

# Stoic Listeners? Speech Harms and the First Amendment

Henrik Essunger \*

## INTRODUCTION

Following a period of unprecedented violence against abortion clinic workers in the mid-1990's, an organization called the American Coalition of Life Activists (ACLA) created a web site that revealed certain information about abortion providers who, the site said, were responsible for the “wanton slaughter of God’s children.” Among other things, the web site, known as the Nuremberg Files site, disclosed the home addresses of the physicians along with descriptions of their cars and the license plate numbers. As abortion providers around the country were attacked – some by activists with ties to the ACLA – the appearance of the victims’ names on the web site would change to indicate whether the victim had been wounded (name shaded in gray) or killed (strikes through the victim’s name).

In this paper, I question some of the assumptions underlying conventional First Amendment theory and doctrine, which I believe prevent a successful lawsuit against the ACLA by the abortion providers. I look at Professor C. Edwin Baker’s First Amendment theory and at Judge Kozinski’s opinion in the Ninth Circuit’s panel decision reversing the jury’s damages verdict against the ACLA. I argue that notwithstanding their differences, Baker’s theory and Kozinski’s interpretation of precedent are both sustained by a deep presumption about our ability to engage in disinterested, rational reflection on the diverse expressive activities that confront us. Both Baker and Kozinski discount the direct and harmful impact that speech can have on a listener and insist that constitutional analysis must treat such harms as imagined or self-imposed. Each of their theories, I conclude, rests on what I call the paradigm of the stoic listener.

The paradigm of the stoic listener has its place: for instance, when applied to the facts of the classic incitement and subversion cases culminating in *Brandenburg v. Ohio*.<sup>1</sup> In *Brandenburg*, the Supreme Court reversed the conviction of a KKK leader for telling a

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\* J.D., 2002, University of Pennsylvania Law School; B.A., 1994, Yale University.

<sup>1</sup> 395 U.S. 444 (1969).

crowd of sympathizers that “there might have to be some revengeance taken” if the white race continued to be ‘suppressed.’<sup>2</sup> The Court held that only “incitement to imminent lawless action” could properly be punished under the First Amendment.<sup>3</sup> The stoic listener principle worked well in *Brandenburg* because the risk of harm identified in that case did not involve a direct injury to the listener but an injury to a third party (i.e. someone other than the speaker or the listener) that would materialize only if the listener processed, approved, and acted on the violent message of the speech. The idea behind the holding in *Brandenburg* was that we may find the speaker guilty of incitement only when the harm is imminent, and when we cannot trust that the listener has sufficient time to process the message. In cases such as *Brandenburg*, involving potential harm to third parties, the stoic listener premise acknowledges the importance of individual autonomy: out of respect for the listener’s autonomy, we will posit that her choices are her own and not hold the speaker causally or morally responsible for any injury that the listener may inflict on a third party. But out of these cases, judges and legal scholars have developed a principle with sweeping reach not warranted by the facts and limited holdings of the cases. This principle announces that speech is *generally* communicative and harmless, irrespective of how the harm is identified. This broad principle has been applied to cases where the injury is more intimately connected with the speaker and the injured party is the recipient of the speech. Doctrinally, we are stuck with this principle because the Court has categorized particular types of expression as deserving of protection by the First Amendment. Protected, that is, against any challenges, including those launched by new victims who have suffered a different kind of harm and seek their remedy under new laws.

The Supreme Court’s method of broadly categorizing areas of protected speech prevents legislatures from remedying harms even when the government has a compelling interest in doing so, and when the constitutional value of the speech is tenuous or difficult to identify. *Brandenburg* was ostensibly a test case for a particular kind of speech in a certain context, potentially threatening to cause a specific harm. But in the name of the categorizing approach, the Supreme Court and the circuit courts have used this case to provide sweeping protection

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<sup>2</sup> *Id.* at 445-446.

