</sup> Correspondingly to Ailwood and Vittins, both arguments placed a greater emphasis on developing platforms' self-regulation to confront online harms, rather than ardently calling for greater regulative responsibilities.<sup>319</sup> Although the code of practice does not seek to confront IBSA and is more encouragement,<sup>320</sup> it amplifies the rising responsibility of platforms to deter online harms 'without destroying the massive benefits' they can bring and presents a steppingstone for future legislative development.<sup>321</sup>

Beyond failing to recognise IBSA offences, the DEA is even unsuccessful in minimising its targeted harms of online bullying and insulting. The Act's reliance on platforms to combat online harms through their own initiative is the crux of the problem as platforms continuously fail to 'tak[e] the issue seriously enough'.<sup>322</sup> Despite platforms' responding to the codes of practice by developing notification systems, the onus remains on users to report and notify the harmful content to be addressed and removed.<sup>323</sup> This model of confronting online harms is significantly undermined as 81% of users fail to report the harmful content they view

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<sup>312</sup> Andrew Ailwood and Matt Vitins, 'Social Media and Concepts of Content and Communications Regulation' [2008] Communications Policy and Research Forum 340, 356

<sup>313</sup> Alice Witt, Nicolas Suzor and Anna Huggins, 'The Rule of Law on Instagram: An Evaluation of the Moderation of Images Depicting Women's Bodies' [2019] The University of New South Wales Law Journal 42(2) 557, 593

<sup>314</sup> *ibid*

<sup>315</sup> *ibid*

<sup>316</sup> *ibid*

<sup>317</sup> *ibid* 592

<sup>318</sup> See Chapter 4: The Legislative Shift to the Online Safety Bill under 4.1: Soft-Law Proposals for Image-Based Sexual Abuse

<sup>319</sup> Ailwood and Vitins (n 312) 356 2

<sup>320</sup> Digital Economy Act 2017, s.103(4)

<sup>321</sup> Nicolas P. Suzor, *Lawless: The Secret Rules that Govern our Digital Lives* (Cambridge University Press, June 2019), 114

<sup>322</sup> House of Commons, 'Tackling Online Abuse' (*UK Parliament*, 1 February 2022), 16 <<https://committees.parliament.uk/publications/8669/documents/89002/default/>> accessed 7 March 2022

<sup>323</sup> Henry and Witt (n 60) 751

across platforms.<sup>324</sup> Moreover, platforms fail to commit to their community guidelines. Member of Parliament, John Nicolson, highlighted this in sharing his experience of homophobic hate on Twitter and the platform's subsequent lack of initiative upon notification, despite being stipulated on their community guidelines.<sup>325</sup> Correspondingly, Suzor concluded platforms' reporting systems to have 'proven to be deeply inadequate' in tackling widespread abuse.<sup>326</sup> The primary incentive for platforms to commit themselves to the DEA is profit-based as they seek to 'look credible and [maintain] an ethical reputation' for shareholders.<sup>327</sup> Resultingly, 'inadequat[e]' codes of practice' under the DEA facilitate platforms' lack of commitment to invest in moderation tools and create a large discrepancy 'between [their] ethical policy and practice'.<sup>328</sup> Thus, by platforms demonstrating a lack of inner motivations to prevent online harms, self-regulation is hugely undermined.

Therefore, whilst the DEA signals a necessary step in addressing online harms occurring on platforms, it remains insubstantial. Beyond failing to recognise harms exclusive to the cyber world, such as IBSA, the Act's intent to tackle bullying and harassment online even demonstrates insufficient. This ineffectiveness is due to user safety methods relying on users rather than the initiative of platforms, resulting in harms being unreported and the Act's effectiveness, ultimately, undermined.<sup>329</sup> Therefore, self-regulation under the DEA has been criticised for suffering defeat in its battle against online harms, resulting in a wider discussion on tackling the issue.<sup>330</sup>

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<sup>324</sup> OFCOM and ICO, 'Internet users' concerns about and experience of potential online harms' (*Ofcom*, May 2019), 64 <[https://www.ofcom.org.uk/data/assets/pdf\\_file/0028/149068/online-harms-chart-pack.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0028/149068/online-harms-chart-pack.pdf)> accessed 6 December 2021

<sup>325</sup> Joint Select Committee, 'Draft Online Safety Bill (Joint Committee) Thursday 23 September 2021 Meeting started at 9.59am, ended 1.07pm' (*Parliament Live TV*, 23 September 2021) <<https://parliamentlive.tv/event/index/d3916789-39c6-4891-9fbb-c5adbcc15a5c>> accessed 21 January 2022

<sup>326</sup> Nicolas Suzor, Molly Dragiewicz, Bridget Harris, Rosalie Fillett, Jean Burgess and Tess Van Geelen, 'Human Rights by Design: The Responsibilities of Social Media Platforms to Address Gender-Based Violence Online' [2019] *Policy and Internet* 11(1), 95-96

<sup>327</sup> Bodolica and Spraggon (n 41) 462

<sup>328</sup> *ibid* 460

<sup>329</sup> OFCOM and ICO (n 324) 64

<sup>330</sup> Joint Committee, 'Draft Online Safety Bill' (*UK Government*, 14 December 2021) 3 <<https://committees.parliament.uk/publications/8206/documents/84092/default/>> accessed 3 January 2022

### 3.5: Summary

The English law has shown an emerging understanding of online harms amongst platforms. Yet, IBSA has continued to emerge unrecognised.<sup>331</sup> Although there are strong economic benefits to confronting self-regulation under the DEA, its disregard for IBSA lengthens the pervading doubt of whether platforms will ever be a safe space for women.<sup>332</sup> The effectiveness of self-regulation is highly dependent on the initiative of private platforms. However, with the safety of users and profits possessing a conflict in business motivations,<sup>333</sup> it is naïve to trust private platforms to willingly divest their profits.<sup>334</sup> Thus, a further enhanced shape regulation which recognises platforms' accountability for IBSA offences and aligns its equilibrium to preserve their private prosperity, remains necessary.

