Electronically Transmitted Threats and Higher Education: Oppression, Free Speech, and Jake Baker

Jared C. Schroeder

The technology-induced transition to the network society has created an atmosphere of change in many institutions, including American universities (Castells, 2009). People with common interests can use the internet to create virtual communities that are based on their interests and desires. Virtual communities are not hindered by the traditional physical limitations of space and time. The new era of communication is eroding the strength of traditional power structures because the network society does not acknowledge physical, geographic boundaries (Castells, 2007).

Institutions of higher education are among the traditional structures being forced to adapt to the network society’s sweeping changes (Kaplin & Lee, 2006). They are not immune from the myriad changes and challenges created by this shift in the way society functions. The transition to a network society has created new avenues for dominant groups to perpetuate the op-
pression of traditionally dominated groups on university campuses (Finn, 2004). Oppressed groups also find the power to organize and disseminate both constructive and disruptive information (Archibold, 2010). Students can harass, threaten, and embarrass others in new ways, using tools such as Facebook and Twitter posts, inappropriate emails, or intimidating message board posts. As Finn (2004) wrote: “The ubiquitous use of the Internet by college students will require colleges to address new social problems associated with online participation” (p. 477). As social media use has surged in recent years, countless virtual communities have formed on college campuses throughout the world. Entire conversations are going on in fragmented, decentralized, and often anonymous forums and groups. These conversations have the potential to dynamically alter the learning environments on college campuses.

In this article, I argue that universities have a significant interest in creating and maintaining safe learning environments for students (Jennings, Gover, & Pudrzynska, 2007). These efforts are often mired in the conflicting challenges of carefully protecting First Amendment freedoms and students who belong to traditionally unprivileged groups. The task is further complicated by the lack of clear precedent regarding how existing law is applied to online communications. The Supreme Court has not heard any cases involving threatening emails or internet hate speech and, therefore, has provided no precedents for others to follow regarding electronically communicated threats (Azriel, 2005). This theoretical article explores a challenge that will likely only grow as the network society fully takes hold in coming years and calls institutions of higher education to be proactive and, above all, aware of the power new technologies have to both disrupt the learning environment and also to help foster dialogue. The new technologies can act both as deterrents or deterrents.

This article considers United States v. Alkhabaz (1997) through two often-conflicting lenses. The article first lays out the facts in the case, which considers a University of Michigan student’s creation and electronic transmission of a story about the abuse, mutilation, and murder of a female classmate. I also briefly consider the appeals court’s use of the Watts v. United States (1969) precedent, instead of the Brandenburg test (1969), in its decision. I chose United States v. Alkhabaz because it is emblematic of a growing challenge that universities face regarding the widespread use of new technologies and the opportunities these innovations create for harassment, especially that of traditionally unprivileged groups (Kaplin & Lee, 2006).

Next, I explore two First Amendment theories: Meiklejohnian self-governance and the Holmsian marketplace of ideas. Both theories are commonly used by the Supreme Court in its decisions (Citizens United v. FEC, 2010; Snyder v. Phelps, 2011). Marketplace of ideas theory is based on the assumption that the truth will be discovered when information is freely exchanged
(Pember & Calvert, 2011). Self-governing theory emphasizes the rights of citizens to receive the information they need to function in a democracy (Bunker, 2001).

In the third section, the article explores concepts of oppression, especially cultural imperialism and violence. Iris M. Youn (2010) described oppression in a structural sense, noting that limitations placed on certain groups within society are woven into a series of norms, symbols, and habits that many, especially those in dominant positions, do not recognize. Finally, the article considers the Baker case in light of oppression and First Amendment concepts. (I cite this case as United States v. Alkhabaz, since Baker changed his name in the course of the legal action.) It concludes with a discussion of the delicate balance posed by these issues.

**Jake Baker, “True Threats,” and Intent**

The scenario in United States v. Alkhabaz (1997) provides a challenging case study for those in higher education. Though not a Supreme Court ruling, the appeals court’s decision created a narrow interpretation of when speech can be limited (Kaplin & Lee, 2006). The case’s controversial outcome also elicited significant discussion among legal scholars (Azriel, 2005; Kaplin & Lee, 2006; Kelner, 1998; Potter, 1999).

