Putting a Chill on Contract Murder: Braun v. Soldier of Fortune and Tort Liability for Negligent Publishing

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PUTTING A 'CHILL' ON CONTRACT MURDER: BRAUN V. SOLDIER OF FORTUNE AND TORT LIABILITY FOR NEGLIGENT PUBLISHING

I. INTRODUCTION

A central issue in negligent publishing law is determining the standard of care to which a state can hold a publisher while satisfying the First Amendment. In New York Times Co. v. Sullivan, the Supreme Court declared that states cannot restrict publication by imposing liability where they could not do so by statute.1 States may not restrict publication in contravention of a publisher's First Amendment rights. The First Amendment states: "Congress shall make no law that abridges the Freedom of Speech."2 This freedom, and the concurrent limitation on state action, is not, however, free from qualification.3

In Braun v. Soldier of Fortune,4 the United States Court of Appeals for

1. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (rejecting liability for allegedly defamatory ad). The Court continued, "[t]he fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute." Id.

2. U.S. CONST. amend. I. "Freedoms such as [association and airing grievances] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960) (citing NAACP v. Alabama, 357 U.S. 449, 460-62 (1958) (discussing right of association in context of law compelling disclosure of group membership lists)). The courts have sought to prevent regulations that indirectly restrain First Amendment rights. See Note, The Chilling Effect in Constitutional Law, 69 COLUM. L. REV. 808, 842 (1969) (describing chilling effect some laws have on certain protected activities). Although courts often use the term chill in speech cases, many other cases discussing the chilling effect involve the freedom of association. See, e.g., Bates, 361 U.S. 516 (requiring disclosure of NAACP membership would chill free association by subjecting those on list to harm and thus prevent potential members from joining). But see American Party v. White, 415 U.S. 767 (1974) (upholding restrictions on candidacy in light of government interest in protecting integrity of nominating process by prohibiting voters in primary from subsequently signing candidate petitions).

3. See Kovacs v. Cooper, 336 U.S. 77, 88 (1949) (holding constitutional ordinance that forbade use of "sound truck" on public streets). "To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." Id; see also Metromedia, Inc v. San Diego, 453 U.S. 490, 501 (1981) (noting that "at times First Amendment values must yield to other societal interests"); Roth v. United States, 354 U.S. 476, 482 (1957) (noting that at time of Bill of Rights, 10 of 14 states had laws prohibiting profanity); Near v. Minnesota, 283 U.S. 697, 708 (1911) ("Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."); American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921) ("[T]he word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.")


(625)
the Eleventh Circuit addressed this issue, holding:

[T]he First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public.\(^5\)

In so holding, the court established the constitutionality of a new standard of care for all publishers.

Before examining the *Braun* decision, some basic definitions and limitations must be established. First, it is necessary to distinguish between a mere transmitter and a publisher. For the purposes of this Note, a transmitter is one who conveys a message between discreet parties with no knowledge of the contents, such as the telephone company or the postal service.\(^6\) Courts generally do not hold transmitters liable for the contents of the transmission.\(^7\) A publisher, on the other hand, is one who disseminates information with knowledge of the contents.\(^8\) Courts have held publishers liable for the harm resulting from information they disseminate.\(^9\) In the context of electronic communication, providers of services such as electronic mail are considered transmitters, while a system operator (sysop) operating an electronic bulletin board is a publisher.

Secondly, it is necessary to delineate the scope of the negligence to be discussed. This Note is concerned with “negligent publishing” as that term is used to refer to the publication of information that when read and acted upon creates a risk of injury to third parties. This is distinct from an action for defamation or invasion of privacy where the harm results from the dissemination of the information itself. For example, in *Braun*, the injury is the death of plaintiffs’ father which was alleged to be proximately caused by an advertisement published by the

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5. *Id.* at 1119 (footnotes omitted). The court would have been more accurate if it had held that the First Amendment “does not prohibit” a state, as opposed to “permits” a state: The First Amendment limits, but does not expand, a state’s discretion.


8. *Cf.* id. at 98 (defining publication in defamation context as act resulting in communication to third person) (citing *Restatement (Second)* of Torts § 577 (1977)).

9. Generally, liability is contingent on knowledge or negligence as to knowledge. Perritt, *supra* note 6, at 99; *cf.* *Restatement (Second)* of Torts § 581 (suggesting liability for publisher only where “he knows or has reason to know of its defamatory character”).
This Note, in Section II, discusses the state of the law before *Braun*, focusing on the protection given to commercial speech under the First Amendment and recent developments in the area of tort liability. Section III describes and analyzes the court's reasoning and conclusions. Finally, Section IV discusses the likely impact of *Braun* on print and electronic publishing.

**II. Background**

Negligent publishing law is negligence law operating under the constraints of First Amendment protection. Consequently, it is useful to consider both negligence and the First Amendment protection of speech individually before examining the state of negligent publishing law itself. Because the *Braun* court applied Georgia law, this Note tailors the discussion of negligence to that state's law. However, the importance of the holding is not so much that it affirms the standard of care now applicable in Georgia, but that the *Braun* court found that standard to be constitutional.

**A. Negligence**

Under Georgia law, a plaintiff asserting a cause of action for negligence must establish four elements: (1) that the defendant owed the plaintiff a legal duty of care; (2) that the defendant breached this duty; (3) that there was a causal connection between this breach and the plaintiff's resultant injury; and (4) that the plaintiff suffered actual harm.

Georgia recognizes a "general duty one owes to all the world not to subject them to unreasonable risk of harm." The creation of an unreasonable risk thus constitutes a breach of one's duty of care. In deter-

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10. 968 F.2d at 1112.
mining whether the risk is unreasonable, Georgia applies a risk-utility analysis similar to that set forth by Judge Learned Hand in United States v. Carroll Towing Co.:\textsuperscript{15} If the magnitude of the risk outweighs the utility of the conduct, the court deems the conduct unreasonable.\textsuperscript{16} Factors a court should consider in measuring the risk include the "social value of the interest imperiled . . . , the probability of harm, and the likely extent of that harm."\textsuperscript{17} In measuring the utility of the conduct, a court should look at the social usefulness of the enterprise, the value of that method of conducting it, and the extent to which a less dangerous method might advance the interest.\textsuperscript{18}

