

NOTE

Protecting Children’s Online Privacy  
and Safety in the US: Lessons  
from the EU

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## Introduction

In 2006, British mathematician Clive Humby shouted, “Data is the new oil.”<sup>1</sup> More than a decade later, this still rings true in the current digital economy where data has become a lucrative commodity controlled by a few giants.<sup>2</sup> Tech companies, such as Google and Meta, collect a significant amount of data from their users’ activities. They feed this data to their recommendation algorithms which then tailor people’s digital experiences on their platforms.<sup>3</sup> While use of such data has arguably improved the online consumer experience for many, there are growing concerns about privacy and the protection of personal information.

In recent years, society has faced some of the downsides of mass data collection and what it means for personal privacy, safety, and autonomy. The need for stronger protections against the misuse of data is especially apparent with minors. In 2021, former Meta (then doing business as Facebook) employee Frances Haugen revealed that the social media company had long known of the negative effects of its platform Instagram on teen mental health.<sup>4</sup> The Wall Street Journal reported that despite the company’s knowledge of the harm it was causing, it had continued detrimental business practices focusing on “videos, feeds of algorithmically chosen content and tools that touched up people’s faces.”<sup>5</sup> Social media usage involving personalized content has since been further linked with an increase in anxiety and depression in young adults.<sup>6</sup>

Despite the prevalence of data privacy problems and the need for increased protection, the United States lacks comprehensive federal data protection laws. It instead primarily relies on regulation by state laws and enforcement actions brought by the Federal Trade Commission (FTC) and state attorneys general.<sup>7</sup> The FTC acts primarily through its authority under Section 5 of the Federal Trade Commission Act which prohibits “unfair and deceptive acts or practices.”<sup>8</sup> Similarly, state attorneys general, as the people’s attorney with duties to protect the safety of their states’ residents, have brought enforcement actions

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1. Michael Kershner, *Data isn't the New Oil – Time is*, FORBES (July 15, 2021), <https://www.forbes.com/sites/theyec/2021/07/15/data-isnt-the-new-oil—time-is/?sh=5be253ef35bb> [https://perma.cc/7AXT-SWJ9].

2. *World's Most Valuable Resource No Longer Oil, But Data*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> [https://perma.cc/Z8QJ-X9LV].

3. Poruz Khambatta, Shwetha Mariadassou, Joshua Morris, & S. Christian Wheeler, *Tailoring Recommendation Algorithms to Ideal Preferences Makes Users Better Off*, 13 SCI. REPS. (2023).

4. Mia Lin, *Is Meta the Next Big Tobacco? How State Attorneys general Can Use Consumer Protection Litigation to Enforce Corporate Accountability*, 15 NE. U. L. REV. 37, 43 (2023).

5. Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sep. 14, 2021), <https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739> [https://perma.cc/WZA5-HMTH].

6. Dylan Walsh, *Study: Social Media Use Linked to Decline in Mental Health*, MIT MGMT. SLOAN SCH. (Sep. 14, 2022), <https://mitsloan.mit.edu/ideas-made-to-matter/study-social-media-use-linked-to-decline-mental-health> [https://perma.cc/ZM2C-8K2Y].

7. Elysa M. Dishman, *Settling Data Protection Law: Multistate Actions and National Policymaking*, 72 ALA. L. REV. 840, 847 (2021).

8. *Id.* at 842.

against companies that violate state consumer protection laws.<sup>9</sup> According to the National Association of attorneys general, state consumer protection laws “prohibit companies from acting deceptively or unfairly in their collection, handling, and use of consumers’ data.”<sup>10</sup> State attorneys general are also responsible for enforcing federal legislation such as the Children’s Online Privacy Protection Act (COPPA).<sup>11</sup>

The flurry of activity on data privacy and protection is not limited to the United States. In fact, scholars have observed that recent proposed and enacted state laws have been prompted by the information privacy standard set in Europe.<sup>12</sup> In 2018, the European Union passed the General Data Protection Regulation (GDPR), the world’s first comprehensive data privacy legislation.<sup>13</sup> The GDPR imposes significant corporate responsibilities onto any organization that “target[s] or collect[s] data related to people in the EU.”<sup>14</sup> Approximately 142 countries, including Brazil and Japan, have since implemented data privacy laws modeled on the GDPR.<sup>15</sup> Likewise, the U.S. should look to the GDPR and see how it can amend or better enforce its own laws. In this vein, while it seems that the U.S. is progressing towards more extensive state laws for data protection, there is still popular support for comprehensive federal regulation.

This Note will focus on the role of the state attorney general in protecting children’s online privacy and safety in the United States. Part I of this Note will discuss the power of the state attorney general, the privacy and safety issues children face online, and the existing US regulations concerning them. Part II will discuss the data protection regulations available in the European Union and compare their legislation and enforcement with those of the US. Based on such comparisons with the EU, Part III will provide recommendations for state attorneys general to pursue in future legislative advocacy, enforcement, and education. It will also highlight some of the recent actions taken by the state attorneys general to address the online privacy issue.

## I. The State Attorney General

### A. The Role of the State Attorney General

The state attorney general has unique power that is defined by their respective state constitutions, statutes, and court decisions.<sup>16</sup> However, there are common responsibilities between the different state attorneys general, which

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9. *Id.* at 843.

10. *Privacy*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/issues/consumer-protection/consumer-protection-101/privacy/> [<https://perma.cc/H89G-AXRF>].

11. *Id.*

12. Anupam Chander, Margot E. Kaminski & William McGeeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1735 (2021).

13. Vanessa Perumal, Note, *The Future of U.S. Data Privacy: Lessons from the GDPR and State Legislation*, 12 NOTRE DAME J. INT’L & COMP. L. 99, 100 (2022).

14. Ben Wolford, *What is GDPR, the EU’s New Data Protection Law?*, GDPR.EU (2020), <https://gdpr.eu/what-is-gdpr/> [<https://perma.cc/XZ5F-E5V5>].

15. Chander, et al., *supra* note 13.

16. Scott M. Matheson, *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 3 (1993).

include acting as an advocate of the public interest.<sup>17</sup> The position requires representing the state in court and enforcing state laws.<sup>18</sup> State attorneys general have a duty to exercise their common law powers as well as their statutory powers.<sup>19</sup> Compared to the federal government or its agencies, state attorneys general can be more responsive to the issues that arise within a state. They do not face as many political or administrative hurdles,<sup>20</sup> and they can primarily act in the interest of the state and its residents, not the broader national interest.<sup>21</sup> When state attorneys general face problems within their state borders, whether it is with the healthcare industry or with charities, they have several ways to address them. Not only do they have the power to bring enforcement actions, but they can also communicate with the public through press conferences and advisory briefs.<sup>22</sup> They can also play a role in the passing of new legislation and policies through their advisory opinions.<sup>23</sup>

One of the core responsibilities of the state attorney general is to act as a public advocate in areas such as consumer protections.<sup>24</sup> The state attorney general protects their state's people from fraudulent and deceptive business practices.<sup>25</sup> They exercise their enforcement authority pursuant to consumer protection statutes that exist at both the federal and state levels.<sup>26</sup>

At the federal level, section 5(a) of the Federal Trade Commission Act (the FTC Act) prohibits "unfair or deceptive acts or practices in or affecting commerce."<sup>27</sup> Deception is defined as any material "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."<sup>28</sup> Unfairness is defined as an act that "causes or likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>29</sup> Although the language of the FTC Act is broad, its effectiveness is limited.<sup>30</sup> One significant limitation

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17. *Id.* at 13.

18. *Id.* at 3.

19. See, e.g., *State v. Lead Indus. Ass'n*, 951 A.2d 428, 471 (R.I. 2008) (quoting *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005) (noting the existence of "a common law duty to represent the public interest").

20. Danielle K. Citron, *The Privacy Policymaking of State AGs*, 92 NOTRE DAME L. REV. 747, 750 (2016).

21. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 701 (2011).

22. NAT'L ASS'N OF ATT'YS GEN., *supra* note 18.

23. Matheson, *supra* note 17, at 9.

24. *Id.* at 3.

25. John H. Kazanjian, *Consumer Protection by the State Attorney General: A Time for Renewal*, 49 NOTRE DAME L. REV. 410, 411 (1973).

26. *Id.* at 412-13.

27. 15 U.S.C. § 45(a)(1).

28. See *Commission's Policy Statement on Deception*, FTC, 1, [https://www.ftc.gov/systems/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/systems/documents/public_statements/410531/831014deceptionstmt.pdf) [<https://perma.cc/M9ZQ-3NSG>].

29. 15 U.S.C. § 45(n).

30. Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1909-10 (2013).

is that the Act does not provide for private rights of action by individuals, and this extends to state attorneys general and local public entities.<sup>31</sup>

The activities of the state attorneys general are concentrated at the state level. Every state has adopted aspects of the FTC Act and enacted its own consumer protection statute,<sup>32</sup> collectively called the little Acts.<sup>33</sup> These statutes, also known as Unfair and Deceptive Acts and Practices (or UDAP) statutes, were passed in response to deficiencies in federal enforcement as well as frustration with the lack of a private remedy.<sup>34</sup> As enforcers of UDAP statutes,<sup>35</sup> state attorneys general shape the consumer protection laws of their states.<sup>36</sup> They can conduct investigations of businesses and bring lawsuits against them on behalf of the state.<sup>37</sup> State attorneys general can mediate individual complaints against various consumer issues such as data security breaches and online safety.<sup>38</sup> They can also seek civil penalties and injunctive relief.<sup>39</sup> In recent years, state attorneys general have collaborated on multistate lawsuits against corporations, resulting in massive settlements.<sup>40</sup>

While the UDAP statutes all purport to protect consumers against deceptive or fraudulent business practices, they vary significantly in strength from state to state—a scheme which has been described as a “state-by-state patchwork approach.”<sup>41</sup> This variation may be attributed to the tailoring of the politics and policy preferences of each state.<sup>42</sup> According to the ABA, the different approaches states take in how they regulate UDAP is either pro-consumer or pro-industry.<sup>43</sup> For example, in 2018, Maryland amended the Maryland Consumer Protection Act (the MCPA) to increase its scope to prohibit “unfair,

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31. *Id.*

32. *Id.* at 1910.

33. *Id.* at 1905.

34. James Cooper & Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, ANTITRUST L.J. 947, 953 (2017).

35. Barry H. Boise et al., *The “New” Enforcers: How States and Localities Are Changing the Landscape of Regulatory Authority*, TROUTMAN PEPPER HAMILTON SANDERS LLP (Sep., 2020), <https://www.troutman.com/insights/the-new-enforcers-how-states-and-localities-are-changing-the-landscape-of-regulatory-authority.html> [<https://perma.cc/ZVE7-D2TB>].

36. Dishman, *supra* note 8, at 843.

37. Len Gordon et al., *Defending Against Multi-Front Investigations*, VENABLE LLP (2022), <https://www.venable.com/-/media/files/events/2022/04/defending-multifront-investigations.pdf> [<https://perma.cc/SQ72-3LJX>].

38. *Consumer Issues*, OFF. OF THE N.Y. STATE. ATT’Y GEN., <https://ag.ny.gov/resources/individuals/consumer-issues> [<https://perma.cc/JKD9-3ZSB>].

39. Citron, *supra* note 21, at 754.

40. See, e.g., Molly McGlynn, *AG’s Office Reaches \$462M Multistate Settlement with JUUL, Secures \$41M for Massachusetts*, OFF. OF THE MASS. ATT’Y GEN. (Apr. 12, 2023), <https://www.mass.gov/news/ags-office-reaches-462m-multistate-settlement-with-juul-secures-41m-for-massachusetts>; *Attorney General James and Multistate Coalition Secure \$49.5 Million from Cloud Company for Data Breach*, OFF. OF THE N.Y. STATE. ATT’Y GEN. (Oct. 5, 2023), <https://ag.ny.gov/press-release/2023/attorney-general-james-and-multistate-coalition-secure-495-million-cloud-company> [<https://perma.cc/LE2E-J9DP>].

41. Allen Denson & Latif Zaman, *States’ Divergent Approaches to Unfair, Deceptive, and Abusive Acts and Practices Reveal Consumer Protection Priorities*, A.B.A. (Aug. 22, 2019), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2019-september/states-divergent-approaches/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2019-september/states-divergent-approaches/) [<https://perma.cc/465Q-QTP6>].

42. Morris, *supra* note 31, at 1910.

43. Denson & Zaman, *supra* note 42.

abusive or deceptive trade practices.”<sup>44</sup> In contrast, in 2017, Arkansas amended the Arkansas Deceptive Trade Practice Act (ADTPA) to confer a private right of action only to an individual that suffers “an actual financial loss as a result of his or her reliance on the use of a practice declared unlawful.”<sup>45</sup> Unlike Maryland’s “efforts to expand consumer protection,” Arkansas has taken a pro-industry approach, focusing instead on preventing “frivolous lawsuits and class actions where no monetary injury exists.”<sup>46</sup>

## B. Children’s Online Privacy and Safety Problem

In the current age, there is an imperative need for consumer protection in the digital space. Similar to how the United States previously faced a public health crisis with tobacco use, American youth now face an online privacy problem. Just as one can conveniently share one’s personal life, one can involuntarily give access to unwanted parties. Some even argue that social media primarily entertains and addicts its users rather than facilitating connections with their friends.<sup>47</sup> The dangers of such access and its resulting detrimental use are especially evident on social media, which has become a necessary area of enforcement.

Popular social media platforms, such as Instagram and TikTok, are extremely enticing and can capture their users’ attention for even hours at a time. While engaging with a variety of people and content, users can go down a very subtle rabbit hole. This can be attributed to the incredibly well-designed algorithm of each platform that produces personalized content,<sup>48</sup> which stands in contrast with the “old-fashioned chronological order.”<sup>49</sup> What feeds such algorithms is the data collected from users. Based on previous views, posts, and likes, algorithms can determine the preferences of their consumers and learn how to keep them engaged.<sup>50</sup> Such personalized information is what companies store as personal data. Often, these mechanisms are admittedly helpful and convenient. With an act as passive as viewing a post, the algorithm can find what best suits one’s interests and preferences.

However, with the convenience and opportunity of data collection come incredible costs to consumer privacy. The adverse use of personal information has significant consequences. Companies can collect personal and transactional data to generate consumer scores, which can be used by hospitals and

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44. *Id.*

45. *Id.*

46. *Id.*

47. See Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html> [<https://perma.cc/Z2DR-U8EN>].

48. Luis Ferré-Sadurní, *New York Seeks to Limit Social Media’s Grip on Children’s Attention*, N.Y. TIMES (Oct. 11, 2023), <https://www.nytimes.com/2023/10/11/nyregion/tiktok-instagram-algorithm-children.html> [<https://perma.cc/7Q9R-UUJT>].

49. Jim Kerstetter, *Another Social Media Giant Embraces Algorithms*, N.Y. TIMES (Mar. 17, 2016), <https://www.nytimes.com/2016/03/18/technology/another-social-media-giant-embraces-algorithms.html> [<https://perma.cc/U57U-BXKF>].

50. Smith, *supra* note 48.

universities to justify differential treatment.<sup>51</sup> Collected data is not merely limited to written information but can also include personal images through facial recognition technology, which can lead to misidentification and profiling.<sup>52</sup> Social media companies also generate profit by selling the personal information of their users to third party retailers who then use the social platforms to sell their products, essentially creating a “dual market.”<sup>53</sup> Further, such platforms have been recognized as a “gold mine” for scammers.<sup>54</sup> There are also dignitary concerns about allowing algorithms to make decisions about humans based on collected data.<sup>55</sup> Under this reasoning, algorithmic decision-making violates people's individuality and autonomy.<sup>56</sup>

Minors are especially susceptible to the risks of adverse data collection and use. A recent survey “found over half (51%) of U.S. teens (13-19) spend a minimum of four hours daily on social media, at an average of 4.8 hours every day.”<sup>57</sup> Up to 95% of teens have been found to use at least one social media platform.<sup>58</sup> From such extensive use, social media platforms collect a tremendous amount of data on young consumers. Each user's online behavior is tracked, monitored, and exchanged. The algorithm's recommendation of a friend or a book may seem harmless, but when these platforms have the powerful ability to shape behavior and are designed to be extremely addictive, they may be highly detrimental to the physical and mental health of their consumers—especially when they are members of vulnerable populations such as the youth.

In recent years, the ongoing youth mental health crisis has been linked with social media use.<sup>59</sup> In May 2023, in his 19-page advisory, U.S. Surgeon General Dr. Vivek Murthy noted that there was ample evidence of social media's significant risk of harm to the mental health and well-being of children and adolescents, who he described as being in a “critical phase of brain

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51. *Consumer Data: Increasing Use Poses Risks to Privacy*, GAO (Sep. 13, 2022), <https://www.gao.gov/products/gao-22-106096> [<https://perma.cc/3MR2-962T>].

52. *Id.*

53. Vivian Adame, Comment, *Consumers' Obsession Becoming Retailers' Possession: The Way that Retailers Are Benefitting from Consumers' Presence on Social Media*, 53 SAN DIEGO L. REV. 653, 656 (2016).