This section outlines the facts of the case and explores the court’s ruling. The section concludes by briefly defining the court’s use of the “true threats” test and looking at related precedents regarding cases involving electronically transmitted threats.

**The Baker Case**

Jake Baker, who changed his name during the appeals process to Abraham Alkhabaz, studied at the University of Michigan from 1994 to 1995 (United States v. Alkhabaz, 1997). Baker shared his stories and personal fantasies regarding assaulting and otherwise “hurting” girls and young women through an extensive email exchange with Arthur Gonda, who lived in Canada at the time. Baker also posted the stories on the Usenet group alt.sex.stories. The stories “generally involved the abduction, rape, torture, mutilation, and murder of women and young girls” (p. 1493). The FBI became involved after he wrote a short story using the specific name and physical description of a female classmate. The story, in detail, described his fantasy of sexually assaulting, mutilating, and murdering this woman over a stretch of several hours. Baker stated that he chose the student because her name included a sexual pun, but the story described the woman’s dorm room in detail (Yen, 2000). He transmitted his fantasy to Gonda, who was also represented as a co-conspirator in the story. News of the story’s existence reached the woman described in the story, as well as others on campus (Kaplin & Lee, 2006). Many
women stopped attending classes because of the story, and the university conducted an investigation regarding the story (*United States v. Alkhazan*, 1997; Yen, 2000). The investigation of Baker’s computers and residence hall room uncovered another story that used the student’s name. It also included her complete address.

Baker was indicted and charged by a grand jury for violating 18 USC 875(c), which reads: “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both” (USC, 2011). The district court dismissed the case on the grounds that Baker’s story did not amount to “true threats” (*United States v. Baker*, 1995). The district court dismissed the charges, and the government appealed the dismissal. The U.S. Court of Appeals for the Sixth Circuit, in a 2-1 vote, agreed with the district court’s ruling.

To prove that Baker had violated the interstate commerce law, the appeals court noted that the government had to meet three criteria: (a) the communication had to be transmitted between states (or countries); (b) it had to communicate a threat, and (c) it had to threaten kidnapping or injury. The first criterion focuses on transmission across state or national boundaries, while the second established the act of communication. Finally, the third requirement deals with the threatening nature of the comment being communicated. The appeals court agreed that Baker violated the first and third requirements but questioned the second. The court defined the threshold for a threat: “A communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the *mens rea*) and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation” (p. 1495). By *mens rea*, the court meant possessing guilty intent or motives. The court therefore found that Baker’s actions did not constitute true threats. The court wrote:

We conclude that the communications between Baker and Gonda do not constitute “communications containing a threat” under Section 875(c). Even if a reasonable person would take the communications between Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation. Quite the opposite, Baker and Gonda apparently sent e-mail messages to each other in an attempt to foster a friendship based on shared sexual fantasies.

The dissenting appeals court judge in *Baker*, Robert Krupansky, argued that the story Baker was transmitting met the standard for violating Section 875(c). In his dissent, he took the unusual step of reprinting the entirety of Baker’s story. He emphasized that searches of Baker’s personal computer and email account
disclosed a chilling correspondence between the defendant and Gonda chronicling the two men’s plans of abduction, bondage, torture, humiliation, mutilation, rape, sodomy, murder, and necrophilia. Most ominously, these messages cumulated in a conspiracy between the two men to realize their aberrant e-mail discussions and exchanges. (United States v. Alkhabaz, 1997, p. 1498)

Krupansky argued that the court’s definition of a threat was too narrow and not in keeping with the past precedents. He stated that intent to intimidate was not required to meet the law’s requirements.

The appeals court’s interpretation of Section 875(c) in the Baker case highlighted two issues regarding electronically transmitted threats. Lacking a Supreme Court ruling, the interpretations of Section 875(c) of the interstate commerce law vary from circuit to circuit (Kelner, 1998). The other concern is the wording of the law. Potter (1999) explained that the statute does not include any wording that addresses a person’s state of mind when acting. Without direction from the law regarding how judges should consider the motive or intent of the person accused of violating the law, district and appeals courts are left to decide what weight a person’s state of mind should play in their rulings.

