OH SNAP!: WHETHER SNAPCHAT IMAGES QUALIFY AS "FIGHTING WORDS" UNDER *CHAPLINSKY V. NEW HAMPSHIRE* AND HOW TO ADDRESS AMERICANS' EVOLVING MEANS OF COMMUNICATION

INTRODUCTION

Digital technology has revolutionized the way people of an entire generation communicate with one another.[1] Communication that previously transpired face to face now happens online—"[w]ith cellphones and Wi-Fi hotspots, the Internet is constantly at individuals' fingertips and messages are transmitted instantaneously."[2] An individual can do any number of activities—ranging from seeking spiritual guidance to wishing someone a happy birthday—with the click of a button or tap of a screen.[3] An evolving nature of communication has created a frenzy of confusion over what constitutes "speech" and how such speech should be treated under American jurisprudence.[4] The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech,"[5] yet the U.S. Supreme Court has recognized that freedom of speech is not absolute.[6] Speech is unprotected when the words "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[7] These "fighting words" are now recognized as an exception to the Free Speech Clause, but the doctrine's current conception and continuing vitality are frequently debated.[8] This Note attempts to reconcile free speech and the fighting words doctrine with one of the newest, most unique digital communication tools: Snapchat. Through an evaluation of the first appellate decision regarding Snapchat and the fighting words doctrine, this Note seeks to clarify

1. Alicia D. Sklan, *@SocialMedia: Speech with a Click of a Button? #SocialSharingButtons*, 32 CARDOZO ARTS & ENT. L.J. 377, 387 (2013).

2. *See* Katherine McCabe, *Founding Era Free Speech Theory: Applying Traditional Speech Protection to the Regulation of Anonymous Cyberspeech*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 823, 825 (2014).

3. Brief for Petitioner at 20, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (No. 15-1194).

4. *See* Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1130 (1993).

5. U.S. CONST. amend. I.

6. McCabe, *supra* note 2, at 826.

7. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

8. *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, *supra* note 4.

the boundaries of free speech and recommend a way to reconcile a 1942 doctrine with 2017 technology.

This Note proceeds in four parts. Part I discusses a Colorado Court of Appeals decision, *In re R.C.*,[9] which is the first case in the country to address whether a Snapchat image could qualify as fighting words. Part II presents the history of the First Amendment's expansion and protection of speech both pre- and post-Internet creation. Part II also examines the prevalence of social media in today's society and, specifically, Snapchat's technology. Then, Part III argues that Snapchat qualifies as symbolic speech but recognizes that, in some instances, a Snapchat image should qualify as unprotected fighting words. Part III further contends that the current emphasis on the imminence arm of *Chaplinsky v. New Hampshire*[10] is ill-equipped to address twenty-first century communication and, rather, that emphasis should be placed on the inflict-injury arm. Finally, Part IV analyzes the potential problem Snapchat communication presents and how the *Chaplinsky* doctrine is still vital to First Amendment jurisprudence.

I. SHAPCHAT AND FIGHTING WORDS IN COURT: *IN RE R.C.*

In *In re R.C.*, the Colorado Court of Appeals reversed the conviction of a fourteen-year-old middle school student, R.C., charged with a violation of Colorado law[11] after taking a photograph of another student, L.P., on the mobile application Snapchat and drawing a picture of an ejaculating penis next to L.P.'s mouth.[12] R.C. showed the image to L.P. and three other friends at their Colorado public middle school just before lunch, then proceeded to the cafeteria where he showed the image to other students.[13] The students in the lunchroom laughed at the image, "which made L.P. feel even worse."[14] L.P. later reported the incident to the principal, and R.C. was subsequently charged with disorderly conduct pursuant to section 18-9-106(1)(a) of the Colorado Revised Statutes.[15]

At trial, the Boulder County District Court ruled that R.C. "knew that his drawing would make L.P. feel humiliated and ashamed and would have tended to incite an immediate breach of the peace, in large part because the drawing implied that L.P. was 'homosexual or behaves in that kind of behavior or has some sort of demeanor about that.'"[16] As a result, the court found R.C. had

9. No. 14CA2210, 2016 WL 6803065 (Colo. App. Nov. 17, 2016).
10. 315 U.S. 568 (1942); *see id.* at 572.
11. COLO. REV. STAT. § 18-9-106(1)(a) (2017).
12. *In re R.C.*, 2016 WL 6803065, at *1.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

violated section 18-9-106(1)(a) and "sentenced [him] to three months of probation, therapy, and eight hours of work crew."[17] R.C. appealed to the Colorado Court of Appeals, arguing, inter alia, that the Snapchat image did not qualify as fighting words and was instead protected speech under the First Amendment.[18]

A. *Majority Opinion*

The Colorado Court of Appeals reviewed the record de novo.[19] Citing to both the Colorado Constitution and the United States Constitution,[20] the court recognized that prohibition on speech is limited to a select few categories—including obscenity, incitement, and fighting words[21]—and that within the applicable fighting words doctrine, only those words "which by their very utterance tend to incite others to unlawful conduct or provoke retaliatory actions amounting to a breach of the peace" qualify as unprotected.[22] Looking to Colorado Revised Statutes section 18-9-106(1)(a), the statute under which R.C. was convicted, the court noted that the law "is narrowly drawn to ban only 'fighting words.'"[23] Therefore, in order for R.C.'s conviction to stand, the Snapchat image must have qualified as such.[24] Moreover, the court noted that as drafted, the statute did not cover speech that merely "inflicts injury" if such emotional injury did not result in an "immediate breach of the peace."[25] Therefore, the court identified the precise issue before it as whether the Snapchat photo would inherently provoke violence, as opposed to merely hurting the feelings of a middle schooler.[26]

The court focused on the "cartoon-like" nature of the Snapchat photo, as distinguished from the dissent's characterization of the image as sexually explicit.[27] Quoting the Vermont Supreme Court, the Colorado appellate court reasoned that "[i]n this day and age, the notion that any set of words—much less a cartoon-type drawing of a penis on a photograph—is 'so provocative that [it] can reasonably be expected to lead an average [person] to immediately respond with physical violence is highly problematic.'"[28] The court continued to reason that an image that humiliated and ashamed another person, regardless of its vulgarity, is not enough to qualify as fighting words; rather, for speech to sufficiently qualify, it must,

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17. *Id.*
18. *Id.* at *2.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at *3.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at *3–4.
28. *Id.* at *4 (quoting State v. Tracy, 130 A.3d 196, 209 (Vt. 2015)).

by its very utterance, be so "inflammatory that it is akin to dropping a match into a pool of gasoline."[29] In order to determine whether the Snapchat image in question would rise to such an inflammatory level, the court acknowledged the importance of the context and the surrounding circumstances.[30] It contrasted other juvenile cases where a conviction for disorderly conduct was upheld due to the "hostile" actions that accompanied the speech,[31] noting that R.C. and L.P. were friends and no other "hostile, aggressive, or threatening language or conduct" accompanied the Snapchat image.[32] The court also took into account the school setting, acknowledging that "a teacher was nearby and available to intervene or mediate," if necessary.[33] The court also noted that L.P. did not have an immediate violent reaction to the photo and that while this evidence is not determinative, it is relevant to the fighting words inquiry.[34]