## Chapter 4: The Legislative Shift to the Online Safety Bill

As the current DEA is inefficient in tackling online harms,<sup>335</sup> extensive discussions on the extent of further regulation have emerged.<sup>336</sup> These take shape in soft-law initiatives as well as tougher indirect and direct approaches that seek to minimise online harms. Though soft law approaches carry fewer 'public shocks' as they preserve the traditional position of the legislature, stronger regulative measures are necessary to confront IBSA offences.<sup>337</sup> The OSB seeks to face the failures of the DEA, advancing its regulative scope with hindsight<sup>338</sup> whilst also honing its response to gendered offences, specifically IBSA.<sup>339</sup> As a result, the

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<sup>331</sup> Revenge Porn Helpline (n 34)

<sup>332</sup> The Times, 'The Times view on social media abuse: No Safe Space' *The Times* (London, 30 June 2021)

<sup>333</sup> Yi Liu, T. Pinar Yildirim and Z. John Zhang, 'Implications of Revenue Models and Technology for Content Moderation Strategies' (*University of Pennsylvania*, 23 November 2021), 1  
<<https://marketing.wharton.upenn.edu/wp-content/uploads/2021/09/09.09.2021-Liu-Yi-JMP.pdf>> accessed 10 April 2022

<sup>334</sup> Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age* (Palgrave Macmillan, 2017), 261

<sup>335</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety under 3.4: The Rise in Legal Recognition of Platforms under the Digital Economy Act

<sup>336</sup> Rochefort (n 16) 226

<sup>337</sup> Terry Flew, 'Technology and Trust: The Challenge of Regulating Digital' [2018] Keynote Presentation to Korean Association for Broadcasting and Telecommunication Studies 30<sup>th</sup> Anniversary, 10

<sup>337</sup> Lord Davies, 'Women on Boards' (*UK Government*, February 2011), 2  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf)> accessed 7 April 2022

<sup>338</sup> Department for Digital, Culture, Media and Sport, 'Draft Online Safety Bill' (*UK Government*, 29 May 2021) s.131(3)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/985033/Draft\\_Online\\_Safety\\_Bill\\_Bookmarked.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf)> accessed 8 March 2022

<sup>339</sup> Digital, Culture, Media and Sport Committee, 'The Draft Online Safety Bill and the legal but harmful debate, Eighth Report of Session 2021-22' HC 1039 (*UK Parliament*, 24 January 2022) 11  
<<https://committees.parliament.uk/publications/8609/documents/86961/default/>> accessed 1 February 2022

Bill has exemplified a closer equilibrium between acknowledging user safety whilst respecting private business practice as opposed to alternative approaches.<sup>340</sup> This equilibrium illustrates the Bill's likelihood of being a sustainable and effective piece of legislation for combatting IBSA in the UK.

#### 4.1: Soft-Law Proposals for Image-Based Sexual Abuse

In response to the legislative failures of the DEA, further soft law approaches to better protect women online have been advocated.<sup>341</sup> These particularly focus on boosting gender diversity in platform designing, placing greater importance on platforms educating their users and creating clearer community guidelines. Though these areas of the platform industry are deficient, their inherent lack of enforceability and promise of transformation diminishes their value as independent initiatives in tackling IBSA.

The promotion of women into the digital sector and platform design has been ardently supported to ensure women's gendered experiences are appreciated and subsequently, confronted. Chapter 3 highlighted the dominance of men and the subsequent remote consideration of gendered harms amongst platforms.<sup>342</sup> By 'many tech companies [being] run by men' and female employees less likely to be promoted, platforms possess a strong absence of women.<sup>343</sup> Accordingly, platforms' restricted access to male perspectives reflects an arena 'designed by men for men'.<sup>344</sup> By encouraging gender diversity, platforms arguably gain access to new sources of expertise on gender-specific online experiences, such as IBSA, which can reflect itself through revised user safety initiatives.<sup>345</sup> To achieve greater gender diversity in the platform industry, EQUALS advocates for developing 'national policy on digital skills' to enforce equal gender opportunities.<sup>346</sup> However, this does not imply the encouragement of gender diversity to be more favourable than strong regulative duties on

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<sup>340</sup> Bodolica and Spraggon (n 41) 460

<sup>341</sup> Henry and Witt (n 60) 763

<sup>342</sup> See Chapter 2: The Conflict Between Platform's Economic and Gender Influences under 2.2: Platforms from a Gendered Perspective

<sup>343</sup> Jenny Little, 'Ten years on, why are there still so few women in tech?' *The Guardian* (London, 2 January 2020)

<sup>344</sup> Katharine Swindells, 'The digital gender gap won't be closed until the internet is safer for women' *TechMonitor* (London, 31 May 2021)

<sup>345</sup> *ibid*

<sup>346</sup> EQUALS Research Group, 'Taking Stock: Data and Evidence on Gender Equality in Digital Access, Skills, and Leadership' (*International Telecommunication Union*, March 2019), 152-153  
<<https://www.itu.int/en/action/gender-equality/Documents/EQUALS%20Research%20Report%202019.pdf>>  
accessed 15 March 2022

platforms. The UK government has already addressed the need for gender diversity under the Davies Report which through soft law, encouraged executive firms to boost female recognition to 25%.<sup>347</sup> Furthermore, the government has introduced initiatives to fund the education of girls entering the digital sector.<sup>348</sup> Despite these strategies, the representation of women has remained static for the last ten years, at 17%.<sup>349</sup> This is due to platforms not being held under any responsibility to promote women to positions of influence. Thus, although the encouragement of gender diversity in the platform industry is a significant issue, it lacks promise in its absence of accountability upon platforms. As a result, stricter obligations upon platforms to confront IBSA persist to outweigh its effectiveness.