“True Threats”

The Supreme Court handed down two decisions in 1969 that dealt with freedom of expression and threatening speech: Brandenburg v. Ohio and Watts v. United States. Both cases focused on the foundational principle of law that criminal intent is almost never punishable if intent does not lead to a criminal act (Kelner, 1999). In Baker’s case, the district and appeals courts turned to the Supreme Court’s ruling in Watts v. United States (1969) for direction. The Watts decision addressed “true threats” as a form of expression that is not protected by the First Amendment. In Watts, the Supreme Court created the true threats test—a test the Court has never used again (Rothman, 2002). Probably the reason for its disuse is that the test is not clear. The Watts decision provided factors courts could consider, such as whether the speech was political hyperbole, its context, the audience’s reaction, and whether the speaker’s words implied that illegal action would be taken. Lower courts have used the list to fashion “reasonable speaker” and “reasonable listener” tests to evaluate if “a reasonable recipient of the statement would believe it constituted a true threat” (Rothman, 2002, p. 288). The appeals court in the Baker decision used the reasonable speaker/listener thinking in its opinion (United States v. Alkhabaz, 1997).

The more common precedent for cases that deal with threatening speech is Brandenburg v. Ohio (1969). The Brandenburg precedent has become “understood as boldly marking out a generous breathing space for dissident speech” (Kelner, 1999, p. 288). While created during the same term, Watts and Brandenburg have diverged in usage. The Brandenburg case created a
four-part test that requires the government to prove advocacy of violence, imminence of action, illegality of action, and likelihood that the threat will be carried out (Pember & Calvert, 2008).

FIRST AMENDMENT THEORIES

Theories of the First Amendment and perspectives on oppression both consider how society is structured and how it should or could be structured. When Young (2010) defined oppression, she noted that the structural roots of the problem can be found in “the everyday practices of well-intentioned liberal society” (p. 35). Though they consider the challenge from different perspectives and with differing objectives, the marketplace of ideas and self-governing theories of the First Amendment also focus on how liberal society is structured. The First Amendment, in few words, promises protection from limitations of freedom of speech and the press. Alexander Meiklejohn (1948) explained: “No one who reads with care the text of the First Amendment can fail to be startled by its absoluteness. . . . It admits no exceptions” (p. 17). This section briefly outlines the concepts behind these two dominant theories of the First Amendment.

Meiklejohnian Self-Government

To Meiklejohn, a First Amendment philosopher whose views are often quoted by the Supreme Court, self-government was at the heart of the Constitution, and the First Amendment is the foundation for protecting the people’s rights to govern themselves. He stated: “If men are to be self-governing, as the Constitution intends, they must exercise an effective control over those legislators who make the laws which they are called upon to obey. Politically, they must govern those who, legally, govern them” (Meiklejohn, 1960, p. 102). The philosopher espoused a two-tiered system of speech protections. Political speech, any speech that enriched the ability of the citizenry to educate itself in an effort to self-govern, was absolutely protected (Meiklejohn, 1961). Private speech, or speech that did not benefit the ability of the people to govern, was relegated to second-class status and was much more vulnerable to government regulation (Meiklejohn, 1948). He wrote: “The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different than from that of a citizen who is planning for the general welfare” (1948, p. 39).

Meiklejohn allowed for the government to limit discussion for the purposes of time, place, and manner restrictions. For example, a person who interrupts a sporting event or political speech can be silenced. He wrote: “The First Amendment is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said” (1948, p. 25).
The Marketplace of Ideas

Marketplace of ideas theory is founded on the idea that the truth can be discovered only when information is freely exchanged (Pember & Calvert, 2011). Justice Oliver Wendell Holmes is credited with creating the theory (Post, 2000) in his dissent in Abrams v. United States (1919). Holmes (1919) wrote that the “ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market” (p. 630). Holmes’s thinking in the Abrams decision was taken from a line of philosophers, principally John Milton and John Stewart Mill. In Areopagitica, written in 1644, Milton argued against licensing and for press freedoms by stating: “So Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?” (qtd. in Sabine, 1951, p. 50). The theory has been criticized because it does not account for the power certain members of society and organizations have to make their ideas more prominent in the marketplace than those of others (Bunker, 2001).