<sup>3</sup> *Id.* at 449.

for certain forms of speech even when the speech harm identified bears no resemblance to that in *Brandenburg*. Where the harm is the injury to *private* individuals caused, for example, by intimidation, harassment and threats – instead of the *public* harm associated with subversive advocacy, the courts should abandon the *Brandenburg* doctrine, acknowledge the performative qualities of communicative speech that have been identified by the lawmakers, and weigh the advantages and disadvantages of allowing the speech. This would achieve a pragmatically sound solution that is in accord with how the courts treat other constitutional rights, for example under the Equal Protection and Due Process clauses of the Fourteenth Amendment.

Broadly speaking, the thesis of this paper is that both Professor Baker's First Amendment theory and Judge Kozinski's doctrinal approach are ill-equipped to deal with cases where the legislature has identified a particular form of intimidating or threatening speech and seeks to remedy the harm that such speech can cause to the recipient. I begin by describing the philosophy behind Professor Baker's so-called liberty theory and his discussion of what boundaries we may properly place on prohibiting threatening speech. I then analyze Judge Kozinski's opinion in *Planned Parenthood v. ACLA*<sup>4</sup> (the case mentioned above) and his use of *Brandenburg* and another important Supreme Court decision, *NAACP v. Claiborne Hardware Co.*<sup>5</sup> I argue that both Baker's and Kozinski's analyses are unsuitable for addressing the harms suffered by the abortion providers, and conclude that we should recognize these harms as a genuine injury not deserving of protection under the First Amendment.

#### PROFESSOR BAKER'S LIBERTY THEORY

To understand Professor Baker's theory it is helpful to contrast it with the traditional "marketplace" justification for protecting speech under the First Amendment. Under the marketplace theory all information – whether true or false – is considered a utility that helps us seek and acquire knowledge. Information gets processed in the competition of the market, in which ideas are exposed to a robust debate that refines our convictions. The marketplace theory assumes

<sup>4</sup> *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *reh'g en banc granted*, 268 F.3d 908 (2001).

<sup>5</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

that “life is an experiment” and that the “best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>6</sup> On this view, people are rational agents who should be allowed freely to contemplate, adopt or reject various assertions about the world. As Frederick Schauer puts it: “Listening to other positions, suspending judgment ... and considering the possibility that we might be wrong virtually defines, in many contexts, the process of rational thinking.”<sup>7</sup> The search for knowledge and truth is best served by affording broad legal protection to speech, because exposure to falsehoods helps to strengthen our convictions that the received opinions are correct.

For Professor Baker, by contrast, the principal first amendment value is self-fulfillment, by which he means the liberty to pursue “self-determined processes of self-realization.”<sup>8</sup> Unlike the marketplace theory, Baker’s self-realization model does not take propositional speech (that is, speech that makes factual assertions or proposes a particular viewpoint) to be the paradigmatic instance of speech. Instead, Baker recognizes that we often use speech in other ways than to make factual assertions: we use speech to define and develop who we are. Baker’s liberty theory is thus concerned with the broad goal of allowing individuals to express themselves without inhibition. Speech should be protected as a means of promoting individual self-development. Prohibitions on speech, Baker thinks, generally stifle such development and disrespect the autonomy of both speaker and listener. Under Baker’s theory, both non-propositional and propositional speech can be granted protection because we are not seeking the truth but rather a channel for self-fulfilling speech conduct.

To illustrate the primacy of self-development over other values, Baker uses an interesting example. Consider, he says, a protester who participates in a demonstration against the Vietnam war, “without any expectation that her speech will affect the continuance of war or even that it will communicate anything to people in power;

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<sup>6</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>7</sup> Frederick Schauer, *Free Speech: A Philosophical Enquiry*, reprinted in *THE FIRST AMENDMENT: A READER* 65, 69 (John H. Garvey and Frederick Schauer eds., 2nd ed. 1996).

<sup>8</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. Rev.* 964, 991 (1978) [hereinafter Baker, *Scope of the First Amendment*]. See also C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH*, ch. 3 (1989)

[hereinafter BAKER, *HUMAN LIBERTY*].

rather, she participates and chants in order to define herself publicly in opposition to the war ... independent of any effective communication to others.”<sup>9</sup> Whereas the marketplace theory seeks to improve our access to information and knowledge in order to maximize utilitarian benefits, the liberty theory privileges the role that expression has in shaping the self-identity of the *speaker*, regardless of the consequences the speech may have on others.<sup>10</sup>

Baker bolsters his claim by arguing that the legitimacy of our legal order is intertwined with, and dependent on, the self-fulfillment ideal. The State, his argument goes, can rightfully expect its citizens to consent to its laws only if it respects their “moral autonomy,” or capacity to consent.<sup>11</sup> Baker also ties the idea of respecting people’s autonomy to the view of American constitutionalism as concerned with protecting individual rights from majoritarian rule.<sup>12</sup> The idea is that the First Amendment should stick up for the individual against overreaching legislatures. So far, so good.

