

# THE FIRST AMENDMENT AND THE GREAT COLLEGE YEARBOOK RECKONING

## INTRODUCTION

“Yearbooks are meant to double as time capsules. There’s aspiration woven into their portrayals of things. . . .”<sup>1</sup> As with all time capsules, some yearbooks contain things that would be better left in the past. Blackface,<sup>2</sup> celebration of the Confederacy<sup>3</sup> and white supremacy,<sup>4</sup> even depictions of students in Nazi uniforms<sup>5</sup> are surely things that most people believe should be left in the past, or should not have even existed in the past to begin with. However, the reality is that such racial and discriminatory depictions have historically been prevalent in student publications. In fact, out of 900 publications across 120 institutions for higher education, a USA Today study found more than 200 blatant displays of racism in college publications throughout the country.<sup>6</sup> And as

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1. Megan Garber, *When a Yearbook Is a Current Event*, ATLANTIC (Feb. 8, 2019), <https://www.theatlantic.com/entertainment/archive/2019/02/ralph-northam-tommy-norment-and-yearbooks-current-events/582331/> [<https://perma.cc/NC4J-NBXZ>].

2. Patrick Wilson & Andrew Cain, *Virginia Gov. Ralph Northam Admits He Posed in Yearbook Photo Showing Men in Blackface, Klan Robe*, RICH. TIMES-DISPATCH (Feb. 1, 2019), [https://www.richmond.com/news/virginia/government-politics/virginia-gov-ralph-northam-admits-he-posed-in-yearbook-photo/article\\_c29e0f55-6284-5bde-8d93-8804ad507d5d.html](https://www.richmond.com/news/virginia/government-politics/virginia-gov-ralph-northam-admits-he-posed-in-yearbook-photo/article_c29e0f55-6284-5bde-8d93-8804ad507d5d.html) [<https://perma.cc/7T9E-J297>].

3. Scott Jaschik, *Yearbook Review Finds Dean with Confederate Flag*, INSIDE HIGHER ED (Feb. 25, 2019), <https://www.insidehighered.com/admissions/article/2019/02/25/wake-forest-searched-its-yearbooks-photos-linked-racism-and-found-its> [<https://perma.cc/8VUZ-ZT4B>]; Mihir Zaveri, *Old Yearbook Photo Shows Tennessee Governor Dressed as Confederate Soldier*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/us/tennessee-governor-bill-lee-confederate.html> [<https://perma.cc/737A-C9RR>].

4. Eric Anthony Grollman, *About (Black) Face*, INSIDE HIGHER ED (Feb. 11, 2019), <https://www.insidehighered.com/views/2019/02/11/yearbook-photos-university-richmond-reflect-racism-institution-confronting-its-past> [<https://perma.cc/9XMN-GPMA>]; Amanda Morris & Michel Martin, *U.Va. Students Investigate Their Yearbook’s Racist History—Starting with Its Title*, NPR (Feb. 10, 2019, 5:07 PM EST), <https://www.npr.org/2019/02/10/693226601/corks-and-curls-virginia-yearbook-has-a-racist-history> [<https://perma.cc/A9ST-4VLC>].

5. Brett Murphy, *Blackface, KKK Hoods and Mock Lynchings: Review of 900 Yearbooks Finds Blatant Racism*, USA TODAY (Feb. 21, 2019, 9:43 AM EST), <https://www.usatoday.com/in-depth/news/investigations/2019/02/20/blackface-racist-photos-yearbooks-colleges-kkk-lynching-mockery-fraternities-black-70-s-80-s/2858921002/> [<https://perma.cc/HZ9Q-8SEJ>].

