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"Every free man has an undoubted right to lay what sentiments he pleases before the public . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity . . . ." W. Blackstone.¹

I. INTRODUCTION

The Eleventh Circuit Court of Appeals, in Braun v. Soldier of Fortune Magazine, Inc.,² recently held that a publisher may be held liable in tort for the criminal conduct induced by an advertisement included in its publication.³ The standard for liability developed in Braun is the latest in a series of attempts by the courts to reconcile the conflict generated by the constitutional right to freedom of speech and of the press, and by the need to protect society from the dangers of "unprotected speech" such as criminal solicitation, incitement, and libel.⁴

Part II of this note briefly describes the facts which gave rise to the cause of action in Braun. Part III sketches the history of case law and legal thought concerning liability for speech which induces illegal action. Part IV analyzes the reasoning the Braun court employed in arriving at its holding. Finally, Part V discusses the significance of the court's holding.

² 968 F.2d 1110 (11th Cir. 1992), cert. denied, 113 S. Ct. 1028-29 (1993).
³ Id. at 1119.
⁴ The courts have adopted different standards for determining the propriety of burdening speech based upon the types of speech and governmental interests involved. John E. Nowak & Ronald D. Rotunda, Constitutional Law 934 (4th ed. 1991). In Dennis v. United States, 341 U.S. 494, 510 (1951), the Court adopted Learned Hand's liability equation whereby the Court measures the burden imposed upon the speech involved against the product of the probability and the magnitude of resulting harm that might occur from the speech. In Konigsburg v. State Bar of California, 366 U.S. 36, 51 (1961), the Supreme Court held that a case by case balancing method should be employed to determine whether First Amendment protection is appropriate. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court adopted a definitional balancing method whereby the type of speech determines the amount of protection it receives. See id. at 346-49.
II. FACTS

On August 26, 1985, Richard Braun, accompanied by his son Michael, drove down the driveway of their suburban Atlanta home. At the bottom of the driveway stood Sean Trevor Doutre who proceeded to fire into Braun's car with a MAC 11 automatic pistol. The shots wounded Braun and his son. Braun managed to roll from his car, landing face down on the driveway. Michael also escaped from the car, falling out onto the other side of the driveway. Doutre ran to Braun's side of the car and fired two shots into the back of Braun's head. Doutre then walked to the other side of the car where Michael lay wounded. Doutre raised his gun towards Michael, then lowered it and placed his finger over his pursed lips before running away.

At the time of the shooting, Doutre was accompanied by two other men, Richard Michael Savage and John Horton Moore. The facts later revealed that Doutre was a contract killer brought in for the job by Savage, who had been hired by Moore and another individual, Bruce Gastwirth, to kill Richard Braun. Gastwirth had been a business partner of Braun's; Moore was another of Gastwirth's business associates.

Moore and Gastwirth obtained Savage's services in response to an advertisement Savage had placed in Soldier of Fortune magazine earlier that year. The ad read as follows: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered."

Sean Doutre had seen the advertisement while in Canada and later traveled to Savage's home in Tennessee, where he went to work

5. *Braun*, 968 F.2d at 1112.
6. *Id.*
7. *Id.*
8. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
15. *Braun*, 968 F.2d at 1112.
16. *Id.*
17. *Id.*
for Savage. Before killing Braun, Doutre had killed at least two other persons for Savage.

Michael Braun and his brother, Ian, sued Soldier of Fortune for the wrongful death of their father, contending that the magazine was negligent in publishing an ad which "created an unreasonable risk of the solicitation and commission of violent criminal activity." Michael filed an additional suit to recover for the personal injuries he received in the incident.

Soldier of Fortune ran Savage's ad from June 1985 to March 1986. Joan Steel, the advertising manager of Soldier of Fortune at the time, decided to run the ad after several conversations with Savage. Ms. Steel left the language of the ad submitted by Savage intact except for the phrase "any and all jobs considered," which was edited to read "all jobs considered." At trial Savage testified that he placed the ad with the intention of obtaining only legitimate jobs. In fact, he did obtain at least one legitimate job as a bodyguard. However, Savage conceded that, of the thirty to forty calls he received a week in connection with the ad, the vast majority solicited his participation in criminal activity.

At trial, both Ms. Steel and Robert Brown, the founder and publisher of Soldier of Fortune magazine, denied having any knowledge of a connection between advertisements placed in the magazine and solicitations for criminal activity. They persisted in this contention despite the fact that numerous newspaper and magazine articles were introduced linking criminal activity to advertisements placed in Soldier of Fortune. Additionally, evidence was presented showing that Soldier of Fortune was contacted on at least two

19. Id.
20. Braun, 968 F.2d at 1112.
21. Id.
22. Id.
24. Id.
25. Braun, 968 F.2d at 1112.
26. Id.
27. Id.
29. Id. These articles included stories printed nationally in Time and Newsweek, and newspaper articles that ran in Boulder, Colorado, where Soldier of Fortune is published. Braun, 968 F.2d at 1113 n.1. The plaintiffs additionally showed that the magazine subscribed to a clipping service "which sent articles to SOF [Soldier of Fortune] from hundreds of newspapers and magazines." Braun, 757 F. Supp. at 1327. The clipping service monitored magazines and newspapers. Whenever Soldier of Fortune was mentioned, the service submitted a copy of the article to the client. Braun, 968 F.2d at 1113 n.2.
occasions by law enforcement officials concerning criminal activities relating to the magazine's advertisements.30

The trial court instructed the jury that Soldier of Fortune could be held liable if the jury found

by a preponderance of the evidence that a reasonable reading of the advertisement in this case would have conveyed to a magazine publisher, such as Soldier of Fortune, that this ad presented the clear and present danger of causing serious harm to the public from violent criminal activity. The Plaintiffs must prove 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, including murder.31

