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## **FIGHTING WORDS IN THE ERA OF TEXTS, IMS AND E-MAILS:**

### **CAN A DISPARAGED DOCTRINE BE RESUSCITATED TO PUNISH CYBER-BULLIES?**

Clay Calvert<sup>1</sup>

One of the few traditional categories of expression falling outside the ambit of First Amendment<sup>2</sup> protection – one of the so-called “categorical carve-outs”<sup>3</sup> – is the much-maligned<sup>4</sup> class of

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1. Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks students Olivia Edinger, Peter Posada, Rebekah Rich and Mirelis Torres of the University of Florida for their help on this article.

2. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-six years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

3. *Carey v. Wolnitzek*, 614 F.3d 189, 199 (6th Cir. 2010). Several other categories of speech also fall outside the scope of First Amendment protection. *See* *United States v. Stevens*, 130 S. Ct. 1577, 1580 (2010) (identifying categories of historically and traditionally unprotected content to include: a) obscenity; b) defamation; c) fraud; d) incitement; and e) speech integral to criminal conduct); *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-246 (2002) (providing that “as a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”) (emphasis added); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52 (1st Cir. 2008) (identifying “agreements in restraint of trade,” “statements or actions creating hostile work environments” and “promises of benefits made by an employer during a union election” as “other species of speech-related regulations that effectively lie beyond the reach of the First Amendment” despite the fact that “for whatever reason, the Justices have never deemed it necessary to address why or how these content-based

speech known as fighting words.<sup>5</sup> The United States Supreme Court wrote in a unanimous opinion nearly seventy years ago in *Chaplinsky v. New Hampshire* that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “*fighting*” words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>6</sup>

Since Justice Frank Murphy penned those words, however, the Supreme Court and lower judicial bodies have nibbled away at the fighting words exception. Indeed, as the United States Court of Appeals for the Third Circuit recently wrote, the fighting words doctrine is now “extremely narrow.”<sup>7</sup>

For instance, there is growing agreement that the first part of the definition – words that “by their very utterance inflict injury”<sup>8</sup> – has been implicitly jettisoned to the ash can of Constitutional refuse.<sup>9</sup> As First Amendment scholar and current Furman

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prohibitions manage to escape First Amendment scrutiny”).

4. See, e.g., Burton Caine, *The Trouble with “Fighting Words”: Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 444 (2004) (lambasting the fighting words doctrine as “a category so ill-conceived that not once in the ensuing sixty-two years has the United States Supreme Court upheld a conviction based on it,” and asserting that “there is no constitutional basis for denying protection to fighting words, either alone or as a subcategory of speech claimed to be unworthy of First Amendment protection”).

5. See Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1138 (1994) (describing fighting words as “a category of expression historically unprotected by the First Amendment”).

6. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (emphasis added).

7. *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003).

8. *Chaplinsky*, 315 U.S. at 572.

9. For instance, the United States Court of Appeals for the Seventh Circuit observed in 2008:

University President Rodney Smolla observes, there now is a “strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence.”<sup>10</sup> Put differently, the fact that words may offend and inflict emotional discomfort, standing alone, is not sufficient to render them fighting words;<sup>11</sup> rather, as Professor Thomas Place writes, “the only justification for prohibiting offensive speech is the danger of an immediate violent response where words are used in a face-to-face confrontation.”<sup>12</sup>

The surviving second aspect of the test – words that “tend to incite an immediate breach of the peace”<sup>13</sup> – still endures, but it too has been cabined and confined by later high court rulings. In particular, Professor Michael Mannheimer notes that in several cases during the 1970s, the Supreme Court clarified “the doctrine as a narrowly-tailored device designed to address the problem of

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Although the “inflict-injury” alternative in *Chaplinsky’s* definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does not have a tendency to provoke an immediate breach of the peace.

*Purtell v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008). It added that “whatever vitality it may have had when *Chaplinsky* was announced, the ‘inflict-injury’ subset of the fighting-words definition has never stood on its own.” *Id.* at 625.

10. Rodney A. Smolla, *Words “Which By Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009).

11. *Cf. Virginia v. Black*, 538 U.S. 343, 358 (2003) (opining that “[t]he hallmark of the protection of free speech is to allow ‘free trade in ideas’ – even ideas that the overwhelming majority of people might find distasteful or discomforting”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (observing that “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

12. Thomas M. Place, *Offensive Speech and the Pennsylvania Disorderly Conduct Statute*, 12 TEMP. POL. & CIV. RTS. L. REV. 47, 55 (2002).

13. *Chaplinsky*, 315 U.S. at 572.

responsive violence by the recipient of insulting language.”<sup>14</sup> For instance, in *Cohen v. California*, it described fighting words as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”<sup>15</sup> The Court added in *Cohen* that fighting words encompass only speech amounting to “a direct personal insult.”<sup>16</sup> In *NAACP v. Claiborne Hardware Co.*, the high court concisely defined fighting words as “those that provoke immediate violence.”<sup>17</sup>

Thus, to constitute fighting words today, the speech must be, Dean Erwin Chemerinsky has observed, “directed at a particular person.”<sup>18</sup> For example, the late Justice Lewis F. Powell, Jr. wrote, fighting words are those “*addressed by one citizen to another, face to face* and in a hostile manner.”<sup>19</sup> In a nutshell, the limits on fighting words center on four core elements:

- ***Content of Speech***: Per *Cohen*, the substance of the speech must consist of personally abusive epithets and insults;<sup>20</sup>
- ***Target of Speech***: The speech must be directed at a specific individual located in such close geographic proximity to the speaker as to create a face-to-face confrontation;<sup>21</sup>
- ***Likelihood of Reaction to Speech***: Retaliation by the target of

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14. Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1528 (1993).

15. *Cohen v. California*, 403 U.S. 15, 20 (1971).

16. *Id.*

17. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

18. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 817 (1st ed. 1997).

19. *Lewis v. City of New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring) (emphasis added).

20. *Cohen*, 403 U.S. at 20.

21. See *Citizen Publ’g Co. v. Miller*, 115 P.3d 107, 113 (Ariz. 2005) (observing that “the fighting words doctrine has generally been limited to ‘face-to-face’ interactions”) (emphasis added); *Idaho v. Poe*, 88 P.3d 704, 714 (Idaho 2004) (observing that fighting words must be “spoken face-to-face”) (emphasis added).

the speech against the speaker must be likely;<sup>22</sup> and

• ***Imminence of Reaction to Speech***: There must be a “likelihood that the person addressed [will] make an *immediate* violent response.”<sup>23</sup>

Distilled to their most basic layperson level, then, fighting words are ones that are “likely to cause an average addressee to fight.”<sup>24</sup>

This article, using the September 2010 opinion by the Nebraska Supreme Court in *Nebraska v. Drahot*<sup>25</sup> as an analytical springboard, examines the viability of the aging fighting words doctrine in the digital era. In particular, it analyzes whether the doctrine can serve as a legal tool for censoring and/or punishing personally abusive speech that is conveyed in targeted, one-on-one fashion via text messages,<sup>26</sup> instant messages<sup>27</sup> and e-mail transmissions. *Drahot* centered on the question of whether several e-mails “laced with provocative and insulting rhetoric”<sup>28</sup> that were sent by a college student to a former professor who was running for public office constituted fighting words.<sup>29</sup> For instance, one e-mail provided, in relevant part:

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22. See Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1314 (2007) (describing both “likelihood” and “imminence” as aspects of fighting words).

23. Cf. *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (emphasis added).

24. *Ross v. Texas*, 802 S.W.2d 308, 315 (Tex. App. 1990).

25. 788 N.W.2d 796 (Neb. 2010).

26. See Wendy Ceccucci et al., *An Empirical Study of Behavioral Factors Influencing Text Messaging Intention*, 21 J. INFO. TECH. MGMT. 16, 16 (2010) (“Text messaging, also known as ‘texting,’ refers to the exchange of brief messages, typically between 140 – 160 characters, sent between mobile phones over cellular networks. The term also refers to messages sent using Short Message Service (SMS).”).

27. See Amanda O’Connor, *Instant Messaging: Friend or Foe of Student Writing?*, 11 NEW HORIZONS ONLINE J. (2005) (“Instant messaging is a form of computer ‘chat’ that allows one to have a real time, typed ‘conversation’ with one or more ‘buddies’ while connected to the Internet. . . . It is an extremely fast-growing communications medium, especially among adolescents”).

28. *Drahot*, 788 N.W.2d at 798.

29. *Id.* at 798-799.

Fuck you! You don't know me one bit. You are a liberal American coward. If it were up to you, you would imprison Bush before bin Laden because you have such a fascination with it. I am tired of your brainwashing students who are in the process of molding their minds. I spent 18 months in Pensacola Florida before I was honorably discharged for a neck injury. You can go fuck yourself if you are going to get that way. I'd kick your ass had you said that right in front of me, but YOU don't have the guts to say that.<sup>30</sup>

Whether such tech-conveyed speech falls within the unprotected category of fighting words is important because, as Professor Heidi Kitrosser notes, legislative bodies may pass laws to punish the use of fighting words.<sup>31</sup> Although the Nebraska Supreme Court ultimately found that the e-mails sent by Darren Drahota did not constitute fighting words,<sup>32</sup> the Court did not slam the door shut on the possibility that one-on-one e-mail correspondence might amount to fighting words under a different set of facts and circumstances.

Instead, it chose to protect Drahota's speech because: (1) the speech was political and, in particular, was directed not merely at a professor, but at a professor running for public office;<sup>33</sup> (2) the speech was part of an ongoing correspondence between Drahota and his professor, William Avery, in which no trouble had

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30. *Id.* at 799.

31. Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 845 (2005).

32. *Drahota*, 788 N.W.2d at 805 (concluding that while "Drahota is not a wordsmith, and his bumper sticker rhetoric was certainly provocative," his e-mails "did not rise to the level of fighting words under these facts. If the First Amendment protects anything, it protects political speech and the right to disagree").

33. For instance, the Nebraska high court focused on the fact that "the context of Drahota's speech was an ongoing political debate." *Id.* at 803. It added that "the First Amendment encourages robust political debate." *Id.* at 804. The court emphasized the point that "[b]y the time Drahota sent the e-mails at issue, Avery was running for office." *Id.*

previously erupted;<sup>34</sup> and (3) “even if a fact finder could conclude that in a face-to-face confrontation, Drahota’s speech would have provoked an immediate retaliation, Avery could not have immediately retaliated. Avery did not know who sent the e-mails, let alone where to find the author.”<sup>35</sup> In summary, rather than simply concluding that an e-mail message can never constitute fighting words and end its inquiry without any further examination of the facts of the case, the Nebraska Supreme Court performed a detailed analysis involving the application of the law to the specific and unique facts of the case.

As of early December 2010, not a single court—be it federal or state—had squarely addressed the issue of whether texting personally abusive messages might, under the right circumstances, constitute fighting words.<sup>36</sup> The question of whether one-on-one electronic correspondence like text messages can ever amount to fighting words is particularly timely today because of the increased dangers, including threat of suicide, posed to minors by cyber-bullying.<sup>37</sup> As one newspaper reported in October 2010, there has been “a rash of teen suicides across the country as a result of cyber-bullying.”<sup>38</sup> The Pew Internet & American Life Project in 2007 released the results of a nationally representative phone

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34. The Nebraska Supreme Court wrote that “Drahota and Avery had corresponded for months on political issues. And both had made provocative statements during that dialog without incident.” *Id.* at 804.

