Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 24 *Volume XXIV*
Number 3 *Volume XXIV Book 3*

Article 6

2014

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Cover Page Footnote

Fordham University School of Law, J.D. Candidate, 2015; B.A. History and Political Science, Fordham University College at Rose Hill, 2012. I would like to thank my advisor Professor Saul Cornell for all of his guidance in writing this Note, and especially for introducing me to the complexities of the First Amendment as an undergraduate student and again as a law student. A special thank you goes to my family and friends for listening to me incessantly talk about and debate cyberspeech regulations for months throughout this writing process.

Founding Era Free Speech Theory: Applying Traditional Speech Protection to the Regulation of Anonymous Cyberspeech

Katherine McCabe*

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INTRODUCTION

The First Amendment guarantees the right of free speech, both written and spoken, to all Americans. Such protection is not limited to words that can be directly tied to the speaker; anonymous speech is protected as well.[1] Since the Founding Era, anonymous speech has played a significant role in American history, influencing both court rulings and free speech traditions.[2] The Supreme Court has repeatedly recognized that anonymous speech has value and is protected by the First Amendment.[3] Regardless of the value inherent in anonymous speech, however, it is not afforded unlimited First Amendment protection.

Anonymous speech is prevalent in all of cyberspace. From anonymous product reviews to message boards, the Internet provides the medium for the instantaneous flow of speech, which is often hateful and destructive. This speech is couched in anonymity to protect the speaker from retribution and often would not be said in a face-to-face confrontation for fear of a violent response. Although the Supreme Court has ruled that First Amendment protections apply in cyberspace, the Court has not yet defined the extent to which anonymous online speech can be protected or regulated.[4]

The First Amendment does not protect all speech equally; rather, certain categories of speech are disfavored and do not

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1 *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960).

2 Alexander Hamilton, John Jay and James Madison published the Federalist Papers anonymously. All papers were published under the name "Publius." The Anti-Federalist Papers were also published anonymously. These were written under pseudonyms including "Cato," "Brutus," "Centinel," and "Federal Farmer."

3 *See, e.g.*, *Watchtower*, 536 U.S. 150; *McIntyre*, 514 U.S. 334; *Talley*, 362 U.S. 60.

4 *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

receive the presumptive protection that such categories as political speech do.[5] Two categories of disfavored speech are speech inciting violence and fighting words.[6] The Supreme Court has held that states can constitutionally proscribe speech that is directed to incite imminent lawless action and that will likely incite or produce such action.[7] Fighting words, on the other hand, are classified as speech in which the violence is directed against the speaker. 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."[8]

A crucial factor for the Supreme Court in determining whether or not speech falls into one of these categories is the imminence and likelihood of violent action.[9] In the Founding Era, the press was not immediate, but hot news needed to be printed and subsequently distributed. Therefore, it was unlikely that written speech in the press would cause imminent lawless action. Today, however, cyberspace is intimately intertwined with everyday life. With cell phones and Wi-Fi hotspots, the Internet is constantly at individuals' fingertips and messages are transmitted instantenously. Regulations of speech in cyberspace should therefore be examined in terms of speech freedom rather than press freedom.

This Note proceeds in three parts. Part I discusses the history of the First Amendment's protections for anonymous speech and the Supreme Court's jurisprudence regarding state regulation of speech. Part II discusses the recent prevalence of Internet cyberbullying and the First Amendment challenges posed by any attempts to regulate anonymous speech online. Part II also

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5 *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1017 (4th ed. 2011).

6 *See id.*

7 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

8 315 U.S. 568, 572 (1942); *see also* Cohen v. California, 403 U.S. 15 (1971) (holding that the words "Fuck the Draft" did not rise to the level of fighting words because there was no showing of actual violence intended or aroused).

9 *See, e.g.*, *Claiborne*, 458 U.S. 886; *Cohen*, 403 U.S. 15; *Brandenburg*, 395 U.S. 444.

explores the arguments for and against regulating anonymous online speech, as well as the extent to which that speech may be constitutionally proscribed. Part III argues that cyberbullying is analogous to fighting words because the intimacy of social media makes cyberspeech more like a verbal assault than a printed communication. As such, states should be able to regulate anonymous cyberspeech in the same manner and to the same extent that they may regulate the spoken word.

I. LEGAL EVOLUTION OF FIRST AMENDMENT JURISPRUDENCE

The First Amendment to the United States Constitution provides that "Congress shall make no law [. . .] abridging the freedom of speech, or of the press."[10] Traditionally, the right to free speech has been considered of the utmost importance to Americans. Despite the profound importance of free speech, however, it is widely recognized and accepted that the First Amendment has limits and does not universally protect any and all speech. This Part discusses the evolution of First Amendment jurisprudence for all speech. Part I.A explores the history of anonymous speech regulation. Part I.B discusses the way the Court has dealt with state regulation of speech with an identifiable author. Part I.C explores the detrimental effects cyberbullying has on children and teenagers, providing specific examples of the harm caused by unrestricted cyberspeech.

A. History of Anonymous Speech Regulation

The First Amendment has protected anonymous speech since the Founding Era. Historically, freedom of speech has been justified for three main reasons: advancing knowledge and truth in the marketplace of ideas; facilitating representative democracy and self-government; and promoting individual autonomy, self-expression and self-fulfillment.[11] Anonymous speech has been held to have inherent value and is thus protected by the First

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[10] U.S. CONST. amend. I.

[11] *See* CHEMERINSKY, *supra* note 5, at 954–58.

Amendment.[12] From an originalist perspective, the mere fact that anonymous speech was allowed and protected during the Founding Era is enough to justify the protection of anonymous speech today. However, there are prudential concerns to this argument, as the goal was arguably not to protect vicious anonymous hate speech and harassment.