The crux of the majority's opinion focused on the image's implications, namely that the image suggested L.P.'s sexual orientation.[35] Disagreeing with both the district court and dissenting opinion, the court reasoned that, in 2016, insinuating that someone is "gay"[36] or a "cocksucker"[37] does not rise to the level of fighting words even if, in the past, such words were recognized as fighting words.[38] Citing a string of cases involving "cocksucker" and similar profanities, where courts in other jurisdictions held such language did not constitute fighting words,[39] the Colorado Court of Appeals held that a "middle school student of average sensibilities and maturity . . . would not be expected to fly into a violent rage upon being shown a photo of himself with a penis drawn over it."[40] Therefore, the court held two-to-one that the government failed to prove a necessary element of section 18-9-106(1)(a) and reversed R.C.'s conviction for disorderly conduct.[41]

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29. *Id.*
30. *Id.* at *5.
31. *Id.*
32. *Id.* at *6.
33. *Id.*
34. *Id.*
35. *Id.* at *5.
36. *Id.*
37. *Id.* at *6.
38. *Id.* ("[W]e must also evaluate [the language's] harshness in the current climate: 'what may have constituted "classical fighting words" in 1942 might comprise nothing more than an innocuous expression' today." (quoting Svedberg v. Stamness, 525 N.W.2d 678, 683 (N.D. 1994))).
39. *Id.* at *7.
40. *Id.*
41. *Id.*

B. Dissenting Opinion

The dissent would have denied the Snapchat image any First Amendment protection and upheld the conviction, finding that it constituted speech likely to provoke a violent response and was, therefore, unprotected speech.[42] First, the dissent reasoned that although the speech at issue involved no spoken words, it still deserved consideration under the fighting words doctrine given the "evolving nature of how we communicate."[43] Equating the image to words, the dissent argued that the Snapchat image depicted a minor "engaged in fellatio" and reasoned that the image was equivalent to R.C. having called L.P. a "cocksucker," language which is unprotected in at least three jurisdictions.[44] The dissent was persuaded not only by these cases recognizing unprotected speech equivalent to the image but also by the context under which the image was created and distributed.[45] Acknowledging that the fighting words doctrine falls into a narrow category of unprotected speech, the dissent reasoned that three contextual factors in the case at bar propelled the Snapchat image to be classified as fighting words: the speaker's close proximity to the listener;[46] the age of the listener; and the presence of bystanders.[47]

Turning first to the speaker's close proximity to the listener, the dissent believed that, because R.C. created and distributed the image in L.P.'s presence, someone in L.P.'s position "could have immediately retaliated with a violent act."[48] The dissent argued that this proximity is what distinguishes this case from other images on social media platforms where there is no in-person confrontation.[49]

Turning second to the age of the listener, the dissent contended that when speech is directed at a minor, a different consideration of what constitutes fighting words is required than when the speech is directed at an adult.[50] Citing the U.S. Supreme Court in *Roper v. Simmons*,[51] the dissent recognized that "children's 'lack of maturity

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42. *Id.* at *8 (Webb, J., dissenting).

43. *Id.* at *9.

44. *Id.* at *11 (citing State v. Broadstone, 447 N.W.2d 30 (Neb. 1989); City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980); City of Shaker Heights v. Marcus, No. 61801, 1993 WL 27676 (Ohio Ct. App. 1993)).

45. *Id.* at *10.

46. Throughout this Note, the word "speaker" is used broadly to refer to the person who spoke, wrote, or created the image or speech at issue. The word "listener" is used to refer to the person who was on the receiving end of the speaker's image or speech.

47. *In re R.C.*, 2016 WL 6803065, at *10–11 (Webb, J., dissenting).

48. *Id.* at *10.

49. *Id.* (citing Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007), *aff'd in part*, 650 F.3d 205 (3d Cir. 2011)).

50. *Id.*

51. *Id.* (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

and . . . underdeveloped sense of responsibility,' coupled with their vulnerability to outside influences"[52] means that a fourteen-year-old boy is more likely to respond violently to an image of him altered to include an ejaculating penis than an adult would in such a circumstance.[53]

Turning lastly to the presence of bystanders, the dissent asserted that "the calculus of violence ratchets up even higher because some of L.P.'s peers were present and saw the image when R.C. displayed it to them."[54] To support this reasoning, the dissent cited *City of Landrum v. Sarratt*,[55] a decision from the South Carolina Court of Appeals, where the court considered the presence of bystanders to be a factor in the fighting words analysis.[56] Upon consideration of this contextual factor, as well as the age of the listener and the speaker's close proximity to the listener, the dissent would have held that the Snapchat image in question rose to the level of fighting words.[57] Therefore, the dissent would have denied it First Amendment protection and upheld R.C.'s conviction under section 18-9-106(1)(a).[58]

C. *Colorado Revised Statute Section 18-9-106*

In order to be convicted of disorderly conduct under section 18-9-106(1)(a), a person must "intentionally, knowingly, or recklessly . . . [make an] utterance, gesture, or display in a public place . . . [that] tends to incite an immediate breach of the peace."[59] The proscription in subsection (1)(a) applies not only to speech but also to "expression closely akin to speech."[60]

Section 18-9-106(1)(a), originally titled section 40-9-106(1)(a), was enacted in 1971;[61] however, five years after its enactment, the Supreme Court of Colorado held the original text of subsection (1)(a) facially overbroad in *Hansen v. People*.[62] In *Hansen*, the court noted that "coarse and obviously offensive" language included protected speech and "prohibitory legislation," such as the disorderly conduct statute, "must be precisely and narrowly drawn to proscribe only

52. *Id.*
53. *Id.* at *11.
54. *Id.*
55. *Id.* (citing City of Landrum v. Sarratt, 572 S.E.2d 476, 478 (S.C. Ct. App. 2002) ("Some of the factors to consider in determining if profanity constitutes fighting words are the presence of bystanders.")).
56. *Id.*
57. *Id.*
58. *Id.* at *12.
59. COLO. REV. STAT. § 18-9-106(1)(a) (2017).
60. Hansen v. People, 548 P.2d 1278, 1280 (Colo. 1976).
61. *See id.* at 1279.
62. *Id.* The original language of subsection (1)(a) read as follows: "(1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly: (a) Makes a coarse and obviously offensive utterance, gesture, or display in a public place." *See id.* at 1280.

unprotected speech."[63] Otherwise, the court acknowledged, the statute would be struck down as overly broad unless the court chose to give the statute a saving construction, as the New Hampshire Supreme Court did in *Chaplinsky v. New Hampshire*.[64] The fighting words exception, originally born out of the *Chaplinsky* decision,[65] would sustain the constitutionality of subsection (1)(a); however, the court in *Hansen* refused to give subsection (1)(a) a saving construction by noting that the Colorado General Assembly explicitly chose to leave out the fighting words limitation when it drafted this law.[66] With the original language of subsection (1)(a) held unconstitutional by the *Hansen* court,[67] the General Assembly subsequently amended the statute in 1981 to limit the charge of disorderly conduct to those utterances, gestures, or displays that "tend to incite an immediate breach of the peace."[68] Having passed constitutional muster, the language of subsection (1)(a) has remained unchanged since the 1981 amendment.[69]

II. BACKGROUND

Application of section 18-9-106(1)(a) in relation to social media platforms such as R.C.'s Snapchat poses unique challenges requiring a discussion of First Amendment history. This background section will proceed in four parts: Subpart II.A. will present the traditional evolution of First Amendment analysis and the emergence of the fighting words doctrine; Subpart II.B. will discuss the prevalence of the internet and social media today; Subpart II.C. will address Snapchat technology specifically; and Subpart II.D. will analyze the relatively new jurisprudence on the First Amendment in the internet era.

