

Braun v. Soldier of Fortune: Tort Law Enters the Braun's Age as Constitutional Safeguards for Commercial Speech Buckle 'neath the Crunch of Third-Party Liability

Advertising is more than just a substantial source of revenue for publications. It embodies the liberties of free speech and free press secured to all of us so fundamentally by the First Amendment. Yet, in Braun v. Soldier of Fortune Magazine, Inc., the United States Court of Appeals for the Eleventh Circuit recently held a magazine liable for negligently publishing a gun-for-hire advertisement that allegedly resulted in the death of plaintiffs' father. This Casenote analyzes the detrimental, long-reaching effects of sustaining a negligence action that penetrates so deeply into First Amendment freedoms.

I. INTRODUCTION

Legal scholars, judges, and legislators alike have filled volumes attempting to define the scope of First Amendment protections of free speech. Such an ambitious endeavor is beyond the scope of this Casenote, however, which will focus primarily on the current safeguards on commercial speech and the adverse impact of a recent appellate court case.

Until now, publishers remained relatively safe from civil liability. Suits in defamation, invasion of privacy, and negligence seldom overcame First Amendment interests in securing unfettered expression. In *Braun v. Soldier of Fortune Magazine, Inc.*,¹ though, an appellate court sustained a successful negligence action against a magazine publisher brought by victims of a third-party crime.

1. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 113 S. Ct. 1028 (1993).

The second part of this Note will explain the court's decision in great detail, highlighting some of the majority's oversights along the way. The third part discusses the recent developments in commercial speech jurisprudence and negligence theory, and how the two interrelate. Part four uses First Amendment and tort law policies to oppose the extension of a negligence action against publishers. That section further punctuates the weaknesses in the majority opinion by illustrating that the merits of *Braun* do not support the court's decision. Finally, part five concludes that this decision sets a dangerous precedent that threatens the very underpinnings of the First Amendment itself by saddling the media with a devastating burden.

II. THE *BRAUN* CASE

A. *The Facts of Braun*

In late 1984, Bruce Gastwirth began planning the assassination of his long-time business partner, Richard Braun. He enlisted the help of his associate, John Horton Moore, and together they made at least three unsuccessful attempts on Braun's life.² Desperate, the two men responded to a mercenary advertisement in *Soldier of Fortune Magazine* (SOF) in early August 1985. The ad read: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discreet [sic] and very private. Body guard, courier, and other special skills. All jobs considered."³

The "gun for hire" was Michael Savage. He had submitted the personal service advertisement to SOF earlier that year, and the magazine had agreed to run it for nine months. Savage testified that when he placed the ad his only intention was to solicit legitimate employment.⁴ Nonetheless, he explained that the response to his ad was almost overwhelmingly directed at procuring his assistance in criminal activity ranging from murder to kidnapping.⁵ One call in particular caught his attention and several days later Savage met with Gastwirth and Moore to discuss plans to murder Richard Braun.⁶

2. The two men sold petroleum leases and Gastwirth allegedly owed Braun over \$250,000. *Victim's Sons Win "Gun for Hire" Damages*, 15 NEWS MEDIA & L. 36 (1991).

3. *Braun*, 968 F.2d at 1112 (phone number and address omitted by author).

4. *Id.*

5. Of the almost 40 calls Savage received per week, only one generated an offer for legitimate work as a bodyguard. *Id.*

6. *Id.*

SOF alleges that Savage enlisted Sean Trevor Doutre as the triggerman and that the two men agreed to kill Braun for \$5,000 each.⁷ On August 26, 1985, Savage, Moore, and Doutre ambushed Braun as he and his sixteen-year-old son, Michael, were backing out of the driveway. Doutre, armed with a MAC-11 automatic pistol, stepped in front of Braun's car and fired multiple shots through the windshield. Michael was hit in the thigh and Richard rolled out of the car severely wounded. Before Richard could stand, Doutre approached him from behind and fired two more shots in the back of his head, execution style.⁸ Richard Braun died instantly.

Michael Braun survived, however, and together with his brother Ian, filed a diversity action against SOF in the district court, seeking compensatory and punitive damages in the amount of \$120,000,000 for the wrongful death of their father.⁹ The district court consolidated this action with a separate cause of action filed by Michael alone, seeking damages for personal injuries he suffered during the attack. The Braun brothers contended that SOF was negligent in publishing Savage's ad, because it created an unreasonable risk of criminal solicitation.¹⁰

To show that SOF knew of the likelihood that criminal activity would ensue from these kinds of personal service advertisements, plaintiffs offered evidence of magazine and newspaper articles implicating a strong connection between SOF ads and a number of criminal convictions for murder, kidnapping, assault, conspiracy, and extortion.¹¹ Furthermore, Braun showed that law enforcement officials had contacted SOF editors on at least two separate occasions in connection with two multi-state criminal investigations linked to SOF personal service ads.¹² SOF president, Robert Brown, testified that he was unaware of any such connection between his magazine's

7. Doutre's connection to Savage is unclear beyond the fact the he too was responding to Savage's personal service ad. SOF claims that Doutre was employed by Savage and had executed at least two other people for him. *Braun v. Soldier of Fortune Magazine, Inc.*, 757 F. Supp. 1325, 1327 (M.D. Ala. 1991).

8. This refers to the narrow margin of error when a gun is fired at point blank range.

9. Complaint filed March 31, 1988, in the United States District Court for the Middle District of Alabama. *Id.* at 1326. Less than one year later, Gastwirth, Savage, Moore, and Doutre pleaded guilty to charges relating to the slaying of Richard Braun. *Supra* note 2, at 37.

10. *Braun*, 968 F.2d at 1112.

11. *Id.* "National magazines like Time and Newsweek carried some of these stories. Others were reported in local newspapers published in and around Boulder, Colorado, the city in which SOF is based." *Id.* at 1113 n.1.

12. *Id.* at 1113.

classified section and criminal activity.¹³

After five days of testimony, the district court instructed the jury that SOF was not obligated to investigate every ad it ran. Moreover, the magazine owed “no duty to the Plaintiffs for publishing an ad if the ad’s language on its face would not convey to the reader that it created an unreasonable risk that the advertiser, Savage, was available to commit such violent crimes as murder.”¹⁴ The court further charged the jury that they could consider both physical and mental anguish in determining Michael Braun’s damages, but that damages for the wrongful death claim were limited to the value of Richard Braun’s life. More importantly, punitive damages were not to be awarded absent a showing of malice or conscious indifference by SOF to the consequences of running the advertisement.¹⁵

The jury returned a verdict for the Brauns and hit SOF with over \$12,000,000 in damages, \$10,000,000 of which was punitive.¹⁶ The district court entered judgment for the plaintiffs in accord with the verdict and denied SOF’s motion for judgment notwithstanding the verdict. The court, however, conditioned its denial of SOF’s motion for retrial on a remittitur agreement reducing the punitive damages award to \$2,000,000.¹⁷ Plaintiffs agreed; the court entered an amended judgment; and SOF appealed.

B. The Majority Opinion

Because of the complex First Amendment issues implicated by imposing civil liability on a publisher, the United States Court of Appeals reviewed the *Braun* case de novo.¹⁸ The court began its two-

13. Both the former managing editor and the advertising editor who accepted Savage’s ad likewise denied having any knowledge of criminal activity linked to the personal service ads. The latter further explained that she understood the term “Gun for Hire” to mean “bodyguard or protection service-type thing,” rather than “contract killer.” *Id.*

14. The jury instructions continued:

Now, of course, the tendency to read the advertisement in question in hindsight is hard to avoid, but it must be avoided. The test for you is not how the advertisement in question reads now in light of subsequent events, but rather how the advertisement read to a reasonable publisher at the time of publication. You should view the facts and these instructions with particular care in this case, in view of the First Amendment to the Constitution, which protects the free flow of truthful and legitimate information even when it is of a commercial rather than a political nature.