Since the Founding Era, anonymous speech has been used to further public discourse. Three influential thinkers and Framers of the Constitution availed themselves of the right to publish anonymous speech in producing the Federalist Papers.[13] Consisting of eighty-five different essays that encourage the adoption of and deliberation about the new Constitution, the Federalist Papers were written by Alexander Hamilton, John Jay, and James Madison, and were published under the pseudonym Publius.[14] Anti-Federalists in the Founding Era also published pseudonymous works, using such names as Cato, Brutus, Centinel, and Founding Farmer.[15]

Throughout history, the Supreme Court has reiterated that the First Amendment also protects anonymous speech. In 1960, the Court struck down a California ban on anonymous handbills.[16] Justice Black, in declaring the statute unconstitutional, explicitly stated that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."[17] Furthermore, Justice Black went on to hold that identification requirements restrict both freedom to distribute information and freedom of expression and, further, that anonymity is often used for constructive purposes.[18] In 1995, the Supreme Court again held that the First Amendment protects anonymous speech in

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12 *See id.* at 1002.

13 *See generally* THE FEDERALIST NOS. 1–85 (Alexander Hamilton, John Jay & James Madison) (Goldwin Smith ed., 1901).

14 *See generally id.*

15 *See generally* THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION (Herbert J. Storing ed., abridged, 1985).

16 *See* Talley v. California, 362 U.S. 60 (1960).

17 *Id.* at 64.

18 *Id.* at 64–65.

McIntyre v. Ohio Elections Commission.[19] In *McIntyre*, the Court struck down a law prohibiting the distribution of anonymous campaign literature, noting that political expression would be burdened if the law were to be maintained. The *McIntyre* Court further held that the regulation at issue was subject to strict scrutiny because of its content-based nature.[20] Anonymous speech, therefore, has inherent value and is thus accorded high First Amendment protections, and regulation of such speech must be reviewed under strict scrutiny.

Anonymity allows an individual to be judged solely by the content of his or her speech rather than any personal opinion people may have of the author. Anonymity encourages participation in the political process without fear of retribution.[21] Margot Kaminski, Lecturer in Law at Yale Law School, points to recent anti-mask laws to claim that the Supreme Court has upheld anonymous speech protections beyond political speech to protect all forms of free expression.[22] Addressing free expression protection, Kaminski also notes that "pure anonymity . . . will become increasingly expressive," pointing to the Internet as a medium for spreading anonymous speech.[23]

The Supreme Court has upheld certain regulations pertaining to anonymous speech that require identity disclosure. Specifically in the area of campaign finance, the Court has found that such disclosure requirements do not violate First Amendment rights. In *Buckley v. Valeo*, the Court upheld the portion of the Federal Election Campaign Act of 1971 requiring disclosure of the identities of campaign donors to every political candidate and committee.[24] Finding that the government had a significant interest in maintaining the integrity of the political process,

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19 514 U.S. 334 (1995).

20 *See id.* at 370; *see also* Sophia Qasir, Note, *Anonymity in Cyberspace: Judicial & Legislative Regulations*, 81 FORDHAM L. REV. 3651, 3664 (2013).

21 *See* CHEMERINSKY, *supra* note 5, at 1002.

22 *See generally* Margot Kiminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815 (2013).

23 *Id.* at 896.

24 *See* Buckley v. Valeo, 424 U.S. 1 (1976).

deterring corruption, and enforcing expenditure limits, the Court held that the government's interests outweighed individual speech rights through use of a balancing test.[25] However, this ruling, which indicated the moment when governmental interests outweigh free speech rights, was limited to the context of campaign finance.

Regulation of anonymous speech on the Internet has not yet been conclusively established by the Supreme Court and poses an interesting question for legal scholars. Indeed, numerous scholars continue to speculate on the limits of online protections of speech.[26] Couched in anonymity, individuals have taken to cyberspace to engage in libel and defamation, among other speech torts. Although the Supreme Court has not yet defined the scope of disclosure requirements and speech protection, the Ninth Circuit has addressed this issue. Specifically, in *In re Anonymous Online Speakers*, the Ninth Circuit was faced with the question of whether or not a plaintiff could subpoena the identity of an anonymous online user accused of interfering with the plaintiff's business.[27] Ultimately, although the court recognized that online speech was entitled to the same protection as other speech, the subpoena was granted because the speech in question was not political and thus entitled to lower First Amendment protections.[28] The judiciary has not yet created a specific rule for establishing how to regulate anonymous speech in regards to disclosure requirements nor identified the scrutiny under which those regulations are to be reviewed.

B. State Regulation of Speech with an Identifiable Author

Government censorship of speech and the press stems from the Statutes De Scandalis Magnatum, enacted in 1275, which imposed penalties for any distribution of anything false or critical of the

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25 *Id.* at 66–69.
26 *See* discussion *infra* Part II.
27 661 F.3d 1168 (9th Cir. 2011).
28 *Id.* at 1173.

King of England.[29] Censorship of speech continued throughout England and in the American colonies. Colonial governments often suppressed speech as strongly as the English Parliament did, and much of the English common law was incorporated into the common law of the colonies.[30] However, freedom of speech soon came to be considered a fundamental right. Sir William Blackstone authoritatively described the right of free speech as a fundamental right that may still be in some ways regulated by government:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[31]

During the Founding Era, even influential thinkers such as John Locke urged that "no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate."[32] This caused problems during the ratification debates, as there was a split between proponents of the English common law and those, like James Madison, who endeavored to break from tradition and give speech more protection from government censorship.[33] For example, Madison urged a broad constitutional amendment that would prevent any deprivation or abridgment of "the right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be

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[29] *See* Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 668 (1985).

[30] *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 409 (7th ed. 2008).

[31] 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52.