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63. *Hansen*, 548 P.2d at 1281.

64. Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942).

65. *Hansen*, 548 P.2d at 1281 ("In order to sustain the constitutionality of the subsection, we would have to follow the method used by the New Hampshire Supreme Court in *State v. Chaplinsky*.").

66. *Id.* at 1282. The Colorado General Assembly drafted section 18-9-106 based on Texas section 42.01. *Id.* at 1281–82. While the Texas disorderly conduct statute is nearly identical to Colorado's section 18-9-106, there is one glaring difference—the Texas statute is limited to fighting words by inclusion of the following: "and the gesture or display tends to incite an immediate breach of the peace." *Id.* at 1282.

67. *Id.* at 1280 ("We conclude that the subsection is unconstitutional because it is overbroad, and we decline to restrictively construe the subsection.").

68. 1981 Colo. Sess. Laws 1010 (clarifying the language of § 18-9-106).

69. COLO. REV. STAT. § 18-9-106(1)(a) (2017).

A. *First Amendment Treatment Pre-Internet*

Although the Free Speech Clause of the First Amendment[70] protects only "speech" by its terms, the U.S. Supreme Court has expanded First Amendment protection to different mediums of expression, commonly referred to as "symbolic conduct"[71] or "symbolic expression."[72] The Supreme Court extended First Amendment protection to several symbolic acts, including the waving of a red flag in opposition of the government,[73] the wearing of black armbands,[74] the burning of the American flag,[75] and the wearing of a jacket with the words "Fuck the Draft" prominently displayed.[76] In *Texas v. Johnson*,[77] where the Court held the burning of an American flag protected by the First Amendment,[78] the Court created a two-pronged test for determining how conduct would qualify as symbolic speech subject to First Amendment protections: when there was "(1) an intent to convey a particularized message, and (2) a great likelihood that the message would be understood by those encountering it."[79] This test seemed to narrow First Amendment protection to prevent all persons behaving in any disorderly way from claiming protection under the Free Speech Clause.[80] However, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,[81] the Court relaxed the "particularized message" prong, concluding that "an activity may constitute speech under the First Amendment even if it does not convey a clear message."[82]

While the Court has expanded its definition of "speech" under the First Amendment, it has also recognized that not all speech is deserving of protection. Certain categories of speech—such as fighting words—fall outside the protection of the First Amendment because they do not contribute to the "exposition of ideas."[83] In *Chaplinsky v. New Hampshire*, the Supreme Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[84] This two-armed

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70. U.S. CONST. amend. I.

71. Ira P. Robbins, *What Is the Meaning of "Like"?: The First Amendment Implications of Social Media Expression*, 7 FED. CTS. L. REV. 123, 129 (2014).

72. Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 379 (2014).

73. Stromberg v. California, 283 U.S. 359, 360–61, 369–70 (1931).

74. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 514 (1969).

75. Texas v. Johnson, 491 U.S. 397, 399 (1989).

76. Cohen v. California, 403 U.S. 15, 16, 26 (1971).

77. 491 U.S. 397 (1989).

78. *Id.* at 399.

79. Robbins, *supra* note 71, at 130 (citing *Johnson*, 491 U.S. at 404).

80. *See id.*

81. 515 U.S. 557 (1995).

82. Robbins, *supra* note 71, at 131 (citing *Hurley*, 515 U.S. at 569–70).

83. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

84. *Id.* at 572.

doctrine, analyzed in full below,[85] has been tempered over time.[86] In 1968, the Court in *Cohen v. California*[87] added the requirement that speech only qualified as fighting words if the words were directed towards a particular addressee.[88] Moreover, the next year, in *Gooding v. Wilson*,[89] the Court took the actual-addressee standard from *Cohen* one step further, concluding that the fighting words inquiry is not whether *any* actual addressee would be provoked to violence but, rather, whether someone in the particular circumstances of the addressee would be provoked to violence.[90] Though the Court has continued to analyze the confines of the *Chaplinsky* doctrine through significant case law, it has yet to find speech offensive enough to qualify as fighting words.[91] The Court has stabilized these traditional legal precedents but has yet to address directly how the First Amendment and the *Chaplinsky* doctrine apply in the twenty-first century. While the Court's broad notions of "speech" and distinctions between its protected and unprotected varieties remain important and applicable, some components of these doctrines need to be reconciled with new communication technologies in order to be useful and effective as communication continues to evolve.[92]

B. The Prevalence of the Internet and Social Media Today

With the advent of the internet and increasing use of cyberspace as a way of communication, face-to-face interaction has dwindled.[93] The internet has changed the way we communicate with one another; rather than meet a person face to face, the internet has made instantaneous communication possible between two people who are miles apart.[94] And not only is this new form of instantaneous communication possible, it is the norm—between 2000 and 2015, the number of internet users increased from 738 million to 3.2 billon.[95] Looking specifically at teenagers (those aged

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85. *See* discussion *infra* Subpart III.B.

86. Tiffany Komasara, Comment, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAP. U. L. REV. 835, 844 (2002).

87. 403 U.S. 15 (1971).

88. *Id.* at 21–22.

89. 405 U.S. 518 (1972).

90. *Id.* at 518; Sanjiv N. Singh, *Cyberspace: A New Frontier for Fighting Words*, 25 RUTGERS COMPUTER & TECH. L.J. 283, 305 (1999) (citing *Gooding*, 405 U.S. at 526–27).

91. *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, *supra* note 4, at 1129.

92. Sklan, *supra* note 1, at 387.

93. Singh, *supra* note 90, at 285–86.

94. *Id.* at 290.

95. Jacob Davidson, *Here's How Many Internet Users There Are*, TIME (May 26, 2015), http://time.com/money/3896219/internet-users-worldwide/.

thirteen to seventeen), 92% report using the internet daily,[96] with 56% of teenagers reporting internet use twice daily.[97] In fact, the internet is used by almost every teenager in some capacity.[98]

Furthermore, internet use is not just for keeping up with school assignments and checking email, as 71% of teenagers report using more than one social networking site.[99] Any website or mobile application that allows social interaction falls under the broad sphere of social networking.[100] Social media networking sites "offer multiple daily opportunities for connecting with friends, classmates, and people with shared interests," which serves a valuable role in modern society.[101] While Facebook is the most popular social networking site,[102] in 2015—just four years after Snapchat's initial release[103]—roughly 40% of teenagers reported using Snapchat.[104] Although this mobile application is arguably in its infancy, it still manages to generate approximately 350 million shared photos each day.[105] Access to Snapchat and other forms of social media is made possible via smartphones, and 73% of teenagers report using a smartphone.[106] A smartphone gives a user access to the internet as well as a plethora of mobile applications, including Snapchat, that allow a user to take and stream videos and photos as well as send messages back and forth anywhere there is cellphone service.[107] Today, users can choose from a variety of messaging applications, some with unique features such as anonymous posting or, as with Snapchat, the ability for content to vanish once viewed.[108] Overall, in 2016, 24% of messaging applications bear the same unique

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96. AMANDA LENHART, PEW RESEARCH CTR., TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015: SMARTPHONES FACILITATE SHIFTS IN COMMUNICATION LANDSCAPE FOR TEENS 16 (2015), http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/.

97. *Id.*

98. *See id.*

99. *Id.* at 3.