Imperialism and Violence

In her explication of the “faces” of oppression, Young (1990) emphasized the structural foundations of the problem. She listed the five “faces” of oppression as exploitation, marginalization, powerlessness, cultural imperialism, and violence. Oppression, Young noted, is embedded in society in ways that are often unrecognized. This definition of oppression refers to more than tyrannical or openly committed injustices against a group of people (Young, 2009). She explained that “oppression in this sense is structural, rather than a few choices or policies. Its causes are embedded in unquestioned norms, habits, and symbols, in assumptions underlying institutional rules” (p. 41). Young listed bureaucratic hierarchies, media portrayals, and cultural stereotypes as examples of places where certain social groups encounter oppression on a daily basis.

The theories of the First Amendment carry certain structural assumptions that, when considered in light of Young’s explanation of oppression, could also be considered unintended purveyors of structural oppression. The marketplace of ideas theory, for example, assumes equal access to the vehicles of communication. This section focuses on cultural imperialism and violence because they are the two faces of oppression that most clearly apply to the Baker case and the First Amendment principles discussed in this article. This section considers imperialism and violence, first briefly defining the form of oppression and then linking it to the legal contexts of this article.
The Past and the Present

As noted above, structural oppression is ingrained in the regular activities of society (Young, 1990). The ingraining aspects of the oppressive structures find their roots in the past. History is a key ingredient in the creation of oppressive social structures because it influences the lenses through which a person views the world (Ricoeur, 1981). Much of the background of the oppressive structures is addressed in the cultural imperialism literature. Imperialism, in the sense of oppression, connects the historical situations that have, in one form or another, continued forward to create inherently unequal social structures in present-day society. Said (1994) stated: “There is no just way in which the past can be quarantined from the present. Past and present inform each other, each implies the other” (p. 4).

Said’s view regarding the influence of history on how people view themselves is reinforced in other areas of literature. German philosopher Wilhelm Dilthey noted, “What man is only history can tell him” (qtd. in Palmer, 1969). Similarly, Young (1990) explained that understanding a group’s oppression requires considering its history, especially as that history relates to the dominant group. The scholars’ focus on connecting history to understanding oppression in current social structures is important in the context of this article because judicial practice emphasizes history.

Justices lean heavily on past precedents in making decisions. Justices also bring their unique cultural perspectives and views of established norms to their interpretations of past precedents and laws. Cultural imperialism places a dominant group’s culture at the center of society, establishing it as the norm (Young, 1990). Society’s values, goals, and experiences become based on the norm created by the dominant group. Groups that are not dominant find themselves defined using the standards of the dominant groups. Members of dominated groups internalize the stereotypes placed upon them and also struggle with the feeling that they are being defined by an external, unfamiliar set of values.

A relevant example would be the origins of the American system of government. The system is entirely European in influence, especially in regard to John Locke’s influence on Thomas Jefferson, who drafted the Declaration of Independence and significantly influenced the ideas incorporated in the U.S. Constitution (Cunningham, 1988; Lutz, 1984). The American judicial system started with colonial laws that were imported from British common law (Pember & Calvert, 2011), which dates from 11th century Europe. These examples are by no means a complete accounting of the formation of American government, but they point out topic-appropriate examples of a dominant group establishing norms, values, and goals to which many dominated groups have limited or no historical or cultural connection. Young (1990) wrote that the dominant group brings other groups under its
structures, and those who fail to follow that dominant form are labeled as inferior or deviant.

Cultural imperialism is significant when considering the largely White and male-dominated origins of American law, especially the First Amendment. The Bill of Rights was penned during a time when only White, land-owning adult males could vote. It is worth noting how traditionally dominated groups might struggle to function under the rules imposed upon them. The struggle can come both from the laws being set up to support the majority, or dominant culture, and the fact that another culture wrote the foundational rules in American society. Judicial review scholar John Hart Ely (1980) noted the dangerous possibility that the majority could set up a system of rules that benefit its members and help it to remain in power. He argued that the government must include ways to protect dominated groups from being mistreated while still protecting the democratic process. The diversification of higher education certainly raises questions regarding the balance between fundamental American ideals, such as those expressed in the First Amendment, and cultivating a safe learning environment for students.

