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Should Motion Picture Studios and Filmmakers Face Tort Liability for the Acts of Individuals Who Watch Their Films

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Should Motion Picture Studios and Filmmakers Face Tort Liability for the Acts of Individuals Who Watch Their Films?

by

S. Michael Kernan

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Introduction

Since the Littleton, Colorado massacre, there has been a great deal of finger pointing about who is responsible for the shootings. Partially because Hollywood does not have a unified lobby, such as gun manufacturers, a great deal of the blame has been placed on the entertainment industry. On June 1, 1999, President Clinton ordered a $1,000,000 federal inquiry into the entertainment industry’s marketing of violent films to children. Clinton recently called for the Surgeon General to prepare a report on youth violence, including the effects of the news media. Moreover, “[s]ome analysts say such a report [by the Surgeon General] could lay the foundation for litigation against the purveyors of violent films and games, much as the harmfulness of second-hand smoke proved a legal headache for the tobacco industry.” But those studies are not the only recent change that should concern motion picture studios and filmmakers. A recent opinion from Louisiana, which was denied review by the United States Supreme Court, may have a far greater impact on filmmaker liability.

That opinion, Byers v. Edmondson, held that Oliver Stone, Warner Bros., and other producers of the film Natural Born Killers could be sued by a shooting victim injured by a murdering couple allegedly on a crime spree similar to the film.

The problem with the Byers opinion is that it does not analyze the speech component of the film and it

3. Id.
6. NATURAL BORN KILLERS (Warner Bros 1994).
7. See Byers, 712 So. 2d at 681.
leaves no clear test for liability in its wake. Under that opinion, the producers of any film, from *Aladdin* to *Saving Private Ryan*, could be sued for inviting violent activity. At the time Mark David Chapman murdered John Lennon, he was holding a copy of *The Catcher In The Rye*, by J.D. Salinger. Under the Byers opinion, assuming John Lennon’s heirs followed the conclusory pleading format in that case, J.D. Salinger could be forced to face litigation for *The Catcher In The Rye*.

How did the Byers opinion diverge from previous rulings? Since 1988, when the California Court of Appeal decided the case in *McCollum v. CBS, Inc.* motion picture studios and producers have generally been shielded from lawsuits arising from tortious acts committed after a tortfeasor watched a particular film. That shield has been the First Amendment. The reasoning behind the shield has been that “rational people” do not take art seriously, and would not kill themselves or others based upon a message from a motion picture.

Contrary to the McCollum rule, the Louisiana Court of Appeal held in *Byers v. Edmondson* that Oliver Stone, Warner Brothers, and other producers of the film, *Natural Born Killers*, could be sued by a victim of a shooting who was injured by a couple allegedly on a crime spree similar to that in the film. The film’s producers appealed to the United States Supreme Court for certiorari, which was denied.

While the Byers opinion merely allowed the case to

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12. While the McCollum case has frequently been used to protect filmmakers, that case actually analyzed whether the singer Ozzy Osbourne could be held liable for a suicide which was committed by a listener while listening to an Ozborne song which allegedly promoted suicide. See id. at 189-92.
13. See id. at 194.
14. See *Byers*, 712 So. 2d at 681.
proceed into the discovery phase, it nonetheless could have a widespread implication for producers and studios, because they could face a flood of lawsuits. The problem with the Byers opinion is that it leaves no rule in place to determine which films could be held liable; there is no standard or guideline provided by the court. The Byers opinion can be interpreted to mean that as long as a plaintiff follows the pleading format set forth in that case, filmmakers will be forced to spend the money necessary to defend against potentially frivolous lawsuits all the way through the discovery phase, up to and until they prepare an expensive motion for summary judgment. If Byers becomes the rule, filmmakers will be forced to either settle cases at nuisance-value amounts, or pay for a costly defense.

Motion pictures are a type of speech, just like many other forms of expression. As such, the First Amendment protects filmmakers from both criminal liability and tort liability for the speech in their films. Given that First Amendment protection, filmmakers can only be held liable for the speech within their film if such speech falls within an exception to First Amendment protection. The First Amendment exception generally enlisted for tort liability suits against filmmakers is the intention to incite imminent lawless activity.