6. *Id.* (noting that offensive and racist content was found in publications of “colleges

much as society may want to assert that this is a thing of the past, the unfortunate reality is that such pervasive displays of racism continue today.<sup>7</sup> For example, Eastern Virginia Medical School, whose yearbook was the catalyst for much of the current controversy,<sup>8</sup> eliminated their yearbook altogether in 2014 after three “soon-to-be doctors” were depicted wearing Confederate uniforms, with one smiling and another holding a gun.<sup>9</sup> The questions raised by these instances, though, are how were these depictions published in the first place, and how do we prohibit such disgraceful displays going forward. Those are the questions I attempt to answer in this essay.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>10</sup> This right was incorporated against the states in *Gitlow v. New York*.<sup>11</sup> Then, in *Healy v. James*, the Supreme Court recognized that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>12</sup> This means that student publications themselves are not immune from the sweep of the First Amendment.<sup>13</sup> Instead, speech by student publications can be prohibited completely only if it falls into one of the Court’s categories of unprotected speech, including incitement, false statements of fact, obscenity, and offensive speech.<sup>14</sup> Additionally, regulations on speech by student publications must be content-neutral, otherwise those regulations are subject to strict scrutiny analysis.<sup>15</sup> Finally, while it is unclear whether the public forum analysis applies to student publications on college campuses, such student publications would likely be considered a limited-use public forum, and thus permissibly subjected to viewpoint-neutral and reasonable time, place, and manner restrictions.<sup>16</sup> While these

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in 25 states, from large public universities in the South, to Ivy League schools in the Northeast, liberal arts boutiques and Division I powerhouses”).

7. Garber, *supra* note 1.

8. The current scrutiny of college yearbooks was sparked by the discovery of a photo on the yearbook page of current Virginia Governor, Ralph Northam, in the 1984 yearbook of Eastern Virginia Medical School, which depicted a man in blackface standing next to a man in a Ku Klux Klan robe. Wilson & Cain, *supra* note 2.

9. Garber, *supra* note 1.

10. U.S. CONST. amend. I.

11. 268 U.S. 652, 666 (1925).

12. 408 U.S. 169, 180 (1972).

13. See 3 JAMES A. RAPP, EDUCATION LAW § 9.04(7)(c) (2018).

14. *Id.* § 9.04(4)(c)(v).

15. *Id.* § 9.04(2)(c)(i).

16. *Id.* § 9.04(5)(b)(ii).

limitations provide some protection for marginalized students, these limitations and the categories of unprotected speech meant to curb such abuses failed to prevent the harms that resulted from the “yearbook reckoning.”<sup>17</sup>

These regulations, though, were and remain insufficient to stem the tide of racial and discriminatory content in yearbooks produced by universities. Thus, in order to adequately balance the competing interests of creating a true “marketplace of ideas”<sup>18</sup> on college campuses and creating a learning environment in which everyone, regardless of their race, gender, or creed, can feel safe, the Supreme Court should recognize that the traditional mechanisms of protecting and regulating speech by student publications are insufficient. Accordingly, I suggest the best way to balance these interests is by adopting modifications to the traditional categories of unprotected speech for speech by student publications at higher education institutions. Such modifications would redefine what is meant by incitement, false statements of fact, obscenity, and offensive speech on college campuses, and it would do so in a way that continues to disfavor content and viewpoint discrimination by the government.

I advance my argument in three parts. In Part I, I discuss the law as it currently applies to student publications. I begin by briefly addressing the law as it applies to student publications in high schools as a way of demonstrating the lack of clarity in the law as it applies to student publications on college campuses. I then discuss the current state of speech regulation for student publications, including yearbooks, on college campuses. In Part II, I discuss each of the categories of unprotected speech as they are currently interpreted by the Supreme Court, and I demonstrate how they fall short of protecting all students. In Part III, I suggest ways these categories of unprotected speech can be modified to better allow for the exchange of ideas on college campuses in a way that promotes inclusive environments where each student can learn and feel safe. Adopting such modifications would

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17. See Emma Pettit & Zipporah Osei, *The ‘Great College-Yearbook Reckoning’: Why Scholars Say Blackface Images Aren’t Outliers*, CHRON. HIGHER EDUC. (Feb. 7, 2019), <https://www.chronicle.com/article/The-Great-College-Yearbook/245643> [<https://perma.cc/VF5Q-XCXS>].

18. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

allow student publications to truly serve as a “marketplace of ideas”<sup>19</sup> where curiosity and creative expression can thrive.