100. Gwenn Schurgin O'Keeffe et al., *Clinical Report—The Impact of Social Media on Children, Adolescents, and Families*, 127 PEDIATRICS 800, 800 (2011), http://pediatrics.aappublications.org/content/127/4/800.

101. *Id.*

102. LENHART, *supra* note 96, at 3.

103. *See* Stuart Dredge, *Ten Things You Need to Know About Snapchat*, GUARDIAN (Nov. 13, 2013), https://www.theguardian.com/technology/2013/nov/13/snapchat-app-sexting-lawsuits-valuation.

104. LENHART, *supra* note 96, at 2.

105. Dredge, *supra* note 103.

106. LENHART, *supra* note 96, at 8.

107. *See* Ryan Sullivan, *7 Things You Didn't Know You Could Do with Your Smartphone*, VERIZON (July 27, 2017), https://www.verizonwireless.com/archive/mobile-living/tech-smarts/what-can-a-smartphone-do/.

108. SHANNON GREENWOOD ET AL., PEW RESEARCH CTR., SOCIAL MEDIA UPDATE 2016: FACEBOOK USAGE AND ENGAGEMENT IS ON THE RISE, WHILE ADOPTION OF OTHER PLATFORMS HOLDS STEADY 11 (2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/.

features as those on Snapchat—which is a seven point increase from 2015—suggesting that applications resembling Snapchat are on the rise.[109] These mobile applications are most popular among younger Americans (individuals between the ages of eighteen and twenty-nine), who are four times more likely to use an auto-delete application like Snapchat than users of a more senior generation (individuals between the ages of thirty and forty-nine).[110]

C. Snapchat Technology

These statistics suggest that Snapchat is becoming an increasingly prevalent social networking site. While it does not yet compete with Facebook in number of users,[111] there is a possibility that this mobile application and its unique features will become just as valuable a communication tool as "likes" and status updates.[112] Snap, Inc.—Snapchat's parent company—recently made its public debut on the stock market, which could lead to tremendous growth of the company, the application's capabilities and features, and, consequently, in its utility for current and future Snapchat users.[113] While the U.S. Supreme Court seems well versed on in the ins and outs of Snapchat,[114] others may need a more in-depth explanation of its unique features.

When a user opens the application, a back-facing camera will open with a large circle on the bottom of the touch screen.[115] Pressing this circle will take a photo and holding the circle down will record a video.[116] When satisfied with the photo or video, the user can access a variety of different features.[117] The first features accessible are a text-box and drawing feature.[118] Additionally, the user can swipe right to access Snapchat's geofilters (which vary

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109. *Id.*

110. *Id.*

111. LENHART, *supra* note 96, at 26.

112. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013).

113. *See* Seth Fiegerman, *How Going Public May Change Snapchat*, CNN TECH (Mar. 2, 2017, 8:06 AM), http://money.cnn.com/2017/03/02/technology/snap-ipo-aftermath/.

114. *See* Adam Liptak, *A Constitutional Right to Facebook and Twitter? Supreme Court Weighs In*, N.Y. TIMES (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/us/politics/supreme-court-north-carolina-sex-offenders-social-media.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&referer=http://m.facebook.com.

115. Hannah Roberts, *The Ultimate Guide on How to Use Snapchat*, BUS. INSIDER (Feb. 16, 2017, 4:00 AM), http://www.businessinsider.com/how-to-use-snapchat-the-ultimate-guide-2017-1/#in-selfie-mode-swipe-left-or-right-to-scroll-through-and-add-the-geofilters-5.

116. *Id.*

117. *Id.*

118. *Id.* At the time R.C. took the Snapchat photo of L.P., these were the only features available. *In re* R.C., No. 14CA2210, 2016 WL 6803065, at *12 n.1 (Colo. App. Nov. 17, 2016).

depending on the user's location) and can overlay up to three of these geofilters onto their image.[119] The user can also access "facial lenses" when the camera is in "selfie mode."[120] These facial lenses allow the user to morph their face in a variety of ways, and the facial lenses available are constantly changing.[121] Some react to movements in the user's eyebrows or change the user's voice when recording a video.[122] These facial lenses can also affect other people in the viewfinder, not just the user.[123] Once satisfied with the image or video (often referred to as a "snap"), the user can send it to a specific individual, add it to his or her "story," or both.[124] If the user sends it to a specific individual, that individual will get a notification and be able to view snap instantly.[125] Once viewed, the snap will disappear after a certain number of seconds.[126]

Because of this disappearing function, Snapchat has "made a name for itself as the go-to app for sharing things that you might not want the whole world to see."[127] Even photos and videos added to a user's "story"—analogous to Facebook's "newsfeed"—lack permanence: they disappear after twenty-four hours.[128] The combination of the application's disappearing feature, facial lenses, and geofilters has led users to push the boundaries of postings, suggesting that there are instances in which Snapchat "speech" ought to be regulated.[129]

D. First Amendment Treatment in the Internet Era

While a small start-up like Snapchat can go from making no money in 2013[130] to opening on the New York Stock Exchange at twenty-four dollars per share in 2017,[131] the same exponential

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119. Roberts, *supra* note 115.
120. *Id.*
121. *Id.*
122. *Id.*
123. James Peckham, *How to Use Snapchat Filters and Lenses*, TECHRADAR (May 9, 2017), http://www.techradar.com/how-to/how-to-use-snapchat-filters-and-lenses.
124. Roberts, *supra* note 115.
125. *Id.*
126. *See id.*
127. *See, e.g.*, Mike Wehner, *Four Kansas Cheerleaders Are Suspended for 'KKK go Trump' Snapchat Photo*, BGR (Nov. 22, 2016), http://bgr.com/2016/11/22/racist-snapchat-university-of-kansas-kkk-trump/.
128. Roberts, *supra* note 115.
129. *See, e.g.*, Robinson Meyer, *The Repeated Racism of Snapchat*, ATLANTIC (Aug. 13, 2016), https://www.theatlantic.com/technology/archive/2016/08/snapchat-makes-another-racist-misstep/495701/. *See also* discussion *infra* Part IV.
130. *See* Fiegerman, *supra* note 113.
131. *Snapchat's Roaring IPO: Everything You Need to Know*, WALL ST. J., https://www.wsj.com/livecoverage/snap-ipo (last updated Mar. 2, 2017, 6:36 PM).

growth does not exist in the law.[132] Because our legal system is based on precedent, the law frequently cannot keep up with such changes in technology.[133] Moreover, the law is slow to recognize the importance such technology has in a changing society.[134] As one commentator illustrates,

> [I]n 1915, when motion pictures were a new phenomenon, the Supreme Court ruled that movies were not protected by the First Amendment but were merely "spectacles, not to be regarded as part of the press of the country or as organs of public opinion." Similarly, in 1968, a federal court, noting that the "public has about as much real need for the services of the CATV system as it does for hand carved ivory back-scratches," held that cable television was not sufficiently "affected with a public interest" to permit local regulation.[135]

The Colorado Court of Appeals, while it may be the first to deal with the First Amendment's applicability to Snapchat, is not the first court to address new technology's place in free speech jurisprudence. In *Reno v. ACLU*,[136] the Supreme Court established that online speech deserved the same protections as offline speech[137] by holding that the Communications Decency Act of 1996's "'indecent transmission' and 'patently offensive display' provisions abridge 'the freedom of speech' protected by the First Amendment."[138] In so doing, the Court acknowledged that the "dramatic expansion of this new marketplace of ideas" and the "phenomenal" growth of the internet should still be entitled to traditional First Amendment protection.[139]

