COMMENTS

PROTECTING QUEER AND TRANS KIDS ONLINE*

I. INTRODUCTION

"I'm a closeted youth whose parents are hardcore Mormon. If I lose these resources then I lose a part of myself."[1] Elliott, an Arkansas child, finds refuge and support in the digital world—a world in which they can safely explore their queerness without the fear of real-world repercussions.[2] This includes the fear of Elliott's mother shielding them from information and resources that may be lifesaving to a closeted queer child.[3] Another queer youth, Liza, puts it this way: "Sometimes the internet is the only way to find community or to learn the language to explain your experience."[4] An integral part of the human experience is claiming it for oneself: defining who one is and who one wants to be.[5] This does not start when one turns eighteen. As the Trump administration's openly hostile executive orders make the physical world more and more difficult for queer and trans people to exist in,[6] online spaces become an important beacon for safety and security.

The Kids Online Safety Act (KOSA), passed by the Senate during the 118th Congress, is a bill that aims to make the internet a safer place for children and teens.[7] If passed by the House, KOSA would give state attorneys general and parents potential

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* Nick Hunsicker, J.D. Candidate, Temple University Beasley School of Law, 2026. I am grateful to Professor Dara Purvis for her guidance and support throughout drafting this Comment. Thank you to Professor Laura Bingham for her comments on my initial draft. Thank you to the *Temple Law Review* staff for their dedication in preparing this Comment. This Comment would not exist without the many family members and friends who helped me along the way, including my partner, Liam, who encouraged me to pursue this concept and listened as I found my voice in the process.

1. Comment, Elliott T, *on Open Letter from LGBTQ+ Youth to Progressive Lawmakers To Oppose KOSA*, FIGHT FOR THE FUTURE, https://www.youthagainstkosa.com [https://perma.cc/3QM5-7TUV] (last visited Apr. 28, 2026) [hereinafter *Open Letter*].

2. *See id.*

3. *See generally* Ashley Austin, Shelley L. Craig, Nicole Navega & Lauren B. McInroy, *It's My Safe Space: The Life-Saving Role of the Internet in the Lives of Transgender and Gender Diverse Youth*, 21 INT'L J. TRANSGENDER HEALTH 33 (2020) (detailing the importance of online access for transgender children).

4. Comment, Liza H, *on Open Letter*, *supra* note 1.

5. Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992))).

6. *See, e.g.*, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025); Keeping Men Out of Women's Sports, Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 5, 2025); Prioritizing Military Excellence and Readiness, Exec. Order No. 14183, 90 Fed. Reg. 8757 (Jan. 27, 2025); Protecting Children From Chemical and Surgical Mutilation, Exec. Order No. 14187, 90 Fed. Reg. 8771 (Jan. 28, 2025).

7. *See infra* Part II.D.

control over the content shown to minors, as well as the people with whom children can speak.[8] For many kids, the internet has become a primary source of information and socialization.[9] Teenagers spend an average of seven and a half hours a day online.[10] Naturally, it makes sense to approach this reality with concern and caution. Protecting children has long been ingrained in the American legal system—whether it effectively does so or not.[11] But in the name of "protecting" children online, KOSA overcorrects by infringing on the intimate privacy of children and teens in spaces that are often the only private refuge they have.[12] This issue is of particular importance for queer and trans youth, who often find community, self-exploration, and resources in the digital sphere.[13]

As the bedrock principle of the "right to privacy" that underlies substantive due process jurisprudence is being chiseled away,[14] this Comment attempts to demonstrate the need to consider queer youth in an online privacy context.[15] Specifically, this Comment draws on Professor Danielle Citron's theory of "intimate privacy" to interrogate KOSA and its potentially damaging impact on queer and trans youth.[16] By highlighting the longstanding history (and current culture war talking points) of viewing queerness and transness as "harmful" to children, this Comment seeks to uncover the relationship between KOSA and the ongoing assault on queer and trans people's rights and existence.[17] Section II of this Comment provides context for KOSA—including a theoretical framework for thinking about privacy, an overview of online privacy in the United States, a detailed look at KOSA, and an introduction to the history of anti-queer and anti-trans sentiment. Section III then applies this context of anti-queer and anti-trans sentiment to the mechanics of KOSA before broadening the discussion to consider how intimate privacy can be deployed to balance the many competing interests in children's online privacy reform.

II. OVERVIEW

The road to KOSA is long and winding. This Section documents the history of online privacy as it relates to KOSA's introduction in 2022.[18] Part II.A provides a brief

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8. *See infra* Part II.D.

9. DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 201 (2014).

10. *Screen Time and Children*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (June 2025), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-Watching-TV-054 [https://perma.cc/V6ZB-FE6B].

11. *See generally* John E. B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2008) (chronicling the historical development of child protection laws in the United States).

12. *See infra* Section III.

13. *See infra* Section III; *see also Open Letter, supra* note 1 ("But for many of us, the Internet is all we have.").

14. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (claiming that "the Due Process Clause does not secure *any* substantive rights").

15. *See infra* Section III.

16. *See infra* Part III.B.

17. *See infra* Section III.

18. While introduced in 2022, the Kids Online Safety Act (KOSA) has been considered in every legislative session since then, including in the 2025–2026 session. *See* Lisa Hagen, *House Version of Kids Online Safety Act Ruffles Blumenthal, Parents*, CT MIRROR (Dec. 5, 2025, at 05:00 ET),

discussion of how Congress came to a renewed interest in children's online privacy. Subsequently, Part II.B lays a theoretical foundation for thinking about privacy, including intimate privacy. Part II.C traces the landscape of online privacy regulation and litigation in the United States. Part II.D unpacks KOSA itself in detail, including its reach and enforcement mechanisms. Part II.E then sketches the history of anti-queer and anti-trans sentiment regarding children, including two case studies for how this sentiment manifests in anti-queer legislation today.

A. The Regulatory Moment

KOSA did not just fall out of a coconut tree—it exists within the context of all in which we live and what came before it.[19] Before the bill was first introduced in 2022, Meta Platforms, Inc. (formerly Facebook) faced a number of issues regarding user privacy.[20] The year prior to KOSA's introduction, a whistleblower, Frances Haugen, leaked internal Meta documents revealing the company's awareness of the potential negative impacts of Instagram on teenagers.[21] The documents showed that Meta, through its own investigation, uncovered Instagram's worsening of social comparison among teenagers and its outsized effects on teenage girls.[22] According to the files leaked by Haugen, Meta employees were aware of the app's exacerbation of body image issues as well.[23] The documents also revealed that Meta intended to target the preteen market, seeing this age group as an untapped economic engine for the company.[24]

In October 2021, Haugen testified to the United States Senate Committee on Commerce, Science, and Transportation about the revelations that her leak exposed.[25] Senator Marsha Blackburn commented that Instagram is an "addictive" product, with Meta prioritizing its bottom line at the expense of children's health.[26] Senator Richard Blumenthal noted that social media platforms rely on "powerful algorithms that amplif[y] [children's] insecurities" and questioned whether algorithms are even capable

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https://ctmirror.org/2025/12/05/kosa-blumenthal-house-version/ [https://perma.cc/U4R3-4BVE] (explaining the changes to the newest version of KOSA).

19. *See generally* María P. Angel & danah boyd, *Techno-Legal Solutionism: Regulating Children's Online Safety in the United States*, *in* CSLAW '24: PROCEEDINGS OF THE 2024 SYMPOSIUM ON COMPUTER SCIENCE AND LAW 86 (2024) (providing sociological and historical context for the development of KOSA).

20. *A Timeline of Trouble: Facebook's Privacy Record and Regulatory Fines*, GUILD (Aug. 4, 2021), https://guild.co/blog/complete-list-timeline-of-facebook-scandals/ [https://perma.cc/48T2-62J9].

21. *The Facebook Files*, WALL ST. J., https://www.wsj.com/articles/the-facebook-files-11631713039 (last visited Apr. 28, 2026) (on file with the Temple Law Review).

22. Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sep. 14, 2021, at 07:59 ET), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline (on file with the Temple Law Review).

23. *Id.*

24. *The Facebook Files*, *supra* note 21.

25. *Protecting Kids Online: Testimony from a Facebook Whistleblower: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Data Sec. of the S. Comm. on Com., Sci., & Transp.*, 117th Cong. 17–25 (2021) (statement of Frances Haugen, Meta Whistleblower).

26. Bobby Allyn, *Here Are 4 Key Points from the Facebook Whistleblower's Testimony on Capitol Hill*, NPR (Oct. 5, 2021, at 21:30 ET), https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress [https://perma.cc/4MS9-CNMM].

of being safe.[27] Haugen's leak seemed to unite the Democratic and Republican parties against a common enemy: big tech.[28]

Media studies scholars researched the harmful and beneficial impacts of media on children for decades.[29] Research has yet to definitively conclude a causal relationship between children's exposure to certain types of media and poor mental health.[30] Despite this, some scholars argue that social media is the cause of increased rates of mental health issues among children and teens.[31] However, many scholars take a more measured approach—acknowledging the positive aspects of media exposure while stressing the potential risks, specifically to children.[32] For example, many studies have shown a credible link between social media usage and eating disorders, depression, and social comparison.[33] At the same time, many scholars have shown the important role that social media can play in children's lives.[34] Foremost among these scholars is Professor danah boyd, who has consistently argued that social media is a crucial space of socialization for teenagers.[35] Moreover, Professor boyd is skeptical that a "technosolutionist" approach to protecting children from the harmful effects of media will truly solve the problems children faced, as many of these problems are layered and exist in the physical world as well as online.[36]

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27. *Id.*

28. *Id.*

29. *See* Peter Vorderer, David W. Park & Sarah Lutz, *A History of Media Effects Research Traditions*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 3 (Mary Beth Oliver, Arthur A. Raney & Jennings Bryant eds., 4th ed. 2020).

30. *See* Victor C. Strasburger, Amy B. Jordan & Ed Donnerstein, *Children, Adolescents, and the Media: Health Effects*, 59 PEDIATRIC CLINICS N. AM. 533, 534 (2012) (stating that media exposure is just one of many factors that influence social outcomes and behaviors).

31. *See generally* JONATHAN HAIDT, THE ANXIOUS GENERATION: HOW THE GREAT REWIRING OF CHILDHOOD IS CAUSING AN EPIDEMIC OF MENTAL ILLNESS (2024) (arguing that childhood has been "rewired" from play-based to phone based, causing an epidemic of mental health crises in youth).

32. *Just How Harmful Is Social Media? Our Experts Weigh-In.*, COLUM. UNIV. MAILMAN SCH. OF PUB. HEALTH (Sep. 27, 2021), https://www.publichealth.columbia.edu/news/just-how-harmful-social-media-our-experts-weigh [https://perma.cc/97UY-WY5Q].

33. Strasburger et al., *supra* note 30, at 534.

34. Arianna Prothero, *How Social Media May Benefit Teens' Mental Health*, EDUCATIONWEEK (Feb. 16, 2024), https://www.edweek.org/leadership/how-social-media-may-benefit-teens-mental-health/2024/02 [https://perma.cc/9WNW-5GWT].

35. *See, e.g.*, BOYD, *supra* note 9, at 201. boyd intentionally uses lowercase letters for the entirety of her name to focus the reader on her work rather than herself as an individual (similar to author bell hooks). *See* danah boyd, *What's in a Name?*, DANAH.ORG, https://www.danah.org/name.html [https://perma.cc/H46K-AJ8V] (last visited Apr. 28, 2026).