The jury awarded Michael and Ian Braun two million dollars for their wrongful death claim based on the expected earnings of their father.32 Michael was awarded an additional $375,000 in compensatory damages and ten million dollars in punitive damages in a separate claim for his personal injuries.33 The trial court denied Soldier of Fortune's motion for a judgment notwithstanding the verdict, but ruled that it would grant Soldier of Fortune's motion for a new trial unless Michael Braun agreed to reduce the punitive damage award to two million dollars.34

On appeal the Court of Appeals for the Eleventh Circuit affirmed the lower court's holding.35 The appellate court found that Soldier of Fortune had a legal duty which was violated by publishing advertisements that subjected people to a clearly identifiable, unreasonable risk of harm.36 Furthermore, the appellate court determined that the instructions issued to the jury by the district court did not place an intolerable burden on the press in light of the First Amendment.37

III. History

The court in Braun v. Soldier of Fortune Magazine, Inc.38 was faced with a complex issue which required the consideration and

30. Braun, 968 F.2d at 1113.
31. Id.
32. Id. at 1114.
33. Id.
34. Id. Michael agreed to the remittitur, and the judgment was subsequently amended to reflect the reduction. Id.
35. Id. at 1122.
36. Id. at 1114.
37. Id. at 1115, 1117.
38. 968 F.2d 1110 (11th Cir. 1992).
resolution of a number of First Amendment questions, each of which has developed its own body of law. Resolution of the First Amendment questions presented required a determination of what speech the First Amendment protects, the proper level of protection for commercial speech, the level of First Amendment protection to be granted publishers, and what constitutes speech inducing illegal action. In order to understand why the **Braun** court arrived at its holding, it is important to start at the beginning and trace the development of the doctrines around which the above questions revolve.

A. First Amendment Protection of Speech and Press

In the **Braun** case two social concerns, freedom of speech and public safety, came into conflict. As a result the Eleventh Circuit Court of Appeals was forced to determine at what point the constitutional protection for speech becomes subordinate to other public policy demands. In this regard the **Braun** case is only a microcosm of the 200 year long struggle to define the limits and boundaries of free speech.

Freedom of speech is one of the fundamental principles upon which our nation was founded. The founders of our country assumed that freedom of speech would be protected by the omission of any constitutional provision granting the government authority to regulate it. However, unsatisfied with this safeguard the First Amendment was added to forbid, without qualification, the restraint of speech. In 1937 Justice Cardozo described the freedom of speech as “the matrix, the indispensable condition, of nearly every other form of freedom.”

The First Amendment explicitly grants unqualified freedom to the press as well as to speech. In fact, freedom of the press has been viewed as a separate institution and is considered to be an

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40. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW; SUBSTANCE AND PROCEDURE § 20.5 (2d ed. 1992).

41. “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. CONST. amend. I.


43. See supra note 41.
important check upon the caprices of a powerful central government.\textsuperscript{44} In \textit{New York Times Co. v. United States},\textsuperscript{45} Justice Black, in his concurrence, wrote that “[t]he Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.”\textsuperscript{46}

Although the First Amendment freedoms have long been considered inherent rights, they have never been considered absolute privileges.\textsuperscript{47} Oliver Wendell Holmes stated over seventy years ago that even “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”\textsuperscript{48} One federal court has more recently stated a similar position in holding that “[enforcing] freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.”\textsuperscript{49} It is often stated that the First Amendment does not prohibit the regulation of speech, only the regulation of “the freedom” of speech.\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{45} 403 U.S. 713 (1971).
\item \textsuperscript{46} \textit{Id.} at 717 (Black, J., concurring).
\item \textsuperscript{47} An absolutist position was advocated by Justice Black in several cases. However, his position was never adopted by the majority of the Court. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT, § 2.01 at 2-3 (1992). See also New York Times v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Konigsberg v. State Bar, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting). Justice Black's rigid position may be explained in part by his narrow interpretation of what constitutes "speech." See, e.g. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 516-17 (1969) (Black, J., dissenting).
\item \textsuperscript{48} Schenck v. United States, 249 U.S. 47, 52 (1919). See also Gitlow v. New York, 268 U.S. 652 (1925), where the Supreme Court stated that “the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose . . . .” \textit{Id.} at 666.
\item \textsuperscript{49} Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397, 1400 (W.D. Ark. 1987) (quoting Kovacs v. Cooper, 336 U.S. 77, 88 (1949)). See also 16A AM. JUR. 2d Constitutional Law § 506 (1979). “Although freedom of speech or of the press under constitutional guaranties may not altogether be restrained, he who abuses the right may nevertheless be held to liability therefor. The First Amendment does not confer an absolute right to speak or publish, without responsibility, whatever one may choose.” \textit{Id.} § 506, at 343 (citations omitted).
\item \textsuperscript{50} WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 29 (1984). The author states that while all speech is encompassed within the First Amendment, the phrase in the amendment, “the freedom of speech,” is a reference to a scope or latitude of freedom which has an external boundary. This interpretation of the amendment allows the regulation or proscription of that speech which is determined not to fall within the protection of the freedom of speech. \textit{Id.} See also NOWAK & ROTUNDA, supra note 4, § 16.6 (quoting ALEXANDER MEIKELJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19 (1948)), for a similar interpretation.
\end{itemize}
B. Speech Capable of Inducing Illegal Action

The current legal doctrines which determine what speech the First Amendment protects evolved to a large extent from a string of cases dealing with speech that contained dangerous ideas or induced unlawful action. The case which set the initial standard for dealing with "dangerous" speech was *Schenck v. United States.*\(^5\) The question in *Schenck* was whether a circular protesting the Selective Service Act should receive First Amendment protection.\(^5\) In affirming Schenck's conviction, Justice Holmes wrote the opinion of the Court, stating that "[t]he question [of the constitutional protection for speech] in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."\(^5\)