### I. THE CURRENT STATE OF STUDENT PUBLICATIONS

The Supreme Court has made it clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>20</sup> While this mantra is frequently repeated by the Court, it is not absolute.<sup>21</sup> Indeed, school administrators frequently exercise control over student speech and student publications. The level of control that administrators exercise not only varies between schools by practice,<sup>22</sup> but it also varies between primary and secondary schools and colleges and universities by law.<sup>23</sup>

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court held that in primary and secondary schools, administrators may properly “exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>24</sup> It was in this case that the Supreme Court first applied the public forum analysis to determine the degree of control academic institutions may exert in regulating student speech in

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19. *See id.*

20. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

21. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“[Students] cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will ‘substantially interfere with the work of the school or impinge upon the rights of other students.’” (quoting *Tinker*, 393 U.S. at 509)); *see also Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680 (1986) (noting that the Court in *Tinker* upheld “students’ right to engage in a nondisruptive, passive expression of a political viewpoint . . . [in a case that] did ‘not concern speech or action that intrudes upon the work of the schools or the rights of other students’” (quoting *Tinker*, 393 U.S. at 508)); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (observing that the First Amendment does not “require[] equivalent access to all parts of a school building in which some form of communicative activity occurs”).

22. Jeff Sklar, Note, *The Presses Won’t Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood’s Application to Colleges*, 80 S. CAL. L. REV. 641, 673–74 (2007) (explaining that “each [publication] operates under its own set of circumstances” and the level of scrutiny applied depends on whether the publication is a public forum which depends on “the degree of control over the publication’s content that the college administration has delegated to students”).

23. *See Hazelwood*, 484 U.S. at 273 n.7 (suggesting a different degree of deference would be appropriate with respect to school-sponsored expressive activities at colleges and universities).

24. *Id.* at 273.

school-sponsored publications.<sup>25</sup> The Court held that because the student publication, *Spectrum*, was not a public forum, the administration could regulate the time, place, and manner of expression so long as the regulation was reasonable and content-neutral.<sup>26</sup>

However, the Court in *Hazelwood* declined to decide whether deference is owed to administrators overseeing student publications at the college or university level or whether student publications at colleges are subject to the public forum analysis at all.<sup>27</sup> Thus, confusion exists as to the amount of deference, if any, school administrators are owed in their potential restriction of student publications on college campuses.<sup>28</sup> Additionally, “[d]espite more rulings in favor of students in the university setting than in the secondary school setting, the Supreme Court has never explicitly held that published speech on the university campus receives a higher level of protection.”<sup>29</sup> Yearbooks and other student publications on college campuses have thus existed in a state of limbo, in which the level of protection that should be afforded to publications on college campuses is unclear.<sup>30</sup> Without a clear standard as to what level of protection should be applied, some student publications have been subject to regular administrative oversight, which could have potentially prevented many of the displays of racism and discrimination that have historically been prevalent in yearbooks while other student publications are given carte blanche to publish as they will.<sup>31</sup>

Even as they publish in this state of limbo, student publications on college campuses remain subject to reasonable restraints on the time, place, and manner of their speech. Additionally, they remain subject to the outright prohibition of categorically unprotected speech. Despite this, administrators are left with few tools to regulate or restrict the potentially racist or derogatory speech of student publications so long as the speech is not otherwise categorically prohibited. The Court can resolve this problem by ex-

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25. *Id.* at 267.

26. *Id.* at 270, 273.

27. *Id.* at 273 n.7.

28. Patrick O. Malone, Note, *The Modern University Campus: An Unsafe Space for the Student Press?*, 85 *FORDHAM L. REV.* 2485, 2516 (2017) (“[T]he Supreme Court’s failure to provide sufficient guidance about which First Amendment standard applies to student publications on campuses today has led to a federal circuit court split.”).

29. *Id.* at 2496–97.

30. *Id.* at 2516.

31. *See id.*

panding the speech that may be categorically prohibited in the context of student publications to allow college administrators to better restrict racist and derogatory speech.