Id.

15. *Id.*

16. The jury awarded Michael \$375,000 in compensatory damages, \$10,000,000 in punitive damages for his personal injury claim, and \$2,000,000 compensatory damages to the plaintiffs on the wrongful death claim. *Id.* at 1114.

17. *Id.* A remittitur is a judicial reduction of the amount awarded by jury.

18. *Id.* “[T]he Supreme Court has held that, in cases involving First Amendment claims, an appellate court must undertake independent review of the record ‘in order to make sure that “the [trial court’s] judgment does not constitute a forbidden intrusion on the field of free expression.”’” *Id.* at 1120 (quoting *New York Times v. Sullivan*, 376

part analysis with an examination of negligence claims under state law.¹⁹

Georgia law remains fairly conventional in its requirements for a cause of action sounding in negligence. Plaintiff must show that defendant breached a duty owed to the plaintiff, that the breach was the proximate cause of the resulting injury, and that plaintiff suffered some loss or harm.²⁰ Although the jury usually decides issues of breach, causation, and damages, "the existence of a legal duty presents a threshold question of law for the court."²¹ Georgia law recognizes a "general duty one owes to all the world not to subject them to an unreasonable risk of harm."²² The appellate court rejected SOF's arguments to the contrary and reduced appellant's legal position to a balancing test.²³

The court, therefore, focused on the reasonability of the alleged risk posed by SOF in publishing Savage's personal service ad. Employing a Learned Hand analysis, the court weighed the gravity and probability of the harm against the burden on the defendant in avoiding such risk.²⁴ Rejecting SOF's contention that the lower

U.S. 254, 285 (1964)).

19. Though adjudicating a federal suit, the "district court, sitting in Alabama, properly looked to Georgia law in resolving" plaintiffs' negligence claims. *Id.* at 1114. "[I]n diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit." *Id.* (quoting *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494 (1941)). Thus, because both the murder and Michael's injuries occurred in Georgia, "Alabama conflict of laws rules required that the district court apply Georgia law." *Id.*

20. The appellate court noted:

To prevail in an action for negligence in Georgia, a party must establish the following elements: 1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; 2) a breach of this standard; 3) a legally attributable causal connection between the conduct and the resulting injury; and 4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.

Id.

21. *Id.* (citing *First Fed. Sav. Bank of Brunswick v. Fretthold*, 394 S.E.2d 128, 131 (Ga. Ct. App. 1990)).

22. *Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 695 (Ga. 1982) (citation omitted).

23. The court stated: "We believe, however, that the crux of SOF's argument is not that it had no duty to the public, but that, as a matter of law, the risk to the public presented when a publisher prints an advertisement is 'unreasonable' only if the ad openly solicits criminal activity." *Braun*, 968 F.2d at 1114-15 (citing SOF's Reply Brief at 24). The court cited several Georgia cases supporting the use of a balancing test to determine whether or not the risk posed by an individual's actions is "unreasonable." *Id.* at 1115.

24. "Simply put, liability depends upon whether the burden on the defendant of adopting adequate precautions is less than the probability of harm from the defendant's

court's jury instructions placed an intolerable burden upon the press, the appellate court reasoned that "the duty of care the district court imposed on publishers was an appropriate reconciliation of" the state's interest in providing compensation for tort victims and First Amendment interests in safeguarding free speech.²⁵

SOF relied primarily on its successful defense of a nearly identical negligence claim filed in the Fifth Circuit, *Eimann v. Soldier of Fortune Magazine, Inc.*²⁶ In that case, plaintiffs, the son and mother of Sandra Black, brought suit against SOF for negligently publishing a similar personal service advertisement through which John Wayne Hearn was contracted to kill Sandra for \$10,000.²⁷ The "hit" was successful, and Sandra's husband, who answered the ad, paid Hearn.

The jury in *Eimann* was instructed to hold SOF 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 of ordinary prudence under the same or similar circumstances to conclude that the advertisement could reasonably be interpreted' as an offer to commit crimes."²⁸ Plaintiffs won the verdict and were awarded \$9,400,000 in compensatory and punitive damages.

The appellate court reversed the jury verdict, however, and refused to saddle SOF with such an onerous burden. The unanimous court postulated that imposing liability on SOF whenever the advertisement "could reasonably be interpreted as an offer to engage in illegal activity" would require the magazine to refuse all ambiguous ads.²⁹ Such a sweeping effect clearly touches on the fringes of First Amendment safeguards, especially in the absence of any bright-line standard.³⁰ Rather than decide the case on constitutional grounds, however, the *Eimann* court rested its reversal on SOF's lack of duty as a matter of state law.³¹ Given the ambiguity of Hearn's ad and

unmodified conduct multiplied by the gravity of the injury that might result from the defendant's unmodified conduct." *Id.* (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)) (a case that provided the genesis for Judge Learned Hand's oft-cited balancing test).

25. *Id.* For jury instructions given in *Braun*, see *supra* note 14 and accompanying text.

26. 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990).

27. Hearn's ad read:

EX-MARINES—67-69 'Nam Vets, Ex-DI [drill instructor], weapons specialist — jungle warfare, pilot, M.E. [multi-engine planes], high-risk assignments, U.S. or overseas. *Id.* at 831 (phone number omitted).

28. *Id.* at 833 (quoting District Court jury instructions).

29. *Id.* at 837 (applying similar balancing test under Texas tort law).

30. The court was particularly concerned with the potential compromise of constitutional protections for commercial speech: "[I]n the constitutional arena we have noted that the [mere] possibility of illegal results does not necessarily strip an ad of its commercial speech protection." *Id.* at 837. However, because the appellate court failed to find a legal duty owed to plaintiffs, it did not feel compelled to address the First Amendment issues directly. *Id.* at 833.

31. "We conclude that no liability can attach under these principles as a matter of

the "pervasiveness of advertising in our society,"³² the magazine's burden to investigate each ad was simply too onerous to be outweighed by the speculative risk of harm involved. The court, therefore, refused to hold SOF liable.

Though *Braun* seems remarkably similar to *Eimann* in both scope and analysis, the *Braun* court distinguished its case on two grounds. First, the jury instructions used in *Eimann* failed to balance adequately the risks and burdens related to defendant's conduct. The jury in that case was permitted to impose liability when the advertisement could reasonably be interpreted as criminal solicitation. Even ambiguous ads are susceptible to "reasonable" interpretations of criminal solicitation and, therefore, liability could be visited upon a publisher who runs a facially innocuous advertisement in good faith.³³ Furthermore, even absent a facial examination of the ad, the jury could have held SOF liable "if a reasonably prudent publisher would discover the connection to crime through the investigation of the advertisement's 'context.'"³⁴

By contrast, the *Braun* instructions explicitly limited the jury's inquiry to a facial interpretation of the ad, thus avoiding an uncertain and burdensome plunge into contextual analysis of the magazine's nature, readership, and knowledge of past criminal links.³⁵ Moreover, unlike the language used in the *Eimann* charge, the *Braun* instructions mandated that the unreasonable risk created be "clearly identifiable" so as to avoid imposing liability for publication of merely ambiguous advertisements.³⁶

The appellate court also addressed a second distinction. While Hearn's ad was "facially innocuous" and "ambiguous in its message," the Savage advertisement "clearly conveyed that the advertiser was 'ready, willing and able' to use his gun to commit other

law. SOF owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad's context—at most—made its message ambiguous." *Id.*

32. *Id.* at 836.

