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The Catalyst to Harm Standard: punishing speech that facilitates harm

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THE CATALYST TO HARM STANDARD: PUNISHING SPEECH THAT FACILITATES HARM

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ABSTRACT

The Catalyst to Harm Standard is a specific standard that sets forth specific criteria for the courts to follow so that they can factually determine if the speech in question falls into the category of protected or unprotected speech. This Standard labels certain speech as "bad" not because of its ideological or social content, but because it is speech that is linked to a definitive social harm that the legislature has the constitutional authority to prevent or punish. This Standard uses three criteria to determine the liability of speech that has allegedly caused harm. In order to meet these requirements, the plaintiff must establish the harm that actually resulted, establish the intent of the speaker, and establish a causal connection between the speech and the harm that occurred.

While my Thesis is not the first research done on the topic of limiting harmful speech, it is the first research paper to develop generic, step-by-step criteria by which courts can legally punish speech that has caused harm. The Catalyst to Harm Standard does not require *Brandenburg*'s notion of imminence because there is no need for the "imminence" requirement when punishing speech that has already resulted in harm. Instead, to impose liability, this standard focuses on other factors such as harm, intent, and causal connection.

The purpose of the Catalyst to Harm Standard is not to impose an unconstitutional prior restraint on speech. Instead, this Standard only applies to speech that has facilitated and resulted in harm. In adhering to the marketplace doctrine, this Standard is a punishment only for certain speech that is too instrumental and intertwined with the performance of criminal activity to retain First Amendment protection.

CHAPTER 1

FREEDOM OF EXPRESSION v. PROHIBITED SPEECH

The greatest achievement of the First Amendment is that it liberates speech to do its work—to facilitate thought, communication, and choice not only in politics but also in economic, social and religious arenas as well.[1] Free speech fosters creativity and dynamism in what Justice Holmes called "the competition of the market" and Justice Brennan later termed "the marketplace of ideas."[2] According to Oliver Wendell Holmes, "the primary goal of the First Amendment is to guarantee a 'marketplace of ideas,' where truth and honest debate emerge from a multiplicity of votes."[3]

Under the marketplace doctrine, the First Amendment protects democracy by promoting public discussion of competing ideas.[4] Courts recognize the value of a free interchange of ideas and maintain it by preventing the government from interfering with the development and expansion of the marketplace.[5] While the First Amendment establishes that any law regulating speech is presumptively invalid,[6] the Supreme Court of the United States has decided that certain forms of speech may not be protected under the Constitution.[7] People have the freedom to say

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[1] O. Lee Reed. *The State is Strong but I Am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence.* 38 Am. Bus. L.J. 177 (2000).
[2] Id. Reed quoting Holmes' dissenting opinion in *Abrams v. U.S.* 250 U.S. 616, 630 (1920) and Brennan in *Lamont v. Postmaster Gen.* 381 U.S. 301, 308 (1965).
[3] *Abrams v. U.S.* 250 U.S. 616, 630 (1919).
[4] John Rothchild. *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens.* 8 Tex. J. Women & L. 207 (1999).
[5] Debra M. Keiser. *Regulating the Internet: A Critique of Reno v. ACLU.* 62 Alb. L. Rev. 769 (1998). In her article, she quotes Holmes from the *Abrams* opinion.
[6] "Congress shall make no law … abridging the freedom of speech …" citing the First Amendment to the Constitution of the United States.
[7] See, e.g. *Gitlow v NY* 268 U.S. 652, 666-667 (1925): Here, the Court held that individual states have the authority to prohibit speech and publication if the state feels as though the speech or publication in question

and think whatever they want, but when those thoughts and words turn into kicks and punches, courts have held speakers responsible for their actions. The power to speak also includes the responsibility to avoid unreasonable harm.[8] Speech that results in harm must be balanced against First Amendment interests, which has resulted in a very limited number of unprotected categories of speech. However, with the advent of the Internet, so-called pedophilic speech—speech that glorifies or encourages pedophilia—has raised concerns that this form of speech contains a degree of toxicity that might justify a more intrusive form of government regulation than other forms of controversial speech. This thesis examines how constitutional and tort law doctrines might intersect to provide a legal remedy to those who are injured by such speech.

STATEMENT OF THE PROBLEM

The freedom of speech is not absolute.[9] Certain forms of speech, such as core political speech and religious expression, are entitled to the strongest level of constitutional protection. Other categories of speech do not enjoy constitutional protection because of the harm caused by the speech. [10] However, the First Amendment does not allow the government to engage in viewpoint discrimination when suppressing otherwise prohibited forms of speech.[11] The First Amendment imposes this limitation on the government's power to suppress speech in order to adhere to the "marketplace of ideas" principle that counterspeech is preferable to censorship. According to this rationale, if speech is not likely to result in unlawful conduct right away—in other words, if there is time for counterspeech—then there is no basis for restricting the speaker's freedom to voice his views.[12]

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has the potential to result in actions that pose a threat to public security, even though such utterances create no clear and present danger. See also *Dennis v. U.S.* 341 U.S. 494 (1919), and *Yates v. U.S.* 354 U.S. 298 (1957); where the Court drew a distinction between the advocacy and teaching of an abstract principle and the advocacy and teaching of concrete action. Consequently, the Court ruled that language of incitement to action is not constitutionally protected.

[8] Stephen C. Jacques. *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas.* 46 Am. U .L. Rev. (1997) 1945,1949.

[9] S. Elizabeth Wiborn Malloy, Ronald J. Krotoszynski, Jr. *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*. 41 Wm. and Mary L. Rev. 1159 (2000).

[10] *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942). With this case, the Court ruled that some forms of expression such as obscenity and fighting words are not protected under the First Amendment.

[11] Malloy, Krotoszynski, Jr., supra note 9.

[12] Rothchild, supra note 4.

However, the Supreme Court has ruled that child pornography falls squarely into the category of unprotected speech.[13] The Court justifies its position by balancing safety against unrestricted speech, concluding that the right of unrestricted speech is outweighed by the substantial government interest in the safety of children.[14] Safeguarding the physical and psychological welfare of a minor is one of the government's highest priorities, and the Court has ruled that the welfare of children supercedes an individual's right to engage in the harmful practice of child pornography.[15]

Consequently, pedophilic speech—speech that constitutes the expression, advocacy, teaching, and exhortation of pedophilic ideas as a socially acceptable way of life— has received some protection under the Constitution.[16] In *New York v. Ferber* the Supreme Court recognized the government's interest in banning child pornography.[17] However, the judicial system has not gone so far as to constitutionally limit the dissemination of pedophilic ideas.[18] As a result, pedophiles and pedophile organizations may exist and operate under some protection from the First Amendment. The question is whether the government's interest in regulating child pornography, as recognized in *Ferber*, justifies a more intrusive governmental regulation of speech that promotes pedophilia and hence the production of child pornography itself.

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[13] *N.Y. v. Ferber* 458 U.S. 747, 773 (1982). With this case, the Court distinguished child pornography from regular obscenity. The Court gave 5 primary reasons why there should be greater leeway in criminalizing child pornography. First, "it is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological wellbeing of a minor' is 'compelling'"(at 756). Second, "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children…" (at 759). Third, "the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, and activity illegal throughout the Nation" (at 761). Fourth, "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis" (at 762). Fifth, "recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions" (at 763).

[14] Keiser, supra note 5; see also Jacques, supra note 8

[15] *Ferber* at 773.

[16] *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002). With this case, the Court invalidated the Child Pornography Prevention Act (CPPA), which attempted to restrict virtual child pornography. This Act restricted computer-generated images that are or appear to be minors engaging in sexually explicit conduct. The CPPA's drafters said that virtual porn feeds the motivations of the pedophile, rendering him more dangerous. However, the Court held that the CPPA was unconstitutional because because it was regulating the speech based on its content. (2002). See also *Reno v. ACLU* 521 U.S. 844 (1997): Here, the Court held that the 1996 Communications Decency Act violated the First Amendment because its regulations involving obscenity, indecency, and child pornography amounted to a content-based blanket restriction of free speech.

[17] *Ferber*, at 773.

[18] See e.g. *Free Speech Coalition*, 535 U.S. 234; *ACLU* 521 U.S. 844.

Differentiating between protected and prohibited speech is a complicated task; therefore, the intent of this research is not to impose an unconstitutional prior restraint on pedophilic speech. According to the marketplace doctrine, society will determine the legitimacy of pedophilic speech. Instead, this research is designed to create a specific standard to determine if advocacy that facilitates harm is punishable under the First Amendment.

This Thesis will study the questionable nature of pedophilic advocacy to determine when such speech is allowable and when it is illegal. With cases like *Gitlow* and *Brandenburg*, the Court established that certain speech is punishable, even though the law requires that the speech only can be punished after a physical crime has taken place.

RESEARCH QUESTIONS

As this study will point out, lawmakers have tried on more than one occasion to limit the free speech rights of pedophiles, but proposed laws attempting to regulate this speech has been struck down by the Supreme Court as unconstitutional content-based restrictions on free speech. However, the Court has ruled that certain speech—for instance, speech that creates or incites harmful action—is not protected under the First Amendment.[19] The research questions, then, are: (1) does pedophilic speech lose its protection under the Constitution once that speech moves beyond mere advocacy and actually facilitates harm; and (2) is there a constitutionally sound method of making pedophile organizations liable for the harm that arises because of their speech?

THE JEFFREY CURLEY CASE

These questions are implicated in a recent case of first impression, *Barbara and Robert Curley v. The North American Man/Boy Love Association, et al.*[20] The North American Man-Boy Love

[19] See e.g. *Gitlow* 268 U.S. 652, and *Dennis* 341 U.S. 494, supra note 7. Also see *Brandenburg v. Ohio* 395 U.S. 444 (1969).
[20] *Barbara and Robert Curley v. The North American Man/Boy Love Association*, *et al* District Court of Massachusetts; Docket No. 00CV10956 GA09 (2000).

Association (NAMBLA) is a pedophile organization that advocates the legalization of sex between men and young boys.[21] NAMBLA was formed in 1978 and calls for the sexual liberation and empowerment of youth.[22] The group produces a substantial amount of literature on the subject, supporting the abolition of age-consent laws, the release of convicted pedophiles from prison, and the legalization of child pornography. The organization also publishes the NAMBLA Bulletin, a publication containing various articles and letters chronicling the man/boy sexual experiences of its various members as well as pictures of "cute boys." NAMBLA also distributes questionable publications like "The Survival Manual: The Man's Guide to Staying Safe in Man/Boy Relationships," and "Rape and Escape," which has been criticized for promoting the rape of young male children. The NAMBLA website supports the idea of children "learning intimacy from an experienced adult," as well as "ending the oppression of men and boys in mutually consensual relationships."[23] The organization claims that prohibiting man-boy sex is "sexual prejudice and oppression."[24] This organziation also argues that pederasty—sexual relations between an adult male and a male child—is a freedom issue.[25]

NAMBLA is not alone in its advocacy of pedophilic issues. Several pedophile organizations publicly advocate having sex with children, and they even petition for society to recognize pedophilia as being no different than heterosexuality or homosexuality. The Pedophile Liberation Front, for example, believes that pedophilic sexuality is better than "normal" sexuality because pedophiles are "more caring and more focused on feelings than non-pedophilic

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[21] Julie Foster, "Kids, sex, the Internet," (2000) available at http://www.worldnetdaily.com/news.asp?ARTICLE_ID=17905. According to her article, NAMBLA distributes a quarterly publication called the NAMBLA Bulletin, which contains various articles and letters chronicling the man/boy sexual experiences of its various members. One statement from the bulletin says, "call it love, call it lust, call it whatever you want. We desire sex with boys and boys, whether society is willing to admit it, desire sex with us."

[22] Id. The NAMBLA Constitution and Position Papers state that "…children especially, and all people in general, must be empowered to have control over all aspects of their lives, so far as the exercise of that control does not infringe on the rights of others. Children in our society are presently denied that control and are treated in the law and in fact as virtually the property of their parents and wards of the state, to be used as their parents and the state wish."

[23] This information is found on NAMBLA's website, http://www.nambla.de. The NAMBLA Bulletin includes articles and letters defending and reporting the sexual experiences of NAMBLA members, as well as "nice collection[s] of photos of cute boys (practically on every page)." One article published in the NAMBLA Bulletin criticized "contemporary sexual morality," and the article went on to condone sexual relationships between teachers and students, noting how they were seen in a positive light in ancient Greek culture. Art Moore, "Amazon sells 'deadly' pedophile magazine—NAMBLA Bulletin name in suit involving rape and murder of boy," (2003) available at http://www.WorldNetDaily.com/news.asp?ARTICLE_ID=34694.

[24] Id.

sexuality."[26] The Rene Guyon Society supports the sexual liberation of consenting children over four years of age. The group's motto is "Sex by year eight or else it's too late."[27]

A tragic incident in Massachusetts helped illuminate the potential problems associated with protecting pedophilic speech. Three years ago, a lawsuit was filed in U.S. District Court by the family of a 10-year-old boy named Jeffrey Curley. Curley was abducted and killed by two men—25-year-old Charles Jaynes and 24-year-old homosexual lover[28] Salvatore Sicari. According to police, Jaynes reportedly viewed NAMBLA's website shortly before attempting to molest and murder Jeffrey Curley. At two separate trials, prosecutors said Jaynes had NAMBLA publications in his possession, and that Jayne and Sicari were sexually obsessed with Curley, and that the two men reportedly lured the boy from his neighborhood by promising him a new bike. The two men then allegedly pounced and smothered Curley with a gasoline-soaked rag when he resisted their sexual advances. Jaynes and Sicari then stuffed him into a concrete-filled container and dumped it into a Maine river.

According to police, Charles Jaynes joined NAMBLA in the fall of 1996. According to the evidence presented in the criminal case, Charles Jaynes received and read the NAMBLA Bulletin (a publication containing various articles and letters chronicling the man/boy sexual experiences of its various members as well as pictures of "cute boys"), accessed and read the NAMBLA website and began to collect child pornography and various pedophilic materials. The NAMBLA Bulletin was mentioned in Jaynes' diary, which was discovered by police after Jeffery Curley's murder. Finding NAMBLA, Jaynes wrote, "was a turning point in discovering myself. NAMBLA's Bulletin helped me to become aware of my own sexuality and acceptance of it."[29]

Curley's parents claimed NAMBLA and its pedophilic publications facilitated their son's murder, but NAMBLA contends that it denies encouraging coercion, rape, or violence. The plaintiffs claimed that as a direct and proximate result of the urging, advocacy, conspiring and

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[25] This information is presented in various links at the organization's website, www.nambla.de
[26] Michael Sheetz. *Cyberpredators: Police Internet Investigations Under the Florida Statute 847.0135*. 54 U. Miami L.Rev. 405, 417-18 (2000).
[27] Chad. R. Fears. *Shifting the Paradigm in Child Pornography Criminalization: United States v. Maxwell.* BYU L. Rev. 835, 836 (1998).
[28] Art Moore, "Amazon sells 'deadly' pedophile magazine—NAMBLA Bulletin named in suit involving rape and murder of boy," (2003) available at http://www.worldnetdaily.com/news.asp?ARTICLE_ID=34694.
[29] Id.

promoting of pedophile activity by NAMBLA, Charles Jaynes became obsessed with having sex with and raping young male children. Also, as a direct and proximate result of the urging, advocacy and promoting of pedophile activity by NAMBLA, Charles Jaynes stalked 10-year-old Jeffrey Curley and eventually abducted, tortured, murdered and mutilated Jeffrey Curley's body on or about October 1, 1997.[30] The lawsuit alleges that after Jaynes joined NAMBLA in 1996, he "became obsessed with having sex with and raping young male children," and "as a result of reading NAMBLA's quarterly bulletin, he came to cope with his feelings and his desires, and then he came to realize it's OK to rape little boys, and that's what he went and did."[31] According to testimony in the criminal trial, Charles Jaynes accessed NAMBLA's website at the Boston Public Library prior to murdering Jeffrey Curley to gain psychological comfort for his actions.[32] Jaynes was convicted of second-degree murder and is able to receive parole in 23 years. Sicari was convicted of first-degree murder and is serving a life sentence without the possibility of parole.