Justice Holmes' standard in *Schenck* served as the basis for the opinion in *Dennis v. United States,*\(^5\) where the Court adopted Learned Hand's formal interpretation of the clear and present danger standard.\(^5\) *Dennis* involved an individual who was convicted of attempting to organize a group of persons whose purpose was the overthrow of the United States government.\(^5\) In affirming the conviction, the Court stated that the test of First Amendment protection must be "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\(^5\)

The doctrine established in *Dennis* was further developed by the Supreme Court in *Yates v. United States.*\(^5\) There the Court distinguished *Dennis,* in which the defendant advocated a course of illegal action, from *Yates,* where the defendant was advocating a particular doctrine.\(^5\) The Court held that advocacy of a particular

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\(^5\) Id. at 47 (1919).
\(^5\) Id. at 51.
\(^5\) Id. at 52 (emphasis added).
\(^5\) 341 U.S. 494 (1951).
\(^5\) Id. at 510. The formal interpretation adopted was in essence Learned Hand's liability equation developed in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). There Judge Hand wrote that liability is determined as a function of whether the burden of precautions against the occurrence outweighs the loss engendered times the probability of that loss's occurrence: B < L x P. *Id.* at 173.
\(^5\) *Dennis,* 341 U.S. at 497.
\(^5\) Id. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
\(^5\) Id. at 320-24. Joseph Hemmer in his treatise THE SUPREME COURT AND THE FIRST AMENDMENT points out the important distinction made by the Court.
theory which may entail illegal conduct was protected under the First Amendment, while the more direct advocacy of action was not. This distinction expanded the protection of speech in First Amendment cases to areas previously unprotected.

In 1969 the Court once again expanded the range of protected speech when it considered the case of *Brandenburg v. Ohio*. The Court held that

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 incite or produce such action.

The decision in *Brandenburg* is the origin of what has been named the incitement doctrine, and it has guided the courts since its adoption in 1969. The incitement doctrine requires that the speaker not only cause imminent, unlawful activity but also that he intend to cause it. The development of this doctrine was an attempt

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He notes that in *Dennis* the Court based its conviction on an active attempt to organize the overthrow of the government, whereas in *Yates* the defendant advocated forcible overthrow only as an abstract doctrine. JOSEPH J. HEMMER, JR., *THE SUPREME COURT AND THE FIRST AMENDMENT* 16 (1991). As Justice Harlan stated in his majority opinion, "those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something." *Yates*, 354 U.S. at 325.

60. *Yates*, 354 U.S. at 310.
61. *Scales v. United States*, 367 U.S. 203, 221-22 (1961) (holding that the requirements of *Yates* must be satisfied in order to uphold a conviction under the Smith Act); *Noto v. United States*, 367 U.S. 290, 297-99 (1961) (holding that to obtain a conviction under the Smith Act there must be a present advocacy of violent overthrow of the government and not merely the possibility of future advocacy).
62. 395 U.S. 444 (1969). In *Brandenburg* the defendant was charged with violating a criminal syndicalism statute which prohibited advocating unlawful means of terrorism in order to accomplish industrial or political reform. *Id.* at 444-45.
63. *Id.* at 447. This opinion gave rise to what came to be known as the incitement doctrine.
64. ROTUNDA & NOWAK, supra note 40, § 20.15, at 72. See also *Hess v. Indiana*, 414 U.S. 105 (1973), where in the middle of a heated protest rally the defendant shouted out "We'll take the fucking street later." *Id.* at 110. The Court determined that the qualification "later" prevented the speech from satisfying the "imminent violence" requirement established in *Brandenburg*, and held that the "tendency to lead to violence" is not enough to remove speech from the protection of the First Amendment. *Id.* at 109. See also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987).
by the Supreme Court to provide more protection for free speech than the earlier clear and present danger standard which was easily manipulated.\footnote{Brandenburg, 395 U.S. at 451-52.}

It has generally been held that the incitement doctrine denies tort liability for speech because the speaker is seen only as advocating and not inciting.\footnote{David A. Anderson, Tortious Speech, 47 WASH. & LEE L. REV. 71, 74 (1990). See, e.g., Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); Zamora v. Columbia Broadcasting Sys., 480 F.Supp. 199 (S.D. Fla. 1979); Olivia N. v. National Broadcasting Co., 178 Cal. Rptr. 888 (1981); Shannon v. Walt Disney Prods., Inc., 276 S.E.2d 580 (Ga. 1981).}

On this basis, courts have denied liability in cases such as \textit{McCollum v. CBS}.

\footnote{Id. at 193.} In \textit{McCollum}, the court determined that an Ozzy Osbourne song which glorified suicide did not rise to the level of incitement under the \textit{Brandenburg} formulation because it did not advocate immediate action.\footnote{Id. at 198.} As a result, the court held that liability did not attach when a nineteen year old boy shot himself while listening to an Osbourne song.\footnote{Id. at 198.}

C. The Commercial Speech Doctrine

Once it is determined that the speech in question falls under the protection of the First Amendment, there may still be an issue as to the level of constitutional protection a particular type of speech will be accorded. The advertisement in \textit{Braun} is an example of one such type referred to as commercial speech. Commercial speech is defined as speech which does no more than propose a commercial transaction.\footnote{Valentine, 316 U.S. at 54. See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976); Bigelow v. Virginia, 421 U.S. 809, 818-19 (1975).}

Because it is exclusively related to profit-motivated exchanges, the Supreme Court has held that this type of speech should not receive the same degree of constitutional protection as noncommercial speech.\footnote{316 U.S. 52 (1942).}

The line of Supreme Court cases which limits the constitutional protection given commercial speech embodies what has come to be known as the commercial speech doctrine.