33. *Id.* at 833.

34. *Braun v. Soldier of Fortune Magazine Inc.*, 968 F.2d 1110, 1116 (11th Cir. 1992) (citing *Eimann*, 880 F.2d at 833).

35. These factors weighed into the second prong of the *Eimann* jury instructions. *Eimann*, 880 F.2d at 833.

36. As the appellate court explains:

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 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 this risk.

Braun, 968 F.2d at 1116.

crimes.”³⁷ The appellate court reasoned, therefore, that the unreasonable risk created by Savage’s advertisement was more “clearly identifiable.” Thus, the court justified imposing liability in *Braun* though recognizing that a similar imposition in *Eimann* would have saddled SOF with too onerous a burden.³⁸

The second part of the appellate court’s analysis of *Braun* focused on the delicate First Amendment issues involved with imposing liability on the media. Reviewing the principles espoused in the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,³⁹ the court recognized that “the First Amendment [even] protects speech that, like Savage’s ad, ‘does no more than propose a commercial transaction.’”⁴⁰

The threat of large damage awards could lead a publisher not to print a completely harmless ad unless he was reasonably certain that no jury could interpret the advertisement as an offer to commit criminal acts. Such self-imposed restraint “would compromise the First Amendment interest in commercial speech by depriving protected speech ‘of a legitimate and recognized avenue of access to the public.’”⁴¹

Despite the grave constitutional concerns that seem to follow any imposition of liability for printing commercial speech, however, the *Braun* court seemed to assuage these concerns with an open-arm acceptance of a “modified” negligence standard.⁴² This new standard coupled the old negligence standard with that part of the jury instruction that limited the scope of defendant’s duty to a facial examination of the advertisement. The absence of language in the jury instructions suggesting that SOF investigate the ad purportedly served the tantamount function of ensuring that any finding of liability would not create a chilling effect on protected speech.⁴³ In less than two pages of the court’s opinion, therefore, the constitutional issues at the forefront of the case were semantically put to rest.

The court quickly rejected the remainder of SOF’s contentions.

37. *Id.* at 1116 n.3 (quoting Brief for Respondents [the Brauns] at 27).

38. *Id.* at 1116.

39. 425 U.S. 748 (1976).

40. *Braun*, 968 F.2d at 1117 (quoting *Virginia State Bd.*, 425 U.S. at 762).

41. *Id.* (quoting *Manual Enters., Inc. v. Day*, 370 U.S. 478, 493 (1962)). For a more detailed analysis of the protection extended to commercial speech, see *infra* part III.A.

42. *Id.* at 1118. See discussion *infra* part III.

43. The following jury instructions were given:

The absence of a duty requiring publishers to investigate the advertisements they print and the requirement that the substance of the ad itself must warn the publisher of a substantial danger of harm to the public guarantee that the burden placed on publishers will not impermissibly chill protected commercial speech.

Id. at 1119.

SOF argued that imposing liability would force the magazine out of business and thereby “chill” all protected speech contained within the magazine. This contention, though provocative, was dismissed in a footnote.⁴⁴ SOF also argued that the intervention of Gastwirth, Moore, Savage, and Doutré severed the causal link between the ad’s publication and Braun’s death; the resulting harm was both unforeseeable and “too remote in the chain of events . . . to hold SOF liable.”⁴⁵ Under a more deferential standard of review, however, the appellate court found “that the jury had ample grounds for finding . . . proximate cause” because third party intervention does not sever the causal link when that intervention was “a reasonably foreseeable consequence of the defendant’s conduct.”⁴⁶

The opinion further concluded that under the “modified” negligence test, Savage’s ad clearly presented an identifiable unreasonable risk.⁴⁷ SOF, therefore, had a legal duty to refrain from publishing the personal service advertisement. Consequently, SOF was held liable for the death of Richard Braun.⁴⁸

C. *The Dissenting Opinion*

Senior Circuit Judge Eschbach cast a brief, but telling, dissent. Though applauding the majority’s “imaginative interpretation of scant precedent,” he refused to “uphold the crushing third-party liability the jury ha[d] imposed on Soldier of Fortune Magazine.”⁴⁹ He based his misgivings on the ambiguity of both the jury instructions

44. “[W]e observe that the Supreme Court has squarely rejected the notion that the First Amendment interest in protected speech requires that ‘publishers and broadcasters enjoy an unconditional and indefeasible immunity from [tort] liability.’” *Id.* at 1119 n.8 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

45. *Id.* at 1121. Because causation is an issue of fact, *de novo* review was inappropriate here and the court employed the “traditional standard of deference to the fact finder.” *Id.*

46. *Id.* at 1122 (quoting *Rosinek v. Cox Enters., Inc.*, 305 S.E.2d 393, 394-95 (Ga. Ct. App. 1983)).

47. After attaching great importance to the different kinds of typeface used in the ad and emphasizing certain key words like “other,” the court stated that:

[T]he ad’s combination of sinister terms makes it apparent that there was a substantial danger of harm to the public. The ad expressly solicits all jobs requiring the use of a gun. When the list of legitimate jobs—i.e., body guard and courier—is followed by ‘other special skills,’ and ‘all jobs considered,’ the implication is clear that the advertiser would consider illegal jobs.

Id. at 1121.

48. *Id.*

49. *Id.* at 1122 (Eschbach, J., dissenting).

and Savage's advertisement. Realizing that juries may not be inclined or able to appreciate the "safeguards" that the modified negligence test purportedly afforded the appellant, Eschbach would have reversed the lower court. To Judge Eschbach, even assuming the constitutionality of the modified negligence standard, the ad still fell short of criminal solicitation.⁵⁰

III. THE COMMERCIAL SPEECH DOCTRINE

A. Brief Overview

Commercial speech is "expression related solely to the economic interests of the speaker and its audience."⁵¹ Until fairly recently, such expression fell well beyond the scope of First Amendment protection.⁵² In 1976, though, the Supreme Court began to forge a long path towards a broader interpretation of free speech. In *Virginia State Board of Pharmacy*, the majority held that truthful advertising of a legal product or service deserved some degree of First Amendment protection.⁵³ In subjecting Virginia's anti-advertising statute to heightened scrutiny, several policies supporting commercial protection emerged.⁵⁴ The Court explained that consumers have a "strong interest in the free flow of commercial information."⁵⁵ Therefore, the state is not to decide selectively which advertisements are in the best interests of the public. In fact, "[i]t is precisely this

50. "I remain convinced that the language of the advertisement is ambiguous, rather than patently criminal as the majority believes." *Id.*

51. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

52. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1942). Though the First Amendment limits the state's power to regulate core speech, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54. In such cases courts normally applied minimal scrutiny. Under this deferential standard, the regulation survived review if the court could construct any conceivable basis for the statute.

53. *Virginia State Bd.*, 425 U.S. at 762. At issue was the constitutionality of a state regulation prohibiting pharmacists from advertising prescription drug prices. The state feared that such publicity would lead to deceptive advertising and foster drug abuse.

54. *Id.* at 770. Heightened scrutiny involves an intermediate level of analysis whereby the Court weighs the state's interests against those adversely effected by the regulation. Thus, the statute must substantially advance a legitimate government objective without overreaching into more securely protected interests (i.e., political expression).

