BALANCED SCRUTINY - THE NECESSITY OF ADOPTING A NEW STANDARD TO COMBAT THE RISING HARM OF INVASIVE TECHNOLOGY

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ABSTRACT

The current First Amendment jurisprudence of strict scrutiny is wholly insufficient in fostering a healthy legal landscape regarding the freedom of speech in cyberspace. Technology is outpacing the legislative action to address these increasing harms that are prevalent in a society that practically lives online. Consequently, if we, as a society, are to effectively begin addressing the growing danger of the practically protected "expression" of Privacy Invaders, we need to first explore the possibility of a new tier of scrutiny; we need balance. This blueprint for balanced scrutiny will begin by highlighting the harms suffered unequally through the invasion of Intimate Privacy, a term originally coined by premiere privacy scholar Danielle Keats Citron. It will then touch on the historical standing and flexibility of the First Amendment. After edifying how cyber harassment and the First Amendment intersect, this study will conclude by proposing a new standard of judicial review to be utilized when addressing laws targeting cyber expression.

INTRODUCTION

The individual practice of privacy has become endangered by the growth spurt of technology coupled with the expressive freedom of the internet. As vital and valued as the First Amendment's Freedom of Expression is, within the scope of cyber expression it has become too powerful in both its protection and its damaging potential. A googleplex of data constantly interacting with innumerable nodes of access have ushered in an age of ingressive information and misinformation. With this modern, and now common, practice, a fresh expression of cruelty has developed. This pervasive, invasive and relentless dark freedom arises from the aforementioned ease of access coupled with a boldness that only complete anonymity and blameless expression can offer.[1] Harassment is discouraged in our society and legal ramifications make it a hurdle that only cruel-intended, obsessive, or ignorant individuals choose to try and overcome. However, with an always "plugged-in" populace, the unceasing pursuit and subsequent emotional damage made possible by cyber harassment is that much easier to achieve.[2] As of 2017, "[r]oughly four-in-ten Americans have personally experienced online harassment, and 62% consider it a major problem."[3] Consequently, statutory action and legal consequences seem an obvious route to defeat this menace to our collective mental health and our intimate privacy. However, these limits must be cognizant of the foundational freedoms allocated by the Constitution. Specifically, the freedom of expression, codified by the First Amendment, must still be observed and not completely

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[1] Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 Yale L. J. 1639, 1641 (1995).

[2] Sarah Jameson, *Cyberharrasment: Striking a Balance between Free Speech and Privacy*, 17 CommLaw Archive 231, 234 (2008).

[3] Maeve Duggan, *Online Harassment 2017*, Pew Rsch. Ctr., Jul. 2017, at 6.

supplanted. Should caution become substantially more powerful than expressional freedom there is a danger of our society becoming full of overly zealous censors.[4] Naturally, this has resulted in a complex judicial and legislative back and forth that struggles to define where the line is. At what stage do cyber communiques cross the line from an open exchange of opinions, however unpopular and callous they may be, to destructive discourse intentionally targeted at others thus potentially surrendering the shield of protected free speech? It is to be acknowledged that "[p]eople often bristle at the prospect of a regulatory response to cyber harassment. In their view, people should be allowed to say anything they want online because it is 'free speech.'"[5] However reluctant American society may be to pursue a course of regulation, the apparent harms of a largely unchecked venue of cyber expression are too dire to ignore. This analysis will explore the checks and threats and offer an alternative route to seek a balance that takes into consideration both the modern risks and our traditional protections of expression. So long as our legislature is held to the standard of strict scrutiny for laws that would challenge First Amendment rights regarding cyber expression, then technology will continue to outpace individual privacy, whether it be intimate or professional, and its own statutory protection. We must look to a jurisprudence that does not stubbornly cling to methods of past eras but instead adopt processes that are balanced by the weight of constitutional freedom and the acknowledgement of the overbearing invasiveness of modern technological practices and those who abuse their execution.

I. INTIMATE PRIVACY AND CYBER HARASSMENT: UNDERSTANDING THE FULL SCOPE OF THE THREAT

A. Definitions

1. Intimate Privacy

"Privacy, as it interlocks with our intimate lives, carves out an invisible space with our bodies and thoughts so we can develop a sense of self and identity."[6] Even as early as 1890, certain legal minds of America, specifically Samuel Warren and Louis Brandeis, recognized that the respect of an individual's privacy, no matter how condemning public opinion may be of it, was going to be a focal struggle in the development of the human condition as we became more interconnected.[7] This struggle has only become more important and dire as technology and access has far outpaced the general public concern of one's individual privacy. Laws such as the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") have achieved at least guided protection of our privacy pertaining to medical issues, however, as individuals do we define ourselves by our medical conditions? As far as personal agency indicates, it is the freedom to explore who we are and whom we love that speaks to a more involved picture of the individual self. This involved exploration—this true classification of the self—is the heart and soul of

[4] *See* Branscomb at 1631.
[5] Danielle Keats Citron, *Hate Crimes in Cyberspace*, Harvard University Press (2018), 190.
[6] Danielle Keats Citron, *The Fight for Privacy: Protecting Dignity, Identity and Love in the Digital Age*, W.W Norton and Company, xiii (2022).
[7] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193-199.

Intimate Privacy, and even one hundred and thirty years after Warren and Brandeis penned "The Right to Privacy," it still has not garnered proper protection.[8]

2. Cyber Harassment

Harassment is recognized through "[w]ords, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person. . . ."[9] The practice of cyber harassment has many similar makings but still lacks a widely accepted definition as opposed to its physical counterpart. For the purposes of this analysis, cyber harassment can be defined as an act that ". . . typically occurs when an individual or group with no legitimate purpose uses a form of electronic communication as a means to cause great emotional distress to a person."[10] Due to its lack of physical presence and reliance on electronic means of communication, many states have opted to bundle in cyber harassment practices with general harassment and telephone-based harassment laws.[11] These may have been sufficient on the onset of cyber harassment, when it was exercised merely through email and text messaging. However, with the exponentially vital role of social media and the wealth of profiles, pictures, and posts available to anyone with a network connection, the practice of cyber harassment has long outstripped the legal constraints of its predecessors.[12] Contributing to this problem is the expanse of cyber harassment into separate and specific categories each bearing different marks of use.[13] Additionally, to properly highlight the perpetrators of these digital heinous acts, the classification of "privacy invaders," a term introduced and utilized by scholar and author, Danielle Keats Citron, will also be edified.