The problem with Baker’s theory lies not in his ideals; instead, the problem is how he frames the relationship between speech and the harm it can cause. In discussing the potential effects of speech on a listener he writes, “[t]he key quality distinguishing most harms caused by protected speech acts from most harms caused by unprotected

<sup>9</sup> Baker, *Scope of the First Amendment*, *supra* note 8, at 994.

<sup>10</sup> If the significance of the free exercise of speech is self-fulfillment, and self-fulfillment is an adequate purpose of the speech exercise, then allowing free speech may be an effective method of preserving social order and the status quo. Under Baker’s theory, social change will not be achieved because self-definition is a false proxy for achieving real change. The Vietnam War protester may chant and march all she wants, so long as she goes home at the end of the day, fulfilled and happily self-defined. Justice Brandeis offered a related perspective on the connection between allowing expressions of dissent and preserving social order: “Those who won our independence ... knew ... that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government....” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). On this view, freedom of speech may serve the interest of those in power because it avoids the *repression* of dissent that could trigger more surreptitious and violent means of expression. Learned Hand made a similar point when, suggesting that the prosecutions of Communist leaders during the Red Scare were ill-advised, he remarked that “[t]he blood of martyrs is the seed of the church.” GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 603 (1994).

<sup>11</sup> C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 1014-17 (1997) [hereinafter Baker, *Harm*]; *see also*, BAKER, *HUMAN LIBERTY*, *supra* note 8, at 48-51.

<sup>12</sup> BAKER, *HUMAN LIBERTY*, *supra* note 8, at 50.

activities is that speech-caused harms typically occur only to the extent that people “mentally” adopt perceptions or attitudes.”<sup>13</sup> I believe this is true of the type of third-person harm that is the paradigmatic harm for the marketplace theorists – i.e. a speaker whose advocacy persuades a listener to commit a criminal act will not be held liable, because we want to treat the listener as a rational being, alone responsible for his actions. This paradigm of harm to third persons is the starting point for Baker, as it is for the marketplace theory. Although Baker has come to recognize the direct harmful impact that speech can cause to a listener,<sup>14</sup> he views the two forms of harm through the same lens: second and third-party harms alike occur only to the extent that the listener “responds” a certain way to the speech.<sup>15</sup> “Speech,” Baker argues, “differs from most other harm-producing conduct in the way it causes harm.”<sup>16</sup> He offers the following example as an illustration:

A speaker's racial epithet or a spurning lover's disavowal of affection harms the hearer only through her understanding of the message. The harm occurs because the speech expresses (or, at least, is understood to express) the speaker's values and visions; and it occurs only to the extent that the hearer (mentally) responds one way rather than another, for example, as a victim rather than as a critic of the speaker. Despite the predictable and understandable occurrence of serious harm, the possibility always exists for a hearer to use the available information in creating or maintaining an affirmative identity ... The hearer must determine a response. Whether harm occurs depends on that response.<sup>17</sup>

Baker's argument fails because the harms it identifies as particular to speech are really no different from many of the harms

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<sup>13</sup> *Id.* at 55-56.

<sup>14</sup> Compare Baker's citations to the saying “sticks and stones may break my bones but names will never hurt me” in 1978, treating the saying as instructive of the popular belief in how speech functions, with his statement in 1989, rejecting the saying as overstating the case. See *id.* at 55; and see Baker, *Scope of the First Amendment*, *supra* note 8, at 997 n.4.

<sup>15</sup> Baker, *Harm*, *supra* note 8, at 990-92.

<sup>16</sup> BAKER, HUMAN LIBERTY, *supra* note 8, at 55.