55. *Id.* at 764. In recognizing a consumer's constitutional right to receive information, the Court continued:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. *To this end, the free flow of commercial information is indispensable.*

Id. at 765 (emphasis added).

kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."⁵⁶

Commercial speech was not afforded absolute protection, however, and still sits somewhat lower in the constitutional hierarchy than political speech.⁵⁷ The Court justified this secondary level of protection on policy grounds. Arguably, commercial speech, by its very nature, is both hardier and more verifiable than political speech.⁵⁸ An advertiser presumably has a greater pecuniary incentive to risk tort liability than a spokesperson for a nonprofit political rights group for example.⁵⁹ The economic motivation to advertise, therefore, mitigates the potential chilling effect feared by First Amendment absolutists.

Though the Court developed a useful rubric for commercial speech analysis, one must remember that *Virginia State Board* and its progeny involved state regulation that functioned as a prior-restraint on commercial expression; that is, some forms of commercial speech were completely forbidden. However, because *Braun* involved, not an attempt to enjoin expression, but a claim by private individuals for the consequences of speech *already* expressed, the emphasis shifts from content regulation to legal duty.⁶⁰ That transition takes form in the following sections.

56. *Id.* at 770. "Virginia is free to require whatever professional standards it wishes of its pharmacies But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*

57. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), where the Supreme Court also noted that:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

Id. at 456.

58. *Virginia State Bd.*, 425 U.S. at 771 n.24.

59. See Lisa F. Firenze, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 COLUM. J.L. & SOC. PROBS. 137 (1990). "[C]ommercial speech is essentially tied to economic profits. Consequently, there is less probability that commercial speech restrictions will deter commercial speakers . . . from asserting first amendment rights." *Id.* at 148 (citing *Virginia State Bd.*, 425 U.S. at 771 n.24).

60. See, e.g., *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987), in which the court recognized that the plaintiff "is not attempting to have defendant enjoined from exercising its right to run advertisements such as those in

B. *The Constitutional Hurdle to Negligence Claims*

In addition to the staggering precedent militating against imposing tort liability on media defendants,⁶¹ First Amendment safeguards on free expression likewise present a formidable impasse. The Supreme Court has decided that the First Amendment does not shield commercial speech to the same degree as political speech.⁶² Many of the policies underlying the importance of unhindered political expression, however, similarly support a protective view of commercial speech.

1. *First Amendment Objectives*

Unlike most constitutional provisions, the First Amendment speaks in simple, straightforward, and absolute terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."⁶³ This mandate commands legislative noninterference and the United States Supreme Court has held that the First Amendment's initial and paramount purpose was to prevent government from imposing prior-restraints on free expression.⁶⁴ Though the First Amendment's scope is not as limitless as a literal reading would imply, the judiciary has been careful to afford speech a degree of protection commensurate with the vital function it serves in our society.⁶⁵

The First Amendment fosters a free flow exchange of information in the open marketplace of ideas.⁶⁶ The veracity of an idea is tested

question. Instead, he is simply asking that a jury, after a trial, award him damages for the consequences of those advertisements." *Id.* at 1400.

61. *See infra* note 91.

62. *See supra* notes 57-59 and accompanying text.

63. U.S. Const. amend. I. *Compare, e.g.,* the First Amendment with the Fourth Amendment's protection of "[t]he right of the people to be secure in their persons, houses, papers, and effects against *unreasonable* searches and seizures." U.S. Const. amend. IV (emphasis added) and the Fifth Amendment safeguard against deprivations of life, liberty, or property without "*due process*." U.S. Const. amend. V (emphasis added). The language used in these amendments, and others, clearly qualifies these rights with procedural limitations, thus denying them the sense of absoluteness that resounds in the terms of the First Amendment.

For an excellent discussion and illustration of the development of First Amendment jurisprudence, see William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1987).

64. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 100 (1979); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

The First Amendment is applied to the states through the Fourteenth Amendment. *See Near v. Minnesota*, 283 U.S. 697, 723 (1931) (express incorporation of First into Fourteenth Amendment); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (dictum) (Fourteenth Amendment extends freedom of speech safeguards to state legislation).

65. The Supreme Court has characterized the freedom of speech as, "the indispensable condition . . . of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.).

66. This rationale originated in the landmark dissent by Justice Holmes in *Abrams*

by competition with conflicting ideas, unhindered in their expression. To this end, the media's function is invaluable. In *Pittman v. Dow Jones & Co., Inc.*,⁶⁷ the court expressed this notion succinctly: "The attitude of courts towards newspapers of general circulation may be fairly characterized as one of somewhat understandable protectionism because of the widespread judicial perception of the necessity to preserve the free flow of information to the public by way of the media."⁶⁸

The unencumbered sharing of ideas requires a neutral forum, protected from the prospect of government regulation or overwhelming civil liability.⁶⁹ Such a threat produces the very "chilling effect" the First Amendment was designed to enjoin.⁷⁰ In the advertising business, the uncertainty of civil suits and financial impracticability of investigating every sponsor might force a prospective publisher to refuse an advertisement for fear of a jury potentially finding the ad criminal on its face. "This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public."⁷¹ Furthermore,

v. United States, 250 U.S. 616 (1919).

67. 662 F. Supp. 921 (E.D. La. 1987).

68. *Id.* at 922; see also JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW (3rd ed. 1986):

[T]hrough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to mis-doubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?

Id. at 835 (quoting John Milton); see also *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) where J. Hand explains that:

The dissemination of news from as many different sources, and with as many different facets and colors as is possible . . . is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all.

Id.

69. Realizing this possibility even in the commercial speech context, the *Pittman* court reasoned that "[i]n weighing private and public considerations . . . the public policy of not subjecting newspapers to the chilling prospect of hordes of suits by disgruntled readers of inaccurate ads dominates." *Pittman*, 662 F. Supp. at 923; see also Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981). "Speakers, listeners and society at large all suffer when the peculiar features of a . . . scheme have a 'chilling effect' on persons that causes them to forego protected expression rather than get themselves enmeshed in the scheme." *Id.* at 24.

70. See *supra* note 64 and accompanying text.

71. *Manual Enters., Inc. v. Day*, 370 U.S. 478, 493 (1962); see also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The threat of civil judgments tends to force individuals to "'steer far wider of the unlawful zone.'" *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1962)).

at least one commentator speculates that fear of liability could extend to publication of seemingly innocuous advertisements of "items for sale" that later turn out to be stolen, or to "singles" ads that result in sexual assaults or the transmission of AIDS.⁷²

Freedom of speech enjoys a particularly salient role in a system of self-government.⁷³ To the extent that the media serve a watch-dog function, searching for corruption within the political system, the First Amendment necessarily "shields those who would censure the state or expose its abuses."⁷⁴ Objective scrutiny requires independence from the very bureaucratic entity that might otherwise engage in selective distribution of "suitable" information.⁷⁵ Therefore, the First Amendment encourages tenacious investigation by a largely self-governing institution.⁷⁶

Lastly, expression serves as a public release mechanism. An open forum diffuses the need for violent displays of civil unrest. From an historical standpoint, the United States Supreme Court noted that, "the path of safety lies in the opportunity to discuss freely supposed grievances [In the past] men feared witches and burnt women."⁷⁷ If courts begin to impose liability on the media, however, one more outlet is closed off, thereby turning the masses towards less peaceful means of expression.

2. *Application to Commercial Speech*

The Court's decision to subordinate commercial speech in the First Amendment hierarchy of protected speech might lead one to contend that the persuasiveness of these policies lies inextricably

72. Thomas C. Kates, *Publisher Liability for "Gun for Hire" Advertisements: Responsible Exercise of Free Speech or Self-Censorship?*, 35 WAYNE L. REV. 1203, 1215-16 (1989).

