

assault and how to avoid detection by law enforcement officials.” [Second] Amended Complaint, ¶ 54 (Docket #68). They also assert that unspecified actions of the defendants caused Jaynes to become “obsessed with raping a young boy” and to murder, molest and mutilate Jeffrey Curley, and that the defendants “aided and abetted, as well as provided substantial assistance to Jaynes in his plan to sexually assault Jeffrey Curley.” [Second] Amended Complaint, ¶ 55.

In denying the defendants’ motion to dismiss for failure to state a claim upon which relief could be granted, the court generously construed the sweeping and unfocused allegations of the complaint, finding that the recitation of the words “aided and abetted” would get the plaintiffs past this initial stage to the point where their allegations could be tested.

Now, after five and one half years of litigation, it is apparent that the plaintiffs’ claims about the connection between Charles Jaynes and the defendants were the product of speculation, not investigation. As shown by the facts summarized in the Statement of Material Facts submitted with defendants’ motion, there is not, and indeed there never has been, a factual basis for these core allegations of the complaint. In a nutshell –

- the defendants were not involved in any way with the abduction and murder of Jeffrey Curley
- they did not meet or communicate directly with Charles Jaynes
- they did not provide Jaynes with training and assistance in the murder of Jeffrey Curley
- Charles Jaynes’ connection with NAMBLA was limited to his basic membership
- Jaynes did not attend meetings sponsored by NAMBLA
- Jaynes never saw or read the publications identified by the plaintiffs as the basis for their claims
- the abduction and murder of Jeffrey Curley were unrelated to material appearing in any NAMBLA publications read by Jaynes.

The minimal contacts between Jaynes and NAMBLA, and the even more remote connection between Jaynes and the named defendants, provide no basis for holding the defendants jointly liable with Jaynes and Salvatore Sicari for the death of Jeffrey Curley. The defendants did not conspire with Jaynes, and nothing the defendants did rises to the level of aiding and abetting Jaynes' criminal actions.

To the extent that the plaintiffs' claims in this action are founded on the dissemination of information contained in the few publications which were sent to Jaynes by NAMBLA and were found in Jaynes' possession, (a) those materials do not counsel the type of unlawful acts committed by Jaynes, (b) reliance on those materials is foreclosed by the plaintiffs' failure to identify them in response to the defendants' contention interrogatories, and (c) even if such claims have been adequately preserved, they are barred by the First Amendment because they do not constitute incitement of imminent unlawful action as defined in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

I. STANDARD FOR SUMMARY JUDGMENT

The standards for consideration of a motion for summary judgment were concisely stated by this court in *Szabo v. Trustees of Boston University*, 1998 WL 151272 (D. Mass), 4 Wage & Hour Cas.2d 894, *aff'd* 181 F.3d 80 (1st Cir. 1998):

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).... Of course, "summary judgment may be appropriate even in cases where elusive concepts such as motive or intent are at issue, ... if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir.1996) (internal quotations omitted). Finally, Fed.R.Civ.P. 56(c) "mandates the entry of

summary judgment, ... upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

II. THE MATERIAL FACTS ARE NOT IN DISPUTE

Through amendment of the pleadings and judicial construction, the plaintiffs' claims have evolved over time from their initial allegation that the defendants were liable based on their public advocacy to plaintiffs' current theory that Jaynes attended meetings, was personally schooled in abduction and murder, and was given written instructions for his crime. The affidavits, pleadings and other materials supporting the defendants' motion show that these allegations are untrue.

A. The Defendants Had No Part in the Kidnaping and Murder of Jeffrey Curley

In October 1997, Jeffrey Curley, the son of plaintiffs Barbara and Robert Curley, was murdered. Charles Jaynes and Salvatore Sicari, neither a party in this case, were subsequently arrested and convicted of his murder. Defendants' Statement of Material Facts ("DSMF") ¶ 1. The complaint in this action arises solely out of the fact that a rather small number of NAMBLA publications were found in the custody of Charles Jaynes at the time of his arrest. The defendants in this case were not involved in the "kidnaping, torture and murder" of Jeffrey Curley. DSMF ¶¶ 3-4. Indeed, only two of the defendants lived in Massachusetts, and none had ever met Jeffrey Curley, Charles Jaynes or Salvatore Sicari.

B. Charles Jaynes' Membership in NAMBLA

For purposes of this motion, the defendants will stipulate that Charles Jaynes, using the name Anthony J. Scaccia, was a member of NAMBLA. His participation, however, was limited to a one year period, and during that time he was not an active member. The membership records of NAMBLA show that a person using the name Anthony J. Scaccia first contacted NAMBLA in

January 1996 and was sent a note and a membership packet. Scaccia joined NAMBLA in February 1996 by paying dues of \$25.00 for a one-year membership. Scaccia's check was returned for insufficient funds, and, after being notified by NAMBLA, he sent a second check for his membership. Scaccia's membership expired in February 1997. He was sent two expiration notices, but he did not renew his membership. NAMBLA's records also show that Scaccia was sent eight issues of the *NAMBLA Bulletin* beginning with the December 1995 issue, several issues of *NAMBLA Topics*, and an announcement of the General Membership Conference which was to be held in Hayward, California in October 1996. The information contained in NAMBLA's records is confirmed by the results of the search of Jaynes' automobile and apartment in New Hampshire which turned up only these same eight issues of the *NAMBLA Bulletin*, various *NAMBLA Topics*, a membership renewal request and a blank registration form for the Hayward conference. DSMF ¶¶ 6, 8. Apart from the Scaccia records, NAMBLA's records show that in 1996 NAMBLA received a letter from Charles Jaynes offering to donate materials to the organization. There is no record that any response was sent to Jaynes. DSMF ¶ 7.

This is the entire record of Jaynes' involvement with NAMBLA. Nothing in NAMBLA's records and nothing in the materials discovered in the possession of Charles Jaynes suggests that there was any other contact between Jaynes and NAMBLA.