A Massachusetts superior court judge awarded the Curleys $328 million in a civil suit against NAMBLA, but the organization has appealed and their liability in this case is currently being contested. In their official complaint against NAMBLA, the Curleys contended that NAMBLA is an organization that falsely alleges it is non-profit in nature as defined by the Internal Revenue Code of the United States of America. The plaintiffs also contend that the organization exists for the purpose of changing society's attitudes about man-boy love through publications, educational and political activities, and membership conferences. Although NAMBLA contends that it is a lawful non-profit organization working to change society's attitudes on pedophile activity, the plaintiffs claim NAMBLA is not a recognized non-profit organization by the United States of America or any state in the United States. However, acting as an overt pedophile organization, NAMBLA provides resources to pedophiles seeking information about sexual relationships between boys. Its mission statement says the group "supports the rights of all people to engage in consensual relations, and we oppose laws which destroy loving relationships merely on the age of the participants." The NAMBLA Constitution and Position Papers stat that "…children especially, and all people in general, must be

[30] *Barbara and Robert Curley v. The North American Man-Boy Love Association, et al.* District Court of Massachusetts; Docket No. 00CV10956 GAO9 (2000).
[31] Moore, supra note 1.

empowered to have control over all aspects of their lives, so far as the exercise of that control does not infringe on the rights of others. Children in our society are presently denied that control and are treated in the law and in fact as virtually the property of their parents and wards of the state, to be used as their parents and the state wish."[33]

The organization publishes a quarterly bulletin, which it distributes throughout the United States and Europe and maintains a website on the Internet at www.nambla.org (changed to www.nambla.de), while it also attempts to associate itself with the Gays Rights Organizations in the United States to justify its advocacy of men having sex with male children.[34] The organization regularly distributes a publication called the NAMBLA Bulletin, which contains various articles and letters chronicling the man/boy sexual experiences of its various members. One statement from the bulletin, as printed in the lawsuit, says, "call it love, call it lust, call it whatever you want. We desire sex with boys and boys, whether society is willing to admit it, desire sex with us."[35] The NAMBLA Bulletin, which includes articles and letters defending and reporting the sexual experiences of NAMBLA members, as well as "nice collection[s] of photos of cute boys (practically on every page).[36] One article published in the NAMBLA Bulletin criticized "contemporary sexual morality." The article condoned sexual relationships between teachers and students, noting how they were seen in a positive light in ancient Greek culture.[37]

Public libraries have been identified by the plaintiffs as places for NAMBLA members to meet or visit. The plaintiffs contend that NAMBLA members travel to Thailand to have sex with young males. The plaintiffs go on to contend that NAMBLA also serves as a conduit for an underground network of pedophiles in the United States who use their NAMBLA association,

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[32] Julie Foster, "ACLU defends child-molester group," (2000) available at http://www.worldnetdaily.com/news.asp?ARTICLE_ID=18029.
[33] Julie Foster, "Kids, sex, the Internet," (2000) available at http://www.worldnetdaily.com/news.asp?ARTICLE_ID=17905.
[34] www.nambla.de
[35] Moore, supra note 1.
[36] The statement, "a nice collection of photos of cute boys (practically on every page)," was excerpted from NAMBLA Bulletin No. 184. The other information is presented on various links at the organization's website, www.nambla.de. For a profit on or about October 11, 1996, Defendant John Doe was the Internet service provider to NABMLA and—according to prosecutors—intentionally, negligently, recklessly, and carelessly provided technical support to NAMBLA to create and maintain the NAMBLA website. John Doe Inc. at all times provides the international website communications systems for pedophiles in North America under the name of NAMBLA which intentionally promotes child pornography and pedophilic activity, according to the Curley's complaint. The Plaintiffs allege that John Doe Inc. allows NAMBLA to "reach more people and provide a more scattered target for" law enforcement officials.
[37] Moore, supra note 1.

contacts, and the Internet website to obtain child pornography and promote pedophile activity. The organization maintains two mailing addresses in the United States,[38] and NAMBLA's voice mail system is established for the purpose of providing communication to and between it's members and to impede law enforcement investigation of it's members' activities.

In their case against NAMBLA, the parents of Jeffrey Curley allege that hundreds of pages of NAMBLA publications were found in the possession of the murderers, who, according to police, accessed NAMBLA's website at the Boston Public Library just before endeavoring to abduct, molest, mutilate, and murder Jeffrey Curley. Introduced into evidence in the criminal trial of Jaynes was a NAMBLA publication found in Jaynes' vehicle titled "The Survival Manual: The Man's Guide to Staying Safe in Man/Boy Sexual Relationships." In addition to "The Survival Manual," police also found in Jaynes' possession a manual published by NAMBLA called "Rape and Escape," which was described by the plaintiffs as an explicit guide to luring children and then avoiding prosecution.[39] In their wrongful death lawsuit against NAMBLA, the plaintiffs claim that portions of NAMBLA's web-based and print publications "promoted, advocated, conspired, and urged the general public to rape young male children and provide information to assist the general public in obtaining child pornography and pedophile-related material."[40]

In response to the superior court's decision, NAMBLA filed a motion to dismiss the Curley's complaint for a failure to state a claim upon which relief can be granted. This motion is still pending before the United States District Court for the District of Massachusetts. The defendants contested that NAMBLA materials constitute advocacy of this kind, instead claiming that these material condemn sex abuse and coercive sexual relations.

Furthermore, the defendants maintained that although NAMBLA opposes age-of-consent laws and provides pornographic material, NAMBLA does not urge, advocate, or condone raping young male children. The defendants alternatively contend that even if such

[38] One location is a mail box location at 537 Jones Street, P.O. Box 8418, San Francisco, California 94102. This mailing address is maintained by Defendant Schoen. NAMBLA's second mailing address is P.O. Box 174, Midtown Station, New York, New York 10018. This mailing address is maintained by Defendant Radow from his residence at 17520 Wexford Terrace, Jamaica, New York 11432. NAMBLA maintains two voice mail telephone numbers—one telephone number is 415-281-0767 and is located in San Francisco, California; the second telephone number is 212-631-1194 and is located in New York, New York.

[39] Moore, supra note 1.

[40] *Barbara and Robert Curley v. NAMBLA*, supra note 3.

advocacy can be perceived from these Internet and print materials, the plaintiff's action is nonetheless barred by the First Amendment under *Brandenburg v. Ohio*. First, they claim that because the plaintiffs do not allege that the so-called advocacy was directed to any particular person, but rather to the public at large, the speech cannot be "directed to inciting or producing imminent lawless action." The defendants argue that aiming speech to a particular individual is necessary in order to constitute advocacy. Second, the defendants argue that any conduct arguably advocated by the defendants' publications was not imminent. In other words, Jeffrey Curley's death was not the likely result of the defendants' publications.

The American Civil Liberties Union, which is serving as NAMBLA's defense, calls the charges against NAMBLA "unconstitutional," claiming the organization is being sued simply because of its ideas. "What they don't like is what NAMBLA stands for," said an ACLU legal director. "They don't like their ideas or the notion that someone else would have accepted them," he told the Boston Globe.[41]

According to the ACLU, the newsletters and other NAMBLA materials in Jaynes' possession, which contain "photographs of boys of various ages and nude drawings of boys," are protected speech under the Constitution. According to the defense, the material does not "urge, promote, advocate or even condone torture, mutilation, or murder." The ACLU has filed a motion to dismiss the case: "Examination of the materials that have been identified by the plaintiffs will show that they simply do not advocate violation of the law," the dismissal motion states. "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."[42]

THE EVOLUTION OF FREE SPEECH

Courts have been reluctant to punish organizations—particularly media outlets—for harm to third parties. In those rare instances when media outlets have been liable for content, the court has focused on one or more of the following three issues: incitement (unlawful speech that

[41] Moore, supra note 1.
[15] Id.

results in immediate harmful activity), foreseeablity (speech that has the potential for harm), and speech (the constitutionally-protected right to voice opinions and ideas).

In *Schenck v. U.S.*[43], the Court determined that speech may not be regulated unless it poses a clear and present danger to society.[44] In *Schenck*, the defendant mailed circulars during World War I to draftees suggesting the draft was abhorrently wrong because it was motivated by the capitalist system. The circulars encouraged draftees not to submit to intimidation and advised peaceful petitioning to show their dissidence. Schenck was charged with violating the Espionage Act for his attempts to cause insubordination in the military and to obstruct recruitment.[45] Schenck claimed that his activity was protected under the first amendment; he was simply advocating a political position. The Supreme Court disagreed, finding that Schenck was not protected because of the nature of the circumstances surrounding his acts. During wartime, utterances tolerable in peacetime may be punished. Finding that Schenck's activities posed a clear and present danger to society, the court upheld Schenck's conviction: "It is a question of proximity and degree…If the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime." [46] The decision in *Schenck* laid the foundation for future constitutional protections for speech.

Six years later, the Court revisited the free speech issue and appeared to retreat from the clear and present danger standard. In *Gitlow v. New York*[47], the Supreme Court ruled that a state government can forbid speech and publication if the speech in question has a tendency to result in action dangerous to public security, even though these utterances create no clear and present danger. In this instance, Gitlow—a socialist—was arrested for handing out copies of a left-wing manifesto that called for the establishment of socialism through strikes and class action of any form. Gitlow was subsequently convicted of violating New York's criminal anarchy law, which punished advocating the overthrow of the government by force. Significantly, the Court held

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[43] *Schenck v. U.S.* 249 U.S. 47 (1919)
[44] Id. at 48: "Words of which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done."
[45] Id.
[46] Id**.** at 52:
[18] *Gitlow*, 268 U.S. 652, supra note 7.

that the First Amendment (through the Fourteenth Amendment) does apply to the states. A state may forbid both speech and publication if they have a tendency to result in dangerous actions that threaten public security. According to the Court, individual states have the authority to punish certain unreasonable speech even if that speech creates no danger whatsoever. *Gitlow* also illustrates the Court's willingness to deny constitutional protection for speech that urges people to act in an inherently dangerous manner, even statements that are not directed to a specific person or group of people.[48]

In *Near v. Minnesota*[49], the Court relied upon the *Gitlow* extension of the First Amendment free speech rights to states to determine that the protection of speech against prior restraint was at the heart of the First Amendment. The Court's rationale revolves around the fact that Jay Near published a "scandal sheet" in which he attacked local Minneapolis officials. Near charged that certain members of the government had gangster associations. Minneapolis state law laid forth that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd, and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical was guilty of a nuisance, and could be prohibited from committing or maintaining the nuisance. Therefore, officials obtained an injunction to stop Near from publishing his newspaper. The case made its way to the U.S. Supreme Court, and the Court held the Minnesota government's actions to be constitutionally invalid. With this decision, the Court established as a constitutional principle the notion that, with a few narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a criminal or other proceeding.

Subsequent cases such as *Dennis v. U.S.*[50] forced the Court to realize the idea of incitement is not a simple as cause and effect. As the Court noted in *Dennis*, the probability of success is not a determining factor in the restriction of speech. In this case, the leaders of the Communist Party of America were arrested and charged with violating certain aspects of the Smith Act, which made it unlawful to knowingly conspire to teach and advocate the overthrow or destruction of the U.S. government. The Supreme Court found that the Smith Act did not

[48] Id. at 666: "It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose…This [Manifesto]…is [in] the language of direct incitement…"
[49] *Near v. Minnesota*, 283 U.S. 697 (1931).
[50] *Dennis*, 341 U.S. 494, supra note 7.

inherently violate the First Amendment; therefore, the Court upheld the convictions. With its decision, the Court held that there is a distinct difference between the mere teaching of communist philosophies and active advocacy, which constituted a clear and present danger that threatened the government. Therefore, *Dennis* provided an added component to the notion of incitement—speech without action—and raised an interesting question: Can speech that does not result in action be restricted? In the Court's opinion, the answer is "Yes." The Court held a distinction between mere teaching and advocacy, citing advocating speech as more possessing the potential for more dire consequences.[51] Through these cases of *Brandenburg, Schenck,* and *Dennis,* the Court set forth the notion of labeling inciting speech as unprotected speech.

These cases exemplify the court system's aggressive defense of highly-valued political commentary. However, there exist rare legal exceptions that allow courts the power to limit certain low-value speech such as harmful speech. This notion of punishing speech that can incite harm is grounded securely in the Supreme Court's ruling in *Brandenburg v. Ohio*[52]. In this case, the Supreme Court ruled speech that incites immediate lawless action is unprotected and therefore punishable. This ruling came about because Brandenburg, a Ku Klux Klan leader, made a threatening speech at a Klan rally. Because of the existence of an Ohio criminal sydicalism law, Brandenburg was convicted of advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal sydicalism." The Court ruled the Ohio law to be unconstitutional because it violated Brandenburg's free speech rights. With its ruling, the Court developed an incitement test that breaks down into the following elements: (1) Advocacy that is directed to incite or produce; (2) imminent lawless conduct; (3) and the likelihood that such action will result.[53] The Supreme Court's notion of incitement is the proposed starting point in forming an analysis for potentially unprotected speech, such as the speech of pedophiles.

In the wake of *Brandenburg,* the federal judiciary has placed an increasingly high value on freedom of expression and its significance to the cultivation of the marketplace of ideas, as

[51] Id. at 510-511.
[52] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
[53] Id. at 447

exemplified in the Supreme Court's 1978 decision in *Landmark Communications, Inc. v. Virginia.*[54] According to the Court's decision in *Landmark*, the major purpose of the First Amendment is to protect free discussion, specifically in regards to holding government and public officials up to scrutiny through the media. Before this ruling, a Virginia statute made it a crime to divulge information regarding proceedings before a state judicial review commission that is authorized to hear complaints about judges' disability or misconduct. The appellant publisher printed in its newspaper an article accurately reporting on a pending inquiry by the commission and identifying the judge whose conduct was being investigated. Consequently, the publisher was convicted of violating the state statute. The Virginia Supreme Court upheld this conviction. However, according to the U.S. Supreme Court, injury to the reputation of judges or the institutional reputation of courts is not sufficient to justify repressing speech that would otherwise be free. Therefore, the clear and present danger principle does not apply in situations like this because a media report or critique of the judgment of public officials, such as out-of-court comments on pending cases or grand jury investigations, does not hamper the administration of justice.

APPLICATION OF THE FIRST AMENDMENT TO PERSONAL INJURY (TORT) LAW

The previously cited cases all involved the Court's review of a state actors' infringement of constitutionally protected speech. The phrase "Congress shall make no laws…" traditionally implied that the Constitution could only be implicated when Congress (or a state, following the incorporation of the Fourteenth Amendment) acted to quash speech. In *New York Times v. Sullivan*,[55] however, the Court applied constitutional scrutiny to a civil lawsuit between private parties. *Sullivan* involved a full-page advertisement in the *New York* Times which alleged that the arrest of civil rights leaders in Alabama was part of a concerted effort by the state to discourage blacks from voting. Sullivan, the Montgomery city commissioner, filed a libel lawsuit against the paper and the endorsers of the ad, claiming the allegations defamed him personally. The Court held that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when the statements are made with actual malice or

[54] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).
[55] *New York Times v. Sullivan* 376 U.S. 254 (1964).

knowledge of falsity, or reckless disregard for the truth.[56] According to the Court, public officials must prove actual malice in order to recover for defamation. The requirement shields citizens from liability for criticizing government officials.

Sullivan marked one of the first times that the Constitution was used to protect a party in a civil action. The Court addressed the issue summarily in *Sullivan*, quickly dismissing the Alabama State Supreme Court's assertion that "the Fourteenth Amendment is directed against State action and not against private action" without citing a single case as precedent.[57] The Supreme Court found that Constitutional protections prevented a private party from using state law to silence another private party. The law in *Sullivan* was a civil statute, not a criminal provision. The Court noted that "the test is not the form which state power has been applied but, whatever the form, whether such power has in fact been exercised."[58] The prospect of a crippling award for damages can serve to silence speech more effectively than a misdemeanor criminal statute, according to the Court.[59] The Constitutional protection afforded to speech demands that courts guard against any device used to silence speech, including civil and criminal statutes. *Sullivan's* progeny strengthened the Court's resolve to protect speech from civil liability.

In the case of *Curtis Publishing Co. v. Butts,*[60] the Court decided to extend the rule in *NY Times v. Sullivan* to public figures. The shield allowing private citizens the right to criticize their elected officials was extended to criticism of "public figures." In *Gertz v. Welch,*[61] the Court clarified its definition of public figures, including people that "voluntarily thrust themselves into the public eye."[62] *Gertz* also required plaintiffs to show some level of fault, amounting to at least

[56] Id. at 279: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
[57] Id. at 265. According to the Court, "The Fourteenth Amendment is directed against State action and not private action," and is a proposition that has "no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not htat the law has been applied in a civil action and that it is common law only, though supplemented by statute."
[58] Id.
[59] Id. at 277: "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."
[60] *Curtis Publishing Co. v. Butts* 388 U.S. 130 (1967).
[61] *Gertz v. Welch* 418 U.S. 323 (1974).
[62] Id. at 339.

negligence, before recovering in defamation.[63] Speakers were granted more immunity from liability as the Court extended Constitutional protection to private individuals suing other private individuals. In a series of cases between 1967 and 1989, the Court repeatedly applied the Constitution to shield the media from liability to shield the media from liability for a variety of torts, including invasion of privacy. In *Time v. Hill*,[64] the Court held that the First Amendment protects the media from liability for false light invasion of privacy for portraying plaintiffs involved in matters of public interest. In *Cox Broadcasting Co. v. Cohn*,[65] the Court ruled that the First Amendment protects media outlets from state privacy laws that place an undue burden on the press. In *Florida Star v. BJF*,[66] the Court held that the Constitution protected a newspaper that printed personal information about a rape victim. Because the paper obtained the information lawfully, the Constitution protected the paper from liability. In *Hustler v. Fallwell*,[67] the Court held that the Constitution prevented public figures from recovering for liability for infliction of emotional distress unless the public figures could show actual malice. NAMBLA is using a similar argument to protect its speech. Because the Curleys are using a state law to punish NAMBLA's speech, the Constitution provides some protection for NAMBLA.