Recently, in *Bland v. Roberts*,[140] the United States Court of Appeals for the Fourth Circuit concluded that "liking" a campaign page on Facebook constituted protected political speech because the act of "clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."[141] Outside the political sphere, in *Brown v. Entertainment Merchants Association*,[142] the Supreme Court held that video games qualified for First Amendment protection because "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and

132. THOMAS J. SMEDINGHOFF, ONLINE LAW 4 (1996).
133. *Id.*
134. *Id.*
135. *Id.*
136. 521 U.S. 844 (1997).
137. Sklan, *supra* note 1, at 378.
138. *Reno*, 521 U.S. at 844.
139. *Id.* at 885.
140. 730 F.3d 368 (2013).
141. *Id.* at 386.
142. 564 U.S. 786 (2011).

the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[143] Although political speech is the most protected form of speech, the Court in *Brown* refused to distinguish the line between political speech and entertainment, noting that the Court has long recognized separating the two is difficult and "dangerous to try."[144] These cases reveal that, while courts have extended First Amendment protection to some new technology, the Supreme Court has yet to address how free speech jurisprudence can be applied to social networking or digital communications and, particularly, how the fighting words doctrine under *Chaplinsky* can be reconciled with the evolving ways in which individuals communicate with one another.

III. ANALYSIS

The court in *In re R.C.* was tasked with confronting two issues: first, determining if the Snapchat image at issue qualified as "speech" under the Free Speech Clause of the First Amendment; and, second, if so, whether the Snapchat image qualified as protected speech or instead was exempted under the fighting words doctrine.[145] The majority seems to skip over the first issue entirely, turning directly to a discussion of whether the Snapchat image qualified as fighting words.[146] The dissent, however, did examine whether or not the image qualified as speech but only analyzed the issue in the context of libel.[147] The majority's silence, and the dissent's brevity, on whether or not a Snapchat image triggers First Amendment protections reveals the many questions that must be answered in today's evolving world of digital communication and how the law is inept at keeping up with technological advances.

A. Is a Snapchat Worth a Thousand Words?: The Parameters of Symbolic Speech

Given the relaxation to the symbolic speech test, the question for modern courts is whether digital images will qualify as symbolic speech, thus triggering First Amendment protections.[148] Social media—including both social-networking websites and mobile-sharing applications—presents new mediums of expression that complicate the reach of First Amendment protection.[149] Given the progression of online interactions and expression of ideas, defining

143. *Id.* at 790.
144. *Id.*
145. *See In re* R.C., No. 14CA2210, 2016 WL 6803065, at *2–4. (Colo. App. Nov. 17, 2016).
146. *See id.* at *2.
147. *See id.* at *9.
148. *See* Robbins, *supra* note 71, at 130–31.
149. *See* Harawa, *supra* note 72, at 366.

"the boundaries between free expression and criminal acts"[150] is difficult, which was precisely at issue in *In re R.C.*[151]

The Fourth Circuit's recent decision in *Bland* sheds some light on how modern courts have attempted to address digital speech. By asserting that "liking" a Facebook page makes a substantive statement, the Fourth Circuit defined the action as pure speech.[152] Additionally, the court reasoned that a "like" could qualify as symbolic expression because the "thumbs up" symbol is commonly understood to convey approval and, thus, expressed a clear message that the person who "liked" the campaign page supported that candidate.[153] In contrast to liking a Facebook page, which is "sufficiently imbued with elements of communication,"[154] an image, lacking accompanying text, or recognizable expressive symbols, does not communicate a clear, substantive statement.

People take photos for a variety of reasons,[155] and therefore, a Snapchat image does not express the same elements of communication as a "like" on Facebook. Moreover, the Snapchat image at issue does not convey a message that is clearly "understood by those who encounter[] it" in the same was as a Facebook "like."[156] "Facebook users and the general public understand the meaning of Like."[157] However, a photograph of a minor with an image of an ejaculating penis drawn next to the minor's mouth does not necessarily convey a particularized message.

Even the majority and dissenting opinion disagreed about the exact meaning of the image. Was it to suggest L.P.'s sexual orientation?[158] Or was it simply an image used to name-call L.P. a "cocksucker?"[159] However, despite clarity on either element of the *Johnson* test, the relaxed criteria under *Hurley* permits the Snapchat image to qualify as speech under the First Amendment.[160] Even if R.C.'s intention was not clear, he at least conveyed a message—one strong enough to upset L.P. If a Pollock painting constitutes speech under the First Amendment,[161] then so does R.C.'s own drawing. In fact, some commentators argue that any medium which express ideas, narratives, or concepts "to an audience

150. *Id.*
151. *See In re R.C.*, 2016 WL 6803065, at *2–4.
152. Bland v. Roberts, 730 F.3d 368, 386 (2013).
153. *Id.*
154. Robbins, *supra* note 71, at 141.
155. *See, e.g.*, Rachel Thomas, *Why Do We Take Pictures?*, ODYSSEY (Jan. 26, 2016), https://www.theodysseyonline.com/why-take-photos.
156. Robbins, *supra* note 71, at 142.
157. *Id.*
158. *In re* R.C., No. 14CA2210, 2016 WL 6803065, at *5 (Colo. App. Nov. 17, 2016).
159. *Id.* at *11 (Webb, J., dissenting).
160. *See* Robbins, *supra* note 71, at 131.
161. *See id.*

whom the speaker intends to inform, edify, or *entertain*" qualifies as speech under the First Amendment.[162] Thus, even if this image was R.C.'s form of lunchroom entertainment, it constitutes speech, regardless of whether it conveyed a particularized meaning within the parameters of *Johnson*.

B. Snapchat and the Traditional Fighting Words Doctrine

Even if a Snapchat image is deemed to fall within the First Amendment's definition of "speech," a court still must determine whether the image qualifies as protected speech.[163] The U.S. Supreme Court, in carving out fighting words from the First Amendment's protection, illustrated that there must be a balance between protecting speech for the benefit of society and protecting society from the harm inflicted by certain kinds of speech:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. 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. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality.[164]

Thus, born from *Chaplinsky* was a two-armed doctrine defining unprotected fighting words.[165] This doctrine can be bifurcated as follows: one arm involves speech that by its "very utterance inflict[s] injury" and the other arm involves speech that tends "to incite an immediate breach of the peace."[166] These two arms can be delineated simply as the "inflict-injury arm" and the "imminence arm."[167] By separating these two clauses with the disjunctive "or," the court seems to imply that either clause is sufficient to constitute fighting words and that these arms are separate and distinct from one another. First, the inflict-injury arm focuses on the content of the words.[168] Second, the imminence arm focuses on the

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162. Steven M. Puiszis, *"Tinkering" With the First Amendment's Protection of Student Speech on the Internet*, 29 JOHN MARSHALL J. COMPUTER & INFO. L. 167, 197–98 (2011) (emphasis added); *see also* Harawa, *supra* note 72, at 379.

163. *See* Harawa, *supra* note 72, at 379.

164. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

165. *See id.*

166. *See id.*

167. Singh, *supra* note 90, at 296.

168. Singh, *supra* note 90, at 317.

circumstances surrounding the speech—in addition to the words themselves—and whether the speech is likely to produce a violent response.[169] Traditionally, the imminence arm is where the Court has spent most of its time—narrowing the doctrine considerably—and has delineated the boundaries between protected and unprotected speech.[170]

1. Inflict-Injury Arm

The inflict-injury prong of *Chaplinsky* has received little attention from the U.S. Supreme Court and, as a result, some commentators argue that the Court has sub rosa overruled it as a viable definition for fighting words.[171] For example, in *Cohen*, the Supreme Court limited the definition of fighting words to those that "are, as a matter of common knowledge, inherently likely to provoke a violent reaction."[172] Additionally, in *Johnson*, the Court ignored the inflict-injury language by modifying the fighting words definition to include those words that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[173] Although the Supreme Court has never explicitly addressed whether the inflict-injury arm was mere surplusage, other jurisdictions have weighed in, finding words alone wholly insufficient to pass constitutional muster.[174] Take for example, the Seventh Circuit's analysis of the inflict-injury language in *Purtell v. Mason*[175]:

> We see nothing in the Supreme Court's more recent iterations of the fighting-words doctrine that would presage a revitalization of the "inflict-injury" alternative in the *Chaplinsky* definition. To the contrary, 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. It seems unlikely that speech causing emotional injury but *not* tending to provoke an average person to an immediate breach of the peace would qualify as fighting words, unprotected by the First Amendment and therefore capable of

169. *See* McCabe, *supra* note 2, at 825.

170. *See The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, *supra* note 4, at 1129.

171. *Id.*

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

173. Texas v. Johnson, 491 U.S. 397, 409 (1989).

174. Purtell v. Mason, 527 F.3d 615, 624 (2008) (citing Collin v. Smith, 578 F.2d 1197, 1203 (7th Cir. 1978) ("We have previously held that speech inflicting psychic trauma alone—without any tendency to provoke responsive violence or an immediate breach of the peace—does not lose constitutional protection under the fighting-words doctrine.")).

175. 527 F.3d 615 (2008).

being regulated or punished without raising any constitutional concern.[176]

Another commentator raised the issue that, if the words in question merely caused psychological injury, there would be no benefit to society in regulating them.[177] From these perspectives, there seems to be little need or value in infringing upon one's chosen form and means of expression when society at large is not adversely affected.

Moreover, it is difficult, if not impossible, to consider what makes words harmful without addressing the circumstantial factors introduced under the imminence arm: "the words are injurious because they are said face to face and are thereby significantly more insulting"[178] and because they are face to face, a violent response is more likely.[179] If the societal benefit to curbing some speech is to prevent "breaches of peace," then the inflict-injury prong is entirely inept at defining the lines between protected speech and unprotected speech. This perhaps is exactly what the Colorado legislature had in mind when it drafted section 18-9-106(1)(a), which merely defines disorderly conduct as that conduct that "tends to incite an immediate breach of the peace."[180] Thus, in R.C.'s case, the only way his speech could qualify as fighting words is if it would tend to provoke an immediate violent response, effectively dismissing consideration of whether the speech alone would inflict injury.

However, while R.C.'s Snapchat image is specifically precluded from the inflict-injury analysis, that is not to say all Snapchat images can—or should—be precluded from analysis under the inflict-injury arm of *Chaplinsky*. Instead, under this arm, the fighting words doctrine can address twenty-first century technology concerns.[181] Within this arm, there is no requirement that injury manifest as physical violence, which is rarely possible with social media communication due to a lack of physical proximity between the speaker and the listener.[182] Rather, this arm of the *Chaplinsky* doctrine focuses entirely on words "which *by their very utterance*" inflict injury.[183] Thus, the focus is on the content of the words, not the circumstances in which they are spoken.[184]

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176. *Id.*
177. Singh, *supra* note 90, at 297.
178. *Id.* at 317.
179. *Id.* at 325.
180. COLO. REV. STAT. § 18-9-106(1)(a) (2017).
181. Singh, *supra* note 90, at 316.
182. *See* discussion *infra* Subpart III.B.2.
183. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added).
184. Singh, *supra* note 90, at 317.

Traditionally, there was no need to exploit the inflict-injury prong because the imminence prong encompassed the vast majority of unprotected speech by the fact that most speech in a pre-internet world was conveyed face to face.[185] The Court perhaps let the inflict-injury prong fall to the wayside in *Cohen* and *Johnson* because other facts of those cases lent well to the imminence arm. However, today, a large portion—if not a majority—of communication occurs not face to face but online through social media platforms.[186] Moreover, "cyberspace is intimately intertwined with everyday life."[187] Thus, while in the past the imminence arm did an adequate job of delineating protected speech from unprotected speech, today to require unprotected speech—as a threshold matter—to be communicated face-to-face is to remove from judicial purview a majority of communication. Instead, the law must attempt to catch-up with the evolving ways we communicate with a fluctuating idea of what speech causes injury.

Online speech, in contrast to face to face speech, is more intrusive often *because* it lacks physical and temporal boundaries.[188] Take, for example, the Court's rationale for limiting fighting words to those targeted at an individual listener:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech" . . . . Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes . . . . [A courthouse corridor] is nothing like the interest in being free from unwanted expression in the confines of one's own home.[189]

Cohen recognizes that unwanted speech at home is capable of regulation at a much higher level than speech in a public space.[190] This dichotomy makes sense in a pre-internet world where conversation ended when you crossed the street, got in your car, closed the door, or waved goodbye. But today, communication—particularly one-sided, potentially unwanted communication—does

185. *See, e.g.*, Feiner v. New York, 340 U.S. 315, 316–17 (1951) (upholding a conviction for disorderly conduct and finding unprotected speech where the individual was standing on the sidewalk and using a loudspeaker to directly address a crowd that had filled that city street).

186. O'Keeffe et al., *supra* note 100, at 800.

187. McCabe, *supra* note 2, at 825.

188. *See* Singh, *supra* note 90, at 334.

189. Cohen v. California, 403 U.S. 15, 21–22 (1971).

190. *Id.* at 21.

not end when physical proximity is not possible. Rather, online communication extends into your home, unraveling any previous distinction between public and private communicative forums. Now, "[w]ith the click of a mouse button and a few keystrokes, tormentors can reach their targets any time of day or night from anywhere in the world."[191] This constant and unfettered access to listeners was unfathomable in 1971 when the Court decided *Cohen*, but the Court's logic that speech should be more susceptible to regulation when listeners cannot "simply [avert] their eyes"[192] is relevant now more than ever because averting one's eyes is becoming harder to manage with the way we communicate.[193]

A diminishing necessity to focus on where and when the speech occurs—because it happens anywhere, at any time—results in an increasing necessity to focus on the content of the speech itself, thus suggesting that the inflict-injury prong of *Chaplinsky* is essential in First Amendment analysis regarding social-media speech.[194] Turning specifically to Snapchat, not only can an individual use Snapchat without Wi-Fi (so long as one has cellular data, but even that is not entirely necessary[195]) but that individual can take a photo or video, filter it using any of Snapchat's provided overlays and filters, draw on it, type accompanying text, and then send it. Not only can the image be sent to a targeted individual but also uploaded to a user's "story" so that the targeted individual (as well as anyone who follows the speaker on Snapchat) can see the image over and over again for a twenty-four-hour period.[196] These Snapchat features provide creative opportunities to push the boundaries on free speech and, in appropriate circumstances, should be subject to the fighting words doctrine. This analysis, however, is only possible under the inflict-injury arm of *Chaplinsky*, which to date has seen little to no action from the Court.