The distinction between commercial and noncommercial speech originated in 1942 in the case of \textit{Valentine v. Chrestensen}.

\footnote{Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376, 385 (1973). However, "speech is not rendered commercial by the mere fact that it relates to an advertisement." \textit{Id.} at 384. In \textit{Valentine v. Chrestensen}, 316 U.S. 52 (1942), the Court stated that a determination of the commerciality of an item is made by looking to its primary purpose. \textit{Id.} at 55.}
involved the right of an individual to distribute leaflets on the street in violation of a local ordinance established to minimize the accumulation of trash in the streets.\textsuperscript{74} The Supreme Court held that commercial advertisements are not necessarily protected by the Constitution.\textsuperscript{75} In the later case of \textit{Metromedia, Inc. v. City of San Diego},\textsuperscript{76} the Court elaborated on the distinction, stating that commercial speech is not necessarily the type of speech essential to liberty, and thus, may be more closely regulated by the state.\textsuperscript{77}

The commercial speech doctrine of reduced constitutional protection for commercial speech has been strictly construed by the courts.\textsuperscript{78} In \textit{New York Times Co. v. Sullivan},\textsuperscript{79} the Court held that an advertisement which also furthered political debate on a socially relevant topic was not commercial speech.\textsuperscript{80} The Court reasoned that the underlying purpose of the writing and not the forum is conclusive in determining whether the writing should receive full constitutional protection.\textsuperscript{81}

In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council},\textsuperscript{82} the Supreme Court appeared to eliminate the commercial speech doctrine altogether when it held that a statutory ban on the dissemination of information concerning the prices of prescription drugs was a violation of the defendants' First Amendment

\textsuperscript{74} \textit{Id.} at 53. The handbill consisted of a commercial advertisement on one side, which solicited visitors to tour plaintiff's submarine which was moored at a nearby state pier, and a protest on the other side, disparaging the action of the city in refusing the plaintiff wharfage privileges at the city docks. \textit{Id.}

\textsuperscript{75} \textit{Id.} at 54.

\textsuperscript{76} 453 U.S. 490 (1981).

\textsuperscript{77} \textit{Id.} at 504-05.

\textsuperscript{78} \textit{See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975). In New York Times Co. v. Sullivan, the Court limited the commercial speech doctrine to purely commercial speech. Sullivan, 376 U.S. 254, 266 (1964). In Pittsburg Press, the Court sidestepped the argument that commercial speech should receive constitutional protection, responding that whatever merits the argument may have in other contexts, in cases involving illegal commercial activity, the argument is unpersuasive. Pittsburg Press, 413 U.S. at 388.}

\textsuperscript{79} 376 U.S. 254 (1964).

\textsuperscript{80} \textit{Id.} at 266. The advertisement in \textit{Sullivan} recited a list of racial abuses, some of which were untrue, and at the end requested funds for the civil rights movement. \textit{Id.} at 256-57. The Court stated that the advertisement was not commercial because it "expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest possible concern." \textit{Id.} at 266. \textit{See also Pittsburg Press, 413 U.S. at 384 (holding that the mere fact that speech relates to an advertisement does not render it commercial).}

\textsuperscript{81} \textit{Sullivan}, 376 U.S. at 266.

\textsuperscript{82} 425 U.S. 748 (1976).
The Court stressed that the interest in and importance of commercial speech may be just as great as with noncommercial speech.\(^84\)

Less than a decade later, in an abrupt turnaround, the Court revived the commercial speech doctrine in the case of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.\(^85\) In this decision, the Court established that before commercial speech could receive constitutional protection, it must be shown to concern lawful activity and not be misleading.\(^86\) If it is determined that the speech is constitutionally protected, then the governmental interest in restricting the speech must be substantial, the proposed regulation must advance the government interest asserted, and the regulation must not be more restrictive than necessary.\(^87\)

More recently, the Supreme Court confirmed its support of the commercial speech doctrine in *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*,\(^88\) holding that commercial speech receives only limited First Amendment protection which makes it amenable to regulation.\(^89\) The *Posadas* case originated with the decision of the Puerto Rican government to legalize gambling in order to boost the tourism trade within the country.\(^90\) However, fearful of adverse effects on the local population, a statute was passed which banned advertisements featuring gambling casinos that were directed at the citizens of Puerto Rico.\(^91\) In upholding the statute, the Supreme Court reasoned that the ban advanced a substantial governmental interest by inhibiting the occurrence of gambling among the local population.\(^92\)

Cases from *Central Hudson* to *Posadas* established the reemergence of the commercial speech doctrine under the present Supreme Court. The continuing presence of this doctrine is pertinent in that the consequent reduction in First Amendment protection may result in the increased likelihood of obtaining successful prosecutions.

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83. *Id.* at 762.
84. *Id.*
86. *Id.* at 564.
87. *Id.* at 564-66. In a later case, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Court emphasized that there must be "a 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 480.
89. *Id.* at 340. The Court applied the *Central Hudson* factors to evaluate the constitutionality of the imposition of any regulation. *Id.*
90. *Id.* at 331-32.
91. *Id.*
92. *Id.* at 341.
of claims of liability for negligent speech. Specifically, in regard to the *Braun* case, an expansive commercial speech doctrine could result in increased occurrences of liability for published commercial speech such as classified advertisements.

D. Publisher Liability

The commercial speech doctrine encompasses cases, such as *Braun*, which deal with the liability of publishers for the content of their publications. While the First Amendment protection for commercial speech has faded, the courts continue to resist placing tort liability on publishers in most cases. The courts have expressed concern over the enormous expenditures of money and time that would be imposed upon publishers if they were required to investigate the safety of each product or accuracy of each individual advertisement that is submitted. Courts are fearful that liability of this nature would act as a chilling factor on certain types of speech.