Assuming the plaintiff has proven duty and breach—or, applying the risk-utility analysis, the creation of an unreasonable risk—the plaintiff still must establish "a legally attributable connection between the defendant's conduct and the alleged injury."\textsuperscript{19} An intervening act of a third party will normally break the causal connection between the defendant's conduct and the plaintiff's injury.\textsuperscript{20} Foreseeable conduct by the third party, however, will not sever the causal connection, even where the third party acts illegally.\textsuperscript{21}

Whether an intervening act is foreseeable depends on the likelihood of its occurrence:

An event is not regarded as being foreseeable if it is one in the nature of an extraordinary coincidence, or a conjunction of circumstances, or which would not occur save under exceptional circumstances; if it is unusual or unlikely to happen, or if it a rare event in experience, or if other and contingent experience preponderate largely in causing the injurious effect.\textsuperscript{22}

15. 159 F.2d 169, 173 (2d Cir. 1947).
17. Hanchey, 171 S.E.2d at 921.
18. Id. The Hanchey court borrowed heavily from Judge Learned Hand's formula set forth in Carroll Towing Co. v. United States, 159 F.2d 169, 173 (2d Cir. 1947) ("[L]iability depends on whether [the burden] is less than [the injury] multiplied by [the probability of injury]."); see also Johnson v. Thompson, 143 S.E.2d 51 (Ga. Ct. App. 1965) (outlining risk utility balance used in Georgia).
20. Rosinek, 305 S.E.2d at 394-95; see also Craine v. United States, 722 F.2d 1523, 1525 (11th Cir. 1984) (applying Georgia law) (holding boat-owner not liable where boat reenter was intoxicated); Razdan v. Parzen, 278 S.E.2d 687, 688-89 (Ga. Ct. App. 1981) (holding issue for jury whether criminal conduct of bogus repairman broke cause when landlord negligently gave him keys).
21. Rosinek, 305 S.E.2d at 394-95 ("[I]f the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the causal connection between that conduct and the injury is not broken.").
22. Standard Oil Co. v. Harris, 172 S.E.2d 344, 349 (Ga. Ct. App. 1969) (holding not foreseeable when clearing gas line with compressed air that cus-
Thus, if a situation implicates no constitutional rights, a plaintiff will prevail where the defendant owes the plaintiff a duty of care, exposes the plaintiff to an unreasonable risk and causes a foreseeable injury. Where constitutional rights are implicated, however, the analysis becomes more complicated.

B. First Amendment Protection

The First Amendment prohibits the imposition of liability where liability would unduly burden free speech.23 The First Amendment, however, does not accord all speech the same protection.24 Because the customer would remove gas cap, causing explosion); see also Warner v. Arnold, 210 S.E.2d 350, 352 (Ga. Ct. App. 1974) (stating proximate cause exists where wrongdoer "had reasonable grounds for apprehending that such a criminal act would be committed").

23. Thomas v. Collins, 323 U.S. 516, 529 (1945) (noting Supreme Court has duty "to say where the individual's freedom ends and the State's power begins").

24. Generally, courts allow speech to be subjected to regulation only to the extent necessary to further a legitimate government interest. See NAACP v. Button, 371 U.S. 415, 428 (1963) ("Precision of regulation must be the touchstone."). The test to determine if regulation of noncommercial speech is constitutional is whether it is reasonable as to time, place and manner. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 515-16 (1981) (holding billboard restriction unreasonable as to time, place and manner). Given a substantial governmental interest, noncommercial speech may even be barred. See Gitlow v. New York, 268 U.S. 652, 667 (1925) ("That a state in the exercise of its police power may punish those who abuse this freedom by utterances mimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."); see also Schaeffer v. United States, 251 U.S. 466, 474 (1920) (upholding conviction of publisher who had published article disparaging U.S. forces and commitment to World War I in German language newspaper). The test to determine if regulation can bar noncommercial speech is "whether the words 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." Schenk v. United States, 249 U.S. 47, 52 (1919). Other speech may be entirely outside First Amendment Protection and not require such a test. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (stating "no constitutional value in false statements of fact"); Roth, 354 U.S. 476 (holding obscenity not protected); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (barring "fighting words" from First Amendment protection); Schenk, 249 U.S. at 52 ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic."). For discussion of the law on First Amendment protection of commercial speech, see infra notes 26-56 and accompanying text.

Courts have also sought to protect the individual from harm caused by others. For example, courts have upheld the common law tort of nuisance: "A man's right to erect what he pleases on his own land will not justify him in maintaining a nuisance or in carrying on a business or trade that is offensive to his neighbors." Camfield v. United States, 167 U.S. 518, 522 (1897) (affirming conviction of persons who enclosed public lands with their own); see also Baltimore & Potomac R.R. v. Fifth Baptist Church, 108 U.S. 317, 330 (1883) (allowing action for nuisance where smoke from chimney enters neighbor's church, even though height of chimney satisfied city regulations); Rideout v. Knox, 19 N.E. 390, 391-92 (1889) (upholding constitutionality of statute limiting height of fences).
speech involved in *Braun* was commercial speech, this Section focuses on the limitations on imposing liability in that context.  

25. *Braun*, 968 F.2d at 1117. A second area in which the Court has limited First Amendment protection is where speech relates to illegal activity. The Court has consistently stated that illegal activity is not protected by the First Amendment. For example, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court’s first step in determining whether the First Amendment protected commercial speech was determining whether the speech concerned lawful activity. 447 U.S. 557, 566 (1980). All parties agreed that the advertisement related to lawful activity—using electricity. Id. Justice Blackmun, concurring, emphasized that a state should not be able to suppress information regarding the availability of a product if it is legal. Id. at 574 (Blackmun, J., concurring). Note, however, that merely advocating illegal activity is not sufficient to remove First Amendment protection. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (overturning prosecution of Ku Klux Klan leader who urged law breaking on grounds that states cannot proscribe mere general advocacy when such advocacy is not directed at inciting “imminent lawless activity”).

In *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, the Court upheld the constitutionality of a commission’s order that a newspaper could not publish employment advertisements under the headings of “Male Interest” and “Female Interest.” *Pittsburgh Press v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973). The commission, pursuant to an ordinance, prohibited sex discrimination in employment. Id. at 378. The Court found that sex-designated columns in advertising implied a willingness to discriminate in hiring, an activity made illegal under the ordinance. Id. at 388-89. In dicta, the Court declared, “[w]e have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.” Id. at 388. The Court further noted that a state could also constitutionally prohibit placing advertisements under the headings “Narcotics for Sale” or “Prostitutes Wanted.” Id. The Court conceded that the sex discrimination was not overt, and the result of the advertisement was to demonstrate that the advertiser was willing to illegally discriminate in employment. Id. at 388. Commentators have noted that “[t]he Court’s opinion in *Pittsburgh Press* leaves open the many difficult questions concerning the manner in which advertising may be ‘related to’ unlawful conduct.” See EDWIN P. ROME AND WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 43 (1985).