[32] *See* JOHN LOCKE, *A Letter Concerning Toleration*, *in* 4 THE WORKS OF JOHN LOCKE at 45–46 (Oxford Univ. Press 11th ed. 1934).

[33] *See* 2 O'BRIEN, *supra* note 30, at 410.

inviolable."[34] Madison stressed that liberty of the press was of utmost importance to the public and was the "bulwark of liberty."[35]

Madison's view of freedom of speech and the press, however, was not representative of the majority views of the Founding Era. The colonies' experience with censorship from England resulted in the widespread belief that a guarantee of freedom of speech and press was necessary but could be regulated by common law restrictions such as those on libel and slander.[36] The newly formed United States of America ultimately adopted the First Amendment of the Bill of Rights, which prevents Congress—and, through the adoption of the Fourteenth Amendment, the States as well—from making any laws abridging freedom of speech and the press.[37] The First Amendment has had a tumultuous history as states have sought to regulate certain types of speech and the Supreme Court has been forced to intercede to address the constitutionality of such regulations.

In response to the Espionage Act and state sedition laws, the Supreme Court developed a standard for interpreting the scope of First Amendment protections of speech. One of the best-known tests for defining the scope of constitutionally protected speech by the First Amendment is the "clear and present danger" test illustrated by Justice Holmes in 1919 in *Schenck v. United States*.[38] Justice Holmes, writing for the majority, noted that even "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[39] The Court in *Schenck* explained that Schenck's leaflets advocating draft dodging presented a clear and present danger that Congress had a right to prevent, as it is not constitutionally protected speech.[40] Over time, the clear and present danger test was abandoned and a

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34 *Id.*

35 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834); *see also* 6 JAMES MADISON, THE WRITINGS OF JAMES MADISON 336 (Gaillard Hunt ed., 1906).

36 *See* 2 O'BRIEN, *supra* note 30, at 412.

37 *See id.* at 336, 412.

38 249 U.S. 47, 52 (1919).

39 *Id.* at 52.

40 *Id.* at 53.

balancing approach was adopted that weighed First Amendment freedoms against government interests.[41]

After the passage of the Fourteenth Amendment, decisions of the Supreme Court established that the First Amendment applied equally to the states; accordingly, the Court was tasked with defining the scope of constitutionally protected speech.[42] It wasn't until 1936 that the Supreme Court held that constitutional principles—as opposed to English common law—governed the scope of protected speech.[43] Justice Sutherland unambiguously stated, "[i]t is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England."[44] As a result, the Court was faced with numerous First Amendment challenges to state laws that attempted to restrict free speech.

To determine whether a state may constitutionally proscribe speech, the Court must first ask whether the law attempts to regulate speech or conduct.[45] The Court also distinguishes between content-based regulations, which seek to restrict speech based on its content, and content-neutral regulations, which can be justified without reference to the content of the speech.[46] Content-neutral regulations such as time, place, and manner restrictions, although not unlimited, are subject to intermediate scrutiny requiring the state to show that the law is substantially related to an important governmental interest.[47] Content-based restrictions, however, are presumptively unconstitutional and subject to strict scrutiny.[48]

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41 *See, e.g.*, Yates v. United States, 354 U.S. 298, 318 (1957); Dennis v. United States, 341 U.S. 494, 530 (1951).

42 *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding First Amendment freedoms to be "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of the people as to be ranked as fundamental"). *See generally* Near v. Minnesota, 283 U.S. 697 (1931); Fiske v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Gilbert v. Minnesota, 254 U.S. 325 (1920).

43 *See* Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936).

44 *Id.* at 248.

45 *See* Qasir, *supra* note 20, at 3656.

46 *See* CHEMERINSKY *supra* note 5, at 960–62.

47 *See* Qasir, *supra* note 20, at 3657.

48 *Id.* at 3656–57.

Although free speech is a fundamental right, the Court does not protect all speech equally. The Supreme Court has established a hierarchy of speech protections with certain categories of speech considered to be disfavored and not presumptively protected by the First Amendment.[49] The Court has created exceptions for state laws that regulate or limit disfavored speech.[50] Two such categories of disfavored speech include speech inciting violence and fighting words.[51] The Court in *Brandenburg v. Ohio* struck down a law that convicted a Ku Klux Klan group leader of advocating violence.[52] In *Brandenburg*, the Court explained that while the government has a compelling interest in preventing people from inciting violence, advocacy of violence is not problematic unless it is *directly intended* to produce *imminent* lawless action and is *likely to induce* such action.[53] With state regulations that proscribe speech that is likely to incite violence, the Supreme Court has included an imminency requirement: simple advocacy of force does not remove speech from the protection of the First Amendment.[54]

Fighting words, on the other hand, are thought to incite violence directed against the speaker rather than violence undertaken to further the speaker's cause. Typically, the claim is that provocative speech so enrages the audience that some listeners are likely to use violence against the speaker. In *Chaplinsky v. New Hampshire*, Justice Murphy unambiguously laid out the hierarchy of speech categories, noting that fighting words are less worthy of protection:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has *never been thought to raise any constitutional problem*. These include the lewd and

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49 *See* CHEMERINSKY *supra* note 5, at 1017–19.

50 *Id.*

51 *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

52 *See Brandenburg*, 395 U.S. at 444–45.

53 *See id.* at 447.

54 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982).

> 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 that may be derived from them is *clearly outweighed* by the social interest in order and morality.[55]

Again, the Court indicated that the First Amendment does not presumptively protect all speech. In *Cohen v. California*, the Court distinguished fighting words from obscenity and included a "likelihood of violence" requirement for state regulation.[56] In *Cohen*, the Court struck down Cohen's conviction, indicating that because there was no evidence showing that Cohen's message, "Fuck the Draft," was either intended to arouse or actually aroused a violent reaction, the message did not constitute fighting words.[57] Ultimately, speech that incites violence and fighting words are disfavored, but not entirely removed, from First Amendment protection. However, the Court affords significantly more deference to the states to regulate or proscribe such speech so long as the imminency and likelihood of violence requirements are met.