The earliest case in which tort liability was imposed against a publisher is *Hanberry v. Hearst Corp.* In *Hanberry*, the defendant, *Good Housekeeping Magazine*, had endorsed a product by placing its seal of approval on the advertisement. When the product failed the plaintiff filed suit. The court held that the defendant had a duty to use ordinary care in issuing an endorsement or certification of the product's quality. The court determined that the product in *Hanberry* was negligently approved, and as a result found that the defendant could be held liable for negligent misrepresentation.

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94. E.g., Pittman v. Dow Jones & Co., Inc., 662 F.Supp. 921 (E.D. La. 1987). In this case, the court refused to impose upon a publisher the duty of investigating into the background of advertisers who placed ads in the magazine. *Id.* at 923.
96. *Braun*, 968 F.2d at 1117 (citing Michael I. Meyerson, *This Gun for Hire: Dancing in the Dark of the First Amendment*, 47 WASH. & LEE L. REV. 267, 270 (1990)).
98. *Id.* at 521.
99. *Id.*
100. *Id.* at 523.
101. *Id.*
Hanberry is generally limited to situations where a publisher affirmatively endorses a product or idea. Absent an endorsement, a publisher traditionally has no legal duty upon which a plaintiff could base liability. The most frequently cited case establishing this general rule is *Yuhas v. Mudge.* In *Yuhas* the court refused to impose liability upon *Popular Mechanics* magazine for failing to test an advertised product which later proved defective.

In addition to a claimed lack of duty, defendants such as those in *Braun* fall back on the protection of the First Amendment. The use of the First Amendment as a defense in publisher liability cases originated in *Weirum v. RKO General, Inc.* This case involved a radio station which sponsored a competition that awarded a prize to the first person to arrive at a mobile broadcasting unit. In the course of the contest a motorist was killed by two teenagers who were racing to get to the mobile unit. The radio station claimed that its broadcasts were protected under the First Amendment. However, the California Supreme Court held that the First Amendment claim was without merit, stating that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." In *Herceg v. Hustler Magazine, Inc.* the Fifth Circuit Court of Appeals was faced with a situation similar to *Weirum* but arrived at a different result. In *Herceg* an adolescent boy was killed attempting to replicate the actions described in an article *Hustler* magazine.
published detailing the practice of autoerotic asphyxiation.\textsuperscript{112} The case was tried on the theory that the article constituted incitement under the \textit{Brandenburg} test.\textsuperscript{113} The trial court found in favor of the plaintiff, but the Fifth Circuit reversed noting that discussion of a dangerous idea is not grounds to remove the speech from the protection of the First Amendment.\textsuperscript{114}

The conflict between cases such as \textit{Herceg} and \textit{Weirum} illustrate the gray area into which the \textit{Braun} case falls. The courts' decisions in cases dealing with dangerous speech appear often to be more attributable to the circumstances of the particular case than to legal precedents. If \textit{Herceg} is distinguishable from the decisions in \textit{Braun} and \textit{Weirum}, it is only because, perhaps, the resulting conduct was more reasonably foreseeable in the latter cases.

E. Illegal Speech

Courts are less concerned with possible burdens placed on publishers when the advertisement published is connected with illegal activity.\textsuperscript{115} The seminal case in this area, \textit{Pittsburg Press Co. v. Pittsburg Commission on Human Relations},\textsuperscript{116} foreshadowed the decision in \textit{Braun}. The case originated with the publication of sex-designated advertising columns that violated a human relations ordinance.\textsuperscript{117} The Supreme Court stated in its opinion that liability would no doubt be imposed if the publisher had published an advertisement for narcotics or prostitutes.\textsuperscript{118} The Court then took this reasoning one step further and determined that, while the language and placement of the advertisement did not explicitly state its criminal intent, liability could still be imposed upon the editor.\textsuperscript{119} It is this holding, that liability may be imposed upon an editor in the absence of an explicit criminal intent, which allows \textit{Pittsburg Press} to serve as an important precedent for the \textit{Braun} case.

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at 1019.
\item \textsuperscript{113} Jonathan M. Hoffman, \textit{Soldiers of Misfortune}, \textit{The Brief}, Summer 1991 at 22.
\item \textsuperscript{114} \textit{Herceg}, 814 F.2d at 1019, 1024.
\item \textsuperscript{115} \textit{Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations}, 413 U.S. 376 (1973). The Court in this case stated that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal . . . ." \textit{Id.} at 389.
\item \textsuperscript{116} 413 U.S. 376 (1973).
\item \textsuperscript{117} \textit{Id.} at 378. The want ads in question were published under headings which designated job preference by sex. This violated a local ordinance prohibiting discriminatory employment practices. \textit{Id.} at 378-80.
\item \textsuperscript{118} \textit{Id.} at 388.
\item \textsuperscript{119} \textit{Id.} at 388-89. The court states that "[t]he illegality in this case may be less overt, but we see no difference in principle here." \textit{Id.} at 388.
\end{itemize}
Later cases have affirmed the Court's low opinion of granting constitutional protection to speech which may be clearly shown to involve illegality.\textsuperscript{120} However, the courts have drawn a fine line between what does and does not concern illegality.\textsuperscript{121}

In \textit{News & Sun Sentinel Co. v. Board of County Comm'rs}\textsuperscript{122} a federal district court distinguished \textit{Pittsburg Press}.\textsuperscript{123} The court held that an ordinance rendering it illegal to publish an ad for construction services that did not contain the contractor's certification number was unconstitutional.\textsuperscript{124} The ordinance was passed to prevent uncertified contractors from advertising and, as a result, obtaining work they were not authorized to perform.\textsuperscript{125} The court stated that the ads in \textit{Pittsburg Press} aided the commission of a crime, whereas, in the \textit{Sentinel} case the ads did not aid "in the incompetent or fraudulent provision of contracting services."\textsuperscript{126} The court's decision was heavily influenced by the fact that imposing liability in \textit{Sentinel} would have placed a much more onerous burden on the publishers than did the holding in \textit{Pittsburg Press}.\textsuperscript{127} This concern restates the general underlying tension between First Amendment and negligence liability issues.