In a case similar to *Pittsburgh Press*, the court concluded that an advertisement which offered a furnished apartment in a “white home” was violative of § 3604(c) of the Fair Housing Act. See *Hunter v. United States*, 459 F.2d 205, (4th Cir.), cert. denied, 409 U.S. 934 (1972). The court refused, however, to grant injunctive relief because other papers carrying similar advertisements were not sued. *Hunter*, 324 F.Supp. 529, 555 (D. Md. 1971). On appeal, the *Hunter* court did not disturb this ruling. 459 F.2d at 221.

In *Bigelow v. Virginia*, the Court emphasized that the activity advertised—abortion services—was legal in the state in which performed (New York). *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). At the time of advertising, however, abortion was not legal in Virginia. Id. The Court held that the Virginia court could not prevent the advertisements then because they were informational and concerned activities that were legal in New York. Id. at 824. The Court noted that the state of Virginia “could not have regulated the advertiser’s activity in [another state], and obviously could not have proscribed the activity in that [s]tate.” Id. at 822-23. The Court explained, however, that the issue of whether the First Amendment protected an ad proposing an illegal activity in another state was not before the Court. Id. at 828 n.14. In his dissent, Justice Rhenquist suggested that the Court entertained the idea that such speech may be protected. Id. at 834 (Rhenquist, J. dissenting).
The Supreme Court defined commercial speech as that which merely "propose[s] a commercial transaction."26 The commercial speech doctrine began in Valentine v. Chrestensen,27 in a manner later described by Justice Douglas as "almost offhand."28 In Chrestensen, a publisher had produced a handbill that contained an advertisement on one side and a political message on the other.29 The publisher sought to enjoin the police from enforcing a city prohibition on distributing commercial handbills.30 In ruling that the city's regulation was constitutional, and thus enforceable, the Supreme Court stated:

This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that . . . [the states] may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.31

Similarly, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court stated that "there [was] no claim that the transactions proposed in the forbidden advertisements [were] themselves illegal in any way." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 (1976). The Court explained, therefore, that any issues concerning this category of unprotected commercial speech—relating to illegal activities—was not before the Court or foreclosed by the case at bar. Id. at 770. The Court noted that if any commercial speech lacked protection "it must be distinguished by its content." Id. at 761. The Court has subsequently interpreted this statement to mean that if the content concerns illegal activity, the First Amendment does not protect the speech. See, e.g., Central Hudson Gas, 447 U.S. at 566 n.9 ("Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, [including] because it was . . . related to unlawful activity.").

Finally, in Board of Trustees v. Fox, the Court noted that the parties had agreed that the speech in question "propose[d] a lawful transaction, [was] not misleading and [was] therefore entitled to First Amendment protection." Board of Trustees v. Fox, 492 U.S. 469, 475 (1989) (emphasis added). Thus, it is clear that the First Amendment does not protect speech related to illegal activity.

26. Fox, 492 U.S. at 473 (quoting Virginia Pharmacy, 425 U.S. at 762). The Court noted that commercial speech remains so even if it discusses important issues as well. Id. at 469.
27. 316 U.S. 52 (1942).
28. Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (discussing commercial speech in context of whether taxpayer could claim deduction for costs associated with publicity to encourage voters to cast ballots a certain way); see also Pittsburgh Press, 413 U.S. at 384 (tracing commercial speech doctrine to "the brief opinion in Valentine v. Chrestensen").
29. Chrestensen, 316 U.S. at 53.
30. Id. at 54.
31. Id. Chrestensen involved a flyer advertising tours through a submarine. Id. at 53. The flyer was pasted back to back with a protest notice. Id. The court determined that the respondent affixed the advertisement to the protest notice simply to evade the statute prohibiting commercial flyers. Id. at 55. The flyer remained commercial speech. Id.
Because Chrestensen, the Court has retreated from such absolutism. In Bigelow v. Virginia, a Virginia newspaper published an advertisement offering placement services for abortions to be performed in New York. Although abortion was legal in New York at the time, the publisher was convicted under a Virginia statute prohibiting the encouragement of procurement of an abortion. The Supreme Court declared the statute unconstitutional, stating that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection." Rather, the Court held that a regulation that restricts commercial speech must be assessed by "weighing it against the public interest allegedly served by the regulation." Subsequently, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Supreme Court conceded that Bigelow may not have fully resolved the question of commercial speech's First Amendment protection. In Virginia Pharmacy the issue was whether a state could prevent a pharmacist from advertising prescription drug prices. The Court stated that "speech does not lose its First Amendment protection because money is spent to project it." The Court concluded, "[i]f there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content." The Court concluded that commercial speech is not so removed from the "exposition of ideas" and "truth" that the First Amendment does not protect it.

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32. In Pittsburgh Press the Court specifically refused to accept plaintiff's argument that "commercial speech should be accorded a higher level of protection than [suggested in Chrestensen]." Pittsburgh Press, 413 U.S. at 388. In Virginia Pharmacy, however, the Court acknowledged that the First Amendment protected the right to receive information. Virginia Pharmacy, 425 U.S. at 757 (citing Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972)).