36. Angel & boyd, *supra* note 19, at 86–87.

B. What is Privacy?

In everyday language, privacy is a concept that seems easy enough to define.[37] But defining privacy in the law has been anything but easy.[38] A foundational definition comes from Attorney Samuel D. Warren and Supreme Court Justice Brandeis, who argued that privacy amounts to the "right to be let alone" and its violation should be treated as a tortious injury.[39] Throughout the twentieth century, ideas around human agency and decisional privacy were fleshed out in landmark cases such as *Griswold v. Connecticut* and *Roe v. Wade*.[40] In the context of the internet, privacy law often focuses on data protection, including the protection of personally identifiable information.[41] In the modern age, the debate as to what privacy law really is rages on.[42]

Regardless of what one thinks about the expansive and competing definitions of privacy law, privacy touches us all in profoundly personal ways.[43] This Comment leans on Professor Citron's theory of intimate privacy, which she defines as the "norms that set and fortify the boundaries around our intimate lives."[44] Professor Citron argues that intimate privacy is an "essential precondition for self-expression" that allows us the space to experiment with identity, relationships, love, and self-understanding.[45] Intimate privacy is a form of informational privacy that fortifies the boundaries of access to intimate information, such as bodies, minds, feelings, sex, gender, and relationships.[46] In other words, intimate privacy acts as a refuge from external forces that prevent the processes of play and experimentation that lead to self-awareness around identity and community.[47]

Professor Citron believes that intimate privacy is, and should be, a civil right, and that the recognition of such a right would not only protect the dignity of all human beings

37. Merriam Webster defines privacy as "freedom from unauthorized intrusion." *Privacy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/privacy [https://perma.cc/M492-4THZ] (last visited Apr. 28, 2026).

38. *See* María P. Angel & Ryan Calo, *Distinguishing Privacy Law: A Critique of Privacy as Social Taxonomy*, 124 COLUM. L. REV. 507, 508–11 (2024).

39. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). The creation of this foundational text in privacy law was motivated by Professor Warren's brother, who was discovering his queer identity at a time when exposing the sexual lives of others was a common journalistic practice and homosexuality was increasingly vilified in American society. *See* DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE xii (2022) [hereinafter CITRON, THE FIGHT FOR PRIVACY].

40. *See* ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 83 (1988) ("[D]ecisional privacy is an aspect of liberty with deep and definite implications for paradigmatic forms of privacy.").

41. *See* Angel & Calo, *supra* note 38, at 512 (critiquing the conflation of privacy and data protection).

42. *See id.* at 511–12 ("It is imperative that we try to understand what work the concept of privacy is doing in today's complex information environment."); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1904 (2013) ("Privacy has an image problem.").

43. ALLEN, *supra* note 40, at 1 ("Privacy problems are ubiquitous and have a well-recognized presence in virtually every arena of American life.").

44. Danielle Keats Citron, *Intimate Privacy's Protection Enables Free Speech*, 1 J. FREE SPEECH L. 3, 4 (2022) [hereinafter Citron, *Intimate Privacy's Protection*].

45. *Id.* at 3.

46. *Id.* at 4–5.

47. *See* Cohen, *supra* note 42, at 1905–06.

but also aid in combatting discrimination.[48] Professor Citron argues that protecting free speech requires securing intimate privacy and that doing so would ensure people feel safe to experiment with different ideas for themselves.[49] According to Professor Citron, internet laws aimed at protecting freedom of speech—such as Section 230[50]—are woefully inadequate in protecting intimate privacy, which is inherently linked to freedom of speech and expression.[51] Rather than lazily resting on blanket free speech protections, Professor Citron instead argues that courts are equipped to balance these often clashing privacy rights with speech rights.[52]

While protecting this form of privacy often allows for isolation, intimate privacy can also serve as an important tool for social participation.[53] Intimate privacy online often involves our digital footprints, which can be reconstructed to reveal information about our intimate lives.[54] As our physical worlds become more interwoven with cyberspace and our corporeal forms sync with our data bodies, intimate privacy online becomes even more imperative.[55]

Intimate privacy violations are perpetrated by various actors, including individuals, corporations, and governments.[56] Professor Citron provides numerous examples of intimate privacy violations, such as nonconsensual pornography made via "nanny cams" by ex-partners, a fellow social media user "outing" a closeted queer person on Facebook, and the dating app Tinder's sale of users' intimate data to advertisers.[57] Intimate privacy can act as a way to protect users in public and online spaces, facilitating social engagement and allowing users to connect and form shared identity. Regulating the digital world inherently requires regulating intimate privacy, which runs the risk of being

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48. CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 109–10.

49. Citron, *Intimate Privacy's Protection*, *supra* note 44, at 7.

50. *See infra* Part II.C.

51. *See* CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 84–87.

52. Not only does Professor Citron argue that U.S. courts are equipped to do this, just as courts around the world do, but she also argues that Professor Warren and Justice Brandeis's seminal text in privacy law acknowledged the difference between speech of "public and general interest" and speech of "no legitimate concern" to the community. *Id.* at 123 (quoting Warren & Brandeis, *supra* note 39, at 214). Professor Citron argues that rape porn, for example, adds nothing to the public discourse and therefore should not be protected if a subject of the video challenged its publication on intimate privacy grounds. *Id.* at 122–24.

53. ALLEN, *supra* note 40, at 2 ("Privacy's value is not limited to what it contributes to individuals in isolation from others. Opportunities for individual privacy help make persons fit for lives of social participation and contribution . . . . Privacy thus has value for friendships, families, organizations, and democratic government."); *see also* SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 47–50 (2021) [hereinafter SKINNER-THOMPSON, PRIVACY AT THE MARGINS] (arguing that privacy acts to foster thoughts, feelings, and identity that will be used for future expression in public and group settings).

54. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874 (2019). "Digital footprint" is defined as "the information about a particular person that exists on the internet as a result of their online activities." *Digital Footprint*, OXFORD ADVANCED LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/english/digital-footprint?q=digital+footprint [https://perma.cc/HL7T-57L2] (last visited Apr. 28, 2026).

55. *See* Citron, *supra* note 54, at 1874.

56. Danielle Keats Citron, *Intimate Privacy in a Post-*Roe *World*, 75 FLA. L. REV. 1033, 1038 (2023).

57. *See generally* CITRON, THE FIGHT FOR PRIVACY, *supra* note 39 (describing these various scenarios and how intimate privacy could be used to prevent them).

overregulated or co-opted by the culture war.[58] This Comment describes these risks and offers principles that should be considered in future legislation.[59] However, our current regulatory landscape suffers not from overregulation but from underregulation.[60]

C. *A Brief History of Online Privacy in the United States*

The United States is a nation of paradoxes, and this sentiment remains true in the realm of online privacy.[61] While the United States is a hub for technological breakthroughs, it lags behind other parts of the world in terms of online safety innovation.[62] No comprehensive statutory framework governing online privacy and data protection currently exists.[63] Instead, data privacy is regulated at the federal level by various sector-specific laws. The main agency tasked with regulating tech companies is the Federal Trade Commission (FTC), as empowered by Section 5(a) of the FTC Act.[64] Section 5(a) of the FTC Act makes unlawful "unfair or deceptive" business practices and empowers the FTC to protect consumers.[65] The FTC also enforces the Children's Online Privacy Protection Act of 1998 (COPPA).[66] Both of these acts allow regulation of "structure" as in data collection, privacy policies, interface design, dark patterns, and business practices.[67] Section 230 of the Communications Decency Act ("Section 230") provides social media companies and internet service providers with a shield against liability for user-generated content.[68] Few carveouts to Section 230 exist,[69] as the Supreme Court has been hesitant to upend its own First Amendment jurisprudence to create such liability for internet service providers.[70] As of now, the patchwork of privacy

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58. *See infra* Section III. This Comment defines "culture war" as an organized economic and political apparatus feeding off—and furthering—conservative sentiment among ordinary people to amass political gains.

59. *See infra* Section III.

60. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 587 (2014) (noting how the U.S. privacy law regime "leaves large areas unregulated, especially at the federal level").

61. *See id.* (explaining the "hodgepodge" landscape of privacy laws in the United States).

62. James Squires, *EU Versus US Privacy Legislation*, KUDOS DATA SOLS. (Mar. 19, 2024), https://www.kudos-data.com/blog/eu-versus-us-privacy-legislation (on file with the Temple Law Review). For example, the European Union provides citizens comprehensive protection against misuse of their data, as well as better control over their data. *See generally* Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 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 O.J. (L 119) 1 (creating an EU-wide data privacy framework).

63. Solove & Hartzog, *supra* note 60, at 587.

64. *Id.* at 585, 587.

65. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a)(1).

66. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506.

67. Solove & Hartzog, *supra* note 60, at 627–42.

68. Communications Decency Act of 1996, 47 U.S.C. § 230.

69. *See Section 230*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/86KS-A5RC] (last visited Apr. 28, 2026).

70. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) (holding that certain provisions of the Communications Decency Act of 1996 violated the First Amendment because they chilled protected speech and were not narrowly tailored).

laws in the United States does not comprehensively regulate the content of posts online,[71] and there is no federal law specifically aimed at safeguarding online privacy in a larger sense.[72]

Understanding the history of online privacy regulation and the current laws governing the space is vital to understanding the risks associated with KOSA. From the lack of any meaningful regulation,[73] to the safety net Congress made for social media companies hosting user-generated content out of deference to the First Amendment,[74] to the recent attempts at holding sex trafficking websites accountable,[75] this Comment builds on the lessons learned throughout the internet's brief history to explain the familiar ways KOSA's application may harm the same population it purports to help.[76]

1. Patchwork of Existing Privacy Laws

One reason the United States lacks a comprehensive regulatory scheme for protecting online activity and data is the history of self-regulation championed by large tech companies like Microsoft, Intel, and IBM.[77] In the 1990s, these tech giants pushed for less government regulation in lieu of self-regulation by the industry, arguing that the companies could monitor and hold themselves accountable better than any federal agency.[78] This strategy worked—while a handful of privacy statutes were passed for specific industries, tech companies remain largely ungoverned by any comprehensive data protection law.[79]

In addition to this push for self-regulation, the 1990s were marked by a trend of "techno-utopianism."[80] Techno-utopianism is a belief that technological advancements will allow humans to be free from an overbearing government.[81] Essentially, many techno-utopianists of the time believed that the internet was a self-governing space, safe from the prying eyes of nations.[82] Chief among their concerns was the possibility that users' freedom of speech and expression online could be violated by an overreaching

71. Sheri B. Pan, *Get To Know Me: Privacy and Autonomy Under Big Data's Penetrating Gaze*, 30 HARV. J.L. & TECH. 239, 242 (2016).

72. Solove & Hartzog, *supra* note 60, at 587.

73. *Id.*

74. MARY ANNE FRANKS, FEARLESS SPEECH: BREAKING FREE FROM THE FIRST AMENDMENT 102–09 (2024).

75. Allow States and Victims To Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018).

76. *See infra* Section III.

77. Solove & Hartzog, *supra* note 60, at 592. The term "tech giants" is context dependent. In the 1990s, this included the likes of Microsoft, Intel, and IBM. Today, this term would include companies like Apple, Meta, and Amazon.

78. *Id.* at 592–93.

79. *Id.* at 594.

80. *See* Cindy Cohn, *Inventing the Future: Barlow and Beyond*, 18 DUKE L. & TECH. REV. 69, 71–72 (2019).

81. *See id.* at 69, 72.

82. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://projects.eff.org/~barlow/Declaration-Final.html [https://perma.cc/7SKF-ZZVZ].

government.[83] While this techno-utopianist vision of the future never fully materialized,[84] the lack of any unifying, comprehensive online privacy regulation honors the techno-utopianist movement of the 1990s.