C. Charles Jaynes Did Not Attend Any Meeting Sponsored by NAMBLA

The core of the plaintiffs' current theory is that Charles Jaynes was present at NAMBLA meetings, and it was at these meetings he received the information and training used in the abduction and murder of Jeffrey Curley. There were three types of meetings held under the auspices of NAMBLA. These are described in the organization's constitution. The first is the

General Membership Meeting (also referred to as the General Membership Conference) which is held annually. The second consists of meetings of the members of the organization's elected Steering Committee. The last are local meetings of chapters or affinity groups sanctioned by the Steering Committee. DSMF ¶ 10. Charles Jaynes did not attend any of these meetings. DSMF ¶¶ 11-24.

General Membership Meetings

The NAMBLA constitution provides that General Membership Meetings, which are the governing body of the organization, are to be held once a year. DSMF ¶ 10. Attendance at General Membership Conferences is limited to members of NAMBLA and invited guests, and that requirement is carefully enforced. At least since 1995, pre-registration has been required in order to prevent participation by non-members. DSMF ¶¶ 11-13. Between 1995 and 1997, the membership conferences were announced to members in the *NAMBLA Bulletin* and in announcements sent by mail, but the location of the conference was not publicly disclosed and preregistration was required. Completed registration forms were to be sent to the NAMBLA post office box in New York. NAMBLA's membership secretary would review the forms to determine that the registrant was a member of NAMBLA. If the person was not a member, he would not be registered for the conference or notified of its location. If the records showed that the registrant was a member, the membership secretary would make a note in NAMBLA's membership records that the person had registered to attend the conference and would provide the conference organizer with the names of the members who had pre-registered. The conference organizers would then provide the registrants with general information about the location of the conference and would check at the entrance to the conference to insure that any person seeking to enter the event was pre-registered. DSMF ¶ 13. These procedures were used

after incidents in which non-members had disrupted meetings and harassed the attendees.

DSMF ¶ 11 .

Only one General Membership Conference was held by NAMBLA during the time that Anthony J. Scaccia was a member of NAMBLA. That conference was held in Hayward, California in October 1996. NAMBLA's records show that Scaccia was sent a notice of the Hayward conference, and a blank registration form for the 1996 conference was found in the course of the search of Jaynes' automobile. DSMF ¶¶ 6, 8, 14. Jaynes, however, did not attend the Hayward conference. DSMF ¶ 14-19.

Without having registered in advance, Jaynes would not have received information about making contact with NAMBLA and would not have been provided with the exact location of the conference. NAMBLA, however, has no record that Jaynes – or Scaccia – registered for or attended the conference, and the registration form found in Jaynes' car was blank. And significantly, none of the defendants who were present at that conference saw him there even though the number of participants at the conferences was not very large, and Jaynes,

an African American who, at that time, was in his early twenties and weighed between 300 and 350 pounds, would have clearly stood out from the crowd by reason of his age, his race

and his size. Moreover, the conference was not

readily accessible to

Jaynes. Attendance would have required him to

travel across country, at substantial expense, to

attend a meeting of an organization in which,



shortly thereafter, he allowed his membership to lapse.¹ DSMF ¶¶ 6, 13-17.

Steering Committee Meetings

The Steering Committee is charged by the NAMBLA Constitution with responsibility for the governance of the organization between general meetings of the members. Members of the Steering Committee are elected at each general membership meeting. The Steering Committee of NAMBLA conducted telephonic and in-person meetings at various times between 1993 and 1997, when Charles Jaynes was arrested. Charles Jaynes was never a member of the NAMBLA Steering Committee and did not attend or otherwise participate in its meetings. DSMF ¶ 21.

Local Meetings

The NAMBLA Constitution provides that members may form local chapters with the approval of the Steering Committee. In the 1980's chapters of NAMBLA were formed in San Francisco, Los Angeles, New York and Boston. The Boston chapter was disbanded in 1985, the Los Angeles chapter died out in the late 1980's, and the New York and San Francisco chapters have been inactive since 1993. No other chapters have been formed or approved since then. In 1995, NAMBLA's General Membership Conference approved a resolution reflecting the discontinuation of chapter activities which stated that "[t]he NAMBLA information pamphlet shall be updated to remove references to local chapters." DSMF ¶ 23.

At the urging of a Virginia police officer named Thomas Polhemus, who had joined NAMBLA under the pseudonym Tom Franklin, NAMBLA's 1995 General Membership Conference approved a resolution that "NAMBLA shall sanction the creation of local affinity

¹ The plaintiffs' relentless but unsupported suggestion that Jaynes was a member of NAMBLA prior to 1996 and after 1997 and could have attended other conferences is at odds with the fact that Jaynes' membership was clearly limited to the period between February 1996 and February 1997, that he has been in custody since October 1997 and that he was not observed at any NAMBLA membership meeting. DSMF ¶¶ 17-18.

groups with the provisos that there will be no exchange of illegal material and that anything written or done in the name of NAMBLA be submitted in writing for approval by the Steering Committee. In addition, there will be a local coordinator who remains in contact with the NAMBLA Steering Committee.” DSMF ¶ 24. There were informal attempts to form local groups under this resolution in three localities: New York, Seattle and the southwestern states of Arizona, New Mexico and Nevada. There were a series of mailing parties held in the New York area from 1995 to 1997, and a few meetings were held in Seattle in 1996. Charles Jaynes did not attend any of these meetings. *Id.*

There were no meetings of NAMBLA members in Massachusetts during the time that Charles Jaynes was a member of NAMBLA. The Boston chapter had been disbanded in 1985. Several informal meetings of NAMBLA members were held in Boston between 1991 and early 1993 without the sanction of the Steering Committee, but Charles Jaynes was not a member of NAMBLA at the time and was not present at any of those meetings. DSMF ¶ 22.