54. Emma Fletcher, *Social Media A Gold Mine for Scammers in 2021*, FTC (Jan. 25, 2022), <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/01/social-media-gold-mine-scammers-2021> [<https://perma.cc/55PT-MMVH>].

55. Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529, 1542, 1544 (2019).

56. *Id.*

57. Brad Adgate, Gallup: *Teens Spend More Time on Social Media than on Homework*, FORBES (Oct. 18, 2023, 2:53 PM), <https://www.forbes.com/sites/bradadgate/2023/10/18/gallup-teens-spend-more-time-on-social-media-than-on-homework/?sh=54b15e803dcb> [<https://perma.cc/8338-ZSGA>].

58. Emily A. Vogels, Risa Gelles-Watnick & Navid Massarat, *Teens, Social Media, and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [<https://perma.cc/64KE-V4KR>].

59. Erika Edwards & Hallie Jackson, *Social Media is Driving Teen Mental Health Crisis, Surgeon General Warns*, NBC NEWS (May 23, 2023, 5:00 AM), <https://www.nbcnews.com/health/health-news/social-media-mental-health-anxiety-depression-teens-surgeon-general-rcna85575> [<https://perma.cc/S7NL-CW4S>].

development.”<sup>60</sup> He discussed how adolescents were especially sensitive to “social pressures, peer opinions and peer comparison” and thus recommended limiting children’s social media use.<sup>61</sup> Because social media has been linked with heightening self-consciousness and amplifying insecurities, the harms of social media have been reported to be especially evident in adolescent girls.<sup>62</sup>

An important note to make is that social media use has yet to be definitively found to harm the well-being of young individuals.<sup>63</sup> Due to the simultaneous increase in social media use and mental-health issues, such as anxiety and depression, among adolescents, some speculate that the two are causally linked.<sup>64</sup> Although such a relationship is not absolutely certain from the existing evidence, there have been multiple revealing reports by previous employees of social media companies. In 2018, Aza Raskin, who invented the infinite scroll, a feature allowing “users to endlessly swipe down through content without clicking,” asserted that social media apps were designed to be maximally addictive to users.<sup>65</sup> In 2021, Frances Haugen revealed that Facebook had ignored studies indicating its detrimental effects on teen users and had chosen to take advantage of its addictive features.<sup>66</sup> In the same year, TikTok’s engineering team offered a glimpse of how the popular platform’s algorithm worked.<sup>67</sup> The documents suggest the company has a great understanding of human nature, specifically “tendencies toward boredom, our sensitivity to cultural cues.”<sup>68</sup> In order to satisfy these tendencies and meet TikTok’s ultimate goal of adding daily active users, the company focuses on optimizing retention and time spent on the platform.<sup>69</sup>

### C. State Attorneys General as Protectors of Young Consumers Online

Children’s online privacy and safety in the United States falls under the authority of the state attorney general. As a representative of the public interest, the state attorney general typically has a duty to act as an advocate for areas that require consumer protection.<sup>70</sup> As discussed above, the digital space is such an area where the possible risks of harm are significant, especially for developing minors who need heightened protections.

60. Matt Richtel, Catherine Pearson & Michael Levenson, *Surgeon General Warns That Social Media May Harm Children and Adolescents*, N.Y. TIMES (May 23, 2023), <https://www.nytimes.com/2023/05/23/health/surgeon-general-social-media-mental-health.html> [https://perma.cc/TRS9-XXP8].

61. *Id.*

62. Jonathan Haidt, *The Dangerous Experiment on Teen Girls*, ATLANTIC (Nov. 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/facebooks-dangerous-experiment-teen-girls/620767/> [https://perma.cc/U77J-LULM].

63. Richtel, Pearson & Levenson, *supra* note 61.

64. *Id.*

65. Hilary Andersson, *Social Media Apps are ‘Deliberately’ Addictive to Users*, BBC (July 3, 2018), <https://www.bbc.com/news/technology-44640959> [https://perma.cc/QR8B-6USH].

66. Lin, *supra* note 4.

67. Smith, *supra* note 48.

68. *Id.*

69. *Id.*

70. NAT’L ASS’N OF ATT’YS GEN., *supra* note 18.

To address this complex issue of children's online privacy and safety, state attorneys general must work with both federal and state laws. Some describe privacy law in the United States as "a reactive patchwork regulatory system."<sup>71</sup> Indeed, a comprehensive law governing the collection, use, or sale of personal data does not exist at the federal level.<sup>72</sup> Instead of a federal privacy law that applies to all types of data, the United States has an assortment of federal laws that "target only specific types of data" and a patchwork of state laws.<sup>73</sup> These laws have primarily regulated the collection of personal information by allowing its use in specific industries but preventing resulting harm.<sup>74</sup> Some scholars characterize the state approach to data protection as the 'consumer protection approach' to data privacy, which focuses on "protecting individuals in direct relationships with companies" and enforcing UDAP laws.<sup>75</sup>

At the federal level, in 1998, Congress enacted the Children's Online Privacy Protection Act (COPPA) to provide additional protection for children's online privacy.<sup>76</sup> COPPA restricts the activities of operators of websites or online services directed to children under 13 years of age.<sup>77</sup> It prohibits collecting their personal data, such as home addresses, without their parent's permission.<sup>78</sup>

State legislatures have passed privacy laws where there has been a lack of congressional action. The patchwork of state laws has protected young consumers by either targeting their privacy or by adding additional protections to comprehensive privacy laws.<sup>79</sup> As of September 2023, thirteen states have passed comprehensive data privacy laws and four are currently effective (California, Colorado, Connecticut, and Virginia).<sup>80</sup> These four laws apply to businesses in various sectors within their states.<sup>81</sup>

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71. Matthew Humerick, *The Tortoise and the Hare of International Data Privacy Law: Can the United States Catch Up to Rising Global Standards?*, 27 CATH. U. J. L. & TECH. 77, 83 (2018).

72. GAO, *supra* note 52.

73. Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES: WIRECUTTER (Sep. 6, 2021), <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/> [https://perma.cc/6KMD-39B3].

74. Fredric D. Bellamy, *U.S. Data Privacy Laws to Enter New Era in 2023*, REUTERS (Jan. 12, 2023, 10:21 AM), <https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12/> [https://perma.cc/4T5M-BFXR].

75. Meg Leta Jones & Margot E. Kaminski, *An American's Guide to the GDPR*, 98 DENV. L. REV. 93, 107 (2021).

76. Diana S. Skowronski, *COPPA and Educational Technologies: The Need for Additional Online Privacy Protections for Students*, 38 GA. ST. UNIV. L. REV. 1219, 1223 (2022).

77. Children's Online Privacy Protection Rule (COPPA), 16. C.F.R. pt. 312 (2013).

78. Natasha Singer & Kate Conger, *Google is Fined \$170 Million for Violating Children's Privacy on YouTube*, N.Y. TIMES (Sep. 4, 2019), <https://www.nytimes.com/2019/09/04/technology/google-youtube-fine-ftc.html> [https://perma.cc/3LN8-2P5N].

79. Nerissa Coyle McGinn & Chanda Marlowe, *A Roundup of State Laws Related to Children's Privacy*, LOEB & LOEB LLP (Aug. 2023), <https://www.loeb.com/en/insights/publications/2023/08/a-roundup-of-state-laws-related-to-childrens-privacy> [https://perma.cc/BE2N-7MEF].

80. F. Paul Pittman, *US Data Privacy Guide*, WHITE & CASE LLP (Sep. 20, 2023), <https://www.whitecase.com/insight-our-thinking/us-data-privacy-guide> [https://perma.cc/8R5L-9BQN].