A number of cases support at least a part of NAMBLA's argument. Courts are loathe to restrict speech that does not possess a reasonable foreseeability to cause harm. In the case of *Olivia N. v. NBC*,[68] a California court held as constitutionally protected a television broadcast of the rape of a young girl. As evidence by this decision, the courts are extremely hesitant to apply the label of "unprotected" to any speech, broadcast, or publication that does not encourage or advocate any acts of violence and does not constitute an incitement to commit a crime. Most lawsuits of this nature involve claims that certain media companies are negligent in the production or distribution of a product that has caused someone to commit a violent act.

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[63] Id. at 347-48: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation."
[64] *Time v. Hill* 385 U.S. 374 (1964)
[65] *Cox Broadcasting Co. v. Cohn* 420 U.S. 469 (1975).
[66] *Florida Star v. BJF* 491 U.S. 524 (1989).
[67] *Hustler v. Falwell* 485 U.S. 46 (1988).
[68] *Olivia N. v. National Broadcasting Company, Inc.* 178 Cal.Rptr. 888 (1981).

Another similar case is *Zamora v. CBS*,[69] which saw the plaintiffs sue CBS, ABC, and NBC for negligently causing their son to become involuntarily addicted to television violence, which caused the son to murder their neighbor. Using the same rationale as the court's decision in *Olivia N*., the action in the *Zamora* case was dismissed on First Amendment grounds. Likewise, in *Walt Disney Productions v. Shannon*,[70] the Georgia Supreme Court applied the clear and present danger test from *Schenck* and affirmed a grant of summary judgment for Walt Disney after a child injured himself when reenacting a sound effect technique shown on Disney's *The Mickey Mouse Club.* Subsequent decisions in *DeFillippo v. NBC*[71] and *McCollum v. CBS*[72] follow the pattern of courts refusing to hold media outlets liable for ensuing violence. In *DeFillipo*, the court held as constitutionally protected a broadcast that resulted in the death of a young boy who was imitating a dangerous television stunt, and the *McCollum* court found the Ozzy Osbourne song "Suicide Solution," which exhorted suicide, as not actionable.

This First Amendment protection is not relegated to broadcasts—it also extends to publications. In *Herceg v. Hustler Magazine*,[73] a Fifth Circuit court held that publication of the description of techniques likely to cause harm is protected under the First Amendment as long as they serve an educational purpose. This case involved a 14-year-old boy who hung himself in the process of replicating the practice of "auto-erotic asphyxia," an act he read about in *Hustler Magazine*. In its opinion, the court stated that even though protecting children is an important societal goal, that concern should be weighed against "the danger that unclear or diminished standards of the First Amendment protections may both inhibit the expression of protected ideas by other speakers and constrict the right of the public to receive those ideas."[74] According to this decision, the court admits the fact that while dangerous materials are readily available throughout the media, the notion of "dangerous ideas" are open to interpretation and difficult to pin point. With these decisions, the courts have concluded that a media broadcast such as a film does not fall within the scope of speech which is unprotected by the Constitution. Therefore, in most cases, the courts are of the opinion that media companies are protected from civil liability for damages allegedly caused by a publication or a broadcast.

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[69] *Zamora v. CBS* 480 F.Supp. 199 (1979).
[70] *Walt Disney Productions v. Shannon* 276 S.E. 2d 580 (1981).
[71] *DeFillipo v. NBC* 446 A.2d 1036 (1982).
[72] *McCollum v. CBS* 249 Cal.Rptr. 187 (1988).
[73] *Herceg v. Hustler Magazine* 814 F.2d 1017 (1987).
[74] Id. at 1020.

However, a case that can be categorized as somewhat of an exception to this rationale is *Byers v. Edmondson.*[75] In this instance, a convenience store clerk was shot and paralyzed by two teenagers who went on a crime spree allegedly after repeated viewings of Oliver Stone's film *Natural Born Killers.* The plaintiffs argued that Time Warner and Stone were liable for making and distributing such a film which they should have known would inspire people to commit similar crimes as portrayed in the film. While the trial court dismissed the suit, the Louisiana Court of Appeals reversed and remanded for further proceedings, finding that the defendants' conduct was not protected by the First Amendment if the plaintiffs could prove the defendants intended to assist and facilitate criminal conduct by urging viewers to imitate the criminal conduct of the main characters in the film. The court noted that evidence of such intent would be difficult to prove, and that this case may illustrate greater tolerance by some courts to entertain suits that previously would have been dismissed on First Amendment grounds. Consequently, both the Louisiana Supreme Court and the United States Supreme Court refused to review the reversal of summary judgment for the defendants. However, on remand, the judge in the trial court granted summary judgment to the defendants, and the Louisiana Court of Appeals affirmed the judgment, saying the movie did not incite the shooter and her boyfriend to go on a crime rampage.

Therefore, under certain circumstances, the media are not completely and utterly unrestricted in the speech they present. According to the courts, the media and similar organizations can be held liable for certain foreseeable harm that comes about as a result of any publication or broadcast. Aside from the notion of incitement, this Thesis will analyze other court rulings and opinions regarding the legal ideas of aiding and abetting and foreseeability—in other words, speech that facilitates harm or speech that has a foreseeable potential for danger attached to it. If so, the speech is punishable.

Perhaps the most notable case involving media or organizational liability is *Rice v. Paladin Enterprises, Inc.*[76] This case revolves around the question of whether the producers of a publication—in this instance, a book detailing explicit instructions on how to kill people and get away with it—can be held liable for any harm that comes about as a result of their printed speech. In regards to *Paladin*, the Fourth Circuit appeals court ruled "Yes," holding that the

[75] *Byers v. Edmondson* 712 So.2d 681 (1998).
[76] *Rice v. Paladin Enterprises, Inc.* 128 F.3d 233 (1997).

information in the book could and did fall outside the realm of protected speech. Here, the speech in question was not aimed at a specific person nor did it target a specific victim. Yet the Fourth Circuit still ruled that *Hitman* was tantamount to incitement because the book "consisted of 'the teachings of methods of terror,' and therefore [is] the absolute 'antithesis of speech protected under *Brandenburg*."[77] Here the Fourth Circuit set forth a precedent that creates the possibility of extending liability to those whose speech is a contributing factor in facilitating a non-specific, non-immediate harm. With this decision, the Fourth Circuit ruled that the information contained in *Hitman* is equitable to the crime of aiding and abetting because "this book constitutes the archetypal example of speech which, because it methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct, finds no preserve in the First Amendment."[78]

The case of *Weirum v. RKO*[79] subscribes to a similar notion of negligence. In this instance the California Supreme Court decided that a radio DJ exhorting driving directions to teenagers created a reasonable probability that danger and harm could occur. In essence, the ruling court held the DJ and the radio station responsible because the DJ issued repeated live exhortations to listeners urging them to act in an inherently dangerous manner, and the foreseeablity of such dangerous action on the part of the listeners was high. Similar to the Fourth Circuit's decision in *Paladin*, the California Supreme Court determined with *Weirum* that its decision to hold the radio station accountable for the harm is based on the premise of incitement of a live audience to imminent lawless and harmful action.

Another case involving foreseeablity and the notion of incitement is *Braun v. Soldier of Fortune Magazine*[80]. In this instance, a magazine published an advertisement calling for a "gun for hire." Responding to the advertisement, a hired mercenary gunned down another man outside his home and the magazine was charged with criminal conspiracy. The magazine used *Brandenburg* and the First Amendment to make its case, but the Eleventh Circuit court rejected the defense's claim and held the magazine to be liable on the basis of a foreseeable danger that could, and in this case did, occur. With *Braun*, the precedent was set that allows the negligent

[77] *Paladin* at 256.
[78] Id.
[79] *Weirum v. RKO* 539 P.2d 36 (1975).

publication of malicious speech to be punished. According to the Eleventh Circuit, this punishment of speech is constitutional based on the fact that speech has a reasonable foreseeability to cause harm. The court ruled the language of the ad to be sinister in nature, even though the threat was couched in terms that were non-explicit. With this decision, the courts installed a legal base of responsibility within the media so that journalists, activists, broadcasters, private organizations, etc., can be held liable for any speech that can be reasonably considered harmful or has the power to incite harm.

LITERATURE REVIEW

In regards to the potentially harmful nature of pedophilic speech, the existing legal literature and research is split on this issue of limiting such controversial speech. Some scholars favor limiting certain kinds of "borderland speech"—questionable speech that has not been addressed specifically by the courts—while others champion the free speech rights of every person regardless of the content or nature of that speech. These champions of free speech provide a compelling argument, fearing any legal condemnation of speech provides a slippery slope that compromises the marketplace of ideas, thereby threatening the very fabric of the Constitution.[81] However, other scholars feel as though the permission of any speech regardless of content is simply anarchy, and the courts have a responsibility to the people to limit certain speech in order to maintain a working, civil, and livable society.[82]

Amy Adler, with her article *The Perverse Law of Child Pornography*,[83] compares regulating certain speech to "opening a Pandora's Box" of censorship that society is ill-prepared to handle. She contends that by regulating things like child pornography, lawmakers may "produce

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[80] *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (1992).

[81] Gredory Akselrud. *Hit Man: The Fourth Circuit's Mistake in Rice v. Paladin Enters., Inc.* 19 Loy, L.A. Ent. L.J. 375. His article contends the "Fourth Circuit ignored important Supreme Court standards and abandoned the fundamental principles underlying First Amendment protection" of free speech. Debra Keiser. *Regulating the Internet: A Critique of Reno v. ACLU.* 62 Alb. L. Rev. 769 (1998). "Within its analysis, the Court stated that the terms within the CDA are not adequately defined, thus, resulting in an overbroad and vague regulation."

[82] Tiffany Komasara. *Planting the Seeds of Hatred: Why Imminence Should No Longer be Required to Impose Liability on Internet Communications.* 29 Cap. U.L. Rev. 835 (2002). David Crump. *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test.* 29 Ga. L. Rev. 1 (1994)

perverse, unintended consequences," and that the ensuing legal battle may have unrecognized costs. Ultimately, her contention is the more regulation society imposes the more harm is caused. Likewise, in his article *Rethinking Harm and Pornography: Conflicting Personal and Community Views*[84], Mark Silver argues that an "individual in a free society may only be deemed free if they can participate unencumbered in behaviors that may, indeed, be harmful." And as far as obscenity goes, according to Silver, the lawmaker gets more satisfaction from making the laws than the man who is making love.[85] Basically, according to Silver, the pleasure of regulation is more powerful to some people than the pleasure of love, and regulation on any expressive activity is tantamount to a restriction on a person's freedom of choice. Silver and other scholars equate any regulation of speech with censorship, and contend that the marketplace of ideas is the ultimate judge of society's speech.

Others believe that regulation is the only way to impede the harm caused by destructive speech. In his article, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*,[86] legal scholar David Crump suggests limiting the inciting speech by applying his notion of camouflaged incitement. This notion involves two aspects: coded speech and inducement by "recipes" for violence and advocacy by attractive presentation or urging. Simply put, coded speech takes place when a speaker simply substitutes a coded, or implied, statement of the activity that is sought to be induced.[87] Inducement by recipes for violence and advocacy by attractive presentation or urging is advocacy that supplies otherwise missing information needed to commit a crime, provides a roadmap to the actors, or simply couples description with details that amount to instructions.[88]

Tiffany Komasara also recommends analyzing questionable speech by relaxing the current imminence standard that was put forth with the *Brandenburg* case. As stated earlier, the

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[83] Amy Adler. *The Perverse Law of Child Pornography*. 101 Colum. L.Rev. 209 (2001).
[84] Mark Silver. *Rethinking Harm and Pornography: Conflicting Personal and Community Views.* 23 Women's Rights L. Rep. 171 (2002).
[85] Id at 171.
[86] Crump, supra note 76.
[87] Id. Crump cites the "GUN FOR HIRE" advertisement in *Braun* as an example of coded speech (at 23).
[88] According to Crump, this inducement involves certain cases in which the defendant's depiction is so specific that it goes beyond mere description—so that it supplies otherwise missing information needed to commit a crime, provides a road map to the actors, or simply couples description with details that amount to instructions. These effects all can be accomplished without express exhortation, and yet the details may provide a "recipe" that really amounts to implicit advocacy of violence or injury, as clearly as express incitement might (at 33).

Brandenburg test breaks down into three elements: (1) advocacy that is directed to incite or produce; (2) imminent lawless conduct; (3) and the likelihood that such action will result. According to Komasara argues that the third element of *Brandenburg* is indisputably met where civil liability is imposed after harm has resulted. She contends the first element revolves around determining the intent of the sender, because

> "evaluation is necessary to avoid imposing liability on speech that should remain protected. The first element of *Brandenburg* is necessary to separate speech that is 'mere advocacy' from speech that 'prepares a group for violent action and steels it to such action.'"[89]

Komasara contends that the second element—that the requirement that action be imminent—creates a major obstacle for imposing liability in questionable incitement cases, such as the one involving NAMBLA. Her idea is to relax *Brandenburg*'s imminence requirement in situations of delayed incitement cases. Komasara argues that the current *Brandenburg* standard requires that incitement must imminent, not just the 'mere abstract teaching' of ways to commit crimes.[90] She contends that relaxing the imminence standard takes into consideration the content of the message, the intent of the sender, and the likelihood that the communication will result in harm. She claims that by implementing this standard, "mere abstract teachings" would still be allowed, and that those who speak of violence will "think twice" before releasing their speech because of the courts balancing their interests against the interest of potential victims.[91]

Komasara is quick to question whether her notion of relaxing the imminence requirement could "hinder the ideals that the First Amendment set out to protect, and that *Brandenburg* has upheld." However, she refers to *Paladin* Justice Luttig's opinion that this notion does not have that effect: "Luttig systematically refutes the claims put forth by the defendant that imposing liability on a book publisher will have chilling effects on free speech and will jeopardize the future of all forms of media." Komasara goes on to contend that media will remain unhindered by the court's decision, which relied on the publisher's intent.

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[89] Komasara, supra note 72 (at 848).
[90] Id.
[91] Id.

David Crump's camouflaged incitement perspective may be another doctrine with which to begin unraveling the idea of what is protected and unprotected speech. But because his notion is developed "on the well-conceived test laid down in *Brandenburg*," this idea of camouflaged incitement is relevant to this issue:

> "[This doctrine is] straightforward to apply, and it can be expected to give as sound results as any constitutional test in so murky an area. This approach would identify serious cases of camouflaged incitement to violence and murder, and yet it would protect the freedom of speech as fully as the Supreme Court has protected it in contexts of less serious risk."[92]

Crump's ideas may provide a starting point by which pedophilic speech can be interpreted as dangerous speech that has the potential to be restricted. However, his doctrine does not specifically address pedophilic speech, and the question still remains as to whether pedophilic speech can be categorized as "camouflaged speech" or incitement.

Although Crump and Komasara have addressed the topic of constitutionally limiting questionable speech, neither applied their notions to the speech of pedophiles. Pedophilic speech has been researched, but most scholars seem to pick an "either/or" mentality to this delicate topic. Some scholars champion the free speech rights of all men—regardless of the consequences of that speech—while others believe that certain individual rights are a small sacrifice for the protection of society.[93] Consequently, this Thesis fills a gap in the literature by addressing this pressing issue. By examining Crump's "camouflaged speech" and Komasara's "relaxing of the imminence standard," the Author hopes to address the legality of certain pedophilic speech.

METHOD

Moral and legal constraints prevent this Thesis from obtaining complete access to all of NAMBLA's publications. Basic, non-threatening organizational information is presented on NAMBLA's website, but access to publications like the NAMBLA Bulletin, "The Survival

[92] Id.
[93] Crump, supra note 76; Komasara, supra note 72; Reed, supra note 1.

Manual," and "Rape and Escape" are available only to those NAMBLA members who pay a membership fee. However, information from these restricted publications is available through court documents and online articles like those presented on www.WorldNetDaily.com.

With this available information, as well as through a careful analysis of court opinions and legal research, this Thesis will investigate all facets of the free speech notions of incitement, foreseeablity, and aiding and abetting. Gaining access to these documents through LexisNexis and other academic search engines, this research will provide an overview of the existing rulings, opinions, and legal theories in order to take a step forward in determining if pedophilic speech falls into a specified unprotected category. The research applied to this Thesis is a law-based research; therefore, this research will employ a legal content analysis in order to arrive at the desired results.