3. Privacy Invaders

The evolution from the 'Peeping Tom' to that of Privacy Invaders is one defined by a horrifying ease of access coupled with advancements in observational focused technology.[14] "Attacks on intimate privacy by Privacy Invaders, acting alone or in coordination, are rampant. Our intimate lives can be secretly recorded and instantly shared with anyone, anywhere. Privacy invasions are getting easier and cheaper to achieve. . . ."[15]. As Privacy Sector Scholar and headrunner Danielle Keats Citron noted in her latest book, while once these invaders were stymied by cost and availability, the affordability and accessibility of modern advances in surveillance technology has empowered amoral actors to disturbing heights.[16]

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[8] Citron at xiii.
[9] BLACK'S LAW DICTIONARY 784 (9th ed. 2009).
[10] *See* Jameson at 234.
[11] Cassie Cox, *Protecting Victims of Cyberstalking, Cyber Harassment, and Online Impersonation Through Prosecutions and Effective Laws* 54 JURIMJ 277, 280 (2014).
[12] *Id*. at 281.
[13] *See* Jameson at 235.
[14] Citron at 25.
[15] *Id.*
[16] *Id.* at 26 (Wherein we learn that miniature hidden cameras as late as 2013 used to cost upwards of roughly five thousand dollars each. Now, today on Amazon, the world's largest online distributor, mini spy cams with night vision, remote monitoring, and long battery lives can be purchased for as little as nineteen dollars and ninety-nine cents).

Perhaps one of the more alarming qualifications of these Privacy Invaders is that their practices are not born of some gross deviancy but rather, arguably, a popular perspective on the "benefits" of anonymity.[17] In a study that analyzed the reasoning behind this abhorrent practice, out of the respondents interviewed, 74% of women and 84% of men indicated that so long as they were sure they would not be caught, they would watch attractive people unknowingly show them their naked bodies or engage in seemingly private sexual activities.[18] Privacy Invaders have become emboldened by the technological growth in invasive methods, the general complacency of victims and the law enforcement agencies tasked f with protecting said victims,[19] and the expressive freedom promised by an internet driven by the commercial power of sex.[20] With such strengthening factors backing their malicious invasions, there is little wonder as to why cyber harassment has grown in such scope in so many methods, as explored next.

B. Cyber Harassment Through Gender Lens

The majority of individuals specifically targeted for cyber harassment practices are women.[21] Consequently, in a world where one's degree of online connectivity may determine their occupational growth or societal value, women are faced with an egregious handicap on the basis of their gender alone.[22] Triggering online messages, posts, or pictures directed at women, whether by the shield of anonymity or the physical distance, still have a profoundly damaging effect, and "[t]he rape threats are particularly frightening to women as one in every six women has experienced an attempted or completed rape as a child or adult."[23] While many individuals have acknowledged that this virtual treatment is abhorrent, for too long the simple answer given to victims was to simply go offline and not make themselves available to the harassment.[24] What that stance fails to take into consideration is the permanence of those harassing posts, messages, and pictures.[25] While the victim may no longer exist in cyberspace if the victim chooses to go offline, though seemingly avoiding fresh insults, those prior posts or pictures are always just one Google search away, to the detriment of their professional and personal lives.[26]

Statutory restrictions to answer this threat are, on the whole, insufficient. While some states like California have specifically adopted laws to combat this practice, other states have merely attempted to regulate cyber harassment by expanding their telecommunications or stalking statutes.[27] This lack of uniformity and special attention to the issue at large has resulted in a piecemeal response, and "[c]urrent cyberstalking and cyberharassment laws hinder successful prosecutions as they unintentionally create difficulties in proving intent, credible threats, and

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[17] Richard B. Kruger and Meg S. Kaplan, "Noncontact Paraphilic Sexual Offenses," in *Sexual Offending*, (2016), https://www.researchgate.net/publication/301264280_Noncontact_Paraphillic_Sexual_Offenses/link/5718cb3208ae986b8b7a9896/download.

[18] *Id.*

[19] Citron at 34,

[20] *Id.* at 27.

[21] L.P. Sheridan & T. Grant, *Is Cyberstalking Different?*, 13 Psychol., Crime & L. 627, 637 (2007).

[22] Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment* 108 MILR 373, 375 (2009).

[23] *Id.* at 385.

[24] *Id.* at 397.

[25] *Id.*

[26] *Id.* at 398.

[27] Cox at 286

surveillance."[28] Additionally, jurisdictional issues play a large role in the continued confusion of applying state and federal laws to cyber harassment.[29]

The paramount harm of gender based cyber harassment exists in the apparent lack of empathy or understanding that arises from the inequity of its application.[30] Studies have shown that while the desire to enjoy an unmitigated freedom of expression and the desire to enforce restrictions to create an online safe space for all are nearly even in their divide, those who value the prior are men who have not experienced the level of cyber harassment that those who value the latter have.[31] Conclusively, so long as online experiences remain heavily influenced by gender, it is unlikely that legislation and the courts will assign the due weight of the issue and change policies accordingly.[32]

1. Revenge Porn

This aforementioned inequity regarding the online experience between men and women can be horrifically and succinctly exemplified in the practice of "Revenge Porn." Nude pictures and videos have been characterized as the new currency of love in this modern age; however, while the images may arise out of consent, their distribution is another matter entirely.[33] Perhaps even more disturbing is the trending growth of victims whose likeness was captured without consent to begin with.[34] To anyone who believes that this issue is merely a generational one being felt only by careless youth, those naysayers need only refer to the findings of numerous countries who noted a startling uptick in revenge porn cases since the onset of the COVID-19 pandemic.[35]

This pervasive problem is as layered as it is abundant, which introduces a whole host of issues in seeking to remedy it. To begin with, the very nomenclature of "Revenge Porn" is problematic.[36] The Oxford Dictionary defines "revenge" as "something that you do in order to make someone suffer because they have made you suffer."[37] However, as studies have shown,