2. *Imminence Arm*

In contrast to the inflict-injury arm, the imminence arm of *Chaplinsky* has enjoyed a "much more favored position by the Court because the regulation of these kinds of fighting words is consistent with the notions of clear and present danger."[197] In this species of

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191. Hon. Brian P. Stern & Thomas Evans, *Cyberbullying—An Age Old Problem, A New Generation*, 59 R.I. BAR J. 21, 21 (2011).

192. *Cohen*, 403 U.S. at 21.

193. McCabe, *supra* note 2, at 835.

194. *See* Singh, *supra* note 90, at 317.

195. Harley Tamplin, *Use These Snapchat Hacks When You're Without WiFi or Data*, ELITE DAILY (Jan. 18, 2017), http://elitedaily.com/social-news/snapchat-hack-send-pics-no-data/1756764/.

196. *See* Jen Hasty, *Snapchat 101: What It Is and How to Use It*, VERIZON (Jul. 14, 2015), https://www.verizonwireless.com/archive/mobile-living/tech-smarts/what-is-snapchat-how-to-use-new-features/.

197. Singh, *supra* note 90, at 297.

fighting words, courts focus on the scope of immediacy or imminence of the speech.[198] Unlike the inflict-injury arm, the "potentially dangerous result of the speech [serves as the basis for the regulation] rather than the content of the speech itself."[199] However, as *Chaplinsky*'s majority points out, even this subset of fighting words is shrinking.[200] In *Cohen*, the Supreme Court articulated that fighting words must be targeted at an individual listener,[201] thus limiting this doctrine to face-to-face communications.[202] Moreover, in *Gooding v. Wilson*,[203] the Court took the "actual addressee standard" from *Cohen* one step further, concluding that the fighting words inquiry is not whether *any* actual addressee would be provoked to violence, but rather whether someone in the particular circumstances of the addressee would be provoked to violence.[204] Thus, in *Gooding*, because the addressees were two police officers, the Court concluded that "such hearers would maintain a higher threshold for abusive language."[205]

While *Cohen* and *Gooding* narrowed the fighting words doctrine, these cases did not abrogate the doctrine completely.[206] Rather, the fact that the Court took the time to clarify the doctrinal distinctions between protected and unprotected speech suggests that the doctrine itself is still viable and relevant as an exception to the Free Speech Clause.[207] Moreover, while *Gooding* in one regard may seem to have limited the fighting words doctrine where particular addressees have a higher threshold for abusive language, the Court's ad hoc analysis equally suggests that the doctrine is broadened where addressees have a lower threshold for abusive language, such as that of an adolescent boy.[208] Thus, the dissent's argument in *In re R.C.*, that the age of the listener be a factor in the fighting words inquiry,[209] should not be dismissed. A pre-teenage boy in the height of puberty is likely to take greater offense to a remark against his sexuality than that of an adult male.[210] Further,

198. *Id.* at 285 n.6.
199. *Id.* at 304.
200. People In Interest of R.C., No. 14CA2210, 2016 WL 6803065, at *4 (Colo. App. Nov. 17, 2016).
201. Cohen v. California, 403 U.S. 15, 21–22 (1971).
202. Singh, *supra* note 90, at 305.
203. 405 U.S. 518 (1972).
204. Singh, *supra* note 90, at 305.
205. *Id.*
206. Rather, the further narrowing of a First Amendment doctrine is common. *See* R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992).
207. Singh, *supra* note 90, at 309.
208. *Gooding*, 405 U.S. at 534 (Blackmun, J., dissenting) (noting that it is "strange" that threatening language used against a police offer is constitutionally protected).
209. People In Interest of R.C., No. 14CA2210, 2016 WL 6803065, at *10 (Colo. App. Nov. 17, 2016) (Webb, J., dissenting).
210. *See* McCabe, *supra* note 2, at 834–35.

since teenagers are more likely than adults to use Snapchat and other forms of instantaneous electronic communication,[211] the fighting words doctrine should be expanded to include these new digital forms of communication.

However, *Cohen*'s limitation to face-to-face communications provides the biggest obstacle for the fighting words doctrine's applicability in the twenty-first century.[212] When words are spoken online, the speaker and listener are often geographically distant from one another.[213] Thus, if a speaker were to say something that, under traditional doctrine, would fall within the parameters of fighting words, those same words conveyed online would fail the imminence test because "online communication is largely removed from physical contact" and, thus, would meet additional barriers to the already lofty burden under the fighting words doctrine.[214] This circumstance would require, at the minimum, the listener to (1) know the speaker's location, (2) have means to transport herself to that location, and, once there, (3) still be provoked to respond violently.[215]

Herein lies the paradox of online fighting words: social media enables a speaker to reach a larger audience and target individuals with reduced effort—effectively providing greater opportunity to engage in hurtful and offensive speech—but, at the same time, reduces the likelihood of provoking actual violence from his targets because the communication lacks physical proximity. In effect, a speaker in South Carolina or Kansas can take a photo of themselves in "blackface"[216] using a Snapchat filter[217] and send it to a targeted

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211. *See* LENHART, *supra* note 96, at 29–30 (showing that 52% of all teenagers use Instagram, compared to 21% of all adults).

212. *See* Emily Drago, *The Effect of Technology on Face-to-Face Communication*, 11 ELON J. UNDERGRADUATE RES. COMM. 13, 13 (2015) (showing that technology "has increasingly taken the place of face-to-face communication").

213. *See* Singh, *supra* note 90, at 326–27.

214. SMEDINGHOFF, *supra* note 132, at 309.

215. *See* Singh, *supra* note 90, at 315.

216. This, unfortunately, is a not a hypothetical scenario. In September 2016, a Kansas State student posted a photo to Snapchat in blackface. Michael Rosen, *Kansas State Student Defends Sending Blackface Snapchat Selfies and Using the N-word*, SPLINTER (Sept. 15, 2016, 3:56 PM), https://splinternews.com/kansas-state-student-defends-sending-blackface-snapchat-1793861933. Even more recently, in February 2017, a University of South Carolina student posted a similar blackface photo on Snapchat, using the Black History Month filter-overlay bearing the words "Young, Black, & Proud." The Master Chief, *University of South Carolina Student Mocks Black History Month with Blackface Snapchat*, GOT (Feb. 1, 2017), http://gossiponthis.com/2017/02/01/madeline-maynor-university-of-south-carolina-usc-student-blackface-snapchat-black-history-month/.

217. Snapchat's face morphing features allow an individual to overlay a photograph of another person's face on top of their own. *See infra* notes 232–38 & accompanying text.

person in California without such speech qualifying as fighting words.[218] In a situation such as this—where the offensiveness of the content would provoke a person to violence if not for the physical distance between them—the traditional fighting words doctrine is completely ill-equipped to address twenty-first century communication.

While social media is often used as a means to communicate contemporaneously with people in distant locations, social media's prevalence in today's society is so great that often people are using these social media sites when they are in close proximity to one another.[219] This is the precise situation in *In re R.C.* In the presence of L.P., R.C. took a photo of L.P., distributed it to his friends, and continued to distribute the image to other students in the cafeteria.[220] Here, the imminence prong still holds value. However, what if that image continued to circulate to students long after R.C. and L.P. had left school? What if, only upon going home and opening up his iPad to a flood of Snapchats from his other friends screenshotting and replicating R.C.'s photo, did L.P. respond? Then, the imminence arm of *Chaplinsky* would hold R.C.'s Snapchat photo as per se protected speech. Perhaps the content of R.C.'s photo was not offensive enough to rise to the level of fighting words, as the majority points out. Nonetheless, there are foreseeable circumstances where a Snapchat image's content could rise to the level of fighting words[221]—yet, if analyzed under the imminence arm of *Chaplinsky*, that speech would rarely qualify as such.