AIDS is the acronym for Acquired Immune Deficiency Syndrome, the lethal virus most commonly communicated through sexual contact.

73. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980) (Free speech has a "structural role to play in securing and fostering our republican system of self-government."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (free speech is the quintessence of self-government).

74. *Herbert v. Lando*, 441 U.S. 153, 185 (1979).

75. As Justice Black noted in one of his more epic concurrences:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press [is] to serve the governed, not the governors The press [is] protected so that it [can] bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

76. "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can." Potter Stewart, *Or of the Press*, 26 *HASTINGS L.J.* 631, 636 (1975).

77. *Whitney v. California*, 274 U.S. 357, 375-76 (1927); see also *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) (freedom to speak diffuses "force and explosions").

bound to the value of political expression itself.⁷⁸ When the equation is altered slightly, and we consider commercial speech instead of political speech in the First Amendment arena, the protection of free expression arguably takes on less importance. To the extent that the future of our democratic livelihood rarely teeters on the ideological contributions of advertisements and want ads, the dangers of censorship and civil unrest would appear overstated.

The distinctions between commercial and core speech, however, suffer from ambiguity, contradiction, and a rather astounding lack of support.⁷⁹ As one commentator notes, “[r]eliance on hardiness and verifiability to justify disparate constitutional standing is unsatisfactory” because such rationales both underestimate the resiliency of political speech and overstate the ease of authenticating deceptive advertising.⁸⁰ Moreover, these rationales find even less tenable application in the publication context, where one author astutely notes:

Publishers do not tout their own products or services, but rather present information regarding the offerings of third parties. Newspapers and magazines, therefore, have a far smaller financial interest than advertisers in the advancement of any one particular product or service. Furthermore, publishers do not have easy access to the facts pertaining to advertisements nor do they have the resources to screen each and every advertisement. Unlike advertisers, publishers often must determine the intent of speech under the pressure of publication deadlines. As a result of these differences, publishers are usually more vulnerable than advertisers to the chilling effects of commercial speech regulations.⁸¹

78. See *supra* notes 63-77 and accompanying text.

79. “The differences between commercial and other forms of speech relied on to limit constitutional protection of commercial speech are neither convincing nor satisfying.” Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 299 (1987). The author advocates that the Court “refrain from translating perceived practical differences between commercial and political speech into constitutional distinctions.” *Id.* at 309. See also *In re Primus*, 436 U.S. 412, 438 n.32 (1978) (noting that the line between commercial and non-commercial speech is not always clear and may be “based in part on the motive of the speaker and the character of the expressive activity”).

80. Lively, *supra* note 79, at 296. The author continues:

Although the profit motive is often a persistent impetus for commercial speech, the desire to be elected is a potent motivating force for political expression. If First Amendment status hinges on resiliency, campaign rhetoric should be afforded diminished protection. The hardiness rationale thus fails to draw a satisfactory distinction between commercial and other types of speech.

Id.

81. Firenze, *supra* note 59, at 149. The author also advocates greater protection for publishers of commercial speech based on her contention that the right to free press carries with it even more staunch First Amendment protections for the media:

The free press interest strongly suggests that publishers of advertisements placed by third parties should be afforded a greater degree of constitutional protection than actual advertisers. First, the press is the only institution

Given the questionable propriety of such an artificial and unpersuasive distinction, particularly in the context of third-party advertisements, arguments attempting to diminish the inherent value of commercial speech in our society carry little weight. Protected speech is protected speech, and the policies underlying the preservation of political expression are equally compelling in the commercial speech context. In *Virginia Board*, the Court went to great lengths to espouse this view by paralleling the open economic market with the open market of ideas. Thus, even in commercial advertising, "people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them."⁸²

IV. ANALYSIS

A. *First Amendment Policies Do Not Support Imposing Liability on Publishers Like SOF*

Braun creates a dangerous precedent. A negligence standard lowers constitutional restrictions on states by allowing them to curtail free expression via heightened civil liability. As the United States Supreme Court noted in *New York Times Co. v. Sullivan*,⁸³ "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law," because the "fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."⁸⁴ That phrase shoulders promethean import, as it carries constitutional safeguards against regulation of commercial speech into tort law.

Analogizing to the *Braun* case, the First Amendment under *Sullivan* would not allow the state to establish a negligence standard for

granted a specific constitutional right by the Bill of Rights. Second, the press, unlike any other social institution, provides the means for the exchange of ideas and opinions necessary to make informed decisions in a democratic society. Consequently, the publishing industry holds a privileged position in the American constitutional scheme.

Id. at 139.

82. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

83. 376 U.S. 254 (1964).

84. *Id.* at 277. The Court considered the permissibility of a per se libel law requiring defendant to establish the truth of the offending statements. Plaintiff was a police chief implicated in a disparaging article about police brutality. Reasoning that First Amendment interests require a showing of malice or reckless indifference in order to recover damages, the Court emphasized the societal importance of being able to criticize the government and public officials with relative impunity. First Amendment protection thus stirs political debate of public concern by shielding those who criticize government officials in good faith. Alabama's libel laws placed the onerous burden of disproving falsity on the defendant and were thus clearly inconsistent with First Amendment objectives.

publishers of commercial speech if the state itself could not permissibly regulate such speech under a comparable criminal standard. For example, suppose the Georgia legislature were to enact a statute under current law forbidding publishers to run advertisements for services that appear to solicit criminal activity on their face. Publisher prints a "gun for hire" ad and is prosecuted by the state for violation of the preceding statute. Publisher challenges the constitutionality of the law as a direct infringement of First Amendment rights. Under the modified *Central Hudson* test, the state would likely face an intermediate level of judicial scrutiny.⁸⁵

First, the court would make a threshold determination of the advertisement's legality and truthfulness, because commercial speech only enjoys any degree of First Amendment protection if it "concern[s] lawful activity and [is] not . . . misleading."⁸⁶ A facial examination of a hired gun ad may spawn ambiguous interpretations which, though perhaps inviting curiosity, hardly rise to the level of falsehood or illegality. In such instance, the court would proceed to an ad hoc analysis of the state's objectives in regulating the advertisements. Public safety certainly qualifies as a substantial government interest. Prohibiting explicit offers to engage in criminal conduct directly advances that interest by discouraging proliferation of such offers. However, the state may be hard pressed to convince the court that the statute is narrowly tailored such that it provides a "reasonable" fit to further such objectives.⁸⁷ Though the law need

85. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). In striking down a regulation prohibiting all promotional advertisements intended to stimulate the purchase of utility services, the majority expressed concern over the legislature's intrusion into First Amendment matters. However, the Court also recognized that the state could regulate the content of commercial speech, even truthful and legitimate advertising, if the statute was tightly drawn. The First Amendment would permit a regulation that directly advanced a substantial state interest as long as the adverse impact on other protected speech remained minimal. Thus, the four part test espoused in *Central Hudson* qualified the amount of constitutional protection extended to commercial speech. The oft-cited test developed in that case requires the Court to determine:

[W]hether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

86. *Id.*

87. First Amendment analysis frequently involves an examination of the means used to achieve the state's desired objective. The tighter the "fit" between the two, the

not be the least restrictive means of achieving the state's goal, when the prohibitive effect of the statute begins to threaten fully protected expression as well, then the interests in preserving free speech may outweigh the state's interest in public safety, in which case the statute will likely be struck down.⁸⁸ This could occur if, in the above example, other publishers refrained from running any personal service ads at all (or in borderline cases), for fear of later falling victim to criminal prosecution. The resulting chilling effect constitutes one of the gravest possible assaults on the First Amendment.⁸⁹

Moreover, the interlocking policies underlying free speech support an especially hostile defense to what effectively amounts to statutory censorship. Other alternatives to publisher liability surely exist. If the state could achieve its safety objectives by tightening gun control laws, increasing prison sentences for violent crimes, or even redefining the advertiser's duty, then perhaps a more sensible balance would be struck between the state's interest in public safety and First Amendment interests in the indispensable free flow of information.