## II. CATEGORIES OF UNPROTECTED SPEECH

There are several potentially applicable categories of unprotected speech that college administrators could use to prohibit speech by student publications. Here, I focus on incitement, false statements of fact, obscenity, and offensive speech. They are woe-fully narrow categories of speech that can be prohibited outright by the government as the prohibited speech included in each category is without value and does not advance the search for truth.<sup>32</sup> Below, these categories are explained and their deficiencies, as they pertain to student publications on college campuses, are discussed.

### A. *Incitement*

The incitement test was famously articulated in *Brandenburg v. Ohio*.<sup>33</sup> There, the Court announced that advocacy for the use of force or violation of the law was only completely without protection when it was “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”<sup>34</sup> The adoption of this test was undergirded by the understanding that speech has consequences, and when the consequences result in the use of force or violence, the Constitution permits punishment for the speech that caused the violence.<sup>35</sup> The *Brandenburg* standard creates a particularly high threshold for restrictions of speech based on the inciting nature of certain words and phrases because it requires the speech be directed to a specific person who could act on it, not just broadcast generally.<sup>36</sup> Additionally, it requires a sort of immediacy, like a heat of the moment response, and ignores the reality that people could be motivated by speech and take time to think through their response to it.<sup>37</sup>

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32. *See Janus v. AFSCME, Council 31*, 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2448, 2464 (2018).

33. 395 U.S. 444, 447 (1969).

34. *Id.*

35. *See id.* at 447–48.

36. *Id.*

37. *Id.*

These elevated requirements limit this category of unprotected speech to a very narrow subset of speech, excusing similarly destructive and dangerous speech, that may not be directed specifically at someone or may not encourage such conduct immediately. As a result, incitement is an underinclusive category of unprotected speech that fails to allow university administrators to effectively limit speech by student publications that has the potential to result in violence.

### B. *False Statements of Fact*

In *Gertz v. Robert Welch, Inc.*, the Supreme Court stated unequivocally that “there is no constitutional value in false statements of fact.”<sup>38</sup> For this reason, the First Amendment allows for prohibitions on libel, slander, fraud, and perjury.<sup>39</sup> The traditional test for determining liability for false statements of facts about public figures and regarding matters of public concern is set out in *New York Times Co. v. Sullivan*.<sup>40</sup> That test provides that false statements on matters of public concern that defame public figures are unprotected only if the speaker knew the statement to be false or recklessly disregarded the statement’s falsehood.<sup>41</sup> Because this test only speaks to defamation of public officials about issues of public concern, it fails to adequately address many instances of false statements of facts that occur regarding private issues or private individuals. While there are additional standards for private figures and private issues,<sup>42</sup> these tests often fail to reach the particular harms that can come from student publications. Further, when it comes to publications or statements about no particular person on issues of public concern, sometimes all liability is prohibited<sup>43</sup> and sometimes the *New York Times Co.*, test applies.<sup>44</sup> This is a complicated landscape that can allow

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38. 418 U.S. 323, 340 (1974).

39. RAPP, *supra* note 13, § 9.04(5)(b)(iv).

40. 376 U.S. 254, 279–80 (1964).

41. *Id.* at 297–98 (Goldberg, J., concurring).

42. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985); *Gertz*, 418 U.S. at 343.

43. *See United States v. Alvarez*, 567 U.S. 709, 752 (2012) (Alito, J., dissenting) (“Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal . . . . Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends.”).

44. *N.Y. Times Co.*, 376 U.S. at 264.

student publications, in particular, to publish “anonymous” black-face photos or “crowded” Confederate soldier photos, without liability stemming from the publication so long as they were not published with reckless disregard for the truth.<sup>45</sup> Creating such a heightened standard to establish liability here virtually prevents recovery against those who publish false stories and who edit or caption photos in misleading ways. It would also prevent recovery when images are inappropriately placed on an individual’s year-book page, as Governor Ralph Northam has alleged is the case for his yearbook page which includes a photo depicting an individual in blackface and an individual in Klu Klux Klan garb.<sup>46</sup>