C. Charles Jaynes Had No Other Contact With NAMBLA

There was no contact between Jaynes and NAMBLA other than the communications relating to or arising from his basic membership and the single letter sent by Jaynes. There was no other correspondence, there were no phone calls, and communication was not possible through the NAMBLA web site. DSMF ¶ 3, 36-39. None of the defendants has ever met or spoken to Charles Jaynes, nor any person using the name Anthony Scaccia, Elizah Wood or Scott Eastman. None of the defendants has personally provided Jaynes with documents or information of any kind. None of the defendants has counseled, advised or trained Jaynes to break the law. DSMF ¶¶ 3, 9.

D. NAMBLA Did Not Provide Charles Jaynes with Materials Identified by the

Plaintiffs as the Basis for their Claims

After broadly alleging that the defendants used their publications to provide Jaynes with information, assistance, training and encouragement in support of his criminal actions, the plaintiffs could point to only two publications which even arguably contain “instruction” of any sort, the manuscript entitled *The Survival Manual* and the article entitled “Staying Safe and Happy as a Man/Boy Lover.”² DSMF ¶ 25-26. The difficulty with this assertion is that (a) the “Survival Manual” was neither written, published nor distributed by NAMBLA, (b) the “Staying Safe and Happy” article was published in 1991, long before Charles Jaynes became a member of NAMBLA, (c) there is no reason to believe that Charles Jaynes had ever seen either of these publications and (d) the so-called “instructions” contained in the “Staying Safe and Happy” article published by NAMBLA were not followed by Jaynes. DSMF ¶¶ 27-33.

Examination of the “Survival Manual” shows that it is a photocopy of a typed manuscript whose author is not identified. According to the affidavit of one Debbie Mahoney, which does not appear to be based on personal knowledge, “The Survival Manual” was found in the possession of Jonathan Tampico, formerly a defendant in this action, who was convicted of sexual abuse of Ms. Mahoney’s son. Tampico, however, was not a member of NAMBLA and there is nothing in the circumstances of the seizure of the manuscript to suggest that NAMBLA or the defendants in this action were in any way responsible for its production. DSMF ¶¶ 28-29. In contrast, the defendants’ affidavits are clear and specific. Each of the defendants denies that “The Survival Manual” was written, published, copied or distributed by NAMBLA or by any of them individually. And neither NAMBLA nor any of these individual defendants provided

² Notwithstanding the defendants’ specific requests that the plaintiffs identify the specific passage in any NAMBLA publication which provides the basis for their allegations, the plaintiffs have failed and refused to do so. See DSMF ¶ 24.

Charles Jaynes with a copy of “The Survival Manual.” DSMF ¶ 28.

In any event, there is no evidence that Jaynes had either of these publication in his possession, much less read them. DSMF ¶ 33. NAMBLA’s records show that specific publications were sent to Jaynes: a specified range of issues of the *NAMBLA Bulletin* and several issues of the occasional papers published under the title *NAMBLA Topics*. The list does not include “The Survival Manual” or the issue of the *NAMBLA Bulletin* containing the article “Staying Safe and Happy as a Man/Boy Lover.” DSMF ¶ 6. Nor were either of these publications found in the course of the search of Charles Jaynes’ automobile or the search of his apartment in Manchester, New Hampshire. DSMF ¶ 8. While the plaintiffs would have the court speculate about the existence of a hidden trove of NAMBLA publications and pornography, it should be noted that the NAMBLA materials discovered in the searches conducted in the course of the investigation of the murder of Jeffrey Curley correspond with the NAMBLA records of what was sent to Jaynes.³ It quite clearly appears that Jaynes kept whatever was sent to him by NAMBLA in the apartment.

E. No Material Published by NAMBLA Provides a Basis for Liability in This Action

Even assuming that Charles Jaynes had obtained and read the 1991 article entitled “Staying Safe and Happy as a Man/Boy Lover,” it would not support the plaintiffs’ claims as the

³ It is patently absurd to suggest that other NAMBLA materials, including these two publications, were somehow overlooked by the police in the course of the searches. The warrant authorizing the search of the apartment specifically authorized the seizure of “documents containing the name NAMBLA (North American Man-Boy Love Association) on them” and “photographs or magazines containing pictures of children or adolescents in a state of nudity.” DSMF ¶ 8. The search of what was obviously a small apartment was meticulously conducted and carefully documented. Nothing, and certainly nothing so obvious as a green tub full of “NAMBLA pornography,” was overlooked.

information and advice contained in that article are unrelated to the Curley murder.

The publication of information intended to facilitate abduction, forcible rape or murder would be entirely inconsistent with long-standing NAMBLA policies. Consistent with those policies, there is no information or advice contained in the article entitled “Staying Safe and Happy as a Man/Boy Lover” which counsels abduction, torture, rape or murder. To the contrary, NAMBLA policy counsels relationships based on respect which are “mutual, caring and ethical”⁴ and that “[b]ecause of the hysteria and the harsh penalties for man and boy alike, an argument can be made for not having sex with boys in the US at this time.” DSMF ¶ 34.

Moreover, to the extent that the article does contain information or advice concerning sexual relationships with persons under the age of consent, none of that advice appears to have been followed by Charles Jaynes.⁵ For example, the article states that “[t]he more people who know about your relationship, the more vulnerable you are. . . . Do not share specific information about your relationship, such as the identity of your lover.” Consistent with this approach, the article goes on to counsel other steps aimed at avoiding detection by others or by the police.⁶ Jaynes was anything but discreet about his attraction to Jeffrey Curley, as it appears that he told a

⁴ The same issue of the *NAMBLA Bulletin* containing this article clearly states NAMBLA’s position that “NAMBLA condemns sexual abuse and all forms of coercion. . . . Some existing laws criminalize sexual relationships that are loving and fully consensual. . . . Nothing published here, either now or in any previous issue, is or has been intended to advocate or counsel the violation of such laws.”

⁵ The article is reproduced as Exhibit 8 in the Appendix to Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted (Docket No. 45).