The notion that courts would support such a statutory measure in the presence of more carefully tailored alternatives that could achieve the same goal without chilling the press is difficult to believe. By virtue of the *Sullivan* axiom stated earlier, therefore, the courts should be equally unwilling to sustain a negligence claim grounded in terms equivalent to those in the state's criminal statute.⁹⁰ To hold otherwise would be to allow the state to achieve *indirectly* through tort law what it could not achieve *directly* through regulation. Indeed, the great majority of courts have reached the same conclusion and have denied such civil claims.⁹¹

less likely the regulation will interfere with other protected speech.

88. The least restrictive means prong of the *Central Hudson* test was later eliminated in *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989). Thus, current law in this area merely dictates that the means be "narrowly tailored" to serve the government objective. *Id.* at 478.

89. As one author notes, negligence claims in particular are even more likely than other tort cases to cause a chilling effect "because even publishers who verify the accuracy of advertisements cannot fully ensure freedom from liability." Firenze, *supra* note 59, at 168. This is especially true in the *Eimann* case where the court itself commented that "even if SOF had investigated Hearn [the advertiser] and his partner . . . it would have discovered . . . no false information that might have aroused suspicion." *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 836 (5th Cir. 1989).

90. *See supra* note 84 and accompanying text.

91. *See e.g.*, *Pittman v. Dow Jones & Co.*, 662 F. Supp 921 (E.D. La. 1987) (no duty to investigate accuracy of investment advertisements absent the magazine's overt guarantee as to their soundness; thus the court adopted a recklessness standard); *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119, 241 Cal. Rptr. 101 (1987) (financial burden to test and insure against advertised products too great to hold defendant liable for injuries to plaintiff resulting from use of advertised tampons even though advertisement appeared textually next to several pages of related subject matter); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974) (magazine under no obligation

Extending a cause of action in negligence against publishers like SOF places a constitutionally impermissible burden on media defendants. Such infringement flies in the face of First Amendment safeguards that ensure the vitality of a free press and secure the benefits of that vitality.

B. Tort Law Policies Do Not Support Imposing Liability on Publishers Like SOF

Negligence arises when conduct falls below a particular standard of care established to protect others from exposure to unreasonable risks of harm.⁹² A successful claim sounding in negligence generally requires plaintiff to prove duty, breach, causation, and damages. Negligence cannot attach to conduct where no duty exists.⁹³ Duty itself is a personal obligation imposed by law. Its existence is determined judicially from a calculus of policy considerations:

among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; considerations of cost and ability to spread the risk of loss; the economic burden upon the actor and the community - and others.⁹⁴

Breach results when the actor's conduct falls below the standard

to investigate or test inherently dangerous products advertised within); *Suarez v. Underwood*, 426 N.Y.S.2d 208 (N.Y. Sup. Ct. 1980) (no liability absent showing of malice, intent, or reckless disregard for plaintiff's harm resulting from use of dangerous hair transplant process advertised in a magazine which also reported on the dangers of such transplants); *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 479 (N.Y. Sup. Ct. 1978) ("The news media, for the most part, is merely the conduit for the speech of the advertiser and, therefore, will not be held liable for the publication of advertising which is false or misleading, unless actual malice is shown."); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 902 (Ohio 1986) ("[C]ompeting public policy and constitutional concerns tilt decidedly in favor of the press when mere negligence is alleged.").

92. RESTATEMENT (SECOND) OF TORTS § 282 (1965); see also W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS §§ 1-7 (5th ed. 1984).

93. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, 145 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 282 (1965).

94. *Hyde v. Columbia Daily Tribune*, 637 S.W.2d 251, 257 (Mo. Ct. App. 1982); in redressing individual injury, one author suggests that several policy considerations influence the imposition of liability: "Assessing fault, deterring future wrongdoing when possible, providing clear standards of conduct, shifting loss to the one best able to bear it, and avoiding the disrupting effects of self-help all are policy considerations that have combined to produce current negligence law." Gerald R. Smith, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 72 MINN. L. REV. 1193, 1219 n.147 (1988) (providing an excellent analysis of negligence theory as applied to First Amendment issues).

imposed and creates an unreasonable risk to others. The unreasonability of the ensuing risk presents one of the thorniest issues for the court and generally involves an application of Justice Hand's balancing test that was discussed earlier.⁹⁶

Causation consists of two parts, cause in fact and proximate cause. While the former generally involves a "but-for" calculus, the latter qualifies the scope of the actor's liability on practical or policy grounds.⁹⁶ Thus, when plaintiff proves that his compensable injuries were proximately caused by defendant's breach of a duty owed to plaintiff, a viable negligence claim will lie. Notwithstanding a successful showing of all four elements, however, courts have proven reluctant to impose liability on media defendants for a myriad of policy concerns.⁹⁷

The young plaintiffs in *Braun* stir tremendous sympathy; the death of their father was tragic, brutal, and unforgivable. Though they may deserve some form of compensation for their loss, however, the above policies do not justify the crushing liability that the appellate court imposed on SOF.

Imposing a duty on publishers to refrain from publishing advertisements that can be facially construed as posing an unreasonable risk of harm presumably serves the state's interest in public safety. The constitutional defects in achieving such an objective through tort law remain clearly stated in the previous section.⁹⁸ More importantly, though, is that the very purpose of negligence law is ill-served by imposing liability on publishers.

Applying the enumerated calculus of policy considerations⁹⁹ to the facts of *Braun*, two main social objectives emerge: 1) spreading victims' losses through compensation; and 2) preventing future harm of a similar nature by using damage awards to deter publishers like SOF from publishing ads that allegedly solicit criminal behavior. Once again, the two sons of the murder victim certainly deserve compensation, but shifting their loss to the publisher, absent a higher degree of fault, seems little more than an inequitable exercise in deep pocket litigation, attaching liability to whoever has the most money. If an action in negligence incorporates such fiscal targeting

95. If the burden on the actor in alleviating the risk does not outweigh the magnitude and probability of the harm occurring, the court finds that the actor has breached his duty to those harmed. "A risk becomes unreasonable when its magnitude outweighs the social utility of the act or omission that creates it." *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 835 (5th Cir. 1989) (citation omitted); RESTATEMENT (SECOND) OF TORTS § 291 (1965); see *supra* note 24.

96. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (public policy militates against endless liability for events racing beyond a foreseeable point).

97. See *supra* note 91.

98. See *supra* notes 83-91 and accompanying text.

99. See *supra* note 94 and accompanying text.

as a matter of law, then the media become little more than involuntary insurers of every one of their readers and their readers' victims.