81. Bellamy, *supra* note 75.

Some time after the European Union's GDPR went into effect in 2018, California passed the California Consumer Privacy Act (CCPA), which is still regarded as the most comprehensive privacy statute in the United States<sup>82</sup> and the most influential state-level data privacy law.<sup>83</sup> It generally applies to businesses that collect and sell the personal information of consumers who are California residents.<sup>84</sup> The CCPA affords consumers with new rights, which include the right to see and remove the personal information that businesses have collected about them.<sup>85</sup> For children in particular, companies must obtain parental consent before selling the data of those under the age of 13.<sup>86</sup> Further, "[t]he California Age-Appropriate Design Code Act (CAADCA), which goes into effect July 1, 2024, expands the definition of children to under 18."<sup>87</sup>

## II. European Union

In 2018, the European Union passed the General Data Protection Regulation (GDPR), the "world's first comprehensive data privacy legislation."<sup>88</sup> The regulation covers all organizations that process the personal information of "anyone who lives, works or travels through the EU,"<sup>89</sup> and outlines both individual rights and company obligations.<sup>90</sup> It exemplifies the "rights-based" approach,<sup>91</sup> which focuses on the individual's right to own and control his personal information.<sup>92</sup> Under such a regime, individuals have the right to control who can use their data,<sup>92</sup> and personal data is perceived as the property of the individual.<sup>93</sup> The GDPR "protects all personal data, regardless of who collects it or how it is processed."<sup>94</sup> This stands in contrast to the historically 'harms-prevention-based' approach of the United States which has regulated

82. Dishman, *supra* note 8, at 843.

83. Dan Frechtling, *Will the U.S. Update Laws for Children's Digital Privacy?*, FORBES (Mar. 7, 2023, 9:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2023/03/07/will-the-us-update-laws-for-childrens-digital-privacy/?sh=23c6d533f170> [https://perma.cc/K9F8-VUEY].

84. Sara H. Jodka, *California's Data Privacy Law: What It Is and How to Comply (a Step-By-Step Guide)*, DICKINSON WRIGHT (July 2018), <https://www.dickinson-wright.com/news-alerts/californias-data-privacy-law> [https://perma.cc/U92T-92UN].

85. *Id.*

86. Jill Cowan & Natasha Singer, *How California's New Privacy Law Affects You*, N.Y. TIMES (Jan. 3, 2020), <https://www.nytimes.com/2020/01/03/us/ccpa-california-privacy-law.html> [https://perma.cc/45CY-P5J5].

87. Frechtling, *supra* note 84.

88. Perumal, *supra* note 14.

89. Virginia A. M. Talley, Note, *Major Flaws in Minor Laws: Improving Data Privacy Rights and Protections for Children Under the GDPR*, 30 IND. INT'L & COMP. L. REV. 127, 134 (2019).

90. Kaminski, *supra* note 56, at 1585.

91. See Bellamy, *supra* note 75.

92. *Id.*

93. *Top Five Concerns with GDPR Compliance*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/top-five-concerns-gdpr-compliance> [https://perma.cc/LH4K-Y4V2].

94. Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), <https://www.cfr.org/report/reforming-us-approach-data-protection> [https://perma.cc/MT6L-U66E].

the use of personal information in only specific sectors, such as finance and healthcare.<sup>95</sup>

The differences between the GDPR and U.S. laws on data privacy lie in their differing viewpoints on personal data. The United States views personal data as a commodity that individuals can trade in exchange for services. Within this digital marketplace, consumers at times require government intervention to protect against deception and unfairness.<sup>96</sup> It may even seem that the United States is more concerned with “respecting their purportedly autonomous decisions” that allow or restrict data practices than overall data protection.<sup>97</sup> The focus is on the individual's freedom of choice to sell their data. However, the GDPR's rationale comes from its rights-based perspective that data protection is a fundamental right.<sup>98</sup> Thus, under the GDPR, people are not allowed to sell their data as freely or as voluntarily as the people under the US laws. This perspective stems from Europe's horrific experiences during World War II with fascism, totalitarianism, and authoritarianism.<sup>99</sup> During this period, the Nazis collected and catalogued personal data to commit atrocities.<sup>100</sup>

The GDPR allows a company to process an individual's personal data “only if there is a ‘lawful basis’ for such processing.”<sup>101</sup> Article 6 provides six legal bases,<sup>102</sup> one being opt-in consent.<sup>103</sup> Consumers must give affirmative and informed consent,<sup>104</sup> which contrasts with the opt-out option allowed under the four comprehensive state data privacy laws effective in the United States.<sup>105</sup> The GDPR's opt-in approach tends to be more consumer-friendly because it places the burden on businesses to achieve explicit consent from their consumers.<sup>106</sup> However, it is an oversimplification and a mischaracterization to describe the GDPR as a consent-based regime with a strong focus on notice-and-consent.<sup>107</sup> The GDPR does not give individuals an absolute right to control their data, and it is more accurate to describe corporate accountability as its core principle rather than individual consent.<sup>108</sup>

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95. Bellamy, *supra* note 75.

96. Ruben de Bruin, *A Comparative Analysis of the EU and U.S. Data Privacy Regimes and the Potential for Convergence*, 13 HASTINGS SCI. & TECH. L.J. 127, 130 (2022).

97. Jones & Kaminski, *supra* note 76.

98. de Bruin, *supra* note 97, at 134.

99. *Id.*

100. Bellamy, *supra* note 75.

101. Lee Matheson, *Top 10 Operational Responses to the GDPR – Part 2: Lawful Bases for Processing*, INT'L ASS'N PRIV. PROS. (Feb. 7, 2018), <https://iapp.org/news/a/top-10-operational-responses-to-the-gdpr-part-2-lawful-bases-for-processing/> [https://perma.cc/V4XP-8EF5].

102. *Id.*

103. See Rita Heimes, *How Opt-In Consent Really Works*, INT'L ASS'N PRIV. PROS. (Feb. 22, 2019), <https://iapp.org/news/a/yes-how-opt-in-consent-really-works/> [https://perma.cc/LP6A-PRAE].

104. See *Id.*

105. *Comparing U.S. State Data Privacy Laws vs. the EU's GDPR*, BLOOMBERG L. (July 11, 2023), <https://pro.bloomberglaw.com/brief/privacy-laws-us-vs-eu-gdpr/> [https://perma.cc/7NXX-RT4L].

106. Sarah Rippey, *Opt-in vs. Opt-out Approaches to Personal Information Processing*, INT'L ASS'N OF PRIV. PROS. (May 10, 2021), <https://iapp.org/news/a/opt-in-vs-opt-out-approaches-to-personal-information-processing/> [https://perma.cc/2R7G-8H3N].

107. Jones & Kaminski, *supra* note 76, at 106.

108. *Id.* at 109.

In fact, COPPA has a narrower scope than the GDPR, focusing mostly on consent and parental permission rather than data governance.<sup>109</sup> To this end, many have been critical of the US approach to data privacy and its “excessive focus on individual notice and choice.”<sup>110</sup> By placing the burden on consumers, state laws seemingly encourage individuals “to take control of their own data processing”<sup>111</sup> despite doubts that the average consumer can offer meaningful consent. Privacy policies can often be difficult to read, and an individual’s consent does not guarantee that he or she has actually read through the document with sufficient understanding.<sup>112</sup> Research shows that many EU consumers poorly understood even the sweeping changes of the much-publicized GDPR.<sup>113</sup>

Under the GDPR, children have the same rights as adults, which includes the rights to access and remove their personal data held by companies.<sup>114</sup> The regulation also recognizes that children’s data need special, additional protections from the ones provided to the data of adults.<sup>115</sup> Thus, there are protective measures such as age of consent measures, which require processors to obtain informed consent from a parent or a guardian to use data from a minor who is below the age of 16.<sup>116</sup> The laws also require data controllers to provide users with information as to how their data will be used.<sup>117</sup> Such information must be provided in “clear and plain language that a child could understand.”<sup>118</sup>

In recent years, big tech companies have faced the repercussions of non-compliance with the GDPR. In September 2023, TikTok was fined \$366 million for “breaching GDPR by failing to protect children’s privacy.”<sup>119</sup> The lead regulator, Ireland’s Data Protection Commission, found that the accounts for teen users were set to public by default, which allowed anyone with the app to view and comment on their videos.<sup>120</sup> A second violation was linked to the

109. Archie Stephens, *The Relationship between COPPA and GDPR: Getting It Right for Your Business*, PRIV. COMPLIANCE HUB (June, 2018), <https://www.privacycompliancehub.com/gdpr-resources/the-relationship-between-coppa-and-gdpr-getting-it-right-for-your-business/> [https://perma.cc/99F3-P3XG].

110. Jones & Kaminski, *supra* note 76, at 107.

111. Samuel M. Roth, Note, *Data Snatchers: Analyzing TikTok’s Collection of Children’s Data and Its Compliance with Modern Day Privacy Regulations*, 22 J. HIGH TECH. L. 1, 14 (2021).

112. Jones & Kaminski, *supra* note 76, at 107-8.

113. Lisa Joy Rosner, *GDPR: Bridging the Gap Between Consumer and Marketer Perceptions*, FORBES (Mar. 10, 2020), <https://www.forbes.com/sites/forbescommunicationscouncil/2020/03/10/gdpr-bridging-the-gap-between-consumer-and-marketer-perceptions/?sh=3ca17c1b27d4> [https://perma.cc/TT29-5ZQN].