Using the legal foundation set forth with cases ranging from *Schenck* to *Paladin*, this Thesis will examine the opinions and rulings of federal and state courts involving limiting and punishing speech. After tracing the legal development of free speech, this Thesis will review and apply the necessary court rulings as well as research and findings of numerous legal scholars to determine if there is a constitutionally protected means by which the courts can punish pedophilic speech that facilitates harm. As a result, this study of the First Amendment will more clearly define the Constitution by illuminating the murky nature of pedophilic speech that facilitates harm in regards to its status under the First Amendment. Courts have ruled that reasonable limits on speech can be justified in a free and democratic society. But the issue remains unresolved as to whether speech can be constitutionally restricted without infringing on the First Amendment. More specifically, this thesis will develop a standard that can determine whether pedophilic speech that facilitates harm falls within or outside of that category of protected speech.

Although this study is based on the questionable free speech rights of pedophiles, the basis for this study is the notion of incitement. Can pedophilic speech such as in the case involving NAMBLA and the Curleys be regarded as incitement under the *Brandenburg* test? Can the courts hold pedophile and pedophile organizations responsible for the harmful effects that their speech may bring about? Through this study, this Thesis will attempt to answer these and any related questions regarding the culpability of speech that has the potential to cause damage.

Although the core research will be based on court rulings and legal theories, the results of this study will be tested by applying the findings to an ongoing case: *Barbara and Robert Curley v. The North American Man/Boy Love Association, et al.* With this case as the backdrop, this Thesis will begin by analyzing various cases and legal doctrines regarding to the constitutionality of potentially harmful speech. By relying on the sources used in this ongoing case as well as independent research, this Thesis will be able to apply the necessary and relevant court cases and legal theories to develop a self-sufficient, fully-functioning legal theory that could possibly be applied to this case and to future cases involving similar circumstances. This theory will be tested by applying its tenets to previously decided cases.

CHAPTER 2

THE EVOLUTION OF SPEECH LIABILITY

For years the United States court system has wrestled with the constitutional notions of what is and what is not allowable in regards to speech, expression, and action. The idea of punishable speech began to become an issue with the United States Supreme Court around the time of World War I, and in the years following World War II a number of cases were brought before the Supreme Court that forced the Court to alter and update its previous notions of punishable speech.

FREE SPEECH AND THE INCITEMENT STANDARD

With the advent of World War I, governmental authorities sought to punish anyone who advocated a violent overthrow of the United States government. The Espionage Act of 1917 criminalized willfully making or conveying false reports or statements with intent to interfere with the prosecution of war or promote the success of enemies during wartimes.[94] Title 12 of the Espionage Act, which sought to punish the willful causing of disaffection from military and obstruction of recruitment, declared material that violates provisions of the act to be "unmailable." Relying on his authority under Title 12, the New York Postmaster declared the anti-war magazine *The Masses* to be nonmailable. The publisher sought to enjoin the Postmaster from refusing to mail the publication.

[94] *Masses Publishing Co. v. Patten,* 244 F. at 535 (1917).

In *Masses Publishing Co. v. Patten,*[95] the Supreme Court ruled in favor of the publisher, and Justice Learned Hand held the publication was not punishable under the statute because it was abstract advocacy and not a direct call for illegal activity. According to Hand's rationale, the actor would have to had used specific triggers to action: "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."[96]

Hand formulated that words can be punished if they "counsel or advise others to violate the law as it stands," but not if they are only critical of the law. This "Hand Formulation" focused solely on the actual words that are spoken rather than the circumstances surrounding the speech. Under this test, the consequences of the speech are deemed irrelevant.

Two years later, with *Schenck v. US,*[97] the Court's clear and present danger rationale was established. The Court concluded any speech could be punished if that speech posed a clear and present danger to society. *Schenck* is an important decision because it provides a standard for determining when the courts can legally and constitutionally regulate speech.[98] In this case, the Court ruled that speech could be punished if it created a clear and present danger that an illegal act would come about as a result of that speech. The circumstances of Schenck's conviction involved his mailing anti-war pamphlets to draftees during World War I. Through these pamphlets, Schenck made the contention that the draft was a calamitous political maneuver that was being perpetrated by the government for capital gain.[99]

The pamphlets urged that draftees "do not submit to intimidation" and advocated the use of peaceful forms of protest such as petitions to oppose the draft.[100] Authorities charged

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[95] Id.

[96] Id. at 540.
[97] *Schenck v. US* 249 U.S. 47 (1919)
[98] Jeremy C. Martin. *Deconstructing "Constructive Threats": Classification and Analysis of Threatening Speech After Watts and Planned Parenthood.* 31 St. Mary's L. J. 751. (stressing that the clear and present danger test is one of proximity and degree); Harry Kalven, Jr., *Professor Ernst Freund and Debs v. United States*, 40 U. Chi. L. Rev. 235 (1973) at 236-38 (stating that the origin of First Amendment law is found in *Schenck* and *Debs*)
[99] *Schenck* at 51.
[100] Id.

Schenck with conspiring to violate the Espionage Act[101] by attempting to cause insubordination in the military and to obstruct recruitment. Schenck appealed the conviction for printing and circulating the pamphlet which advocated that people resist the draft. In the pamphlets, Schenck "accused Wall Street of creating the despotism of conscription, assailing cunning politicians and a mercenary capitalist press, and urged citizens to exercise 'your right to assert your opposition to the draft.'"[102]

Although Schenck claimed that his actions, words, and expression were protected by the First Amendment as free speech, the Court unanimously affirmed Schenck's conviction. Concluding that Schenck was not protected in this situation, the Court cited the prevention of a violent overthrow of the government as the government's compelling interest in restricting the defendant's speech. According to the Court, the character of every act depends on the circumstances. The Court found that Schenck's intended goal was to influence listeners to obstruct the draft:

> "Words of which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done."[103]

In the Court's view, the defendant's words had the intent and the potential to create a clear and present danger; therefore, the Court has a duty to regulate harmful utterances that possess little communicative value.[104] The Court's rationale in this case is that the effect or potential effect of the speech in question deserves more importance than the message involved:

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[101] Id. at 48-49 (quoting the Espionage Act of June 15, 1997, ch. 30, 40 Stat. 217, 219 [repealed 1948] that prohibits "causing and attempting to cause insubordination,…in the military and naval forces of the United States, and to obstruct the recruiting and enlistment services of the United States").
[102] David Crump. *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test.* 29 Ga. L. Rev. 1 (1994)
[103] *Schenck* at 48.
[104] Id. at 51.

> "…the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic…It is a question of proximity and degree…If the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[105]

Following in the footsteps of *Schenck,* the Court ruled in *Gitlow v. NY*[106] that the clear and present danger test was not applicable in circumstances where Congress already had forbade certain speech. During this period, the Criminal Anarchy statute banned advocating the overthrow of the government by violence and force. Gitlow, a socialist, was arrested for distributing copies of a left-wing manifesto that urged the establishment of socialism through strikes and any form of class action. On appeal, Gitlow's contention was that no action came about as a result of his publication. He also argued that the statute unconstitutionally penalized speech that did not incite dangerous results.

The Court disagreed, however, and held that individual states have the authority to prohibit speech and publication if the state feels as though the speech or publication in question has the potential to result in actions that pose a threat to public security, even though such utterances create no clear and present danger:

> "Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language…That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." [107]

In essence, the Court was distinguishing between speech that furthers discussion and speech that has the potential to incite violent conduct. Here, the intent of the Court was not to penalize speech that promotes an abstract doctrine that was not designed to cause concrete

[105] Id. at 52.
[106] *Gitlow v. NY* 268 US 652 (1925).
[107] *Gitlow* at 666-667.

action; instead, the Court was limiting speech that uses the "language of direct incitement."[108] In this instance, the Court ruled that Gitlow's manifesto went beyond mere advocacy of an abstract doctrine. Consequently, the Court held Gitlow's utterances that advocated an overthrow of the government by unlawful means to be a "sufficient danger of substantive evil."[109]

Based on this decision, the Court gave lawmakers to authority to decide that an entire class of speech is so dangerous that it should be prohibited. Those legislative decisions would retain constitutional protection if they were not unreasonable, and the defendant will be punished even if the speech created no danger at all: "A state may punish publications advocating and encouraging a breach of its criminal laws."[110]

In the post-World War II era, the Communist threat prompted Congress to pass certain laws designed to protect the United States government from a potential overthrow at the hands of the Communist Party. In 1948, the leaders of the Communist Party of America were arrested and charged with violating provisions of the Smith Act, which made it unlawful to knowingly conspire to teach and advocate the overthrow or destruction of the United States government.[111] Party leaders were found guilty of conspiring to advocate the overthrow of the US government and conspiring to reorganize the Communist Party of the United States.

In *Dennis v. US*,[112] the Supreme Court upheld the convictions of the Communist Party leaders and found that the Smith Act did not inherently violate the First Amendment, holding that there was a distinction between the mere teaching of communist philosophies and active advocacy of those ideas. With *Dennis*, the Court further solidified the notion that there exists a distinct difference between the mere teaching of abstract doctrines and an active advocacy of harmful actions. Here, in regards to the Smith Act, the Court ruled that because there exists a difference between mere teaching and advocacy of action, the Act did not inherently violate the First Amendment. Therefore, the Court upheld the convictions of the Communist Party leaders,

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[108] Id.
[109] Id.
[110] Id. at 667.
[111] Under the Smith Act (1940), leaders of the Communist Party were indicted for "willfully and knowingly conspiring (1) to organize as the Communist Party a group of persons to teach and advocate the overthrow and destruction of the government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the government of the United States by force and violence." *Dennis v. United States* 341 U.S. 494 (1951) 497
[112] *Dennis v. US* 341 US 494 (1919).

ruling that preparing and steeling a sufficiently sized and cohesive group to violence by employing the language of incitement is not constitutionally protected.

The fact that the advocacy had already taken place is the essence of the *Dennis* judgment. The Court was not placing a prior restraint on speech; instead, the Court was penalizing words that had actually been uttered. According to the Court, such speech created a clear and present danger that threatened the government. Given the gravity of the consequences of an attempted overthrow, the Court held that the success or probability of success was not necessary to justify restrictions on speech. In the words of the Court:

> "…making it a crime for any person knowingly or willfully to advocate the overthrow or destruction of the government of the United States b force or violence, to organize or help to organize any group which does so, or to conspire to do so, do not violate the First Amendment or other provisions of the Bill of Rights and do not violate the First or Fifth Amendments because of indefiniteness."[113]

In *Dennis* the Court did not hesitate to punish a certain type of speech that it felt possessed a tremendous potential to cause harm. However, in *Yates v. United States*,[114] the Court ruled definitively that a mere advocacy of an abstract doctrine is unpunishable under the First Amendment. Once again, the issue in this case involved the Communist Party teaching and advocating the forceful overthrow of the government. As in *Dennis*, the Court drew a distinction between the advocacy and teaching of forcible overthrow as an abstract principle and the advocacy and teaching of concrete action for a forcible overthrow of the government. However, in this instance, the Court ruled in favor of the Communist Party, ruling that "the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this court."[115] Because of that distinction, the Court recognized that instances of speech that amounted to advocacy of action (such as in *Dennis*) were few and far between, and that the mere teaching of abstract doctrines is constitutionally protected speech.

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[113] Id. at 513.
[114] *Yates v. US* 354 US 298 (1957).
[115] Id. at 318.

Even though the Court established the unconstitutionality of speech that advocates harmful action in cases like *Schenck* and *Dennis*, it wasn't until *Scales v. United States*[116] that the Court extended its definition of unprotected speech to any speech that facilitated harm. In *Scales*, the Court upheld the conviction of Junius Scales based on his membership status in the Communist Party. [117] The Court noted that Scales at the very least knew, encouraged, and provoked illegal party activities over the course of his 8-year membership; therefore, he was guilty under the Smith Act of complicity in the commission of criminal activity.[118] In supporting *Scales*' conviction, the Court noted:

> "In this instance it is an organization which engages in criminal activity, and we can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be anymore immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act."[119]

With this decision, the Court ruled that there was no difference between speech that was active advocacy that has the potential to produce imminent harm, and speech that does not produce imminent harm but rather advocated violence in a fashion that directly facilitates the realization of harm.[120]

A companion case to *Scales*, *Noto v. United States*[121] involved the defendant's conviction for violating the membership clause of the Smith Act, criminalized the acquisition or holding of membership in any organization advocating the overthrow of the government by force or

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[116] *Scales v. US* 367 US 203 (1961).
[117] According to the Court in *Scales*, "complicity has been defined thus: 'A person is an accomplice of another person in commission of a crime if:
(a) with the purpose of promoting or facilitating the commission of the crime he
    1. commanded, requested, encouraged or provoked such other person to commit it, or
    2. aided, agreed to aid or attempted to aid such other person in planning or committing it
(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission.'" [quoting from the American Law Institute, Model Penal Code 2.04 (3), tentative draft No. 1 (1953)].
[118] *Scales* at 224-225.
[119] Id. at 224-226.
[120] Malloy, Krotoszynski, Jr. *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*. 41 Wm. And Mary L. Rev. 1159 (2000).
[121] *Noto v. United States* 367 U.S. 290 (1961).

violence. The Supreme Court reversed this conviction, ruling that the evidence advanced at the trial was insufficient to show that the Communist Party, of which Noto was a member, engaged in advocacy of action. The Court held that the mere abstract teaching is not the same as preparing a group for violent action (as was the case in *Noto*).

According to the Court, an active member who has guilty knowledge of a violent group's intent to engage in certain harmful action may be prosecuted. However, in the case of *Noto*, when the defendant is a member of a group that advocates only an abstract doctrine, the speech involved in an instance such as this is unpunishable because there is no language of incitement at play.[122]

Although the Court addressed language of incitement in the previous cases, the Court didn't develop a specific incitement test until *Brandenburg v. Ohio*.[123] With this case, the Court crafted a modern restatement of its clear and present danger by ruling that the only speech that can be punished or suppressed is the speech which incited imminent lawless action. The clear and present danger test evolved into the *Brandenburg* test to determine whether the government can prohibit specific kinds of speech. Brandenburg, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism Statute for his actions during an organized Klan rally.. Although only a dozen or so hooded and armed Klansmen attended the so-called meeting, Brandenburg lashed out with racist remarks toward Jews and blacks. He also made the following remark:

> "This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the state of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the state of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one

[122] Id. at 296-297.
[123] *Brandenburg v. Ohio* 395 US 444 (1969).

group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."[124]

Brandenburg was convicted under the Ohio criminal syndicalism law, which made illegal the advocating of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform, as well as assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines f criminal syndicalism.

The Court overturned the conviction, ruling that the Ohio law violated Brandenburg's right to free speech:

> "As we said in *Noto v. US*, 'the mere abstract teaching…of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control."[125]

With this decision, the Court crystallized a specific, step-by-step standard by which the nature of the speech in question could be determined. In order for speech to be labeled as the language of incitement, the government must prove the speech is (1) directed to inciting or producing imminent lawless action (the Learned Hand Test), and (2) is likely to produce such action (clear and present danger). [126] This test varied from previous clear and present danger standards in that it provided specific requirements that, if met, would hold the speaker responsible for the immediately harmful results of his speech. [127]

With its decisions from *Masses* to *Brandenburg*, the Court dealt specifically with speech that was spoken with the intent to cause harm. However, as later courts found out, speech doesn't need to be intentional in order to cause harm. Borrowing from the notion of incitement, courts developed the concept of negligence/foreseeability. Under this concept, a person can

[124] *Brandenburg* at 446.
[125] *Brandenburg* at 447-448.
[126] *Brandenburg* at 447.
[127] Crump, supra note 9.

constitutionally be held responsible for the harmful effects of ignoring his duty to prevent harm and to warn others to the potential of harm. However, unlike incitement, the concepts of negligence/foreseeability do not require that the harmful results of speech be intentional. Instead the essence of this negligence/foreseeability concept is based on the fact that the harm was avoidable, and the failure to foresee possible harm could result in negligence being assigned to a private person or entity.

SPEECH LIABILITY THROUGH NEGLIGENCE/FORESEEABILITY

According to California's Civil Code, "…all persons are liable for injuries caused by failure to exercise due care."[128] With *Rowland v. Christian,*[129] the California Supreme Court followed this rationale as it set forth the "Rowland Factors," which involved the fundamental principle of balancing a number of considerations in regards to determining negligence. In this case, the plaintiff was a guest in the defendant's apartment. The plaintiff asked to use the bathroom and subsequently suffered an injury when a cracked handle on the toilet basin broke and severed tendons and nerves on the plaintiff's hand. The defendant knew of the problem but failed to alert the plaintiff to the potential for injury as a result of the defect. The plaintiff argued that the host breached a duty that a reasonable and prudent person would exercise in a similar situation, and that the defendant failed to warn of a known dangerous condition.[130] The court agreed, holding that negligence applies in this case because a person can be held liable for injuries caused by his/her carelessness or for a breach of duty. According to the court, the failure to warn a guest of a potentially dangerous situation is to subject that person to an unreasonable risk of harm when the guest is aware of the potential danger. The court's factors, which were set forth to determine a person's duty of care, are as follows:

- The foreseeability of harm to the plaintiff.
- The degree of certainty that the plaintiff suffered injury.
- The closeness of the connection between the defendant's conduct and the injury suffered.
- The moral blame attached to the defendant's conduct.
- The policy of preventing future harm.