35. *Id.*

36. That is, no on-point published opinions were available.

37. See, e.g., Katie Leslie, *School Confronts Online Bullying*, ATLANTA J.-CONST., Oct. 22, 2010, at 1A (describing cyber-bullying as “the least physical and nonconfrontational but perhaps the most public way to humiliate and intimidate others,” and noting that “cyber-bullying, or using social media Web sites or text messaging to degrade others, has received national attention after instances of young people who were victims of the harassment committing suicide”).

While there is no agreed-upon spelling for the term – variants include cyber bullying, cyberbullying and cyber-bullying – this article adopts the spelling “cyber-bullying,” except when the article is quoting from other sources, in which case the spelling employed by those sources is used as-is and remains unaltered.

38. Tiffani N. Garlic, *Father Pleads for Action Against Bullies*, STAR-LEDGER (Newark, N.J.), Oct. 17, 2010, at 36.



survey of 935 teenagers indicating the pervasiveness of the problem of cyber-bullying:

Girls are more likely than boys to say that they have ever experienced cyberbullying – 38% of online girls report being bullied, compared with 26% of online boys. Older girls in particular are more likely to report being bullied than any other age and gender group, with 41% of online girls ages 15 to 17 reporting these experiences. Teens who use social network sites like MySpace and Facebook and teens who use the [I]nternet daily are also more likely to say that they have been cyberbullied.<sup>39</sup>

The federal government in October 2010 “issued guidance to support educators in combating bullying in schools by clarifying when student bullying may violate federal education anti-discrimination laws.”<sup>40</sup> At the same time, in an attempt to “build upon efforts led by the U.S. Department of Education and other federal agencies to spark a dialogue on the ways in which communities can come together to prevent bullying and harassment,”<sup>41</sup> the White House announced it would “host a conference to raise awareness and equip young people, parents, educators, coaches and other community leaders with tools to prevent bullying and harassment.”<sup>42</sup> Furthermore, Congress in 2010 considered the Safe Schools Improvement Act of 2010<sup>43</sup> in order to address school-based bullying, which the measure defined as “conduct that adversely affects the ability of one or more

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39. AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, DATA MEMO: CYBERBULLYING AND ONLINE TEENS 2 (2007) <http://www.pewinternet.org/~media/Files/Reports/2007/PIP%20Cyberbullying%20Memo.pdf>.

40. Press Release, U.S. Dep’t of Education, Guidance Targeting Harassment Outlines Local and Federal Responsibility (Oct. 26, 2010), *available at* <http://www.ed.gov/news/press-releases/guidance-targeting-harassment-outlines-local-and-federal-responsibility> (last visited Dec. 13, 2010).

41. *Id.*

42. *Id.*

43. S. 3739, 111th Cong. (2010).

students to participate in or benefit from the school's educational programs or activities by placing the student (or students) in reasonable fear of physical harm."<sup>44</sup> Another federal bill proposed in 2010 specifically targeted cyber-bullying in schools and defined it as bullying "that is undertaken, in whole or in part, through use of technology or electronic communications (including electronic mail, internet communications, instant messages, or facsimile communications) to transmit images, text, sounds, or other data."<sup>45</sup>

The federal government defines cyber-bullying as:

any type of harassment or bullying (i.e., teasing, telling lies, making fun of someone, making rude or mean comments, spreading rumors, or making threatening or aggressive comments) that occurs through e-mail, a chat room, instant messaging, a website (including blogs), text messaging, videos, or pictures posted on websites or sent through cell phones.<sup>46</sup>

With bullying and its digital-age sidekick, cyber-bullying, firmly lodged in the cross-hairs of the federal government,<sup>47</sup> state and local legislative bodies,<sup>48</sup> and the news media in late 2010,<sup>49</sup> it is a

44. *Id.*

45. H.R. 5184, 111th Cong. (2010).

46. Electronic Aggression/Cyberbullying, FindYouthInfo.gov, [http://www.findyouthinfo.gov/spotlight\\_cyberBullying.shtml](http://www.findyouthinfo.gov/spotlight_cyberBullying.shtml) (last visited Dec. 13, 2010). FindYouthInfo.gov is an government working group that was "created by the Interagency Working Group on Youth Programs (IWGYP), which is composed of representatives from 12 Federal agencies that support programs and services focusing on youth." About the Working Group, FindYouthInfo.gov, <http://www.findyouthinfo.gov/about.shtml> (last visited Dec. 13, 2010).

47. See *supra* notes 40-46 and accompanying text.

48. See, e.g., Carol Demare, *Budget, Cyber Law Get Airing*, TIMES-UNION (Albany, N.Y.), Oct. 13, 2010, at B9 (describing a cyber-bullying law proposed in Albany County, New York); Susan K. Livio, *A New Weapon Against Bullies; After Past Efforts Fall Short, Jersey Lawmakers Unveil Toughest Bill in the U.S. And Assure Victims: We Have Your Back*, STAR-LEDGER (Newark, N.J.), Oct. 26, 2010, at 1 (describing a bill introduced in the New Jersey Assembly known as the Anti-Bullying Bill of Rights); Ericka Mellon, *Texas Eyes Anti-Bullying Laws*, HOUSTON CHRON., Oct. 11, 2010, at B1 (describing efforts in the Texas

propitious moment to examine whether the fighting words doctrine – either in its current form or in a modified one that adapts it to the changing modes of digital communication popular among minors – provides a mechanism for targeting and punishing the electronic speech of cyber bullies.

Such electronic speech is a favored mode of bullying communication among minors today. For example, Boston College Law School Professor Mary-Rose Papandrea observed in a recent article that “rather than harass their classmates in the locker room, hallways, and bathrooms, students engage in ‘electronic aggression,’ often in the form of malicious rumors or humiliating or threatening speech spread on social networking sites, *e-mails*, *instant messages*, chat rooms, *text messages*, and blogs.”<sup>50</sup>

It is the above-mentioned italicized forms of communication— one-to-one, real-time electronic messages between minors—in Professor Papandrea’s statement that are the specific modes of expression examined in this article. Conversely, this article does not address messages posted to either the general public or to

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legislature to address bullying and cyber-bullying).

49. For instance, in October 2010 alone, the topic of cyber-bullying was covered in articles and editorials by major newspapers across the United States. *See, e.g.*, Editorial, *Fighting the Bullies*, L.A. TIMES, Oct. 14, 2010, at A10 (opining that “the behavior of the bullies . . . must be addressed and that “[p]eople from different cultures, backgrounds and religions are not always going to like one another. But bullies must be taught two lessons: that the pain their victims feel can be life-threatening, and that their actions will not be tolerated”); Pamela Paul, *The Playground Gets Even Tougher*, N.Y. TIMES, Oct. 10, 2010, at Section ST, 12 (addressing the topic of bullying and noting that “at a time when teenage cyber-bullying is making headlines, parents fear that the onset of bullying behavior is trickling down. According to a new Harris survey of 1,144 parents nationwide, 67 percent of parents of 3- to 7-year-olds worry that their children will be bullied”); Julie Pfitzinger, *How to Stop Bullies; Harassing Behavior Goes Beyond the Myth*, STAR TRIB. (Minneapolis), Oct. 24, 2010, at 2E (addressing bullying and cyber bullying within the context of the Minneapolis Public Schools); John Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 3, 2010, at Section WK 1 (addressing the question, “What should the punishment be for acts like cyberbullying and online humiliation?”).

50. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1037 (2008) (emphasis added).

selected friends/subscribers on websites, such as posts on Facebook walls and Twitter feeds.

Furthermore, this article concentrates exclusively on the fighting words doctrine, not on two other distinct categories of unprotected speech that also focus on potential acts of violence – true threats<sup>51</sup> and incitement to violence.<sup>52</sup> Discussion of these other two categories of speech easily could constitute an entirely separate law journal article.

Finally, this article centers on the extension of the fighting words doctrine to cyber-bullying between minors in *off-campus, non-school* settings. Why? Because when cyber-bullying transpires on campus (two students, for instance, who are texting or instant messaging each other in the school cafeteria or in a classroom), school administrators need not reach for the fighting words doctrine in order to punish the protagonists. Instead, they need only turn to the United States Supreme Court's four-decade-old precedent in *Tinker v. Des Moines Independent Community School District*.<sup>53</sup> Although some courts have attempted to stretch

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51. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (observing that “the First Amendment also permits a State to ban a ‘true threat’” and defining true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”).

52. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

53. 393 U.S. 503 (1969). In its seminal student-speech ruling in *Tinker*, the high court protected the right of public school students in Iowa to wear black armbands to school as a form of protest against the war in Vietnam and as a call for a truce in that conflict. The Court in *Tinker* held that schools may censor such student displays of political expression only when there is actual evidence the speech in question “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Id.* at 513. The Court added, in language highly favorable to student speech rights, that the government “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 509. Similarly, it noted that an “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 508. Ultimately, the Court in *Tinker* concluded

*Tinker* to apply to the off-campus, online speech of their students,<sup>54</sup> the United States Supreme Court has yet to rule on such a case involving on-campus punishment under *Tinker* based upon off-campus, technology-conveyed speech that targets a student.<sup>55</sup>

Part I of this article thus begins by providing a brief overview of the growing problem of cyber-bullying, exploring both the definitional difficulties in explicating cyber-bullying and the harms that minors purportedly sustain and suffer at the hands of cyber-bullies. In addition, Part I examines the First Amendment issues raised by the censorship and punishment of cyber-bullying and how courts confronted those issues in several very recent cases.

Next, Part II addresses typical and traditional instances of fighting words, providing examples of the types of personally abusive epithets that may trigger the application of the doctrine. Furthermore, Part II highlights the judiciary's growing recognition of and concern about harms caused to minors by abusive epithets targeting gay, lesbian and transgendered students. Finally, Part II also creates and teases out several cyber-bullying scenarios that are fodder for fighting words analysis – scenarios that constitute neither true threats nor incitements to violence, but that

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that “the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.” *Id.* at 514.

54. As one federal court recently observed, “student off-campus speech, though generally protected, could be subject to analysis under the *Tinker* standard as well if the speech raises on-campus concerns.” *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010). See generally Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1175 (2009) (observing that “some lower courts are now using – misusing, really – *Tinker* in a situation and scenario that the Court in 1969 could hardly have imagined. In particular, they are incorrectly applying it to censor off-campus student expression that is posted on the World Wide Web”).

55. See Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies from 2009*, 8 FIRST AMEND. L. REV. 86, 108 (2009) (describing “the profound muddle that is the body of jurisprudence surrounding the free speech rights of public school students in cyberspace,” and arguing that “it is time for the Supreme Court to enter into the fray to resolve the confusion and to bring uniformity so that both students and principals know the legal boundaries”).

nonetheless use the type of “personally abusive epithets”<sup>56</sup> kids engage in today to pick on minorities, gays and other groups. Considering such scenarios is important because they illustrate the possible real-world application of the fighting words doctrine, rather than rendering this article a mere theoretical, academic exercise.