114. *Children and the GDPR*, INFO. COMM’R’S OFF. (Mar. 22, 2018), <https://ico.org.uk/media/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-gdpr-1-0.pdf> [https://perma.cc/MYZ6-LC7F].

115. Talley, *supra* note 90, at 140.

116. *Id.*

117. *Id.* at 141.

118. *Id.*

119. Carolyn Thompson & Haleluya Hadero, ‘Addictive’ Social Media Feeds that Keep Children Online Targeted by New York Lawmakers, ASSOCIATED PRESS (Oct. 11, 2023), <https://apnews.com/article/data-privacy-regulation-facebook-instagram-social-media-798dbfa6004da3a2aa2c36031369a909> [https://perma.cc/4TNJ-ZZNR].

120. Kelvin Chan, *TikTok is Hit with \$368 Million Fine Under Europe’s Strict Data Privacy Rules*, ASSOCIATED PRESS (Sep. 15, 2023), <https://apnews.com/article/tiktok-data-privacy-europe-regulation-fine-8ebacba7646ef872fb8e85a1bcb93876>.

Family Pairing feature of the platform, which allows “adults to link their accounts with child accounts to manage screen time, restrict unwanted content and limit direct messaging to children.”<sup>121</sup> However, the feature did not require the overseeing adult to be verified as the child's actual parent or guardian, allowing any person to undo the privacy protections.<sup>122</sup>

In 2022, the EU also enacted the Digital Services Act (DSA), providing further data protections for EU residents. The DSA went into effect for the world's largest social media platforms on August 2023.<sup>123</sup> The affected companies include Amazon, Facebook, Instagram, TikTok, Snapchat, and Twitter among many others.<sup>124</sup> Under the DSA, platforms must give users the option to opt out of “automated systems that recommend videos and posts based on their profiles.”<sup>125</sup> Specifically for young consumers under the age of 18, targeted advertising will be prohibited on certain platforms like Snapchat and TikTok.<sup>126</sup> Overall, the rules may prevent the algorithmic promotion of harmful content.<sup>127</sup> The DSA also requires an independent audit of each affected company once a year and will fine a firm for 6% of its global revenue if the results indicate noncompliance.<sup>128</sup> This expansive Act has been characterized as ending “an era of voluntary self-regulation.”<sup>129</sup> In addition to the DSA, there is still more legislation to come into effect in the EU, such as the Digital Markets Act and the AI Act.<sup>130</sup>

Despite its landmark status, the GDPR has faced immense criticism for its slow and lax enforcement of big corporations.<sup>131</sup> The delay is partially due to the legislation's one-stop shop mechanism.<sup>132</sup> Each company is regulated by an organization in the country where its European headquarters are

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121. Brian Fung, *TikTok Fined \$368 Million in Europe for Failing to Protect Children*, CNN (Sep. 15, 2023), <https://www.cnn.com/2023/09/15/tech/tiktok-fine-europe-children/index.html> [https://perma.cc/7SDB-UQAQ].

122. *Id.*

123. Kelvin Chan, *Europe's Sweeping Rules for Tech Giants Have Kicked In. Here's How They Work*, ASSOCIATED PRESS (Aug. 25, 2023), <https://apnews.com/article/digital-services-act-social-media-regulation-europe-26d76cc4785df1153669258766cc6387> [https://perma.cc/JHQ9-5BTG].

124. Chris Velazco, *What the E.U.'s Sweeping Rules for Big Tech Mean for Your Life Online*, WASH. POST (Aug. 30, 2023), <https://www.washingtonpost.com/technology/2023/08/30/eu-digital-services-act-faq/> [https://perma.cc/9YWU-SVJJ].

125. Thompson & Hadero, *supra* note 120.

126. Chan, *supra* note 124.

127. Joanna Gill, *Can An EU Law Save Children from Harmful Content Online?*, REUTERS (July 12, 2022), <https://www.reuters.com/legal/litigation/can-an-eu-law-save-children-harmful-content-online-2022-07-12/> [https://perma.cc/9YWU-SVJJ].

128. Velazco, *supra* note 125.

129. Gill, *supra* note 128.

130. Martin Coulter, *Big Tech Braces for EU Digital Services Act Regulations*, REUTERS (Aug. 24, 2023), <https://www.reuters.com/technology/big-tech-braces-roll-out-eus-digital-services-act-2023-08-24/> [https://perma.cc/GD5P-KEEK].

131. Adam Satariano, *Europe's Privacy Law Hasn't Shown Its Teeth, Frustrating Advocates*, N.Y. TIMES (Apr. 27, 2020), <https://www.nytimes.com/2020/04/27/technology/GDPR-privacy-law-europe.html> [https://perma.cc/W8JA-PHUG].

132. Vincent Manancourt, *What's Wrong with the GDPR?*, POLITICO (June 15, 2022), <https://www.politico.eu/article/wojciech-wiewiorowski-gdpr-brussels-eu-data-protection-regulation-privacy/> [https://perma.cc/ZD8Z-KMBE].

located, rather than a single overseeing entity over the entire EU.<sup>133</sup> As a result, the distribution of work between the regulatory organizations has been highly uneven. For example, because most major tech firms are headquartered in Dublin, the Irish Data Protection Commission has been flooded with numerous complaints and investigations.<sup>134</sup> As a result, the Commission faces tech giants, such as Facebook, Twitter, Google, and Apple, with insufficient resources and staffing.<sup>135</sup>

Critics have also targeted the inconsistent enforcement of the GDPR.<sup>136</sup> As nation-level data agencies have implemented the GDPR rules,<sup>137</sup> which some find ambiguous,<sup>138</sup> differences of interpretation as well as resulting inconsistent decisions with companies have been made.<sup>139</sup> Law firms recommend companies to “take note of the local context,” as the local regulators differ in their interpretations of the GDPR and their priorities.<sup>140</sup> Additionally, businesses that face the possibility of a steep fine may find it difficult to ensure compliance.<sup>141</sup> Some commentators even argue that the strict rules have made “almost any data collection, however innocent its intent may be, suspect” which thus “threatens to render the Internet unusable for commercial purposes in the EU.”<sup>142</sup>

### III. How Can State Attorneys General Address the Children’s Online Privacy and Safety Issue

In response to the ongoing mental health crisis and the risks of harm that youth face online, state attorneys general in the United States must take an active role in bringing sweeping changes to protect children’s online privacy and safety. The state attorneys general should consider existing data privacy laws, both in the US and the EU, and examine how they can facilitate stronger protections for American children online. The necessary changes brought by the state attorneys general will likely not only affect the regulations and enforcement in the US but will also have a broader international effect.

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133. *Id.*

134. *Id.*

135. Ilse Heine, *3 Years Later: An Analysis of GDPR Enforcement*, CTR. STRATEGIC & INT’L STUD. (Sep. 13, 2021), <https://www.csis.org/blogs/strategic-technologies-blog/3-years-later-analysis-gdpr-enforcement> [<https://perma.cc/EJ9T-SKFE>].

136. Benjamin Mueller, *Two Recent Cases Show How the GDPR is Failing European Businesses*, CTR. FOR DATA INNOVATION (Feb. 3, 2022), <https://datainnovation.org/2022/02/two-recent-cases-show-how-the-gdpr-is-failing-european-businesses/> [<https://perma.cc/VBQ2-D2QN>].

137. Jennifer Huddleston, *Takeaways from the GDPR, 5 Years Later: What Worked, What Didn’t, and Where Data Privacy and Security Stands*, CATO INST. (May 15, 2023), <https://www.cato.org/commentary/takeaways-gdpr-5-years-later> [<https://perma.cc/3W8V-YK6K>].

138. Mueller, *supra* note 137.

139. Huddleston, *supra* note 138.

140. Catherine Di Lorenzo, Jane Finlayson-Brown, & Helen Christakos, *Happy Birthday, GDPR – Five Lessons From Five Years of EU Data Protection Law*, A&O SHEARMAN (May 25, 2023), <https://www.aoshearman.com/en/insights/happy-birthday-gdpr-five-lessons-from-five-years-of-eu-data-protection-law> [<https://perma.cc/8YM2-BL6Z>].

141. Mueller, *supra* note 137.

142. *Id.*

### A. Legislation

The state attorney general cannot directly engage in rulemaking; such role is left to the legislative branch of the US government. However, they can influence both federal and state legislation in alternative ways. In terms of affecting federal law, state attorneys general can write to Congress, expressing their concern over children's online privacy and suggesting certain action to be taken. This task does not have to be done individually but can be a collaborative task between multiple attorneys general. For example, in July 2022, a group of attorneys general advised Congress to adopt legislation that would set a floor for critical privacy rights and respect more protective state laws.<sup>143</sup> In May 2023, the National Association of Attorneys General (NAAG) also issued a letter on behalf of 54 state attorneys general, asking Congress to study how artificial intelligence is used to exploit children.<sup>144</sup> Similarly, state attorneys general should continue to express their concern over children's online privacy and advocate for more rigorous federal standards.