[128] Civ. Code, 1714.
[129] *Rowland v. Christian* 70 Cal. Rptr. 97 (1968).
[130] Id. at 98-99.

- The extent of the burden of the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.
- The availability, cost, and prevalence of insurance for risk involved.[131]

Although this is not a media case, the California Court did begin laying the groundwork for a step-by-step standard by which courts can determine liability in cases involving negligence. California courts are among the most influential in the nation, and other courts frequently follow the decisions and precedents that the California courts set forth. Therefore, *Rowland* is relevant to this study because of the establishment of definitive factors that can determine a person's duty of care.

This duty of care rationale was advanced by the Missouri Supreme Court's ruling in *Scheible v. Hillis*.[132] In this case, the plaintiff was shot while in the defendant's residence by a third party using a gun owned by the defendant. According to the Missouri Court, the defendant had full knowledge of the prior mischevious, wanton, and brutal acts of the third party and deliberately kept a loaded gun in her possession, kept the gun in an obvious location to the third party, and notified the third party of the existence of the gun. The Court was of the opinion that the defendant should have known of the third party's potential actions and should have warned the plaintiff to the existence of potential danger.

The Court here based its decision on the circumstances surrounding the harm, altering *Rowland*'s '"duty of care" rationale into a more specific "duty to warn." According to the court, "negligence depends upon the surrounding circumstances and the particular conduct involved."[133] This is so because a specific "act or omission would clearly be negligent in some circumstances" and the same act or omission "would not be negligent in others."[134]

Citing the *Restatement of Torts,* the court concluded that certain factors should be considered in determining if a person is required to take precautions in this situation. The factors include "the known character, past conduct and tendencies of the person whose conduct causes the harm, the opportunity or temptation which the circumstances may afford him for such misconduct, together with the gravity of the harm which may result." [135]

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[131] Id. at 100.
[132] *Scheibel v. Hillis* 531 SW 2d 285 (1976).
[133] Rest. 2d Torts, Sec. 302B, comment f.
[134] Id.
[135] Rest. 2d Torts, Sec. 302B.

The concept of "duty to warn" set forth in *Scheibel* was also used by the Ninth Circuit Court of Appeals in *Molsbergen v. US*[136]—in this instance, a World War II Navy pilot who dropped the atomic bomb on Nagasaki sued the government for not warning him of the radiation hazards involved with the atomic bomb. The plaintiff claimed the government should have alerted him to the potential hazards such a mission entailed once the government first learned of the risks of exposure to atomic radiation.

The California Supreme Court held that "when an employer gains information about a serious danger to which a readily identifiable former employee has been exposed in the course of his employment, the relative cost or inconvenience of warning him is not substantial and there is a reason to believe that the warning might be of some benefit to its recipient, the California Supreme Court would find that a duty to warn exists."[137] Under California law, the existence of a duty to warn an individual of dangers to which he as been or will be exposed turns largely upon five salient factors:

- The nature of the relationship between the party who has knowledge of the danger and the party who is threatened with potential injury.
- The seriousness of the potential injury.
- The extent to which the potential injury is a foreseeable result of the defendant's conduct.
- The extent of the burden on the defendant of imposing a duty to warn.
- The likelihood that a warning will have a practical effect.[138]

California courts weigh all of these factors together when determining whether a duty to warn exists. In order to find such a duty, "each factor need not favor the plaintiff."[139]

From *Rowland* to *Molsbergen*, the courts have used negligence/foreseeability in regards to assigning liability to harmful actions. However, with *Weirum v. RKO*, the legal system decided that negligence/foreseeability can also be applied to speech that causes harm. And although the court system established these foreseeability/negligence criteria in cases involving private people, the courts also have gone so far as to extend these responsibilities to cases involving foreseeability/negligence in regards to the media and the potential harm that may come about as a result of a broadcast or a publication. *Weirum* is one of the few cases to impose media liability

[136] *Molsbergen v. US* 757 F.2d 1016,(9th Cir. 1985).
[137] Id. at 1021
[138] Id.
[139] Id.

for harm (outside of defamation and privacy) under the negligence standard. Perhaps the most cited media-related physical injury case, *Weirum,*[140] upheld a broadcaster's liability for the wrongful auto death caused by a youthful driver who was responding to an ill-conceived promotional contest.

Radio station KHJ was a successful Los Angeles, and in an attempt to attract even more listeners and to increase advertising revenue, KHJ started a promotion called "The Summer Spectacular." As a part of the promotion, a popular DJ traveled to a number of locations in the L.A. area. Periodically, he announced his current location and where he was planning on going next on the radio. The first listener to physically locate the DJ received a cash prize.

Two different teenage drivers heard where the DJ was headed and decided to follow the DJ's car so that he or she would be the first person to claim the prize. For the next few miles, the two teenage drivers jockeyed for the position closest to the DJ's car, reaching speeds up to 80 miles per hour.

In attempting to follow the DJ, the speeding drivers forced another car to overturn. The passenger in the overturned car died as a result of the accident. Consequently, the plaintiff brought a wrongful death action against the radio station, and the Supreme Court of California affirmed a jury verdict holding the radio station liable under a negligence theory for the foreseeable results of a broadcast which created an undue risk of harm. In upholding the jury verdict, the Court carefully limited its holding to the facts of the case, which the court described as a "competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit." [141]

Weirum, an influential case also determined by a California court, is often cited as a case of true incitement in the same vein as *Brandenburg*, a decision based on the premise of incitement of a live audience to imminent lawless and harmful action. This interpretation highlights the fact that the DJ's directives were in close temporal proximity to the reckless driving that caused a death to occur. In addition, because the DJ issued repeated live exhortations to listeners, urging them to act in an inherently dangerous manner, the foreseeability of such action on the part of listeners was high.

[140] *Weirum v. RKO* 539 P.2d 36 (1975).

With *Weirum*, the court extended *Rowland*'s duty of care rationale to the media, ruling that the media are not insulated from liability for the foreseeable harm that their negligent speech may cause. The media's duty to foresee certain harm was further established in *Hyde v. City of Columbia.*[142] In this case, a Missouri Appellate Court affirmed a lower court's ruling that a newspaper acted negligently when the paper disclosed the name and address of an abduction and sexual attack victim while her abductor and assailant was still at large.[143] Acting on the publication of this delicate information, the attacker made harassing, terrorizing phone calls to the victim. The court held that because the newspaper negligently published the victim's private information, the paper was indeed liable for the harm that followed:

> "…conduct may be negligent solely because the actor should have recognized that it would expose the person of another to an unreasonable risk of criminal aggression…"[144]

Despite the fact that *Hyde* involves the newspaper publishing truthful, lawfully-obtained information, this case is unique in that it imposed a duty of reasonable care upon the newspaper not to not to make a rape victim's private information available to the public while her attacker was still at large.

However, in a case like *Herceg v. Hustler Magazine*,[145] the Fifth Circuit overturned a jury award against *Hustler* of damages for emotional and physical harm to the mother and friend of an adolescent boy who died recreating an act he read about in a magazine article. *Hustler* published an article titled "Orgasm of Death," which described a practice known as auto-erotic asphyxiation. This involves masturbating while hanging one's self to cut off the blood supply to the brain at the moment of orgasm. The article contained a disclaimer pointing out the deadly nature of this act. A 14-year-old named Troy D. read the article, ignored the warnings, and performed the act. A friend later found Troy's body hanging nude in his closet, a copy of the article on the ground near the body. Troy's mother sued *Hustler* on theories of negligence,

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[141] Id. at 40.
[142] *Hyde v. City of Columbia* 637 SW 2d 251 (1982).
[143] This case is distinguishable from *Florida Star v. BJF* because even though the newspaper in that case published truthful, lawfully obtained private facts about a rape victim, no harm resulted from the publication. In *Hyde*, the newspaper published truthful, lawfully obtained facts about a rape victim, but the rape victim experienced harm as a result of the publication.
[144] *Hyde* at 257.

attractive nuisance, product liability, and strict liability founded on dangerous instrumentality. An appeals court found *Hustler* not civilly liable for the boy's death. While the court conceded that the magazine "paint[s] in glowing terms the pleasure supposedly achieved by the practice it describe[s]." However, "…the *Hustler* article, while published in a magazine published for profit, was not an effort to achieve a commercial result and, at least in the explicit meaning of the words employed, attempts to dissuade its readers from conducting the dangerous activity it describes."[146]

The court went on to distinguish this case from *Weirum*, ruling that, unlike the radio contest in *Weirum*, the *Hustler* article served some sort of educational purpose and did not exist solely as a commercial, money-making tool. In fact, the court ruled that *Hustler* cautioned its readers to the danger of auto-erotic asphyxiation, and the court cited *Hustler*'s repeated "attempts to dissuade its readers from conducting the dangerous activity it describes."[147]

Although the courts are wary of assigning blame to media outlets for harm that allegedly comes about as a result of a publication or broadcast, two specific cases involving *Soldier of Fortune Magazine* have shown the courts' willingness to assign negligence-based liability to media outlets that publish or broadcast advertisements that have a foreseeable risk of harm. The Fifth Circuit court in *Eimann v. Soldier of Fortune Magazine, Inc.*[148] rejected a wrongful death action involving an advertisement referring to "high risk assignments" that ran in *Soldier of Fortune Magazine* (SOF). As a result of the ad, a woman was murdered by a would-be assassin who was hired by her husband. A lower court ruled in favor of the plaintiffs, but the Fifth Circuit court reversed the verdict, holding that SOF could only be held liable if "(1) the relation to illegal activity appears on the ad's face; or (2) 'the advertisement, embroidered by its context, would lead a reasonable publisher or ordinary prudence under the same or similar circumstances to conclude that the ad could reasonably be interpreted' as an offer to commit crimes."[149]

With this decision, the Fifth Circuit held the language of the ad to be too vague and innocuous for SOF to reasonably be able to foresee that harm could occur. The ad did not specifically call for an assassin, and based on the context of the ad, it was not reasonable that SOF

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[145] *Herceg v. Hustler Magazine Inc.* 814 F.2d 1017 (1987).
[146] Id. at 1024.
[147] Id.
[148] *Eimann v. Soldier of Fortune Magazine, Inc.* 880 F.2d 830 (1989).

could determine the ad was propositioning killers. So in order not to place an undue burden on the press, the Fifth Circuit exonerated SOF from any liability. After applying the Texas risk-utility balancing principle—a risk is unreasonable if it's "of such magnitude as to outweigh what the law regards as the utility of the defendant's alleged negligent conduct"—the court concluded that "the standard of conduct imposed by the district court against SOF is too high…"[150] To impose liability whenever the advertised product "could reasonably be interpreted as an offer to engage in illegal activity" would require a publisher to reject all ambiguous ads.[151]

The Fifth Circuit court stated that "without a more specific indication of illegal intent than this ad or its context provided, we conclude that SOF did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity."[152] The court held the ad's phrase "high risk assignments" to be too ambiguous and ruled that the risk of harm was not sufficiently foreseeable; therefore, SOF was not responsible for the harm that occurred.

In contrast, in *Braun v. Soldier of Fortune Magazine, Inc.*,[153] the Eleventh Circuit court upheld a wrongful death claim arising out of a commercial advertisement that ran in the magazine. As the Fifth Circuit court did in *Eimann,* the Eleventh Circuit court applied the risk-utility balancing principle in this case, holding that the publisher's liability depends on "whether the burden on the defendant adopting adequate precautions is less than the probability of harm from the defendant's unmodified conduct multiplied by the gravity of the injury that might result from the defendant's unmodified conduct."

In *Braun*, a man named Richard Savage ran the following advertisement in *Soldier of Fortune*: "GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier and other special skills. All jobs considered." After reading the advertisement, a man named Bruce Gastwirth hired Savage to murder Gastwirth's business associate, Richard Braun. Braun was gunned down outside his home in

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[149] Id. at 838.
[150] Id.
[151] Id. at 837.
[152] Id. at 838.
[153] *Braun v. Soldier of Fortune Magazine, Inc.* 968 F.2d 1110 (1992).

Atlanta, and Gastwirth and Savage were convicted of criminal conspiracy. Braun's two sons later filed a civil suit seeking damages for *Soldier of Fortune*'s involvement in their father's murder.[154]

The Eleventh Circuit court reiterated the lower court's instructions to the jury, stressing that the jury could hold SOF liable only if the ad on its face contained a clearly identifiable risk of harm to the public.

> "We are convinced that the district court's use of phrases like 'clear and present danger' and 'clearly identifiable unreasonable risk' properly conveyed to the jury that it could not impose liability on SOF if (defendant) Savage's ad posed only an unclear or insubstantial risk of harm to the public and if SOF would bear a disproportionately heavy burden in avoiding the risk..." [155]

In essence, the Eleventh Circuit held that the published ad created an unreasonable and foreseeable risk of harm of potentially violent, criminal activity. The court went on to establish that according to the "modified" negligence standard that "SOF had no legal duty to investigate the ads it printed," and a jury could find negligence "only if [the] advertisement 'on its face' would have alerted a reasonably prudent publisher that the 'ad in question contained a clearly identifiable risk, that the offer in the ad is one to commit a serious violent crime.'"[156]

The Eleventh Circuit distinguished this case from *Eimann* by holding the language used in the ad to be harmful, ruling that the ad's "combination of sinister terms ma[de] it apparent that there was a substantial danger of harm to the public."[157] The court also took into account the context of the speech in question. Even though no specific harmful action was referenced in the ad, the court ruled that SOF, as a reasonable publisher, should have been able to recognize the fact that this ad was offering services for criminal activity.[158] Therefore, the lower court was correct in holding SOF liable for the harm because the harm was foreseeable and could have been avoided if not for the magazine's negligent publishing of the harmful ad.

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[154] Id. at 1111-1112.
[155] Id. at 1116.
[156] Id.
[157] Id. at 1115.
[158] Id.

With this case, the Eleventh Circuit ruled that the speech involved was a direct catalyst to causing the violence that occurred in this instance. According to the concept of negligence/foreseeability that has been set forth by the courts, both private individuals and public entities (including the media) have a legal responsibility to prevent harm, even if that harm is unintentional. However, in cases where harm was intentional, such as in cases involving aiding and abetting crime, the courts have ruled that speech—the spoken or written word—is not immune from prosecution. In the eyes of the court, any speech that aids others in the commission of a crime is constitutionally punishable.

SPEECH LIABILITY THROUGH AIDING AND ABETTING

In *US v. Buttorff,*[159] the Eighth Circuit Court of Appeals upheld a conviction for aiding and abetting the filing of false income tax returns by giving specific instructions at a large public gathering. The defendant cited *Brandenburg* in his defense, claiming his speech did not bring about immediate lawless action. However, the court disagreed:

> "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[160]

The court ruled that holding tax evasion speeches were not subject to *Brandenburg* because, although they did not "incite the type of imminent lawless activity referred to in criminal syndicalism cases," they did "go beyond mere advocacy of tax reform."[161] According to the Eighth Circuit, "the right of free speech is not absolute." The court cited Justice Hand's *Masses* opinion, ruling that "one may not counsel or advise others to violate the law as it stands." Applying Hand's rationale, the court here ruled Buttorff's words to be "triggers of action;"[162]

[159] *US v. Buttorff* 572 F.2d 619 (1978).
[160] Id. at 623
[161] Id.
[162] Id. at 624.

therefore, because the defendant advocated, counseled, and advised others in the commission of a crime, his speech was punishable under the First Amendment.[163]

This case is nearly indistinguishable in principle from the Ninth Circuit court's rationale in *US v. Barnett.*[164] In this case, the Ninth Circuit court ruled that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through publication and distribution of instructions on how to make illegal drugs. This case involved a man, Barnett, who was selling PCP synthesis instructions through the mail. Barnett's defense was that he was immune from search or prosecution because he used the printed word to encourage and counsel others in the commission of a crime. He argued that he had a First Amendment right "to disseminate and exchange this information through the mails even if the recipients use the same for unlawful purposes." The court derided as a "specious syllogism" with "no support in the law" Barnett's First Amendment defense not only to the search itself, but also to his prosecution:

> "The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."[165]

The principle of *Barnett*, that the provision of instructions that aid and abet another in commission of a criminal offense is unprotected by the First Amendment, has been uniformly accepted, and the principle has been applied to the aiding and abetting of innumerable crimes.[166]

Notably, the United States Supreme Court relied on the *Barnett* principle to sustain aiding and abetting convictions for tax fraud in *US v. Freeman.*[167] In this case, the Ninth Circuit court held that the defendant could be held criminally liable for counseling tax evasion at seminars held in protest of the tax laws, even though the speech that served as the predicate for the conviction "sprang from the anterior motive to effect political or social change."[168] In this

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[163] *Masses*, supra note 1.
[164] *US v. Barnett* 667 F.2d 835 (1982).
[165] Id. at 842.
[166] Quoting Fourth Circuit's opinion in *Rice v. Paladin*, at 245.
[167] *US v. Freeman* 761 F.2d 549 (1985)
[168] Id. at 551.

instance, where an indictment is for counseling, the circumstances of the case determined whether the First Amendment is applicable, either as a matter of law or as a defense to be considered by the jury; and the court holds that there can be some instances where speech is so close in time and substance to ultimate criminal conduct that the speech is punishable.