<sup>17</sup> Baker, *Harm*, *supra* note 8, at 991-92.

caused by physical violence and other physical conduct. It is tempting to treat physical and non-physical behavior as completely separate; after all, physical harm is particular to physical conduct and cannot be caused, in the strict meaning of the word, by non-physical conduct – at some point someone has to *do* something to cause the physical harm to occur. Speech is treated differently because it does not have the same tangible consequence of directly altering the physical world.

But the same cannot be said about the relationship between physical conduct and non-physical harm because non-physical harm is not particular to non-physical conduct. Put another way, the harm in speech is not unique to speech. Consider, for example, the harm in rape. That harm surely involves physical damage produced by physical means. The harm also involves an infringement on the victim's freedom. But rape also involves a psychological harm to the victim, without the presumption of which we would never think to impose twenty-year prison sentences on convicted rapists. This psychological harm is something other than the physical harm directly caused by the assault and battery that constitute the physical act of rape – that is, the perpetrator's physical violence against the victim. Certainly much of the harm is *caused* by these physical acts, but most of the harm is presumed to be psychological. The rape victim often feels violated in a more serious way than the victim of an aggressor who inflicts a more permanent physical injury, or who deprives the victim of her freedom for a longer time. As R.A. Duff has explained, "rape constitutes a grievous attack on, or invasion of, [the victim's] sexual integrity and autonomy; this is the 'harm' which rape essentially involves."<sup>18</sup> Yet under Baker's theory, it would be tempting to say that the extra-physical harm to rape victims is self-imposed because it derives from the victim adopting "certain perceptions and attitudes" about the physical violence, her own body, and her "idea" of dignity and autonomy. Baker would probably respond that rape is nonetheless different because it involves a physical violation of the victim's autonomy where speech, without more, does not. But my point is simply that Baker is wrong when he characterizes the harm in speech as *particular* to speech. So, based only on a distinction between harms caused by speech and harms caused by violence, there is no reason to treat speech differently.

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<sup>18</sup> R.A. Duff, *Intentions Legal and Philosophical*, 9 OXFORD J. OF LEG. STUD. 76, 90 (1989).

Except for the immediate physical harm done to a victim of violent rape, the harm in speech and in conduct alike requires the victim to adopt, mentally, a certain perception. And yet, rape laws have never been understood as implicating First Amendment concerns.<sup>19</sup> Unless Baker would be willing to concede that rape laws “disrespect[ ] the responsibility and freedom” of the victim in so far as the laws attribute to the victim certain psychological harm, his argument must be rejected.

Rape, of course, is not speech: the harm in rape is caused by physical violence, not by words. But the criminal law *does* account for harms that would not occur absent mental intermediation by the victim. Sticks and stones *do more* than break one’s bones, and because we allow punishment based on our understanding of that additional, non-physical harm, we cannot say that speech harms are distinct from harms caused by physical conduct.

Baker’s liberty theory does make room for an exception to the general stoic listener principle that underlies his theory. Invoking his general concern for individual autonomy, Baker says that “respecting the listener’s integrity as an individual normally requires treating the listener as responsible for her conduct unless she has been coerced or forced into the activity.”<sup>20</sup> Baker thus defines unprotected, coercive speech as speech “used to influence another person ... if the speaker manifestly disrespects and attempts to undermine the other person’s will and the integrity of the other person’s mental processes.”<sup>21</sup> Baker studies two types of threats: blackmail and whistle blowing. If A tells B, who has committed a crime, “I will tell the police what you did unless you give me \$100,” Baker argues that A’s speech does not deserve First Amendment protection because the speech undermines and disrespects the autonomy of the listener.<sup>22</sup> If, on the other hand, A tells B, “I will tell the police if you keep breaking the law,” A’s speech should be protected because it does not disrespect the “listener’s integrity.”<sup>23</sup>

For Baker, everything turns on this autonomy enhancing principle. Speech generally does not interfere with the listener’s right and ability to decide for herself whether to react or act a certain way in

<sup>19</sup> See CATHERINE MACKINNON, ONLY WORDS 94 (1994).

<sup>20</sup> BAKER, HUMAN LIBERTY, *supra* note 8, at 55.