In writing to Congress, state attorneys general should advocate to amend COPPA, the existing federal regulation on children's online privacy. There has been much concern that it no longer sufficiently protects minors against the threats they face online. First, it does not protect teens between the ages of 13 and 18.<sup>145</sup> California raised the age limit to 18 in 2022, but the state's data privacy laws, CCPA and CAADCA, only apply to residents in California.<sup>146</sup> State attorneys general should encourage Congress to update COPPA to include all minors or at least minors up to age 16 to mirror what the GDPR has done. Uniformity with the age threshold in the EU would be helpful for companies that have to monitor active users under both jurisdictions. Additionally, teens between the ages of 14 and 17 are more likely than younger teens to use social networking sites.<sup>147</sup> It seems appropriate for these minors to receive further protections as they face increasing risks to their online privacy and safety.

Furthermore, COPPA has been criticized for only targeting websites that have "actual knowledge" of collecting data from children.<sup>148</sup> This means that

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143. Letter to Congress re Federal Privacy, OFF. OF THE CAL. ATT'Y GEN. (July 19, 2022), <https://oag.ca.gov/system/files/attachments/press-docs/Letter%20to%20Congress%20re%20Federal%20Privacy.pdf> [https://perma.cc/S62P-8CR6].

144. Press Release, Nat'l Ass'n of Att'ys Gen., 54 Attorneys general Call on Congress to Study AI and Its Harmful Effects on Children (Sep. 5, 2023), <https://www.naag.org/press-releases/54-attorneys-general-call-on-congress-to-study-ai-and-its-harmful-effects-on-children/> [https://perma.cc/Z8HR-6XP7].

145. Frechtling, *supra* note 84.

146. James Sullivan, Kate Lucente & Sally Robertson., *California's Age-Appropriate Design Code Act – And the Looming State Patchwork of Online Child Protection Laws*, DLA PIPER (May 8, 2023), <https://www.dlapiper.com/en/insights/publications/2023/05/californias-age-appropriate-design-code-act> [https://perma.cc/4WHQ-NMG6].

147. MARY MADDEN ET AL., PEW RSCH. CTR., PART 1: TEENS AND SOCIAL MEDIA USE 17 (2023), [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) [https://perma.cc/RKS4-5J58].

148. Frechtling, *supra* note 84; *Complying with COPPA: Frequently Asked Questions*, FTC, <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions> [https://perma.cc/5T8R-3DHC].

the regulation does not require platforms to ask or verify user ages.<sup>149</sup> At least for social media platforms or websites that require users to create accounts with their personal information, state attorneys general should encourage regulators to require verifiable parental consent. Recently, US lawmakers have discussed online age-check requirements, which mandate “age-verification on certain social media platforms and websites.”<sup>150</sup> Age verification is an ongoing issue for businesses as they find it difficult to ensure that children will accurately represent their ages online.<sup>151</sup> Many websites currently have a self-reporting system, and some new state laws may require more “more stringent age-verification” such as government IDs.<sup>152</sup> However, federal judges have paused such laws due to First Amendment concerns and “fundamental questions about free speech and privacy.”<sup>153</sup> Until the age verification issue is resolved, perhaps COPPA, like California’s CAADCA, can be expanded to apply to websites that are likely to be accessed by minors, rather than limited to companies that specifically target children.<sup>154</sup> In the meantime, the United States should look to the EU to see how it can handle this age verification issue.

Amending COPPA into an effective federal data privacy and protection law would have significant benefits. In the current digital age, data is a commodity that is exchanged between parties that are not necessarily within one state or are willing to stay in one state. Technology has facilitated a significant amount of cross-border interaction and sharing of data. A uniform regulation thus would be in the interest of businesses globally because they likely face substantial costs complying to a variety of standards.<sup>155</sup> In this light, some argue that companies have suffered under the current piecemeal approach and the contradictory competing requirements.<sup>156</sup>

When amending COPPA, however, it is important to consider the criticism the GDPR has faced over the years. As already discussed, many have been frustrated with the slow enforcement of the GDPR, which is partially attributed to its one-stop shop mechanism.<sup>157</sup> If a similar mechanism was enacted in the US and its states were individually responsible for companies headquartered within them, lawmakers will probably see an extreme concentration of

149. Tonya Riley, *Meta’s Dispute Over Addicted Kids Reignites Age-Proofing Fight*, BLOOMBERG L. (Oct. 26, 2023), [https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/XBH1BQDC000000?bna\\_news\\_filter=privacy-and-data-security#jcite](https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/XBH1BQDC000000?bna_news_filter=privacy-and-data-security#jcite) [<https://perma.cc/ALH2-PJ5X>].

150. Skye Witley, *Online Age-Check State Laws Run into Constitutional Headwinds*, BLOOMBERG L. (Sep. 19, 2023), [https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/BN%200000018a8b27daa0a5efab3f06ce0001?bna\\_news\\_filter=privacy-and-data-security](https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/BN%200000018a8b27daa0a5efab3f06ce0001?bna_news_filter=privacy-and-data-security) [<https://perma.cc/C4DS-NMF3>].

151. Lauren A. Matecki, *Update: COPPA is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J.L. & SOC. POL’Y. 369, 385 (2010).

152. Natasha Singer, *States’ Push to Protect Kids Online Could Remake the Internet*, N.Y. TIMES (Apr. 30, 2023), <https://www.nytimes.com/2023/04/30/business/louisiana-kids-age-porn-law.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/WXT8-TM5C>].

153. Witley, *supra* note 151.

154. Sullivan et al., *supra* note 147.

155. *The State of Privacy: Does The US Need A Federal Privacy Law?*, LEGAL 500, <https://www.legal500.com/gc-magazine/feature/the-state-of-privacy/> [<https://perma.cc/2S3G-VVXJ>].

156. O’Connor, *supra* note 95.

157. Manancourt, *supra* note 133.

enforcement in certain states such as California and New York.<sup>158</sup> Thus, state attorneys general may want to recommend an overseeing entity and advise an alternative to the GDPR's one-stop shop system.

The advocacy for legislative change should not be limited to the federal level; state attorneys general should also encourage state-level reforms to protect children online. Each state attorney general should first determine whether there is an existing state law that directly restricts the adverse use of data collected from minors. The attorney general should then either consider strengthening that law or helping the state legislature draft a new bill. When doing so, they should consider the opt-in consent requirements of the GDPR as a model. The EU's regulation requires that if consent is used as the lawful basis for data processing, then children or their guardians must have affirmatively consented after having read the consent terms written in plain language.<sup>159</sup> As already discussed, the existing state data privacy laws do not have such heightened requirements and instead allow opt-out mechanisms.<sup>160</sup> Like the GDPR, state laws should consider requiring businesses to obtain active consent from young consumers and to provide them with information on how their personal information will be used, specifically in age-appropriate language.

A great example of state-level advocacy is the recent activity by the attorney general of New York, a state that currently does not have a law that restricts the collection of personal data from minors.<sup>161</sup> In October 2023, New York Governor Kathy Hochul and New York Attorney General Letitia James introduced new legislation, targeting the protection of children online: the Stop Addictive Fees Exploitation for Kids Act (SAFE) and the New York Child Data Protection Act. The former focuses on restricting addictive social media feeds that keep minors on social media platforms for many hours at a time.<sup>162</sup> One of the proposed changes would allow parents to somewhat determine the social media feeds of their children.<sup>163</sup> Under SAFE, parents can select a feed to display chronological content from only followed accounts, rather than a default feed full of suggested content curated by an algorithm based on past activities.<sup>164</sup> SAFE would also allow parents to directly limit the hours their children spend on social media platforms, by allowing them to block access from midnight to 6 a.m.<sup>165</sup> The second bill, the New York Child Data Protection Act, would prohibit all websites from collecting and using the personal data

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158. See, e.g., Matthew Haag, *Silicon Valley's Newest Rival: The Banks of the Hudson*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/nyregion/nyc-tech-facebook-amazon-google.html> [https://perma.cc/GD5U-MDDL].

159. Talley, *supra* note 90, at 141.

160. *Comparing U.S. State Data Privacy Laws vs. the EU's GDPR*, *supra* note 106.

161. Emma Misiaszek, *NY Proposes Legislation to Regulate Minors' Social Media Usage and Protect Online Privacy*, WHAM (Oct. 11, 2023), <https://13wham.com/news/local/ny-proposes-legislation-to-regulate-minors-social-media-usage-and-protect-online-privacy> [https://perma.cc/6B7T-D55A].