Much like *Buttorff*, the defendant in this case was convicted of criminally counseling tax evasion at seminars; however, in this instance the defendant, Freeman, contended his actions were done in protest of tax laws. Therefore, Freeman invoked the First Amendment in his defense, claiming innocence based on the notion that his actions "sprang from the anterior motive to effect political or social change."[169] The court rejected Freeman's defense, ruling that his speech was not constitutionally protected:

> "The First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."[170]

With its decision, the court held that there can be some instances where speech is so close in time and substance to ultimate criminal conduct that no free speech is appropriate. The court went on to conclude that a First Amendment instruction was required only for those counts as to which there was evidence that the speaker "directed his comments at the unfairness of the tax laws generally, without soliciting or counseling a violation of the law in an immediate sense [and] made statements that, at least arguably, were of abstract generality, remote from advice to commit a specific criminal act."[171]

According to this court:

> "Freeman claims he did nothing more than advocate tax non-compliance as an abstract idea, or at most as a remote act, and that the First Amendment necessarily bars his prosecution. In this he is incorrect. Where there is some evidence, however, that the purpose of the speaker or the tendency of his words

[169] Id.
[170] Id. at 552.

> are directed to ideas or consequences remote from the commission of a crime or criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration. In some instances, he made statements that, at least arguably, were of abstract generality, remote from advice to commit a specific criminal act. There was on the other hand, substantial evidence of Freeman's use of words of incitement quite proximate to the crime of filing false tax returns, words both intended and likely to produce an imminent criminal act."

For those counts as to which the defendant, through his speech, directly assisted in the preparation and review of false tax returns, the court held that the defendant was not entitled to a First Amendment instruction at all.[172] Therefore, because there existed substantial evidence of Freeman's use of words of incitement that were proximate to the crime, the court ruled that his words were both intended to and likely to produce an immediate criminal act.

Although the Supreme Court ruled in *Brandenburg* that abstract advocacy of lawlessness is protected speech under the First Amendment, the Ninth Circuit, citing *Freeman*, held *Brandenburg* inapplicable in the case of *US v. Mendelsohn*.[173] In this instance, the court upheld the conviction of the defendants, who were charged with conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia. The defendants were arrested for disseminating a computer program that assisted others to record and analyze bets on sporting events, and the court ruled that the program was "too instrumental in and intertwined with the performance of criminal activity to retain First Amendment protection."[174]

Citing *Freeman*, the Ninth Circuit concluded:

> "For a First Amendment instruction to meet these requirements (supported by laws and had some foundation in the evidence), there must be some evidence that the defendants' speech was informational in a manner removed from immediate connection to the commission of a specific criminal act."[175]

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[171] Id. at 551-52, as cited by the Fourth Circuit in *Paladin*.
[172] Id. at 552
[173] *US v. Mendelsohn* 896 F.2d 1183 (1990).
[174] Id. at 1186.
[175] Id. at 1185.

Like every other court to address this issue, the Fourth Circuit also had concluded on numerous occasions that the First Amendment is generally not applicable to charges involving aiding and abetting violations of tax laws.[176] However, in the case of *Rice v. Paladin Enterprises, Inc.*,[177] the Fourth Circuit extended that rationale to a book publishing company that released a "hit man" instruction book that assisted a murderer in soliciting, preparing for, and committing murders. As a result, the court held that "the First Amendment does not pose a bar to finding that Paladin is civilly liable as an aider and abetter of a triple contact murder."[178]

In this case, James Edward Perry, "readied by the instructions and steeled by the seductive adjurations"[179] from *Hit Man: A Technical Manual for Independent Contractors,* broke into Mildred Horn's Maryland home and brutally killed Mrs. Horn; her eight-year-old quadriplegic son, Trevor; and Janice Saunders, Trevor's nurse. According to the court, Perry acted by all means as a contract killer—a "hit man"—hired by Mildred Horn's ex-husband, Lawrence Horn, to murder Horn's family so Horn could inherit the $2 million trust fund that had been set aside to care for Trevor's condition. The court noted the connection between the book and the action:

> "In soliciting, preparing for, and committing these murders, Perry meticulously followed countless of *Hit Man*'s 130 pages of detailed factual instructions on how to murder and to become a professional killer."[180]

In *Paladin,* the Fourth Circuit United States Court of Appeals overturned the lower court's summary judgment in the publisher's favor, holding that the book's information could

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[176] *US v. Kelley* 769 F.2d 215 (1985). Court held defendant who "participated" in the preparation of false tax forms for others by telling listeners "what to do and how to prepare the forms" and by supplying forms and materials was not entitled to protections of the First Amendment, even though the defendant offered his advice in a meeting of a group concededly dedicated to the political belief "that the federal income tax is unconstitutional as applied to wages," (id. at 216). The court held that "the cloak of the First Amendment envelops critical, but abstract discussion of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law. It was no theoretical discussion of non-compliance with laws; action was urged; the advice was heeded, and false forms were filed," (at 217).
US v. Fleschner 98 F.3d 155 (1996). Fourth Circuit held that defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to a First Amendment jury instruction on the charge of conspiracy to defraud the United States of income tax revenue because "the defendant's' words and acts were not remote from the commission of the criminal acts," (at 158-59).
[177] *Rice v. Paladin* 128 F.3d 233 (1997).
[178] Id. at 243.
[179] Id.
[180] Id. at 239.

fall outside the realm of protected speech, despite the fact that the book did not specifically call for James Perry to murder Mildred Horn, Trevor Horn, and Janice Saunders.

> "[The First Amendment] would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment….at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience…."[181]

The court ruled the very nature of the book's speech was dangerous because of the harm it facilitated. The Fourth Circuit's rationale in this case created the possibility of extending liability to those who disseminate harmful information to the public at large, and the court insisted that the First Amendment did not bar the imposition of civil liability for speech that the plaintiff can demonstrate was performed with specific intent.[182]

In *Brandenburg*, the Supreme Court distinguished between mere advocacy of lawlessness doctrines, and inciting or encouraging lawless action. Consequently, the Court has ruled that the First Amendment does not allow the state to punish the mere advocacy of an abstract doctrine. However, the Fourth Circuit in this case ruled that *Hitman* was not advocacy in any way, but rather instead was an instructional manual without relevant communicative value.[183] Therefore, *Hitman* found no preserve in the First Amendment because it "methodically and comprehensively prepare[d] and steele[d] its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct."[184]

Both *Barnett* and *Paladin* show the fact that the harmful speech involved was the printed word does not prohibit the punishment of speech. If speech causes unintentional harm through negligence and foreseeability, or if the speech causes intentional harm through incitement or

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[181] Id. at 248.
[182] Beth Fagan. *Rice v. Paladin Enterprises: Why Hit Man is Beyond the Pale.* 76 Chi.-Kent. L. Rev. 603 (2000).
[183] *Paladin* at 263.
[184] Id. at 256.

aiding and abetting, the courts have ruled in cases from *Masses* to *Paladin* that such speech is unprotected under the First Amendment.

In the case of Jeffrey Curley, the fact that harm occurred is irrefutable. The question of NAMBLA's involvement in the murder, however, is debatable. This legal foundation set forth by the courts concerning harmful speech allows for the punishment of speech under certain specific circumstances. However, the courts have also set forth the doctrine that abstract advocacy cannot be punished.

The conundrum of the Curley case against NAMBLA is the categorization of NAMBLA's speech. The Curleys claim the speech is harmful speech in the same vein as cases like *Paladin*, *Weirum,* and *Braun*. NAMBLA contends, however, that its speech is unpunishable under *Masses* and *Brandenburg*_ because the speech does not urge others to commit harm, nor does the speech call for harm against specified individuals. A closer look at the facts of the case will reveal the best means to characterize NAMBLA's speech.

CHAPTER 3

PUNISHING PEDOPHILIC SPEECH THAT INSTIGATES HARM

The rationale for NAMBLA's defense seems to be based on the Supreme Court's decision in *Masses*. In that case, Justice Hand articulated the notion that abstract advocacy that does not call for illegal activity is not punishable under the First Amendment.[185]

According to its website, NAMBLA exists to enact "social change and tolerance"[186] of pedophilia as opposed to violence. NAMBLA contends the information presented on its website and in its bulletins constitute mere advocacy of an alternative lifestyle. Furthermore, NAMBLA maintains that the information it disseminates condemns sex abuse and coercive sexual relations. According to its website and bulletin, NAMBLA holds firmly to the idea that pedophiles are an oppressed minority that suffers discrimination in the legal system because of their belief that men and boys should legally be able to engage in sexual relationships with each other. Although NAMBLA admits that it opposes age-of-consent laws and that it supplies its members with pornographic material, NAMBLA does not urge, advocate, or condone raping young male children. In its defense against the Curleys' charges, NAMBLA claims that the incitement allegations levied against the organization are an imposition upon its First Amendment right of political speech.

NAMBLA also contends that even if an illegal form of advocacy can be perceived from these Internet and print materials, the Curleys' action is nonetheless barred by the First Amendment under *Brandenburg*. First, NAMBLA claims that because the plaintiffs do not allege

[185] *Masses* at 540: "If one stops short of urging upon others that it is their duty to their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."

that the so-called advocacy was directed to any particular person, but rather to the public at large, the speech cannot be "directed to inciting or producing imminent lawless action."[187] NAMBLA argues that targeting speech to a particular individual is necessary in order to constitute advocacy. NAMBLA goes on to contend that any conduct arguably advocated by its publications was not imminent—in other words, Jeffrey Curley's death was not the likely result of the information presented in NAMBLA's publications.

The Curley case against NAMBLA illustrates a loophole in the law which allows groups like NAMBLA to get away with facilitating harm, and the purpose of this Thesis is to close that loophole in order to prevent harm to children. For example, the rhetoric presented on NAMBLA's website may be legal because of the generality of its content. But the website is merely a portal for traveling deeper into the world of pedophilia. Through the website, one can sign up to become a member of NAMBLA. Once joining, a member is allowed access to questionable publications like "Rape and Escape" and "The Survival Manual," which have the potential to cause harm.[188] This loophole in the law permits groups who publish this harmful information to exist without prohibition.

The law as it stands now is flawed because it allows these types of organizations to disseminate such speech that is capable of facilitating harm, which is defined by state criminal law. Unfortunately, as previously explained, the existing standards for punishing this speech do not work because they fail to address specific aspects like harm, intent, and proximate cause. Other standards, like Crump's Camouflaged Incitement and Malloy's and Krotoszynski's notion of Harm Advocacy, fail in their attempt because these standards are based on speculation—they adopt a case-by-case analysis for determining liability. They do not provide a specific, generic measure by which liability can be determined. Because of this deficiency, the courts are in desperate need of a concrete, constitutionally sound standard that can stop harmful speech that facilitates violence but is not directed toward specific individuals.

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[186] This information is found on NAMBLA's website, www.nambla.de.
[187] *Brandenburg* at 447.
[188] *Barbara and Robert Curley v. NAMBLA, et al.* District Court of Massachusetts; Docket No. 00CV10956 GAO9 (2000). In their complaint against NAMBLA, the Curleys contend that the information presented on NAMBLA's website coupled with the other NAMBLA publications that were in Jaynes' possession helped motivate Jaynes and Sicari to abduct, molest, mutilate, and murder Jeffrey Curley.

With cases like *Weirum, Paladin,* and *Braun*, the courts have ruled that speech that facilitates harm is not protected under the First Amendment; however, despite their rulings, the courts failed to set forth a specific standard by which liability can be determined. By failing to create a specific, constitutionally sound standard, these decisions have left intact a certain ambiguity that continues to plague the American legal system in regards to the constitutionality of certain harmful speech.

THE CATALYST TO HARM STANDARD

The purpose of this Thesis is to create a specific standard that can be applied to cases like the NAMBLA case, which involves speech that facilitates harm. This Catalyst to Harm Standard will set forth specific criteria for courts to follow so that they can factually determine if the speech in question falls into the category of protected or unprotected speech. As of now, the line between protected and unprotected speech remains blurry. This standard attempts to clarify that line.

Because NAMBLA is categorizing its speech as pure political expression, the protection of the First Amendment is operating at its highest level. However, at its core NAMBLA's speech seems to constitute criminal advocacy—encouraging sexual relations between grown men young boys[189]—the court should determine if NAMBLA's speech is in fact punishable under the First Amendment once that speech translates into harmful action. To determine if NAMBLA's speech falls outside the protection of the First Amendment, the court should determine if NAMBLA's speech constitutes advocacy and is in fact low-value speech as opposed to high-value Political Speech.

The Catalyst to Harm Standard will determine if NAMBLA's speech in this instance falls within the narrow spectrum of expression that both instigates and facilitates illegal activities

[189] Art Moore, "Amazon sells 'deadly pedophile magazine—NAMBLA Bulletin named in suit involving rape and murder of boy," (2003) available at http://www.worldnetdaily.com/news.asp?ARTICLE-_ID=34694. NAMBLA's website "includes selected articles from the Bulletin from the past 20 years. One article, criticizing 'contemporary sexual morality,' argues for sexual relationships between teachers and students, noting how they were seen in a positive light in ancient Greek culture."

against others. [190] Furthermore, the Catalyst to Harm Standard relaxes the "imminence" requirement set forth in *Brandenburg*; consequently, it does not require that the speech in question be specific in regards to a time frame for violence against precise, identifiable victims. This relaxation is necessary because the Supreme Court's ruling in *Brandenburg* does in fact limit the government's ability to proscribe certain speech. *Brandenburg*'s imminence requirement responds to a suspicion that the government may seek to suppress certain questionable or unpopular speech for improper reasons.

By creating this imminence requirement in *Brandenburg*, the United States Supreme Court developed a measure to ensure that the danger posed by the speech is in fact certain and not speculative, and that the government's interest in preventing the violence is not pretextual. [191] Vague or overbroad speech regulations violate the Constitution because they punish protected speech or act effectively as prior restraints[192] through their chilling effect.[193]

On the other hand, the Supreme Court has held that the First Amendment does permit viewpoint-neutral speech regulations and prohibitions in order to achieve important social goals. These prohibitions are allowable only when the social risks created by the speech in question clearly exceed the benefits potentially associated with it. [194] The fact that someone engages in speech activity or expressive conduct does not automatically insulate them from liability for the social harms caused by their speech activity or expressive conduct—sometimes the costs are imposed on the speaker and other times they are not.

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[190] In their article *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, Malloy and Krotoszynski, Jr. define Harm Advocacy as any speech that encompasses the narrow spectrum of expression that both advocates and facilitates illegal or tortuous activities against others.
[191] Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*. 8 Tex. J. Women & L. 207 (1999).
[192] The Supreme Court has characterized the avoidance of prior restraint on speech as the First Amendment's most important safeguard. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (stating that the main purpose of the First Amendment is to prevent "prior restraints"). The Court continues to emphasize that avoiding prior restraints is the "chief purpose" of the First Amendment. *Gannett Co. v. DePasquale*, 443 U.S. 368, 393 (1979).
[193] Malloy, Krotoszynski, Jr., supra note 6. Regulations that are overbroad or vague carry the danger that they will act as a prior restraint through self-censorship. *Near v. Minnesota*, 283 U.S. 697 (1931) (The Court established as a constitutional principle the doctrine that, with some narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication).
[194] Id.

The first element of *Brandenburg* basically involves determining the intent of the sender. As laid forth earlier, the intent of NAMBLA's speech could be labeled as malicious because the organization seems to have been grossly indifferent to the risk of harm associated with its speech.[195] This evaluation of is necessary to avoid imposing liability on speech that should remain protected. The first element of *Brandenburg* is necessary to separate simple advocacy from speech that prepares and encourages a group for violent action." In situations where liability is imposed after the harm has resulted, as in this case, the third element is indisputable met.[196]

It is the second element—the requirement that the harmful action be imminent—that creates a nearly impossible hurdle[197] to imposing liability to groups like NAMBLA. The importance of *Brandenburg*'s imminence standard is to justify a restraint on speech prior to the commission of violent activity.[198] There is no need for the imminence requirement when punishing speech that has already occurred.[199] The purpose of the Catalyst to Harm standard is not to prevent violence that might occur as a result of harmful forms of speech such as pedophilic speech; instead, its purpose is to limit any speech that instigates potentially harmful criminal activity.