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[28] *Id.* at 287.
[29] *Id.*
[30] Monica Anderson, *Key takeaways on how Americans view -and experience- online harassment*, (2017) https://www.pewresearch.org/fact-tank/2017/07/11/key-takeaways-online-harassment/.
[31] *Id.* (The Pew research center conducted a survey that 70% of women who are online think that cyber harassment is a problem as opposed to the 54% of men who think similarly. The real concern arises when the question of the freedom to speak one's mind was weighed against the feeling of safety for all. There 56% of men valued freedom over safety as opposed to 63% of women who thought that safety should be the more important factor. The study concluded that this issue arises from the very different experiences that women and men have in cyberspace.)
[32] Citron at 415.
[33] Dr. Michael Salter & Associate Professor Thomas Crofts, *Responding to revenge porn: Challenges to online legal impunity*, ResearchGate, 1, 1-2 (2015).
[34] Nicola Henry, Clare McGlynn, Asher FLynn, Kelly Johnson, Anastasia Powell, and Adrian J. Scott, *Image-Based Sexual Abuse: a Study of the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (London: Routeledge, 2020), 21 (Wherein, a survey of 6,109 candidates indicated that at least in Asutralia, New Zealand and the United Kingdom that one in three individuals have had their nude image captured without consent).
[35] FBI, "Online Extortion Scams Increasing During the COVID-19 Crisis," August 20, 2022, https://www.ic3.gov/media/2020/200420.aspx.
[36] Asia Eaton, Holly Jacobs, and Yanet Ruvalcaba, "2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration," *Cyber Civil Rights Initiative* , June 2017, https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf.
[37] OXFORD ENGLISH DICTIONARY. OED Online. Oxford University Press, September 2022. Defining "Revenge".

almost 80% of individuals who release nonconsensual sexual imagery of their victims do not necessarily do so out of an explicit desire to harm them, let alone if they have suffered harm first from their victim's actions.[38] Therefore, "[t]hat label is misleading. While some people are driven by malice, others are motivated by vanity, cruelty, or carelessness. Calling it 'revenge' also assumes that the victim has done something to merit revenge."[39]

This epidemic of privacy invasions, affecting women substantially more so than men, is more accurately referred to as "nonconsensual pornography,"[40] and its harms can result in the diminishment of psychological well-being, lost occupational opportunities, and a heavy blow to the victim's reputation resulting in the potential loss of interpersonal relationships as well as a constant feeling of being "virtually raped."[41]

However, even in the face of such substantial harms, the tools for remedying those harms are not effective. In addition to law enforcement often not recognizing the weight of the related harm on the victims, "victim blaming" is also too common of an issue due to the popular belief that "all nudes leak."[42] Additionally, while certain torts, like defamation, intentional infliction of emotional distress, and public disclosure of private facts, may offer some method of restitution for the victims of nonconsensual pornography, rulings in the victims' favor are far from assured and are only a reactionary measure at best.[43] As Federal laws do not yet exist to properly address this problem, as many as forty-eight of the fifty states have attempted to draft their own remedies.[44] While substantial steps have been made, many of these laws find themselves partially restricted in their means of addressing the perpetrator's anonymity and freedom to post in an online context, despite their arguably lewd or obscene content. Conclusively, the perpetrators' constitutional rights for expression serve an ample role in delaying more substantial legislative measures.[45] "Social attitudes and cultural forces have brought us to this predicament . . . [w]e can and should look to law . . .[b]ut law is not up to the task."[46] So, this begs the assertion that to answer these mounting harms against a marginalized class of victims, we must not just analyze the legislative steps we have taken to rectify this issue but also question the traditional methods utilized to measure these said steps. Unfortunately, despite the heavy burden imposed on women through these abhorrent practices, they are not the only affected class of victims.

C. Cyber Harassment in Schools - The Cyber Bully

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[38] *See* Eaton, Jacobs, and Ruvalcaba (2017) (Wherein, 159 adults out of the 3,044 respondents revealed that they had released another's nude images without the victim's consent. 79% did so only "with friends"; 25% did so "because it was fun to share"; 17% did so out of a sense of revenge; 11% did so "because it made them feel good"; and 6% did it for "upvotes, likes, and retweets". Furthermore, many of these respondents indicated they would not have done so if they had known there was a potential for repercussions against them.)

[39] Citron, *The Fight for Privacy* at 35.

[40] *Id,*

[41] *Id* at 41.

[42] *Id* at 77.

[43] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 346-47 (2014).

[44] *State Revenge Porn Policy*, Electronic Privacy Information Center, https://epic.org/state-revenge-porn-policy/.

[45] Jameson at 234.

[46] Citron, *The Fight for Privacy* at 81.

Nearly every teenager in the United States has access to the internet.[47] To many, this access is nigh uninterrupted and is a focal interest in their day to day life.[48] This dependency has cultivated a generational culture of constant accessibility and, with it, some horrific repercussions. Unlike the physical bully, who's immediate influence ends in the safety of the victim's home, the cyberbully has no such limitation.[49] Additionally, while the physical bully's actions and words may exist in the moment and in memory alone, the cyberbully's medium of choice lends a permanence to the harm inflicted whether it be in a cruel blog post or a compromising photo posted to social media.[50] Furthermore, "[t]he omnipresent nature of cyber bullying has compounded the consequences. No longer is the audience limited to the playground, it is any of hundreds or even thousands of Facebook friends or Twitter followers."[51] All of these factors have contributed to a disturbing trend of adolescents and pre-adolescents opting to seek a permanent escape from their tormentors.[52] While it is by no means suggested that cyber bullying is the sole cause of the climb in teenage suicides, it is certainly an influential factor.[53]

Numerous school districts and states have recognized this mounting issue and the heightened danger it presents to students of varying ages. Indeed, even prior to the explosion of cyber issues, schools had already discovered various routes of justifiable limitations on expressions within their purview. As said by Justice Potter Stewart, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[54] Yet, only nine years after this view was stated, the very same Supreme Court delivered the holding of *Tinker v. Des Moines* and introduced the concept of restrictions upon those expressive freedoms in the scholastic setting. While the peaceful and passive demonstration of the black armbands in protest of the Vietnam War was ultimately deemed a protected expression, the Supreme Court recognized that school environments must be held to a different standard.[55] Consequently, exceptions were illustrated that would be used by courts over numerous circuits for years to come. The substantial disruption test provided the courts with a chance to interpret what is and is not permissible on school grounds regarding the freedom of expression.[56] However, this jurisprudence only addresses the speech that occurs within the direct and concrete boundaries of the scholastic institution and fails to properly outline the influence a school could and should exercise to restrain that disruptive speech on the home desktop of its students, where the dangers and harms are no less severe.