162. Governor Hochul, Attorney General James, Senator Gounardes, and Assemblymember Rozic Take Action to Protect Children Online, N.Y. STATE. (Oct. 11, 2023), <https://www.governor.ny.gov/news/governor-hochul-attorney-general-james-senator-gounardes-and-assemblymember-rozic-take-action> [https://perma.cc/2Y5E-33WG].

163. Thompson & Hadero, *supra* note 120.

164. *Id.*

165. *Id.*

of minors under the age of 18 “unless they receive informed consent or it is otherwise necessary.”<sup>166</sup>

Stronger data privacy and protection laws within one state can have a broad effect that goes beyond state boundaries. They can serve as regulatory models and encourage other states and possibly countries to amend their own laws. For example, when the GDPR was first passed in 2018, it was described as the world’s toughest set of laws on digital privacy.<sup>167</sup> Five years later in 2023, the GDPR has become a model for new privacy rules in Brazil, Japan,<sup>168</sup> and even parts of California’s CCPA.<sup>169</sup> In turn, California’s data privacy law has also had a domino effect on other states.<sup>170</sup>

## B. Enforcement

UDAP statutes grant state attorneys general broad enforcement authority in the consumer protection area.<sup>171</sup> State attorneys general should use this power to pursue litigation against corporations with business practices that are detrimental to young consumers. In the current political climate, enforcement is potentially a quicker way to address the youth’s online privacy and safety problem compared to legislation. Although there seems to be bipartisan support for stronger government regulations to protect consumer data,<sup>172</sup> there is less agreement over how they should look. Within the House and the Senate, there are “competing legislative priorities, politicking, and the practicality of predicting a bill’s actual odds of success.”<sup>173</sup> Thus, while Congress attempts to draft a bill supportable by the majority, state attorneys general should actively investigate and initiate enforcement actions.

In fact, state attorneys general have eagerly pursued consumer protection litigation against huge corporations. Specifically, state attorneys general have frequently pursued multistate litigation,<sup>174</sup> which is defined as “any co-ordinated litigation among two or more attorneys general against the same

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166. *Id.*

167. Adam Satariano, *G.D.P.R., a New Privacy Law, Makes Europe World’s Leading Tech Watchdog*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/technology/europe-gdpr-privacy.html> [<https://perma.cc/LQ3D-TRMY>].

168. Satariano, *supra* note 132.

169. Kashmir Hill, *Want Your Personal Data? Hand Over More Please*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/technology/data-privacy-law-access.html> [<https://perma.cc/G2AV-XBEW>].

170. Roth, *supra* note 112, at 14.

171. Ryan J. Strasser et al., *State AGs Lead the Way in False Advertising Enforcement*, TROUTMAN PEPPER (Feb. 2, 2022), <https://www.troutman.com/insights/state-ags-lead-the-way-in-false-advertising-enforcement.html>.

172. Michelle Faverio, *Key Findings About Americans and Data Privacy*, PEW RSCH. CTR. (Oct. 18, 2023), <https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/> [<https://perma.cc/X89V-JKV6>].

173. *What’s Going On With The Children’s Online Privacy Protection Act (COPPA)?*, OSANO (Nov. 7, 2022), <https://www.osano.com/articles/whats-new-coppa> [<https://perma.cc/9EST-CE6C>].

174. Paul Nolette, *Multistate Consumer Protection Actions*, NAT’L ASS’N OF ATT’YS GEN. (Dec., 2021), <https://www.naag.org/attorney-general-journal/multistate-consumer-protection-actions/> [<https://perma.cc/H79E-XZG6>].

defendants.”<sup>175</sup> In past years, they have successfully collaborated against Big Tobacco and Big Pharma companies.<sup>176</sup> Such collaborative litigation allows state attorneys general to come together to share “legal theories, discovery materials, court filings, litigation expenses, and even staff.”<sup>177</sup> Against huge corporations with a seemingly unlimited amount of means, multistate litigation is probably a safer choice than a single state pursuit. Specifically, the GDPR and the Irish Data Protection Commission have demonstrated the delay and frustration that can result from an overburdened regulatory body. The advantage of resource pooling is even more apparent after considering the financial constraints that private plaintiffs face.<sup>178</sup> Furthermore, as a state official, the state attorney general has a public platform.<sup>179</sup> Thus, when companies are investigated by the attorney general and thus faced with negative press, they may be more willing to settle or comply.<sup>180</sup>

Accordingly, these multistate investigation have often resulted in huge settlements and injunctive relief.<sup>181</sup> For example, a landmark multistate settlement that still has influence to this day is the Master Settlement Agreement in 1998 that resolved the tobacco litigation.<sup>182</sup> Attorneys general from 46 states came together to recover the health-care costs resulting from smoking.<sup>183</sup> Not only did the settlement include a more than \$200 billion payment by the tobacco companies,<sup>184</sup> it also brought significant changes to the tobacco industry that reduced smoking among youth.<sup>185</sup> Some analogize Meta to Big Tobacco companies and argue that a similar consumer protection litigation approach should be used to enforce corporate accountability.<sup>186</sup>

Multistate litigation against social media platforms is ongoing, “triggered largely by Frances Haugen’s whistleblowing in 2021.”<sup>187</sup> In 2021, a coalition of state attorneys general began investigating Meta for “providing and promoting the social media platform Instagram to children and young adults despite

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175. *Multistate Litigation and Settlements*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/issues/antitrust/multistate-litigation-and-settlements/#:~:text=Multistate%20litigation%20includes%20any%20coordinated,and%20several%20large%20tobacco%20companies> [https://perma.cc/7JMR-U9ZR] (last accessed June 27, 2024).

176. Cecilia Kang & Natasha Singer, *Meta Accused by States of Using Features to Lure Children to Instagram and Facebook*, N.Y. TIMES (Oct. 24, 2023), <https://www.nytimes.com/2023/10/24/technology/states-lawsuit-children-instagram-facebook.html> [https://perma.cc/G2AV-XBEW].

177. Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys general in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001).

178. Lin, *supra* note 4, at 53.

179. *Id.*

180. *Id.*

181. Nolette, *supra* note 176.

182. *Id.*

183. *The Master Settlement Agreement*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/> [https://perma.cc/L32N-PGZ9] (last accessed June 27, 2024).

184. Nolette, *supra* note 176.

185. NAT’L ASS’N OF ATT’YS GEN., *supra* note 185.

186. Lin, *supra* note 4, at 37.

187. Tate Ryan-Mosley, *Why Meta Is Getting Sued Over Its Beauty Filters*, MASS. INST. TECH. TECH. REV. (Oct. 30, 2023), <https://www.technologyreview.com/2023/10/30/1082628/why-meta-is-getting-sued-over-its-beauty-filters/> [https://perma.cc/EAH8-SDUL].

knowing that such use is associated with physical and mental health harms.”<sup>188</sup> As of October 2023, there is a bipartisan coalition of 33 attorneys general suing Meta in federal court, “alleging that the company knowingly designed and deployed harmful features on Instagram and other social media platforms that purposefully addict children and teens.”<sup>189</sup> The complaint, filed in the U.S. District Court for the Northern District of California, alleges that even though Meta knew the detrimental impacts of its platforms, it continued to mislead the public and hide the harms suffered by addicted children and teens.<sup>190</sup> Meta is also alleged to have knowingly collected data from users under 13 without parental consent.<sup>191</sup> The legal complaint against the company states that Meta had actual knowledge of millions of users under the age of 13 and continued to routinely collect their personal information.<sup>192</sup> Even when the company received reports of underage Instagram users, it allowed them to continue using their accounts “as long as the accounts did not contain a user biography or photos.”<sup>193</sup> Former employees have revealed that “its platform algorithms push users into descending rabbit holes in an effort to maximize engagement” through features such as infinite scroll and near-constant alerts.<sup>194</sup> The attorneys general claim that such practices violate state consumer protection laws and COPPA.<sup>195</sup> Several state attorneys general have also filed separate complaints in their own state courts.<sup>196</sup>

Meta is not the only recent target of these bipartisan coalitions. TikTok, a popular Chinese-owned video site, is facing similar accusations of deploying addictive features that have contributed to the youth mental health crisis.<sup>197</sup> In March 2022, a group of state attorneys general announced that it had opened an investigation into TikTok, which is ongoing as of October 2023.<sup>198</sup>

188. Press Release, Off. of the N.Y. State Att’y Gen., Attorney General James Calls on Social Media Platforms to Provide Answers after Terrorist Attacks in Israel Spark Violent Threats Online (Oct. 13, 2023), <https://ag.ny.gov/press-release/2023/attorney-general-james-calls-social-media-platforms-provide-answers-after> [https://perma.cc/7BMR-88S2].