### C. *Obscenity*

Speech is classified as obscenity and thus unprotected if,

‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest[;] . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>47</sup>

As such, obscenity has been explicitly limited to the publication or promotion of unusual sexual proclivities.<sup>48</sup> This category of unprotected speech is motivated by the concern that such speech has a “tendency to exert a corrupting and debasing impact [and] lead[] to antisocial behavior.”<sup>49</sup> By its very definition, obscenity excludes other categories that society might deem to have a “corrupting and debasing impact” that is nonsexual.<sup>50</sup> For example, depictions or accounts of extreme violence, whether digital, photographic, or written, are not considered obscene and thus are protected by the First Amendment.<sup>51</sup> Study after study has

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45. *Id.* at 297–98 (Goldberg J., concurring).

46. Alan Suderman, *Virginia’s Gov. Northam Says That Wasn’t Him in Racist Photo*, AP (Feb. 2, 2019), <https://www.apnews.com/416ee0f404d74cf8855be7061c2604e9> [https://perma.cc/37TW-SVXD].

47. *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

48. *See Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792–93 (2011).

49. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

50. *Id.*

51. *See, e.g., Brown*, 564 U.S. at 792–93 (“As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking,

demonstrated a correlation between the viewing of violent programs or the playing of violent games and the desensitization to other's pain, as well as increased aggression.<sup>52</sup> However, the obscenity test ignores this correlation and focuses only on those sexually explicit influences. As such, the Supreme Court overlooks an entire category of speech and expression that may have more harmful results than obscenity as it is currently defined in order to protect values that the Court deems necessary to protect. Thus, student publications and yearbooks can continue to publish photos of nooses hung around someone's neck and call it a joke,<sup>53</sup> regardless of the violence they depict and their "corrupting and debasing impact."<sup>54</sup>

#### D. *Offensive Speech*

Offensive speech can take many forms, from fighting words<sup>55</sup> to infliction of emotional distress, to vulgarity over the radio or television,<sup>56</sup> to abusive words that "by their very utterance inflict injury."<sup>57</sup> However, each of these forms is particularly narrow. The category of fighting words, for example, pertains only to those words that "tend to incite an immediate breach of the peace" by provoking a fight,<sup>58</sup> are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," and are "directed to the person of the hearer," and thus likely to be seen as "direct personal insult[s]."<sup>59</sup>

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but only depictions of 'sexual conduct . . .').

52. See L. Rowell Huesmann, *The Impact of Electronic Media Violence: Scientific Theory and Research*, 41 J. ADOLESCENT HEALTH 56, 56 (2007); Keilah A. Worth et al., *Exposure of US Adolescents to Extremely Violent Movies*, 122 PEDIATRICS 306, 306-07 (2008); *Violence in the Media*, AM. PSYCHOL. ASS'N (Nov. 2013), <https://www.apa.org/action/resources/research-in-action/protect> [<https://perma.cc/4GH2-MV6Y>].

53. Nick Anderson & Susan Svrluga, *Photos of Blackface, KKK Robes and Nooses Lurk Alongside Portraits in Old College Yearbooks*, WASH. POST (Feb. 7, 2019), <https://www.washingtonpost.com/education/2019/02/08/photos-blackface-kkk-rob-nooses-lurking-alongside-portraits-old-college-yearbooks> [<https://perma.cc/8TNT-VCRL>]; see also Murphy, *supra* note 5 (referring to a photo at the University of Illinois depicting an African American man smiling and holding a beer while posing with three individuals in KKK robes, an alumnus of the school observed, "I'm sure at the time they probably thought that was funny").

54. *Paris Adult Theatre I*, 413 U.S. at 63.

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

56. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

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

58. *Id.*

59. *Cohen*, 403 U.S. at 20 (citing *Chaplinsky*, 315 U.S. 568, and then quoting Cantwell

As such, the fighting words prohibition only applies when the words are directed toward an individual in particular who would then view the words as a direct personal insult and likely react accordingly. That is certainly not the case in widely published yearbooks, where the publishers may make no statements other than their inclusion of a particular photo in the edition.