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[47] Ivana Vojinovik, *Heart-Breaking Cyberbullying Statistics for 2022* (2022), https://dataprot.net/statistics/cyberbullyig-statistics/ (A study by the Cyber Bullying Research Center, conducted in 2018, showed that of the teenagers poled, 95% have regular access to the internet).

[48] *Id* (As of 2018, the Pew Research Center indicated that over 45% of U.S teens would describe themselves as always being online. This is nearly double the number that was calculated in 2014. As technology has continued to grow and become more prevalent in our lives, it would be an easy step to assume this number has only continued to grow).

[49] Shaheen Shariff, *Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace*, 1 Int'l J. of Cyber Criminology 76, 85 (2007).

[50] Emily Bazelon, *Stick and Stones, Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy* 274, 283 (2013).

[51] Gavin, Bryan R., *Cyberbullying and the 1st Amendment: The Need for Supreme Court Guidance in the Digital Age* (2014). *Law School Student Scholarship*. 615.

[52] Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 Archives of Suicide Rsch., 206, 208 (2010).

[53] *Id.*

[54] *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

[55] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

[56] *Id*.

In 2010, the Beverly Hills Unified School district was reprimanded for attempting to restrict a student's freedom to post a YouTube video of students having a conversation off campus and referring to another female student as "spoiled" and a "slut."[57] In line with that judicial exercise, the New York Court of Appeals shot down a cyber bullying law in Albany County in *People v. Marquan M.* because although the student in question had posted sexually explicit pictures of another student, the law itself was deemed as overly broad to accommodate the substantial government interest of protecting students from cyber bullying.[58] Similar circumstances and results were found in 2016 when the North Carolina Supreme Court invalidated the state's cyber bullying law in *State v. Bishop*[59]. Despite the fact that the student in question was tormenting another female student by authoring negative comments under a sexually explicit photo posted online, the North Carolina Supreme Court ruled that because the statute failed to specify that the tormenting behavior must result in suffering or harm on the part of the victim, it was deemed too broad to satisfy [60]. The stringent standard upon which the North Carolina Supreme Court depended on for their First Amendment jurisprudence succeeded only in preventing a harmed minor from seeking recompense, and rather than prevent similar issues, their finding only further propped open the door for privacy invaders and cyber bullies alike to continue their disruptive acts without restriction.[61] Additionally, there was the 2019 decision of the Court of Appeals of Michigan in *In Re JP* where four teenage girls initially faced criminal cyber harassment charges [62] for exchanging various stances of their shared hatred for a fellow student and how said student should die.[63] Despite the lower court's finding that the participants in the Snapchat group message entitled "R.I.P. [S] and his goldfish" were guilty of "send[ing] text messages intended to 'terrorize, frighten, intimidate, threaten, harass, molest, or annoy' another person,[64] the Court of Appeals recognized that between the expectation of privacy of those utilizing the chat group and the lack of actual targeted speech directed at "S," there was no actual intended harm.[65] Consequently, although the speech itself within the group chat was not worth First Amendment protection, the orders of adjudication were vacated, despite the prosecution's argument that "nothing on the internet is private."[66]

Conclusively, when viewing the aforementioned cases, a picture of comprehension is painted. At least regarding cyber bullying, the First Amendment stands perhaps too stalwartly in defense of a student's right to harass another instead of the well-being of the students at large.

II. THE FIRST AMENDMENT: ITS PROTECTIONS AND EXCEPTIONS

A. Intent and Scope

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[57] *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C. D. Cal. 2010).
[58] *People v. Marquan M.*, 2014 WL 2931482 (Ct. App. NY July 1, 2014).
[59] *State v. Bishop* 787 S.E.2d 814 (2016).
[60] *Id.*
[61] *Id*.
[62] Malicious use of service provided by telecommunication service provider, Mich. Comp. Laws Ann. § 750.540e (West 2002).
[63] *In Re JP*, 944 N.W.2d 422, 430 (2019).
[64] *Id.* at 434.
[65] *Id*.
[66] *Id.*

"[T]he proper end of man is the realization of his character and potentialities as a human being . . . . [Therefore,] freedom of expression is essential as a means of assuring individual self-fulfillment."[67] However famous this perspective of Thomas Emerson may be, it perhaps assigns far too grandiose and noble a right when viewed through modern lens and is too unencumbered by legal enforcement to be deemed practical.[68] When approaching any question of First Amendment protection, the legal scholar must first recognize if the issue falls into either a hybrid or one of three categories that serve as the rationale for the freedom of speech and expression: 1) building on the the structure of self-government, 2) contributing to the marketplace of ideas, or 3) the promotion of self-fulfillment and individual autonomy.[69] Now, while these fundamental rationales may indicate that there exists a coherent line for constitutional protection, that is not the case. Perhaps, due to their broad nature, they fall woefully short of illustrating the complexity of the jurisprudence, societal ramifications, and overall legal issues surrounding the freedom of speech.[70]

When considering the scope of this particular and essential freedom, it must be noted that at the core of expression is the battle between judicial consistency and interpretation. This core rests upon the rockbed of persistent legal doctrines derived from court decisions. Whether a scholar's inclination to the Constitution is based in Originalism, Textualism, or some amalgamated medley, the struggles to classify the First Amendment's scope signifies that "the boundaries of the First Amendment are dynamic, not static."[71] These fluid borders illustrate the judicial and societal pressures that assume a, sometimes unfounded, classification of speech in order to determine its protected or unprotected status.[72] Consequently, it can be concluded that the scope of the First Amendment is not determined by "[a]n intent to convey a particularized message [that while] present . . . in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it"[73] but rather is consistently redefined and stretched by the courts in determining an expression's protection as opposed to its potential validity as speech. To that end, to understand if a mode of speech can even earn the protection of the First Amendment, it must first be made clear what is already classified as unprotected speech. These classifications serve not only to illustrate recognized fallibility of an absolutist approach but also to highlight the precedent of flexibility--indications that because such stretches have occurred in the past, they may yet occur again.