<sup>21</sup> *Id.* at 59.

<sup>22</sup> *Id.* at 60.

<sup>23</sup> *Id.* at 60.

response to the speech. Indeed, Baker thinks, it would be disrespectful not only to the speaker's integrity but also to the listener's if we were to prohibit speech on the presumption that the listener cannot decide for herself what to think, feel and do. The one exception Baker identifies is coercive speech. But the kind of threats Baker has in mind are not the kind at issue in the Nuremberg Files case. The harm inflicted on the abortion providers by those responsible for the web site was not a matter of coercion. As Professor Kent Greenawalt has pointed out:

[T]he point of most threats is not to give the listener helpful information but to put him in a state of fear, and the emotional outlet of the threat is not so different from the emotional outlet of an actual physical assault . . . damage depends not only on whether the feared substantive harm occurs, but also on how a vulnerable human being will feel if he must live in the shadow of the threat.<sup>24</sup>

Greenawalt's point is related to my point about the stoic listener. Though Baker renounces the propositional speech paradigm at the heart of the marketplace theory, his discussion of coercion is anchored in that same paradigm. When he discusses blackmail and whistle blowing, Baker is concerned exclusively with the propositional value of speech: namely, how the *information* relayed from speaker to listener can be processed. Baker wants a First Amendment exception for blackmail because the listener cannot help but contemplate the factual assertion of the speech. The speaker forces the listener to react and respond by changing the situation for the listener. Thus, Baker does not want to sway from the premise of the stoic listener but rather is willing to concede only that some propositional speech may warrant prohibition, exactly because of how that speech communicates its message.

The liberty theory and the marketplace theory share a single premise when it comes to "speech harms:" the assumption that the listeners, the recipients of the speech, are stoically disinterested, with no personal investment in the truth or falsehood of the speech. The marketplace theory, concerned only with propositional speech,

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<sup>24</sup> KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE, 290-91 (1989)

presumes a detached listener who is willing and able rationally to distinguish falsehoods from truths. This listener is supposed to be capable of remaining continually open to all possibilities, her own inquisitiveness operating, much like the First Amendment itself, on the assumption that “there is no such thing as a false idea.”<sup>25</sup> And, so the argument goes, the First Amendment teaches us tolerance by ignoring the self-imposed harm of intolerant listeners.<sup>26</sup> The liberty theory also generally denies the existence of a constitutionally cognizable speech harm. It does so by claiming that speech injures only in so far as the victim reacts a certain way, and because she is generally not forced by the speaker to react that way, her autonomy is better respected by affording the speech constitutional protection. Consequently, Professor Baker’s liberty theory promotes using the First Amendment as a constitutional bar to a finding of proximate causation of harm. The question of causation becomes crucial in the next section, in which I analyze Judge Kozinski’s opinion in the Nuremberg Files anti-abortion case.

#### JUDGE KOZINSKI’S OPINION IN PLANNED PARENTHOOD V. ACLA

As alluded to above, some of the abortion providers who were identified on the Nuremberg Files web site sued the ACLA for damages and a jury awarded them over \$100 million, mostly in punitive damages.<sup>27</sup> The plaintiffs had sued under the federal Freedom of Access to Clinic Entrances Act (FACE), which imposes criminal and civil liability on anyone who “by force or threat of force . . . intentionally injures, intimidates or interferes with any person because that person is . . . obtaining or providing reproductive health services.”<sup>28</sup>

<sup>25</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (Justice Powell, writing the opinion of the Court).

<sup>26</sup> Compare with Justice Black’s majority opinion in *Bridges v. California*, 314 U.S. 252, 278 (1941) (speaking of minds of “reasonable fortitude,” unaffected by vigorous criticism); and Justice Brandeis’ concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927) (praising the “courageous, self-reliant men, with confidence in the power of free and fearless reasoning”).

