Chapter 3
Fighting Words

ABSTRACT

This chapter describes the fighting-words jurisprudence. It explains why fighting words are unprotected speech. It reviews the Chaplinsky v. New Hampshire (1942) case in which the United States Supreme Court first excluded fighting words from First Amendment protection. The chapter aims to show that, since fighting words are unprotected speech, school officials can censor such speech outside the schoolhouse gate without violating the First Amendment. However, school officials must establish that the speech qualifies as fighting words – a challenging task.

INTRODUCTION

Although the First Amendment generally guards against government censorship of speech, there are categories of speech that are not afforded constitutional protection. One of these categories is “fighting words.” This chapter analyzes the fighting words and examines its application to public-school censorship of student speech. The first part of this chapter discusses the United States Supreme Court’s decisions related to the fighting-words doctrine. The second examines examples of online communications in the K-12 and higher education contexts. The third part discusses cases in which courts have applied the fighting-words doctrine to student communications. The final part of this chapter analyzes whether public schools can justify the restriction of online student communication through the fighting-words doctrine.

MAIN FOCUS OF THE CHAPTER

United States Supreme Court Decisions

The United States Supreme Court established the fighting-words doctrine in Chaplinsky v. New Hampshire (1942). Members of the Rochester, New Hampshire community accused Walter Chaplinsky of making derogatory statements about religion in a public square. After a police officer had warned Chaplinsky to
stop making such proclamations, Chaplinsky called the officer “a God damned racketeer” and “a damned Fascist” (p. 570). He also declared that “the whole government of Rochester are Fascists or agents of Fascists” (p. 570). Chaplinsky was then convicted of violating a state statute, which provided that:

_No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation (Chaplinsky v. New Hampshire, 1942, p. 569)._  

The Supreme Court of New Hampshire found that the statute included two severable provisions – the first relating to words uttered to another in a public place, while the second addressed noise and exclama-
tions. Assuming that the second provision was unconstitutional, the New Hampshire court ruled that the first provision was constitutional because its purpose was to keep the peace by prohibiting words that had a “direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed” (p. 573). The court went on to state that the provision did “no more than prohibit the face-
to-face words plainly likely to cause a breach of the peace … including ‘classical fighting words’” (p. 573). The test for whether an utterance could be classified as “fighting words” was articulated as “what 
men of common intelligence would understand would be words likely to cause an average addressee to fight” (p. 573).

Chaplinsky then appealed to the United States Supreme Court. The Court upheld the conviction. It found that the First Amendment did not protect certain statements. Such statements included fighting 
words – “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” (Chaplinsky v. New Hampshire, 1942, p. 572). The Court then agreed with the state high court’s analysis that the statute, as construed, was narrowly drawn to limit speech that would cause a breach of the peace.

Subsequent to Chaplinsky v. New Hampshire (1942), in a series of cases, beginning with Terminiello v. City of Chicago (1949), the United States Supreme Court limited the scope of the fighting-words doctrine. In Terminiello v. City of Chicago, Arthur Terminiello was a speaker at a meeting sponsored by the Christian Veterans of America. Outside of the auditorium where the meeting was held, about one thousand persons protested against the meeting. Several skirmishes occurred despite the efforts of the police to maintain order. Terminiello responded to the protest by “condemn[ing] the conduct of the crowd outside and vigorously, if not viciously, criticiz[ing] various political and racial groups whose activities he denounced as inimical to the nation’s welfare” (p. 895). The city of Chicago found him guilty of breaching the peace in violation of a city ordinance and fined him. A state trial court charged the jury that “breach of the peace” applied to speech that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance” (p. 895).

After the state appellate and supreme courts upheld the conviction, Terminiello appealed to the United States Supreme Court. The Court reversed the conviction. The Court found that the trial court’s instructions defining “breach of the peace” was a ruling of state law, and therefore, was as binding on the Supreme Court as the actual words of the ordinance. The Court then noted that one of the functions of speech in this country’s system of government was to invite dispute. Further, free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as
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