B. Exceptions

"The constitutional right of freedom of speech does not extend its immunity to conduct which violates a valid criminal statute; neither does the protection of the First Amendment extend to every use and abuse of the spoken and written word."[74] In short, not all speech or actions bear

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[67] Thomas I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 6.

[68] Helen J. Knowles and Steven B. Lichtman, *Judging Free Speech: First Amendment Jurisprudence of US Supreme Court Justices* (New York: Palgrave Macmillan, 2015), 194.

[69] *Freedom of Speech (1): Three Rationales*, Nahmod Law, https://nahmodlaw.com/2010/01/19/an-introduction-to-freedom-of-speech/ (last visited Sept. 22, 2022).

[70] *Id.*

[71] Amanda Shanor, *First Amendment Coverage*, 93 NYULR 318, 320 (May, 2018).

[72] *Id* at 323.

[73] *Spence v. Washington*, 418 U.S 405, 409-11 (1974) (concluding that a displayed flag met the criteria for expressive speech. This was the standing test for the scope of the First Amendment until it was found to be an unsustainable system of classification in *Cressman v. Thompson*, 798 F.3d 938(10th Cir. 2015)).

[74] U.S.C.A. Const. Amend. 1.

the same contributive weight to society. Through precedent, state and federal statutes and the jurisprudence of our higher courts, certain categories of speech are restricted and consequently do not enjoy the typical protections of the First Amendment.[75] Although more categories exist, the enclosed exceptions are those most closely associated with harassment and, by extension, cyber harassment.

1. Incitement

As outlined in the "Clear and Present Danger" test,[76] incitement, categorized as constitutionally unprotected speech, occurs when the speech bears elements indicating that it was intended to produce an "imminent lawless action"[77] and is likely to produce the aforementioned action.[78] Courts are consequently faced with the challenge of identifying the speech in question and whether it crosses the line from public discourse to criminal mischief. The development of the internet and its vast communicative potential has only served to exacerbate this issue and to provide ample opportunities to invoke inciting expression.[79] While some may wonder what possible incentive reaction could be derived from a blog post or Facebook comment, their answer would become rapidly apparent if their home address was leaked[80] along with instructions to bring harm to the subject in said home.[81] However, although speech that indicates a conclusion of imminent harm is restrictable, courts have been found hesitant to restrict such speech in practice because of the narrow application of the test derived from *Brandenburg.*[82] Ultimately, there is a belief that even ". . . dangerous speech–speech that might persuade people to do some very bad things–is protected . . . "[83] may succeed in this test to the detriment of the target of said speech.[84]

2. Fighting Words

Sharing a common element with incitement, speech is construed as unprotected fighting words if "it tends to incite an immediate breach of the peace" resulting in a fight,[85] is a "personally abusive epithet. . . addressed to an ordinary citizen. . . inherently likely to provoke a violent reaction,"[86] and is likely to be taken as "a direct personal insult."[87] The foundation of the

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[75] Eugene Volokh, *The First Amendment and Related Statutes: Problems, Cases And Policy Arguments* , 3 (Saul Levmore et al. eds., 7th ed. 2020).
[76] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[77] *Id*; *see also Hess v. Indiana*, 414 U.S. 105 (1973) (holding that "imminent" most likely means to occur immediately, within a few hours, or at most several days.)
[78] *Id*.
[79] Harry A. Valetk, *Cyberstalking: Navigating a Maze of Laws*, 228 N.Y.L.J. (2002).
[80] *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 529 (6th Cir. 1984) (holding that one's home address is an important privacy interest).
[81] Sarah E. Smith *Threading the First Amendment Needle: Anonymous Speech, Online Harassment and Washington's Cyberstalking Statute* 93 Wash. L. Rev. 1563, 1564 (2018).
[82] Volokh at 4.
[83] *Id*.
[84] *Id*.
[85] *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573 (1942).
[86] *Cohen v. California*, 403 U.S. 15 (1971).
[87] *Id*.

jurisprudence for this unprotected speech was constructed from cases from the mid-1900's.[88] With the internet taking its fledgling steps in the late 1960's and the fighting words exception being expanded by *Cohen* in its most recent adaptation, it is no small wonder why so many of the taunting online posts of various "trolls" fall instead into the protected purview. Indeed, how can there be an immediate breach of the peace if the offending party is not face-to-face with the target of their personal insults? Certainly, it is an egregious dragging of the feet of our judicial system that "conventional wisdom dismisses the fighting words doctrine as a viable cyberspace concept without really considering how cyberspace has changed the nature of human interaction, and without considering how the law should adapt to these changes."[89]

3. Speech Integral to Unlawful Conduct

Given clarification in Justice White's opinion in *New York v. Ferber*,[90] the issue of the promotion of child pornography and its, at most, *de minimis* contribution to society was used as the leverage necessary to introduce an exception to First Amendment protection that, unlike its fellow exceptions, did not possess clearly defined borders.[91] Lacking an ironclad definition of the scope of this exception, it is generally accepted that speech integral to unlawful conduct occurs when "[the] speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct . . .such as murder . . . child sexual abuse, discriminatory refusal to hire, and the like."[92] However, for the exception to be valid, the scope in question must be narrowly defined so as not to sweep in speech that would act as dissuasion to engage in unlawful conduct.[93] One truly discerning feature that separates this exception from its brethren is that at its core "the *exception* should be seen less as a single exception than *as a guide to generating other exceptions.*"[94] In short, contributing to the cause of restricting behavior and speech that would inspire others to perpetuate harm, the Supreme Court has authorized an exception to the freedom of expression that specifically serves as an evolving means of restriction. Yet, despite its validated existence for the last four decades, our legislature still lags behind on introducing restrictive actions against malicious expression that at times goes so far as to release the intimate private details of one's own home address, calling for harm against its occupants.[95]