Violence

Another of the faces of oppression that Young (2010) outlined is violence. She emphasized the structural nature of violence and its dual impact—causing literal violence to some and also the fear of violence to many. Young (2010) wrote: “The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation” (p. 43). She noted that, historically, certain groups, such as women, Blacks, Asians, Arabs, and LGTB people, have faced more threats of violence than members of the dominant group. Violent acts include sexual assaults and less severe incidents that still harass, intimidate, and ridicule oppressed social groups. The daily fear of violence informs the way members of dominated groups live their lives. The fear changes both their outward behavior and their inward thought processes, because they have to consider how to best hide their oppressed identity (Zutlevics, 2002). Eisenberg (2006) wrote that eliminating violent oppression requires changing the social structures that allow or encourage them to happen, while Zutlevics (2002) added that, in many cases, certain violent acts are “legitimized in so far as the perpetrators of it are never reprimanded, nor is anyone surprised by its occurrence” (p. 100).

The preferred protections bestowed on freedom of speech and expression in American society provide the possibility that threatening language and ideas can be communicated to both dominant and dominated groups. As two examples among many, the structural underpinnings of violence/oppression and free speech come into contrast in Village of Skokie and Snyder v. Phelps. In the first case, Village of Skokie v. National Socialist Party of America (1978),
a Nazi organization planned a march through Skokie, Illinois, a village that included about 5,000 people who had family members who were persecuted by the Nazis (Smolla, 1992). The White supremacist group planned to wear Nazi attire and to display swastikas. Skokie village filed a suit against the organization’s petition to march, and the Cook County Circuit Court entered an injunction against the Nazi group. The village also quickly passed a series of ordinances outlawing material that could encourage or incite hatred against people because of their race, national origin, or religion. The Illinois Supreme Court found that the Nazi group could not be stopped from holding its march or displaying the swastika. The court wrote:

It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers and it is entirely clear that the wearing of distinctive clothing can be symbolic expression of a thought or philosophy. The symbolic expression of thought falls within the free speech clause of the first amendment and the plaintiff village has the heavy burden of justifying the imposition of a prior restraint upon defendants’ right to freedom of speech. (Village of Skokie, 1978, p. 612)

In so ruling, the court placed the cherished structural values of free speech and expression above protecting a dominated group from violence.

More recently, the Supreme Court decided Snyder v. Phelps (2011). The case focused on Westboro Baptist Church’s right to communicate its anti-homosexual message by picketing at the funerals of American soldiers who were killed in Iraq and Afghanistan. The Westboro protestors carry signs with messages such as “Fags Doom Nations,” “God Hates Fags,” “Fag Troops,” and “Semper Fi Fags.” The Supreme Court decided, in an 8–1 vote, that the First Amendment protected Westboro’s speech. In the majority opinion, Chief Justice John Roberts wrote:

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral, and Westboro’s choice to conduct its picketing at that time and place did not alter the nature of its speech. (p. 1220)

Roberts’s opinion emphasized the structural values of free speech and exchanges of ideas over protecting people in an oppressed position from what Young (2010) defined as violence, such as harassment and intimidation. Young argued that violence is institutional because in many situations it is encouraged or tolerated. Violence is woven into our society, Young (2010)
wrote: “Group-directed violence is institutionalized and systemic to the degree that institutions and social practices encourage, tolerate, or enable perpetration of violence against members of specific groups” (p. 44). She noted that change must come through cultural images and how dominance is reproduced in everyday life.