The majority of current tech industry regulation comes from the FTC's enforcement of Section 5(a).[85] Section 5(a) empowers the FTC to prevent "unfair or deceptive acts or practices."[86] The FTC's main goal, and the aim of its power, is consumer protection.[87] Because of this specialized goal, the FTC is not necessarily equipped to proactively regulate online privacy in any comprehensive way[88] and it has instead focused its enforcement power on fraudulent activity, deception of consumers, and violations of privacy policies.[89] While the umbrella of privacy is large, it is difficult to say that consumer protection forms the only basis for protecting online privacy.[90]

However, despite this limitation on the FTC, Congress often places privacy enforcement power in the hands of the agency.[91] In addition to Section 5(a) of the FTC Act, COPPA is a major authority over the tech industry.[92] COPPA, as passed in 1998, was originally intended to protect the "personal information" of children accessing the internet and to provide greater parental control over how information is collected from children online.[93] COPPA is also enforced by the FTC.[94] COPPA requires website operators who are knowingly collecting personal information from children thirteen years or younger to, among other things, provide a privacy notice and obtain verifiable parental consent for children to use the website.[95] While COPPA technically tailors its applicability to the collection of personal information via "websites directed to children," the FTC has enforced COPPA against websites with general audiences.[96] For example, the FTC brought enforcement action against YouTube for collecting personal

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83. *See A History of Protecting Freedom Where Law and Technology Collide*, ELEC. FRONTIER FOUND., https://www.eff.org/about/history [https://perma.cc/EEA7-W8VL] (last visited Apr. 28, 2026).

84. *See* Pan, *supra* note 71, at 251 (discussing parole boards' use of big data and its implications for procedural due process); Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. REV. 1143, 1144–46 (2022) (noting how policing agencies "hoover up" a vast amount of information on citizens).

85. Solove & Hartzog, *supra* note 60, at 587.

86. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a)(1).

87. *See* Andrew Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices*, 48 S.D. L. REV. 809, 811 (2011) (explaining the Federal Trade Commission's (FTC) origins in consumer protection).

88. *See* Solove & Hartzog, *supra* note 60, at 586 (acknowledging the disparity in comprehensiveness between European Union laws and the powers of the FTC).

89. *Id.* at 614–17.

90. *See* Angel & Calo, *supra* note 38, at 540–41 (distinguishing between privacy law and consumer protection).

91. For example, Congress gave the FTC enforcement power over the Children's Online Privacy Protection Act of 1998 (COPPA). Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506. Additionally, KOSA is drafted in such a way that it gives the FTC enforcement power. Kids Online Safety Act, H.R. 7891, 118th Cong. § 110(a)(1) (2024).

92. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506.

93. *Id.*

94. *Id.*

95. FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312.3 (West 2025).

96. FED. TRADE COMM'N, CHILDREN'S ONLINE PRIVACY PROTECTION RULE: NOT JUST FOR KIDS' SITES 1–2 (2013) (explaining that COPPA applies to general use sites as well as sites specifically for children).

information from children through its intentional hosting of channels aimed at children, despite YouTube being a mixed-generational platform.[97]

Other major pieces of legislation aimed at regulating online activity are the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA)—companion bills that are often referred to as "FOSTA-SESTA."[98] Signed into law in 2018, the stated purpose of these bills is to protect people from sex trafficking carried out via digital tools like user-generated content and online advertisements.[99] FOSTA-SESTA allegedly achieves this goal by creating a carveout to Section 230's blanket immunity from liability for user-generated content enjoyed by social media platforms.[100] While protecting people from sex crimes is a social benefit, the effects of FOSTA-SESTA have differed from its intended purpose.[101] For example, many sex workers who found safety in mediated, online networks were forced to go offline to engage in their work, exposing them to more danger, as their preferred online platforms became targets of FTC enforcement and less willing to host their content.[102] Additionally, studies found that online classified advertising websites like Craigslist and Backpage preemptively removed scores of sexual content, even when the content had no connection to sex trafficking.[103] The effects of FOSTA-SESTA show how well-intentioned laws can reach far beyond the problems they aim to address and may lead to chilling effects on speech by the entities subject to the laws, just as this Comment argues in relation to KOSA.[104]

2. California Age-Appropriate Design Code and First Amendment Concerns

For decades, COPPA, FOSTA-SESTA, and Section 5(a) of the FTC Act dominated the arena of online child privacy law.[105] Recently, however, there has been renewed interest in laws aimed at protecting children online,[106] including "Age-Appropriate Design Code[s]" emerging at the state level,[107] updates to COPPA,[108] as well as renewed

97. Complaint at 3, 6, FTC v. Google, LLC, No. 19-cv-02642 (D.D.C. Sep. 4, 2019).

98. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018).

99. Linda S. Anderson, *Ending the War Against Sex Work: Why It's Time To Decriminalize Sex Work*, 21 U. MD. L.J. RACE RELIGION GENDER & CLASS 72, 122–23 (2021).

100. Kyler Baier, *Replacing What Works with What Sounds Good: The Elusive Search for Section 230 Reform*, 26 ILL. BUS. L.J. 40, 43 (2021).

101. *See* Anderson, *supra* note 99, at 123.

102. *Id.*

103. *See id.* at 123–25.

104. *See infra* Part III.A.

105. *See* Simona Shirazi, *Speech in the Digital Age: A First Amendment Analysis of California's Age-Appropriate Design Code*, 54 GOLDEN GATE U. L. REV. 137, 151 (2024).

106. *See 2023 State Children's Privacy Law Tracker: Tracking U.S. State Children's Data Privacy Legislation.*, HUSCH BLACKWELL (last updated June 24, 2024) [hereinafter *State Legislation Tracker*], https://www.huschblackwell.com/2023-state-childrens-privacy-law-tracker [https://perma.cc/2WXH-Z2AY].

107. *Id.*

108. *See* Press Release, Ed Markey, U.S. Sen., Sens. Markey and Cassidy Reintroduce COPPA 2.0, Bipartisan Legis. to Protect Online Priv. of Children and Teens (May 3, 2023), https://www.markey.senate.gov/news/press-releases/senators-markey-and-cassidy-reintroduce-coppa-20-bipartisan-legislation-to-protect-online-privacy-of-children-and-teens [https://perma.cc/9XMR-G9ED].

federal efforts to legislate in this area.[109] A major current tension involves the legal difference between content and design: Laws aimed at regulating design often overreach into regulating content.[110]

Many states have their own online privacy and consumer protection laws that bolster federal protections.[111] The same is true for children's online privacy, which has seen a rush of activity in recent years.[112] Most prominent among these is the California Age-Appropriate Design Code Act (CAADCA),[113] which was passed in 2022 and was scheduled to take effect in 2024.[114] The CAADCA is a comprehensive bill aimed at "promot[ing] privacy protections for children" and "promot[ing] innovation by businesses . . . in a manner that recognizes the distinct needs of children at different age ranges."[115] It aims to achieve these goals through a number of means including by compelling businesses to create "data protection impact assessments" (DPIA) on the risks of (1) their product or design "exposing children to harmful . . . content,"[116] (2) their algorithms harming children,[117] and (3) their use of targeted advertisements harming children.[118] Businesses must then create a "timed plan to mitigate or eliminate the risk" before allowing children to access their products.[119] Notably, the CAADCA does not include a definition of "harm" and instead leaves this term open to interpretation by the businesses subject to it.[120]

The CAADCA is noteworthy not only for its comprehensiveness, but also for its backlash from the tech industry.[121] In the 2024 case *NetChoice, LLC v. Bonta*, a group of tech giants—including Amazon, Google, Meta, Netflix, and X—brought suit against the state of California to strike down the CAADCA on First Amendment grounds.[122]

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109. *See, e.g.*, Kids Online Safety Act, H.R. 7891, 118th Cong. (2024).

110. *See* Caitlin Burke, Christina Lee & Jennifer King, *KOSA's Path Forward: Distinguishing Design from Content To Maintain Free Speech Protections*, TECH POL'Y PRESS (Oct. 1, 2024), https://www.techpolicy.press/kosas-path-forward-distinguishing-design-from-content-to-maintain-free-speech-protections [https://perma.cc/73LA-UY2K] (distinguishing between "design features" and "personalized recommendation systems").

111. *See US State Privacy Legislation Tracker 2024: Comprehensive Consumer Privacy Bills*, INT'L ASS'N OF PRIV. PROS. (July 24, 2024), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/DWE8-HAFP].

112. *State Legislation Tracker*, *supra* note 106.

113. Jesús Alvarado & Dean Jackson, *The California Age Appropriate Design Code Act May Be the Most Important Piece of Tech Legislation You've Never Heard Of*, TECH POL'Y PRESS (July 9, 2024), https://www.techpolicy.press/the-california-age-appropriate-design-code-act-may-be-the-most-important-piece-of-tech-legislation-youve-never-heard-of/ [https://perma.cc/R6VX-9VKR].

114. *Id.*

115. A.B. 2273, 2021–2022 Leg., Reg. Sess. § 1(b)–(c) (Cal. 2022).

116. *Id.* § 1798.99.31(a)(1)(B)(i).

117. *Id.* § 1798.99.31(a)(1)(B)(v).

118. *Id.* § 1798.99.31(a)(1)(B)(vi).

119. *Id.* § 1798.99.31(a)(2).

120. *See id.* § 1798.99.30.

121. Gabby Miller, *Constitutionality of California's Child Online Safety Law Disputed in Court of Appeals*, TECH POLICY PRESS (July 18, 2024), https://www.techpolicy.press/constitutionality-of-california-child-online-safety-law-disputed-in-court-of-appeals/ [https://perma.cc/G8X3-R2GW].

122. NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024), *aff'd in part, vacated in part*, 170 F.4th 744 (9th Cir. 2026).

After two years of litigation, the United States Court of Appeals for the Ninth Circuit affirmed a lower court's granting of a preliminary injunction of the law, finding that certain provisions of the CAADCA would "likely fail[] strict scrutiny" and, consequently, violate the First Amendment.[123] Specifically, the Ninth Circuit took issue with the law's DPIA requirement, stating that it "compel[led] speech" and "deputize[d] private actors into censoring speech based on its content."[124] Furthermore, the *Bonta* court questioned whether the CAADCA took the "least restrictive means" to achieve its goal of protecting children[125] and found the law's provisions to be "worded at such a high level of generality" that it provided no guidance for businesses to determine what content might be "harmful" to children.[126] Based on this vagueness, the Ninth Circuit found that the disclosure regime created by the CAADCA relied on "highly subjective opinions about content-related harms to children."[127] While the Ninth Circuit remanded the case for further consideration of certain provisions that may not trigger strict scrutiny due to First Amendment concerns, the court left intact the preliminary injunction against the enforcement of the DPIA provision of the CAADCA.[128]

The *Bonta* decision was not the first time a court questioned social media regulation because of First Amendment concerns.[129] Just one month prior, the United States Supreme Court held in *Moody v. NetChoice, LLC*, that Texas and Florida state laws restricting social media platforms' ability to engage in content moderation (i.e., filtering, prioritizing, or removing user content) likely violated the First Amendment.[130] The Court reasoned that social media companies are "private actors" and that their compilation of users' posts via algorithms and content moderation "create a distinctive expressive offering."[131] Accordingly, the Court likened content moderation policies to "editorial discretion" and held that social media companies cannot be compelled to show messages in their users' feeds that the companies do not wish to show.[132] Taken together, these two decisions, *Bonta* and *Moody*, convey courts' hesitance toward government-compelled regulation of content on social media, even when government interests, like the protection of children online, are present.[133]

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123. *Id.* at 1121; *see also* Reno v. ACLU, 521 U.S. 844, 870–74 (1997) (holding that certain provisions of the Communications Decency Act of 1996 violated the First Amendment because they chilled protected speech and were not narrowly tailored); ACLU v. Ashcroft, 322 F.3d 240, 251 (3d Cir. 2003) (holding that the "harmful to minors" language in the Child Online Protection Act of 1998 was not narrowly tailored and therefore failed strict scrutiny), *aff'd*, 542 U.S. 656 (2004).