⁶ The article provides the following advice: (a) “Avoid activities that bring attention to your relationship;” (b) “Don’t keep photos of your partner in a place where police may find them;” (c) “Don’t document your relationship unnecessarily;” and (d) “never discuss the specifics of a relationship with therapists or social workers.”

number of people about his intentions. And indeed, he failed even to dispose of the most incriminating evidence of the murder. The article also suggested “[d]evelop[ing] a positive relationship with your partner’s family” and [b]eing sensitive to the boy’s family and community,” advice which Jaynes plainly did not follow. And most significantly, it cautions the reader “never push the relationship further than is comfortable.” If this is step-by-step instruction for illegal activities, it was not followed by Jaynes. There is nothing in this article that is reflected in his unlawful behavior.⁷

While Rule 56 does not require the defendants to anticipate factual arguments that may be put forward by the plaintiffs in response to the defendants’ motion for summary judgment, it is worth noting that the plaintiffs have at every stage of the proceedings trotted out the same bolus of “evidence” to support their claims: the Polhemus affidavits, the supposed “NAMBLA e-mails,” the Echols affidavit, the Jaynes diary, the “Survival Manual,” and so on. In the reams of material that have so far been put forward, however, the plaintiffs have yet to come up with a shred of admissible evidence that Charles Jaynes was anything more than a dues-paying member of NAMBLA or that he was provided with anything more than the materials which were discovered in his possession. Of all the material filed with the court, what little appears to be based on personal knowledge has nothing to do with Charles Jaynes,⁸ and the few statements

⁷ The plaintiffs have attempted to portray this article as the functional equivalent of the “murder manual” at issue in *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). In *Rice*, however, the evidence showed that the murderer followed the instructions to the letter. The same correlation between text and conduct is not present here.

⁸ See , e.g., Affidavit of Thomas Polhemus (no mention of Jaynes); Affidavit of Gary Hann (same). Plaintiffs’ Response to Defendants’ Motions to dismiss (Docket No. 142), Exhibits 4-6

dealing with Charles Jaynes are either hearsay or speculation.⁹ See *Maiorana v. MacDonald*, 596 F.2d 1072, 1080 (1st Cir. 1979) (affidavits on summary judgment must be based on personal knowledge, not “impermissible speculation or conclusory language”).

II. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. The Conduct of the Defendants Is Not Actionable under Massachusetts Law.

The plaintiffs argued in opposition to the motion to dismiss for failure to state a claim upon which relief could be granted that their complaint alleged that the defendants conspired with Jaynes or that they aided and abetted the murder of Jeffrey Curley. This court held that “speech which counsels and procures criminal conduct” could qualify as incitement within the meaning of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and would therefore “support liability for ‘aiding and abetting.’” The court noted, however, that “[w]hat the plaintiffs can ultimately prove will be seen.” Docket No. 65. The more complete record now before the court on summary judgment reveals that there is no basis for holding the defendants liable on either theory. These claims must accordingly be dismissed.

1. Conspiracy

Under Massachusetts law, a civil action for conspiracy may be based on either of two theories. *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1563 (1st Cir.1994).

The first kind of civil conspiracy is generally described as coercive and requires a showing that the defendants acted in unison, and possessed some peculiar power of coercion that they would

⁹ See, e.g., Affidavit of W.H. (Mike) Echols (hearsay); Deposition of Charlene Letourneau (opinion concerning the impact of NAMBLA materials on Jaynes). Appendix to Plaintiffs Memorandum in Opposition to Defendant Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted (Docket No. 45), Exhibits 2, 5

not have had if they had been acting independently. *Id.*; *Neustadt v. Employers' Liab. Assur. Corp.*, 303 Mass. 321, 325, 21 N.E.2d 538, 541 (1939). The second kind of civil conspiracy is related to a theory of common law joint liability in tort. It is the concept that where two or more persons act *in concert*, each will be jointly and severally liable for the tort. *Aetna*, 43 F.3d at 1564.

As there is no allegation, much less any evidence, that the defendants' conduct involved the coercive type of conspiracy, the plaintiffs' claim requires at the very least a showing of (1) an agreement or common design, and (2) a tortious act that is committed pursuant to or in furtherance of that agreement. *Id.*; *Payton v. Abbott Labs*, 512 F.Supp. 1031, 1035 (D.Mass. 1985); *Kyte v. Philip Morris, Inc.*, 408 Mass.162, 166, 556 N.E.2d 1025, 1027 (1990). And where joint liability is based on a claim that a party provided "substantial assistance," see Restatement (Second) of Torts § 876(b), it appears that Massachusetts requires the plaintiff to prove "a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." *Stock v. Fife*, 13 Mass.App.Ct. 75, 82 n.10, 430 N.E.2d 845, 849 n.10 (1982) (Greaney, J.). Here, there was neither a common plan nor any action by individual defendants or NAMBLA to achieve the result.

Plainly, there was no express agreement between Charles Jaynes and the defendants. None of the defendants have ever met him, spoken to him or even seen him. Nor was there any communication between NAMBLA and Jaynes constituting an agreement. The only communication with Charles Jaynes was the exchange concerning the Scaccia membership, the mailing of specific NAMBLA publications and the notice of the 1996 meeting, and the letter which Jaynes sent to NAMBLA's post office box in New York offering to contribute some

unspecified literature. There was nothing in these routine exchanges which could in any way be construed as an agreement.

To be sure, under Massachusetts law, an agreement need not be explicit. It may be implied from the circumstances. *Orszulak v. Bujnevicie*, 355 Mass. 157, 158, 243 N.E.2d 897 (1969). But the circumstances here are insufficient to warrant such an inference. Not one of the defendants in this action has had any personal contact with Jaynes. They were not on notice of his unlawful intention to abduct and murder Jeffrey Curley. There was never any communication with Jaynes concerning abduction, torture, murder or forcible rape. Compare *Kyte v. Philip Morris, Inc.*, *supra* (implied agreement or common design lacking where cigarette manufacturer's uncontroverted affidavits showed it had no knowledge of illegal tobacco sales to minors by retailer), with *Direct Sales Co. v. United States*, 319 U.S. 703, 705-707 (1943) (tacit understanding based on long course of consistent sales of huge quantities of morphine).