Such logic stems from the basic fact that, among several individual parties, a magazine or newspaper, inevitably tied to a corporate entity, will almost always have access to greater financial resources than individual plaintiffs. A corporate conglomerate sitting opposite two small boys in a courtroom probably appears an easy target for an emotionally-swayed jury charged with assessing liability. Yet SOF, in choosing to publish a magazine for military enthusiasts, certainly had no intention of placing its bankroll behind every subscriber, much less behind unforeseeable third parties, in order to insure him or her against any injuries caused by those who happen to advertise in the same publication. Such reasoning subjects publishers to claims by an extraordinarily large and indeterminate class of potential plaintiffs who may not have any connection at all to the magazine.¹⁰⁰

Perhaps a more rational approach would be to recognize that compensation arises out of liability, and not that liability arises out of an ability to compensate. Clarifying that misconception insures a more objective review of publisher conduct without the moral, social, or psychological pressure juries may feel to insure that the sympathetic plaintiffs receive reparations for their terrible loss. Under the guise of spreading the losses to those who can most afford to bear them, a negligence suit against publishers turns a conduit of indispensable information into an insurance carrier saddled with financial burdens well beyond its capacity.

Additionally, whatever deterrent function is served by a punitive damage award, the subsequent risks to all forms of protected speech, and the disproportionate impact on publishers, clearly outweigh the safety incentives supposedly furthered. Put simply, imposing civil liability constitutes overkill of the severest kind. Though the purpose of allowing a modified negligence claim may be limited to discouraging

100. "For the law to permit such exposure to those in the publishing business who in good faith accept paid advertisements for a myriad of products would open the doors 'to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.'" *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) (quoting *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 444 (N.Y. 1931)); *but see Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951) (rejecting defendant's contention that large civil suits would bankrupt the journal: imposing a negligence standard of care only "applies to a publisher what the law applies to others"). Such a sweeping justification, however, fails to account for the special role the press plays in our society as recognized by the First Amendment. *See supra* notes 63-77 and accompanying text.

the publication of only facially criminal advertisements, the result may not be so limited. As a California appellate court recognized, the threat of civil judgments, “along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader Soon the total number of publications in circulation would drop dramatically.”¹⁰¹

The *Braun* court attempted to distinguish its decision from *Walters v. Seventeen Magazine*, and other similar cases, by merely requiring SOF to examine the ads facially, instead of investigating each one in detail.¹⁰² As several commentators have pointed out, though, “even requiring publishers to screen advertisements which contain facially apparent violations involves the media in an overly burdensome law enforcement task because of the practical difficulty of statutory interpretation in determining mixed questions of law and fact.”¹⁰³ A “mere” facial examination, therefore, cannot sufficiently mitigate the burden on the publisher who, under the guise of public safety, may be forced to shut down completely due to lost revenues and multi-million dollar damage awards. The censuring effect on both commercial and core speech in light of such a shut down carries the dreaded chilling effect to the absolute extreme: closing the channels of communication completely.¹⁰⁴ Thus the safety objective, though legitimate, is ill-conceived as grounds for a tort action and butts hard against First Amendment safeguards.

C. Braun Decision Shaky on the Merits

Even assuming, arguendo, that a justifiable negligence action lies here for victims of third party crimes, the facts of *Braun* did not support a judgment for plaintiffs on the merits. In employing a risk-utility analysis under Georgia law, the court failed to strike a proper balance between “the burden on the defendant of adopting adequate precautions” and “the probability of harm from defendant’s unmodified conduct multiplied by the gravity of the injury that might result from the defendant’s unmodified conduct.”¹⁰⁵ In fact, the entire

101. *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119, 1122, 241 Cal. Rptr. 101, 103 (1987) (no publisher liability where teenage girl injured by tampon after reading magazine’s ad for the product).

102. See *supra* notes 42-43 and accompanying text; *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1119 (11th Cir. 1992).

103. Firenze, *supra* note 59, at 161 n.160 (citing Hunter, *Prescription Drugs and Open Housing: More on Commercial Speech*, 25 EMORY L.J. 815, 837-48 (1976)).

104. “[A] newspaper can be silenced as easily by cutting off its source of funds, as it can be by enjoining its publication.” *United States v. Hunter*, 459 F.2d 205, 212 (4th Cir. 1972).

105. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1115 (11th Cir.

analysis consisted of little more than unpersuasive attempts to distinguish *Eimann*, upon which appellant relied.¹⁰⁶

Distinguishing *Eimann* solely on a difference in jury instructions, the court placed great weight on the alleviated burden that a mere facial examination, as opposed to an arduous investigation, purportedly entails. Thus, the majority argued, because the jury could not impose liability where the unreasonable risk of harm would only have been foreseeable after careful investigation, the burden on defendant remained minimal.¹⁰⁷ However, as already shown, the burden involved in a facial analysis versus that involved in a contextual investigation of the same ad is not as disparate as the court reasoned.¹⁰⁸ Because the reasonableness of the risk created by publishing the ad will most likely be determined by the jury on an ad hoc basis, a publisher must still enjoy a sufficient degree of clairvoyance to accurately divine which advertisements will be interpreted on their face as criminal solicitations.

In *Time v. Hill*,¹⁰⁹ the Supreme Court realized that the unpredictability of juries in tort suits translates into an implicitly greater burden on publishers in avoiding liability:

We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of . . . guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.¹¹⁰

Though the Court in *Time* was grappling with a falsity issue not present in *Braun*, the underestimation of the defendant's duty when faced with a potential jury determination carries the same warning to the publisher in both cases: even minimal duties involve tremendous risks of future liability. Thus, the Supreme Court's reasoning drastically undercut the distinction drawn by the appellate court here between a superficial and investigatory examination.

The appellate court then distinguished *Eimann* based on the requirement that the unreasonable risk be "clearly identifiable," language not present in the jury instructions of the latter case.¹¹¹ A

1992). The appellate court reviewed the district court's risk-benefit analysis de novo. *Id.* at 1114.

106. See *supra* notes 26-38 and accompanying text.

107. *Braun*, 968 F.2d at 1116.

108. See *supra* note 103 and accompanying text.

109. 385 U.S. 374 (1967) (refusing to hold publisher liable for nondefamatory, negligent misstatement of fact).

110. *Id.* at 389.

111. *Braun*, 968 F.2d at 1116.

change in semantics alone, however, does not reduce the danger of subjecting SOF to an undue burden, per se. The publisher is still forced to second-guess the jury regarding the interpretation of the criminal risk, whether the risk is obvious enough to be clearly identified, and whether the risk is unreasonable. The distinction made is misleading, largely due to the foreseeability problem involved when harm results from the actions of a third party.¹¹² In fact, the court's search for a clearly identifiable unreasonable risk in the Savage ad illustrates the shortcomings of this "modified" standard.

For example, the appellate court held that though the ad in *Eimann* was "facially innocuous" and "ambiguous in its message," Savage's advertisement in *Braun* "clearly conveyed that the advertiser was 'ready, willing and able' to use his gun to commit crimes."¹¹³ The appellate court reasoned, therefore, that the unreasonable risk created by Savage's advertisement was more "clearly identifiable." Yet the conclusion reached stems from an imaginative, result-oriented interpretation of Savage's ad. The court emphasized the ad's use of "sinister terms," like "confidential and 'very private,'" and then interpreted that language to reveal Savage's disposition towards any employment "requiring the use of a gun."¹¹⁴ Furthermore, the court found the fact that "the list of legitimate jobs—i.e., body guard and courier—[was] followed by 'other special skills' and 'all jobs considered,'" clearly meant "that the advertiser would consider illegal jobs."¹¹⁵ Central to this logic must be the assumption that Savage's ad constituted an exhaustive list of legitimate jobs, such that anything following the word "courier," ipso facto, fell into a separate category of illicit employment. Even within the field of security, however, a wide array of employment positions must exist, from personal protection to armored car drivers, etc. That SOF did not require Savage to include an exclusive list of jobs sought should hardly trigger such a presumption of illegality.