124. *Bonta*, 113 F.4th at 1121.

125. *Id.*

126. *Id.* at 1122.

127. *Id.*

128. *Id.* at 1125.

129. David Greene, *In These Five Social Media Speech Cases, Supreme Court Set Foundational Rules for the Future*, ELEC. FRONTIER FOUND. (Aug. 14, 2024), https://www.eff.org/deeplinks/2024/08/through-line-supreme-courts-social-media-cases-same-first-amendment-rules-apply [https://perma.cc/7GAN-YUKA].

130. 144 S. Ct. 2383, 2390 (2024).

131. *Id.* at 2391.

132. *Id.*

133. The State of California argued it had an interest in protecting children from harm and the Ninth Circuit still invalidated the challenged provisions on First Amendment grounds. *Bonta*, 113 F.4th at 1121. Likewise, Texas argued an interest in preventing viewpoint discrimination and ensuring diversity of viewpoints

D. Kids Online Safety Act (KOSA)

Despite the legal setback in the Ninth Circuit, and the Supreme Court's hard-line stance on content moderation regulation, many states have pressed forward in passing their own age-appropriate design codes.[134] Congress has also been keen to legislate in this space, as seen by the advancement of both an updated COPPA and KOSA.[135] In July 2024, the Senate overwhelmingly passed the bipartisan KOSA[136] aimed to "protect the safety of children on the internet."[137] KOSA is similar to the CAADCA in a number of ways, most notably in its use of the word "harm,"[138] its reporting requirements,[139] and its control over online content.[140] KOSA is more expansive than COPPA in that KOSA would regulate the relationship between social media companies and "minors"—defined as an individual under seventeen years of age.[141]

If enacted, Section 102 of KOSA would establish a duty of care for "high impact online companies" to prevent "harm to minors" in their design.[142] KOSA's definition of "harm" includes mental health disorders as defined by the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") like anxiety, depression, and eating disorders.[143] Importantly, the DSM-5 lists "gender dysphoria" as a mental disorder, which is often, but not always, experienced by trans individuals.[144] KOSA's

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on social media, but that interest was also inadequate to survive a First Amendment challenge. *Moody*, 144 S. Ct. at 2391.

134. *State Legislation Tracker*, *supra* note 106.

135. Press Release, U.S. Senate Comm. on Com., Sci., & Transp., Senate Overwhelmingly Passes Children's Online Privacy Legislation (July 30, 2024), https://www.commerce.senate.gov/press/dem/release/senate-overwhelmingly-passes-childrens-online-privacy-legislation/ [https://perma.cc/G8WL-6G25].

136. Mary Clare Jalonick & Barbara Ortutay, *Senate Passes Bill To Protect Kids Online and Make Tech Companies Accountable for Harmful Content*, ASSOCIATED PRESS (July 30, 2024, at 16:34 ET), https://apnews.com/article/senate-child-online-safety-vote-f27c329679feb2d74787fc3887aa710f [https://perma.cc/5W89-7AKF]. *But see* Ben Brody, *Kids Online Safety Bill Supporters Bring the Fight to Johnson*, PUNCHBOWL NEWS (Oct. 10, 2024), https://punchbowl.news/article/tech/kosa-proponents-take-advocacy-direct-to-mike-johnson-home-turf/ [https://perma.cc/AMD7-LUGJ] (describing the difficulty KOSA is facing in the House); Justin Jendrix, *US House Subcommittee Advances 18 Child Online Safety Bills*, TECH POLICY PRESS (Dec. 13, 2025), https://www.techpolicy.press/house-subcommittee-advances-18-child-online-safety-bills/ [https://perma.cc/A4Q4-UZEE] (reporting the reintroduction of KOSA in the 2025–2026 legislative session).

137. Kids Online Safety Act, H.R. 7891, 118th Cong. (2024).

138. *Id.* § 102(a).

139. *Id.* § 105(a).

140. *Id.* § 101(4)(F) (including "personalized recommendation systems" in its definition of "design feature").

141. *Id.* § 101(9).

142. *Id.* § 102(a).

143. KOSA defines "mental health disorder" as equivalent in meaning to "mental disorder" in the DSM-5. *See id.* § 101(7).

144. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 491 (5th ed. 2013).

definition of "design" of online platforms includes personalized algorithms showing targeted content based on data the social media company has collected.[145]

Section 103 of KOSA would require that default privacy settings for users who are known to be minors provide the "most protective level of control that is offered by the platform."[146] KOSA would provide for parental oversight over their child's social media accounts, including control over settings.[147] Section 103 of the bill would also establish standards for reporting harms, which could be done by both child-users and their parents.[148]

Section 105 of KOSA would mandate yearly reporting by companies of any "reasonably foreseeable risks of harms to minors" with an assessment of mitigation and prevention measures.[149] KOSA also includes other sections that would establish a "Kids Online Safety Council" as well as require companies to provide clear and conspicuous privacy notices.[150] The Senate-approved KOSA would be enforced by the FTC under its authority to regulate unfair and deceptive trade practices.[151] Sections 103 to 105 of KOSA could also be enforced by state attorneys general.[152] This means that a state attorney general could theoretically bring an enforcement action against a social media company for failing to account for harms to minors that the attorney general deems as "reasonably foreseeable."[153]

On its face, KOSA is a bipartisan, objective, "evidence-informed" attempt to rein in excessive data harvesting, deceptive design, "harmful" content, and more.[154] Numerous organizations, including Parents Defending Education Action and various psychological and pediatric associations, praised the bill for affirming parental rights and for protecting vulnerable children.[155] The America First Policy Institute lauded KOSA for "stand[ing] up for our children from predators, toxic content, exploitation, and more."[156] KOSA has also faced criticism and opposition on free speech and discrimination grounds from entities like the American Civil Liberties Union[157] and the

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145. H.R. 7891 § 101(4)(F); *see also* Burke et al., *supra* note 110 (detailing how algorithmic curation systems are enveloped within KOSA's definition of design).

146. H.R. 7891 § 103(a)(3).

147. *Id.* § 103(b)(2)(ii); *see also* Danielle Keats Citron & Ari Ezra Waldman, *Rethinking Youth Privacy*, 111 VA. L. REV. 1429, 1432–35 (2025) (arguing against the trend of parental rights models in youth online privacy law).

148. H.R. 7891 § 103(c).

149. *Id.* § 105(a).

150. *Id.* §§ 104, 111.

151. *Id.* § 110(a)(1).

152. *Id.* § 110(b)(1)(A).

153. *Id.* § 110(b)(1)(A).

154. *See id.* § 102(a)(1).

155. Press Release, Marsha Blackburn, U.S. Sen., What They Are Saying: The Conservative Case for the Kids Online Safety Act (Aug. 1, 2024), https://www.blackburn.senate.gov/2024/8/what-they-are-saying-the-conservative-case-for-the-kids-online-safety-act [https://perma.cc/TT7W-CVHA].

156. *Id.*

157. Press Release, ACLU, ACLU Slams Senate Passage of Kids Online Safety Act, Urges House To Protect Free Speech (July 30, 2024, at 13:00 ET), https://www.aclu.org/press-releases/aclu-slams-senate-passage-of-kids-online-safety-act-urges-house-to-protect-free-speech [https://perma.cc/J4R7-9EHJ].

Center for Democracy & Technology,[158] among others.[159] The Electronic Frontier Foundation, an influential organization formed in the 1990s as a leading techno-utopianist voice, cautioned that KOSA "gives the government the power to target services and content it finds objectionable."[160]

As illustrated by the CAADCA, KOSA is situated between the noble goal of protecting children from certain harmful design features and the slippery slope of restricting access to content and threatening free speech.[161] The bill has generated curious bedfellows[162] and reveals the complex nexus between protecting children from serious, real risks to their health and ensuring that children can still exercise their intimate privacy and develop their senses of self and identity.[163] KOSA could be implemented to limit the amount of content and information about queerness that children and teens can access, which is a dangerous potential practice in part because of powerful and persistent misinformation about queerness.[164] If children and teens only have access to information from unreliable or homophobic narrators, queer children will endure more hardship than is necessary before they can come out, while straight children will have less access to tools of tolerance.[165]

E. History of Anti-Queer Sentiment and the Recent Wave of Anti-Trans Legislation

KOSA does not exist in a vacuum—as discussed, there has recently been renewed interest in "protecting" children through legislative means.[166] In the past few years,

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158. *More Than 90 Human Rights and LGBTQ Groups Sign Letter Opposing KOSA*, CTR. FOR DEMOCRACY & TECH. (Nov. 28, 2022) [hereinafter *Groups Sign Letter Opposing KOSA*], https://cdt.org/press/more-than-90-human-rights-and-lgbtq-groups-sign-letter-opposing-kosa/ [https://perma.cc/CVT7-CUN7].

159. *See, e.g.*, Mathew Ingram, *Lawmakers Are Pushing an Online Safety Bill for Kids. Critics Have Free-Speech Concerns.*, COLUM. JOURNALISM REV. (Feb. 8, 2024), https://www.cjr.org/the_media_today/kosa_child_safety_online_zuckerberg_criticism.php [https://perma.cc/M758-87RS]; Lauren Feiner, *The Teens Lobbying Against the Kids Online Safety Act*, THE VERGE (Aug. 1, 2024, at 10:00 ET), https://www.theverge.com/24210795/kosa-kids-online-safety-act-senate-teens-student-lobby [https://perma.cc/ZLR8-3MF4].

160. Molly Buckley, *The U.S. House Version of KOSA: Still a Censorship Bill*, ELEC. FRONTIER FOUND. (May 3, 2024), https://www.eff.org/deeplinks/2024/05/us-version-kosa-still-censorship-bill [https://perma.cc/7EDR-KZUG].

161. Burke et al., *supra* note 110.

162. The American Psychological Association (APA) is one of these curious bedfellows. For example, the APA affirms that gender-affirming care for minors is essential for ensuring mental health for trans kids. *See* Press Release, Am. Psych. Ass'n, APA Adopts Groundbreaking Policy Supporting Transgender, Gender Diverse, Nonbinary Individuals (Feb. 28, 2024), https://www.apa.org/news/press/releases/2024/02/policy-supporting-transgender-nonbinary [https://perma.cc/9YLG-N2HT]. Yet the APA also supports KOSA, a bill steeped in parental rights rhetoric from the culture war that this Comment argues can easily be weaponized at the expense of trans kids' mental health. Amy Novotney, *Kids Online Safety Act: APA Leads More than 200 Advocates in Urging Senate To Pass Bill*, AM. PSYCH. ASS'N (July 18, 2023), https://www.apa.org/news/apa/2023/kids-online-safety-act-senate-letter [https://perma.cc/74PG-CWNZ].

163. *See infra* Part III.B.

164. *See infra* Part II.E.1.

165. *Groups Sign Letter Opposing KOSA*, *supra* note 158.