C. Cyberbullying: The Detrimental Effects of Unrestricted Cyberspeech on the Nation's Youth

Cyberbullying—the harassment of classmates, friends, enemies, or even strangers, on the Internet—has become increasingly prevalent in today's society, especially among children and teenagers. Unfortunately, the Internet has provided a new medium for individuals to anonymously, pseudonymously, or identifiably harass, embarrass, and threaten others. The public nature of the Internet, specifically social media, makes the harassment especially harmful for children and teenagers who are at an impressionable age. Furthermore, the immediacy of instant

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

56 403 U.S. 15 (1971).

57 *Id.* at 20.

messaging, emailing, text messaging, and other messaging applications on cellphones has put this age group at a further disadvantage.

There are numerous media through which individuals can use cyberspeech to spread hate and harass others without the victim's participation. Text messaging and the messenger application Kik, released in October of 2010 for smartphones, allow individuals to transmit messages and images to people's phones, regardless of whether or not those people wish to receive them. Kik allows individuals to identify themselves by a personalized username that may or may not have anything to do with their actual name or phone number.[58] Applications such as Kik can be used to cloak the user in secrecy or create an entirely different persona, giving individuals yet another opportunity to harass their peers.

The Honorable Brian P. Stern, Associate Justice, Rhode Island Superior Court, succinctly described cyberbullying and explained the harm it can, and does, cause:

> With 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. Tormentors are instantly able to spread lies and embarrassing information about their victims to hundreds and thousands of people at a time. This 24/7 widespread harassment can have a far more dangerous effect on the victim than traditional bullying.[59]

Cyberbullying, much like traditional bullying, can cause psychological harm such as depression, anxiety, isolation, and low self-esteem.[60] Furthermore, the repercussions of cyberbullying often last longer as the harassing, embarrassing, or threatening

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[58] *See* ABOUT KIK MESSENGER, http://kik.com/about (last visited Feb. 13, 2014).

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

[60] *See* Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 851 (2010) (examining several cyberbulling instances and their negative repercussions).

comments remain in cyberspace indefinitely, able to be shared and re-shared with the simple click of a mouse.[61]

Tragically, cyberbullying has been involved in recent suicides among teenagers and students. In Missouri, a 47-year-old woman named Lori Drew pushed thirteen-year-old Megan Meier to suicide through cyberbullying.[62] Drew, knowing that Megan was taking anti-depressants, concocted a fake MySpace account under the name Josh Evans and pretended to be a sixteen-year-old boy.[63] Under this pseudonym, Drew flirted with Megan for weeks but then began to harass and insult Megan, ultimately writing "[t]he world would be a better place without you."[64] After this final insult and the barrage of insults from "Josh" and others, Megan went to her room and hanged herself.[65] Though she arguably directly caused Megan's suicide, Drew was never charged with a crime.

Another highly publicized suicide attributed to cyberbullying is that of eighteen-year-old Rutgers University freshman Tyler Clementi in 2010. On September 19, 2010, Clementi's roommate, Dharun Ravi, also eighteen years old, tweeted that he saw Clementi "[m]aking out with a dude" and used his webcam to live stream Clementi's intimate relations with another man in Clementi's own dorm room.[66] Only three days later, Tyler Clementi posted a chilling message on his Facebook page, "[j]umping off the gw bridge sorry" and proceeded to commit suicide by jumping into the Hudson River.[67] Ravi faced numerous charges including invasion of privacy and bias intimidation.[68]

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61 *See id.* at 850–51.

62 *See* Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, http://www.nytimes.com/2007/11/28/us/28hoax.html.

63 *See id.*

64 *Id.*

65 *See id.*

66 Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?page wanted=all.

67 *Id.*

68 *See* Richard Pérez-Peña*, Rutgers Dorm Spying Trial Begins with Questions of Motivation,* N.Y. TIMES, Feb. 24, 2012, http://www.nytimes.com/2012/02/25/nyregion/in-tyler-clementi-trial-looking-at-dharun-ravis-intentions.html.

Ultimately, Ravi was convicted on all counts, including the felony charges, and served thirty days in jail, avoiding deportation back to India.[69]

More recently, a twelve-year-old girl in Florida has become one of the youngest victims driven to suicide by cyberbullying.[70] Rebecca was apparently cyberbullied by fifteen other middle school children for over a year and bombarded with insults and urges to kill herself through messaging apps such as Kik Messenger.[71] Ultimately, two girls were charged with felonies for cyberbullying, but the charges were dropped because, although their messages were of the type that some children could find emotionally crushing, "the posts did not rise to the level of a crime."[72] As technology advances, children and teenagers are constantly finding new ways to harass, embarrass, and threaten their peers. As a result, more and more of the nation's youth are being driven to suicide due to cyberbullying.[73]

II. CYBERBULLYING AND SPEECH REGULATIONS IN CYBERSPACE: ANONYMOUS AND AUTHORED SPEECH AND HOW IT MAY BE REGULATED

On the Internet, anonymous users can make use of a plethora of media to disseminate their opinions. The Internet allows the communication of text, sound, images, and pictures between devices and can be accessed at any time by any person with a

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[69] *See* Kate Zernike, *Rutgers Webcam-Spying Defendant Sentenced to 30 Days*, N.Y. TIMES, May 21, 2012, http://www.nytimes.com/2012/05/22/nyregion/rutgers-spying-defendant-sentenced-to-30-days-in-jail.html.

[70] Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES, Sept. 13, 2013, http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html?_r=0.