Part III returns to the fighting words doctrine and examines its possible application to punish cyber bullies, including the hurdles that likely would plague the doctrine’s deployment in this area. In particular, two critical issues are addressed. First, must the fighting words doctrine be confined to in-person, face-to-face spoken communications; or can it be expanded to encompass one-on-one, real-time electronic communications, such as personally abusive text messages, where the sender and recipient are in relative geographic proximity to each other – the same athletic field, the same movie theatre or the same shopping mall, for instance – such that physical retaliation by the message recipient could occur in face-to-face fashion in a matter of only a very few minutes after receipt of the message? Second, would the United States Supreme Court, after its 2010 decision in the crush-video<sup>57</sup> case of *United States v. Stevens*,<sup>58</sup> even be amenable to modifying a category of historically unprotected expression – namely, fighting words – to expand its reach to a new mode of communication (texting and e-mails) with which it historically has never dealt?

Finally, Part IV concludes by arguing that a carefully crafted and narrow expansion of the fighting words doctrine may be successful in targeting some instances of cyber bullying, but it could well have the unintended, negative consequence of squelching other forms of expression worthy of Constitutional protection.

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56. *Cohen*, 403 U.S. at 20.

57. These are “are fetish videos in which small animals are taunted, tortured, then crushed to death under the feet of provocatively dressed women.” *People v. Thomason*, 84 Cal. App. 4th 1064, 1065 n.2 (Cal. Ct. App. 2000).

58. 130 S. Ct. 1577 (2010).

## I. FROM BULLYING TO CYBER-BULLYING: AN OVERVIEW OF THE PROBLEM AND HOW COURTS ARE STARTING TO ADDRESS IT

This part has two sections, the first of which provides an overview of the problems of both bullying and cyber-bullying, including the harms caused by each and the definitional difficulties in defining the concepts. The second section concentrates on how courts are beginning to address cyber-bullying and the First Amendment issues it raises.

### A. *Bullying and Cyber-Bullying: Definitions and Harms*

Bullies have been an undesired element of adolescent life for generations.<sup>59</sup> As Barbara Coloroso, an expert on the topic,<sup>60</sup> recently observed, “almost all of us have been on the receiving end of some sort of bullying.”<sup>61</sup>

In the past, however, being a bully’s victim often ended upon a minor’s egress through the proverbial schoolhouse gates and entrance through his home’s doorway.<sup>62</sup> Parents today may look back at those pre-Internet and pre-cell phone days and wish the same space and time constraints on bullying were true for their

59. IAN RIVERS ET AL., *BULLYING: A HANDBOOK FOR EDUCATORS AND PARENTS* 3 (2007) (describing the past being “littered” with bullying references, and noting that until the early 1970s, bullying was “viewed as being nothing more than one part of the fabric of human development – a rite of passage for those that survived, and a mark of shame for those who did not escape undamaged”).

60. See Barbara Coloroso Biography, Kids Are Worth It!, [http://www.kidsareworthit.com/Barbara\\_s\\_Biography.html](http://www.kidsareworthit.com/Barbara_s_Biography.html) (last visited Dec. 13, 2010) (providing a brief biography of Coloroso and noting that she is “an international bestselling author and for the past 38 years an internationally recognized speaker and consultant on parenting, teaching, school discipline, positive school climate, bullying, grieving, nonviolent conflict resolution and restorative justice”).

61. BARBARA COLOROSO, *THE BULLY, THE BULLIED, AND THE BYSTANDER* 45 (1st ed. 2003).

62. Robert Slonje & Peter Smith, *Cyberbullying: Another Main Type of Bullying?*, 49 SCANDANAVIAN J. PSYCHOL. 147, 148 (2008) (stating that cyber-bullying is different from traditional bullying because cyber-bullying follows the victim home).

own children, who cannot so easily evade bullies in a world of smart phones, texts and instant messages.<sup>63</sup>

The rise of the Internet, coupled with the ubiquitous development and deployment of multiple modes of real-time electronic communication technologies, unfortunately, threatens adolescents with the potential for perpetual harassment in the perceived security of their homes.<sup>64</sup> Bullying can occur at multiple times of day and in myriad places. One study, for instance, examined the frequency of bullying by surveying more than 1,000 students at fourteen schools in nine cities across four states.<sup>65</sup> The results indicated a difference between *intermittent* victims of bullying (thirty-three percent of students surveyed) and *repeat* victims (more than 48.5 percent of students studied).<sup>66</sup> Only 18.4 percent of those surveyed reported no bullying at all over the course of the study.<sup>67</sup>

A 2007 Pew Internet & American Life study examined cyber-bullying and found that:

About one third (32%) of all teenagers who use the internet say they have been targets of a range of annoying and potentially menacing online

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63. See Stacy M. Chaffin, Note & Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 773 (2008) (writing that “today, kids are not able to escape the schoolyard bullies by running to the comfort of their own homes. Now, the bullies follow them home and start the real harassment online. A new wave of bullies – cyberbullies – have found their niche in the playgrounds of cyberspace”).

64. Carter Hay et al., *Traditional Bullying, Cyber Bullying, and Deviance: A General Strain Theory Approach*, 26 J. CONTEMP. CRIM. JUST. 130, 134 (2010) (describing cyber-bullying to be a “reason for concern because, unlike face-to-face bullying, cyber bullying may be especially difficult to escape from”).

65. Finn-Aage Esbensen & Dena C. Carson, *Consequences of Being Bullied: Results From a Longitudinal Assessment of Bullying Victimization in a Multisite Sample of American Students*, 41 YOUTH & SOC’Y 209, 215 (2009).

66. *Id.* at 221. Intermittent victims are “those who reported one or more instances of being bullied during only one data collection period or those who were bullied once during at least two separate reporting periods,” while repeat victims are “those who were bullied two or more times during two or three reporting periods.” *Id.* at 218.

67. *Id.* at 221.



activities—such as receiving threatening messages; having their private emails or text messages forwarded without consent; having an embarrassing picture posted without permission; or having rumors about them spread online.<sup>68</sup>

No longer can harassed individuals find refuge in their homes because they now can be reached at all times of the day via electronic communication.<sup>69</sup>

What is bullying? There is no single, agreed-upon definition.<sup>70</sup> A 2010 study in the journal *Educational Research* observes, however, that:

[t]here are common features in definitions used, such as the intention to cause distress to another pupil; it tends to be carried out by one or more pupil; it occurs repeatedly over time; and there is an imbalance of power between the perpetrator and the victim . . . but there is no universally accepted set of features as to what constitutes bullying.<sup>71</sup>

Dr. Tonja Nansel of the National Institute of Child Health and

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68. Amanda Lenhart, *Mean Teens Online: Forget Sticks and Stones, They've Got Mail*, PEW INTERNET & AMERICAN LIFE PROJECT, June 27, 2007, available at <http://pewresearch.org/pubs/527/cyber-bullying>.

69. See *Cyberbully Tactics are Focus of State Law*, LAS VEGAS REV.-J., July 1, 2010, at 1A (“Bullies have always been around. But they’ve changed their scare tactics since the growth of electronic technology. Now they spread their hostility with computers and cell phones”) available at <http://www.lvrj.com/news/cyberbully-tactics-are-focus-of-state-law-97566509.html> (last visited Dec. 13, 2010).

70. Marilyn Langevin, *Helping Children Deal With Teasing and Bullying: For Parents, Teachers and Other Adults*, Int’l Stuttering Assoc., [http://www.stutterisa.org/CDRomProject/teasing/tease\\_bully.html](http://www.stutterisa.org/CDRomProject/teasing/tease_bully.html) (last visited Dec. 13, 2010) (writing that “[d]efinitions of bullying vary. At present there is not an agreed-upon definition and there are differences in how the term is used”).

71. Rachel E. Maunder et al., *Pupil and Staff Perceptions of Bullying in Secondary Schools: Comparing Behavioural Definitions and Their Perceived Seriousness*, 52 EDUC. RES. 263, 264 (2010).

Human Development defines bullying as “a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one.”<sup>72</sup> There are three possible modes of bullying: verbal, physical, and relational.<sup>73</sup>

While the meaning of the first two types seems obvious (words and action), the concept of relational bullying refers to “the systematic diminishment of a bullied child’s sense of self through ignoring, isolating, excluding, or shunning.”<sup>74</sup> The harms from such bullying are multiple: victims may experience loss of self-esteem, lack of desire to go to school, decrease in grades, and behavioral and emotional changes, such as depression and posttraumatic stress disorder.<sup>75</sup> In addition, one study of middle-school students found that victims were “more likely to report having difficulty making friends and having poor interactions with classmates.”<sup>76</sup> With the advent of new communication technologies, bullying is being transformed by a tech-savvy generation of teenagers.<sup>77</sup>

In particular, so-called cyber-bullying is both a relatively new, technology-fueled phenomenon<sup>78</sup> and, apparently, an under-

72. Tonja Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094 (Apr. 25, 2001), available at <http://jama.ama-assn.org/content/285/16/2094.full.pdf+html> (defining bullying).

73. COLOROSO, *supra* note 61, at 14.

74. *Id.* at 17.

75. *Id.* at 130-139.

76. RIVERS, *supra* note 59, at 5.

77. As Professor Mary Sue Backus writes:

Whether viewed as an acceptable rite of passage or as a social ill worthy of substantial intervention on the part of parents, educators, and legislators, bullying has been a part of growing up for generations. It should come as no surprise, then, that today’s technologically savvy youth engage in bullying behaviors through the same technology they use to interact with each other and the world.

Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment – TISNF!*, 60 CASE W. RES. 153, 155 (2009).

78. Qing Li, *Cyberbullying in Schools: A Research of Gender Differences*, 27

reported problem.<sup>79</sup> As the author of a recent book on the topic observes, “teens are reluctant to tell adults—for fear of overreaction, restriction from online activities, and possible retaliation by the cyberbully.”<sup>80</sup>

Just as with bullying, there is no agreed-upon definition of cyber-bullying, although a few organizations and researchers have fashioned working definitions. For instance, Professor Kimberly Mason defines cyber-bullying as “an individual or a group willfully using information and communication involving electronic technologies to facilitate deliberate and repeated harassment or threat to another individual or group by sending or posting cruel text and/or graphics using technological means.”<sup>81</sup> She adds that “[c]yberbullying, like other forms of bullying, is centered on the systematic abuse of power and control over another individual that is perceived to be vulnerable and weaker . . . and this imbalance of strength and power makes it difficult for the person being bullied to defend him- or herself.”<sup>82</sup>

Stop Cyberbullying, an organization developed by WiredSafety.org,<sup>83</sup> limits its definition to the bullying of children and adolescents, asserting that “[o]nce adults become involved, it is plain and simple cyber-harassment or cyberstalking. Adult cyber-harassment or cyberstalking is NEVER called

SCH. PSYCHOL. INT’L 1, 2 (2006) (observing that “[c]yberbullying is a new phenomenon resulting from the advance of new communication technologies including the Internet, cell phones and Personal Digital Assistants”) (emphasis added).

79. Peter K. Smith et al., *Cyberbullying: Its Nature and Impact in Secondary School Pupils*, 49 J. CHILD PSYCHOL. & PSYCHIATRY 376, 382 (2008) (finding that more than forty percent of students were not telling anyone and fewer than twenty-five percent of the remaining told an adult).

80. NANCY WILLARD, *CYBERBULLYING AND CYBERTHREATS: RESPONDING TO THE CHALLENGE OF ONLINE SOCIAL AGGRESSION, THREATS, AND DISTRESS 1* (1st ed. 2007).

81. Kimberly L. Mason, *Cyberbullying: A Preliminary Assessment for School Personnel*, 45 PSYCHOL. IN SCH. 323, 323 (2008).