**OPPRESSION, FREE SPEECH, AND JAKE BAKER**

Numerous conflicts arise when the theories of the First Amendment and concepts regarding oppression are placed beside one another. This article does not seek to condemn one area of literature or the other. Instead, this section seeks to illuminate areas of conflict between the two theoretical approaches. The Baker case is particularly relevant because it captures the challenges involved in the network society, the higher education setting, and conflicts between oppression and freedom of speech. It is not the only incident that raises questions regarding the impact of emerging online technology on providing a safe learning atmosphere. Rutgers University student Tyler Clementi committed suicide after his roommate filmed him having sex with another man and posted the video online (Starkman, 2010). The roommate and another student face criminal charges for invasion of privacy. Clearly, Clementi’s privacy was invaded in an insensitive and, likely, ignorant way. In other words, the technological abilities of his tormentors outpaced their ethical understanding of the power of the new media. The scenario, though even more tragic, is similar to the Baker case. New technologies allowed a person to be oppressed and tormented, and the universities were left wondering what they could have done differently.

Using Young’s (2010) definition, the young woman who was named and described in Baker’s story, as well as others on campus, can be viewed as oppressed. While oppression does not automatically cross the Supreme Court’s threshold of true threats, it certainly raises questions about the safety and viability of the learning environment. In the Baker case, oppression comes in the form of structural norms and values; his actions can be seen as structurally accepted, to some extent, because he followed the rules created by the dominant culture. This rule-following can be seen in the court’s reasoning for siding with Baker. While his behavior was viewed as deviant (United States v. Alkhazab, 1997), the structural protections for free speech shielded him, while leaving the young woman vulnerable. This section addresses these ideas by examining the case through the violence and cultural imperialism concepts discussed by Young (2010).

**Protecting Violence**

No physical violence occurred toward the female classmate Baker described in his story; but Young (2010) noted that oppressive violence includes
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harassment, humiliation, and intimidation. Young (2010) explained: “The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation, solely on account of their group identity” (p. 43). After hearing about the violent, explicit, and deadly story she was cast in by one of her classmates, the young woman felt the effects of violent oppression. In his dissent, Judge Krupansky wrote: “Jane Doe’s reaction to those threats when brought to her attention evinces a contrary conclusion of a shattering traumatic reaction that resulted in recommended psychological counseling” (United States v. Alkhabaz, 1997, p. 1507).

Other women students chose not to attend class when they heard about the story. Their fear-based response is also evidence of oppressive violence. Members of the oppressed group were forced to alter the way they live because they felt vulnerable to violence. Finally, the violence was made possible and somewhat acceptable by the decision of the court. Baker did not have to stop writing and communicating his stories about the young woman. He did not have to take down his posts. The court said what he did was legal. The structures in place made the oppression possible.

Products of Imperialism

The structures that protected Baker’s actions while leaving Jane Doe vulnerable have deep roots in the norms and values of the dominant influences and culture in society. Said (1994) explained that cultural imperialism is a result of man-made structures “of both authority and participation, benevolent in what they include, incorporate, and validate, less benevolent in what they exclude and demote” (p. 15). In the Baker case, the court weighed competing values and chose the dominant legal thinking over social justice theories advanced by scholars like Young.

In one of the landmark cases in this area of the law, Brandenburg v. Ohio (1969), the U.S. Supreme Court weighed a similar set of values as those found in the Baker case. In that case, a member of the Ku Klux Klan (KKK) was charged with violating an Ohio law against criminal syndicalism. Clarence Brandenburg, the KKK member, was recorded making such statements as: “Send the Jews back to Israel,” “Bury the niggers,” and “Niggers should be returned to Africa” (p. 446). Clearly, the KKK’s language could be seen as oppressive. The Supreme Court ruled that the Ohio law against criminal syndicalism was unconstitutional. The First Amendment protected the KKK member’s speech because it did not fit within the narrow area of unprotected speech. The Court found, according to the four-part test it created, that Brandenburg’s speech did not include calls for imminent lawless action or the advocacy of actual violence (1969). As with the young woman in the Baker case, members of the target groups were left to adapt, in much the same way that Young (1990, 2010) described oppression, to the identities given to them by the dominant group.
Other cherished American legal concepts were also in play in the Baker case. The concepts of the free exchange of ideas (which can be found in the Miltonian marketplace of ideas) and free information for the purpose of self-government (the bulwark of Meiklejohn’s theory of the First Amendment) were held superior to the young woman’s right to be self-determining and free of oppression. The First Amendment theory that the judges chose have roots in history that can be followed back to the founding of the nation. The marketplace of ideas theory is based on the concept that the truth will arise through an open exchange of ideas (Bunker, 2001). In the marketplace, some of the exchanges of ideas might be harmful, but the courts have stated that some hurtful speech must be allowed to protect the exchange of ideas (New York Times v. Sullivan, 1964; Snyder v. Phelps, 2011).