Accordingly, the prohibition on fighting words is concerned with immediate violence, not the long-lasting harms of such epithets. Additionally, the prohibition on abusive words that was originally articulated in *Chaplinsky v. New Hampshire* has been so limited by the Court that many scholars believe it no longer serves as a prohibition on speech.<sup>60</sup> By so limiting the category of offensive speech, the Supreme Court has allowed significant emotional and societal harms to be visited upon millions in order to allow for rather valueless speech. College is a time when most people begin to develop their identity and sense of self, so to allow student publications to subject them to such harm at such a vulnerable time only increases the societal harm that results from offensive speech.

### III. MODIFICATIONS TO THE CATEGORIES OF UNPROTECTED SPEECH FOR STUDENT PUBLICATIONS ON COLLEGE CAMPUSES

As the First Amendment currently applies to student publications on college campuses, there is broad discretion to report on happenings on campus, political movements, and society as a whole.<sup>61</sup> But with that broad discretion also comes the opportunity for significant abuse. As we have seen in recent months, student publication staff members are still maturing; they are still apt to make what they would later deem mistakes.<sup>62</sup> Just as student publishers are apt to make mistakes because they are still maturing, those who their mistakes harm are more likely to suf-

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v. Connecticut, 310 U.S. 296, 309 (1940)).

60. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 191 (6th ed. 2016).

61. *Id.* at 593 (“The government acting as college educator is generally assumed by recent lower court cases to have no greater powers than the government acting as sovereign . . .”).

62. Nicole Carroll, *I Became Part of Our Story on Racist Images in College Yearbooks. I’m Here to Apologize for Publishing That Photo*, USA TODAY (Feb. 20, 2019), <https://www.usatoday.com/story/opinion/2019/02/20/usa-today-editor-apologizes-racist-yearbook-image-run-her-watch/2931521002/> [<https://perma.cc/SC6A-VZL8>].

fer significant and long-term psychological damage as a result of those mistakes.<sup>63</sup>

In recognition of the harm that student publications can cause when given significant discretion, the Supreme Court should adopt modified categories of unprotected speech for student publications on college campuses. Such modifications, as discussed below, would be slight and would still allow for the university to be the marketplace of ideas, but they would require those ideas be expressed responsibly and in a way that allows the university to be the marketplace of ideas for *all*, regardless of their race, gender, or creed.

#### A. *A New Type of Incitement*

In order to better protect the marketplace of ideas for all, the incitement standard should be amended to prohibit speech that is likely to cause substantial and widespread campus unrest. By requiring a likelihood of substantial and widespread campus unrest, this standard remains heightened to protect as much speech as practicable, but it eliminates the “directed to” and “imminence” requirements that allow for student publications to essentially publish anything so long as it is not a direct mandate to do something violent or illegal immediately. By weakening those requirements for student publications, the Court would simply acknowledge that student publications can incite violence in unique ways that may not result from a direct or immediate command, like causing widespread campus unrest or dividing the campus into competing and enraged factions.

#### B. *A New Recognition of the Harms Associated with False Statements of Fact*

Likewise, the definition of, and possible liability stemming from false statements of facts, should be broadened to account for those statements made about communities, or races, or nationalities. Statements stereotyping and communicating false information about entire communities can be just as harmful as

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63. See Murphy, *supra* note 5 (“[T]he choice to publish the images for posterity cut even deeper . . . . ‘People ask, “Why are the black kids sitting together in the cafeteria?’” said Beverly Daniel Tatum, the psychologist and author. ‘It’s because they are protecting themselves from this kind of toxic environment.’”).

statements directed at an individual, and the Court should recognize as much.

For example, statements by politicians and the media categorizing a whole class of individuals, primarily young African American men, as “superpredators” essentially villainized and criminalized an entire community before many young men had even committed offenses.<sup>64</sup> By recklessly labeling an entire community, the politicians who weaponized those labels damaged the national perception of an entire generation of African American men.<sup>65</sup> Acknowledging the unique harm that can be inflicted upon entire communities by false statements of facts, the Supreme Court should assign liability to college student publications for those false statements of facts made about entire communities that are published with reckless disregard for their validity. These student publications should not be able to publish crowded photos without captions<sup>66</sup> that promote the anonymity currently associated with racist portrayals of entire groups of individuals.