<sup>27</sup> *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130 (Oregon 1999)

<sup>28</sup> 18 U.S.C. § 248 (2002)

At trial, plaintiffs testified to the terrifying impact that the Nuremberg Files had on abortion providers everywhere. The fear of being targeted by a violent anti-abortion terrorist led several clinic workers to wear bulletproof vests, even while at home, and in some cases, to seek psychological counseling.<sup>29</sup>

Last year, a three-member panel of the Ninth Circuit vacated the jury's verdict on First Amendment grounds.<sup>30</sup> Writing for the court, Judge Kozinski purported to analyze and reject the arguments that the case could fall under either the incitement or the threats exceptions to First Amendment protection, as articulated by the Supreme Court. Citing *Brandenburg*, Judge Kozinski made short work (and rightly so) of any argument that the speech at issue constituted unprotected incitement: "If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely."<sup>31</sup> Kozinski's reliance on *NAACP v. Claiborne Hardware Co.*,<sup>32</sup> however, requires a more careful analysis.

The plaintiffs in *Claiborne* were white storeowners who claimed to have lost business because of a NAACP sponsored boycott of their stores. The storeowners sued the NAACP for tortious interference with their businesses. The plaintiffs argued, among other things, that NAACP leaders had intimidated and threatened black patrons of the stores, who would have continued to patronize the stores if not for the threats made by the civil rights leaders. One local NAACP leader, Charles Evers, for instance, once reportedly urged a large crowd to support the boycott, stating, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."<sup>33</sup> Certain "store watchers" would also identify patrons who violated the boycott and have their names read at local NAACP meetings.<sup>34</sup> Ruling that the First Amendment prevented the plaintiffs from recovering damages against the NAACP, the Supreme Court in *Claiborne* vacated the lower court's verdict against the organization.

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<sup>29</sup> 41 F.Supp.2d at 1154

<sup>30</sup> *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001).

<sup>31</sup> *Id.* at 1015.

<sup>32</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>33</sup> *Id.* at 902.

<sup>34</sup> *Id.* at 903-04.

In *ACLA*, Kozinski analogized to the facts in *Claiborne* and concluded that the “First Amendment protects *ACLA*’s statements no less than the statements of the NAACP.”<sup>35</sup> Kozinski wrote that the Court in *Claiborne* “held that the statements were protected because there was insufficient evidence that Evers had ‘authorized, ratified, or directly threatened acts of violence.’”<sup>36</sup> But the Supreme Court in *Claiborne* did not rule that as a matter of the First Amendment, the intimidating speech was protected and non-actionable. The Court’s opinion rested not on a broad principle of a constitutionally protected right to make the *type* of speech Evers made; instead, the ruling was rooted in the plaintiffs’ failure to prove with adequate precision the causal connection between the threatening speeches and the plaintiffs’ subsequent loss of business. This is not to say that *Claiborne* was not decided on First Amendment grounds. Rather, it means that *Claiborne*’s jurisprudence was very much concerned with the harm resulting from the speech – in this case, concluding that a connection between the speech and the harm had not been proven.<sup>37</sup>

Prefacing its causation analysis, the *Claiborne* court stated, “While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. *Only those losses proximately caused by unlawful conduct may be recovered.*”<sup>38</sup> The Court’s subsequent causation analysis demonstrates that Kozinski is wrong to read *Claiborne* as extending broad First Amendment protection to a *form* of speech. The Court in *Claiborne* went on to say that the findings of the court below (the Mississippi Supreme Court) were “inadequate to assure the ‘precision of regulation’ demanded by [the First Amendment] ... [A]ll of respondents’ losses were not proximately caused by violence or threats of violence.”<sup>39</sup>

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<sup>35</sup> 244 F.3d at 1014.

<sup>36</sup> 244 F.3d at 1014 (*citing* *Claiborne*, 458 U.S. at 929).

<sup>37</sup> This is not to say that had there been a more easily discernible connection between the speech and the harm, the Court would have ruled in favor of the white storeowners. In such a case, the Court would most likely have adopted a different strategy so as to ensure the same result: absolving the black civil rights leaders fighting a historic battle for equality. In any event, this is beside the point – namely, that the actual holding in *Claiborne* does not support extending First Amendment protection to speech irrespective of the harm it causes.

<sup>38</sup> 458 U.S. at 918 (*italics added*).

<sup>39</sup> *Id.* at 921-22.