Alternatively, enhancing platforms' transparency and communication with their users has been advocated for the deterrence of gendered online harms.<sup>350</sup> Witt et al. emphasise platforms' adopting clearer definitions in their community guidelines<sup>351</sup> and communicating with their users on content-moderation processes to be of significance.<sup>352</sup> Communicating with users to explain why their content may have been removed in accordance with their community guidelines<sup>353</sup> is essential in establishing the limits of 'acceptable behaviour' on platforms.<sup>354</sup> These interactions, simultaneously, diminish perpetrators' sense of being assisted by platforms in their online offences.<sup>355</sup> The issue of platform transparency is exemplified in Instagram's community guidelines.<sup>356</sup> Instagram, owned by Facebook, states users bear the responsibility for the 'offensive, inappropriate, obscene' content they post.<sup>357</sup> This definition is indicative of IBSA offences being shielded by platforms. However, the terms are still vague, failing to provide any specific examples or define deeper.<sup>358</sup> Henry et al. argued platform ambiguity to be intentional<sup>359</sup> as it allows platforms to appear receptive to business 'pressures', seeming morally conscious,<sup>360</sup> whilst being able to avoid 'legal or

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<sup>347</sup> Lord Davies (n 337) 5

<sup>348</sup> Amelia Heathman, 'UK government announces £2.4 million investment to encourage more girls into computing' *Evening Standard* (London, 30 April 2019)

<sup>349</sup> Little (n 343)

<sup>350</sup> Witt et al. (n 313) 592

<sup>351</sup> Witt et al. (n 313) 569

<sup>352</sup> Henry and Witt (n 60) 755

<sup>353</sup> Witt et al. (n 313) 569

<sup>354</sup> Henry and Witt (n 60) 755

<sup>355</sup> Kolisetty (n 76)

<sup>356</sup> Instagram, 'Terms of Use' (*Instagram*, 4 January 2022) <<https://help.instagram.com/581066165581870>> accessed 15 March 2022

<sup>357</sup> *ibid*

<sup>358</sup> Witt et al. (n 313) 569

<sup>359</sup> *ibid* 573

<sup>360</sup> Henry and Witt (n 60) 755

financial obligations'.<sup>361</sup> Thus, prioritising platform transparency may arguably ensure platforms are held accountable and users operate within their parameters. However, the soft law nature of platform transparency initiatives mirrors the failings of the DEA, lacking enforcement powers.<sup>362</sup> Enforcement is necessary as without it, platforms' complacency in investing towards user safety initiatives and subsequently, IBSA, will persist.

Therefore, while these soft-law proposals highlight areas in need of development amongst platforms, their effectiveness in confronting IBSA offences is undermined by their lack of enforcement powers. Consequently, a firmer shape of platform regulation which introduces proactivity into reactivity by holding platforms accountable, alongside perpetrators, for their facilitation persists necessary to minimise IBSA.<sup>363</sup>

#### **4.2: Indirect Proposals for Platform Regulation**

The need for a stricter shape of regulation upon platforms has reached an almost global consensus.<sup>364</sup> Indirect regulative strategies under the public utility models and competition law which seek to impose tougher obligations upon platforms have been advocated for. These approaches demonstrate the capacity to centre platforms towards user safety. However, direct regulation upon platforms for online harms presents itself as more sustainable and effective in tackling IBSA.

An emerging proposal for facing platforms' exceeding power has been the public utility approach.<sup>365</sup> The national perception of platforms has presented a shift as platforms have grown to be seen 'akin to public spaces' in which their responsibilities exceed those of private corporations in other markets.<sup>366</sup> Rahman, the current policy advisor to the USA,<sup>367</sup> advanced this fresh observation by endorsing the regulation of platforms to mirror that of public utilities.<sup>368</sup> He addressed the prevailing economies of scale and market power of

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<sup>361</sup> Witt et al. (n 313) 573

<sup>362</sup> Joint Committee (n 330) 3

<sup>363</sup> Rackley et al. (n 8) 318

<sup>364</sup> Rochefort (n 16) 226

<sup>365</sup> Rahman (n 192) 1672

<sup>366</sup> Department for Digital, Culture, Media and Sport and Home Office, 'Consultation Outcome: Online Harms White Paper' (*UK Government*, 15 December 2020) <<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>> accessed 5 March 2022

<sup>367</sup> David Meyers, 'Biden taps second voting rights leader to join administration' *The Fulcrum US* (Washington, 27 January 2021)

<sup>368</sup> Rahman (n 192) 1622

leading platforms to limit their ‘ordinary accountability’ in a competitive market.<sup>369</sup> Due to this, Rahman contended platforms to no longer compete on ‘moral or social’ factors, such as user safety, and prioritise their profits.<sup>370</sup> As a result, he argued there to be a higher susceptibility to online harms. The public utility approach is favoured as it focuses ‘on correcting economic distortions and lack of consumer protection’.<sup>371</sup> It is seen in the UK by the energy regulator, Ofgem, having the power to set price controls upon energy companies to protect consumers from exploitation.<sup>372</sup> This is due to the energy sector’s monopoly powers over essential goods posing a risk of exploitative harm to consumers.<sup>373</sup> Social networking platforms present similarities to the energy sector. The platform market is ‘extremely concentrated’<sup>374</sup> as America’s anti-trust agency, the Federal Trade Commission, found Facebook to hold a 91% share of the market in 2021.<sup>375</sup> Furthermore, platforms are strongly relied upon economically,<sup>376</sup> alongside socially, with the average UK user spending 108 minutes on them per day.<sup>377</sup> The public utility proposal is arguably effective, being a form of market correction, realigning platforms to ordinary competitive conditions. However, Rochefort rationalised this approach, conceding to greater regulation being needed, but questioning its necessity to reach the extent of public utilities.<sup>378</sup> The public utility approach is largely doubted on ‘political acceptability’ grounds, with views being ‘mixed and inconclusive’.<sup>379</sup> Merrin reflected the approach’s unacceptability, arguing it to create a ‘totalitarian future’ in which society is returning to state-controlled broadcasting and limited free speech.<sup>380</sup> Although the public utilities approach carries the capacity to rebalance major platforms’ profit and moral incentives, state interference in platforms which are traditionally