C. Conclusion

When reviewing any issue of speech, the Supreme Court has approached the issue with a level of reverence and caution that is demanded of such an essential right. Laws that wish to have

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[88] *Id*.
[89] Sanjiv N. Singh, *Cyberspace: A New Frontier for Fighting Words*, 25 Rutgers Computer & Tech. L.J. 283, 316 (1999).
[90] *New York v. Ferber,* 458 U.S. 747 (1982).
[91] Id.
[92] Volohk at 163.
[93] *Id*.
[94] *Id*. (emphasis added).
[95] *See "doxxing",* Dylan E. Penza, *The Unstoppable Intrusion: The Unique Effect of Online Harassment and What the United States Can Ascertain from Other Countries' Attempts to Prevent It*, 298, 303, Cornell International Law Journal (2018).

any sort of restraining power on speech are, with very few exceptions, held to the heightened standard of strict scrutiny that demands a narrowly tailored application to achieve a compelling governmental interest.

However, as viewed in the sections above, that fervor runs the danger of focusing more on the core of expression and not its fluid borders, potentially granting protection where none should exist. Additionally, in recognition that not all speech bears the worth of the First Amendment protection, exceptions exist beyond state or federal statutes and are exercised via long standing jurisprudence. Ultimately, these exceptions are more relevant than ever as the issue of cyber harassment grows more and more pervasive, and yet, their applications remain strictly adhered to times when such expressive, invasive and communicative mediums did not yet exist.

Conclusively, if these issues are to be remedied and the weight of cyber harassment ameliorated, a modern approach to the application of the liberties allocated by the First Amendment must be chartered or else by virtue of physical limitations such horrendous speech shall remain protected and its harmful practices will persist.

III. CYBER HARASSMENT AND THE FIRST AMENDMENT

A. Example of State Statute Barred by Strict Scrutiny

Harkening back to our discussion regarding the gender inequality of cyber harassment, to properly illustrate the freezing effect of the First Amendment on statutory action to restrict cyber harassment, we will examine the example set provided by Kelly Convirs-Fowler and her failed fight against cyber flashing.[96]

Now, as this is the first reference to this practice in this particular analysis, let us take a moment to explore the abhorrent practice of cyber flashing. With all of the repulsive rewards but none of the legal risk of physical flashing, cyber flashing is the act of utilizing a smartphone's "AirDrop" feature to instantly and directly send obscene images, often of the sender's genitalia, to any nearby activated AirDrop accounts.[97]

While the state of Virginia's House of Representatives unanimously supported the bill to abolish cyber flashing by imposing either a fine of two thousand and five hundred dollars or a year in prison on offenders, the Senate immediately ruled it out of existence at the recommendation of the Senate Judiciary Committee.[98] While contributing reasons to bills failure may have been found to be a lack of understanding as to the nature of intimate privacy or a collection of mostly male senators who do not feel the weight of cyber harassment, it must not be overlooked that "[c]ommittee members raised concerns that the bill was overly broad in violation of the First Amendment."[99] Regardless of the main reason, the zealous defense of the freedom of expression and its stringent jurisprudence definitely contributed to the death of a measure aimed at protecting the populace from invasions of their intimate privacy.

B. Example of State Statute Relying on Judicial Interpretation

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[96] Michael Pope, "Senate Kills Cyberflashing Bill," *Virginia Public Radio*, February 18, 2021, https://virginiapublicradio.org/2021/02/18/senate-committee-kills-cyberflashing-bill/.

[97] https://dictionary.cambridge.org/us/dictionary/english/cyber-flashing. Definition of "Cyber-Flashing".

[98] Citron, *The Fight For Privacy* at 82.

[99] *Id* at 82-83.

Previously, we discussed briefly how, at least in the context of cyber stalking, many states have opted to simply reskin their physical stalking statutes to apply to cyber stalking as well. While some states may have done so in a manner that would ultimately not accomplish its intended goal, the same cannot be said of Maine and its comprehensive combination of both physical and cyber stalking under one title.[100] As edified in the case *United States v. Rogers*, "Maine's Terrorizing statute does not require that the threats of committing a crime of violence be *directly* communicated to the ultimate victim."[101] This method of law drafting has allowed for a seemingly seamless transition of traditional law enforcement to a restriction on the type of cyber expression that this analysis has attempted to stymie. However, while this particular statutory construction has succeeded in addressing abhorrent cyber practices while also surviving First Amendment challenges,[102] it has also illustrated how judges need to construct and define through various enforcement hoops to deal with incredibly fact specific issues.[103]

Through judicial deliberation, the Maine stalking statute has been so broadly written that it can encompass the type of activities to the point that cyber stalking becomes at least partially brought in.[104] "Maine has this broad stalking statute which applies in the cyber context, [it has not] been challenged, so who knows if it would stand up. . . ."[105] This broad application was exemplified in the facts of *State v. Heffron*. The factual analysis and interpretation indicates that the case ultimately hinged on the fact that it was email stalking only.[106] The defense had tried to argue that because it was electronic communication that it did not constitute actual stalking[107]. However, while the Court rejected this argument and the Defendant's claim that the statute was too broad and restricted his ability to express himself online, the decision was based only upon the fact that the Defendant had previously engaged in actions that had earned him a Protection from Abuse order from the victim.[108] His repeated postings on Facebook constituted contact, even though they were not on the victim's wall nor was she tagged in the comments.[109] However, they shared Facebook friends and had been in a relationship for some time.[110] Consequently, the Trial Court Justice found that it was more than likely than not that someone, like a shared friend, would have provided the victim with the messages.[111] When pressed for clarification, Justice Billings likened the facts of the case to a hypothetical situation: had the Defendant written a threatening message addressed to the victim on a sign and then displayed that sign on his lawn alone, it would not constitute contact; however, because of the direct address and the shared friends on the social media website, his sign was more akin to posting it along the path he knows the victim takes to work each day.[112] When pressed for further details about fact specific elements that led to his decision and later the appellant decision, Justice Billings said, "If the facts were slightly different,