82. *Id.* (citations omitted).

83. *An Overview of WiredSafety.org – who we are and what we do*, WIRESAFETY.ORG, <http://www.wiredsafety.org/information/overview.html> (last visited Dec. 13, 2010) (identifying WiredSafety.org as the largest and oldest online safety, education and help group in the world).

cyberbullying.”<sup>84</sup> This author of this article, however, takes no position on whether or not cyberbullying can involve an adult; it focuses in Parts II and III on whether cyberbullying between minors (rather than than between an adult and a minor) may constitute fighting words.

A definition with more specificity is fashioned by another researcher, who defines cyber-bullying as “an aggressive, intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself.”<sup>85</sup> As a 2008 study published in *CyberPsychology & Behavior* points out, cyberbullying, like traditional bullying, “happens more than once, it involves psychological violence, and it is intentional.”<sup>86</sup>

Cyber-bullying occurs in multiple ways, and it can take place both on and off-campus.<sup>87</sup> For instance, one study of 150 middle-school and high-school students published in 2007 found that:

[a] majority of the female students indicated that cyber bullying was a problem at their schools, although male students were somewhat less likely to agree that this was a problem. Students indicated that the *majority of the incidents occurred outside of the school day, with the exception of cyber bullying via text messaging*. Students indicated that they were unlikely to report cyber bullying to the adults at school, as it frequently occurs via cellular phone use, and it is against the school policy to

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84. *What is Cyberbullying, Exactly?*, STOP CYBERBULLYING, [http://www.stopcyberbullying.org/what\\_is\\_cyberbullying\\_exactly.html](http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html) (last visited Dec. 13, 2010) (providing that cyber-bullying occurs “when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies or mobile phones,” and adding that cyber-bullying must “have a minor on both sides, or at least have been instigated by a minor against another minor”).

85. Smith, *supra* note 79, at 376 (defining cyber-bullying).

86. Francine Dehue, *Cyberbullying: Youngsters’ Experiences and Parental Perception*, 11 *CYBERPSYCHOL. & BEHAV.* 271, 217 (2008).

87. RIVERS, *supra* note 59, at 10.

have cellular phones on during school hours.<sup>88</sup>

These cyber-offenders go after their prey through various online fora and their attacks can be posted anonymously or under a pseudonym, as the National Crime Prevention Council asserts those who cyber-bully do so by “[pretending] they are other people online to trick others, [spreading] lies and rumors about victims, [tricking] people into revealing personal information, [sending] or [forwarding] mean text messages and [posting] pictures of victims without their consent.”<sup>89</sup> Cyber-bully victims experience many of the same effects felt by those that are bullied the traditional way. However, the emotional effects may be more damaging to the targets than traditional bullying for several reasons. In particular, Nancy Willard writes:

A target of in-school bullying has the ability to escape such bullying when at home. The same is not true with cyberbullying. Cyberbullying can be occurring 24/7, whenever a teen uses a technological device – or even if the teen does not use any device (as in the case where students create a Web site defaming another student).<sup>90</sup>

Willard adds that “online communications can be extremely vicious and cruel.”<sup>91</sup> Furthermore, bullies may not realize the extent of the damage they cause because the interaction is online and the bully cannot witness in person how much they hurt their victims.<sup>92</sup> Ultimately, “cyberbullying can cause serious psychological harm, including depression, low self-esteem,

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88. Patricia W. Agatston et al., *Students' Perspectives on Cyber Bullying*, 41 J. ADOLESCENT HEALTH S59, S60 (2007) (emphasis added).

89. *Cyberbullying*, NATIONAL CRIME PREVENTION COUNCIL, <http://www.npc.org/newsroom/current-campaigns/cyberbullying> (last visited Dec. 13, 2010).

90. WILLARD, *supra* note 80, at 48.

91. *Id.*

92. *Id.* at 33 (explaining bullies may not be able to “understand the emotional experiences of others”).

anxiety, alienation, and suicidal intentions.”<sup>93</sup>

Indeed, sometimes those suicidal intentions lead to suicidal actions. One high-profile victim of cyberbullying was Megan Meier.<sup>94</sup> In October 2006, thirteen-year-old Meier committed suicide.<sup>95</sup> The death captured national headlines when it was revealed that Meier had been harassed online by an adult.<sup>96</sup>

In particular, a Missouri woman named Lori Drew, whose daughter had a falling out with Meier, used the online social network MySpace to pose as a teenage boy who initially sent friendly messages to Meier that later turned menacing in tone.<sup>97</sup> Using the pseudonym Josh Evans,<sup>98</sup> Drew ultimately wrote to Meier that “[t]his world would be a better place without you.”<sup>99</sup> The same day that she received that message Meier took her own life.<sup>100</sup> Her tragic actions are not surprising, as researchers at the Cyberbullying Research Center at Florida Atlantic University have

93. Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 851 (2010). See also Donna St. George, *Cyber-Bullying Linked to Spike in Depression*, WASH. POST, Sept. 21, 2010, at A3 (reporting that “[w]ith traditional bullying methods, depression levels were highest among both the victim and what researchers call ‘bully-victims,’ youths who sometimes act as bullies but are also sometimes victims. But with cyber-bullying, victims faced significantly greater levels of depression than their attackers or students who were both bully and victim”).

94. See generally *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009) (providing the facts surrounding the cyber-bullying of Meier).

95. *Id.*

96. See Tamara Jones, *A Deadly Web of Deceit; A Teen’s Online ‘Friend’ Proved False, and Cyber-Vigilantes are Avenging Her*, WASH. POST, Jan. 10, 2008, at Style C01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/09/AR2008010903367.html>.

97. Brian Stelter, *Guilty Verdict in Cyberbullying Case Provokes Many Questions Over Online Identity*, N.Y. TIMES, Nov. 28, 2008, at A28, available at <http://www.nytimes.com/2008/11/28/us/28internet.html>.

98. See Christine Olley, *When Cyberbullying Kills: Suicide’s Mom Warns of Social-Networking Dangers*, PHILADELPHIA DAILY NEWS, Apr. 24, 2009, at Local 20 (writing that “Josh Evans seemed to be the perfect kid. His photo showed brown, wavy hair, blue eyes and chiseled features. But Josh Evans wasn’t real. He was the invention of Lori Drew”).

99. Jones, *supra* note 96, at C01.

100. *Id.*

found that “cyberbullying victims were almost twice as likely to have attempted suicide compared to youth who had not experienced cyberbullying.”<sup>101</sup>

Because of the negative consequences of cyber-bullying, states now are engaging in concerted efforts to combat it. According to a 2010 survey conducted by the Cyberbullying Research Center, forty-four states have laws and policies on bullying including thirty states on electronic harassment, but only five have laws including the term cyber-bullying.<sup>102</sup> Forty-two states, in turn, require schools to have a policy on bullying, while seven states criminalize such behavior.<sup>103</sup> Most states place the burden of bully punishment on schools,<sup>104</sup> but the lack of a precise legal definition for cyber-bullying leaves each state to determine what constitutes such bullying for itself, potentially excluding bullying between adults and children.

### *B. The Courts Begin to Weigh in on Cyber-Bullying*

With about one-third of minors reportedly experiencing cyber-bullying,<sup>105</sup> it is not surprising that courts now are beginning to confront cases involving this burgeoning phenomenon. In the case of Megan Meier, Lori Drew initially was convicted of misdemeanor charges under the Computer Fraud and Abuse Act<sup>106</sup> for violating MySpace’s terms-of-service policy,<sup>107</sup> but the

101. Sameer Hinduja & Justin Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CENTER (2010), [http://www.cyberbullying.us/cyberbullying\\_and\\_suicide\\_research\\_fact\\_sheet.pdf](http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf) (last visited Dec. 13, 2010).

102. Sameer Hinduja & Justin Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RESEARCH CENTER (July 2010), [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws\\_20100701.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws_20100701.pdf) (last visited Dec. 13, 2010).

103. *Id.*

104. *Id.*

105. *See supra* note 68 and accompanying text.

106. 18 U.S.C. § 1030 (2010).

107. *See* Editorial, *Vague Cyberbullying Law*, N.Y. TIMES, Sept. 8, 2009, at A24 (noting that “the jury acquitted Ms. Drew of intentional infliction of emotional distress, but convicted her of accessing a computer without proper authorization in violation of the federal Computer Fraud and Abuse Act. Her

conviction was later reversed.<sup>108</sup> In August 2009, U.S. District Judge George H. Wu held that the portion of the Act under which Drew was convicted gave too much discretion to law enforcement and too little notice to people like Drew for it to be used against them when they allegedly violate a website's terms of service.<sup>109</sup>

The criminal case against Drew is not the only cyberbullying dispute to be litigated. For instance, a California appellate court in March 2010 affirmed a trial court's refusal to dismiss a civil lawsuit for defamation<sup>110</sup> and intentional infliction of emotional distress<sup>111</sup> filed on behalf of a Los Angeles-area high school student who was the subject of posts on his own website by several fellow students who made "derogatory comments about his perceived sexual orientation and threaten[ed] him with bodily harm."<sup>112</sup> One such post stated:

I want to rip out your fucking heart and feed it to you. . . . I've . . . wanted to kill you. If I ever see you I'm . . . going to pound your head in with an ice pick. Fuck you, you dick-riding penis lover. I hope

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crime was, in essence, violating MySpace's terms of service"). Available at <http://www.nytimes.com/2009/09/08/opinion/08tue2.html> (last visited Dec. 13, 2010).

108. Rebecca Cathcart, *Conviction is Tossed Out in MySpace Suicide Case*, N.Y. TIMES, July 2, 2009. Available at <http://www.nytimes.com/2009/07/03/us/03bully.html> (last visited Dec. 13, 2010).

109. *Drew*, 259 F.R.D. at 467.

110. See generally GENELLE BELMAS & WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW: 2011 EDITION 117 – 180 (2011) (providing an excellent overview of defamation law, including its two subsets, libel and slander).

111. A cause of action for intentional infliction of emotional distress typically "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

112. *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1199 (Cal. Ct. App. 2010), *rev. denied*, 2010 Cal. LEXIS 6052 (Cal. June 17, 2010).



you burn in hell.<sup>113</sup>

The appellate court specifically considered the dangers posed by cyber-bullying,<sup>114</sup> and it addressed the issue of whether the statement quoted above would constitute a true threat of violence.<sup>115</sup> True threats of violence are one of the narrow categories of expression not protected by the First Amendment.<sup>116</sup> The appellate court did not, however, consider whether the statements constituted fighting words. Nonetheless, it was “one of the first [cases] in California to examine the boundaries between free expression and so-called cyber-bullying.”<sup>117</sup>

In May 2010, a federal district court in California addressed a case involving a student, identified as J.C., who was suspended from her public school after she posted a video on YouTube of her friends talking in disparaging fashion about one of their classmates.<sup>118</sup> The girl who took the video and later posted it was suspended from school for two days.<sup>119</sup> She responded by suing the school and certain administrators, claiming they “violated her First Amendment rights by punishing her for making the YouTube video and posting it on the Internet. J.C. argue[d] that the School had no authority to discipline her because her conduct took place entirely outside of school.”<sup>120</sup> In considering the claim, U.S. District Judge Stephen V. Wilson offered up what might be the first concise judicial definition of cyber-bullying when he wrote:

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113. *Id.*

114. *Id.* at 1218.