112. The appellate court even recognized the *Eimann* court's concern that "virtually anything might involve illegal activity." *Id.* (quoting *Eimann v. Soldier of Fortune Magazine, Inc.* 880 F.2d 830, 833 (5th Cir. 1989)); "[t]he range of foreseeable misuses of advertised products and services is as limitless as the forms and functions of the products themselves." *Eimann*, 880 F.2d at 838.

But cf. *Hyde v. City of Columbia*, 637 S.W.2d 251, 257 (Mo. Ct. App. 1982) ("Our law imposes the duty on an actor in some circumstances to foresee that the misconduct of a third person will result in injury to another and imposes liability for failure to protect against that risk of harm . . . Thus, 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.").

Foreseeability, while critical to proximate cause analysis, is sometimes cast in terms of foreseeability of harm, thereby subsuming the issue into the duty and breach analysis. See e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928).

113. *Braun*, 968 F.2d at 1116 n.3 (quoting Brief for Appellees [the Brauns] at 27).

114. *Id.* at 1121; see also *supra* note 3 and accompanying text.

115. *Id.*

The appellate court, looking for constitutional support, clung to *Gertz v. Robert Welch*, in which the Supreme Court sustained a libel suit against a newspaper for injuries "to the reputation of a private individual," where the publisher was only negligent.¹¹⁶ Because a private individual has not chosen to enter the public eye and does not have the access to media that public officials enjoy, he or she cannot rebut the falsehoods as easily. Consequently, under such circumstances, the individual's privacy interests outweigh the rights of the press and a civil action is justified.¹¹⁷ Because *Gertz* involved core speech, which enjoys even greater First Amendment protection than commercial speech, the *Braun* court believed that refusing to sustain a similar action in the immediate case would effectively afford advertising more protection than noncommercial speech.

Importantly, *Gertz* involved a case of defamatory falsehoods.¹¹⁸ In *Braun*, however, plaintiffs' cause of action sounded in negligence, not defamation, and thus sought to protect substantially different interests than those addressed in a libel suit. The plaintiffs' reputation is generally not an issue in a negligence suit, nor is the accuracy of the advertisement. Thus, the policies underlying a defamation suit find little application in a tort action where, as in *Braun*, the "victims" were not singled out by the magazine in any way, were not the targets of any false or damaging accusations, or denied any meaningful access to the media.

Moreover, constitutional interests in a free press find greater recognition where the nature of the published information reveals, not personal information about an individual's private life, but public information regarding a personal service. Like the pharmacists in *Virginia State Board*, the advertiser seeks to inform the public that he has "X" to sell at "Y" price. In this context, the Supreme Court has struggled to insure that the press receives protection commensurate with the important role commercial speech plays in our free market society.¹¹⁹ Because Savage's ad clearly falls into this category of speech, SOF's interest, as a disseminator of public information, takes on greater importance and tips the scales towards First Amendment protection.¹²⁰ This is particularly true, as the court noted, in the context of publisher liability, when the magazine's comparative lack of

116. 418 U.S. 323 (1974).

117. *Id.* at 323-24.

118. *Id.* at 346.

119. *See supra* notes 51-56 and accompanying text.

120. *See, e.g.,* Pittman v. Dow Jones & Co., Inc., 662 F. Supp. 921, 922 (E.D. La.

economic incentive actually heightens the dangers of chilling protected speech.¹²¹ The appellate court's reliance on *Gertz*, therefore, appears misplaced because the safety interests and the kind of speech involved in *Braun* differ substantially from those factors that weighed in favor of compensating the plaintiff in *Gertz*.¹²²

The only risk clearly identifiable here is the one taken by the appellate court. In justifying the constitutionality of its decision through application of a "modified" negligence test, the majority appears to have engaged in the very type of contextual analysis it purported to reject. Indeed, the court affirmed a nearly \$4,500,000 award based on little more than innuendo and the "sinister" syntax of Savage's ad.

In his dissent, Senior Circuit Judge Eschbach clearly recognized the danger of such a result-oriented approach and explicitly cautioned that "the language of [Savage's] advertisement is ambiguous, rather than patently criminal as the majority believes."¹²³ The very fact that the ad leaves a different impression on two different judges, even by itself, severely undercuts the purported "clarity" of the risk alleged. If a court, even with the benefit of hindsight, cannot interpret the language of the advertisement in one, consistent, unanimous manner, a publisher, without such hindsight, surely faces a difficult task in weeding-out the "dangerous" ads in the face of such a subjective standard. In light of the critical First Amendment issues involved, therefore, the presence of ambiguity commands judicial restraint and liability should not have been imposed on SOF.

V. CONCLUSION

Advertising plays a key role in a free market economy so inundated by the mass media. Dissemination of commercial information fosters consumption, bargaining, enlightenment, well-informed allocations of funds, and responsible decision making. Not surprisingly, then, the Supreme Court has proclaimed that commercial speech deserves a substantial degree of First Amendment protection. Thus, early decisions attempted to delineate the state's regulatory power to

1987) ("Quite simply, courts have placed more value on the societal benefits of information availability than on the rights of private persons who claim to have been harmed.").

121. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1117-18 (11th Cir. 1992); see also *Firenze*, *supra* note 59 and accompanying text.

122. *But see* *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1028 (5th Cir. 1987) ("The interest in protecting life is recognized specifically for first amendment purposes and, analytically, can be no less important than the interest in reputation.").

123. *Braun*, 968 F.2d at 1122. As the *Eimann* court recognized, "in the constitutional arena we have noted that the possibility of illegal results does not necessarily strip an ad of its commercial speech protection." Thus, any doubts should be resolved in favor of free expression.

insure that free expression would not be unduly restrained. Such protection really promises very little, however, if First Amendment safeguards do not insulate the publisher on both sides, such that expression of "unregulated" commercial speech may fall subject to the curbing force of civil liability. In this light, extending a negligence action against the publisher for harm caused by the criminal acts of a third party marks a substantial retreat from constitutional guarantees previously thought virtually unassailable.

The appellate court's decision risks in long-reaching effect what it lacks in reason: a completely result-oriented manipulation of First Amendment case law, buttressed with a strained attempt to translate diction, type face, and punctuation into criminal intent. The arbitrariness of the court's interpretation of the ad and the degree of insinuation required to find liability belie the constitutional soundness of the so-called "modified" negligence test. Though the test allegedly eases the burden on publishers by looking only to the risks created on the face of the advertisement, the court, perhaps unable to justify its decision so superficially, clearly engages in a subtextual analysis. What the court labels as a mere facial examination thus requires the publisher to exhaust an unacceptable amount of resources to avoid the possibility of being sued by a victim he cannot foresee, praying for an amount he may not have, and awarded by a jury whose assessments he cannot predict. Publishers cannot be saddled with such a demanding burden absent any compelling rationale for such a frontal assault on free expression.

The chilling impact that this multi-million dollar judgment could wreak on commercial speech alone is staggering. This decision could possibly force publishers to insure against tort claims for defective products, bad services, or third-party criminal acts. The threat of looming liability could also destroy newspapers and magazines alike, close down open channels of communication, wipe out the diverse spectrum of published material available to the public, and even silence political speakers unable to find an effective conduit to reach the masses. Though the state has a legitimate interest in safeguarding the public, and though the Braun children deserve compensation, the First Amendment necessitates that other, less intrusive solutions be explored. Slicing the magazine's jugular merely sacrifices an invaluable forum for a quick fix.

TIMOTHY J. TATRO