[71] *See id.*

[72] Lizette Alvarez, *Charges Dropped in Cyber-bullying Death, but Sheriff Isn't Backing down*, N.Y. TIMES, Nov. 21, 2013, http://www.nytimes.com/2013/11/22/us/charges-dropped-against-florida-girls-accused-in-cyber-bullying-death.html?_r=1&.

[73] *See* Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 227, 223–24 (2011).

computer or other Internet-ready device.[74] Since cyberspace is accessible without respect to geographic boundaries, "there is no current method to limit its accessibility to within state boundaries or selectively limit its dissemination to any geographic area."[75] As such, the law as it stands is insufficient to address harmful information disseminated on the internet. Cyberspace has become a hotbed for destructive speech, cyberbullying, and "sexting," as well as defamation, tortious interference with business, and copyright infringement.[76] As a result, many states are imposing criminal penalties for the sharing of sexually explicit materials involving children. For example, New York has enacted the Cyber Crimes Youth Rescue Act, mandating an eight-hour educational program for youths accused of sharing sexually explicit images of other minors.[77]

Many early cyberspeech regulations focused on minors, but were not entirely efficient. In response to the perceived danger that "predatory adults will expose minors" to harmful matter on the Internet, Congress and several states – California, New York, New Mexico, Michigan, and Virginia – have enacted penal statutes criminalizing the "dissemination of harmful matter to minors over the Internet."[78] The Court has consistently justified protection of minors as a compelling state interest warranting regulation of certain types of speech.[79] With respect to the Internet, however, the Court has found these types of regulations to be overbroad.[80] Enacted by Congress, section 223 of the Communications Decency Act of 1996 (CDA) sought to prohibit any sexually explicit

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74 *See* Alex C. McDonald, *Dissemination of Harmful Matter to Minors over the Internet*, 12 SETON HALL CONST. L.J. 163, 166–67 (2001).

75 *Id.* at 168.

76 *See* Qasir, *supra* note 20.

77 Cybercrime Youth Rescue Act, 2011 N.Y. Sess. Laws A. 8170-B (McKinney).

78 *See* McDonald, *supra* note 74, at 163–64.

79 *See generally* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565 (2005) (examining the First Amendment concerns inherent in the concept of sheltering children from otherwise free speech).

80 *See, e.g.*, Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

communications from use in telecommunications.[81] The law specifically sought, in § 223(a), to criminalize the "knowing transmission of obscene or indecent messages" to minors,[82] and in § 223(d) to criminalize sending or displaying a message to a minor "that, in any context, depicts or describes [in offensive terms . . .] sexual or excretory activities or organs."[83] This law, however, was entirely focused on the availability of offensive material to minors, not all Internet users.

Shortly after its enactment, the American Civil Liberties Union (ACLU) challenged the constitutionality of § 223(a)(1) and § 223(d) in *Reno v. American Civil Liberties Union*.[84] Writing for the majority, Justice Stevens recognized the "importance of the congressional goal of protecting children from harmful materials," but ultimately found that the statute abridged First Amendment protections of freedom of speech.[85] Justice Stevens noted that the CDA applied broadly to all aspects of cyberspace and was therefore a content-based regulation of speech that must be evaluated under strict scrutiny.[86] Although the statute was found to be impermissibly broad, in dicta, Justice Stevens discussed an attribute of cyberspace that has significantly changed in today's society as opposed to that of 1997.[87] He noted that the Internet is "not as 'invasive' as radio or television," and agreed with the district court that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden."[88] In making this determination, Justice Stevens likened cyberspace to the press, a less invasive medium for expression. However, the Internet has changed drastically since 1997 and has become significantly more immediate and intertwined in daily life.

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[81] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *invalidated in part by* Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

[82] *Id.* § 223(a).

[83] *Id.* § 223(d).

[84] 521 U.S. 844.

[85] *Id.* at 849.

[86] *Id.* at 868.

[87] *Id.* at 868–69.

[88] *Id.* at 869 (quoting Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

Additionally, children and minors make up a significant portion of Internet users.

Another example of regulation of cyberspeech directed at minors, since held by the Court to be unconstitutional,[89] was the Child Online Protection Act (COPA), which criminalized transmission over the Internet, for commercial purposes, of material "harmful to minors."[90] In *Ashcroft v. American Civil Liberties Union*, the Court enjoined the enforcement of the Child Online Protection Act of 1998 for burdening adult access to protected speech.[91] Justice Kennedy, writing for the majority, upheld the district court's injunction and remanded the case for further examination on the issue of whether there were less restrictive alternatives to COPA.[92] Justice Kennedy reiterated that content-based prohibitions have the "constant potential to be a repressive force in the lives and thoughts of a free people," and are thus presumptively invalid.[93] Although COPA was struck down, the Court did note that other forms of restricting speech on the Internet, such as prohibitions on misleading domain names, are valid.[94] Still, the laws regarding prohibitions of misleading information are not adequate to address cyberbullying or other dissemination of harmful information on the Internet.

Aside from protection of minors, personal privacy is another issue Congress and states look to in justifying regulations. Although the Court has recognized a right to privacy implicit in the penumbras of the Constitution,[95] privacy torts are "of limited utility when applied to the Internet."[96] One example of the failure of tort law in cyberspace is the case of *Boring v. Google*, *Inc.*, where the Borings sued Google for taking images of their home on

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89 *See* Am. Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008); s*ee also* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004).

90 Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998).

91 542 U.S. 656 (2004).

92 *Id.* at 660.

93 *Id.*

94 *Id.* at 663 (referencing 18 U.S.C. § 2252B).