189. Press Release, Off. of the Ga. Att’y Gen., Carr Joins Bipartisan Coalition in Filing Suit Against Meta for Harmful Effects on Youth Mental Health (Oct. 24, 2023), <https://law.georgia.gov/press-releases/2023-10-24/carr-joins-bipartisan-coalition-filing-suit-against-meta-harmful-effects> [https://perma.cc/C3J8-PAQZ].

190. *Id.*

191. *Id.*

192. Natasha Singer, *At Meta, Millions of Underage Users Were An ‘Open Secret,’ States Say*, N.Y. TIMES (Nov. 25, 2023), <https://www.nytimes.com/2023/11/25/technology/instagram-meta-children-privacy.html> [https://www.nytimes.com/2023/11/25/technology/instagram-meta-children-privacy.html].

193. *Id.*

194. Off. of the Ga. Att’y Gen., *supra* note 191.

195. *Id.*

196. Tim Starks & David DiMolfetta, *Here’s How a Children’s Privacy Law Figures into that Big Legal Effort Against Meta*, WASH. POST (Oct. 25, 2023), <https://www.washingtonpost.com/politics/2023/10/25/heres-how-childrens-privacy-law-figures-into-that-big-legal-effort-against-meta/> [https://perma.cc/NN3T-QXZ3].

197. Dennis Romero, *Utah Lawsuit Accuses TikTok of Knowingly Getting Children Hooked on Harmful Content*, NBC NEWS (Oct. 10, 2023), <https://www.nbcnews.com/news/us-news/utah-lawsuit-tiktok-children-health-rcna119818> [https://perma.cc/Y2GX-PQZ9].

198. Cecilia Kang, *A Coalition of State Attorneys general Opens an Investigation into TikTok*, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/technology/tiktok-states-investigation.html> [https://perma.cc/SB4Z-B2KD].

The group, which includes attorneys general from Massachusetts and Nebraska, is concerned with whether the app poses potential physical and mental health harms to young adults and teens.<sup>199</sup> The attorneys general are focusing on the issue of online child safety and investigating whether TikTok has violated state consumer protection laws by attempting to “boost engagement and keep young users hooked to the app.”<sup>200</sup> In March 2023, as part of their ongoing multistate investigation led by Tennessee Attorney General Jonathan Skrmetti and Colorado Attorney General Phil Weiser, the attorneys general asked a Tennessee court to order TikTok to preserve and produce relevant information and documents.<sup>201</sup>

By pursuing the biggest social media platforms, such as Meta and TikTok, state attorney general have the chance to produce industry-wide change. With the amount of negative press that such investigations produce, corporations will have a significant amount of pressure to change their deceptive and unfair practices.<sup>202</sup> Even companies not named in such nationwide lawsuits are affected. As such businesses see the expectations of consumers change, they will have to reassess some of their own practices and reform accordingly. For example, some believe the ongoing Meta lawsuit will encourage other platforms with underage users to audit their own procedures and implement complaint mechanisms.<sup>203</sup> The headline cases also are a great opportunity for the government to clarify data privacy regulations on young consumers. The goal of these multistate lawsuits isn't simply to punish the company for its illegal practices. Rather, they serve the bigger purpose of protecting the youth from further harm and even shaping the future behavior of businesses.

### C. Education

The role of the state attorney general in ensuring children's online privacy and safety is not limited to dealings with huge corporations like Meta and TikTok. The attorney general should also directly engage with consumers, specifically within their own states. Educating the public is a common duty of the state AG,<sup>204</sup> and most importantly, it may be the most practical option to deal with the possible risks of harm to the youth while legal action is pending.

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199. *Id.*

200. *Id.*

201. Press Release, Office of the S.C. Att'y Gen. Attorney General Alan Wilson Joins 46-state Coalition Asking Court to Order TikTok to Preserve and Produce Company Communications Critical to Multistate Investigation, (Mar. 6, 2023), <https://www.scag.gov/about-the-office/news/attorney-general-alan-wilson-joins-46-state-coalition-asking-court-to-order-tiktok-to-preserve-and-produce-company-communications-critical-to-multistate-investigation/> [https://perma.cc/UQ6Z-YQFN].

202. Amy Pritchard Williams, Ryan Strasser & Ashley Taylor, *State Attorney General Actions: Strategies for Venue and Settlement Differ from Typical Litigation*, REUTERS (Feb. 16, 2023), <https://www.reuters.com/legal/legalindustry/state-attorney-general-actions-strategies-venue-settlement-differ-typical-2023-02-16/> [https://perma.cc/P4HG-WD2C].

203. Riley, *supra* note 150.

204. *State AGs: Who They Are and What They Do*, CHANGE LAB SOLS. (2010), [https://www.changelabsolutions.org/sites/default/files/documents/State\\_AGs\\_-\\_Who\\_They\\_Are\\_and\\_What\\_They\\_Do\\_FINAL\\_20100624.pdf](https://www.changelabsolutions.org/sites/default/files/documents/State_AGs_-_Who_They_Are_and_What_They_Do_FINAL_20100624.pdf) [https://perma.cc/YPW4-VU54].

It often takes years for the government to pass new legislation<sup>205</sup> and for state attorneys general to successfully prosecute businesses in consumer protection lawsuits. Tech companies continue to lobby against proposed laws that will better protect children online,<sup>206</sup> and much time will need to pass before there is a visible trickle-down effect from these enforcement actions.

State attorneys general should thus provide educational resources that help children avoid becoming victim to big tech companies. One way to do so is to educate parents on how to better protect their children online. These resources should raise awareness of the importance of children's online privacy and the significant consequences for violating it. For example, the website of the New York State Attorney General has a page dedicated to providing practical tips to protect children on Facebook.<sup>207</sup> The page includes information on setting account privacy controls and monitoring online activity.<sup>208</sup> Even informing parents that social media platforms may not be appropriate for unmonitored use for children under the age of 13 is helpful. Some psychologists even recommend "delaying the age of first use as much as possible."<sup>209</sup> State attorneys general could also share the recent studies on the link between the youth mental health crisis and the use of social media platforms.

State attorneys general can also spread the idea of data protection being a fundamental right, like the perception behind the GDPR<sup>210</sup>. Through educational resources or through public statements, state attorneys general can explain the significance of personal data and the implications of it being owned by huge corporations. Perhaps by realizing the necessity of data protection, people may make more conscientious decisions surrounding their data. For example, they may be more selective with the websites where they share or exchange their data. The purpose of such public education is not to encourage parents to prohibit their children from any online engagement, but it is to help all individuals make more informed choices as consumers.

## Conclusion

The state Attorney General is in a unique and powerful position to enact positive change on children's online privacy and safety in the United States. In the face of the youth mental health crisis and the increasing loss of privacy for all consumers, children need stronger protections online.

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205. Margot Sanger-Katz, *Little-Noticed Part of G.O.P. Bill Could 'Make It Impossible to Regulate'*, N.Y. TIMES (May 12, 2023), <https://www.nytimes.com/2023/05/12/upshot/republican-bill-government-regulations.html> [<https://perma.cc/Q6DS-5RA5>].

206. Kang & Singer, *supra* note 178.

207. *Facebook Privacy and Safety for Children*, OFF. OF THE N.Y. STATE. ATT'Y GEN., <https://ag.ny.gov/resources/individuals/consumer-issues/technology/facebook-privacy-and-safety-children> [<https://perma.cc/HN76-Z7K5>].

208. *Id.*

209. Rachel Ehmke, *How Using Social Media Affects Teenagers*, CHILD MIND INST. (Aug. 10, 2023), <https://childmind.org/article/how-using-social-media-affects-teenagers/> [<https://perma.cc/VM7A-BRL6>].

210. de Bruin, *supra* note 97, at 134.

The European Union's GDPR is an immensely helpful guide to understand the currently inadequate US regulations on data privacy and protection. The United States currently lacks comprehensive federal regulation on data protection and instead works with a growing patchwork of state laws. This Note urges the state attorney general to consider the lessons of the GDPR and to further engage in legislative advocacy, enforcement, and public education that can lead to much-needed widespread changes in online privacy law in the United States.

Furthermore, the future changes to the US regulations that may be modeled after the GDPR could have significant international ramifications. Many of the world's biggest companies with access to the personal data of millions of people are headquartered in the United States. By requiring stronger protections for children's data from these companies, the US may produce a positive effect that goes beyond its borders.