115. *Id.* at 1219-1226.

116. *See supra* note 51.

117. Bob Egelko, *Threatening Posts Ruled Not Free Speech*, S.F. CHRON., Mar. 17, 2010, at C2. Available at [http://articles.sfgate.com/2010-03-17/bay-area/18835111\\_1\\_free-speech-first-amendment-message](http://articles.sfgate.com/2010-03-17/bay-area/18835111_1_free-speech-first-amendment-message) (last visited Dec. 13, 2010).

118. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010). Among other things, the classmate that was verbally bullied on the video was called a slut and described by one girl as “the ugliest piece of shit I’ve ever seen in my whole life.” *Id.* at 1098.

119. *Id.* at 1099.

120. *Id.* at 1100.

The Court's ruling is limited to the issue of whether, and under what circumstances, the School can discipline a student for off-campus speech within the bounds of the First Amendment. Whether a student separately may be liable in tort for *defamatory, derogatory, or threatening statements made about a classmate and published over the Internet, often called "cyber-bullying,"* is not at issue here.<sup>121</sup>

While Judge Wilson dodged the issue of whether there is a separate tort cause of action for cyber-bullying, a trial court judge in New York in July 2010 squarely addressed and rejected such a proposition.<sup>122</sup> In particular, Judge Randy Sue Marber reasoned that "the Courts of New York do not recognize cyber or Internet bullying as a cognizable tort action. A review of the case law in this jurisdiction has disclosed no case precedent which recognized cyber bullying as a cognizable tort action."<sup>123</sup>

Courts facing cases involving cyber-bullying must confront thorny First Amendment questions because, to the extent that cyber-bullying necessarily involves a speech component – namely, abusive words and insults – there are issues surrounding whether that speech merits Constitutional protection or whether it crosses the line into one of the unprotected categories of expression.<sup>124</sup> Indeed, minors who bully via technologically disseminated

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121. *Id.* at 1122 n.15 (emphasis added). Judge Wilson ultimately held that the case was governed by the United States Supreme Court's precedent from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and that the school had violated the student's First Amendment rights because "no reasonable jury could conclude that J.C.'s YouTube video caused a substantial disruption to school activities, or that there was a reasonably foreseeable risk of substantial disruption as a result of the YouTube video." *Id.* at 1117.

122. *Finkel v. Dauber*, 906 N.Y.S.2d 697, 702-703 (N.Y. 2010).

123. *Id.* at 703.

124. This is illustrated by the cases of *D.C. v. R.R.*, 182 Cal. App. 4th 1190 (Cal. Ct. App. 2010), and *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010), described earlier in this section.

messages generally do possess First Amendment speech rights.<sup>125</sup> While cyber-bullying likely will not vanish without the combined efforts of parents, educators and legislators, perhaps some battles can be won in court by applying *Chaplinsky's* fighting words doctrine as one means of redress. The next part of this article thus turns its attention to fighting words scenarios involving minors.

## II. FIGHTING WORDS, MINORS AND CYBER-BULLYING SCENARIOS INVOLVING TEXTS AND INSTANT MESSAGES

This part also has two sections. First, Section A provides an overview of the types of language that traditionally give rise to the application of the fighting words doctrine, and the contexts in which that language is used. Section B delves deeper to articulate three hypothetical scenarios involving real-time, high-tech communication between minors that may fall within the confines of the fighting words doctrine were it to be expanded beyond mere face-to-face communications.

### A. *The Types of Epithets and Circumstances That May Give Rise To Application of the Fighting Words Doctrine*

In determining whether a particular instance of speech constitutes fighting words, two variables are critical: 1) the nature of the words used; and 2) the factual circumstances and context in which the words are used.<sup>126</sup> As one court put it, “[t]he ‘fighting

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125. *Cf.* *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (observing that “[c]hildren have First Amendment rights”); *Allen v. City of Bordentown*, 524 A.2d 478, 484-485 (N.J. Super Ct. Law Div. 1987) (observing that “while the rights of minors are not as extensive as those of adults,” minors “are recognized as ‘persons’ under the Federal Constitution and thus possess certain fundamental rights, “including freedom of speech,” and adding that “children have constitutional rights, including First Amendment rights”).

126. As the United States Court of Appeals for the Eleventh Circuit observed nearly thirty years ago, “. . . words are not inflammatory *per se*, without regard to the circumstances in which they were uttered” and that “the circumstances surrounding the words can be crucial.” *Lamar v. Banks*, 684 F.2d 714, 719 (11th Cir. 1982).

words' concept has two aspects. One involves the quality of the words themselves. The other concerns the circumstances under which the words are used."<sup>127</sup> Simply put, any fighting words formula requires: **words + circumstances**.<sup>128</sup>

Keeping in mind the two-part relationship between words and circumstances, this section initially examines some traditional notions of, and scenarios involving, fighting words and then, more specifically, examines fighting words when the target of the speech is a minor. In particular, the following straightforward quotation succinctly captures what is arguably the quintessential fighting words scenario in the United States:

*"No fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate."*<sup>129</sup>

So wrote the Supreme Court of North Carolina in 1997 in finding that the use of the word "nigger" by one adult directed at another adult amounted to "a classic case of the use of 'fighting words' tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina."<sup>130</sup> Indeed, the use of racial slurs can constitute fighting words if they are directed at particular individuals and when they are considered in conjunction with the speaker's actions and proximity to the target of the speech.<sup>131</sup> Racial slurs that constitute fighting words also include the derogatory utterance of "nigger" by a Caucasian minor directed at

127. *Connecticut v. Hoskins*, 401 A.2d 619, 621 (Conn. Super. Ct. 1978).

128. *See Maine v. John W.*, 418 A.2d 1097, 1106 (Me. 1980) (noting that many courts "faced with the task of determining what constitutes fighting words" employ objective tests that "*focus on the context of the incident rather than solely on the content of the words*") (emphasis added).

129. *In re Spivey*, 480 S.E.2d 693, 699 (N.C. 1997) (emphasis added).

130. *Id.* at 699.

131. *See, e.g., Wichita v. Hughes*, 798 P.2d 972 (Kan. Ct. App. 1988) (involving a defendant who "called various people 'nigger,' 'Communist spic,' 'moustached fag,' 'son of a bitch,' 'motherfucker,' and 'criminal cop'" at the same time the defendant was "slamming of a metal rack down onto a counter and the grabbing of a store customer by the shirt," and concluding the speech constituted fighting words).

an African-American minor under certain circumstances.<sup>132</sup>

In addition to racial insults, sexually derogatory insults may constitute fighting words. At least one appellate court, for instance, has held that the use of the words “bitch” and “slut” by an adult are “likely to cause an average addressee to fight”<sup>133</sup> and that those words can be expressed in a mode and manner “calculated to bait another into a fight.”<sup>134</sup> Calling an adult female, who identified herself as a Christian and a lesbian, terms such as “Christian lesbo” and “lesbian for Jesus” has also been found to constitute fighting words.<sup>135</sup>

Professor Timothy Jay, a psycholinguistics expert from the

132. The Supreme Court of North Dakota in 2010 found the use of the word “nigger” and other similar terms by a minor, identified as H.K., in a one-on-one, face-to-face encounter with an African-American minor, identified as T.L., “constituted ‘fighting words’ in the context in which they were uttered and the protections of the First Amendment did not apply.” *In re H.K.*, 778 N.W.2d 764, 770 (N.D. 2010). The court reasoned:

H.K. did more than simply utter an offensive racial epithet. The evidence established H.K. followed T.L. into the bathroom at the teen center, yelled at her, repeatedly called her a “nigger,” and told her to “watch out” because she “own[s] this town” and does not want “niggers” in it. Upon consideration of the context in which she made these statements, *an objectively reasonable person would find H.K. used the term “nigger” in a derogatory manner that heightened the potential her statements would incite a breach of the peace or violent reaction*, particularly when addressed to an individual of African-American ancestry.

*Id.* (emphasis added).

Similarly, a New York appellate court ruled in 2008 that the speech of one juvenile to another while riding a school bus constituted fighting words when the speech included the phrase, “we shoot niggers like you in the woods.” *In re Shane EE.*, 48 A.D.3d 946, 946 (N.Y. App. Div. 2008). In addition to finding that this speech constituted a true threat of violence, the appellate court concluded that “the language at issue here is so personally and racially offensive that it was ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’” *Id.* at 947 (quoting *Chaplinsky v. New Hampshire*, 315 US 568, 574 (1942)).

133. *Griffith v. City of Bay St. Louis*, 797 So. 2d 1037, 1041 (Miss. Ct. App. 2001).

134. *Id.*

135. *Gilles v. Davis*, 427 F.3d 197, 205-206 (3d Cir. 2005).

Massachusetts College of Liberal Arts,<sup>136</sup> observes that words such as “fuck off” and “motherfucker” produce a strong reaction from males to fight, as do references that question masculinity and sexual identity such as “pussy” and “faggot.”<sup>137</sup> Jay’s research finds that females would be likely to fight when words such as “slut,” “whore” and “cunt” are used because they “refer to sexual looseness.”<sup>138</sup> Jay concludes that “although the fighting words doctrine does not address the issue of gender differences, these differences do exist.”<sup>139</sup> In other words, a distinction should be made between whether the target of the speech is a male or a female.

If this is the case, then a distinction might also be made whether the target of the speech is an adult or a minor, with age-like gender-affecting the propensity of person to respond with violence to speech. When it comes to minors, personal insults that constitute fighting words might well conceivably sweep up far more than just racial insults like the word “nigger”. One kid calling another kid fat, for instance, might be enough to trigger a fight.<sup>140</sup> Likewise, one minor calling another a “fag” or “queer”

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136. Jay is “[a] world-renowned expert in cursing” who “is frequently sought for his expertise on psycholinguistics.” Dr. Timothy Jay, Professor, Psychology Faculty, Massachusetts College of Liberal Arts, <http://www.mcla.edu/Undergraduate/majors/psychology/timothyjay> (last visited Dec. 13, 2010).

137. TIMOTHY JAY, *WHY WE CURSE: A NEURO-PSYCHO-SOCIAL THEORY OF SPEECH* 218 (1st ed. 2000).

138. *Id.*

139. *Id.*

140. For instance, after teenage singing sensation Miley Cyrus was derided as “fat” by several people on the Internet, she responded with what the *Toronto Star* described as “an angry tirade on her Twitter web page.” *She Ain’t Heavy, Just Really Annoyed*, *TORONTO STAR*, May 20, 2009, at E2. In particular, then sixteen-year-old songstress Cyrus wrote:

Talk all you want. I have my flaws. I’m a normal girl there’s things about my body I would change, but stop calling me f\*t in post. I don’t even like the word. *Those remarks that you hateful people use are fighting words, the ones that scar people and cause them to do damage to themselves or others.*

*Id.* (emphasis added). Although Miley Cyrus has no credibility as a legal scholar and is not using the term “fighting words” in a legal sense, her observation that weight-based insults can be traumatizing to teens nonetheless is indicative of the type of personal insult that might spark responsive violence in a

might also constitute unprotected fighting words, as Judge Richard Posner suggested in his recent majority opinion in *Nuxoll v. Indian Prairie School District*.<sup>141</sup> The plaintiff in *Nuxoll*, a high school sophomore, conceded that “he could not inscribe ‘homosexuals go to Hell’ on his T-shirt because those are fighting words and so can be prohibited despite their expressive content and arguable theological support.”<sup>142</sup> Posner called this concession “prudent,”<sup>143</sup> adding that:

People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity – none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being.