2. Aiding and Abetting

The plaintiffs fare no better on the theory that the defendants aided and abetted Charles Jaynes in the murder of Jeffrey Curley. Under Massachusetts law, aiding and abetting requires proof of two elements.

The first is that the defendant must give substantial assistance or encouragement to the other party. *Brown v. Perkins*, 83 Mass. (1 Allen) 89, 97-98 (1861). In determining whether this element is satisfied, "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." Comment on Clause (b), Restatement § 876. Unlike the concert of action theory, there need be no agreement between the parties for this theory to apply. *Brown v. Perkins*, 83 Mass. (1 Allen) at 97. The second element is that defendant must have an unlawful intent, i. e., knowledge that the other party is breaching a duty and the intent to assist that party's actions. *Id.* at 98. See *McGrath v. Sullivan*, 303 Mass. 327, 22 N.E.2d 192 (1939); *The American Agricultural Chemical Co. v. Robertson*, 273 Mass. 66, 172 N.E. 871 (1930).

Payton v. Abbott Labs, supra, 512 F. Supp. at 1035.

Each of the factors essential to the “aiding and abetting” claim is absent here. The murder of Jeffrey Curley was the criminal act of Charles Jaynes and Salvatore Sicari. The defendants were not present when the crime was committed. They provided no “assistance” in the commission of the crime, and they had no relationship with Jaynes. They certainly had no intention to assist in the murder of Jeffrey Curley.

Finally, it is clear at this point that the plaintiffs may no longer rely generally on the fact that NAMBLA sent various publications to Jaynes as they have expressly disavowed such reliance except as to a few designated materials or statements. The defendants acknowledge that they provided Charles Jaynes with specific issues of the *NAMBLA Bulletin*, occasional papers published under the title *NAMBLA Topics*, a specific issue of Gayme and Ariels’s Pages. Indeed, most of these items were found in Charles Jaynes’ possession. The plaintiffs, however, have by their formal responses, admitted that none of these materials contributed to the death of Jeffrey Curley.

In response to the defendants’ contention interrogatories asking which specific publications, and passages in those publications, formed the basis for the plaintiffs’ allegations of assistance or encouragement of Charles Jaynes, plaintiffs do not mention the materials sent to Jaynes except to note that those materials contained notices of unspecified meetings.¹⁰ They claimed instead that Jaynes was influenced by two other publications, “The Survival Manual” and the “Staying Safe

¹⁰ In 2000, plaintiffs obtained from the District Attorney for Middlesex County copies of all materials found in Jaynes’ apartment and automobile. Plaintiffs filed those materials with the court in response to defendant Radow’s motion for a more definite statement.

and Happy” article.¹¹ But the defendants did not provide Charles Jaynes with these materials, and there is no reason to believe that Jaynes ever saw or read these materials.¹² Having failed in their responses to defendants’ interrogatories to identify even a single passage in the materials sent to Jaynes that would support their claims, the plaintiffs are not allowed at this point to assert that materials which they have failed to identify should be considered. Responses to contention interrogatories are binding on the party providing them. Because the answering party has “ample opportunity to reflect on the question, to consult all pertinent sources of information bearing on it, and to seek the advice and assistance of counsel in order to craft answers that provide a full and accurate disclosure,” *Wechsler v. Hunt Health Systems, Ltd.*, 1999 WL 672902 (S.D.N.Y August 27, 1999), they are treated as “judicial admissions” which generally estop the answering party from later seeking to assert a different position. *Guadagno v. Wallack Ader Leviathan Associates*, 950 F.Supp 1258 (S.D.N.Y. 1997), *aff’d* 125 F.3d 844 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); *see also Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2nd Cir. 1975).

B. The Plaintiffs’ Claims are Barred by the First Amendment

In the absence of any claim that Jaynes was influenced by particular statements, information

¹¹ The plaintiffs’ response to defendants’ interrogatories does contain an unexplained reference to a third article, a news item in the September 1996 issue of the *NAMBLA Bulletin* concerning the arrest of one John Smith by Detective Polhemus. Appendix to Plaintiffs Memorandum in Opposition to Defendant Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted (Docket No. 45), Exhibit 10. On reading that article, one would be hard pressed to find statements which counsel, urge or assist abduction and murder.

¹² The defendants’ interrogatories specifically requested whether the plaintiffs’ claims were based on materials which were not found in the possession of Charles Jaynes and, if so, to state the basis for their claim that Jaynes read these materials. The plaintiffs’ answers to these questions contain no information linking Jaynes to these materials.

or passages in the materials which NAMBLA sent to him, the plaintiffs’ case is reduced to their initial assertion that Jaynes’ behavior was caused by the “totality of [the] child sex environment” created by the defendants. Plaintiffs’ Opposition to Defendant’s Motion for a More Definite Statement (Docket No. 10), p. 3. To the extent that plaintiffs are allowed to assert that the NAMBLA materials which were sent to Jaynes or were available to him on the NAMBLA web site encouraged or assisted his conduct in this general sense, or even that Jaynes was influenced by other NAMBLA publications, those claims are barred by the First Amendment.

In examining this claim, it is essential to focus on what is actually in those materials and not on the scandalous allegations of the complaint. And what were these materials? The *NAMBLA Bulletin* is a periodic publication of NAMBLA, which describes itself as “a political, civil rights, and educational organization” that “provide[s] factual information and help[s] educate society about the positive and beneficial nature of man/boy love.” Its stated goal “is to end the extreme oppression of men and boys in mutually consensual relationships by: building understanding and support for such relationships; educating the general public on the benevolent nature of man/boy love; cooperating with lesbian, gay, feminist, and other liberation movements; [and] supporting the liberation of persons of all ages from sexual prejudice and oppression.” Appendix to Defendants’ Memorandum in Support of Their Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted (Docket No. 31), p. 378.