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<sup>369</sup> Rahman (n 192) 672

<sup>370</sup> *ibid*

<sup>371</sup> Rochefort (n 16) 253

<sup>372</sup> Ofgem, ‘Price control explained’ (*Ofgem*, March 2013)

<[https://www.ofgem.gov.uk/sites/default/files/docs/2013/03/price\\_control\\_explained\\_march13\\_web.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2013/03/price_control_explained_march13_web.pdf)> accessed 14 March 2022

<sup>373</sup> Michael Pollitt, ‘New Model Regulation in the Electricity Industry’ Electricity Policy Group Working Papers EPRG 0811 (*University of Cambridge*, 21 October 2008) <<https://www.jbs.cam.ac.uk/insight/2008/new-model-regulation-in-the-electricity-industry/>> accessed 25 April 2022

<sup>374</sup> IBIS World (n 21)

<sup>375</sup> Daniel Liss, ‘Today’s real story: The Facebook Monopoly’ *Tech Crunch* (San Francisco, 19 August 2021)

<sup>376</sup> See Chapter 2: The Conflict Between Platform’s Economic and Gender Influences under 2.1: Platforms from an Economic Perspective

<sup>377</sup> Joseph Johnson, ‘Average daily media use in the United Kingdom (UK) 2021, by media’ (*Statista*, 31 March 2022) <<https://www.statista.com/statistics/507378/average-daily-media-use-in-the-united-kingdom-uk/>> accessed 26 April 2022

<sup>378</sup> Rochefort (n 16) 253

<sup>379</sup> *ibid*

<sup>380</sup> William Merrin, ‘Save the Troll! UK Social Media Legislation and the Attack on Freedom of Speech’ Neil Ewen, Alan Grattan, Marcus Leaning and Paul Manning, *Capitalism, Crime and Media in the 21<sup>st</sup> Century* (Springer International Publishing, 2021), 224

symbolic of free speech would be highly controversial.<sup>381</sup> Furthermore, as the approach is an economic response to corporations' excessive power, specific harms such as IBSA are at risk of remaining overlooked.<sup>382</sup> Thus, a duty of care approach which can limit itself to specific online harms without invading free speech, and realigning business motivations would be more successful.<sup>383</sup>

Competition law has also been proposed as a solution to the online harms occasioned by the excessive market power of major platforms.<sup>384</sup> Wu advocates for the breaking up of major platforms to realign them with competitive markets, driven by innovation, choice and quality for consumers.<sup>385</sup> Dominant platforms enjoy the competitive advantage under 'network effects'<sup>386</sup> and possess the high-scale profits required to conduct 'killer acquisitions', further limiting their competition.<sup>387</sup> Subsequently, they are able to continue their profit goals without competing on user-safety grounds.<sup>388</sup> In adopting competition law, there is the capacity to push platforms' focus towards corporate responsibility and user safety in an attempt to remain competitive. Yet, this approach has its downfalls; the English economic and political system possesses 'a deeply ingrained, hands-off liberalism' resulting in a shift to breaking up platforms to be doubtful.<sup>389</sup> Moreover, competition law bores the risk of escalating online harms as smaller firms lack the economies of scale and resources required for researching and developing effective content-moderation tools.<sup>390</sup> Therefore, a duty of care approach would be supreme, having foundations of platform responsibility laid under the DEA and limiting itself solely to online harms in contrast to their commercial practice.

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<sup>381</sup> Meta, 'Mark Zuckerberg Stands for Voice and Free Expression' (*Meta*, 17 October 2019) <<https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression/>> accessed 14 March 2022

<sup>382</sup> Frank A. Wolak, 'Public utility pricing and finance' in Steven N. Durlauf and Lawrence E. Blume, *The New Palgrave Dictionary of Economics* (Palgrave Macmillan 2<sup>nd</sup> edn, 2008), 1

<sup>383</sup> Joint Committee on the Draft Online Safety Bill (n 198) 4

<sup>384</sup> Annemarie Bridy, 'Remediating Social Media: A Layer-Conscious Approach' [2018] Boston University Journal of Science and Technology Law 24(2) 193, 196

<sup>385</sup> Patel (n 191)

<sup>386</sup> See Chapter 2: The Conflict Between Platform's Economic and Gender Influences under 2.1: Platforms from an Economic Perspective

<sup>387</sup> Frank Pasquale, *The Black Box society- The Secret Algorithms that Control Money and Information* (Harvard University Press, 2018), 82

<sup>388</sup> *ibid*

<sup>389</sup> Duncan Weldon, 'Condemned to be liberal: why Britain can't easily break with economic laissez-faire' *Prospect* (London, 8 June 2021)

<sup>390</sup> Rochefort (n 16) 255



Although the public utilities and competition law approaches carry credibility, the imposition of a duty of care upon platforms pervades necessary to confront their exceeding power and wider harms. The suggested approaches intervene directly into the operation of private businesses and though precedent, they are remote from the liberal standpoint of the UK in regard to platforms.<sup>391</sup> Furthermore, as these approaches are broad in their remit, in which their consequences of greater user safety are hypothetically ‘assume[d]’, specific harms such as IBSA may remain unsheltered.<sup>392</sup> A duty of care approach which develops upon the shortcomings of current platform legislation to realign platforms’ economic complacency and recognise IBSA remains necessary. This is seen under the OSB.