95 *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

96 *See* Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J. L. ETHICS & PUB. POL'Y 237, 264 (2011).

a private road for dissemination on Google's "Street View" mapping program.[97] There, the district court dismissed the suit for invasion of privacy because of a failure to establish Google's conduct as "highly offensive to a person of ordinary sensibilities."[98]

There have also been attempts to protect online privacy through the use of criminal laws. Various states have enacted criminal laws to address cyberstalking, cyberharassment, and cyberbullying.[99] However, there is currently no federal law addressing cyberharassment or cyberbullying.[100] Congress has taken some steps to regulate the Internet, such as enacting the Computer Fraud and Abuse Act (CFAA), which criminalizes computer fraud.[101] However, in *United States v. Drew*, a case in which a mother created a fake MySpace profile of a teenage boy to harass and bully a teenage girl, the district court held the law to be unconstitutionally vague.[102]

Some commentators believe that even the states that do attempt to regulate and protect online privacy are unsuccessful in their efforts. Terence J. Lau, Associate Professor, University of Dayton, describes state regulation of online privacy as "meager and pitiful."[103] Blogs, for instance, are an area of concern for online privacy regulation. Although multifaceted, blogs are popularly used by children and teenagers, and can become virtual diaries that are shared throughout cyberspace.[104] Currently, speech of private concern on the Internet is given less protection than speech of public concern, somewhat limiting bloggers' rights to engage in

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97 362 F. App'x 273, 276 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 150 (2010).

98 *Id.* at 277 (quoting Boring v. Google, Inc., 598 F. Supp. 2d 695, 699–700 (W.D. Pa. 2009)).

99 *See, e.g.*, Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 258–60 (2008); Lau, *supra* note 96, at 266.

100 *See* Lau, *supra* note 96, at 266.

101 18 U.S.C. § 1030 (2012).

102 United States v. Drew, 259 F.R.D. 449, 464 (C.D. Cal. 2009).

103 *See* Lau, *supra* note 96, at 266.

104 *See, e.g.*, Alan J. Bojorquez & Damien Shores, *Open Government and the Net: Bringing Social Media into the Light*, 11 TEX. TECH. ADMIN. L.J. 45, 48–49 (2009).

online gossip.[105] Overall, however, there is little state regulation in this area today.

The state regulation that exists in this area is, at this point, insufficient. Much of it focuses solely on the protection of minors or privacy. Furthermore, federal regulations, such as the CDA, COPA, and CFAA, do not sufficiently fill the gaps left by state laws. As there are currently no federal laws addressing cyberharassment or cyberbullying, the Internet remains a potentially dangerous place in need of regulations.[106] The law as it stands, in its current state, is inadequate to address cyberbullying and must be amended. Ultimately, both federal and state regulations of cyberspeech fall short of addressing free speech concerns while still serving governmental interests.

III. CREATING A PROPER STANDARD TO EVALUATE CYBERSPEECH REGULATIONS: RESURRECTING THE TRADITIONAL HIERARCHY OF PROTECTED SPEECH

First Amendment law with respect to free speech should be used to govern cyberbullying. Applying the traditional hierarchy of protected speech to cyberspeech would remedy the current inadequacies in the current laws regulating cyberspeech. In the United States, freedom of speech is a fundamental right but it is not absolute, and certain types of speech are subject to governmental regulation. Cyberbullying on the Internet must be regulated, but currently there are no uniform standards for federal or state regulation of such harmful speech. The First Amendment guarantees both the freedom of speech and of the press, and protections of expressions made in cyberspace are more analogous to the protections afforded speech than those bestowed upon the press. As such, traditional standards of scrutiny should govern the Court's analysis of state regulations. Part III.A discusses some of the challenges inherent in regulating anonymous cyberspeech and reasons that cyberspeech unequivocally falls under First

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[105] Daniel J. Solove, *A Tale of Two Bloggers: Free Speech & Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1198 (2006).

[106] *See* Lau, *supra* note 96, at 266.

Amendment protections and regulations. Part III.B argues that the immense reach of the Internet, permeating everyday life, renders cyberspeech more akin to freedom of speech rather than to freedom of the press and, accordingly, places cyberbullying in the disfavored speech category of speech that incites violence or fighting words. Finally, Part III.C applies the traditional hierarchy of protected speech to cyberspeech presenting guidelines for how courts and legislatures should approach cyberbullying. Ultimately, both state and federal governments should regulate cyberspeech in the same manner and to the same extent as they may regulate the spoken word.

A. Some of the Challenges Inherent in Regulating Anonymous Cyberspeech

The Supreme Court has held that the First Amendment protects speech in cyberspace but that such protection is not absolute.[107] Congress and the states have attempted to regulate cyberspeech in one way or another, though such attempts are inevitably restricted by the scope of the First Amendment. As a result of years of accumulating Supreme Court jurisprudence, states are afforded "wide latitude in regulating classes of speech that offer such negligible social value" as to be outweighed by social interests in order and social morality.[108] Although cyberbullying clearly offers little to no social value, legislators are tasked with crafting cyberspeech laws that do not infringe upon protected speech rights.[109]

It is clear that anonymous speech is protected by the Constitution and has been since the Founding Era.[110] In the Founding Era, anonymous speech was protected in order to encourage political speech such as that found in the Federalist Papers and Anti-Federalist Papers.[111] These types of anonymous speech were protected because of the value of encouraging

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107 *See* Qasir, *supra* note 20, at 3653.
108 *See* King, *supra* note 60, at 865.
109 *Id.* at 865–66.
110 *See* Qasir, *supra* note 20, at 3652.
111 *See supra* note 2.

political discourse. The Founders did not seek to protect anonymous speech so as to encourage harassment, which is what unrestricted cyberspeech fosters today. Furthermore, from an originalist perspective, "most of modern First Amendment doctrine is incompatible with the original understanding of the freedom of the press."[112] The policies and principles for protecting anonymous speech and the press in the Founding Era are no longer as relevant in the Internet era. Cyberspeech that fosters intelligent or political discourse should naturally be protected regardless of whether or not it is anonymous. However, even originalist principles cannot justify protecting anonymous cyberspeech that fosters hate and cyberbullying.