34. Id. at 811-12.
35. Id. at 811, 822.
36. Id. at 825. In Virginia Pharmacy, the Court reflected that in Bigelow "the notion of unprotected 'commercial speech' all but passed from the scene." Id. at 759.
37. Bigelow, 421 U.S. at 826. The Court stated that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." Id. The Court distinguished Chrestensen. Id. at 822. The advertisement in Bigelow did more than "simply propose a commercial transaction"—it disseminated material "of clear public interest." Id.
39. Id. at 760 (noting that Bigelow left "[s]ome fragment of hope for the continuing validity of a 'commercial speech' exception").
40. Id. at 749-50.
41. Id. at 761 (citing Buckley v. Valeo, 424 U.S. 1, 35-59 (1976) (discussing constitutionality of Act limiting political contributions and expenditures)).
42. Virginia Pharmacy, 425 U.S. at 761. The Court noted that merely because speech pertains to a "commercial subject" does not bar First Amendment protection. Id.
43. Id. at 762 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572
The Court relied on *Virginia Pharmacy* when deciding *Central Hudson Gas v. Public Service Commission*. The Court interpreted *Virginia Pharmacy* as protecting commercial speech from "unwarranted governmental regulation." *Central Hudson Gas* concerned a regulation prohibiting advertising by electric companies which "promote[d] the use of electricity." The purpose of the regulation was to conserve energy. The Court held that the regulation was unconstitutional because it was an unnecessarily broad restriction on speech. The Court emphasized the societal importance of advertising, noting that "some accurate information is better than no information at all." While recognizing the need for some First Amendment protection, however, the Court stated that "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expressions." In determining whether regulation of the commercial speech in *Central Hudson Gas* was constitutional the Court established a four part test: (1) the regulations must concern lawful activity and not be misleading; (2) there must be a substantial government interest; (3) the regulation must advance that interest directly; and (4) the regulation must be no more expansive than necessary.

The Court re-examined this test in *Board of Trustees v. Fox*. University officials refused to allow a company to demonstrate its products in university dormitories. Several students brought suit claiming that the

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(1942) (deciding that "fighting words are not protected by First Amendment); Roth v. United States, 354 U.S. 476, 484 (1957) (declaring that obscene material not protected by First Amendment). The Court determined that the consumer and society have an interest in the free flow of information. *Virginia Pharmacy*, 425 U.S. at 764.

44. 447 U.S. 557 (1980).
45. Id. at 561 (citing *Virginia Pharmacy*, 425 U.S. at 761-62).
46. *Central Hudson Gas*, 447 U.S. at 559 (quoting New York Public Service Commission regulation (not provided)).
47. Id.
48. Id. at 570.
51. *Central Hudson Gas*, 447 U.S. at 566.
53. Id. at 472.
university violated their First Amendment rights by preventing them from meeting with their "commercial invitees." The Court, however, interpreted Central Hudson Gas as not requiring courts to apply a "least-restrictive-means" test to determine if regulation of commercial speech was valid; rather, there need only be a "fit" between the regulation and the interest sought to be protected. The Court noted that to hold the state to the heavier burden of proving they used the "least-restrictive-means" of regulating commercial speech would dilute the distinction between commercial and noncommercial speech.

Thus, the Supreme Court has confirmed the distinction between commercial and noncommercial speech, and has held that commercial speech may be subjected to greater regulation by the courts. Indeed, the Court will uphold any restrictions on commercial speech as long as there is a "fit" between the government's legitimate interest and the means used to restrict such speech.

C. Negligent Publishing

The varying protection given to different types of speech affects the standard of care to which a state can hold a publisher in a negligent publishing case.

Early attempts to hold publishers liable for negligent publishing arose where advertised products subsequently caused injuries. For example, Yuhas v. Mudge concerned a suit brought by persons injured by firecrackers. The plaintiffs asserted that the magazine that advertised the firecrackers had a duty to investigate the product for safety. The New Jersey Court of Appeals rejected this claim, holding that "no such legal duty rests upon respondents unless it [sic] undertakes to guarantee, warrant or endorse the product."

A California court rejected a similar argument in Walters v. Seventeen Magazine. The Walters plaintiff was a minor who suffered toxic shock after using tampons advertised in the defendant magazine. The plaintiff claimed that by placing the advertisement among articles on women's health issues, the magazine lead young readers to believe the magazine endorsed the product. The court rejected the claim, asserting:

[W]e are loathe to create a new tort of negligently failing to

54. Id.
55. Id. at 477-80.
56. Id. at 481 (citing Ohralik v. Ohio, 436 U.S. 447, 455-56 (1978)).
58. Id. at 825.
59. Id.
61. Id. at 101.
62. Id.
investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous costs . . . would deter many magazines from accepting advertising, hastening their demise from lack of revenue.63

The court noted that those who accepted advertising and complied with the investigation requirements would increase the cost of the magazine beyond the reach of buyers, while those who did not comply could be bankrupted by tort liability.64

In Blinch v. Long Island Daily Press Publishing Co.,65 however, a New York court imposed liability on a publisher who failed to verify a telephone number in an adult advertisement.66 The advertisement incorrectly listed the plaintiffs’ number, resulting in a deluge of obscene calls.67 The court rejected the defendant’s claim that a publisher should be able to rely on the text submitted by the advertiser.68 Instead, the court applied a risk-utility analysis, weighing the risk of harm against the burden of preventing this harm by verifying the numbers.69 Applying this test, the court imposed liability, noting that “[t]he suggestive nature of the text of these advertisements . . . renders it highly foreseeable that what happened would happen if the telephone number was wrong.”70 However, the Blinch court, like the courts in Yuhus and Walters, never considered the constitutionality of imposing liability.

More recently, two federal courts squarely faced the issue of imposing liability on a publisher for harm allegedly arising from a personal service advertisement. In Norwood v. Soldier of Fortune Magazine,71 the defendant sought dismissal of plaintiff’s claim for injuries received during alleged attempts on his life.72 Norwood claimed that his attackers were

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63. Id. at 854.
64. Walters, 241 Cal. Rptr. at 102-03. The court noted that “[p]erhaps this dire possibility is one reason the United States Supreme Court has been so vigilant about linking commercial speech to the First Amendment.” Id. (citations omitted). One California case did hold that a publisher who endorsed a product could be liable under the theory of negligent misrepresentation. See Hanberry v. Hearst Corp., 81 Cal. Rptr. 519 (Cal. App. Ct. 1969). The court in Walters found that case “inapposite.” Walters, 241 Cal. Rptr. at 102.
66. Id. at 855.
67. Id. at 854.
68. Id.
69. Id. at 855.
70. Id. The court also noted that the burden on the publisher was slight, as it would take “only a minute or so” to verify the number. Id. Another line of cases has emerged in text books and “how to” books. See generally Hoffman, supra note 11.
72. Id. at 1402. The defendant in both Norwood and Eimann v. Soldier of Fortune Magazine, Inc. is the same defendant as in Braun. See Eimann v. Soldier of
hired through two advertisements placed in the defendant magazine. The one of these advertisements was the same as that in *Braun*; the other read:

**GUN FOR HIRE.** Nam sniper instructor. SWAT. Pistol, rifle, security specialist, body guard, courier plus. All jobs considered. Privacy guaranteed.