166. Kimberly Jade Norwood & Jaimie Hileman, *The Tragic Costs of "Protecting" Trans Youth*, 73 WASH. U. J.L. & POL'Y 203, 204 (2024).

anti-queer and particularly anti-trans rhetoric has entered the mainstream of the culture war.[167] In 2023 alone, over four hundred bills were introduced at various levels of government that targeted the trans community.[168] In 2024, candidates for public office across the country ran on explicitly anti-trans platforms.[169] Much of the culture war around trans identity feels familiar, including disputes over which gendered bathrooms trans people can use,[170] concerns over which gender category trans athletes can compete in,[171] and questions of whether employers can terminate workers based on their trans identity.[172] But the moral panic of today is even more familiar: the fear of children being "groomed" into a queer or trans lifestyle.[173] While today this fear manifests in debates over parental rights,[174] access to gender-affirming care for minors,[175] and children's exposure to drag queens,[176] the core of this panic over the socialization of children into queerness—"turning" them queer—has existed for centuries.[177] This Comment argues that legislators and regulators must be mindful of this rhetorical history and should craft bills in a way that limits the law's ability to be co-opted by this narrative through moral enforcement.[178]

1. Tracing the Longstanding Moral Panic over Queerness and Children

Author and Professor Clifford Rosky traces this lineage of fear regarding queerness and children in *Fear of the Queer Child*.[179] Moral concern around socializing children into queerness can be found as far back as ancient Greece and persisted through the

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167. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting) (highlighting the recent backlash to transgender rights); Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 967 (2024) [hereinafter Skinner-Thompson, *Trans Animus*].

168. Norwood & Hileman, *supra* note 166, at 204.

169. *See, e.g.*, Julia Mueller, *Missouri Candidate Blasted for Anti-LGBTQ Videos Loses Primary*, THE HILL (Aug. 7, 2024, at 12:47 ET), https://thehill.com/homenews/campaign/4816196-missouri-anti-lgbtq-primary/ (on file with the Temple Law Review).

170. Matt Lavietes, *Transgender Bathroom Bills Are Back. Does the Nation Care?*, NBC NEWS (Feb. 3, 2024, at 07:00 ET), https://www.nbcnews.com/nbc-out/out-politics-and-policy/transgender-bathroom-bills-are-back-nation-care-rcna137014 [https://perma.cc/BW49-SFAX].

171. Michael J. Higdon, *LGBTQ Youth and the Promise of the Kennedy Quartet*, 43 CARDOZO L. REV. 2385, 2399–400 (2022).

172. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

173. *See generally* Clifford J. Rosky, *Fear of a Queer Child*, 61 BUFF. L. REV. 607 (2013) (archiving the historical antecedents to today's culture war flashpoints).

174. Dara E. Purvis, *Gender-Affirming Care and Children's Liberty*, 15 CONLAWNOW 155, 164–65 (2024) [hereinafter Purvis, *Gender-Affirming Care*] (discussing the parental rights argument in gender-affirming care bans and how it can both help and harm trans children).

175. *Compare* Brandt v. Rutledge, 47 F.4th 661, 672 (8th Cir. 2022) (affirming injunction against Arkansas law banning gender-affirming care for minors), *with* L.W. v. Skrmetti, 83 F.4th 460, 480–81 (6th Cir. 2023) (holding gender-affirming care bans for minors do not violate the Equal Protection Clause), *aff'd sub nom.* United States v. Skrmetti, 145 S. Ct. 1816 (2025).

176. Ashley Cerrentano, *Miss Anita Lawya: Drag Bans and the Erosion of Rights and Erasure of the LGBTQIA+ Community*, 92 UMKC L. REV. 407, 408 (2023).

177. Rosky, *supra* note 173, at 620–21.

178. *See infra* Part III.B.

179. Rosky, *supra* note 173, at 618–25.

Middle Ages.[180] These fears mainly concerned sexual seduction, initiation into queerness by teachers, and the idea that queerness had to be "passed on from one generation to the next."[181] These early articulations of the dominant society's fear of socializing children into queerness map neatly onto the present moral panic.[182]

As concepts of "homosexuality" and the "child" became more concrete in the early twentieth century[183] so too did the fear of the queer child. By the 1930s, narratives framing queer people as child molesters took hold, rooted in the ancient fear of "passing on" homosexuality to a new generation.[184] This "recruitment" narrative was enshrined in legislative documents in the United States in the 1950s.[185] Despite this, the queer rights movement still gained some legislative and judicial victories during this time.[186] For example, throughout the 1950s and 1960s, the Supreme Court refused to apply obscenity laws to "homosexual" content in magazines, solidifying several legal victories for both First Amendment and queer activists alike.[187] However, just as queerness gained the slightest bit of legal ground, cisheterosexuality was quick to reassert its social and legal dominance.[188]

In the 1970s, notable anti-gay rights activist Anita Bryant gained fame for her "Save Our Children" campaign, which attacked a Miami-Dade County antidiscrimination ordinance that recognized queer Floridians as equal under the law, and other laws like it, by proselytizing the idea that "nothing should be done to harm children."[189] Bryant's "Save Our Children" campaign called back to long-held tropes about gay male recruitment, sexual seduction, and sexual exploitation of children.[190] These ideas and fears, which had developed since ancient Greece, seemed plausible to American voters in the 1970s.[191] So plausible, in fact, that the antidiscrimination ordinance Bryant's campaign protested against was repealed by voters just six months after it was passed.[192]

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180. *Id.* at 618–19.

181. *Id.* at 621.

182. *See id.* at 618.

183. *See* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 56 (2008) ("At the same time that Americans were growing obsessively concerned about protecting children from sexual abuse, they constructed the image of the (male) homosexual as a predator victimizing their sons and daughters."); John D'Emilio, *Capitalism and Gay Identity*, *in* THE LESBIAN AND GAY STUDIES READER 467, 468 (Henry Abelove, Michele Aina Barale & David M. Halperin eds., 1993).

184. Rosky, *supra* note 173, at 630–31.

185. *See, e.g.*, SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, INTERIM REPORT: EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT 4 (1950) (warning of the "young and impressionable people who might come under the influence of a pervert").

186. Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 883–86 (2018).

187. *Id.*; *see* One, Inc. v. Olesen, 241 F.2d 772, 777 (9th Cir. 1957) (holding that the postal service could refuse service to a magazine dedicated to queer issues based on an obscenity argument), *rev'd*, 355 U.S. 371 (1958) (per curiam); *see also* Manual Enters., Inc. v. Day, 370 U.S. 478, 489–91 (1962) (holding that male physique publications could not be subject to obscenity regulations because they were not patently offensive despite their appealing to gay, male audiences).

188. *See* Rosky, *supra* note 173, at 636 ("Social movements often beget backlashes.").

189. Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL'Y 125, 144 (2013).

190. *Id.* at 145.

191. *Id.* at 149.

192. Rosky, *supra* note 173, at 646.

These ancient tropes parroted by the "Save Our Children" campaign even found their way into the Supreme Court's dissenting opinion in *Ratchford v. Gay Lib*, where Justice Rehnquist entertained the notion that queerness would spread if a gay student group was allowed on a university campus.[193]

Unfortunately, Bryant's "Save Our Children" campaign successfully modernized the ancient fears around queerness and children.[194] In the 1990s, concerns around "[h]omosexual indoctrination" led to the repeal of antidiscrimination laws in Colorado.[195] And, in an infamous decision, the Supreme Court relied on a version of this ancient fear to allow the Boy Scouts of America to fire employees and volunteers on the basis of their sexual orientation, claiming that the Boy Scouts had a recognizable interest in excluding gay men from serving as "role models" for young boys.[196]

The ancient fears around queerness and children are also deeply linked to the current moral panic surrounding transgender children.[197] Societal concern over deviant gender roles has an equally long history that is intertwined with the history of moral panic over queerness—with men being criminally charged for presenting as women being the classic example of this panic.[198] Often, the fear over queerness and children can be articulated through a fear of trans identity.[199] In this sense, fears over "turning" children trans represent a thread of logic in this long history of fearing children's exposure to queerness.[200] As societal attitudes shift toward acceptance of cisgender queer people, the dominant culture returns to one of its core anxieties—nonnormative gender.[201] The recent focus on protecting children from the "harm" of trans people is simply a rearticulation of the same fear.[202]

2. Case Studies of Anti-Trans Legislation: Don't Say Gay and Drag Bans

The twenty-first century saw an explosion of anti-trans sentiment, especially relating to children.[203] For exemplification purposes, this Comment highlights two recent

193. Ratchford v. Gay Lib, 434 U.S. 1080, 1083–84 (1978) (Rehnquist, J., dissenting).

194. Rosky, *supra* note 173, at 647 ("Bryant's campaign marked the beginning of a religious conservative backlash against the LGBT movement.").

195. *Id.* at 649–50 (quoting Colorado for Family Values, *Equal Rights—Not Special Rights*, at 2 (1992), *reprinted in* Robert Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167, 193 (1997)).

196. Boy Scouts of Am. v. Dale, 530 U.S. 640, 652 (2000) (holding that the Boy Scouts had a First Amendment right to expressive association that allowed them to fire people with whom they did not want to associate with).

197. Rosky, *supra* note 173, at 659 (referring to the "parallel fears" of homosexuality and gender variance).

198. *See* ALLI JERNOW, GENDER IDENTITY AND JUSTICE: A COMPARATIVE LAW CASEBOOK 159 (Robert Archer ed., 2011).

199. *See* Rosky, *supra* note 173, at 622.

200. *Id.* at 622.

201. *Id.* at 659 ("During the 1990s, opponents of LGBT rights shifted away from explicit claims about children's homosexuality, in favor of increasingly vague claims about children's variance from traditional gender roles and identities.").

202. *Id.* ("In the long arc of history, this trend is decidedly recent, but it reminds us that anything old can be new again: after all, the specific fear of children becoming 'homosexual' is barely more than a century old, and even now, it is routinely conflated with parallel fears of children becoming gender variant.").

203. Skinner-Thompson, *Trans Animus*, *supra* note 167, at 967–68.

examples of state legislation that aim to "protect" children from the "harms" associated with queer identity.[204] This discussion also shows how these pieces of legislation are connected to the longstanding fears of queerness around children discussed previously.[205] In Section III, this Comment notes that each of these state laws has a dual impact: moral enforcement and chilling effects.[206] This Part explores the laws as follows: (1) Florida's "Don't Say Gay" law, which is intended to reaffirm parental rights in education;[207] then, (2) Tennessee's law banning "adult entertainment" for children.[208]

In 2022 the Florida legislature passed the Parental Rights in Education Act, often referred to as the "Don't Say Gay" law.[209] The law became famous for its prohibition on classroom discussion of sexual orientation and gender identity, as well as its mandate requiring teachers to inform parents if students "come out" to school employees.[210]

While these provisions are frightening enough, the context of the law's passage is even more troubling.[211] Statements from Florida legislators reveal that the central motivation for the law's passage was to prevent the "grooming" of children.[212] Describing the bill as an "[a]nti-[g]rooming" measure, Florida Governor Ron DeSantis's press secretary confirmed that "anyone who wants to teach kids . . . about sex—particularly over parental objections—is creating an environment where grooming can easily occur."[213] For his part, Governor DeSantis asserted that teachers are "trying to sow doubt in kids about their gender identity" by teaching materials that are inappropriate for children.[214] In this way, ancient rhetoric around the dangers of "passing on" queerness, particularly in spaces of education, formed the logical basis of Florida's "Don't Say Gay" law.[215]

Despite limited enforcement of the law by Florida's attorney general, teachers have reported changing their curricula, removing books from their libraries, and being less open to discussing queerness with their students in response to the legislation's

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204. *See infra* Part III.A.1. To be clear, this author is only highlighting two examples of anti-trans legislation and is not undertaking a survey.

205. *See* Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 460–61 (2024) [hereinafter Purvis, *Transgender Students*].

206. *See infra* Part III.A.2–3.