There are also privacy concerns regarding regulation of anonymous cyberspeech. The Supreme Court has already restrained the right to anonymous speech by imposing disclosure requirements in campaign finance laws.[113] However, these mandatory disclosure laws would have a different effect on cyberspeech. First, privacy concerns may outweigh a mandatory disclosure as individuals have the right to voluntarily disclose what aspects, if any, of their identity that they wish to express.[114] Imposing a mandatory disclosure requirement could destroy all anonymity on the Internet and, if taken to the extreme, could destroy the voluntariness of cyberspace. Furthermore, courts have found that the justifications[115] for restriction of anonymous speech in printed media, such as corruption in campaign finance, "do not apply to online speech, and the government should protect speakers' legitimate expectations of privacy."[116] However, it is unclear exactly how much privacy the Supreme Court aimed to protect when protecting anonymous speech: it is possible that the Supreme Court was "protecting political privacy rather than

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[112] Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 754 (2013) (internal citations omitted).

[113] *See* Qasir, *supra* note 20, at 3665.

[114] *See* Qasir, *supra* note 20, at 3660–61.

[115] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[116] *See* Qasir, *supra* note 20, at 3667–68.

creating a broad right to anonymity."[117] Placing broad restrictions on anonymous cyberspeech that would require identity disclosure has the potential to change the entire character of the Internet and eliminate any expectation of privacy that individuals are entitled to under the Constitution.

The current regulations regarding cyberbullying are met with various challenges. Much of the legislation attempting to regulate cyberbullying is found in a state's education statutes rather than in penal codes.[118] Most laws prohibit cyberbullying in the public-school context, which gives more responsibility to teachers and administrators to combat online harassment.[119] Furthermore, the current regulations are often perceived as inadequate as the laws "are not always written to deal with the nuances of cyberbullying."[120] Specifically, victims of cyberbulling more often than not have no legal remedy they can turn to for recourse.[121] Although victims can often rely on harassment or cyberstalking laws, these have proven to be inadequate solutions to the problem of cyberbullying.[122] Ultimately, the current regulations attempt to avoid important First Amendment questions but as a result are insufficient to serve their intended aim of combating cyberbullying.

The Supreme Court has ruled that the First Amendment protects speech in cyberspace.[123] In examining the Communications Decency Act of 1996, Justice Stevens established that certain types of speech-based regulations in cyberspace could be potentially overbroad.[124] Although Justice Stevens likened cyberspace to the less-invasive press medium, the Internet has

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117 *Id.* at 3670.

118 *See* John Schwartz, *Bullying, Suicide, Punishment*, N.Y. TIMES, Oct. 3, 2010, http://www.nytimes.com/2010/10/03/weekinreview/03schwartz.html?gwh=C526DC66084E68DBA5953E0CE1C79B90.

119 *See* King, *supra* note 60, at 859.

120 Alvarez, *supra* note 72.

121 *See* King, *supra* note 60.

122 *Id*.

123 Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997).

124 *See supra* notes 84–88.

evolved significantly since then.[125] Accordingly, First Amendment protections are becoming more prevalent in the courts and regulations are being passed more frequently.[126] Ultimately, cyberspeech is speech and, therefore, is subject to the protections and limitations established by the First Amendment. The remaining questions concern the extent to which that speech may be regulated by government without infringing upon those First Amendment protections.

B. The Vast Reach & Impact of Cyberspeech: Analogous to Traditional Speech Categories

The Internet is omnipresent in today's society, permeating even the most intimate aspects of individuals' lives. There is no longer a waiting period for news or writing to reach the desired recipient or audience; rather, a message can now be delivered within seconds of its creation. Especially with the increasing popularity of social media sites such as Facebook and Twitter, communication has become easier and more pervasive. All that is required to view, receive, or create any form of cyberspeech is Wi-Fi access or any form of Internet connection. As such, cyberspeech is more similar to speech than to the press and should be regulated according to the rules of freedom of speech rather than the principles of freedom of the press.[127]

Furthermore, cyberbullying is analogous to both speech that incites violence and to fighting words.[128] These speech categories are traditionally considered to be of low value, and thus disfavored by the First Amendment, and do not receive presumptive protection.[129] The same type of speech printed on the Internet should thus be regulated according to the same standards and those

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125 *Id.*

126 *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (holding that speech that materially assists a foreign terrorist organization can be constitutionally punished); United States v. Williams, 553 U.S. 285 (2008) (excluding offers or requests for child pornography from First Amendment protection); Virginia v. Black, 538 U.S. 343 (2003) (upholding a law prohibiting cross burning).

127 *See* discussion *supra* Part II.A–B.

128 *See* discussion *supra* Part I.B.

129 *See id.*

regulations reviewed under the same level of scrutiny. Hate speech, threats, and other insults that incite violence and that are published on the Internet, do not deserve presumptive protection and should be regulated by Congress and the states.

The instantaneous nature of the Internet is what likens cyberbullying to speech that incites violence and fighting words. The main concern with speech that incites violence and fighting words is in the likelihood of imminent lawless action.[130] With social media and the Internet pervading virtually all aspects of life, it is increasingly likely that hateful speech, such as that involved in cyberbullying, will result in immediate violent action. As noted above, cyberbullying has already led to an increased number of suicides among teenagers, which is unambiguously a negative consequence of cyberspeech.[131]

Additionally, not all cyberspeech is posted in cyberspace to passively await an audience. Rather, much cyberspeech is instead directed at individuals and reaches them more immediately. Texting and messaging apps like Kik assume an active role, bombarding the message recipient with notifications that a message has been received.[132] Sometimes a recipient need not open the application to read the message they have received. Imminent lawless action or violence against the speaker is not only possible in such situations, but at times may even be probable. In today's society, where the Internet's reach is so vast and its use so prevalent, cyberspeech, especially cyberbullying, is clearly analogous to speech that incites violence and fighting words. As such, the traditional hierarchy of favored versus disfavored speech should be applied to cyberspeech, and cyberbullying should be regulated accordingly as this form of speech falls into the disfavored category of speech that incites violence and fighting words.