In cases such as this where the punishment of speech comes about subsequent to the speech itself, such regulation is conducted with the benefit of hindsight. Therefore, courts can determine the expression in question actually has caused a legally cognizable harm. When speech is responsible for such a harm its punishment is justified by this causal connection.[200] As long as the plaintiffs can prove that harmful activity did occur, the speech in question rose beyond an abstract level of advocacy, and that the harm that came about was a result of the speech, then the imposition of this liability against the speaker does not offend the First Amendment.[201] The Catalyst to Harm Standard is grounded in the notion that it is unjustifiable

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[195] NAMBLA publishes/distributes materials such as the NAMBLA Bulletin, "The Survival Manual: The Man's Guide to Staying Safe in Man/Boy Relationships," and "Rape and Escape." According to the plaintiffs, these publications contain pictures of young boys, and they ostensibly give advice to readers on how to lure children and then avoid prosecution.

[196] Tiffany Komasara. *Planting the Seeds of Hatred: Why Imminence Should No Longer be Required to Impose Liability on Internet Communications.* 29 Cap. U.L. Rev. 835 (2002).

[197] Id.

[198] Kenneth J. Brown. *Assessing the Legitimacy of Governmental Regulation of Modern Speech Aimed at Social Reform: The Importance of Hindsight and Causation.* 10 Wm. & Mary Bill of Rts. J. 459 (2002)..

[199] Komasara, supra note 12.

[200] Brown, supra note 14.

[201] Komasara, supra note 12.

to impose ex-post facto punishments for consequence-free speech.[202] However, NAMBLA's speech in this instance appears to have been a factor in instigating violence. As stated earlier, the Curleys can theoretically hold NAMBLA's speech responsible for the death of their son based on the Catalyst to Violence standard. The Catalyst to Harm standard does not require *Brandenburg*'s imminence standard in order to link NAMBLA's speech to the harm that occurred to Jeffrey Curley. Based on decisions in cases such as *Paladin* and *Braun*, relaxing the imminence standard is constitutionally feasible in cases where speech was a significant catalyst in brining about harm.

Much like the standard of Harm Advocacy,[203] the Catalyst to Harm Standard labels certain speech as "bad" not because of its ideological or social content, but because it is speech that is linked to a definitive social harm that the legislature has the constitutional authority to prevent or punish. In order to determine if the speech in question meets the requirements for the Catalyst to Harm Standard, the plaintiff must (1) establish the harm that actually resulted, (2) establish the advocacy of harm within the speech in question, and (3) establish a causal connection between the speech and the harm that occurred.

1. Speech that Results in Harm (Establishing that Harm Actually Occurred)

The first step in applying the Catalyst to Harm Standard is to determine that harm actually occurred so that liability can be constitutionally imposed. Speech that does not result in action is unpunishable;[204] however, the right to free speech is not absolute. The popular reasoning that one may not lawfully yell "Fire!" in a crowded theater is an example of the way in which the First Amendment yields to the need to prevent potentially dangerous disorder.[205] As Justice Hand reasoned in *Masses*:

> "One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of the law cannot by any latitude of

[202] Brown, supra note 14.
[203] Id.
[204] *Brandenburg* at 447: "…constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocay of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."
[205] *Schenck* at 52.

interpretation be a part of that public opinion which is the final source of government in a democratic state…"[206]

The Court echoed Justice Hand's reasoning in *Gitlow:*

"Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility…That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."[207]

As was set forth by the Court in cases like *Masses* and *Gitlow*, the First Amendment does not protect violence or words that incite violence. Lower courts have extended this rationale to third parties with the decision in *Weirum.* This case is often cited as a case of true incitement in the same vein as *Brandenburg*, a decision based on the premise of incitement of a live audience to imminent lawless and harmful action.

"If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby…It is of no consequence that the harm to decedent was inflicted by third parties acting negligently."[208]

The First Amendment does not protect violence,[209] and words tending to lead to or that actually instigate violence enjoy no greater protection than do the violent acts themselves.[210] The first element of the Catalyst to Harm Standard does not deal with abstract advocacy; instead, the first element establishes that harm actually occurred. This requirement is important because it calls for the punishment of speech that is tied to harmful action; therefore, it insures that advocacy of abstract doctrines that does not result in harm is not unfairly punished.

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[206] *Buttorff* at 623-624.
[207] *Gitlow* at 666-667.
[208] *Weirum* at 40.
[209] *NAACP v. Claiborne Hardware Co.* 458 US 886, 916 (1982).
[210] *Brandenburg* at 447: "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.

2. Speech that Advocates Harm (Intent of the Speaker)

The first element of *Brandenburg* basically involves determining the intent of the sender. This evaluation is necessary to avoid imposing liability on speech that should remain protected—the first element of *Brandenburg* is necessary to separate speech that is "mere advocacy" from speech that "prepar[es] a group for violent action and steel [s] it to such action." [211]

Advocacy alone of certain unpopular behavior remains fully protected under the First Amendment. If no legitimately proscribed harm results from the speech at issue, then punishment of the speech cannot be constitutionally justified. This is so because, in theoretical terms, the marketplace of ideas never ceased to function. Because the speech did not result in harm, the opportunity exists for counterspeech to combat the lesser speech. However, once that speech facilitates action, then speech loses its constitutional protection and becomes punishable because speech that causes action causes harm. Speech that does nothing more than facilitate a socially harmful act such as murder does not enjoy First Amendment protection, and the Supreme Court has refused to afford speech such as obscenity and child pornography First Amendment protection—the same rationale should apply to speech that instigates harmful action.

To establish that speech activity in question can be judged by the Catalyst to Harm Standard, the plaintiff would need to show that the speaker specifically desired to cause the resulting harm and must have hoped that circumstances would be created such that the harm will ensue, or the speaker must be proven to have been grossly indifferent to the known risk of the harm associated with the work at issue.

This requirement is perhaps best exemplified in *Paladin*—where the Fourth Circuit court held that the book *Hit Man*, which was a 130-page detailed, factual instruction manual on how to murder and to become a professional killer—fell outside the realm of protected speech:

> "[The First Amendment] would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment…at the very least where a speaker—individual or media—acts with the purpose of assisting

> in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience…[212]

In her article, Beth Fagan determined that the First Amendment would not "bar the imposition of civil liability for speech that the plaintiff can demonstrate was performed with specific intent" to cause harm.[213]

Likewise, in *Braun*, the Eleventh Circuit held that a published advertisement calling for a "GUN FOR HIRE" created an unreasonable and foreseeable risk of harm of potentially violent, criminal activity:

> "Our review of the language of the ad persuades us that SOF had a legal duty to refrain from publishing it…The ad's combination of sinister terms makes it apparent that there was a substantial danger of harm to the public…"[214]

The only defense based on the First Amendment is if the speech in question is of abstract generality, without counseling or solicitation. Both *Paladin* and *Braun* fall outside of this protected category of speech because the respective courts ruled that the speech involved in these cases was designed to result in harm. Likewise, according to the Ninth Circuit in *Freeman*, any speech that directly assists in the preparation and review of criminal activity is not entitled to First Amendment protection:

> "The First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."[215]

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[211] *Brandenburg* at 448, as cited by Komasara, supra note 12..
[212] *Paladin* at 248.
[213] Beth Fagan. *Rice v. Paladin Enterprises: Why Hit Man is Beyond the Pale.* 76 Chi.-Kent. L.Rev. 603 (2000).
[214] *Braun* at 1115.
[215] *Freeman* at 552.

Because the content of the speech is important in establishing the intent necessary to determine whether speech constitutes instigation, a reviewing court also must consider the context in which the author disseminated the speech. When a publisher distributes materials that are highly coercive in facilitating a crime, a reasonable court would have to consider that the publisher intended to produce a specific criminal response or at least knew that such a crime indeed might be committed.

When one combines a sufficiently demanding level of intent with the occurrence of a grave harm, it becomes reasonable for the law to tax the social costs of instigating speech against the speaker.[216] In essence, if someone speaks with the intent to cause harm, then, according to the courts' decisions in *Paladin, Braun,* and *Freeman*, the speech is just as punishable as the criminal harm that occurred.

3. Establishing a Causal Connection between the Speech and the Harm (Evidence of Connection)

However, in order to implicate speech in the commission of a crime, the plaintiff would need to prove that the speech at issue actually caused or was a substantial factor in the commission of a criminal act or intentional tort in order to enact the third requirement of the Catalyst to Harm Standard. In the case of *Paladin,* the First Amendment did not prevent Paladin from being held civilly liable as an aider and abetter of a triple contract murder because *Hit Man* served to steel and ready James Perry to murder.[217]

In *Braun,* the Eleventh Circuit linked the ad to the murder by the sinister language that was used:

> "…we agree with the district court that 'the language of this ad is such that, even though couched in terms not explicitly offering criminal services, the publisher could recognize the offer of criminal activity as readily as its readers obviously did.'"

Likewise, the defendants in *Mendelsohn* were arrested for disseminating a computer program that facilitated illegal sports bets. The Ninth Circuit ruled that the program was "too instrumental and intertwined with the performance of criminal activity to retain First

[216] *Brandenburg* at 447.

Amendment protection."[218] When governmental punishment of speech occurs subsequent to the speech itself, such punishment is conducted with the benefit of hindsight. This is important because hindsight enables the courts to discern whether the speech in question instigated any legally cognizable harm. Therefore, when such speech is responsible for creating, facilitating, or instigating harm, its punishment is justified by this causal connection between the speech and the harm.[219]

As stated earlier, the purpose of the Catalyst to Harm Standard is not to impose an unconstitutional prior restraint on speech. Because this standard requires the establishment that a specific harm did occur, the Catalyst to Harm Standard only applies to speech that has allegedly facilitated harm. In adhering to the Marketplace doctrine, this standard is a punishment only for certain speech that is too instrumental and intertwined with the performance of criminal activity to retain First Amendment protection.

TESTING THE CONSTITUTIONALITY OF THE CATALYST TO HARM STANDARD

The Catalyst to Harm Standard must be tested against previous court decisions in order to determine the standard's constitutionality. By applying the Standard to established precedent, we can assess its constitutionality.

The case of *Weirum* actually resulted in media liability under the rationale of incitement—in this instance, a radio station facilitated the death of a motorist by urging driving listeners to find one of the radio station's DJs. The court ruled the outcome was unintentional but predictable, and the court reasoned that the contest was directed to incitement of imminent lawless action in the form of reckless driving, and that it therefore was not protected by the First Amendment.[220]

Despite its decision, the court failed to create a standard for future reference. In applying the Catalyst to Harm Standard to this case, actual harm needs to be established—here, the actual

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[217] *Paladin* at 239.
[218] *Mendelsohn* at 1186.
[219] Brown, supra note 14.

harm was the death of a motorist. The second requirement is to determining the intent of the speaker. The defendant in *Weirum* had no apparent intent to cause illegal results or any kind of harm. However, the radio station intentionally uttered the words and created dangerous circumstances; therefore, the speech was directed to inciting, as well as likely to incite, harmful conduct. The third requirement is establishing a causal connection between the speech and the harm. The radio station was promoting itself through a contest encouraging drivers to race around the city to find one of the station's DJs who had in his possession a sum of money. The drivers who caused the accident in which a motorist was killed were participating in the contest when the accident happened.

The facts of this case meet the three parts of the Catalyst to Harm standard. Even though the radio station was not encouraging a specific motorist to race through the city and kill another specific motorist, the communication was nonetheless the proximate cause of death. The fact that the results were not intended and the harmful speech was not tailored to an intended receiver does not preclude the radio station from liability. By applying the Catalyst to Harm Standard, the court's decision in *Weirum* remains the same.

In the *Hustler* case, *Hustler Magazine* was sued by the mother and friend of an adolescent boy, Troy D., who died recreating an act he read about in *Hustler.* In the "Orgasm of Death" article, *Hustler* described a practice known as auto-erotic asphyxiation, which involves masturbating while hanging one's self to cut off the blood supply to the brain at the moment of orgasm. The boy's mother sued *Hustler* on theories of negligence, attractive nuisance, product liability, and strict liability founded on dangerous instrumentality. However, the Fifth Circuit court afforded no liability to *Hustler* because the article served some sort of educational purpose and did not exist solely as a commercial, money-making tool, distinguishing this case from the *Weirum* rationale. In addition, *Hustler* was not liable because the magazine repeatedly attempted to dissuade its readers from conducting the dangerous activity.

In applying the Catalyst to Harm Standard, the resulting harm in this case is the death of the 14-year-old Troy D. The connection between the speech and the harm is evident here as well—Troy's body was found hanging nude in his closet with a copy of article on the ground near the

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[220] David Crump. *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test.* 29 Ga. L.Rev. 1 (1994).

body. The intent of the speaker is in question here. The issue in this case is whether or not *Hustler Magazine* intended the harm that resulted, or if *Hustler* was negligent in its publication of the article. It seems in this instance that *Hustler* did not show a gross indifference to the risk of harm that might come about a result of this article, nor did the magazine hope to create circumstances in which a death would result. These assertions are solid because, unlike the radio broadcast in *Wierum*, this article was not published solely for the purpose of making money. Also, *Hustler* included within the article a number of advisories dissuading readers from conducting this act. Because of these advisories, the court correctly concluded that *Hustler* was not advocating harm and was in fact hoping to avoid harm. As a result of *Hustler*'s attempts to discourage its readers from performing this dangerous act, as well as the educational nature of the article, *Hustler Magazine* is not liable for the boy's tragic death. Therefore, *Hustler*'s speech in this case did not meet the necessary requirements for liability as set forth by the Catalyst to Harm Standard.

The Fifth Circuit court in *Eimann* rejected a wrongful death action involving an advertisement referring to "high risk assignments" that ran in *Soldier of Fortune Magazine* (SOF). In this instance, the son and mother of the murder victim brought a wrongful death claim against SOF, seeking to hold SOF liable for publishing a personal service ad through which the victim's husband hired an assassin to kill her. A lower court found for the plaintiffs, but the Fifth Circuit court reversed the verdict, holding that SOF could only be held liable if "(1) the relation to illegal activity appears on the ad's face; or (2) 'the advertisement, embroidered by its context, would lead a reasonable publisher or ordinary prudence under the same or similar circumstances to conclude that the ad could reasonably be interpreted' as an offer to commit crimes."[221]

In applying the Catalyst to Harm Standard to this case, the speech must have resulted in harm. In this instance, the harm that resulted was murder. Next, the intent of the speaker, SOF, must be established. In order to hold SOF responsible for the death, the plaintiffs would need to determine that the magazine specifically desired to cause harm and hoped that the speech would create circumstances in which such harm would ensue; or the plaintiffs must prove SOF to have been grossly indifferent to the known risk of the harm associated with work at issue. Based on the facts, one could reasonably conclude that SOF did not specifically intend for an assassin to

[221] *Eimann* at 838.

kill an innocent woman. However, the notion that SOF was grossly indifferent to the known risk of harm is questionable. SOF ran an ad that referred to "high risk assignments"—this phrase is ambiguous, and the Fifth Circuit court in this case ruled that SOF could not be held liable for the murder because of the ad's ambiguity.

> "…virtually anything might involve illegal activity, and that applying the district court's standard would mean that a publisher 'must reject all ambiguous ads,' or risk liability for any 'untoward consequences that flow from his decision to publish' them."[222]

Likewise, SOF is not liable under the Catalyst to Harm Standard because requiring the magazine to determine that "high risk assignments" as potentially harmful is placing too much of a burden of interpretation on SOF; also, "high risk assignments" is too vague for SOF to determine that the phrase would be a catalyst to harm. Therefore, the ruling remains the same in this case because "high risk assignments" is too ambiguous to apply liability to SOF on the basis of gross indifference to a known risk of harm. Because SOF is not liable under the second element Catalyst to Harm Standard, the applying the third element of the Catalyst to Harm Standard—causal connection— is unnecessary.

In the case of *Braun*, a man named Richard Savage ran the following advertisement in *Soldier of Fortune*: "GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier and other special skills. All jobs considered." After reading the advertisement, a man named Bruce Gastwirth hired Savage to murder Gastwirth's business associate, Richard Braun. Braun was gunned down outside his home in Atlanta, and Gastwirth and Savage were convicted of criminal conspiracy. Braun's two sons later filed a civil suit seeking damages for *Soldier of Fortune*'s involvement in their father's murder.