### 4.3: The Online Safety Bill’s Key Elements

The OSB is the ‘first online safety la[w] of [its] kind’ worldwide.<sup>393</sup> It stands out prominently as it rejects the neutral positions of platforms and introduces a duty to care upon them to block specific online harms.<sup>394</sup> Consequently, it advances the view of platforms as public arenas in which they must protect their digital visitors.<sup>395</sup> The legislative development under the Bill discards platforms’ from their ‘libertarian sandbox’,<sup>396</sup> and reprioritises ‘particular concerns over others’ to strike an equilibrium between private business practice and user safety.<sup>397</sup> It is this readjustment of duties and policy concerns under the Bill that ‘offers an opposite answer’ to the same asked of Section 230 of the Communications Decency Act and the EU’s e-Commerce Directive.<sup>398</sup>

Following the Bill’s imposition of a duty to care, platforms’ obligations range from performing illegal content risk assessments to eliminating specifically stipulated offences under the illegal content section.<sup>399</sup> Since its conception, the OSB committed itself to tackling

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<sup>391</sup> Weldon (n 389)

<sup>392</sup> Wolak (n 382) 3

<sup>393</sup> UK Government, ‘UK to introduce world first online safety laws’ (n 49)

<sup>394</sup> Department for Digital, Culture, Media and Sport, ‘Draft Online Safety Bill’ (n 338) s.18

<sup>395</sup> Carnegie UK Trust, ‘House of Lords Communications Committee Inquiry. Response from Professor of Internet Law Lorna Woods, University of Essex and William Perrin- Written Evidence’ (*Carnegie UK Trust*, 24 April 2018) [25] < [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/01/25143759/House-of-Lords-Evidence-Final.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/01/25143759/House-of-Lords-Evidence-Final.pdf) > accessed 31 January 2022

<sup>396</sup> Sheir (n 295) 85

<sup>397</sup> *ibid* 86

<sup>398</sup> Luke Price, ‘Platform responsibility for online harms: towards a duty of care for online hazards’ [2021] *Journal of Media Law* 13(2) 238, 245

<sup>399</sup> Department for Digital, Culture, Media and Sport, ‘Draft Online Safety Bill’ (n 338) s.5(2) (a-b)

terrorism and child exploitative sexual abuse online.<sup>400</sup> This commitment was included in the ‘illegal content’ section, placing a direct duty of care upon platforms to eradicate the two offences.<sup>401</sup> However, the Bill exhibits flexibility to protect adults from online harms by incorporating a third limb under the ‘illegal content’ section.<sup>402</sup> This limb, called ‘priority illegal content’, allows new offences to be introduced and protected to the same standard as the original offences.<sup>403</sup> However, it is at the discretion of the Secretary of State for Digital, Culture, Media and Sport.<sup>404</sup> Though yet to be finalised, the Secretary of State has vocalised her intentions to include IBSA under this priority standard of protection.<sup>405</sup> Beyond the ‘illegal content’ category, ‘legal but harmful’ offences exist under ‘content that is harmful to adults’.<sup>406</sup> This section excludes legally recognised offences and focuses on specifically physically and psychologically damaging harms,<sup>407</sup> such as cyberflashing and online abuse.<sup>408</sup> However, this is an area of contention, with several campaigners viewing it to be too broad in its remit, whilst others defend its necessity to tackle gender-based abuse and harassment.<sup>409</sup>

Platforms face comprehensive repercussions under the OSB if they fail to protect their users to their stipulated standard. The Bill has delegated new powers to Ofcom, the UK’s independent regulator for the communications industry, to ensure platforms are held accountable.<sup>410</sup> In doing so, Ofcom is given legislative powers to bind platforms to fines of £18 million or 10% of their worldwide revenue.<sup>411</sup> Moreover, the Bill goes beyond monetary detriments to powers of convicting and imprisoning senior managers of the non-compliant platforms for up to two years<sup>412</sup>

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<sup>400</sup> Joint Committee on the Draft Online Safety Bill (n 198) 41

<sup>401</sup> Department for Digital, Culture, Media and Sport, ‘Draft Online Safety Bill’ (n 338) s. 41(5)

<sup>402</sup> Joint Committee on the Draft Online Safety Bill, ‘Draft Online Safety Bill: Report of Session 2021-22’ (*UK Parliament*, 10 December 2021), 42

<<https://publications.parliament.uk/pa/jt5802/jtselect/jtonlinesafety/129/129.pdf>> accessed 19 January 2022

<sup>403</sup> Department for Digital, Culture, Media and Sport, ‘Draft Online Safety Bill’ (n 338) 41(5)(c)

<sup>404</sup> *ibid*

<sup>405</sup> Secretary of State (n 402) 42

<sup>406</sup> Department for Digital, Culture, Media and Sport, ‘Draft Online Safety Bill’ (n 338) s.46

<sup>407</sup> *ibid*

<sup>408</sup> This dissertation is written in accordance to the position of English law as of December 2021.

<sup>409</sup> Digital, Culture, Media and Sport Committee (n 339) 11

<sup>410</sup> Ofcom, ‘Ofcom to gain new online safety powers as Government bill published today’ (*Ofcom*, 12 May 2021) <<https://www.Ofcom.org.uk/about-Ofcom/latest/features-and-news/new-online-safety-powers-government-bill-published>> accessed 3 January 2022

<sup>411</sup> Department for Digital, Culture, Media and Sport, ‘Draft Online Safety Bill’ (n 338) s.85

<sup>412</sup> *ibid* s.72

The OSB's key components demonstrate a significant shift from the English law's traditionally liberal stance.<sup>413</sup> This movement particularly rests on the OSB's recognition of platforms' shared culpability with perpetrators for the infliction of online harms and subsequent accountability. Moreover, its prominence is furthered by its newfound recognition of IBSA under platform regulation.