The reasoning employed in \textit{Pittsburg Press} set the stage for a trio of cases which culminated in the \textit{Braun} decision. The initial case was \textit{Norwood v. Soldier of Fortune Magazine, Inc.},\textsuperscript{128} which involved a situation identical to \textit{Braun} in that it dealt with a murder-
for-hire in conjunction with a Soldier of Fortune advertisement.\(^{129}\) In a ruling which laid the ground work for the Braun opinion, the court for the Western District of Arkansas held that a publisher’s rights are not absolutely privileged under the First Amendment.\(^{130}\) The court recognized that the advertisement involved was commercial speech and, as a result, was not deserving of the same degree of constitutional protection afforded other types of speech.\(^{131}\) The opinion went on to state that when commercial speech may foreseeably result in harm a triable issue of fact exists.\(^{132}\)

The second case, which also involved a fact scenario similar to Braun, was Eimann v. Soldier of Fortune Magazine, Inc.\(^{133}\) The Fifth Circuit overruled a district court’s decision which imposed liability upon Soldier of Fortune.\(^{134}\) The appellate court never reached the First Amendment issue because it held that the ad itself was too ambiguous to warrant an imposition of liability.\(^{135}\) The Fifth Circuit Court of Appeals found that the jury instructions submitted by the trial court placed a burden on publishers “to recognize ads that ‘reasonably could be interpreted as an offer to engage in illegal activity’ . . . .”\(^{136}\) This was determined to be an unjustifiably heavy burden on publishers.\(^{137}\) The court did not, however, eliminate the possibility that liability could be imposed on a publisher in a similar case.\(^{138}\) The court only determined that under a Pittsburg Press standard the advertisement must clearly be intended to solicit criminal activity.\(^{139}\)

\(^{129}\) Id. at 1398.

\(^{130}\) Id. at 1398-1400. The court, quoting Branzburg v. Hayes, 408 U.S. 665, 683 (1972), pointed out that “[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.” 651 F. Supp. at 1400. Additionally, the court cited Blackstone for the proposition that a publisher must take the consequences for damages occasioned by the publication of what is mischievous, improper, or illegal. Id. at 1402.

\(^{131}\) 651 F. Supp. at 1398-99. The court noted that commercial speech was considered to be outside the protection of the First Amendment until as recently as 1975. Id. (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 (1981)).

\(^{132}\) 651 F. Supp. at 1402-03.

\(^{133}\) 880 F.2d 830 (5th Cir. 1989). The plaintiffs’ deceased was murdered by a contract killer hired through an advertisement placed in Soldier of Fortune. Id. at 831.

\(^{134}\) Id. at 838.

\(^{135}\) Id. at 836.

\(^{136}\) Id. at 835.

\(^{137}\) Id. at 838.

\(^{138}\) Id. at 834. The court stated that “SOF [Soldier of Fortune] owed no duty to refrain from publishing a facially innocuous classified advertisement when the ad’s context—at most—made its message ambiguous.” (emphasis added) Id.

\(^{139}\) Id.
The holdings in *Eimann* and *Norwood* laid the framework for the court's analysis in *Braun* where liability was imposed upon a publisher. Although the court in *Eimann* refused to impose liability, it set the stage for a determination of negligence in a case such as *Braun*, in which the criminal solicitation in question was facially determinable by a reading of the advertisement. Furthermore, the court's ruling in *Norwood*, that in a case such as *Braun* the First Amendment does not completely bar an imposition of liability on a publisher, elucidated the necessary constitutional justifications to uphold an imposition of liability.

### IV. Reasoning

In *Braun v. Soldier of Fortune Magazine, Inc.* the Court of Appeals for the Eleventh Circuit balanced traditional concepts of negligence against First Amendment principles in arriving at a decision. Initially, the court decided the question of whether *Soldier of Fortune* had acted negligently in running Michael Savage's advertisement. Specifically, the court focused on the issues of duty and breach of duty. The appellate court gave scant attention to causation, stating that causation followed as a matter of course if the requirements of the modified negligence standard applied by the court were met.

The court looked to duty as the threshold question. In Georgia the courts recognize "a 'general duty one owes to all the world not to subject them to an unreasonable risk of harm.'" The trial court in *Braun* found that a duty could be found to exist between the publisher and the public when the likelihood and gravity of the possible harm from an advertisement is great and is easily discernible from its face, and when the social utility of the advertisement is

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140. The *Eimann* opinion stated only that a standard requiring a publisher to reject all ambiguous ads is overly burdensome when balancing the burdens and the risks. *Id.* at 837. By implication, in a case such as *Braun* where the intent of the advertisement is more clear, it would be possible that the risks might outweigh the burdens. *Id.*


142. *See Braun*, 968 F.2d at 1114.