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[100] ME ST T. 17-A § 210.
[101] *United States v. Rogers, C.A.1* (Me.)2021, 17 F.4th 229 (emphasis added).
[102] *See State v. Heffron*, (Me.) 2018, 190 A.3d 232.
[103] Billings, D., Discussion Regarding Maine Cyber Crimes. Interview by Roosevelt Bishop. *Balanced Scrutiny*.
[104] *Id.*
[105] *Id.*
[106] *Id*.
[107] *Id.*
[108] *Id*.
[109] *Id*.
[110] *Id.*
[111] *Id*.
[112] *Id*.

the results may have been different."[113] So, what does this mean exactly to Maine's cyber stalking statute and its implications on expression? Rather than statutes, cases like *State v. Heffron* have been used to define "contact" in the trial courts in the state of Maine. Such cases have provided that "[c]ontact can encompass a large type of conduct, particularly in the cyber realm."[114] The case has allowed trial judges to say and consider what constitutes a prohibited contact in the cyber realm in the Maine Supreme Judicial Court. In this instance, if the Defendant had not already had a standing Protection from Abuse order against him, it is a reasonable belief that his actions would not have been deemed criminal. They may have merited a Protection from Abuse order, but his actions would not yet have been seen as criminal. Maine's Protection from Abuse statute encompasses the obvious cyber stalking issues. However, to those who are adept in the art of concealed cyber harassment, it is too easy for the perpetrators to hide who is making such harmful communications.

These kinds of cases have left a significant impact on Maine's approach to cyber stalking and cyber harassment and their relation to Protection from Abuse orders and, by extension, bail contacts and similar restrictive measures. Generally, Maine trial judges have read *Heffron* in such a way that "contact" can be read similarly in similar contexts. It has been acknowlegded that "[h]aving only general statutes has limited [Maine's] ability to address these issues. So far they have not been successfully challenged. [Maine's] general criminal statutes have fit in the cyber issue context so that [the legislature] can address the situation."[115] The statutes are structured in such a way that they do not restrict just the speech, but the speech when viewed in the context of the effect on the victim and the intent. The statutes are aimed at regulating behavior that in a vacuum is not criminal but when viewed in context of the specific facts and the effects, it becomes criminal. Over time the law develops by applying statutes or applying appellate court rulings to specific facts, and over time legislators gain more insight into what crosses the line and what does not.[116]

So how does this application of *State v. Heffron* apply to the overarching goal of addressing the concerns of insufficient protections from malicious cyber expression? At an initial glance, it would almost seem to suggest that a less restrictive jurisprudence regarding statutes centered on mitigating cyber harassment and the like is unnecessary if Maine's cyber stalking statute is any indication. However, when it concerns the mental wellness of the victims of cruel and destructive cyber expression and the general growth of the pursuit of an ideal interconnected marketplace of ideas, it is vital to note that 'possible' is not a synonym for 'effective.'

C. Conclusion

When it comes to the failed crusade against cyber flashing, the need for a less stringent threshold of constitutionally permissive statutes to address obscene cyber expression is obvious. There is no great leap in logic needed to recognize a problem and propose an answer. What does bear merit for additional contemplation are instances when a method may be permissible but can still be deemed either ineffective, insufficient, or inefficient. This is what this analysis seeks to derive from the study of statutes, like those found in Maine, regarding cyber stalking as edified in *State v. Heffron*.

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

Imagine, if you will, two distinct paths. One is a direct route to the ideal destination that is directly in view with no gross discrepancies or distractions. However, standing directly on the onset of this path is a large boulder that no one has bothered to move for the simple reason that it has always been there and many individuals claim it is essential that the boulder stay in that precise spot, blocking you from your destination. The other path is similarly blocked, but certain trailblazers have constructed a series of twists and detours that have the potential of reaching the ideal destination. Such is the blockade of strict scrutiny upon the path to clearly and statutorily enforced protection from cyber harassment and its various methods of expression. State laws that are explicit in their intent to mitigate the harm of malicious cyber expression, like Virginia's cyber flashing bill, are barred. Whereas broad statutes that umbrella cyber terms, like the stalking statute in Maine, bypass the roadblock of strict scrutiny but only by guiding judicial views along a russian nesting doll-esque labyrinth of specific facts meeting appellant challenges which then meet judicial opinions which then meet imperfect comparisons that, after all is said and done, results in a conditional protection from invasive cyber expression. Certainly, the latter path may eventually bring you to the desired outcome. However, would it not serve the better interests of the nation and its citizens if the boulder blocking the prior path be moved or at least shaped in such a manner that the direct path is viable? It is in the pursuit of that path that the next section of this analysis introduces a potential tool to arrive at that desired and necessary outcome.

IV. CONCLUSION - A POTENTIAL ANSWER: THE CONSTRUCTION OF "BALANCED SCRUTINY"

A. The Precedent of Shifting Tiers of Scrutiny

"There is little doubt that over the past thirty years, the most important doctrinal development in the jurisprudence of constitutional rights has been the formulation, and proliferation, of the 'tiers of scrutiny,' which courts employ to reconcile individual liberties with societal needs."[117] That reconciliation and need for alternating thresholds of judicial review is the source of the plea of this analysis. Applying the overall purpose to the aforementioned balance, individual liberties in this context apply to the average citizen's right to express their thoughts and opinions as promised by the First Amendment. As to societal needs, the earlier sections regarding the profound and consistent invasions in intimate privacy have elucidated the necessary reform to better protect the interests of the average citizen from privacy invaders. To put it simply, as societal problems evolved or shifted to present the judicial system with fresh harms, to mitigate those harms, the courts forced themselves to reevaluate the restrictions that applied to the constitutional right of expression.[118] Rather than freeze societal protections, the courts constructed new tiers of scrutiny. With the constructed tiers evidenced below, it is vital to keep in mind that if this type of jurisprudence has changed before, it can do so again.

1. Exacting Scrutiny

[117] Ashutosh Bhagwat, T*he Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783 (2007) 784.
[118] *Id* at 786.