#### **4.4: A Sustainable Piece of Legislation?**

The OSB not only signals the future precedent of traditionally liberal nations but also presents itself as a piece of legislation with permanence. The Bill was intended to be 'sustainable' for future application, and it reveals itself as capable of being so.<sup>414</sup> This stems from its strong enforcement capability to push platforms' business focus towards user safety while upholding the UK's traditionally liberal economic approach.<sup>415</sup> By achieving an equilibrium between the opposing objectives, the Bill presents itself to be a sustainable piece of legislation for platform regulation.<sup>416</sup>

The OSB presents an effective response to the dilemma surrounding platform regulation by maintaining scope for self-regulation<sup>417</sup> alongside its strong enforcement powers, achieving a balance.<sup>418</sup> Although the OSB takes a strong regulative stance by imposing a duty of care upon platforms to protect their users from specific harms, how platforms achieve doing so is not legally imposed or limited.<sup>419</sup> As a result, platforms remain able to construct their content-moderation tools through their own efficiencies dynamically without intervention. This self-regulative component is significant as rule-based regulation has been widely criticised for being unsustainable among platforms' diverse and consistently evolving

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<sup>413</sup> Weldon (n 389)

<sup>414</sup> Department for Digital, Culture, Media and Sport, 'Government response to the Joint Committee report on the Online Safety Bill' (*UK Government*, 17 March 2022) <<https://www.gov.uk/government/publications/joint-committee-report-on-the-draft-online-safety-bill-government-response/government-response-to-the-joint-committee-report-on-the-draft-online-safety-bill>> accessed 5 April 2022

<sup>415</sup> Weldon (n 389)

<sup>416</sup> See Chapter 2: The Conflict Between Platform's Economic and Gender Influences under 2.2: Platforms from a Gendered Perspective

<sup>417</sup> Jacqui Morrissey, Laura Kennedy and Lydia Grace, 'The Opportunities and Challenges of Regulating the Internet for Self-Harm and Suicide Prevention' [2022] *Crisis* 43(2) 77, 79

<sup>418</sup> See Chapter 2: The Conflict Between Platform's Economic and Gender Influences under 2.2: Platforms from a Gendered Perspective

<sup>419</sup> Joint Committee on the Draft Online Safety Bill (n 198) 31

nature.<sup>420</sup> Thus, in maintaining self-regulative factors, the Bill is able to reshape the market in which platforms operate, by toughly pushing for user safety, without directly intervening in their private business practice. As a result, the Bill's fluidity demonstrates its sustainability, prioritising the safety of users 'without destroying the massive benefits' they can bring.<sup>421</sup>

Furthermore, sustainable platform regulation need not only stricter parameters but also 'new structures' which can monitor, penalise and enforce platforms to abide.<sup>422</sup> The OSB successfully achieves this through its extensive delegations of enforcement powers to Ofcom.<sup>423</sup> Ofcom's duties vary from carrying out risk assessments of platforms to cooperating with international regulators.<sup>424</sup> However, they also act as the decision-maker in the OSB's enforcement.<sup>425</sup> Ofcom's enforcement abilities carry the propensity to narrow the gap between platforms' 'ethical policy and practice' as their exposure to detrimental fines or convictions can push their profit motivations towards regulative compliance.<sup>426</sup> Thus, the Bill's strong enforcement capacities, alongside its self-regulatory elements, can ensure platforms are effectively held accountable and online harms are reduced.

The Bill is a monumental step of platform regulation, bearing permanence. Whilst the Bill is viewed as revolutionary in its introduction of a duty of care, it is not wholly unprecedented as it advances upon the flaws under the DEA to develop its self-regulative shape.<sup>427</sup> Resultingly, it arguably carries fewer 'public shocks'.<sup>428</sup> This paired with its enforcement strength, the Bill is both sustainable and chiefly effective in realigning platforms' economic objectives with their wider social influences to confront IBSA.

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<sup>420</sup> Mark Bunting, 'Regulation and accountability: How to save the internet' *European Council on Foreign Relations* (Berlin, 30 January 2020)

<sup>421</sup> Suzor (n 321) 114

<sup>422</sup> *ibid* 171

<sup>423</sup> Ofcom (n 410)

<sup>424</sup> Joint Committee on the Draft Online Safety Bill (n 198) 92

<sup>425</sup> Department for Digital, Culture, Media and Sport, 'Draft Online Safety Bill' (n 338) s.85

<sup>426</sup> Bodolica and Spraggon (n 41) 460

<sup>427</sup> Giancarlo F. Frosio, *Oxford Handbook of Online Intermediary Liability* (Oxford University Press, 2020) 309

<sup>428</sup> Flew (n 337) 2

#### 4.5: A Further Safeguard from Image-Based Sexual Abuse?

The Bill's legislative sustainability paired with its distinct recognition of IBSA indicates an effective framework for confronting the offence and its subsequent harms. In shifting the onus of tackling online harms from users to platforms under a duty of care standard, the Bill creates a strong preliminary force to diminishing IBSA.<sup>429</sup> Despite the Bill's criticisms for failing to wholly appreciate wider gendered harms and still possessing 'much space for further development', its intent to place IBSA under a high standard of protection combined with its enforcement powers bears strength.<sup>430</sup>

The OSB presented an emerging acknowledgement to the wider gendered dimensions of online harms by welcoming expertise.<sup>431</sup> This ranged from relying on legal scholars in the field of IBSA, such as McGlynn and Rackley,<sup>432</sup> gendered statistics<sup>433</sup> and End Violence Against Women and Girl's (VAWG) initiatives.<sup>434</sup> Consequently, these sources have aided the Bill's appreciation of the disproportionate levels of harm women face online<sup>435</sup> and fuelled IBSA offences being expected under 'priority illegal content'.<sup>436</sup> Nonetheless, the Bill's appreciation of gendered online harms has been criticised by VAWG for being inadequate. VAWG found the Bill to continue in disappointment due to the Joint Committee's failure to address the wider scale of misogynistic abuse online, beyond IBSA, through 'any specific recommendations'.<sup>437</sup> McGlynn and Rackley emphasised IBSA to be a branch from the overarching epidemic of gendered abuse online, seeking legislation to confront the issue holistically.<sup>438</sup> Thus, in the Bills' failure to appreciate IBSA's wider gendered abuse problem, the Bill's effectiveness was seen as diluted.<sup>439</sup> However, the harms