207. H.B. 1557 § (1)(8)(c)(1)–(3), 2022 Leg., Reg. Sess. (Fla. 2022).

208. S.B. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

209. Meredith Johnson, *The Dangerous Consequences of Florida's "Don't Say Gay" Bill on LGBTQ+ Youth in Florida*, GEO. J. GENDER & L., Summer 2022, at 1, 2.

210. H.B. 1557 § (1)(8)(c)(1)–(3).

211. Brooke Migdon, *Gov. DeSantis Spokesperson Says 'Don't Say Gay' Opponents Are 'Groomers*,*'* THE HILL (Mar. 7, 2022), https://thehill.com/changing-america/respect/equality/597215-gov-desantis-spokesperson-says-dont-say-gay-opponents-are/ [https://perma.cc/WWY7-P9J4].

212. *Id.*

213. *Id.*

214. *What Is Law Critics Have Dubbed 'Don't Say Gay'?*, ASSOCIATED PRESS (Mar. 29, 2022, at 01:05 ET), https://apnews.com/article/health-lifestyle-education-florida-ron-desantis-322e0a40da909f48954b8b1bd9190750 [https://perma.cc/B2UJ-VD34].

215. Kelly Hayes, *'Gay Is Not a Permanent Thing': Legislature Passes Bill To Restrict LGBTQ Topics in Elementary Schools*, FLA. POL. (Mar. 9, 2022), https://floridapolitics.com/archives/505744-gay-is-not-a-permanent-thing-legislature-sends-controversial-parental-rights-bill-to-governor/ [https://perma.cc/G4MT-CZBP] (quoting a Florida legislator sarcastically calling the law the "'[d]on't turn my son into a daughter' bill"); Rosky, *supra* note 173, at 620–21.

passage.[216] This is likely due to the bill's chilling effects as noncompliance can result in the loss of a job or a lawsuit from a parent.[217] Some critics of the "Don't Say Gay" law have called it an unconstitutionally vague restriction on free speech.[218] Others take issue with the rhetorical conflation of discussing sexuality and gender identity with an inherently *sexual* discussion that is inappropriate for minors.[219]

In Tennessee, state legislators passed the Adult Entertainment Act, which forbids certain performances that are "harmful to minors" from being staged where a minor could witness the performance.[220] The law includes drag performances and "male or female impersonators" in its list of performances that are considered harmful to minors.[221] This "drag ban" rests upon the same logic or fear of queer people wanting to "turn" children queer.[222] The conservative anxieties around grooming and indoctrinating children into queerness—spreading "gender ideology" to young kids—are the logical fallacy with which this law justifies itself.[223] In doing so, many commentators have suggested that the bill does more than ban drag shows—it criminalizes presenting as trans in public.[224] Similar to Florida's "Don't Say Gay" law, chilling effects in Tennessee have set in despite limited enforcement of the bill.[225]

In 2024 the operator of a drag show production company challenged the Tennessee law on First Amendment grounds.[226] The reviewing district court found the law to be unconstitutionally vague in violation of the First Amendment,[227] but the Sixth Circuit Court of Appeals reversed the decision on standing grounds.[228] In doing so, the Sixth Circuit held that "there is no constitutional interest in exhibiting indecent material to minors."[229] This holding equates presentations of gender variance and gender nonconformity to "indecent material" that is not suitable for children—in fact, it asserts that this material is harmful to children.[230] In so doing, the Sixth Circuit maintains the

216. Hunter Foist, *Keep Saying Gay: How Nationwide "Don't Say Gay" Bills Violate the First Amendment, Chill Protected Speech, and Hinder Public Health Outcomes*, 21 IND. HEALTH L. REV. 177, 180–82 (2024).

217. H.B. 1557 § (1)(8)(c)(7)(b)(II), 2022 Leg., Reg. Sess. (Fla. 2022).

218. Foist, *supra* note 216, at 181.

219. Purvis, *Transgender Students*, *supra* note 205, at 460–64. Importantly, a lawsuit settlement in the Eleventh Circuit nullified many of the most concerning aspects of the law and clarified that the law is not a license to discriminate. Cielo Sunsarae, *Historic Settlement Achieved in Challenge to Florida's "Don't Say Gay or Trans" Law*, EQUAL. FLA. (Mar. 11, 2024), https://eqfl.org/historic-settlement-achieved-challenge-floridas-dont-say-gay-or-trans-law [https://perma.cc/6SNB-B8LD].

220. S.B. 3, 113th Gen. Assemb., Reg. Sess. § 1(A) (Tenn. 2023).

221. *Id.*

222. Rosky, *supra* note 173, at 608; *see* Cerrentano, *supra* note 176, at 420 (referring to Tennessee's Adult Entertainment Act as a "drag ban").

223. Cerrentano, *supra* note 176, at 420.

224. *Id.* at 421.

225. *Id.* at 408.

226. Friends of George's, Inc. v. Mulroy, 108 F.4th 431, 434 (6th Cir. 2024), *cert. denied*, 145 S. Ct. 1178 (2025).

227. *Id.*

228. *Id.* at 438.

229. *Id.*

230. *Id.*

ancient fear that exposure to queer content and queer people is inherently harmful to children and provides support for the notion that trans people are "making their children trans."[231]

Florida's "Don't Say Gay" law and Tennessee's "drag ban" are just two examples of morals-based legislation deeply entrenched in the current culture war.[232] As explained, this culture war against trans people may seem new, but this war has waged for centuries.[233] These two state laws, enforceable by their respective state attorneys general, are instructive as to how KOSA could be wielded when enforcement power is placed in conservative hands.[234] Moreover, these two bills illustrate the chilling effects that legislation can produce—one of the unintended consequences Section III discusses.[235]

III. DISCUSSION

The stakes could not be higher when it comes to regulating online privacy. As our lives become increasingly digital, the need for robust protections of our digitized selves becomes more and more clear.[236] The current privacy debate situates itself along a binary—digital society can have robust privacy protections or free speech, but not both.[237] KOSA sits along this same binary.[238] This Comment exposes this binary as false and utilizes the idea of intimate privacy to provide more nuance to the current conversation.[239] While protecting children from third-party misuse of their personal data, addictive design features, and behavioral advertising does serve the interest of protecting children's data privacy and personal information, giving regulators and parents control over what content is considered "harmful" to children runs the risk of violating children's intimate privacy.[240] This intimate privacy risk has the potential to be realized in three ways: (1) through KOSA's definition of harm, (2) through chilling effects on media platforms, and (3) through moral enforcement by state attorneys general and parents. Instead, as this Comment shows, focusing the debate on protecting intimate privacy might allow legislators to advance important safeguards for children online while also

231. *See* Purvis, *Transgender Students*, *supra* note 205, at 463.

232. *See generally* Foist, *supra* note 216 (providing more examples of morals-based legislation aimed at trans youth).

233. *See generally* Rosky, *supra* note 173 (discussing the history of this moral panic).

234. *See* Paxton Texana, *State Attorneys-General Are Shaping National Policy*, THE ECONOMIST (Feb. 8, 2024), https://www.economist.com/united-states/2024/02/08/state-attorneys-general-are-shaping-national-policy (on file with the Temple Law Review).

235. *See infra* Part III.A.3.

236. *See* Scott Skinner-Thompson, *Agnostic Privacy & Equitable Democracy*, 131 YALE L.J.F. 454, 454–56 (2021).

237. *See* CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 144–47.

238. *See* Burke et al., *supra* note 110.

239. *See* Aziz Z. Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post-Roe Era*, 98 N.Y.U. L. REV. 555, 560–63 (2023) (utilizing the idea of sexual privacy to show the complexity in safeguarding digital privacy for pregnant people).

240. *See* Angel & boyd, *supra* note 19, at 93–94 (showing the risk of the overbroad use of "harm" and how this could be used to remove queer content).

ensuring they still have space to experiment and be themselves.[241] Protecting the freedom of expression is an integral component in the assurance of privacy online.[242]

As of now, much of the relevant case law and discussion around KOSA, and similar bills, focuses on freedom of speech.[243] For example, the court in *Bonta* overturned the CAADCA's reporting requirement for overbroadness, vagueness, and compelling speech.[244] Meanwhile, the Supreme Court struck down content moderation restrictions in *Moody* based on the idea that social media feeds are "expressive" outputs.[245] As Section II states, these two cases suggest that KOSA, if passed, could be overturned on First Amendment grounds.[246] While this would eliminate the risk of moral enforcement of KOSA by state attorneys general, it might not prevent the chilling effects of the law from sinking in.[247] Moreover, it misses the point: Tech companies can and should be regulated, but not at the expense of freedom of expression and self-actualization.[248] Basing decisions and critiques on free speech grounds alone misses an opportunity to highlight the complex issue before us: How do we regulate big tech platforms to ensure the safety of users while also ensuring users' liberty interests in accessing content, connecting with others, and learning about themselves?

This task is immense, and this Comment does not propose a practical solution. Rather, this Comment argues that lawmakers, social media companies, and regulators should utilize the idea of intimate privacy as a touchstone in how they draft and enforce laws.[249] This is because protecting intimate privacy inherently protects First Amendment freedoms while also insulating people from discrimination and harassment.[250] As Professor Citron theorizes, not every clash between privacy rights and speech rights must end in an absolute victory for the freedom of speech.[251] The privacy tradeoffs and balancing tests that are constantly considered should always center intimate privacy as a way to protect both privacy and speech.[252] KOSA is just one example of this—while this Comment utilizes KOSA as a tool to illustrate the dangers associated with its potential passage, these dangers persist in many other bills and enforcement actions.[253]

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241. *See infra* Part III.B.1.

242. CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 147 (arguing that free speech and intimate privacy "reinforce each other").

243. *See, e.g.*, Buckley, *supra* note 160.

244. *See* NetChoice, LLC v. Bonta, 113 F.4th 1101, 1121–22 (9th Cir. 2024), *aff'd in part, vacated in part*, 170 F.4th 744 (9th Cir. 2026).

245. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2404–05 (2024).

246. *See supra* Part II.C.2.

247. *See* Anderson, *supra* note 99, at 123.

248. *See* Citron, *Intimate Privacy's Protection*, *supra* note 44, at 13 (arguing that social media platforms can and should be required to protect intimate privacy).

249. *See infra* Part III.B.

250. *See* CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 128–30.

251. *Id.* at 122–23.

252. *See id.* at 125–26.

253. *See generally* MÜGE FAZLIOGLU, US FEDERAL PRIVACY LEGISLATION TRACKER, INT'L ASS'N OF PRIV. PROS. (2025), https://iapp.org/media/pdf/resource_center/us_federal_privacy_legislation_tracker.pdf [https://perma.cc/4A5B-WFD6] (tracking various legislative proposals in the realm of children's privacy).

A. KOSA's Potential Threat of Culture War Co-optation

KOSA is a facially neutral bill aimed at the universally accepted goal of protecting one of the most vulnerable populations: children.[254] But look beneath the surface and troubling commonalities between KOSA and other culture-war-entrenched laws emerge.[255] This Comment does not argue that KOSA was drafted with the explicit goal of preventing children from accessing queer and trans content and therefore preventing kids from exercising intimate privacy. Instead, this Comment argues that this is a potential effect of the bill. The three main reasons for this are the bill's (1) statutory definition of harm, (2) enforcement mechanism, and (3) potential chilling effects.