### C. *A New Addition to Obscenity Law*

The obscenity category of unprotected speech should be broadened for student publications on college campuses to prohibit not just unusually sexually explicit content, but also particularly violent depictions or situations stemming from such extremely violent acts. Student publications and yearbooks accordingly could be prohibited from publishing photos of students “mock lynching” other students, students pretending to be a firing squad preparing to execute classmates, and students pretending to kill or maim themselves or others. Such depictions should not be promoted as “truths of a gauzy past” as yearbooks are intended to be.<sup>67</sup>

Instead, those depictions are obscene ones that have a particularly “corrupting and debasing impact” that should be left in the

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64. See Priyanka Boghani, *They Were Sentenced as “Superpredators.” Who Were They Really?*, PBS (May 2, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> [https://perma.cc/B5LJ-2288].

65. *Id.*

66. Murphy, *supra* note 5 (“Few images had captions to provide names or context and people’s faces were often hidden behind hoods or blackface.”).

67. Garber, *supra* note 1.

past.<sup>68</sup> Allowing student publications to continue to publish such images would contribute to the desensitization to other's pain that is scientifically associated with images of violence.<sup>69</sup> It would also serve to increase the pain felt by already marginalized communities on college campuses.<sup>70</sup> Therefore, it is incumbent upon the Supreme Court to recognize the unique harm attendant to violent obscenity being printed in student publications and end its protection.

#### D. *A New Acknowledgement of What Constitutes Offensive Speech*

Offensive speech on college campuses should be interpreted by the Supreme Court more broadly to reach that speech which causes severe and long-lasting harm but currently has no restriction placed on it.<sup>71</sup> For example, the fighting words category of offensive speech should be broadened by eliminating the requirements that the speech be “directed to the person of the hearer,” and thus likely to be understood as a “direct personal insult.”<sup>72</sup> Doing so would allow the definition of fighting words to reach the largely defunct abusive words category of offensive speech, that would allow restrictions on words or phrases that “by their very utterance inflict injury.”<sup>73</sup> It would meld the two categories and acknowledge that the use of certain epithets, when directed at the ordinary person inherently are injurious and valueless. By acknowledging that there are certain words or phrases so insulting that they inherently cause harm and “tend to incite an immediate breach of the peace,” the Court could better protect the marketplace of ideas for all students on college campuses, even those who participate in student publications.<sup>74</sup>

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68. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

69. *Violence in the Media*, *supra* note 52.

70. *Murphy*, *supra* note 5 (“Minority students from that era say the comfort with public behavior that would likely meet swift condemnation today further marginalized minorities on campus. And the choice to publish the images for posterity cut even deeper.”).

71. Granted, offensive speech restrictions would still need to be content-neutral as categories of unprotected speech cannot “be made the vehicles for content discrimination unrelated to the distinctively proscribable content.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992).

72. *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

73. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1992).

74. *See id.*

## CONCLUSION

Colleges and universities are recognized as unique institutions where the free exchange of ideas and the encouragement of curiosity are particularly critical.<sup>75</sup> But that only proves true when the free exchange of ideas includes all ideas, and when certain groups of students are marginalized because of their race, gender, or creed, they are not able to engage as freely for fear of being otherwise isolated or further ostracized.<sup>76</sup> In order to better promote the expression of ideas on college campuses, student publications, particularly yearbooks that have proved rather one-sided and problematic in recent months, should be subject to modified categories of unprotected speech. By adopting these modifications, the Supreme Court would better recognize the unique nature of student publications as educational experiences that allow students to learn and grow while protecting the interests and well-being of otherwise marginalized students. It would provide an “opportunity for colleges not only to address the past, but also to focus on the racial inequalities that are still present on campus, just [sometimes] better hidden.”<sup>77</sup>

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75. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

76. *See* *Murphy*, *supra* note 5.

77. *Id.*

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