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<sup>429</sup> Henry and Witt (n 60) 49, 751; See Chapter 3: The Development of Platform Legislation Prior to the Online Safety under 3.4: The Rise in Legal Recognition of Platforms under the Digital Economy Act

<sup>430</sup> Sheir (n 295) 89

<sup>431</sup> Secretary of State (n 402) 13

<sup>432</sup> UK Parliament, 'Written evidence submitted by Professor Clare McGlynn, Durham Law School, Durham University' (*Parliament Committees UK*, September 2021)

<<https://committees.parliament.uk/writtenevidence/39012/pdf/>> accessed 5 April 2022

<sup>433</sup> Joint Committee on the Draft Online Safety Bill (n 198)

<sup>434</sup> Secretary of State (n 402) 13

<sup>435</sup> *ibid*

<sup>436</sup> Digital, Culture, Media and Sport Committee (n 339) 11

<sup>437</sup> End Violence Against Women, 'Online Safety committee fail to name violence against women in recommendations for new law' (*End Violence Against Women*, 15 December 2021)

<<https://www.endviolenceagainstwomen.org.uk/parliament-committee-misogynistic-abuse-online/>> accessed 31 January 2022

<sup>438</sup> McGlynn and Rackley, 'Image-Based Sexual Abuse' (n 31) 537

<sup>439</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.1: Scholarly Definitions

arising from wider abuses beyond IBSA would fall under the ‘legal but harmful’ category.<sup>440</sup> As this category is currently under intense scrutiny for its subjectiveness and breadth, IBSA’s emergence under the established category of ‘priority illegal content’ should be celebrated.<sup>441</sup>

The OSB signals potential in minimising the harms arising from IBSA offences. The central harms of IBSA incur from platforms’ inherent omnipresence or after its occurrence through doxing.<sup>442</sup> ‘Doxing’<sup>443</sup> is a significant harm for IBSA victims as the uploading of personal images amongst platforms is commonly alongside their personal details, occasioning ‘secondary victimisation’.<sup>444</sup> As over half of IBSA victims are also victims of doxing, the Bill’s intent to hold platforms accountable for failing to block IBSA from entering their public arena would simultaneously deter the surfacing of doxing.<sup>445</sup> In contrast, confronting the psychologically distressing ‘omnipresence’ of platforms appears more challenging as platforms are inherently interminable.<sup>446</sup> Nevertheless, the Bill has the competence to lessen these harms. As the only safeguard for IBSA victims has traditionally lied under the deficient and distrusted criminal law, victims were left vulnerable, hypervigilant and anxious.<sup>447</sup> However, the Bill’s extension of protection by imposing duties upon platforms diminishes the weaponising of platforms by perpetrators and provides victims with a preliminary net of protection from IBSA offences.<sup>448</sup> This can contribute to alleviating victims’ hypervigilance from confronting IBSA by themselves.<sup>449</sup> Thus, the OSB presents considerable scope in protecting IBSA victims from the offence’s harms.

OSB’s criticism for its insufficient recognition of gendered online abuse should not detract from its momentum in confronting IBSA offences. IBSA, soon to be included under a priority standard of protection of the OSB, is a large step from the offence solely being recognised under the criminal law. In appreciating IBSA’s susceptibility amongst platforms,

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<sup>440</sup> Digital, Culture, Media and Sport Committee (n 339) 11

<sup>441</sup> *ibid*

<sup>442</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.3 Harms

<sup>443</sup> *ibid*

<sup>444</sup> Davidson et al. (n 3) 46

<sup>445</sup> Souza (n 98) 107

<sup>446</sup> Flynn et al. (n 12) 14

<sup>447</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under Harms

<sup>448</sup> Akhila Kolisetty, ‘How image-based sexual abuse is a form of domestic violence’ (*End Cyber Abuse*, 13 October 2019) <<https://endcyberabuse.org/how-image-based-sexual-abuse-is-a-form-of-domestic-violence/>> accessed 28 February 2022

<sup>449</sup> *ibid*

the Bill introduces the capacity to alleviate its harms. Thus, the OSB responds to the necessity of an *ex-ante* safeguard which effectively confronts IBSA offences.<sup>450</sup>

#### 4.6: Summary

Whilst the OSB nonetheless carries its own flaws, it is a significant step ‘in the right direction’ for platform regulation and IBSA offences.<sup>451</sup> This success owes itself to the OSB maintaining a self-regulative component while establishing enforcement and subsequent accountability upon platforms. As of present, the final version of the OSB is uncertain, with there being ‘much space for further development.’<sup>452</sup> However, with IBSA forecasted to be under OSB’s priority standard, this piece of regulation will be fundamental in tackling its harms.<sup>453</sup> Soft-law proposals have the potential to further the influence of the Bill but fail to be effective independently due to their lack of enforceability.<sup>454</sup> Furthermore, the OSB’s outcome-focused regulation presents itself supreme in balancing policy and profit incentives, in contrast to the economic, theory-based proposals under the public utility and competition law approaches.<sup>455</sup> The OSB signals a positive era of platform regulation in confronting IBSA offences and their subsequent harms.<sup>456</sup>

#### Conclusion

The ‘time is ripe’<sup>457</sup> for the English law to detach from its traditional laissez-faire approach towards platforms under neoliberalism and to confront the emergence of IBSA.<sup>458</sup> Being currently only protected under the criminal law, IBSA offences continue to rise while the justice gap continues to expand.<sup>459</sup> Despite the myriad of developments, the criminal law can embark on, it remains ‘piecemeal’ due to its inherent cultural and *ex-post* deficiencies in confronting gendered offences.<sup>460</sup> These deficiencies result in the criminal law’s large attrition rate for the offence and facilitate victims’ decisions to not report, confronting their

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<sup>450</sup> See Chapter 1: The Background Behind Image-based Sexual Abuse under 1.2: Gendered Context

<sup>451</sup> Stokes (n 50)