But before this is developed further, it must be made clear how the culture war has already rallied behind KOSA.[256] For example, then-director of the Heritage Foundation's Tech Policy Center noted that KOSA will offer parents a chance to fight back against the "predations" of big tech.[257] This statement aligns KOSA with the culture war in two ways. First, it draws on the longstanding fears that queer people prey on children, causing them harm.[258] Second, it highlights how KOSA affirms parental rights, a hot topic among anti-queer culture war voices.[259] This is but one of many examples of how those at the center of culture war praise KOSA.[260]

1. How KOSA Defines Harm

Although the connection between the culture war and KOSA may seem obvious from the statements this Comment has highlighted, the bill is a bipartisan effort that does not necessarily read as a culture-war bill in the way that Tennessee's "drag ban" does.[261] However, key to understanding the threat KOSA poses is understanding how the law defines harm. Section 102 of KOSA requires social media companies to protect children from "harms," including both "mental health disorders" as well as "sexual exploitation."[262] While Section 102 of KOSA provides a few examples of the referenced "mental health disorders," Section 101 of KOSA simply states that this term is to be treated as consistent with what the DSM-5 defines as mental health disorders.[263] The DSM-5 includes gender dysphoria in its list of mental health disorders.[264] This ambiguity means that, theoretically, KOSA requires social media companies to prevent kids from

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254. *See* Jalonick & Ortutay, *supra* note 136.

255. *See infra* Part III.A.1–3.

256. *See* Angel & boyd, *supra* note 19, at 93–94.

257. Kara Frederick (@karaafrederick), X (July 30, 2024, at 13:49 ET), https://x.com/karaafrederick/status/1818343112688730465 [https://perma.cc/KG48-9PTC].

258. Rosky, *supra* note 173, at 620–21.

259. *See* Purvis, *Gender-Affirming* Care, supra note 174, at 164–65 (discussing the parental rights argument in gender-affirming care bans and how it can both help and harm trans children).

260. As noted earlier, this is not to say that KOSA does not have support from nonculture-war sources. *See supra* Part II.D.

261. *See* Jalonick & Ortutay, *supra* note 136.

262. Kids Online Safety Act, H.R. 7891, 118th Cong. § 102(a) (2024). As previously explained, the inclusion of "sexual exploitation" in this definition of harm allows queer and trans content to be enveloped under the "ancient fear" of queer people exploiting children. *See* Rosky, *supra* note 173, at 620–21, 630.

263. H.R. 7891 § 101(7).

264. AM. PSYCHIATRIC ASS'N, *supra* note 144, at 452.

the "harm" of gender dysphoria. While gender dysphoria can certainly be harmful to the physical and emotional well-being of anyone experiencing it, this ambiguity can be weaponized by the culture war to equate trans identity and trans people with being "harmful" to children.

Ambiguity aside, culture war commentators often argue that queer and trans "indoctrination" causes anxiety and depression among children.[265] Moreover, a centuries-old argument advances that mere exposure to queer and trans people is inherently sexually exploitative, even if there is no such exploitation.[266] This argument is very much present in the modern-day culture war.[267] As the argument goes, queer and trans content could cause "harm" to children, as defined by KOSA, and thus under the law social media companies owe a duty of care to mitigate such "harm."[268] A similar logic was employed in Tennessee's drag ban, which used the term "harm" to classify all drag performances—regardless of the actual content of the performance—as detrimental to children.[269] Conversely, Florida's "Don't Say Gay" law does not explicitly use the term "harm," but the history of its passage makes clear that—in the eyes of Florida lawmakers—exposure to queer content in educational spaces harms children.[270] By relying on an overbroad definition of harm, KOSA leaves itself open to culture war co-optation, inserting the culture war's own idea of "harm" in place of a more stringent standard and censoring queer content simply for being queer, regardless of its lack of actual harm to children.[271]

2. How KOSA is Enforced

KOSA, if passed, would be enforced at the federal level by the FTC.[272] This is not a surprise given the FTC's role of de facto online privacy protector.[273] What is surprising—troubling, even—is the role of state attorneys general in enforcing KOSA.[274] Sections 103 to 105 of KOSA, which include the mandate of reporting "reasonably foreseeable harms," can be enforced by state attorneys general.[275] This means that each state could bring a lawsuit for failure to report the "harms" associated with a social media platform, as defined by KOSA.[276] However, as previously noted, KOSA leaves the definition of "harm" open to interpretation.[277] So, an attorney general from one state might not view benign queer and trans content as "sexually exploitative,"

265. See *supra* Part II.E.1 for a further discussion of these claims of "indoctrination."

266. *See supra* Part II.E.1.

267. *See* Purvis, *Transgender Students*, *supra* note 205, at 460–61.

268. *See* Shirazi, *supra* note 105, at 171 (explaining how various topics could be considered "harmful" depending on who is defining the term and how the Supreme Court has rejected this as a basis for censorship).

269. S.B. 3, 113th Gen. Assemb., Reg. Sess. § 1(A) (Tenn. 2023).

270. *See, e.g.*, Hayes, *supra* note 215.

271. Angel & boyd, *supra* note 19, at 94.

272. Kids Online Safety Act, H.R. 7891, 118th Cong. § 110(a) (2024).

273. *See* Solove & Hartzog, *supra* note 60, at 602.

274. H.R. 7891 § 110(b).

275. *Id.* §§ 105(d)(6), 110(b).

276. *See supra* Part II.D.

277. *See supra* Part III.A.1.

and therefore harmful under KOSA, whereas another state attorney general could.[278] The potential for moral enforcement—enforcement based on the morals and viewpoints of the attorney general—is a serious risk to children's intimate privacy[279] and to the free speech rights of social platforms and content creators.[280]

This risk of moral enforcement by state attorneys general has been a defining aspect of the present-day culture war.[281] For example, Florida's "Don't Say Gay" law and Tennessee's drag ban are dangerous because of the risk of enforcement by the states' attorneys general.[282] Should someone sympathetic to the queer and trans communities be in office, the risk of these laws being morally enforced diminishes greatly.

In addition to the formal enforcement mechanism in Section 110 of KOSA, the bill gives parents an inappropriate role in policing their children's social media.[283] "Parental rights" and the notion that parents should control nearly all aspects of their children's lives is one of the cornerstones of the culture war today.[284] KOSA affords parents the ability to control their child's social media settings, to limit the "types or categories of recommendations" from social media platforms, and to opt out of personalized algorithmic recommendations altogether.[285] Further, the bill allows parents to "limit the ability of other users . . . to communicate with the minor."[286] When placed against the backdrop of the culture war, it is not difficult to understand the potential dangers within these parental affordances. Given that protecting children from the "dangers" of queerness has long been an objective of parents steeped in the culture war,[287] the ability to limit access to "categories of recommendations" affords parents the right to concretize this ancient fear of queerness around children into the digital sphere.[288] Additionally, giving parents the unmitigated power to cut contact with other users could risk isolating queer children from those best equipped to support them—other kids discovering their queerness, too.

The role of parents in KOSA's enforcement is similar to Professor Citron's concept of "privacy invaders,"[289] though KOSA goes beyond privacy *invasion*. Privacy invaders monitor and surveil the intimate lives of their victims,[290] whether this be through stealthily taking nude photographs, spying on them through hidden cameras, or collecting

278. *See* Angel & boyd, supra note 19, at 93–94 (arguing that KOSA does not rise above politics).

279. *See* Shirazi, *supra* note 105, at 171 (discussing how topics like gender-affirming care could be considered "harmful" to children and yet there are children who want or need to access this content).

280. Ingram, *supra* note 159.

281. *See* Texana, *supra* note 234.

282. *See supra* Part II.E.2.

283. *See infra* Part III.B.2.

284. *See* Purvis, *Gender-Affirming Care*, *supra* note 174, at 164–65.

285. Kids Online Safety Act, H.R. 7891, 118th Cong. § 103(a)(1)(C)(i)–(iii) (2024).

286. *Id.* § 103(a)(1)(A).

287. *See supra* Part II.E.1.

288. H.R. 7891 § 103(b)(2)(A).

289. *See* CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 24–28.

290. The author is using the term victim here to mean the person who suffers harm as a result of someone else's actions. Professor Citron also uses this term in her book. *See, e.g.*, CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 25–31. The author is not suggesting that all parental supervision of children's use of social media inherently constitutes an abuser/victim relationship.

their data without their knowledge and reconstructing their digital lives.[291] The actions of privacy invaders leave their victims feeling shattered, hypervigilant, and without agency.[292] In the case of KOSA, parents would not only be able to monitor and surveil their children's online activity, but actually control the digital experience of their children.[293] This would seemingly include control over what content their children see and who their children can communicate with.[294] Through this increased access to and control over their children's intimate lives—including their messages and relationships, content feeds, and interests—KOSA effectively sanctions parents as privacy invaders on steroids.[295] In this way, KOSA is written as an intentional violation of intimate privacy, rather than a protection of such, all in the name of online "safety." This paradox between privacy and safety is a false one, as this Comment elaborates on.[296] This threat of moral enforcement from state attorneys general and parents presents a serious intimate privacy risk for young queer folk.

3. KOSA's Potential Chilling Effects

KOSA also runs the risk of chilling protected speech. Just two months after KOSA was passed by the Senate, Meta announced sweeping changes to its handling of Instagram's children and teenage users.[297] These changes include providing greater parental control over accounts and limiting accessibility to potentially sensitive content.[298] Even without its passage into law, KOSA—and the context from which it was born—has had the effect of limiting content and providing greater opportunities for parents to invade and control their children's intimate privacy.[299] Of course, Meta's actions are admirable—Instagram is censoring children from seeing videos glamorizing eating disorders and suicide, content that can be severely detrimental to children's health.[300] This type of content censorship is arguably the goal of KOSA.[301] But left unexplored are the unintended consequences that often come with bills like KOSA.

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291. *Id.* at 25–28.

292. *Id.* at 41.

293. H.R. 7891 § 103(b)(2)(A)(ii).

294. *Id.*

295. In a similar way, Florida's "Don't Say Gay" law sanctions privacy invaders by requiring teachers to report to parents when their student comes out to them. *See* H.B. 1557 § (1)(8)(c)(1)–(3), 2022 Leg., Reg. Sess. (Fla. 2022).

296. *See infra* Part III.B.

297. Angela Yang, *Instagram to Automatically Put Teens into Private Accounts with Increased Restrictions and Parental Controls*, NBC NEWS (Sep. 17, 2024, at 13:37 ET), https://www.nbcnews.com/tech/instagram-meta-teens-private-accounts-increased-restrictions-rcna171294 [https://perma.cc/PQ3C-LQBZ].

298. *Id.*

299. *See id.*

300. Daysia Tolentino, *Meta To Start Blocking Some Content from Reaching Teens on Facebook and Instagram*, NBC NEWS (Jan. 9, 2024, at 15:45 ET), https://www.nbcnews.com/tech/social-media/meta-start-blocking-content-reaching-teens-facebook-instagram-rcna133027 [https://perma.cc/9CGG-YUSG].

301. *See* Allyn, *supra* note 26 (explaining Haugen's testimony about "anorexia content" and how this animated senators during the hearing).

As explained in Part II.C.1, the passage of FOSTA-SESTA was seen as a watershed moment for enhancing online safety and protecting victims of sex trafficking.[302] But FOSTA-SESTA's good deed did not go unpunished—its effect was to censor sex workers from advertising online, forcing them into the unsafe streets.[303] In this way, FOSTA-SESTA's intended impact was narrowly targeted, and yet its actual impact was a much broader content suppression. The same risk is present with KOSA—in attempting to target "harmful" content, social media companies may preemptively censor content that is considered controversial by the present culture war (such as queer content, pro-Palestine content, pro-choice content, etc.).[304] This risk is especially heightened in light of the second Trump administration's extreme hostility toward trans rights and its sympathy toward arguments for parental rights that are predicated on the ancient fears of queerness and children.[305] When faced with a question about what content is considered "harmful" to children, history tells us that social media companies may play it safe by proactively censoring queer content.[306]

B. *Intimate Privacy Solutions: Protecting Queer Kids Online*

Part III.A elaborates on the particularized risks that KOSA presents. This comes in the form of a malleable definition of "harm" that can be weaponized by the culture war to invade, surveil, and regulate the intimate privacy of teenagers;[307] the risk of moral enforcement by state attorneys general and the outsized role parents are given in monitoring their children's social media;[308] and the potential chilling effects that are already underway.[309] But KOSA is just one bill among many disparate legal attempts at regulating social media and particularly children's use of social media.[310] The particularized risks detailed above are instructive as to what to *avoid* in the crafting of legislation. This Comment now turns to a broader discussion on how intimate privacy should be employed in the creation of online privacy bills.