143. *Id.* at 1122. The court stated that since it had already determined that the language of the advertisement should have alerted a reasonable publisher to the clearly identifiable risk of harm occurring from the publication of the ad, it followed that the crime was foreseeable and therefore "the chain of causation was not broken." *Id.*

144. *Id.* at 1114. Because the murder in *Braun* took place in Georgia, the court looked to Georgia law under the applicable conflict of laws holdings. *Id.*

145. *Id.* (quoting Bradley Center, Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982)).
The appellate court affirmed the trial court’s decision and refuted *Soldier of Fortune*’s argument that a publisher owes no duty to the public in regard to the personal advertisements it publishes.\(^{147}\)

The court next addressed the issue of whether *Soldier of Fortune* had breached its duty of care by running Savage's ad. Under Georgia law, an unreasonable risk results when it is “‘of such magnitude as to outweigh what the law regards as the utility of the defendant’s alleged negligent conduct.’”\(^ {149}\) The district court in *Braun* found that, because the likelihood of harm resulting from the advertisement was great and the social utility of the ad was small, the imposition of liability was justified in this case.\(^ {150}\)

On appeal, *Soldier of Fortune* contended that the district court erred in its application of the risk-utility balancing test.\(^ {151}\) *Soldier of Fortune*’s defense was based primarily upon *Eimann v. Soldier of Fortune Magazine, Inc.*,\(^ {152}\) a case factually similar to *Braun*, in which the Fifth Circuit Court of Appeals overturned a district court’s 9.4 million dollar jury verdict for the plaintiffs.\(^ {153}\) The basis for the court’s reversal was a finding that the jury instructions submitted by the district court imposed too stringent a standard upon publishers, in effect, forcing them to reject all ambiguously worded advertisements.\(^ {154}\)

The court in *Braun* distinguished the *Eimann* decision based upon the differing jury instructions given in the two cases.\(^ {155}\) In *Eimann*, the trial court submitted jury instructions which allowed a finding of liability if the ad in question “could reasonably be interpreted as an offer to commit crimes.”\(^ {156}\) Additionally, the *Eimann* instructions placed upon publishers the burden of finding what “a reasonably prudent publisher would discover” through investigation into the context of an advertisement.\(^ {157}\)

\(^{146}\) *Braun*, 749 F. Supp. at 1085 (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 31, at 170-71 (5th ed. 1984) and Restatement (Second) of Torts §§ 291-92 (1965)).

\(^{147}\) *Braun*, 968 F.2d at 1114. The court stated “that [Soldier of Fortune] had a legal duty to refrain from publishing advertisements that subjected the public... to a clearly identifiable unreasonable risk of harm.” *Id.*

\(^{148}\) *Id.* at 1115.

\(^{149}\) *Id.* (quoting Johnson v. Thompson, 143 S.E.2d 51, 53 (Ga. Ct. App. 1965)).

\(^{150}\) *Braun*, 749 F. Supp. at 1085.

\(^{151}\) *Braun*, 968 F.2d at 1115.

\(^{152}\) 880 F.2d 830 (5th Cir. 1989).

\(^{153}\) *Id.* at 838.

\(^{154}\) *Id.*

\(^{155}\) *Braun*, 968 F.2d at 1115-16.

\(^{156}\) *Eimann*, 880 F.2d at 833.

\(^{157}\) *Braun*, 968 F.2d at 1116.
The jury instructions in *Braun* were more restrictive, perhaps as a result of the *Eimann* decision. In *Braun* the applicable jury instruction allowed a finding of liability "only if the ad on its face contained a 'clearly identifiable unreasonable risk' of harm to the public." This instruction constituted what the appellate court termed a "modified" negligence standard. The Eleventh Circuit Court of Appeals concluded that the jury instructions given by the district court were satisfactory because they properly precluded the imposition of liability for ads which were ambiguous or posed an insubstantial risk of harm to the public.

The court reasoned that the preclusion of liability for ambiguous ads was important because it eliminated the two concerns present in the *Eimann* case. First, it removed the possibility that the court's decision would place upon publishers the burden of attempting to construe an ambiguous advertisement. Secondly, the instruction eliminated the potential of a resulting duty to investigate the advertisement. The court held that the restrictive jury instructions ensured sufficient protection for *Soldier of Fortune*'s rights and were therefore distinguishable from the instructions given in *Eimann*.

Once the issue of negligence was resolved, the court turned to the issue of whether the modified negligence standard infringed upon *Soldier of Fortune*'s rights granted under the First Amendment. The Eleventh Circuit Court of Appeals emphasized that, although the ad in question constituted commercial speech, it still enjoyed protection under the First Amendment. As a separate issue, however, the court recognized that First Amendment protection does not extend to speech related to illegal activity.

In light of these counterveiling considerations, the court was cautious in determining the appropriate standard of conduct in order

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158. *Id.* (quoting district court jury instructions).
159. *Id.* at 1118.
160. *Id.* at 1116.
161. *Id.*
162. *Id.* (citing *Eimann*, 880 F.2d at 833).
163. *Id.*
164. *Id.* at 1116-17. The court cited New York Times v. Sullivan, 376 U.S. 254, 283 (1964), in which the Supreme Court held that "the Constitution delimits a State's power" to award civil remedies, and Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974), in which the Court stressed that state law must be reconciled with the competing interests under the First Amendment. *Id.*
166. *Id.* (citing Central Hudson, 447 U.S. at 564).
to avoid imposing too heavy a burden on publishers. The court emphasized that imposing liability upon a publisher for harm occasioned by the advertisements in its publication would increase the risk of chilling public speech. The reasoning was that publishers only provide a forum for advertising and are less likely to be economically dependent on the income derived from a particular advertisement than an advertiser who has a direct financial interest in publicizing its product. As a result, an advertiser is more likely to ensure that his message reaches the public to promote sales in situations where a publisher may forego publishing the advertisement for fear of potential liability.

In *Braun*, the court determined that the modified negligence standard adopted by the trial court adequately reflected that an unduly heavy burden upon publishers would chill commercial speech. The court found that this standard of conduct, unlike a traditional negligence standard, was manageable by publishers, and thus less likely to chill controversial but otherwise legitimate speech. In support of its decision, the court cited *Gertz v. Robert Welch, Inc.* for the proposition that the modified negligence standard enunciated in *Braun* was the most appropriate selection to protect First Amendment concerns. The court concluded by stating that the modified negligence standard was an accurate reflection of a constitutionally permitted infringement upon the rights guaranteed by the First Amendment.