The court denied defendant’s motion for summary judgment, stating that the court could constitutionally impose liability on the magazine. The court noted that if a publisher infringed on the rights of others, it would have to “take the consequences of [its] own temerity.” The court rejected the defendant’s argument that no reasonable jury could conclude that the advertisements in question gave rise to a foreseeable risk of harm. Further, the court refused to find that the actions of third party lawbreakers broke the chain of causation.

The Fifth Circuit considered a similar scenario in *Eimann v. Soldier of Fortune Magazine*. There, the plaintiff’s daughter had been killed in a contract murder set up by the victim’s husband. The killer had been contacted through an ad in the defendant’s magazine, which read:

**EX-MARINES—67-69 'Nam Vets, Ex-DI, weapons specialist— jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas.**

The Fifth Circuit reversed the jury verdict, refusing to hold the magazine liable. The court reasoned that the publisher had no duty to refrain from publishing what it termed “a facially innocuous advertise-

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Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989), cert. denied, 493 U.S. 1024 (1990). Both Savage and Doutre were defendants in *Norwood*.


74. *Id.* at 1398. The ad also supplied a name and telephone number. *Id.* For the text of the advertisement in *Braun*, see infra note 89 and accompanying text.

75. *Id.* at 1402.

76. *Id.* (citing 34 WILLIAM BLACKSTONE, COMMENTARIES at 1326). The court considered “inappropriate, to say the least,” defendants’ attempt to analogize to *Sullivan*. *Id.* at 1399.

77. *Id.* at 1402. The court singled out the phrases “gun for hire,” “professional mercenary,” “all jobs” and “discreet and very private” as indicative of the risk. *Id.*

78. *Id.* at 1402-03. The court relied on *Franco v. Bunyard*, which held a gun seller liable where he negligently sold a gun that was subsequently used in a robbery and shooting. See *Franco v. Bunyard*, 547 S.W.2d 91 (Ark.), cert. denied, 434 U.S. 835 (1977). The *Norwood* court found the alleged consequences in *Norwood* to be “at least as foreseeable as [in *Franco*].” *Norwood*, 651 F. Supp. at 1403.


80. *Id.* at 831.

81. *Id.* The ad contained a contact telephone number. *Id.* “DI” was short for “drill instructor” and “M.E.” referred to multi-engine planes. *Id.*
ment.” Assuming a duty of care to the public, the court applied a risk-utility analysis and concluded that the defendant had not breached its duty of care. The court acknowledged that “[t]he prospect of ad-inspired crime represents a threat of serious harm.” However, the court found the burden of preventing this harm was too great to impose on the publisher, describing the standard of conduct used as “more exacting than a duty to investigate.”

Although the court never expressly reached the First Amendment considerations, it appears to have acted with them in mind. The court noted that an expert witness testified that an advertiser’s willingness to undertake illegal activities could not be determined from the content of an advertisement. Were publishers to reject all ambiguous advertisements, the court continued, they could potentially lose enough revenue to prevent them from publishing altogether.

Thus, prior to Braun, the law of negligent publishing was not set-

82. Id. at 834, 838.
83. Id. at 835-36. The court cited to Judge Learned Hand’s formula in Carroll Towing Co. v. United States. Id. at 835 (citing Carroll Towing Co. v. United States, 159 F.2d 169, 173 (2d Cir. 1947)).
84. Id. Evidence in the case showed that in 10 years the magazine had published 2000 advertisements, nine of which could be linked to criminal activity. Id. As evidenced by Savage’s ad being at issue in both Norwood and Braun, at least one was used multiple times. The court noted in Eimann that Hearn, the advertiser, had met his girlfriend, Debbie Bannister, through the ad: Hearn killed Bannister’s husband and her sister’s ex-husband a month before the Eimann killing. Eimann, 880 F.2d at 832.
85. Id. at 835. The jury was charged to find knowledge of the ad’s offer to commit illegal activity even if it were only apparent from the advertisement’s context, which included the nature of the magazine, its articles, advertisements, and readership. The magazine would be held liable if it should have known that the advertisement “reasonably could be interpreted as an offer to engage in illegal activity.” Id.
86. Eimann, 880 F.2d at 836 (citing Virginia Pharmacy, 425 U.S. at 763).
87. Id. at 836. For a summary of the expert’s findings, see infra note 139-41.
tled. Absent a duty as an endorser, publishers were not liable for defects in products they advertised. However, in Blönick, the court held that liability could be imposed where the advertisement contained a mistake that led to foreseeable harm, even where the publisher did not cause the mistake. In Norwood, the district court held that liability could constitutionally be imposed on a publisher of a personal service advertisement. Eimann, however, limited this liability, saying that there was no duty to reject or investigate ambiguous advertisements. Thus, the precise standard to which a state could hold a publisher without violating the First Amendment remained unsettled.

III. **BRAUN v. SOLDIER OF FORTUNE**

A. **Facts**

From June, 1985 through March, 1986, Soldier of Fortune Magazine (SOF) carried an advertisement reading in part:

GUN FOR HIRE: 37-year-old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Body guard, courier, and other special skills. All jobs considered.89

The advertisement further provided contact telephone numbers and an address.90 Bruce Gastwirth responded to the advertisement through an intermediary, who hired the advertiser, Michael Savage, to kill Richard Braun.91 Savage then hired Sean Trevor Doutre to carry out the killing.92 Doutre shot Braun and his son, Michael, as they were leaving Braun's home, killing Braun and wounding Michael.93

Michael and his brother, Ian, brought an action against Soldier of Fortune Magazine and its parent company, Omega Group, Ltd. (hereafter collectively SOF), for the wrongful death of their father; Michael brought a separate action for personal injury.94 They sought to hold

89. Braun v. Soldier of Fortune Magazine, 757 F. Supp. 1325, 1327 (M.D. Ala. 1991), aff’d, 968 F.2d 1110 (1992), cert. denied, 113 S. Ct. 1028 (1993). Joan Steele, the advertising manager of SOF, had edited the advertisement, changing “[a]ny and all jobs considered” to the published “[a]ll jobs considered.” Id. Her explanation was that the former was too vague. Id. The advertiser had given her permission to make any necessary edits. Id.

90. Id.

91. Id. Braun was a business associate of Gastwirth, who had previously arranged at least three attempts on Braun’s life. Braun v. Soldier of Fortune Magazine, 968 F.2d 1110, 1112 (11th Cir. 1992), cert. denied, 113 S. Ct. 1028 (1993).