There is evidence, though it is suggestive rather than conclusive, that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school’s expectations.<sup>144</sup>

Importantly for purposes of this article, Posner suggested a possible two-level, age-based theory of fighting words when he added that adults “can handle such remarks better than kids can and [. . .] adult debates on social issues are more valuable than debates among children.”<sup>145</sup> In brief, given different levels of cognitive development, what might not rise to the level of a fighting word for an adult might well do so when the speech is

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one-on-one setting.

141. 523 F.3d 668 (7th Cir. 2008).

142. *Id.* at 671.

143. *Id.*

144. *Id.*

145. *Id.* at 674.

directed at a minor.

The judiciary is growing increasingly concerned by anti-gay epithets directed by minors and the harms they may cause. For instance, U.S. District Judge James Gritzner wrote in 2004 that “the use of anti-gay epithets, homophobic comments, or other forms of ‘gay bashing’ is a serious problem in our schools.”<sup>146</sup> Three years earlier, U.S. District Judge Donovan W. Frank observed that:

The teenage years are a time of discovery as all of our youth assert their individuality and sexuality. Those students who identify themselves as gay, lesbian, bisexual, or transgender (“GLBT”), however, struggle with the added pressures of potential alienation from friends, family, and community, and the potential for ridicule or even violence. Indeed, studies show that more than ninety percent of high school students hear negative comments regarding homosexuality during the school day. *It is no wonder that there are significantly higher reports of depression and suicide amongst our GLBT youth, a problem that cannot be ignored.*<sup>147</sup>

More recently, U.S. District Judge Richard Smoak in 2008 cited a veritable laundry list of research publications when observing that studies “confirm the vulnerability of gay and lesbian students.”<sup>148</sup> All of this provides support for adjusting the fighting words doctrine to take into account the age of the target of speech, as well as his or her sexual orientation.

Can insulting text messages lead to fights between the sender and recipient when both are minors? The answer clearly is yes.

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146. *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 815 n.2 (S.D. Iowa 2004).

147. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1073 (D. Minn. 2001) (emphasis added).

148. *Gillman v. Sch. Bd. Holmes County*, 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008).



As a November 2010 article in *USA Today* explained one such incident, “Josie Lou Ratley, 15, suffered permanent brain damage when he was beaten outside the school by a student from another school who allegedly received a disparaging text message from Ratley about his brother, who had committed suicide. Ratley, an eighth-grader, was stomped with steel-toe boots.”<sup>149</sup> The individual who allegedly attacked Ratley, Wayne Treacy, was charged with attempted murder.<sup>150</sup>

*B. Teens, Technology and Fighting Words: Some Scenarios That a Modified Fighting Words Doctrine Might Address*

Given the above background on fighting words, this section sets forth three brief hypothetical scenarios involving one-on-one mediated communications—either e-mails or texts—between minors. The hypotheticals are used here simply to illustrate situations to which the fighting words doctrine might be applied, were it to be interpreted liberally by courts to sweep up not simply face-to-face communications, but also texts and e-mails. The personally abusive epithets used in the hypotheticals were specifically chosen in light of the research about fighting words set forth in Section A of this part of the article.

Significantly, in each of the following scenarios, the minors are in close geographic proximity to each other such that a fight could well result within less than five minutes of a message being communicated to one of the parties. In addition, the author of this article has attempted to carefully craft the content of the messages in all three scenarios so as to fall *outside* the reach of the true threats doctrine but *within* the ambit of the fighting words doctrine as abusive, personal insults. As noted earlier, these are two

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149. Jarrett Bell, *Brown’s Anti-Violence Plea; His Campaign Teaches Kids Conflict Resolution*, USA TODAY, Nov. 16, 2010, at 1C. Available at [http://www.usatoday.com/printedition/sports/20101116/brown16\\_cv.art.htm](http://www.usatoday.com/printedition/sports/20101116/brown16_cv.art.htm) (last visited Dec. 13, 2010).

150. Rafael A. Olmeda, *Middle School Students Writing a Book about Bullying*, SOUTH FLORIDA SUN-SENTINEL (Fort Lauderdale), July 19, 2010. Available at [http://articles.sun-sentinel.com/2010-07-18/news/fl-broward-bullying-book-20100718\\_1\\_anti-bullying-program-miami-dade-school-districts-deerfield-beach-middle-school](http://articles.sun-sentinel.com/2010-07-18/news/fl-broward-bullying-book-20100718_1_anti-bullying-program-miami-dade-school-districts-deerfield-beach-middle-school) (last visited Dec. 13, 2010).

distinct First Amendment doctrines,<sup>151</sup> and while speech constituting true threats and fighting words are sometimes entangled such that both doctrines could apply to a single speech episode or occurrence, this article concentrates on the latter standard. Finally, all three situations involve real-time, electronic communications between minors in decidedly off-campus, non-school locations such that punishment of the speakers should not fall within the purview of school administrators under the *Tinker* standard.<sup>152</sup>

### 1. *The Locker Room Episode*

A local youth-league soccer team, comprised of minors ranging from fourteen to sixteen years of age, is in the locker room preparing for a game against a team from a neighboring community. A rumor has floated around the team for several days that one of its members, Greg, is gay. Biff, a teammate, starts sending Greg text messages from across the locker room where they are getting dressed, telling him “keep your hands off the soccer balls; I know you’ve got a thing for balls.” The texts, which Biff sends about every minute or so for about ten minutes, escalate into homophobic slurs – calling Greg “fag,” “queer,” and a “bone-smoking cock sucker.” About twenty seconds after receiving a text that calls him a “pussy,” Greg walks over about fifteen yards to Biff’s locker and tells him to stop texting. Biff just laughs, and Greg takes a swing at Biff, punching him in the face. The coach calls the police and Greg is arrested for assault, but his attorney argues that Biff’s speech amounted to fighting words.

### 2. *The Movie Theater Eruption*

In a shopping-mall movie theater, two fourteen-year-old girls—Brittany and Hayley—are using Research in Motion’s Blackberry Messenger, an instant messaging application for Blackberry smart-

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151. See *supra* note 51 and accompanying text (referencing the true threats doctrine as a distinct category of unprotected expression).

152. See *supra* notes 53–55 and accompanying text (describing the authority of school officials under *Tinker* to punish student expression).

phone owners, to communicate with each other. Brittany, who is sitting in the back row of the theater, is secretly forwarding the conversation to other girls she knows who are also in the theater as a joke on Hayley.

Brittany then starts making fun of Hayley, who is sitting ten rows in front of Brittany, in their texting conversation for believing that they are “bffs,”<sup>153</sup> and she tells Hayley “you are nobody without me, you fat bitch.” Brittany then adds, “btw, I’ve been forwarding this to everyone, lesbo. Lol!” Just then the movie ends, and Hayley quickly exits the theatre and waits in the lobby for about thirty seconds for Brittany. As soon as Brittany enters the lobby, Hayley slaps her in the face before Brittany even sees her. Hayley is arrested for assault after movie personnel call the police, but her parents argue that Brittany’s speech amounted to fighting words.

### 3. *The Shopping Mall Showdown*

Jayson and Heath, two 15-year-old boys with a history of animosity between them, are texting each other while both are walking around the same shopping mall on a Saturday afternoon. Although they are in different stores and about 100 yards away from each other, Jayson and Heath both know they are somewhere in the same mall because they saw each other being dropped off their by their respective mothers. Jayson texts Heath, “Your girlfriend is a skanky slut. She got high with me last night and we fucked.” Heath quickly texts back, “Fuck off.” Jayson immediately replies, “I’d rather fuck your girlfriend, douche bag.” Heath then sets off to find Jayson in the mall, and he locates Jayson about three minutes later. Heath then punches Jayson in the stomach. Heath is arrested by Blart, a mall cop, for battery, but Heath asserts that Jayson’s texts constituted fighting words.

The next part of this article considers whether the fighting words doctrine could, indeed, be interpreted by courts in a manner that would render unprotected by the First Amendment the expression

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153. This stands for “best friends forever.” URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=bff> (last visited Dec. 13, 2010).

of Biff, Brittany and Jayson in each of these scenarios.

III. MODIFYING THE FIGHTING WORDS DOCTRINE TO ACCOUNT  
FOR CYBER-BULLYING: IS SUCH AN APPROACH POSSIBLE AFTER  
*STEVENS*?

In its 2010 ruling in *United States v. Stevens*,<sup>154</sup> the United States Supreme Court held unconstitutional a federal statute criminalizing the commercial creation, sale or possession of certain depictions of animal cruelty.<sup>155</sup> In crafting its decision, the high-court majority was unambiguous in its extreme disinclination to create and designate new categories of unprotected expression simply because the speech at issue supposedly—in the government’s opinion—is devoid of social value.<sup>156</sup>

In particular, Chief Justice John Roberts, writing the opinion of the court for an eight-justice majority,<sup>157</sup> rejected the use of what he called “a free-floating test for First Amendment coverage”<sup>158</sup> that would hinge on little more than “an ad hoc balancing of relative social costs and benefits”<sup>159</sup> of the speech in question. “When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of

154. 130 S. Ct. 1577 (2010).

155. See 18 U.S.C. § 48 (2010) (providing that “[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both,” but carving out an exception for “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value”).

156. Despite its absolutist language, the First Amendment does not protect all expression. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002) (writing that “as a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”). See *supra* note 4 (providing further elaboration on categories of unprotected expression).

157. The lone dissenting justice was Samuel A. Alito, Jr. See *Stevens*, 130 S. Ct. at 1592-1602 (Alito, J., dissenting).

158. *Id.* at 1585.

159. *Id.*

a simple cost-benefit analysis,”<sup>160</sup> Roberts wrote. He openly derided such a test as “highly manipulable,”<sup>161</sup> explaining that the Court lacks such “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”<sup>162</sup>

Fighting words, as described earlier, have long been recognized by the Court as outside the scope of First Amendment.<sup>163</sup> Yet compared to the texting and messaging scenarios set forth in Section B of Part II, *Chaplinsky v. New Hampshire*<sup>164</sup>—the decision that gave rise to the fighting words exception—occurred in an in-person, face-to-face situation in which a Jehovah’s Witness, while standing on a public sidewalk, called the City Marshal of Rochester, New York, “a God damned racketeer”<sup>165</sup> and “a damned Fascist.”<sup>166</sup> Not only was the speech of Walter Chaplinsky communicated in a person-to-person manner, but the Supreme Court emphasized that “the *spoken*, not the *written*, word is involved.”<sup>167</sup> In fact, the Supreme Court’s articulation of the fighting words doctrine in *Chaplinsky* uses the term “utterance,”<sup>168</sup> further suggesting the doctrine was originally designed to apply only to the spoken word.

The notion that the fighting words doctrine is cabined to in-person, spoken-word scenarios was reiterated by Justice Antonin Scalia during oral argument in October 2010 in the Westboro Baptist Church funeral-protest case of *Snyder v. Phelps*.<sup>169</sup> As Justice Scalia verbally volleyed with Margie J. Phelps, attorney for the respondents, “My goodness. We – we did have a doctrine of fighting words, and you acknowledge that if somebody *said*, you know, things such as that *to his face*, that wouldn’t be protected by

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160. *Id.* at 1586.