The Court's lengthy discussion of whether the plaintiffs' loss of business was caused by Charles Evers' threats or the reading aloud of the store watchers' notes tells us three important things about how useless the *Claiborne* opinion should have been to Judge Kozinski in deciding the Nuremberg Files case. First, the *Claiborne* Court's causation analysis should remind us that the defendants escaped liability because the plaintiffs, whose burden it was to prove how much of their business loss could be attributed to non-protected threats, did not present any evidence tailored to meet this burden. This means that Kozinski was wrong to interpret the holding in *Claiborne* as extending protection to an entire type of speech. We can speculate about what the Court would have done had the plaintiffs presented evidence of how much business they lost because of threats against black patrons. But such speculation does not change *Claiborne's* holding. Kozinski overstated that holding and the applicability of *Claiborne* to the facts in *ACLA*.<sup>40</sup>

Second, the white store owners in *Claiborne* were situated very differently from the abortion providers in *ACLA*. Consider what would have happened if after the decision in *Claiborne*, black individuals who felt intimidated by the threatening speeches had sued the NAACP and Mr. Evers on a theory of infliction of emotional distress – or, more generally, based on an anti-threats statute which made intimidating speech actionable. If Kozinski were right, and *Claiborne* established, as a matter of speech type protection, that the threatening speech was constitutionally protected, why did the *Claiborne* Court bother to analyze, at length, the lack of proof that the intimidating speech had proximately caused a loss of business for the white storeowners? If Evers had a right to intimidate, regardless of whether his speech caused any harm, why spend so much time discussing whether his speech had in fact caused the alleged harm? Moreover, if Kozinski were right, and *Claiborne* protected Mr. Evers' speech against *any* liability, then the black plaintiffs seeking to recover under an anti-threats law would automatically be barred from bringing suit. In that case, the threatened blacks should have been required to

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<sup>40</sup> There is, concededly, a risk that the jury verdict in *ACLA*, like that in *Claiborne*, reflected damages for conduct or speech beyond that which the FACE statute proscribed. After all, in settling on \$107 million the jury may well have considered, for instance, how news reports of violence against abortion clinics (reports that are constitutionally protected and, moreover, beyond the defendant's control) may have contributed to the fear experienced by the plaintiffs.

join the original suit by the white storeowners, which of course they were not. In short, the Court's discussion of the causal connection between the speech and the harm would be ineffectual and pointless unless the speech *could* have been actionable under other circumstances.

Third, the Claiborne Court's causation analysis supports my thesis that the harm to third parties is importantly different from the harm to a second party. The district court in the *ACLA* case determined that the trial jury appropriately found the Nuremberg Files web site responsible for causing harm to the abortion providers – harm not in the form of lost profits but psychological harm resulting from the fear instilled in the plaintiffs. The abortion clinic workers in *ACLA* suffered real harm – unlike in *Brandenburg*, where by the time the KKK leader was tried it was clear that the speaker had not in fact succeeded in inciting violence; or in *Claiborne*, where likewise no provable harm materialized.

Even if Kozinski is right to read *Claiborne* as granting broader First Amendment protection than I have suggested, his reliance on *Claiborne* is nonetheless misplaced. As noted earlier, Kozinski interpreted *Claiborne* as holding that Charles Evers' speech was protected because he had not "authorized, ratified, or directly threatened acts of violence."<sup>41</sup> Kozinski's argument is relevant only in so far as we define the harm in threats as contingent on the likelihood that the threatened physical harm will result. But as Professor Greenawalt has pointed out, the harm in speech can also be located in how the victim feels when forced to "live in the shadow of the threat."<sup>42</sup> Judge Kozinski, like Professor Baker, ignores this distinction, which lies at the heart of my argument that both the liberty theory and Judge Kozinski's opinion in *ACLA* rely on the limited speech paradigm of the stoic listener.

So far, I have tried to reframe the discussion of the harm in speech. My focus has been on the psychological harm to the recipient of the speech. But the *ACLA* case also raises an interesting question about the proper limits of liability for bringing about such harm. Judge Kozinski addressed this question in a footnote in which he distinguished between two types of frightening speech.<sup>43</sup> One type is blackmail, which Kozinski defines as a warning that unless the victim

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<sup>41</sup> 244 F.3d at 1014.