92. Braun, 757 F. Supp. at 1326-27. Doutre had initially contacted Savage after seeing the advertisement himself, and offered to work for him. Id. at 1327.

93. Id. at 1326-27. Braun managed to roll out of the car, but Doutre then shot him in the back of the head. Id. Doutre then took aim at Michael, but left without firing again. Id. at 1327.

94. Id. at 1326. The two actions were brought separately, and consolidated by the court. Braun, 968 F.2d at 1112.
SOF liable on the ground that the magazine “negligently published a personal service advertisement . . . which created an unreasonable risk . . . .”\textsuperscript{95} The jury awarded the plaintiffs compensatory damages on the wrongful death claim and also awarded Michael Braun compensatory and punitive damages on his personal injury claim.\textsuperscript{96}

B. Discussion

The United States Court of Appeals for the Eleventh Circuit affirmed the jury verdict, holding that the First Amendment did not prohibit imposing liability on a publisher that negligently publishes an ad that, on its face, conveys a substantial danger of harm to the public.\textsuperscript{97} In reaching this conclusion, the court divided the analysis into two issues: duty and causation.\textsuperscript{98} Because causation is an issue of fact for the jury, and therefore subject to deferential review, the discussion here focuses only on the issue of duty of care.\textsuperscript{99}

On the issue of duty, the court examined whether SOF owed any

\begin{itemize}
\item \textsuperscript{95} \textit{Braun}, 757 F. Supp. at 1326.
\item \textsuperscript{96} \textit{Id.} The jury awarded Michael \$375,000 for his personal injuries and \$10 million in punitive damages. \textit{Id.} The brothers were awarded \$2 million on the wrongful death claim. \textit{Id.} Michael Braun accepted a remittitur reducing his punitive damages to \$2 million. \textit{Id.} at 1330-31.
\item \textsuperscript{97} \textit{Braun}, 968 F.2d at 1119.
\item \textsuperscript{98} \textit{Id.} at 1114-21.
\item \textsuperscript{99} \textit{Id.} at 1121. SOF contended that the actions of Gastwirth and Doutre were unforeseeable, and thus an intervening cause of the injuries. \textit{Id.} Applying deferential review, the court refused to overturn the jury determination. \textit{Id.} at 1122. This conclusion is supported by the testimony at the trial that SOF had been contacted by investigators on two occasions involving crimes linked to advertisements in its magazine. \textit{Id.} at 1112-13. Further, the plaintiffs showed that SOF subscribed to a clipping service which sent the magazine any articles in which it was mentioned; several newspapers and some national magazines had carried articles concerning the links between crime and the advertisements. \textit{Id.} at 1113 nn.1-2. Despite this service, the former managing editor and the current advertising editor claimed to be unaware that other crimes had been linked to their advertisements. \textit{Id.} at 1113. This conclusion is permissible under the tests of foreseeability set forth in \textit{Standard Oil Co. v. Harris}. See \textit{Standard Oil Co. v. Harris}, 172 S.E.2d 344, 349 (Ga. Ct. App. 1969). \textit{Standard Oil} sets forth that “foreseeability requires only that one having a responsible relationship to the situation anticipate that which is likely to happen.” \textit{Id.}
\item The \textit{Eimann} court posed an interesting foreseeability question under its examination of proximate causation: Whether one who advertised high speed cars would be liable when a driver exceeds the speed limit. \textit{Eimann}, 880 F.2d at 836. The court questioned whether there would only be liability by such reasoning if the magazine especially appealed to drivers, or carried advertisements for radar detectors. \textit{Id.} Significantly, in \textit{Braun} the court did not depend on the context of the advertisement, but only “on its face.” \textit{Braun}, 968 F.2d at 1116. The plaintiff apparently tried to show foreseeability based on historical links between advertising in the magazine and violent attacks, introducing evidence that the defendant subscribed to a clipping service which would have delivered articles raising this possibility. \textit{Id.} at 1112-13 & 1113 n.2.
\end{itemize}
duty to the plaintiffs. The court then applied a risk-utility analysis to
determine whether the standard of care set forth by the district court
was appropriate. After determining that it was a proper standard
under common law, the court looked at whether it was constitutional
under the First Amendment. Finally, the court scrutinized the jury
verdict to ascertain whether the application of this standard was consti-
tutional on the facts before it.

The court first determined that the publisher did owe the plaintiffs a
duty of care. Appellants contended that they owed no duty to the
public in publishing personal service advertisements. The court re-
jected this contention, concluding that “[SOF's] position is clearly in-
consistent with Georgia law.”

Having established that a duty existed, the court examined the risk-
utility analysis undertaken by the lower court to determine whether the
risk posed by the advertisement was an unreasonable one. The argu-
ment before the court centered on the instructions to the jury, which
read, in part:

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. Now,
while Defendants owe a duty of reasonable care to the public,
the magazine publisher does not have a duty to investigate
every ad it publishes.

The magazine asserted that the lower court erred in applying the
risk-utility analysis, analogizing to Eimann v. Soldier of Fortune, where the
jury had been instructed to find liability where the advertisement “could
reasonably be interpreted as an offer to engage in illegal activity.” The Braun
court, however, distinguished Eimann concluding that the in-
structions below had “properly conveyed to the jury that it could not
impose liability on SOF if Savage's ad posed only an unclear or insub-
stantial risk of harm to the public and if SOF would bear a dispropor-

100. Braun, 968 F.2d at 1114-15.
101. Id. at 1115-16.
102. Id. at 1116-20.
103. Id. at 1120-21.
104. Id. at 1114.
105. Id.
106. Id. Because the issue of duty is a question of law, the Circuit Court
subjected the lower court's determination of the standard of care to de novo re-
view. Id. (citing Newell v. Prudential Insurance Co. of America, 904 F.2d 644,
649 (11th Cir. 1990))
107. Id. at 1115-16.
108. Id. at 1113.
109. Id. at 1115 (citing Eimann, 880 F.2d at 837). An alternative ground for
finding liability was if “the relation to illegal activity appears on the ad's face.”
Id.
tionately heavy burden in avoiding this risk."\textsuperscript{110} Notably, the court agreed with the Fifth Circuit that the instruction in \textit{Eimann} imposed too great a burden on a publisher, because it would force publishers to reject even ambiguous advertisements.\textsuperscript{111} The narrow instructions in \textit{Braun} placed a lesser burden on SOF than the instructions in \textit{Eimann}, the court stated.\textsuperscript{112}