In Snyder v. Phelps (2011), the case that upheld the right of Westboro Baptist Church to protest at the funerals of slain American soldiers, Justice Roberts wrote:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. (p. 1220)

In other words, the nation has chosen to accept some hurtful speech in an effort to protect speech that is relevant to self-governance. But what about speech is of no public importance? Meiklejohn’s model of self-governance provides absolute protection for speech that is necessary for people to participate in democracy (1960). Speech that did not contribute to the public’s self-governance was less protected. It would be difficult to find a Meiklejohnian argument to protect Baker’s speech.

On an institutional level, beyond theories and case law, the American judicial system appears to strongly favor agent groups. Young (2010) defined cultural imperialism as “the universalization of a dominant group’s experience and culture, and its establishment as the norm” (p. 41). The dominant group in the nation’s founding when the Constitution and Bill of Rights were written and adopted, consisted of White, land-owning adult men who articulated roughly similar norms, values, and goals of free speech and personal liberty. Of the judges in the Baker case, two of the three were White males. They seem to have followed the norms and values of their field in deciding the case. The judges used the First Amendment, precedents that acted as interpretations of the First Amendment, and quoted Shakespeare in the decision.
As the Baker case illustrated, the shift to the network society multiplies the challenges that higher education administrators face when trying to preserve First Amendment freedoms and also to protect the educational environment from disruptive and oppressive communication (Finn, 2004; Kaplin & Lee, 2006). Delgado (1998) captured the challenges universities face when he wrote: “When a university proposes a speech code to protect some of the most defenseless members of society—black, brown, gay, or lesbian undergraduates at dominantly white institutions” (p. 871), the ideas are rejected as being unconstitutional. He continued: “Racism is a classic case of democratic failure; to insist that minorities be at the mercy of private remonstrance against their tormentors—and that the alternative is censorship—is to turn things on their head” (p. 871). What Delgado is questioning is the ability of the marketplace of ideas to truly produce an environment where every idea has an equal chance to compete for acceptance.

Universities can create regulations to limit speech that is not protected by the First Amendment, such as defamation, obscenity, false advertising, and true threats (Kaplin & Lee, 2006). But the courts have relatively limited views regarding what messages are considered truly threatening (Brandenburg v. Ohio, 1969; United State v. Alkhabaz, 1997; Watts v. United States, 1969). Universities also have limited control over how students use personal electronic devices to communicate threatening messages using external forums, such as Facebook or Twitter.

It is for these reasons that this exploratory article has gone beyond a retelling of case law and university policies to consider the underlying theories behind the delicate balance between simultaneously upholding free speech and protecting students from oppression. The Baker case represents a clear conflict between free speech and limiting oppression. The free speech rights supported by the judges allowed the continued oppression of a young woman who had done nothing to ask for the harassment and intimidation she was subjected to by Jake Baker. The rights the judges protected also contributed little if anything to the self-governance of members of the democratic society that the First Amendment was created to protect. Instead, the case’s outcome fit Young’s (2010) definition of violence—violence made possible by cultural imperialism and the domination by the importation into the present of past values of a dominant group. The Baker case offers a cautionary tale for university communities. While legal action might not limit oppressive speech, universities have other tools available to them.

The case highlights the fact that universities have an opportunity—even an obligation—to work in the safer territory found between the problematic polar extremes of allowing unfettered online oppression as seen in Baker and squelching free speech. The safe area requires a posture of proactive thinking
on the part of leaders within university communities (Finn, 2004). The space between the unattractive polar opposites of this issue creates opportunities for three key areas of action: educational efforts, safety measures, and the employment of the very technology that has created this challenge. The three areas, ideally, work together.

Education, in the context of this discussion, boils down to using information and communication to foster a campus environment that focuses on the awareness and acceptance of diversity. Universities provide varying levels of educational programs regarding diversity. These programs, while valuable, are not a focus of this article. Possible fruits of the conceptual ideas considered here would include strong, concerted, and relevant online programs regarding diversity awareness. Essentially, campus leaders should employ the same tools that can disrupt the university environment to encourage and cultivate an atmosphere of openness, understanding, and acceptance.