Senior Circuit Judge Eschbach voiced a brief dissent to the majority's conclusion. He agreed with the majority's intricate bal-

170. *Id.* at 1118.
171. *Id.* at 1117.
172. *Id.* at 1118-19.
173. 418 U.S. 323 (1974). In *Gertz*, the Supreme Court concluded that a publisher may be held liable for defamation of a private individual as long as the standard imposed was not liability without fault. *Id.* at 346-47.
174. *Braun*, 968 F.2d at 1119. The Supreme Court has held that liability may be imposed by a state when a publisher negligently prints a defamatory statement which makes apparent the substantial danger to reputation. *See Gertz*, 418 U.S. at 348; Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376, 387-88 (1973).
175. *Braun*, 968 F.2d at 1119.
176. *Id.* at 1122 (Eschbach, J., dissenting).
ancing of First Amendment concerns and with the adoption of the modified negligence standard.  

However, Judge Eschbach differed from the majority in that he did not believe the advertisement in question was clearly identifiable on its face as a solicitation for criminal activity. In addition, he expressed concern that the jury instructions might not have been clear enough to enable the jury to ascertain the necessary level of clarity which was required under the standard of conduct.

V. Significance

The significance of the *Braun* decision is still largely speculative. However, in at least one instance, printers have turned away a publication because of the fear of liability inspired by *Braun*. Several press organizations have expressed concern over the spectre of increased liability raised by this decision. The National Association for Information Services even went so far as to file a brief as amicus curiae for *Soldier of Fortune* urging a reversal of the *Braun* decision.

The true significance of *Braun* may be in its ability to serve as an illustration of the current overlapping and inconsistent doctrines which have grown up around the First Amendment right to freedom of speech. In *Braun* the court determined a question of publisher liability by incorporating standards developed in publisher liability cases, defamation cases, cases involving illegal speech, and cases dealing with commercial speech. The Eleventh Circuit could have also employed the reasoning behind the incitement standard as other circuit courts have done.

The existence of these numerous and varied doctrines may result in inconsistent decisions determined as much by the type of analysis

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177. Id.
178. Id.
179. Id.
180. Twenty-three printers turned away a controversial article by Richard Mohr entitled *Gay Ideas: Outings and Other Controversies* even though it was published by the respectable Beacon Press. "Some printers [were] afraid of the liability meted out in a recent suit against *Soldier of Fortune* Magazine." PROGRESSIVE, Oct. 1992, at 4.
181. Press groups such as Magazine Publishers of America and the National Newspapers Association urged the Supreme Court to accept the petition for certiorari and reverse the lower court's holding. These groups noted that classified advertisements comprised a 10.5 billion dollar industry in 1991. David G. Savage, *Magazine Held Responsible for Ad that Led to Slaying*, LOS ANGELES TIMES, Jan. 12, 1993, at A1.
182. *Braun*, 113 S. Ct. at 1028.
the court selects as by the facts of the case. For instance, in *Braun* the court downplayed *Soldier of Fortune*’s ability to regulate the advertisement as pure commercial speech, even though recent cases such as *Posadas* have given courts broad discretion to regulate speech in accord with a substantial governmental interest. The court also downplayed the fact that illegal speech is wholly outside the protection of the First Amendment; stating that an unduly heavy burden on publishers could impermissably chill otherwise protected commercial speech. The Eleventh Circuit Court of Appeals reached its decision to adopt the modified negligence standard only after looking to precedent established in defamation cases. This was in spite of the fact that defamation was the one area of First Amendment law which had no tangential relation to the facts of the case.

A totally different decision might have been reached under an incitement analysis. The *Braun* court gave no discussion to this doctrine although similar cases such as *Herceg* relied almost solely upon it. Had the court considered the *Brandenburg* incitement standard, the imposition of liability would have been unlikely as this standard is only applicable if the defendant’s actions were directed toward inciting imminent violence.

The court in *Braun* did look to the publisher liability cases for precedent, but found them distinguishable. Prior to *Braun*, courts considering publisher liability cases had been reluctant to impose liability upon publishers under similar circumstances for fear that such a holding would result in the creation of a duty to investigate the content of the advertisements a magazine chose to publish. *Braun* allowed the imposition of liability upon a publisher if the advertisement, on its face, presented a serious, clearly identifiable danger, thus curtailing the duty to investigate. The impact of *Braun* on cases decided under the publisher liability standard will

184. *Braun*, 968 F.2d at 1117. The court cited *Virginia State Bd. of Pharmacy*, 425 U.S. at 762, and *Pittsburg Press Co.*, 413 U.S. at 385, which were decided at a time when the commercial speech doctrine was in disfavor. *Id.* However, the court does not cite more recent cases which have diminished the constitutional protection of commercial speech. *See, e.g.*, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).


186. *Braun*, 968 F.2d at 1117.


188. For a discussion of *Herceg*, see *supra* notes 111-14 and accompanying text.

189. For a discussion of *Brandenburg*, see *supra* notes 62-66 and accompanying text.

190. *Braun*, 968 F.2d at 1118.

191. *See supra* note 105 and accompanying text.

depend on how courts will interpret the "clearly identifiable" language.

The United States Supreme Court could clarify the confusion among these overlapping and often inconsistent doctrines. However, the Court has not yet accepted for review a case dealing with media liability for physical injury.\(^{193}\) In the event that a petition for certiorari were accepted, the recent attitude of the Court in reviving the commercial speech doctrine, the denial of certiorari in the *Braun* case, and Chief Justice Rehnquist's record for allowing limitations on First Amendment protections,\(^{194}\) all indicate that perhaps the Court would adopt a standard analogous to the one established in the *Braun* case.

*John Peel*

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