IV. IMAGES ON THE HORIZON: SNAPCHAT IN 2016 AND 2017 AND WHAT COMES NEXT

Social media in general is a "place to conduct adolescence."[222] While in past generations children and teenagers made mistakes in private, the youth of today are making those same mistakes in public.[223] Previous indiscretions went largely unnoticed because they were conducted behind closed doors; now, however, "they often occur in a forum that someone is actively monitoring."[224] This reality is troublesome for both the speaker and the listener. On the one hand, the speaker should not face criminal prosecution for

218. *See* SMEDINGHOFF, *supra* note 132, at 309.
219. Singh, *supra* note 90, at 327.
220. *In re* R.C., No. 14CA2210, 2016 WL 6803065, at *1 (Colo. App. Nov. 17, 2016).
221. *See* discussion *infra* Part IV.
222. Harawa, *supra* note 72, at 375 (citing Sonia Livingston, *Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy and Self-Expression*, 10 NEW MEDIA & SOC'Y 393, 396 (2008)).
223. *Id.* at 375–76.
224. *Id.* at 376.

simply working through adolescence. On the other hand, the listener—more often than not another adolescent—should be protected from being the target of offensive and hateful speech, thus creating the argument for expansion of the fighting words doctrine to fit multimedia speech. Not only is the public nature of social media especially harmful to adolescents, as they are at an impressionable age, but the immediacy of the content has also put these young adults at a further disadvantage.[225]

While R.C.'s photo arguably falls under First Amendment protection, that is not to say all Snapchat images should be protected. Snapchat has gained a reputation in part for its features that enable targeted racist speech.[226] A quick Google search of Snapchat indiscretions brings forth a plethora of hateful images that have been shared.[227] For example, in August 2016, Snapchat debuted a new facial lens that covered a "user's eyes and forehead with closed-eye slants while enlarging their teeth and reddening their cheeks."[228] While the company labeled the lens "anime-inspired," people were quick to declare the filter a digital form of "yellowface."[229] While Snapchat countered the criticism by stating that the facial lenses were "meant to be playful and never to offend,"[230] Snapchat's digital features nonetheless have the ability to exploit racist themes and could, in certain contexts, rise to the level of fighting words if accompanied by an intent to provoke a listener.

The anime-inspired lens is not the only time Snapchat has been under fire for its facial lenses. In April 2016, Snapchat released a Bob Marley facial lens that "edited a knit cap and dreadlocks on users, while also darkening their skins."[231] This facial lens was referred to as "digital blackface,"[232] which, again, could rise to the level of fighting words if an image was taken and targeted at a

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225. *See* McCabe, *supra* note 2, at 835 (quoting Hon. Brian P. Stern & Thomas Evans, *Cyberbullying–An Age Old Problem, A New Generation*, 59 R.I. BAR J. 21, 21 (2011)).

226. Meyer, *supra* note 129.

227. *See, e.g.*, Robert Anthony, *Kansas State University Finally Addresses Sorority Girl's Racist Snapchats*, ELITE DAILY (Sept. 15, 2016), https://elitedaily.com/social-news/snapchat-racist-blackface-kansas-state-university-address/1612834/; Amy Bartner, *Indianapolis-Area School Condemns Student's Racist Snapchat*, INDYSTAR (June 27, 2017), http://www.indystar.com/story/life/2017/06/27/indianapolis-area-school-condemns-students-racist-snapchat/429037001/; Hope King, *Snapchat Under Fire for Another 'Racist' Filter*, CNN (Aug. 10, 2016), http://money.cnn.com/2016/08/10/technology/snapchat-racist-asian-filter/index.html.

228. Meyer, *supra* note 129.

229. *Id.*

230. *Id.*

231. *Id.*

232. *See* Alex Hern, *Snapchat, and Kylie Jenner, in Hot Water Over 'Blackface' Filter*, GUARDIAN (April 20, 2016), https://www.theguardian.com/technology/2016/apr/20/snapchat-and-kylie-jenner-in-hot-water-over-blackface-filter.

specific individual. The possibilities for hateful speech that rises to the level of fighting words are evident in some Snapchatters' use of the mobile application.

For example, a Kansas State University student sparked national controversy when she posted a photo to Snapchat wearing a charcoal beauty mask and captioning the photo "Feels good to finally be a nigga."[233] Additionally, another student at University of South Carolina—also wearing a beauty mask—decided to post a similar photo to Snapchat but, instead of typing her own caption, chose to use Snapchat's Black History Month geofilter bearing the text "Young, Black & Proud."[234] Thus, Snapchat's features make it possible to target an individual and send a message of hate and ridicule. As our digital communications continue to grow, the law needs to reconcile its oldest principles of free speech with its newest forms of communication.

On February 27, 2017, the U.S. Supreme Court heard oral arguments in the case of *Packingham v. North Carolina*,[235] which addresses whether North Carolina may bar registered sex offenders from using popular social media sites.[236] In her questions, Justice Kagan acknowledged the need for the law to catch up to digital communication, stating that social media sites and digital communication have become incredibly important parts of our culture.[237] While this case does not address fighting words, it provides some much needed guidance in First Amendment jurisprudence regarding twenty-first century digital communication.[238]

CONCLUSION

As the majority in *In re R.C.* recognizes, times are different.[239] Just as we must evaluate the harshness of language in our current

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233. Rosen, *supra* note 216.

234. The Master Chief, *supra* note 216.

235. 137 S. Ct. 1730 (2017).

236. Liptak, *supra* note 114.

237. Transcript of Oral Argument at 32, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (No. 15-1194).

238. In *Packingham v. North Carolina*, decided in June 2017, the United States Supreme Court reversed the decision of the North Carolina Supreme Court and vacated the defendant's conviction for violating North Carolina General Statute section 14-202.5(a), (e). *Packingham*, 137 S. Ct. at 1738. The North Carolina statute made it a felony for a registered sex offender to access and use social networking websites. *Id.* at 1731. The Supreme Court held that the statute was unconstitutional under the First Amendment's Freedom of Speech Clause, *id.* at 1733, recognizing the Internet and social networking sites are "the most importance places (in a spatial sense) for the exchange of views." *Id.* at 1735.

239. *In re* R.C., No. 14CA2210, 2016 WL 6803065, at *6 (Colo. App. Nov. 17, 2016) ("The requirement that we consider the language in context means that we must also evaluate its harshness in the current climate.").

social climate,[240] we must also evaluate the mediums through which we express that language. Snapchat, along with other new technology, deserves First Amendment protection. However, reconciling First Amendment speech principles by qualifying Snapchat images as "speech" without reclassifying how such speech is evaluated under the fighting words doctrine does a disservice to our First Amendment jurisprudence. Applying the traditional imminence analysis to digital communication is futile. Instead, the Court should recognize that digital communication, particularly multifaceted communication like Snapchat, has replaced face-to-face interactions. Thus, the Court should revitalize the inflict-injury arm of *Chaplinsky* to regulate, in appropriate circumstances, speech that by its content alone rises to the level of fighting words.

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240. *Id.*

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