After reaching this conclusion, the court considered SOF's contention that the First Amendment forbade a negligence standard from being imposed.\textsuperscript{113} The court assumed the speech in question was commercial speech, and recognized that, as such, it was protected by the First Amendment.\textsuperscript{114} The court conceded that "[t]his cases poses a greater risk" of chilling commercial speech than do most commercial speech cases, because the advertisement was published not by the speaker, but by a third party who has a lesser financial interest in promoting the message.\textsuperscript{115} The court concluded, however, that the narrow instructions and "'modified' negligence standard" used by the lower court were within the constitutional bounds of the First Amendment.\textsuperscript{116} The court relied on \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{117} in asserting that the Supreme Court has not rejected a negligence standard for publishing.\textsuperscript{118}

SOF further argued that, because of the economic burden of liability, the decision endangered noncommercial speech and thus violated the First Amendment.\textsuperscript{119} The magazine's argument had two compo-

\textsuperscript{110} \textit{Id.} at 1116. This conclusion was based on "the district court's use of phrases like 'clear and present danger' and 'clearly identifiable unreasonable risk.'" \textit{Id.}

\textsuperscript{111} \textit{Id.} "The Fifth Circuit correctly observed that virtually anything might involve illegal activity." \textit{Id.} (citing \textit{Eimann}, 880 F.2d at 837). For a discussion of one interpretation of the burden in \textit{Eimann}, see \textit{supra} note 85 and accompanying text.

\textsuperscript{112} \textit{Braun}, 968 F.2d at 1116.

\textsuperscript{113} \textit{Id.} at 1116-20. However, SOF conceded that a negligence standard is proper if the advertisement openly solicits illegal activity. \textit{Id.} at 1116.

\textsuperscript{114} \textit{Id.} (noting that Supreme Court recognized that speech which, "like Savage's ad, does 'no more than propose a commercial transaction,'" is protected by First Amendment) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

\textsuperscript{115} \textit{Id.} at 1117-18 (citing Lisa F. Firenze, Note, Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment, 23 \textit{COLUM. J.L. & SOC. PROBS.} 137, 149 (1980)).

\textsuperscript{116} \textit{Id.} at 1119. The court noted approvingly the emphasis the lower court had placed on construing this narrowly; only if it presented a "clearly identifiable unreasonable risk" could liability be imposed. \textit{Id.}

\textsuperscript{117} 418 U.S. 325 (1974).

\textsuperscript{118} \textit{Braun}, 968 F.2d at 1118-19. The court noted that because some cases allow for liability based on negligence in speech otherwise protected by the First Amendment, Georgia tort law should similarly be able to constitutionally impose liability. \textit{Id.}

\textsuperscript{119} \textit{Id.} at 1118.
nents: first, that the liability in general would threaten the viability of publishing; and second, that the judgment of the lower court, in particular, would put them out of business, "depriv[ing] public debate of SOF's protected, non-commercial speech."120

The court rejected these arguments, concluding "the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public."121 The fact that the standard did not impose a duty to investigate, and that the advertisement itself must warn the publisher of a substantial danger of harm to the public, reduced the burden on publishers and thus prevented a chill on the press.122

The court then subjected the jury finding on negligence to independent review to determine whether it contravened the protection of the First Amendment.123 The court concluded that the "combination of sinister terms makes it apparent that there was a substantial danger of harm to the public."124 The court specifically noted the elements of the advertisement which brought them to that conclusion: the terms "Gun for Hire" and "professional mercenary"; the references to confidentiality; and the fact that the advertisement listed legitimate jobs involving use of a gun, followed by "all jobs" considered.125 The court stated that these terms implied that illegal jobs would be considered.126

In a brief dissent, Senior Circuit Judge Eschbach agreed with the majority's interpretation of the law.127 However, he differed on the ap-

120. Id.
121. Id. at 1119 (footnote omitted). The court noted that "a different rule would apply to presumed damages or punitive damages." Id. at n.7 (citing Gertz, 418 U.S. at 348-50).
122. Id. at 1119.
123. Id. at 1120. The Supreme Court has held that where there are First Amendment claims, the appellate court must review the record independently. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984).
124. Braun, 968 F.2d at 1121.
125. Id.
126. Id. The court could have held that the advertisement itself contained a solicitation to commit a crime. Were this the holding, the speech would not be protected by the First Amendment, and therefore could be regulated or even barred without reaching the issue of whether such regulation was reasonable. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973). Thus, the issue would be resolved without risking a subsequent court's reliance on this opinion to expand the standard of care owed by publishers.

The court may have considered this idea. Braun, 968 F.2d at 1117. They specifically note that commercial speech "related to illegal activity" is not protected by the First Amendment. Id. (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S 557, 564 (1980)).
127. Id. at 1122 (Eschbach, J., dissenting). Judge Eschbach was in full
Application of this law to the facts before the court.\textsuperscript{128} He first argued that the language of the advertisement was ambiguous and not patently criminal as had been suggested by the majority.\textsuperscript{129} Further, he doubted the ability of the jury to properly apply the instructions as they, too, were ambiguous about what constituted a clear solicitation for criminal activity.\textsuperscript{130} Because of these ambiguities, the Senior Circuit Judge dissented from imposing "crushing third-party liability" on the defendant magazine.\textsuperscript{131}

IV. Analysis

The Fifth Circuit made two holdings in \textit{Braun}. First, the court established the constitutionality of a new standard of care for publishers: A publisher is liable when it publishes an advertisement which, on its face, poses an unreasonable risk of serious harm. Second, the court held that liability could be imposed under this standard where a publisher printed an advertisement containing several specific phrases, including "This Gun For Hire." However, the court's analysis in reaching these conclusions will negatively influence the precedential value of this case. Although the court dealt correctly with the law before it, its approach is somewhat confusing and leaves the decision open to varying interpretations. Further, the court left no effective standards by which to determine whether the newly approved standard of care had been breached.

A. Standard of Care

The standard of care the court approved is beneficial to the public. It imposes a reasonable duty of care on publishers of commercial speech without unduly burdening them or chilling the press. Further, it is consistent with prior case law. However, the approach the court took in reaching this standard is confusing. Rather than dividing the analysis into a risk-utility determination and a subsequent First Amendment determination, the court should have incorporated the constitutional analysis as an element of the risk-utility analysis. The result would have been a clearer, and thus stronger, precedent for publishers to follow.