In its publications and governing documents, NAMBLA describes itself as “a political, civil rights, and educational organization” which “provide[s] factual information and help[s] educate society about the positive and beneficial nature of man/boy love.” Its stated goal “is to end the extreme oppression of men and boys in mutually consensual relationships by: building understanding and support for such relationships; educating the general public on the benevolent

nature of man/boy love; cooperating with lesbian, gay, feminist, and other liberation movements; [and] supporting the liberation of persons of all ages from sexual prejudice and oppression.” *Id.*

The contents and themes of the *NAMBLA Bulletin* and other NAMBLA publications are informed by, and reflect, its stated belief that “sexual feelings are a positive life force,” its claim to “support the rights of youth as well as adults to choose the partners with whom they wish to share and enjoy their bodies,” and its opposition “to age-of-consent laws and all other restrictions which deny men and boys the full enjoyment of their bodies and control over their own lives.” *Id.*

The NAMBLA web site as it appeared in 1997 contained a description of the organization and its purpose (“Who We Are,”) *id.* at 378-379,¹³ a sampling of the perspectives and comments of well-known writers, scholars and researchers such as Camille Paglia, Alfred Kinsey, Kate Millet, Allen Ginsberg and Oscar Wilde along with numerous others (“What People Are Saying,” A. 328-368), a translation of a study of sex offenses conducted under the auspices of the German Bundeskriminalamt (the criminal investigative agency of the German government) (A. 353-361), an annotated bibliography of scholarly articles supporting or relevant to NAMBLA’s position (“What Science Can Tell Us About Man/Boy Love,” A. 369-371), and selected writings from its

¹³ Three passages from this section are noteworthy for purposes of the motion before the court.

“We condemn sexual abuse and all forms of coercion. Freely-chosen relationships differ from unwanted sex. Present laws, which focus only on the age of the participants, ignore the quality of their relationships. We know that differences in age do not preclude mutual, loving interaction between persons. NAMBLA is strongly opposed to age of consent laws and all other restrictions which deny men and boys the full enjoyment of their bodies and control over their own lives.

“NAMBLA does not provide encouragement, referrals or assistance for people seeking sexual contacts. NAMBLA does not engage in any activities that violate the law. . .

“NAMBLA is a political, civil rights, and educational organization. We provide factual information and help educate society about the positive and beneficial nature of man/boy love.”

publications. The web site contains no materials which urge, promote or advocate or even condone torture, mutilation or murder.

According to the statement that appears on its masthead, the *NAMBLA Bulletin* is published quarterly by NAMBLA, but “[c]ontent is determined by the *Bulletin* Collective, which includes all NAMBLA members working for the *Bulletin*. The Collective operates autonomously, by consensus, with only general policy determined by NAMBLA’s Steering Committee.” *Id.* at 2. In addition to the type of material that is found on the web site, the *Bulletin* contains news articles, editorials and commentary reflecting NAMBLA’s general position. It also contains poetry and fiction that has explicit sexual content. The *Bulletin* is illustrated with photographs of boys of various ages and nude drawings of boys. These issues of the *Bulletin* contain no materials which urge, promote or advocate or even condone torture, mutilation or murder.

Jaynes also had in his possession three pamphlets published by NAMBLA, “Criminal Justice,” “Boys Speak Out on Man-Boy Love,” and “Not Fade Away: Selections from the *NAMBLA Bulletin*.” *Id.* at 214-325. The titles are fairly descriptive of their content, which is not significantly different from the material found on the web site and in the *Bulletin*.

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” Here, the defendants are alleged to have published and distributed various magazines and pamphlets and to have made information available on the Internet in which they advocate what its admittedly a politically controversial viewpoint. This, however, is “the essence of First Amendment expression.” *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *see also, Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important

role in the discussion of public affairs.")(citation omitted). They have formed an organization and held meetings with others who share their views. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)(describing as "beyond debate" that freedom of speech encompasses "freedom to engage in association for the advancement of beliefs and ideas"). They have also established a site on the Internet where their positions can be readily accessed by the public. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (Internet "provides a relatively unlimited, low-cost capacity for communication" that allows "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox.")

The plaintiffs have alleged that what is urged by NAMBLA's speech, organizing and publications is unlawful, and on that basis they seek substantial damages from the defendants.¹⁴ The defendants contest this characterization of their speech. Examination of the materials that have been identified by the plaintiffs will show that they simply do not advocate violation of the law. But even if that were the case, speech is not deprived of the protection of the First Amendment simply because it advocates an unlawful act. The First Amendment does not permit government "to forbid or proscribe advocacy of the use of force or of law violation except where

¹⁴ The First Amendment protection against punishment of speech extends to both criminal prosecution and civil liability. The Supreme Court has long recognized the severe chilling effect the imposition of civil liability has on free expression. *See New York Times Co. v. Sullivan*, 376 U.S. 252, 277 (1964)("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute"); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) ("One of our basic constitutional tenets, therefore, forbids the state to punish protected speech, directly or indirectly, whether by criminal penalty or civil liability").

such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Noto v. United States*, 367 U.S. 290, 291 (1961). Advocacy is unprotected only if it is "intended to produce, and likely to produce, imminent disorder;" "advocacy of illegal action at some indefinite future time" is not actionable. *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973).

Brandenburg was intended to protect the expression of ideas, no matter how controversial or how far removed from the mainstream. As explained in *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000),

“Imminent lawless action,” as used in *Brandenburg*, means violence or physical disorder in the nature of a riot. Peaceful speech, even speech that urges civil disobedience, is fully protected by the First Amendment. Were this not the case, the right of Americans to speak out peacefully on issues and to petition their government would be sharply circumscribed.

The term "advocacy," as used in *Brandenburg*, encompasses not only freedom of speech, but the other rights of expression guaranteed by the First Amendment as well. *Brandenburg* specifically held that "statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action." 395 U.S. at 449 n.4. See also *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 448-50 (1974) (applying *Brandenburg* principles to state regulation of access to the ballot).