161. *Id.*

162. *Id.*

163. *See supra* notes 2 – 5 and accompanying text.

164. 315 U.S. 568 (1942).

165. *Id.* at 569.

166. *Id.*

167. *Id.* at 571.

168. *Id.* at 572.

169. Transcript of Oral Argument, *Snyder v. Phelps*, No. 09-751 (Oct. 6, 2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-751.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-751.pdf) (last visited Dec. 13, 2010).

the First Amendment.”<sup>170</sup> Similarly, Justice Ruth Bader Ginsburg expressed her belief during oral argument in *Snyder* that the fighting words doctrine is limited to situations in which “you say that to me and I’m immediately going to punch you in the nose.”<sup>171</sup>

The question that arises, when reading *Chaplinsky* through the lens of *Stevens* and the oral-argument remarks of both Justices Scalia and Ginsburg in *Snyder*, is this: Does the high court’s stated reluctance in *Stevens* to carving out new categories of unprotected expression mean that it would be similarly averse to expressly modifying *Chaplinsky*, allowing it to apply to modern-day modes of one-on-one, real-time communication—namely, texting, instant messaging, and e-mailing—that are favored by teens?<sup>172</sup> Parsed differently, does an avowed reluctance to create new categories of unprotected expression in *Stevens* translate to an equally stubborn unwillingness to expand those categories of unguarded speech that already exist?

Modifying and expanding the fighting words doctrine in order to prevent harm to minors caused by cyber-bullying certainly seems, at least at first glance, like an uphill battle because, if anything, the Court has narrowed the fighting words doctrine over time, not expanded it. Professor Jeffrey Shaman, for instance, writes that “while the Court has never expressly overruled *Chaplinsky* nor expressly recanted the fighting words doctrine, it has made a point of confining the fighting words doctrine to a more narrow scope

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170. *Id.* at 28 (emphasis added). Margie Phelps, the daughter of the Westboro Baptist Church’s leader, the Reverend Fred Phelps, actually expressed her own displeasure with the fighting words doctrine later during oral argument when she stated, “Well, Justice Scalia, I must hasten to say this: I am not a fan of the fighting words doctrine. I do think it has problems. I just don’t think it applies in this case.” *Id.* at 45.

171. *Id.* (emphasis added).

172. As Professor Rich Ling of the IT University of Copenhagen recently observed:

Teens and young adults have been a major force in the development and use of texting. Indeed, in Norway as in other locations, it was teens that first popularized the use of text messages as a free way to communicate with their peers in the latter part of the 1990s.

Rich Ling, *Texting as a Life Phase Medium*, 15 J. COMPUTER-MEDIATED COMM. 277, 277 (2010).

and for many years has not used the fighting words doctrine to uphold a regulation of speech.”<sup>173</sup> It thus would represent a dramatic break from its past interpretation of the fighting words doctrine were the Supreme Court to suddenly construe it broadly in the context of cases involving one-on-one, real-time electronic communication between minors.

Yet the Court in *Stevens* expressly stated that exceptions to the blanket of First Amendment protection may be made when the speech in question, such as child pornography, is intrinsically related to the abuse of minors.<sup>174</sup> Although it is a slender reed upon which to lean any expansion of the aging fighting words document, it is somewhat encouraging that the Court focused on *harm to minors* and a “proximate link”<sup>175</sup> between the speech and the harm that minors suffer in its description in *Stevens* of when a categorical carve-out is permissible. This will become significant if courts focus only on expanding the fighting words exception narrowly to cover cyber-bullying scenarios involving one-on-one texting, instant messaging and e-mailing between minors, given the harms discussed earlier in this article that are caused by personally abusive epithets directed by bullies *at minors*. If the judiciary is particularly concerned about harm to minors caused by speech, and if in very recent cases such as *Federal Communications Commission v. Fox Television Stations, Inc.*<sup>176</sup> it does *not* require direct proof of causation of harm to minors purportedly wrought by speech, then this too would militate in favor of an expansion of the fighting words doctrine to such one-on-one texting and instant-messaging scenarios between minors.<sup>177</sup>

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173. Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 303 (1995).

174. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

175. *Id.* (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002)).

176. 129 S. Ct. 1800 (2009).

177. In *Fox Television Stations*, Justice Antonin Scalia wrote for the majority of the Court, in considering the Federal Communications Commission’s efforts to protect minors from broadcast indecency:

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children

Despite such a mixed trajectory for modification and expansion, the fighting words doctrine certainly can be—and actually has been—tweaked to adapt to the particular characteristics of the target of the speech (the person at whom the speech is directed). For instance, courts have recognized “a narrower application”<sup>178</sup> of the doctrine when the target of speech is a police officer.<sup>179</sup> Why? Because, as the Supreme Court has observed, “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers”<sup>180</sup> because a properly trained officer is expected to exercise a higher degree of restraint than “the average citizen, and thus be less likely to respond belligerently to ‘fighting words.’”<sup>181</sup>

Under this line of logic, calling a police officer an “asshole” typically is not enough to trigger the application of the fighting words doctrine.<sup>182</sup> Similarly, naming an officer a “son of a bitch” does not fall within the scope of the fighting words exception to free expression.<sup>183</sup> Furthermore, as U.S. District Judge James O.

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are intentionally exposed to indecent broadcasts (and insulated from all other *indecenty*), and others are shielded from all *indecenty*. . . . Here it suffices to know that children mimic the behavior they observe – or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives.

*Id.* at 1813 (emphasis added).

178. *Haynes v. San Francisco*, 2010 U.S. Dist. LEXIS 76829, \*19 (N.D. Cal. July 28, 2010).

179. *Id.* See *Gold v. City of Miami*, 138 F.3d 886, 888-889 (11th Cir. 1998) (reasoning that “the fighting words doctrine has a narrower application where, as here, an individual’s speech offends a police officer”).

180. *Houston v. Hill*, 482 U.S. 451, 461 (1987).

181. *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

182. See *Greene v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002) (involving a case in which a man claimed he was arrested without probable cause and in retaliation for his having insulted a police officer, and concluding that “Mr. Greene’s characterization of Lt. Barber as an ‘asshole’ was not egregious enough to trigger application of the ‘fighting words’ doctrine”); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (calling an arresting officer an “asshole” was protected speech), *cert. denied*, 502 U.S. 898 (1991).

183. *Johnson v. Campbell*, 332 F.3d 199, 213 n.10 (3d Cir. 2003).



Browning held in 2006, “the phrase ‘fuck you’ by itself does not rise to fighting words when directed at a police officer, even in a crowded mall.”<sup>184</sup> The bottom line of these “contempt of cop”<sup>185</sup> cases, despite a few outlier opinions,<sup>186</sup> is that:

a shift in the intended audience of speech – in other words, a shift in the target at whom speech is directed – will affect the extent of protection that speech receives, at least within the framework of the fighting words doctrine as it has evolved since *Chaplinsky*. Placed in the context of a simple “if-then” formula: If the audience or target of the speech is the average citizen, then the speech receives less protection than if the target is the police.<sup>187</sup>

What is more, while one teenager giving the middle-finger gesture to another teenager might well constitute fighting words,<sup>188</sup>

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184. *Stone v. Juarez*, No. CIV 05-508 JB/RLP, 2006 U.S. Dist. LEXIS 27272, at \*35 (D.N.M. Apr. 23, 2006).

185. William Cohen, *A Look Back At Cohen v. California*, 34 UCLA L. REV. 1595, 1605 (1987).

186. *See, e.g., Delaware v. Field*, 1990 Del. Super. LEXIS 316, at \*4 (Aug. 15, 1990) (concluding that “calling a law enforcement officer a vulgar name is not protected speech. The only purpose of such an act is to attempt to cause the officer to lose his professional bearing, i.e. to provoke a response. These are ‘fighting words’”).

187. Clay Calvert, *Personalizing First Amendment Jurisprudence: Shifting Audiences & Imagined Communities to Determine Message Protection in Obscenity, Fighting Words, and Defamation*, 20 U. FLA. J.L. & PUB. POL’Y 439, 459 (2009).

188. It should be noted, however, that the U.S. Supreme Court “has not directly addressed whether the middle finger gesture constitutes fighting words.” Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1426 (2008). If the teenagers giving the middle finger to each other were on public school campus, the fighting words doctrine would not need to be used to punish them because, under the Supreme Court’s ruling in *Tinker v. Des Moines Community Independent School District*, 393 U.S. 503 (1969), “a school can punish a student for using the middle finger gesture in a school setting if the school can show that the student’s actions would substantially and materially disrupt the educational process.” *Id.* at 1471.

at least one federal court has ruled that when the same offensive digital form of symbolic expression<sup>189</sup> is “used against a universe of teachers, [it] is not likely to provoke a violent response”<sup>190</sup> and thus does not fall within the fighting words exception.<sup>191</sup>

Thus, adapting a different fighting words threshold when the target of the speech is a minor—rather than a police officer, a teacher or an average adult—is possible. The argument, in brief, is this: If police officers must withstand *more* verbal abuse than the average adult under the fighting words doctrine, then surely it seems logical to hold that minors, particularly those grappling with gender and sexual-orientation issues, must withstand *less* verbal abuse than the average adult.

A major hurdle in making the fighting words doctrine applicable to one-on-one texting and e-mailing between minors is the fact that these forms of communication are not in-person, face-to-face messages. For instance, U.S. District Judge Terrence F. McVerry observed in 2007 that “a ‘MySpace’ [I]nternet page is not outside of the protections of the First Amendment under the fighting words doctrine because *there is simply no in-person confrontation in cyberspace* such that physical violence is likely to be instigated.”<sup>192</sup> Indeed, when analyzing whether fighting words exist, courts examine whether there is “a confrontational *face-to-face* exchange.”<sup>193</sup> As the Supreme Court of Missouri observed, “offensive language can be statutorily prohibited only if it is personally abusive, addressed in a *face-to-face manner* to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient.”<sup>194</sup> Thus, writing personally

189. See generally James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1 (2008) (providing a current and comprehensive review and analysis of the symbolic speech doctrine).

190. *Klein v. Smith*, 635 F. Supp. 1440, 1441 n.3 (D. Me. 1986).

191. *Id.* at 1442.

192. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007), *aff'd*, 593 F.3d 249 (3d Cir. 2010), *vacated*, 2010 U.S. App. LEXIS 7362 (Apr. 9, 2010) (emphasis added).

193. *Spiller v. Texas City*, 130 F.3d 162, 165 (5th Cir. 1997).

194. *Missouri v. Carpenter*, 736 S.W.2d 406, 408 (Mo. 1987) (emphasis added).

abusive epithets in the note line on a bank check does not constitute fighting words because messages conveyed on checks are “clearly not face-to-face communications.”<sup>195</sup>

There is emerging case law, however, holding that e-mails containing personally abusive epithets can constitute fighting words. In August 2009, for instance, the Maryland Court of Special Appeals—the state’s intermediate appellate court—in *Davidson v. Seneca Crossing Section II Homeowner’s Association, Inc.*<sup>196</sup> considered a case involving a series of e-mails that referred directly to the recipients of those e-mails as, among other things:

- “ballbusting trash”<sup>197</sup>
- “mercenary cunt”<sup>198</sup>
- “beeeeYatch”<sup>199</sup>
- “buttsquirt”<sup>200</sup> and
- “motherfucker.”<sup>201</sup>

In upholding a lower-court injunction prohibiting the individual from sending e-mails with such language directly to the same recipients in the future, the appellate court wrote that:

It is clear from the record and the findings of fact that much of appellant’s behavior consisted of the use of “fighting words.” Without repeating the language used by appellant against appellees, we conclude that appellant regularly employed “personally abusive epithets which . . . [were] . . . inherently likely to provoke violent reaction.”<sup>202</sup>

In addition to the ruling in *Davidson*, the Nebraska Supreme

195. *Bd. Managers Old Colony Vill. Condo. v. Preu*, 2009 Mass. Super. LEXIS 417 at \*47 (Oct. 21, 2009).