<sup>42</sup> GREENAWALT, *supra* note 24, at 291.

<sup>43</sup> 244 F.3d at 1015 n.8.

does what is asked of him, the speaker will bring about some undesirable event. This is the same type of speech that Baker calls “coercive” and wants to exclude from First Amendment protection. The second type of frightening speech mentioned by Kozinski is exemplified by someone telling a person, “If you smoke cigarettes you will die of lung cancer.”<sup>44</sup> This statement is different from blackmail, Kozinski explains, because it is merely predictive of an undesirable event outside the control of the speaker.<sup>45</sup> Kozinski wants us to think of the Nuremberg Files web site as falling into this latter category of speech. After all, the ACLA did not warn that *it* would commit violence against the abortion providers. The insinuation on the web site was at most that some other party might use the personal information about the clinic workers in committing an attack against them. Surely, Kozinski seems to say, because the occurrence of the insinuated or predicted harm was beyond the control of the ACLA, any fear instilled in the plaintiffs would be qualitatively indistinguishable from the fear felt by a smoker who is warned about the dangers of smoking. In Kozinski’s view, the jury should have imposed liability only “if it understood the statements as expressing their [the defendants’] intention to assault the doctors but not if it understood the statements as merely encouraging or making it more likely that others would do so.”<sup>46</sup>

Judge Kozinski’s argument is clever: it combines his intuitive distinction between coercive and predictive threats with *Brandenburg’s* rule against imposing liability for inciting or encouraging third parties to commit violence. In other words, Kozinski determined that the ACLA could not be held liable for inciting others to commit violence against the abortion providers; nor could it be held liable for intimating to the plaintiffs that parties outside the ACLA’s control might commit violence against them.

But the speech at issue in the Nuremberg Files was not a simple “predictive” threat. Even if we suppose that the jury did not understand the statements on the web site as expressing the ACLA’s intention to commit acts of violence against the abortion providers, this does not justify thinking of the speech as merely “predicting” or intimating that the targeted abortion clinic workers might be harmed. The fear and distress experienced by the plaintiffs was caused by a

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<sup>44</sup> *Id.* at 1015 n.8.

<sup>45</sup> *Id.* at 1015 n.8.

<sup>46</sup> *Id.* at 1016.

combination of factors related to how the web site was perceived. The jury may have determined that plaintiffs feared that the persons responsible for the web site had been involved in past attacks on abortion clinics, and that by disclosing personal information about abortion providers, the site facilitated attempts by anti-abortion sympathizers to target and commit acts of violence against them. *Brandenburg*, of course, is usually understood as protecting speech even if it increases the likelihood that violence will follow. But that is because the harm that the statute in *Brandenburg* identified was the actual physical injury that the speaker threatened. If the KKK leader's conviction in *Brandenburg* had been upheld, that would have been akin to finding him causally responsible for any violence that was committed in the wake of his speech.<sup>47</sup> In reversing his conviction it was as if the Court created a constitutional bar preventing a jury from finding that the speech was the proximate cause of any subsequent harm. In the *ACLA* case, on the other hand, the relevant harm was in the fear experienced by the targeted abortion providers who quite reasonably thought that the Nuremberg Files increased the likelihood of violence. Holding the *ACLA* liable for causing this fear is thus distinct from holding it liable for having incited violence against the plaintiffs. Although *Brandenburg* prevents lawmakers from holding a speaker responsible for increasing the likelihood that physical harm will be inflicted by a third party, that case should not be seen as precluding liability for a speaker who *causes* a listener to *fear* that the speech increases the likelihood of physical harm.

## CONCLUSION

The harm at issue in the Nuremberg Files case is analytically distinct from the harm in the typical incitement case. The injury in the former is the speech recipient's fear of physical harm, whereas the injury in the latter lies in the probability that a third party will suffer physical harm inflicted by a recipient of the speech. First Amendment doctrine properly protects inciting speech that creates this latter type of harm. I have suggested that both doctrine and Professor Baker's liberty theory rest on the paradigm of stoic listeners, and that this paradigm should be abandoned in cases involving second-party speech harms.

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<sup>47</sup> Incidentally, his speech was not followed by any acts of violence.