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130 *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
131 *See* discussion *supra* Part I.C.
132 *See id.*

C. Applying the Traditional Hierarchy to Cyberspeech

First Amendment scholar Eugene Volokh expertly argues that controversies about cyberspeech should "be driven not by the medium, but by the relatively medium-independent underlying free speech principles."[133] The current methods of regulating cyberspeech are inadequate insofar as they are largely dependent on other laws, including education reform and criminal harassment laws.[134] Because the Internet is a medium for speech, both authored and anonymous, that speech should be regulated under traditional speech standards. However, these laws are often overbroad and do not actually provide a sufficient remedy for victims of cyberbullying. Harassment law, for example, "operates to generally suppress speech."[135] Additionally, the laws for cyberharassment are not necessarily unique to cyberspace and have little to do with the actual medium of cyberspace.[136]

Evaluating content-based restrictions on cyberspeech reveals that the online medium is largely irrelevant to the actual restriction on speech.[137] Because the Internet is instantaneous, it is highly probable that certain speech would incite imminent lawless action. The imminence requirement is easily met given that messages posted in cyberspace are instantly transmitted throughout cyberspace to thousands of users. The same is true for cyberspeech that may incite violence against the speaker. Fighting words on the Internet are more pervasive than those simply displayed in public, for example on a jacket.[138] The messages that teenagers spread throughout cyberspace frequently lead to violence and tragically to an increasing number of suicides.[139]

In arguing for the passage of the Online Freedom of Speech Act, Senator Bill Frist noted that "the Internet represents the most

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133 Eugene Volokh, *Freedom of Speech, Cyberspace, and Harassment Law*, 2001 STAN. TECH. L. REV. 3, 4 (2001).
134 *See* discussion *supra* Part II.B.
135 Volokh, *supra* note 133, at 18.
136 *Id.* at 20.
137 *Id.* at 67.
138 *See* Cohen v. California, 403 U.S. 15, 20 (1971).
139 *See* discussion *supra* Part I.C.

participatory form of mass speech in human history."[140] The purpose of the Online Freedom of Speech Act was to protect the privacy of bloggers and ensure that the expression of political views on the Internet was not infringed upon.[141] While this is a legitimate concern, the law itself does not address the need for a proper and uniform standard for regulating cyberspeech. The Internet is exceptionally participatory and is a highly effective medium for the spread of political opinions and intelligent discourse. However, cyberspace is also a medium for hateful speech that is highly detrimental to the nation's youth. Congress and the states have a duty to protect the nation's youth, and cyberspeech accordingly should be regulated based on its content. The proper standard for regulating cyberspeech is to simply resurrect the traditional hierarchy of protected speech and apply it in the context of cyberspace.[142]

Applying this traditional hierarchy to cyberspeech, it is easy to determine into which categories different types of cyberspeech will fall. For example, a product description on the Amazon website would be commercial speech and a product review on the same website would likely fall into the same category. Messages posted on a comment board about politics, tweets about current events, and messages posted on a candidate's webpage would likely fall into the category of political discourse and would thus be protected. Cyberbullying, however, clearly falls into the categories of speech that incite violence and fighting words. Ultimately, applying the traditional First Amendment hierarchy to online speech results in cyberbullying falling under the categories of speech that incite violence and fighting words. As these are historically disfavored categories of speech that do not enjoy presumptive protection, cyberbullying thus falls under the purview of Congress and the states to regulate.

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140 152 CONG. REC. S1954-02 (daily ed. Mar. 9, 2006) (statement of Sen. Frist).

141 *Id.*

142 *See* discussion *supra* Part I.B.

CONCLUSION

The First Amendment guarantees freedom of speech, anonymous and authored, written and spoken, in the tangible sphere and in cyberspace.[143] Speech protection is neither absolute nor equal for all types of speech. There is a hierarchy in which certain categories, such as fighting words, are disfavored and largely unprotected from governmental regulation, and other categories, such as political discourse, are granted presumptive protection.[144] Anonymous speech occurs in both of these categories. Specifically in cyberspace, anonymous speech is used to instantly spread hateful and harmful speech. This has led to an increase in teenage suicides resulting from cyberbullying. Current federal and state attempts to regulate speech are inadequate and often under-inclusive or overbroad, resulting in significant First Amendment challenges.

Speech, both anonymous and authored, that is published on the Internet is more analogous to the spoken word than to publications in the press and should therefore be governed by speech freedom rather than press freedom. The cyberspace medium itself should not dictate the means through which speech is regulated. Instead, the traditional hierarchy of speech protections should be applied to cyberspeech. Cyberbullying, with its immediacy and intimate involvement in everyday life, should be regulated in the same way as speech that incites violence or fighting words. Therefore, cyberbullying should be considered a disfavored category of speech, one that has low social value, which may thus be regulated by Congress and the states. The Court should recognize that cyberspeech is on the same level as spoken speech, and that governmental regulations attempting to proscribe the type of speech found in cyberbullying should be reviewed under strict scrutiny, with the highest deference afforded to the government. Moving forward, states must be able to regulate anonymous cyberspeech in the same manner and to the same extent that they may regulate the spoken word.

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143 U.S. CONST. amend. I.

144 *See generally* CHEMERINSKY, *supra* note 5, at 1017–19.