196. 979 A.2d 260 (Md. Ct. Spec. App. 2009).

197. *Id.* at 270.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Davidson*, 979 A.2d at 283 (quoting *Dziekonski v. Maryland*, 732 A.2d 367, 372 (Md. 1999)) (emphasis added).

Court's decision in *Nebraska v. Drahota*<sup>203</sup> discussed in the Introduction suggests that the fighting words doctrine may apply to one-on-one e-mailed messages filled with personally abusive epithets if:

- the target of the speech is a private person rather than a political candidate;<sup>204</sup>
- the speech is not about politics;<sup>205</sup> and
- the target-recipient of the e-mail possesses the ability to immediately retaliate.<sup>206</sup>

Ultimately, extension of the fighting words doctrine to cyber-bullying scenarios among minors involving e-mails, texts and instant messages must be narrowly tailored and carefully crafted so as to both: 1) *remain as faithful as possible to the current requirements of the doctrine*; and 2) *not sweep up within its reach speech that merits protection*.

Judge Richard Posner wrote a decade ago, when considering the validity of law targeting minors' access to violent video games in arcades, that "[w]e are in the world of kids' popular culture. But it is not lightly to be suppressed."<sup>207</sup> Just like video games, texting and instant messaging today are an integral part of the social lives and culture of minors, and suppressing the speech aspects of minors' lives should not be taken lightly simply because some adults may believe that texting lingo is silly due to all of the "acronyms, words missing vowels and a complete lack of

203. 788 N.W.2d 796 (Neb. 2010).

204. See *Drahota*, 788 N.W.2d at 805 (While Avery, as a political candidate, had diminished privacy rights trumped by a potential constituent's First Amendment rights, we recognize that balancing free speech rights against the privacy rights of a private citizen may yield a different result").

205. *Id.* (stating that "[o]bviously, Drahota is not a wordsmith, and his bumper sticker rhetoric was certainly provocative. But it did not rise to the level of fighting words under these facts. If the First Amendment protects anything, it protects political speech and the right to disagree").

206. *Id.* at 804 (reasoning that "even if a fact finder could conclude that in a face-to-face confrontation, Drahota's speech would have provoked an immediate retaliation, Avery could not have immediately retaliated. Avery did not know who sent the e-mails, let alone where to find the author")

207. *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

capitalization.”<sup>208</sup>

In light of these concerns, this article asserts that any judicial modification and expansion of the fighting words doctrine designed to address cyber-bullying by minors must be confined and cabined to situations in which each of the following three variables is present:

1. *The electronic message must be conveyed by the alleged bully-sender directly to the target-recipient of the bullying in a one-on-one fashion.* This element stays true to the notion that fighting words must be directed to a specific person.<sup>209</sup> The electronic messages would include a text, instant message or e-mail sent by the alleged bully-sender directly to his or her target-recipient. In contrast, the posting of an insulting or personally abusive message by a bully on a website or on a Facebook wall visible to others does not suffice.

2. *The alleged bully-sender and the target-recipient must be in such close geographic proximity that a physical response by the target could occur within a matter of only a few minutes.* This requirement remains true to the fighting words doctrine’s elements of both face-to-face confrontation and imminence of responsive violence.<sup>210</sup> Drawing bright lines in terms of a precise distance the bully and victim must be away from each other and exactly how much time can elapse between speech and responsive violence is undesirable, as courts need flexibility to consider the totality of circumstances and the unique facts of any given case.<sup>211</sup>

3. *The content of the texted, IM’ed or e-mailed message transmitted by the bully-sender must be so personally abusive of the target-recipient that responsive violence from a reasonable*

208. Stephanie Dunnewind, *A Text of the Times*, LEXINGTON HERALD LEADER (Ky.), May 22, 2003, at E1.

209. See *supra* note 21 and accompanying text.

210. See *supra* notes 12-13 and accompanying text.

211. Defamation law, for instance, allows for such flexibility in group-defamation scenarios where more than just the precise size of a group is considered on the element of identification. As Professor Robert Trager and his colleagues recently wrote, “Where is the line to be drawn? How many members must a group include before it crosses the threshold from small enough to too big? Like so much in the law, there is no definitive answer.” ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM & MASS COMMUNICATION* 140 (2d ed. 2010).

*minor in the position of the target-recipient is likely to occur.* This element stays true to the likelihood or probability element of fighting words.<sup>212</sup> It mandates that courts employ an objective standard of likeliness by requiring the consideration of the response of a reasonable minor with the same characteristics (sexual orientation, for instance) as the actual target-recipient of the speech. Such an objective component tracks the U.S. Supreme Court's requirement in harassment cases that "the objective severity of harassment should be judged from *the perspective of a reasonable person in the plaintiff's position*, considering 'all the circumstances.'"<sup>213</sup> It also mirrors the objectivity requirement in the tort of intentional infliction of emotional distress that the emotional distress suffered must be "so severe that *no reasonable person could be expected to endure it.*"<sup>214</sup>

By keeping this trio of considerations in mind when attempting to apply the fighting words doctrine to cyber-bullying scenarios, courts hopefully will neither stray too far for the core components of the existing doctrine nor veer off into the realm of censoring speech that merely offends.

#### IV. CONCLUSION

At this stage, a quartet of points should be abundantly clear. First, bullying and, in particular, cyber-bullying are of critical national concern due to the deadly consequences those insidious behaviors may foster.<sup>215</sup> Second, the problem has garnered the attention of lawmakers nationwide who now are groping for

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212. See *supra* note 24 and accompanying text.

213. *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75, 81 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)) (emphasis added).

214. *Thomas v. BSE Industrial Contractors, Inc.*, 624 So. 2d 1041, 1043 (Ala. 1993) (emphasis added).

215. See generally Nancy Cambria, *School Bullying on U.S. Agenda*, ST. LOUIS POST-DISPATCH, Apr. 9, 2010, at Apr. 9, 2010, at A1 (describing "a raging debate on school bullies" and noting that "prominent national cases in which bullying – particularly online and through texting – may have contributed to suicides has led leaders to scrutinize the schools' role in controlling such behavior, and its overall impact on children and school performance.").

legislative ways to rein in cyber-bullying.<sup>216</sup> Third, squelching cyber-bullying necessarily raises First Amendment questions to the extent that cyber-bullying involves the free speech rights of minors and because the line between protected and unprotected expression is not always clear when it comes to texted and e-mailed messages.<sup>217</sup> Fourth, the aging fighting words doctrine that was created long before the advent of text messages and e-mails may, depending upon how narrowly or expansively it is construed today, provide one mechanism for courts to declare that particular instances of cyber-bullying by and between minors fall outside the scope of First Amendment protection.

As it now stands, the fighting words doctrine is “narrowly confined”<sup>218</sup> to situations involving “face to face insults which, it is feared, will provoke a reasonable person to violence.”<sup>219</sup> As described above, the face-to-face component would need to be expanded to text-to-text situations, and the average person would need to be changed to take into account the sensibilities of an average minor (rather than an adult) in the same position of the bully’s target (an average minor possessing similar ethnic, gender, religious, sexual-orientation and other characteristics as the bully’s target).

Ultimately, of course, it is left to judges and justices to determine whether the fighting words doctrine will be modified to adapt to the new and ever-changing modes of communication with which today’s youth are particularly comfortable and conversant. As UCLA psychology professors Kaveri Subrahmanyam and Patricia Greenfield observe, “teens are heavy users of new communication forms such as instant messaging, e-mail and

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216. *Supra* notes 40 – 46 and accompanying text.

217. See generally Abbott Koloff, *States Push for Cyberbully Controls*, USA TODAY, Feb. 7, 2008, at 3A (noting that “cyberbullying laws could lead to freedom-of-speech challenges,” and quoting Vito Gagliardi, a New Jersey attorney who represents school districts, for the proposition that “[t]here’s not a large body of case law that addresses that issue”). Available at [http://www.usatoday.com/news/nation/2008-02-06-Cyberbullying\\_N.htm](http://www.usatoday.com/news/nation/2008-02-06-Cyberbullying_N.htm) (last visited Dec. 13, 2010).

218. John F. Wirenius, *The Road Not Taken: The Curse of Chaplinsky*, 24 CAP. U. L. REV. 331, 362 (1995).

219. *Id.*

texting messaging”<sup>220</sup> and that, “among youth today, the popular communication forms include e-mail, instant messaging, [and] text messaging.”<sup>221</sup> Courts too recognize the importance of these forms of electronic media as an essential part of teen communication today.<sup>222</sup>

Neither texting nor teens that bully via texts are likely to disappear anytime soon. According to one survey conducted in late 2008, teens in the United States sent and received, on average, a whopping eighty texts each day.<sup>223</sup> It is doubtful that all of those incoming texts were welcome and some, in fact, might have provoked a violent reaction from a recipient. That is where the fighting words doctrine, this article has argued, may—not necessarily must or should—come into play.

The real challenge facing the legal system wrought by cyber-bullying is to attempt to mitigate the negative uses and detrimental consequences to minors of electronic communication technologies while simultaneously preserving the First Amendment speech interests possessed by minors, as well as the more valuable uses of the new technologies in question. This tension is rather axiomatic; as Amy Jordan, Director of the Media and the Developing Child Sector of the Annenberg Public Policy Center at the University of Pennsylvania, recently wrote, “in American society, freedom of speech sometimes comes into conflict with the need to protect children.”<sup>224</sup>

With texting and instant messaging between minors, this conflict involves a dialectical dance between those in support of the speech rights of one minor—the alleged bully—and those in support of the

220. Kaveri Subrahmanyam & Patricia Greenfield, *Online Communication and Adolescent Relationships*, 18 FUTURE OF CHILD. 119, 120 (2008), available at [http://futureofchildren.org/futureofchildren/publications/docs/18\\_01\\_06.pdf](http://futureofchildren.org/futureofchildren/publications/docs/18_01_06.pdf).

221. *Id.*

222. See *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 223 (D. Conn. 2009) (asserting that “[t]oday, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages”).

223. See Carol L. Tilley, *Texting*, SCH. LIBR. MONTHLY, Sept. 2009, at 40 (providing the results of a Nielsen poll).

224. Amy B. Jordan, *Children’s Media Policy*, 18 FUTURE OF CHILD. 235, 236 (2008).



safety rights of another minor—the target/victim of the bully.<sup>225</sup> Put differently, there is a tension between freedom of speech and freedom from physical/emotional abuse. The aging fighting words doctrine, if narrowly modified, can provide one legal mechanism for addressing that tension.

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225. The United States Supreme Court has recognized that “there is a compelling interest in protecting the physical and psychological well-being of minors.” *Sable Commc’ns Cal. v. FCC*, 492 U.S. 115, 126 (1989).