Distinct from the more commonly used tier of scrutiny in First Amendment jurisprudence, summarily, exacting scrutiny differs from strict scrutiny in a few substantial ways. To begin, exacting scrutiny begs the invitation of judicial biases as its application rests firmly in the explicit references to specific connections between the compelling governmental interest and a substantially related method of execution.[119] Additionally, exacting scrutiny elicits a more flexible judicial interpretation than its strict counterpart, as it calls for careful tailoring to achieve the governmental interest rather than the most narrow application possible.[120] Another obvious departure from the typical First Amendment jurisprudence is the nature of exacting scrutiny's laxed formulation that the law in question need only bear a "substantial relation"[121] to the government interest to be deemed valid.[122] While such comparisons viewed in a vacuum may make exacting scrutiny appear to be an ideal substitute for addressing the issue of malicious cyber expression, at its core exacting scrutiny has proven time and time again to be a confusing battlegrounds upon which to challenge the strength of the First Amendment.[123] In short, when it comes to the application of exacting scrutiny, "[r]ecognizing the need for balancing . . . does not, however, ensure that the balancing will be conducted in satisfactory fashion."[124] Conclusively, for matters as relevant and vital as the invasion of one's intimate privacy, relying upon exacting scrutiny is too flawed and risky.

2. Intermediate Scrutiny

Intermediate scrutiny, where the government interest must be important rather than compelling and the means of enforcement must leave room for alternatives rather than being the most narrowly tailored, has been applied to issues of free speech in this country in the past. When regulating the aspects of adult entertainment, the Fifth Circuit upheld a city ordinance that imposed zoning restriction on topless establishments.[125] Although the ordinance would not have held up to the standard of strict scrutiny, due to the ordinance's alleged content neutral restriction, intermediate scrutiny was applied.[126] Furthermore, regarding the regulation of mass media, the Ninth Circuit used intermediate scrutiny to uphold a federal statute prohibiting telephone companies from providing video programming to their customers.[127] The Court of Appeals deemed this an acceptable standard of review, despite the First Amendment issue, because the government was able to demonstrate "that the recited harms [were] real, not merely conjectural, and that the regulation [would] in fact alleviate these harms in a direct and material way."[128] The purpose of these case briefings is to illustrate a vital truth pertaining to the development of First Amendment jurisprudence: there is a precedent for abandoning strict scrutiny if the needs are worthy and the execution is not overly broad. Therefore, as covered by the cases and statistics, the courts could

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[119] R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UKMC L. Rev. (2016) 207, 208.
[120] *Wagner v. FEC,* 793 F.3d 1, 5 (D.C. Cir. 2015).
[121] *Buckley v. Valeo*, 424 U.S 1, 64, 66 (1976) ,
[122] *See also; Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).
[123] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, (1995); *see also McCutcheon v. FEC,* 134 S. Ct. 1434, (2014) (wherein the Supreme Court either incorrectly defined exacting scrutiny as the basis for strict scrutiny or attempted to define exacting scrutiny as merely as subset of strict scrutiny.)
[124] Wright at 212.
[125] *MD II Entertainment, Inc. v. Dallas*, 28 F.3d 492 (5th Cir. 1994).
[126] *Id.*
[127] *US West, Inc. v. United States*, 48 F.3d 1092(9th Cir. 1994).
[128] *Id.* at 1095.

begin adopting and applying intermediate scrutiny to the rampant issues of cyber harassment. However, the danger in such a lackadaisical application would be the creation of such a restricted internet that even perceived offenses could be sufficient to stymie speech.[129]

Conclusively, if strict scrutiny is too stringent to allow for protection, exacting is too unpredictable, and intermediate too dangerous for overzealous censorship, then it would seem that the best answer would be the construction of a new, specially tailored tier of scrutiny.

B. The New Tier for Cyber Expression - Balanced Scrutiny

The construction of this tier of scrutiny is not intended as the rallying cry for regulation of the internet. This is not offered as a zealous legal agenda designed to squash our collective expressive rights. Rather, "First Amendment protections and free speech values are far more nuanced than that. They do not work as absolutes."[130] These protections have been stretched and redefined to fit the challenges in discourse and discussion as time and the development of our nation has demanded of it. This saturation of online expression is simply another such time to demand a redefinition. "As one court put it, the Internet can never 'achieve its potential' as a facilitator of discussion unless 'it is subject to . . . the law like all other social discourse.'"[131] Balanced Scrutiny is the answer to the fears of over-regulation while addressing the active harms of the modern world and its ever-connected practices. Balanced scrutiny bears a resemblance to intermediate scrutiny but exists only to be applied to laws challenged on constitutional grounds when the subject is centered on digital or cyber application. Specifically, it bears a mid-way resemblance in that it must serve a substantial governmental interest but that the application does not need to be in the most narrow possible scope and instead be reasonably narrow enough that it does not over-restrict. While this may seem to be a rather simplistic approach to such a dire issue, this nation's approach to legal matters has consistently demonstrated that complexity breeds confusion while simplicity can lead to success. Intermediate scrutiny applied to the online world would serve to not only stymie the privacy invaders but also anyone with any differing view. Suppression would become entirely too easy to enact and enforce. This is simply not a trade worth enacting. However, as edified in prior sections of this analysis, strict scrutiny has only served as a shield for the malicious practices that can hide behind First Amendment protection. The mounting harms and risks perpetuated by privacy invaders have demonstrated an alarming lack of preventative measures. If the court systems were to adopt and apply balanced scrutiny to cyber statutes and questions of constitutionality regarding online expression, theoretically, a compromise between the lawmakers tasked with protecting the interest of the people and the people's interest in their freedom of expression would be implied ere their analysis begins. Lawmakers would no longer fear having to construct the most narrow applications of a technology they do not fully understand in order to pass judicial muster, and simultaneously, the general populace would not fear the potential deprivation of their online marketplace of ideas. Conclusively, balanced scrutiny offers precisely what it has been labeled as: balance.

The tiers of scrutiny are not static, the harms of non-restricted cyber expression are not lessening on their own, and with balanced scrutiny, perhaps the societal needs and the individual liberties can find said balance once again.

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[129] *See* Branscomb at 1631.
[130] Citron, *Hate Crimes in Cyberspace*, at 190.
[131] *Id* at 196.