The *Brandenburg* test, which has been described as “the most speech-protective standard yet evolved by the Supreme Court,” G. Gunther, “Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History,” 27 *Stan. L. Rev.* 719, 755 (1975), has been

scrupulously followed by the Supreme Court in subsequent cases. *See Hess v. Indiana, supra, NAACP v. Claiborne Hardware Co., supra; Communist Party of Indiana v. Whitcomb, supra; Texas v. Johnson*, 491 U.S. 397 (1989). *Brandenburg* is a bulwark for the protection of controversial speech, and an insurmountable barrier to liability in this case.

The claims set forth in the plaintiffs’ amended complaint do not meet *Brandenburg*’s requirement that advocacy, to be outside the protection of the First Amendment, be “directed to inciting or producing imminent lawless action.” 395 U.S. at 447. First, as the complaint specifically concedes, the defendants’ advocacy was not “directed” to a particular person but to the public at large. For purposes of *Brandenburg*’s analysis, the requirement that speech be directed essentially is a question of intent. The speaker must “aim” his speech toward a particular individual or group of individuals. A general statement, not directed toward any particular person or group, is not “advocacy” of any particular action. *Hess v. Indiana, supra*. The fact that speech disseminated to the general public may be of greater interest to a particular group does not mean that it is directed to that group. In *Davidson v. Time Warner, Inc.*, 1997 WL 405907 (S.D.Texas), 25 Media L. Rep. 1705, the court rejected the plaintiff’s claim that music aimed at the “violent black ‘gangsta’ subculture” was sufficiently directed to constitute advocacy of unlawful action. “[T]o hold otherwise,” the court reasoned, “would remove constitutional protection from speech directed to marginalized groups.” Thus, however small or select the audience for NAMBLA’s publications, it is nevertheless too large and diffuse for the court to conclude that NAMBLA’s message was “directed” within the meaning of *Brandenburg*.

Nor was the defendants’ speech “likely to incite or produce . . . imminent lawless action.” Any conduct that was arguably advocated by the defendants’ publications was not imminent.

Under *Brandenburg*, the term “imminent” has a specific and distinctive legal meaning. It means present conduct. It does not mean “advocacy of illegal action at some indefinite future time” and does not apply to speech even though it may have “a tendency to lead to violence.” *Hess v. Indiana, supra*, 414 U.S. at 108-109.¹⁵ See, e.g., *McCoy v. Stewart*, 282 F.3d 626 (9th Cir.), cert. denied, 537 U.S. 993 (2002) (speech advising gang members on gang operations was not an incitement of lawlessness because the social circumstances of the speech militated against imminent action).

Finally, there is no basis for concluding that the NAMBLA materials made available to Jaynes were “likely to incite or produce” imminent lawless actions. However tragic, the death of Jeffrey Curley was not a likely result of the defendants’ publication of the material at issue. No fair reading of these materials would result in the conclusion that they incited torture, murder and mutilation. Nothing in the materials even mentions this. There is simply no way to mistake the content of the *NAMBLA Bulletin* or NAMBLA’s web site for “literal commands or directives to immediate action.” *McCollum v. Columbia Broadcasting Sys., Inc.*, 202 Cal.App.3d 989, 1002 (1988). See *Yakubowicz v. Paramount Pictures*, 404 Mass. 624, 631, 536 N.E.2d 1067, 1071 (1989) (film did not exhort, entreat, solicit or overtly advocate unlawful activity); *Byers v. Edmondson*, 826 So.2d 551, 556 (La. Ct. App. 2002) (same). Moreover, as a practical matter, hundreds, perhaps even thousands, of other people have read these materials, but there is no suggestion that they have been similarly affected. This alone suggests it is unreasonable to infer that the NAMBLA publications, *per se*, were so effective that they were “likely” to incite

¹⁵ Hess involved an individual who was convicted of disorderly conduct for declaring “We’ll take the fucking street later,” after the police had cleared a demonstration. 414 U.S. at 107.

murderous violence in readers.¹⁶ Indeed, it bears repeating here that the complaint contains no explanation of how NAMBLA’s alleged advocacy of the “illegal rape” of male children corresponds to the torture, murder and mutilation of Jeffrey Curley.

This view is supported by the decisions of numerous courts in Massachusetts and elsewhere that have refused to hold authors, publishers, filmmakers and musicians liable for the injuries inflicted by their readers, viewers or listeners who have imitated conduct that has been portrayed in a particular work. *See, e.g., McCollum v. CBS, Inc.*, 249 Cal.Rptr. 187 (Cal.Ct.App. 1988) (teenager committed suicide after listening to recordings of Ozzy Osbourne); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (imitation of simulated hanging demonstrated by professional stunt man on “The Tonight Show”); *Yakubowicz v. Paramount Pictures*, 536 N.E.2d 1067 (1989) (murder after seeing portrayal of urban violence in the film “The Warriors”); *Olivia N. v. National Broadcasting Co.*, 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982) (“artificial rape” with a soft-drink bottle allegedly inspired by a similar scene in the TV movie “Born Innocent”); *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (accidental death by hanging inspired by article on “autoerotic asphyxiation”); *see also Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981); *Byers v. Edmondson*, 826 So.2d 551 (La. Ct. App. 2002) (dismissing suit against producer of film “Natural Born Killers”); *Pahler v. Slayer*, 2001 WL 1736476, 4 (Cal. Sup. Ct. 2001) (lyrics glorifying violence against women did not amount to

¹⁶ The fact that there may be an idiosyncratic response by a single reader of a work does not create liability on the part of its publisher. *Davidson v. Time Warner, Inc.*, 25 Media L.Rep. 1705, 1997 U.S. Dist LEXIS 21559, 1997 WL 405907 (S.D.Tex. 1997); *see also Watters v. TSR*, 904 F.2d 378, 381 (6th Cir. 1990). In any audience of significant size, there will be people who are mentally disturbed, insane, paranoid, highly susceptible to suggestion, violent, or unstable.

aiding and abetting the murderer-torturers of young girl). Nor is there liability for behavior that was changed or dangerously affected by seeing or hearing the challenged material. *See, Davidson v. Time Warner, Inc.*, 25 Media L.Rep. 1705, 1997 U.S.Dist LEXIS 21559, 1997 WL 405907 (S.D.Tex. 1997)(shooting of police officer attributed to rap recording “Cop Killer”); *Watters v. TSR, Inc.*, 715 F.Supp. 819 (1989), *aff’d on other grounds*, 904 F.2d 378 (6th Cir. 1990)(suicide attributed to obsession with “Dungeons and Dragons” game); *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla 1979)(fifteen year old murderer addicted and desensitized to violence by network television shows).