Online programs would include student-moderated online forums that encourage the discussion of relevant issues. The forums could be divided to serve various communities within the larger campus environment. Multiple forums, rather than a few large ones, would be more likely to succeed because online communication tends to be fragmented. Fragmentation is one of the features of the network society (Castells, 2000). The forums should be created to meet smaller groups that identify with one another because they share like characteristics or interests.

These forums cannot exist in a vacuum as something separate from existing programs. Instead, the forums, or any online tools, should be thoroughly integrated into existing programs and, at the same time, marketed as viable tools. For example, many universities now offer Ally training for support and understanding of the LGTB community. Part of the program should require that allies participate in online forums as part of the exercises within their training and encourage continued presences by those involved after they have completed the program. Making online presences important, centerpiece-type parts of existing programs, such as Ally training, is only one idea. Overall, the main focus must be that universities become proactive in their involvement in the virtual communities that help shape the actual campus atmosphere.

In a related sense, universities should also devote resources to monitor social network communication in and around their community. This would include messages produced by fraternities, sororities, athletes, international student organizations, and other groups. By monitoring the discussions being conducted throughout the virtual communities surrounding the physical campus environment, the university places itself in a position to respond using social networks, such as Facebook and Twitter, to plan relevant forums and events, and to prepare for possible disruptions in the educational environment.
I do not encourage monitoring messages for the purpose of censoring or penalizing students. Instead, I advocate that universities use virtual communities to proactively step into the discussions. For example, an editorial about racism in sororities that appears in the student newspaper could generate significant discussion in social networks. A university that is not linked into the virtual conversations that are created in the affected communities—in this case, traditionally oppressed groups and sororities—will miss an opportunity to facilitate discussion regarding a topic of great relevance to the community. Tempers might flare on Twitter or on Facebook groups but never manifest in physical ways that are visible on campus. Just the same, the university has an opportunity to bring groups together, encourage understanding, and facilitate education.

The roots of both of these ideas can be followed back to the conceptual themes discussed earlier. Free speech protections and the largely anonymous, decentralized, and fragmented nature of the internet make halting or controlling student speech a nearly impossible and ill-advised option. Just the same, failures on the part of universities to take a role in limiting oppressive communication can damage or reduce the value of the learning environment for traditionally oppressed student groups and dominant groups alike. To limit oppressive electronic messages and to protect the stability of the educational environment, universities must be proactive about education and understanding in online communities. Universities must not only become aware of the largely unseen and fragmented virtual communities that surround their campus communities but institutions must also use these virtual communities to bring students together and to create forums in which students can vent, learn, and find support.

The ideas mentioned earlier act only as representative examples. Future studies can better provide more practical and nuts-and-bolts information on implementation. This theoretical, exploratory article is limited in depth. It is intended to introduce basic ideas and connections regarding higher education and the network society. Deeper studies into connections and conflicts between First Amendment theory and oppression literature must be done before significant conclusions can be made regarding how electronically transmitted threats can or should be regulated and prepared for by universities.

Future studies could pursue the line of cases involving electronically transmitted threats that are related to universities. The theoretical concepts discussed in this article could also be explored using more empirical methods. A content analysis of a carefully assembled sample of higher education-related Twitter feeds or Facebook group pages could indicate directions regarding the tone of both dominant and traditionally oppressed groups in their communications using social media. Ideally, social media outlets would
be related to the campus community but not heavily edited or overseen by the institution of higher education. The content analysis could be done at multiple universities simultaneously: those that are friendly to free speech and those that offer more closed, carefully monitored environments. Also powerful in exploring the concepts discussed in this article might be surveys that triangulate student perceptions of online-based oppression and the availability of university resources that encourage sensitivity, diversity training, and forums for dialogue. Similar surveys could be created for university leaders. Together, the student and administration surveys could help provide a picture regarding which online tools members of the community are using and what parts of the university’s efforts to limit electronically communicated threats are working.

**References**


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