Like in the *Eimann* case, the resulting harm as a result of SOF's speech was murder. However, unlike *Eimann*, the intent of the magazine in publishing the ad falls more on the side of gross indifference. While SOF did not intend for the ad to specifically result in murder, the magazine ignored red-flag phrases like "GUN FOR HIRE," "professional mercenary," and "discreet and private." Therefore, SOF's speech in this case can be labeled as grossly indifferent

[222] The Eleventh Circuit in *Braun* (at 1115) citing the Fifth Circuit's decision in *Eimann*.

to anticipated harm because the magazine should have been able to interpret that this specific advertisement was a call to harmful action. The connection between SOF and Gastwirth and Savage is established through testimony—Savage ran the ad in SOF, Gastwirth saw the ad in SOF, and Gastwirth subsequently hired Savage to murder Richard Braun. Because a causal connection can be established among Savage, SOF, and Gastwirth, SOF's speech in this case meets the requirements for liability according to the Catalyst to Violence Standard:

> "…[the] advertisement 'on its face' would have alerted a reasonably prudent publisher that the 'ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime.'"[223]

The Fifth Circuit already has applied a relaxed imminence standard in this case by not requiring that Savage's actions be immediate—SOF was a conduit for the harm that transpired; therefore, the notion that the harm must be imminent is not necessary to assign liability in this case.

By applying the Catalyst to Harm Standard, the decision remains the same because the facts of the case meet the requirements necessary for the Catalyst to Harm Standard to be applicable. Instead of a stand-alone decision, in applying the Catalyst to Harm Standard, the courts now have specified criteria that can more solidly determine liability in a case such as this one.

With the *Paladin* decision, the Fourth Circuit Court held the publisher of *Hitman* liable for a murder committed by one of the book's readers. Using the Catalyst to Harm Standard, the ruling would remain the same. In fact, it is a perfect example of the relaxed imminence standard at work. In this case, the book was labeled as a how-to manual for would-be assassins, and the publisher conceded that it knew and intended its instruction manual to aid in the commission of murder. In its defense, the publisher claimed protection under the First Amendment.

The harm established is the murder of three people—Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor's nurse, Janice Saunders—by a man named James Perry, who was acting as a contract killer. Perry was acting as hitman in this instance, following the step-by-step instructions in the book to murder the three victims. The second element is to

[223] *Braun* at 1115.

determine the intent of the speaker. By publishing what in essence is a "how to" manual of murder, Paladin Enterprises acted with gross indifference to the harm that would logically occur.

> "…at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of a crime, we do not believe the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience."[224]

The third requirement is to establish a connection between the speech and the harm. Police found *Hitman* in Perry's possession, and medical examiners determined that Perry followed the book's instructions when he murdered the three victims and disposed of their bodies.

> "In soliciting, preparing for, and committing these murders, Perry meticulously followed countless of *Hit Man*'s 130 pages of detailed factual instructions on how to murder and to become a professional killer."[225]

The facts in this case meet the requirements for the Catalyst to Harm Standard. Although the threat of murder did not meet the *Brandenburg* definition of immediate incitement to violence, the facts show that *Hitman* was an instrumental factor in facilitating the murder of Mildred Horn, Trevor Horn, and Janice Saunders. Therefore, the court in this case was correct in its decision to implicate Paladin Enterprises as an abettor of this horrendous crime. Like the rationale in *Weirum*, Paladin Enterprises did not specifically instruct James Perry to murder the three specific victims; however, *Hitman* set forth specific instructions on how to efficiently murder someone and how to properly dispose of the body. Perry followed these instructions implicitly as he murdered the three victims. Although Paladin did not instruct Perry to murder these specific people, the instructions contained in the book were enough of an incitement to violence, and the implication of Paladin in the case does not require the speech in *Hitman* to pose an immediate and imminent threat.

> "…the nature of the speech itself, strongly suggests that the audience both targeted and actually reached is, in actuality, very narrowly confined, as in the case before us."[226]

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[224] *Paladin* at 248.
[225] Id. at 239.

The outcome of this case remains the same even after the application of the Catalyst to Harm Standard; however, by applying this standard, the ruling is more specified as to how it was decided.

The review of cases illustrates the constitutional validity of the Catalyst to Harm Standard. The Massachusetts court should follow the same reasoning in its review of the Curley case. Because the Catalyst to Harm is constitutionally secure, then the Standard can be applied to determine if any liability can be assigned to NAMBLA's speech because of its involvement in the murder of Jeffrey Curley.

APPLYING THE CATALYST TO HARM STANDARD TO THE JEFFREY CURLEY CASE

Because NAMBLA's speech in the case of Jeffrey Curley seems to meet the requirements for classification as a Catalyst to Harm, then it is highly likely that a reasonable court could deem NAMBLA's advocacy as low-value speech rather than high-value speech. In an instance such as this, when speech has resulted in a significant public harm, the social value of the speech is not sufficient to overcome the harm involved. Here, the state has a substantial interest in punishing speech that has caused a crime, particularly a crime that has resulted in serious bodily harm and death. Because the constitutionality of the speech of an unpopular "minority" organization like NAMBLA is in doubt, a high burden should be placed on the court to justify imposing liability for the consequences of speech activity. Nevertheless, a high burden in theory should not prove to be an insurmountable burden in practice. The victims of those who use speech as a means of facilitating and instigating harm should not be denied a meaningful remedy on the theory that the First Amendment privileges the advocacy of a de facto accomplice before the fact. When cases arise that meet reasonable speech-protected standards of liability, such as this case, the court must be willing and able to impose liability.[227]

In its defense, however, NAMBLA claims that its pedophilic speech is not targeted to a specific person; instead, the speech is directed to the public at large, and the speech cannot be directing to inciting or producing imminent lawless action. Therefore, the speech in question is

[226] Id.
[227] Malloy and Krotoszynski, Jr., supra note 6.

not punishable under *Brandenburg* because, according to NAMBLA, advocacy exists only when speech is aimed at a specific individual. NAMBLA also claims that any conduct arguably advocated by the NAMBLA Bulletin or any other publication was not imminent and is not punishable.

NAMBLA's defense strategy is based on the notion that its speech is directed to the public at large rather than specified receivers; NAMBLA also maintains that any speech put forth by the organization does not constitute the *Brandenburg* definition of "imminent lawless conduct" because the harm to Jeffrey Curley was not immediate.[228] Because NAMBLA is using *Brandenburg* as the cornerstone of its defense, then the *Brandenburg* analysis of speech that incites lawless conduct must be circumvented in order to punish this speech that meets the requirements for the Catalyst to Harm Standard.

The fist step in applying the Catalyst to Harm Standard to the Curley case is to determine the harm that occurred. As stated earlier, the harm involved in this case is the murder of Jeffrey Curley by Charles Jaynes and Salvatore Sicari. According to police, NAMBLA members and homosexual lovers Jaynes and Sicari picked up fifth-grader Jeffrey Curley and took the boy to the Boston Public Library where Jaynes accessed NAMBLA's website in order to gain psychological comfort for what he was about to do, which was attempt to sexually assault Curley. The 10-year-old fought back, however, and in an attempt to restrain him, Jaynes gagged the boy with a gasoline-soaked rag, eventually killing him. The men then put Jeffrey's body in a tub with concrete and threw it into a river.[229] The Curley's lawsuit against NAMBLA claims that prior to the murder, Jaynes had been stalking Jeffrey Curley. As evident by the horrendous actions of Jaynes and Sicari, the harm that resulted in this case was attempted molestation and eventual murder of Jeffrey Curley.[230]

The second step is to establish the intent of the speaker. In their wrongful death lawsuit against NAMBLA, the plaintiffs claim that portions of NAMBLA's web-based and print publications "promoted, advocated, conspired, and urged the general public to rape young male children and provided information to assist the general public in obtaining child pornography

[228] Julie Foster, "ACLU defends child-molester group," (2000) available at http://www.worldnetdaily.com/news.asp?ARTICLE_ID=18029.
[229] Id.
[230] *Barbara and Robert Curley v. NAMBLA*, supra note 4.

and pedophile-related material."[231] The lawsuit goes on to allege that Jaynes "became obsessed with having sex with and raping young male children. As a result of reading a NAMBLA bulletin, he came to cope with his feelings and his desires, an then he came to realize it's OK to rape little boys, and that's what he went and did."[232]

In order to hold NAMBLA liable for its part in this murder, the plaintiffs need to show that NAMBLA either specifically desired to cause the harm by creating circumstances such that harm would ensue, or that the organization was grossly indifferent to the known risk of the harm associated with its speech. Because of the Jeffrey Curley incident, NAMBLA and other pedophile organizations can no longer plead ignorance to the possibility that its speech may cause harm. However, in the Curley case, it can be argued that NAMBLA created an environment for harm to occur.

Acting as an overt pedophile organization, NAMBLA provides resources and comfort to pedophiles seeking information about sexual relationships with boys. NAMBLA disseminates publications such as the NAMBLA Bulletin, which includes articles and letters defending and reporting the sexual experiences of NAMBLA members.[233] Introduced in the criminal trial was a NAMBLA publication titled "The Survival Manual: The Man's Guide to Staying Safe in Man/Boy Sexual Relationships."[234] In addition, NAMBLA also released a publication titled "Rape and Escape," which was described by the plaintiffs as an explicit guide to luring children and then avoiding prosecution.[235] While NAMBLA claims that it does not advocate or condone raping young male children,[236] the evidence of suggests that NAMBLA—with publications such as the NAMBLA Bulletin, "The Survival Manual," and "Rape and Escape"—hoped to create circumstances in which the actual molestation of children could take place.

The third step in establishing the Catalyst to Harm Standard against NAMBLA is for the plaintiffs to provide evidence of a causal connection between the speech and the harm. Admitted

[231] Id.
[232] Moore, supra note 5.
[233] Id.
[234] Id.
[235] Id.
[236] Foster, supra note 44. The ACLU—which is defending NAMBLA in this case—claims the material does not "urge, promote, advocate or even condone torture, mutilation, or murder. Examination of the materials that have been identified by the plaintiffs will show that they simply do not advocate violation of

into evidence during the criminal trial was Jaynes journal, which was discovered by police after Jeffrey Curley's murder. In his journal, Jaynes wrote that finding NAMBLA "was a turning point in discovering myself. NAMBLA's Bulletin helped me to become aware of my own sexuality and acceptance of it."[237] Also introduced into evidence were the NAMBLA publications "The Survival Manual" and "Rape and Escape," both of which were found in Jaynes' possession. Finally, according to testimony, Jaynes visited NAMBLA's website from a Boston Public Library moments before murdering Jeffrey Curley to gain psychological comfort for what he was about to do, which was attempt to molest and eventually murder the 10-year-old boy.[238]

These facts establish that there was a connection between Charles Jaynes and NAMBLA, and also that there was a connection between NAMBLA's speech and the murder of Jeffrey Curley. Based on these facts, NAMBLA's speech appears to have been a factor in the murder of Jeffrey Curley because of the influence it had in motivating Jaynes to stalk, kidnap, and murder the 10 year old. If not for NAMBLA's involvement in this situation, in the form of advocacy speech, Charles Jaynes may not have had the motivation and support he needed to commit such a crime.

However, in its defense, NAMBLA claims that its pedophilic speech is not targeted to a specific person; instead, the speech is directed to the public at large, and the speech cannot be directed to inciting or producing imminent lawless action. Therefore, the speech in question is not punishable under *Brandenburg* because, according to NAMBLA, advocacy exists only when speech is aimed at a specific individual. NAMBLA also claims that any conduct arguably advocated by the NAMBLA Bulletin or any other publication was not imminent and is not publishable.

In regards to NAMBLA's contention that its speech does not constitute advocacy because it was not targeted to a specific person, the rationale in *Wierum* invalidates that contention. In that case, the court ruled that even though the radio station did not intend to cause harm and therefore had no specific individual in mind as a victim, the station still was guilty of incitement because of its communication was directed to inciting harmful conduct. Although NAMBLA had no specific victim in mind, its speech created the circumstances which led to the murder of Jeffrey

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the law," the ACLU stated in a dismissal motion. "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."

[237] Moore, supra note 5.

[238] Id.

Curley. Therefore, NAMBLA's "specific person" rationale is flawed and is fails as a solid defense. Also, since NAMBLA's speech in this instance meets the necessary requirements of the Catalyst to Violence Standard, then NAMBLA's speech can be labeled as criminal advocacy, which, based on the *Brandenburg* definition, is speech that has caused or is likely to cause lawless action.

Furthermore, because NAMBLA is using *Brandenburg*'s definition of "imminent lawless conduct" as the cornerstone of its defense, then the *Brandenburg* analysis of speech that incites lawless conduct must be circumvented in order to punish this speech. As set forth earlier, the first element of *Brandenburg* basically involves determining the intent of the sender. NAMBLA's speech was found to be a catalyst in causing the harm that came to Jeffrey Curley, and the intent of its speech was to create circumstances in which the molestation of children could take place. The third element is met in this instance because the plaintiffs are seeking to impose liability on harm—Jeffrey's murder— that has already occurred.

Therefore, the second *Brandenburg* element—the requirement that the harmful action be imminent—is the crux of NAMBLA's defense. In a situation such as this, if the court were to rely solely on *Brandenburg* as a means to assign liability to speech that facilitated harm, then groups like NAMBLA that reach a wide, unspecified audience would face no liability because the "imminent lawless conduct" is a nearly impossible hurdle to overcome. However, by applying the Catalyst to Harm Standard to this situation (thereby relaxing the *Brandenburg's* imminence requirement), NAMBLA would not be able to hide behind the vale of imminence because the Catalyst to Harm Standard implicates NAMBLA in the aiding and abetting of Jeffrey Curley's murder. At the same time, by relaxing the imminence requirement through the Catalyst to Harm Standard, NAMBLA is prohibited from using a First Amendment loophole to avoid liability. The fact that NAMBLA's advocacy was not imminent according to *Brandenburg*'s standard does not preclude the court from holding NAMBLA accountable for the harm brought about by its speech.

CONCLUSION

With the Catalyst to Harm Standard available to apply to cases involving harmful speech, the courts now have a specific, clear-cut standard by which to determine liability. By establishing the resulting harm, the intent of the speaker, and a proximate connection between the speech and the harm that occurred, courts as well as speakers now can determine on a point-by-point basis whether the speaker can constitutionally be held responsible for the harmful results of his speech.

By creating a hybridization of the incitement constitutional standard, the tort law of negligence, and the crime of aiding and abetting, this standard bridges a gap between the rulings of the courts and the suggestions of scholars like Crump, Komasara, Malloy, and Krotoszynski. The specificity of the Catalyst to Harm Standard compensates for the shortcomings of Crump's notion of Camouflaged Incitement and Komasara's idea to relax *Brandenburg's* imminence requirement. Crump's Camouflaged Incitement falls victim to the same weakness as the courts' decisions in cases like *Weirum, Braun,* and *Paladin* in that they all operate on a case-by-case basis. Komasara's relaxed imminence standard is deficient in that it does not establish a specific approach to relaxing the imminence standard. Consequently, these ideas and decisions fail to create a generic, detailed standard by which liability in instances such as these can be determined. By implementing directed steps designed to help the courts determine liability in all cases involving harmful speech, the Catalyst to Harm Standard fills in the gaps left by the courts and certain scholars. Speech such as NAMBLA's is legal as long as it does not facilitate harm. However, once that speech results in harm, such as the case of Jeffrey Curley, then that speech must stand up against the Catalyst to Harm Standard in order to avoid liability.

In this instance, the harm that resulted was the tragic death of Jeffrey Curley. The second step, determining the intent of the sender, is satisfied with the existence of such pictured publications as the NAMBLA Bulletin, as well as "The Survival Manual" and "Rape and Escape." These publications, according to the plaintiffs, serve as specific guides to luring children and then avoiding prosecution. With these documents, it is evident that NAMBLA hoped to create circumstances in which the actual molestation of children could take place. In order to meet the

requirements for the third step, the plaintiffs need to prove that a proximate connection existed between NAMBLA's speech and the harm that resulted. In his journal, Jaynes wrote that finding NAMBLA "was a turning point in discovering myself. NAMBLA's Bulletin helped me to become aware of my own sexuality and acceptance of it." But for the Bulletin, Curley would be alive. NAMBLA's speech in this instance meets the three requirements for liability under the Catalyst to Harm Standard. NAMBLA cannot hide behind *Brandenburg*'s imminence requirement, and it must answer for its role in the death of Jeffrey Curley.

The Catalyst to Harm Standard provides answers to the questions concerning the prohibition of questionable speech that were brought about by this case. For instance, despite its instigating nature, pedophilic speech maintains its constitutional protection as long as the speech does not facilitate violence. The information NAMBLA disseminates is perfectly legal as long as that speech is not a factor in the commission of a crime. However, once this speech moves away from mere advocacy and actually brings about harm, then pedophilic speech loses its constitutional protection. And this prohibition on such speech is not based on the subject matter involved; instead, the speech is rendered punishable because of the criminal harm that is attached to it.

Some members of the media may be concerned at the possible chilling effects of the Catalyst to Harm Standard, but this concern is misplaced because of the high burden of proof that the Standard requires. The Constitution refers to a free and responsible press, and in order to avoid any type of liability, the media need only to avoid irresponsible behavior, such as broadcasting the type of speech that has the potential to cause harm (such as the speech in *Weirum*). The media can easily shield themselves from liability by issuing an advisory before they broadcast or publish inflammatory speech. Consequently, the media remain free and responsible, and the virtue of the First Amendment remains intact.

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