Even when violence has followed closely upon viewing a film, the courts have been unwilling to impose liability. *Yakubowicz v. Paramount Pictures, supra*; *Bill v. Superior Court of San Francisco*, 137 CalApp.3d 1002, 1187 Cal.Rptr. 625 (Cal.Ct.App. 1982); *Phillips v. Syufy Enterprises*, 20 Media L. Rep. 1199 (Cal.Super.Ct. 1992).¹⁷

¹⁷ Not only are the defendants’ actions (serving at various times on steering committee of organization that sent publications to Jaynes) protected by the First Amendment, they also cannot be shown to be the proximate cause of the death of Jeffrey Curley. *Jacob v. Curt*, 898 F.2d 838, 839 (1st Cir. 1990) (chain of causation does not readily extend from the reader of a publication to its author). Indeed, even where there may be a contributing act, the “passage of time can certainly reduce the legal significance” of it. *Rodriguez-Cirilo v. Garcia*, 115 F.3d 50, 52-53 (1st Cir. 1997) (remoteness in time of the harm precludes finding of proximate causation), *citing Martinez v. California*, 444 U.S. 277, 285 (1980) (murder committed by parolee five months after release “too remote” to establish liability based on alleged negligence). The death of Jeffrey Curley occurred more than a year after Jaynes ceased being a member of NAMBLA and there is no evidence that he received any additional mailings from the organization other than requests that he renew his membership.

While proximate cause is frequently treated as a factual matter for a jury, the lack of proximate cause can be the basis for summary judgment where there is no genuine dispute of material fact. *Girardi v. Gabriel*, 38 Mass. App. Ct., 553, 558-560, 649 N.E.2d 805, 808-809 (1995) (“mere possibility” and “conjectures” insufficient to avoid summary judgment for lack of proximate cause). *Cf. Kent v. Commonwealth*, 437 Mass. 312, 320-321, 771 N.E.2d 770, 776-77 (2002) (proximate cause decided as matter of law on motion to dismiss).

In denying the defendants' Rule 12(b)(6) motion, the court relied on *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), and *Rice v. The Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), for the proposition that speech which counsels and procures criminal conduct is not protected by the First Amendment, notwithstanding the absence of the immediacy required by *Brandenburg*. This line of cases is factually and legally distinguishable from this case and should not control the outcome here.

First, unlike the claims of the plaintiffs, these cases involve specific and detailed instructions which were intended to assist others in the violation of the law. This level of detail is significant because, as the court noted in *Rice*:

it is alleged, and a jury could reasonably find, that Paladin aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder.

Second, where the plaintiffs in *Rice* could show a point by point correlation between the article published by Paladin Press and the actual murder, the present case is notable for the lack of any specific correlation between material published by NAMBLA and the torture, mutilation and murder of Jeffrey Curley. The plaintiffs have identified no statements by NAMBLA which counsel, urge or even suggest such acts. Indeed, even with respect to the allegation of the advocacy of rape, the only discernible reference in the NAMBLA materials to such conduct is the express disapproval of non-consensual activities.

Third, the *NAMBLA Bulletin* is different from the publications at issue in *Rice*, *Barnett*

and *Schiff* in that those publications had no content other than their instruction in criminal activity. Thus, in *Rice*, the court observed that *Hit Man* expressed “no ideas, no argument, no information about politics, religion, science, art or culture.” The same cannot be said of the materials distributed by NAMBLA through its publications and web site. Even a cursory review of the NAMBLA web site, for example, reveals a seriousness in the treatment of the subject of sex and sexuality that is not found in the publication at issue in *Rice*.

Finally, as the court was careful to note, the defendant in *Rice* had stipulated that it intended to attract and assist criminals who desire information and instructions on how to commit crimes, that it intended and had knowledge that the article would be used on receipt by criminals to plan and commit murder and that it in fact assisted in the perpetration of the murders which were the subject of the suit.¹⁸ Nothing in NAMBLA’s publications would support such a conclusion here.

Apart from these pronounced factual differences between the two cases, it must also be noted that the reasoning in *Rice* and its analysis of the applicability of *Brandenburg* turn on factors which are simply not present in this case. In light of the stipulations by the defendants and the fact that the plaintiffs in *Rice* had brought suit under a Maryland statute which provided a civil cause of action for aiding and abetting a criminal offense, the court in *Rice* concluded that the publication of the book was not speech but the act of successfully assisting others in the

¹⁸ The Fourth Circuit, in *dicta*, indicated that it might have reached the same result, even in the absence of this extraordinary stipulation, in light of the stated purpose of the book, its singular promotion of murder and a marketing strategy aimed directly and primarily at murderers and would-be criminals. 128 F.3d at 252-254. The plaintiffs here, however, have made no such allegations, and the materials on which their claims must ultimately rest would not support such a conclusion in any event.

commission of crime rather than speech.

CONCLUSION

The evidence is clear that Charles Jaynes had no contact with NAMBLA or the defendants in this action other than his basic membership in the organization and the likelihood that he may have read various publications which were sent to him. There is nothing in those materials which even remotely could form the basis for liability. Plaintiffs cannot recover on the basis of the dubious proposition that NAMBLA's publications caused Charles Jaynes to become "obsessed" because plaintiffs have effectively waived this claim, because this has not and cannot be shown and because it would be fundamentally in opposition to the guarantees of the First Amendment.

The constitutional objections to this type of claim were eloquently stated in Judge Easterbrook's comments on the First Amendment in *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323, 327-328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), and we will not attempt to improve on them:

Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious – the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

Summary judgment should be granted for all defendants on all claims.

Respectfully submitted,

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