The court's conclusion on the constitutionality of the standard of care adopted by the lower court is consistent with \textit{Board of Trustees v. Fox}.\textsuperscript{132} There, the Supreme Court noted that where there was a substantial governmental interest at stake, commercial speech could be reg-

\begin{quote}
agreement "with \{the majority's\} imaginative interpretation of scant precedent."
\textit{Id}. (Eschbach, J., dissenting).
128. \textit{Id}. (Eschbach, J., dissenting).
129. \textit{Id}. (Eschbach, J., dissenting).
130. \textit{Id}. (Eschbach, J., dissenting).
131. \textit{Id}. (Eschbach, J., dissenting).
\end{quote}
ulated or even barred. The substantial governmental interest in that case was in "promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility." If such an interest is substantial enough to prohibit commercial speech in dormitories, surely one could argue that the governmental interest in preventing injury to the unsuspecting public resulting from contract crimes legitimizes banning advertisements that could be interpreted as soliciting such activity.

Furthermore, the standard fills a gap left by Norwood and Eimann. The former had held that liability could constitutionally be imposed in a situation similar to that in Braun, but had not defined any standard. Eimann established that whatever the constitutional boundary, publishers had no duty to reject or investigate ambiguous advertisements. Braun filled the gap between these cases by setting a standard that imposed liability on publishers, but with more restriction than the standard rejected in Eimann.

The method the court used to set this standard, however, is confusing. Rather than determining the standard, and then testing its constitutionality, the court should have considered the First Amendment protection as a component in the risk-utility analysis. Thus, the court could calculate the cost of editing or rejecting those advertisements clearly creating an unreasonable risk and the cost of the potential chill on legitimate speech and weigh the combined costs against the probability of an advertisement leading to harm multiplied by the gravity of the harm should it occur. A standard could then be reached at a point where the utility of free dissemination of information is balanced with the risk of death or severe bodily injury resulting from the publication of such advertisements.

The court, in a round-about fashion, did consider these factors, concluding that because the instructions ensured that liability could have been imposed only if the advertisement contained a "clearly identifiable unreasonable risk" on its face, the standard was correct. However, the divided route the court took to reach this conclusion may weaken its value.

B. Was There a Breach?

Having established the standard of care, the court then applied it to the facts before them, and found that that SOF had breached this standard of care. However, in doing so, the court declined to establish any constructive guidelines for subsequent courts to follow.

The jury had concluded that SOF breached the standard of care in

133. Id. at 476-78.
134. Id. at 475.
135. Braun, 968 F.2d at 1122.
publishing the "GUN FOR HIRE" advertisement.\textsuperscript{136} The Circuit Court properly concluded that, because of the First Amendment issue, it was required to review the record independently.\textsuperscript{137} The majority affirmed the jury's decision, concluding that the advertisement, on its face, contained a clearly identifiable unreasonable risk.\textsuperscript{138}

The validity of this conclusion is somewhat undermined by testimony presented in \textit{Eimann}.\textsuperscript{139} In that case, an expert testified that the wording of an advertisement did not reliably correlate to an advertiser's willingness to undertake criminal jobs.\textsuperscript{140} Further, he noted that it was the context of the advertisements placed in a magazine aimed at those considering themselves mercenaries that made these advertisements dangerous.\textsuperscript{141} This leaves the question of whether the same advertisement, placed in a different context (for example, the \textit{Wall Street Journal}) would be considered to clearly state an unreasonable risk.

However, it is not contradictory to hold that this particular advertisement does "clearly indicate an unreasonable risk," even though other advertisements may be more difficult to evaluate. Simply because the exact line between publishable and unpublishable advertisements is not known does not prevent the conclusion that this advertisement, with its terms "Gun for Hire" and "All Jobs Considered," poses an unreasonable risk.

Nevertheless, it seems that having established a new standard of care for publishers, the court might have set down some constructive guidelines for subsequent courts to follow. This might also provide some guidance for publishers who seek to avoid liability.

\textbf{V. IMPACT}

\textit{Braun} established the constitutionality of a new standard of care for publishers, requiring that they reject any advertisement that, on its face, poses an unreasonable risk of serious harm to a third party. The immediate impact of this decision, and of the prior lawsuits in \textit{Norwood} and \textit{Eimann}, can already be quantified: a recent issue of "Soldier of Fortune" did not contain any personal service advertisements, facially in-
necuous or otherwise.142 Given that the magazine carried over 2000 personal advertisements in the decade before these suits,143 advertisers appear to have already lost a forum to disseminate legitimate information.

The court’s decision in Braun ends the relative immunity publishers have enjoyed with respect to personal service advertisements. However, because the court declined to provide guidelines on the application of the standard of care, the potential future application by courts is unclear. As a result, this decision extends beyond merely imposing liability on one publisher, but could potentially chill a large body of publishers. While publishers need only edit advertisements to ensure that no possibility of criminal solicitation is conveyed, in doing so they are likely to err on the side of caution.144 Some magazines, like Soldier of Fortune, may decide not to take the risk of tort liability and may decline altogether to publish such advertisements.

Likewise, the implications this decision has for electronic publishers are uncertain. To the extent that such publishers seek to publish classified advertisements, issues will arise as to what standard they must follow.145 As these publishers currently may never see the advertisements they publish, one issue that must arise is whether they will have a duty to read each advertisement. Obviously, this would reduce some of the benefits of such advertising. The uncertainty over the applicability of Braun may inhibit would-be electronic publishers who are unsure of their potential liability. This itself is a chill on publishers.

The court was correct to impose liability on SOF in this case. It is imperative that people like Savage do not have access to a market to peddle murder. However, because of the difficulty in predicting how future courts will apply this new standard of care, the decision will lead to a more substantial chill of the press than was necessary.

Brian J. Cullen

143. Eimann, 880 F.2d at 835.
144. Savage testified that Steele had asked to edit his advertisement, and he had allowed this. The change was made from "[a]ny and all jobs considered" to the published "[a]ll jobs considered." Braun, 757 F. Supp. 1325, 1327 (M.D. Ala. 1991).
145. Richard Neustadt has forecasted: "Classified ads should do particularly well on electronic publishing, because the content can be updated quickly and because home users can easily call up the page with the desired category . . . ." RICHARD M. NEUSTADT, THE BIRTH OF ELECTRONIC PUBLISHING 8 (1982).