Two ways in which intimate privacy may be helpful when regulating online privacy are (1) distinguishing design from content, and (2) disrupting how enforcement mechanisms invade privacy. Intimate privacy has a fundamental relationship to freedom of expression.[311] As such, this Comment argues that it should be used to aid in drawing the line between design and content—an assessment of the intimate privacy benefits that access to certain content provides to users can be a tool to distinguish content from

302. *See* Anderson, *supra* note 99, at 123 (comparing the "promises and expectations" of the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA) with its actual consequences).

303. *Id.*

304. Angel & boyd, supra note 19, at 94.

305. *See* Skinner-Thompson, *Trans Animus*, *supra* note 167, at 967–68 (detailing the recent attacks on queer and trans people).

306. *See* Angel & boyd, supra note 19, at 94.

307. *See supra* Part III.A.1.

308. *See supra* Part III.A.2.

309. *See supra* Part III.A.3.

310. *State Legislation Tracker*, *supra* note 106.

311. CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 147.

design.[312] Drawing this line will also combat the false binary between increased online protections and free speech rights.[313] This Comment also suggests that centering intimate privacy can help tailor legislative enforcement mechanisms.[314] Effectively tailoring enforcement mechanisms to provide parental oversight while protecting children's rights to intimate privacy will achieve the goals of keeping children safe online.[315]

1. Drawing the Line Between Design and Content

KOSA takes aim at design features like addictive scrolling, rewards for time spent on a platform, push notifications, targeted advertisements, and appearance-altering filters.[316] These types of design features have a demonstrated history of harming children by keeping them on the platforms, making them feel reliant on the platforms, and altering their sense of self-image and self-worth.[317] These design features are just that—design. They mediate the structure of the platform, not the content delivered through the structure.[318] Interventions aimed at addictive scrolling would not necessarily alter the content shown to children, or at least they would not categorically remove queer content from children's feeds. Rather, such interventions would disrupt the endless scroll and add more friction to the experience of using the platform.[319]

The line between design and content becomes most difficult to decipher for personalized content algorithms.[320] In a way, the algorithm is content—it uses various inferences the platform has gleaned (or purchased) about a user to deliver content it believes will be relevant to the user, with the ultimate goal of keeping the user on the platform longer.[321] One could argue that the algorithm is also design in the sense that it is a piece of technology that uses data to populate a user's feed, divorced from judgments as to the worthiness of any particular content. However, this Comment argues that the algorithm acts more like content as it is the vehicle by which content is curated for a user—the algorithm makes choices that dictate what information will be directed to a user.[322] This is an act of content decision-making so intertwined with the content itself that it is inseparable.[323] KOSA is written in a way that allows for content algorithms to

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312. *See infra* Part III.B.1.

313. CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 122–24.

314. *See infra* Part III.B.2.

315. *See infra* Part III.B.2.

316. Kids Online Safety Act, H.R. 7891, 118th Cong. § 103(a)(1)(B) (2024).

317. This assertion is contested, as described earlier in Section II. Media effects scholars disagree as to what effect media consumption has on youth and whether there is a cause-and-effect relationship between media and problematic behaviors. *See* Angel & boyd, *supra* note 19, at 91.

318. Burke et al., *supra* note 110.

319. *Id.*

320. *Id.*

321. By no means does the author suggest that targeted advertisements and the business model of selling personal data should be protected as something that fosters intimate privacy. *See id.*

322. *Id.*

323. *See* Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2390 (2024) (holding that content-curating algorithms are expressive and covered by First Amendment protections).

be regulated for "harmful" content.[324] This means that bills like KOSA go beyond simply regulating harmful design and instead regulate the content available to users.[325]

Scholars like boyd,[326] Professor Citron,[327] and Professor Scott Skinner-Thompson[328] have previously articulated the importance of access to content as it relates to identity, community, and expression. This Comment simply places children's online privacy legislation within the larger context: Requiring "harmful" content to be stripped from children's feeds makes possible the erasure of queerness and transness that has long-been a project of the culture war.[329] This project is operationalized through queer and trans content, regardless of whether it is sexual in nature, being labeled as such.[330] This then forms the basis for removing "harmful" queer content from children's feeds, as "sexual" content is either age inappropriate or detrimental to mental health.[331] Alternatively, social media companies could start pulling queer content from feeds in an attempt to preemptively police themselves and avoid scrutiny—similar to the removal of sex work content in an effort to scrub any sex trafficking content online post-FOSTA-SESTA.[332] Whether the consequence is intended or unintended, queer and trans content will face censorship if KOSA extends to content algorithms, and, ironically, many queer children will be harmed by lacking access to affirming content and information.

To be clear, this Comment does not argue that *all* content interventions should be unlawful. Children certainly should not have access to videos glamorizing eating disorders or AI bots encouraging them to commit suicide. Rather, content intervention should be lawful when *actual* harm is at stake. Intimate privacy thus serves as a tool for distinguishing what type of content intervention should be allowable.[333] In one instance, a fourteen-year-old child may access an X account glamorizing anorexia and then receive targeted ads for diet pills. Access to such content, while not the only factor, often leads children to engage in the same self-harming behavior they see online.[334] In this example, there is no affirmance of one's identity, connection to others with a shared fundamental experience, or introduction to a culture that protecting intimate privacy often preserves.[335] By contrast, a twelve-year-old child who is questioning why the world around him demands that he play football and date girls will benefit mentally and emotionally from access to videos discussing sexual orientation and gender identity. He

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324. Kids Online Safety Act, H.R. 7891, 118th Cong. § 102(a) (2024).

325. Burke et al., *supra* note 110.

326. BOYD, *supra* note 9, at 201.

327. *See* Citron, *Intimate Privacy's Protection*, *supra* note 44, at 7.

328. *See* SKINNER-THOMPSON, PRIVACY AT THE MARGINS, *supra* note 53, at 47–50.

329. *See supra* Part II.E.1.

330. *See supra* Part II.E.2.

331. *See supra* Part III.A.1.

332. *See supra* Part III.A.3.

333. *See, e.g.*, CITRON, THE FIGHT FOR PRIVACY, *supra* note 39, at 123–24 (discussing the balance between free speech and intimate privacy and why rape videos do nothing to add to public discourse).

334. Roslyn L. Gerwin & Sahar Ashraf, *The Impact of Social Media Use on the Development of Eating Disorders*, 72 PEDIATRIC CLINICS N. AM. 203, 204–05 (2025).

335. *See* SKINNER-THOMPSON, PRIVACY AT THE MARGINS, *supra* note 53, at 47–50 (arguing that privacy is essential to identity formation and the incubation of future speech).

may learn that, despite what he has been told, there is another way to live his life that is equally lawful and causes no harm. In fact, forcibly staying in the closet due to a manufactured lack of knowledge is arguably the real harm. Affirming this child's right to intimate privacy—to engage in self-discovery and exploration through online interactions both with content and with other users[336]—can therefore be used to draw this content intervention line.

This Comment leaves the question of where the line should be drawn to another scholar. But this Comment does raise the issue of regulating access to content and co-optation by the culture war. Furthermore, this Comment proposes that intimate privacy can be a tool in deciding where to draw this line by looking at the fundamental benefits of the content—specifically where those benefits are an affirmance of individual identity, access to a larger community and culture, and more.

2. Moral Enforcement, Parental Rights, and Privacy Invasions

One of the potential threats that KOSA presents is in its enforcement.[337] KOSA, and other bills in the children's online privacy space, claims to protect children's privacy by sanctioning its invasion—whether that invasion be by the government or by parents.[338] When the government invades a child's privacy, there is a risk of moral enforcement, as evidenced by the potential abuse of the word "harm" in KOSA's language.[339] When a parent is doing the invading, this risk of moral enforcement becomes more immediate as the violation of online privacy can have direct consequences in the physical world.[340] For example, a parent could confiscate a device, block internet access, and even reject their child based on their intimate internet activity (like exploring queer identity). Because of these risks, legislators should factor intimate privacy into their crafting of enforcement mechanisms for children's online privacy bills.

Centering intimate privacy in the creation of enforcement mechanisms intended to safeguard children's privacy would account for potential privacy invasions and mitigate against them. Intimate privacy protects the exploration of self, the incubation of identity and group belonging, and the sharing of culture.[341] Accordingly, enforcement of KOSA, and any other children's online privacy bill, should explicitly avoid granting privacy invaders control over what intimate privacy seeks to safeguard. As noted above, this could be achieved by drawing a line between design and content—though, admittedly, this may be easier said than done.[342] But even if bills extend to content, centering intimate privacy in the enforcement of children's online privacy bills would prevent attorneys

336. *See* Cohen, *supra* note 42, at 1906 ("Privacy is shorthand for breathing room to engage in the processes of boundary management that enable and constitute self-development. So understood, privacy is fundamentally dynamic. In a world characterized by pervasive social shaping of subjectivity, privacy fosters (partial) self-determination. It enables individuals both to maintain relational ties and to develop critical perspectives on the world around them.").

337. *See supra* Part III.A.2.

338. *See supra* Part III.A.2.

339. *See supra* Part III.A.1.

340. *See* Citron & Waldman, *supra* note 147, at 1442.

341. Citron, *Intimate Privacy's Protection*, *supra* note 44, at 7; SKINNER-THOMPSON, PRIVACY AT THE MARGINS, *supra* note 53, at 47–50.

342. *See supra* Part III.B.1.

general and parents alike from targeting queer content. Assessing content based on its intimate privacy affordances and excluding it from reach would mitigate against abuses of power. For example, allowing parents to exclude content glamorizing eating disorders or self-harm would not be a violation of their child's intimate privacy, but extending that power to exclude queer and trans content would violate their child's right to self-discovery, experimentation, and cultural belonging, and would therefore violate their intimate privacy.

Protecting a child's privacy and safety online does not justify unfettered invasion of their privacy.[343] While existing online inherently involves privacy tradeoffs, completely removing all agency from child users and allowing privacy invasions on multiple fronts does not make children "safe."[344] Rather, this level of intimate privacy violation exposes children to increased scrutiny, decreased agency and self-exploration, and potential physical dangers as well. This Comment applies the concept of intimate privacy as an intervention to the renewed interest in children's online privacy legislation.

IV. CONCLUSION

As the far right doubles down with laser-like focus on the ancient fear regarding queerness and children, this Comment offers a stark reminder of the potential tools at their disposal. While seemingly neutral, bills like KOSA have a unique ability to be co-opted by the culture war via both their methods of enforcement and their chilling effects. This Comment bridges the divide between "protecting" children and ensuring queer kids have a chance to exist. By focusing our line-drawing on preserving intimate privacy—that is, self-discovery, community building, and expression—attempts to "protect" children online will not sacrifice queer and trans children for the good of the whole. Rather, by preserving intimate privacy, legislators and advocates will protect privacy rights for all.

343. Angel & boyd, *supra* note 19, at 95.

344. *See id.* at 94.