<sup>452</sup> Sheir (n 295) 89

<sup>453</sup> Secretary of State (n 402) 42

<sup>454</sup> Joint Committee (n 330) 3

<sup>455</sup> Daniel Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing, 2012), 116

<sup>456</sup> Bunting (n 420)

<sup>457</sup> McGlynn and Rackley, ‘Image-Based Sexual Abuse’ (n 31) 561

<sup>458</sup> Gorwa (n 23) 39

<sup>459</sup> See Chapter 1: The Contextual Backdrop of Image-Based Sexual Abuse under 1.2: Gendered Context

<sup>460</sup> Rackley et al. (n 8) 294

abuses by themselves. As a result, the very perpetrators and moneymaking structures which accelerate and ease the offence remain blameless.<sup>461</sup> However, with IBSA inflicting extensive harms, psychological to financial, and contributing to victims' virtual detachment and consequent isolation from society, it is necessary to address the protection of platforms to confront IBSA.<sup>462</sup>

Platforms are the primary distributors of IBSA.<sup>463</sup> Despite this, they face no accountability for evading these offences and are even able to exploit the offence to boast thousands in revenue per year.<sup>464</sup> This regulative remoteness is a reflection of the English law's neoliberal foundations in which platforms' private corporate standing, and ensuing monetary successes, are perceived to be disconnected from the online harms occurring on their sites.<sup>465</sup> Although this dissertation does not strive to expel IBSA's recognition under criminal law, it emphasises the effectiveness of broadening its scope under platform regulation to confront the technology-borne offence with technological responses.<sup>466</sup> 'Conventional approaches'<sup>467</sup> under the criminal system are necessary to ensure justice for victims; nonetheless, technology can be employed as a preliminary tool to compensate for its exceeding deficiencies.<sup>468</sup> This would fuse the criminal law's reactive nature with platforms' proactive capacities to ultimately protect victim-survivors and potential future victims from IBSA.<sup>469</sup> However, platforms lack the incentive to employ their resources to further solutions for user safety, being subordinate to platforms' profit objectives.<sup>470</sup> This is furthered by platforms' absence of legal accountability enabling them to continue maximising their profit incentives and divesting from user safety. Thus, the initiation of stronger platform regulation would be

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<sup>461</sup> Gimenez (n 239) 13

<sup>462</sup> Clare McGlynn, Erika Rackley, Nicola Henry, Nicola Gavey, Asher Flynn and Anastasia Powell, 'Its Torture for the Soul': The Harms of Image-Based Sexual Abuse' [2021] *Social and Legal Studies* 30(4) 541, 554

<sup>463</sup> Claire Slattery (n 30)

<sup>464</sup> Morris (n 39)

<sup>465</sup> See Chapter 3: The Development of Platform Legislation Prior to the Online Safety Bill under 3.3: The Technoliberal Foundations of Platform Regulation

<sup>466</sup> Alicia Hammond, Mirai Maruo, Diana J. Arango, 'The good, the bad and the intersection of gender-based violence and technology' (*World Bank Blogs*, 4 December 2019) <<https://blogs.worldbank.org/voices/good-bad-and-intersection-gender-based-violence-and-technology>> accessed 9 April 2022

<sup>467</sup> *ibid*

<sup>468</sup> Anastasia Powell, 'Violence against women: does technology do more harm than good?' *The Conversation* (London, 10 February 2016)

<sup>469</sup> Rackley et al. (n 8) 318

<sup>470</sup> Bodolica and Spraggon (n 41) 460



“instrumental in aligning the discrepancy between platforms’ ‘profit and practice’ to confront IBSA.<sup>471</sup>

The OSB exhibits itself to be chief in regulating platforms to address IBSA. In assessing further soft law proposals as an alternative to platform regulation, the equivalent issues under the current legislative position of English law arose: platform unaccountability. Thus, a stricter shape of regulation is necessary. Though indirect regulation under public utilities and competition law approaches carry strength to confronting user safety, their hypothetical economic approaches present too broad to guarantee IBSA’s confrontation in comparison to the OSB’s direct IBSA distinction.<sup>472</sup> The OSB demonstrates its sustainability in conserving hues of the English law’s liberal commitment in its outcome-based regulative approach to which platforms’ can diversely implement.<sup>473</sup> This maintenance signals the Bill’s ability to build upon legislative foundations and strike a balance between profit and policy considerations.<sup>474</sup> Though seen as a ‘missed opportunity to protect women’ online due to its deficiencies in addressing wider gendered abuse, this should not wholly detract from its effectiveness to confront IBSA.<sup>475</sup> Alongside its enforcement abilities to balance platforms’ incentives and intent to place priority protections for IBSA, the OSB is also able to alleviate the harms arising from the offence.<sup>476</sup>

It is time for the English law to abandon its traditionally neoliberal stance towards platform regulation and confront IBSA. IBSA’s impacts can be ‘life-ending’ and all-encompassing.<sup>477</sup> Nonetheless, the neoliberal foundations of platform regulation further the emergence of IBSA across platforms. The OSB’s drafting signals the UK’s divergence from its traditional stance and exhibits a monumental potential to eliminate IBSA’s emergence and consequently, detrimental harms.

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<sup>471</sup> Bodolica and Spraggon (n 41) 460

<sup>472</sup> Wolak (n 382) 3

<sup>473</sup> Joint Committee on the Draft Online Safety Bill (n 198) 31

<sup>474</sup> Bodolica and Spraggon (n 41) 460

<sup>475</sup> Ruth Davison, ‘Opinion: UK Online Safety Bill is a missed opportunity to protect women, girls’ (*Refuge*, 23 March 2022) <<https://news.trust.org/item/20220327134233-ojwhy/>> accessed 14 April 2022

<sup>476</sup> See Chapter 4: The Legislative Shift to the Online Safety Bill under 4.5: A Further Safeguard from Image-Based Sexual Abuse?

<sup>477</sup> Rackley et al. (n 8) 293

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