I

Analysis of the First Amendment Exception for the Incitement of Unlawful Activity and Decisions Under that Rule

A. The Brandenburg Test for the First Amendment Exception of Speech that Incites Imminent Lawless Activity

The United States Supreme Court opinion in Brandenburg v. Ohio is the seminal opinion setting forth the First Amendment exception for imminent lawless activity. In Brandenburg, the Court set forth a two-part

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17. See id.
test to determine whether speech falls within that exception. The speech must be (i) directed to incite or produce imminent lawless action; and (ii) "likely to incite or produce such action."20

Subsequently, in Hess v. Indiana,21 the Supreme Court found that speech does not fall within the exception merely because it advocates illegal action at some indefinite time in the future. Rather, the speech must advocate immediate lawless action.22 Since the Brandenburg and Hess opinions, many lower courts have analyzed the First Amendment exception for the incitement of imminent lawless activity. The leading opinion generally relied upon in suits relating to speech found within music or films is McCollum v. CBS, Inc.23

B. The McCollum Opinion

In McCollum v. CBS, Inc., the plaintiffs, parents of a teenager who committed suicide, sought to hold CBS Records and the singer Ozzy Osbourne liable for the suicide of their son.24 At the time their son shot and killed himself, he was allegedly listening to Osbourne's music.25 The suit sought damages for negligence and intentional tort. In order to avoid First Amendment concerns, the plaintiffs alleged the music was an attempt to incite imminent lawless action.26 Despite these arguments from the deceased listener's parents, the California Court of Appeal refused to apply the First Amendment exception. The court stated that "merely because art may invoke a mood of depression, as it figuratively depicts the darker side of human nature, does not mean that it constitutes a direct 'incitement to imminent violence.'"27 Relying on the U.S. Supreme

19. See id.
20. Id. at 447.
22. See id.
24. See id. at 189.
25. See id.
26. See id. at 193.
27. Id. at 194.
Court’s opinion in *Hess v. Indiana*, the court found Osbourne could not be held liable for the effects of his song. It stated:

Musical lyrics and poetry cannot be construed to contain the requisite ‘call to attention’ [to violence] for the elementary reason that they are simply not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. Reasonable persons understand musical lyrics and poetic conventions as the fugitive expressions which they are. No rational person would or could believe otherwise nor would they mistake musical lyrics for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit.

The plaintiffs argued that the court could not determine the question of whether the lyrics constituted an incitement but, rather, the issue should be left to a jury. However, the court found the plaintiffs had pled all the facts which could amount to incitement under the *Brandenburg* standard, and had failed to meet that standard. Consequently, Osbourne’s musical speech was protected by the First Amendment.

C. The *Rice v. Paladin Enterprises* Opinion

In recent opinion that defines the rule of what may constitute speech that is intended to incite imminent lawless action, the court in *Rice v. Paladin Enterprises, Inc.*, allowed tort liability to be established against the publisher of a book. The *Paladin* case demonstrates that there are instances where books, music and films can go so far as to constitute an intention to incite

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28. 414 U.S. 105 (1973). The U.S. Supreme Court in *Hess* found that the words "we'll take the fucking street again" shouted to a crowd at an anti-war demonstration amounted to nothing more than the advocacy of some illegal action "at some indefinite future time." *Id.* at 107-8 Thus, the words could not fall into the exception for the incitement of unlawful activity.


30. *Id.* at 194.

31. See *id*.

32. See *id.* at 195.

33. 128 F.3d 233 (4th Cir. 1997).

34. See *id.*
imminent lawless activity. However, the facts which gave rise to liability in *Paladin* are unique, and that opinion should be limited to egregious speech, such as that found in the case.

The facts of the murder in *Paladin*—and the speech which gave rise to that murder—are chilling. On the night of March 3, 1993, James Perry entered the residence of Lawrence Horn and brutally murdered Lawrence Horn's wife, Mildred, and the Horns' eight-year-old quadriplegic son, Trevor. Perry also brutally murdered Trevor's nurse, Janice Saunders. The execution of each of the victims occurred in textbook fashion, following the instructions found in the book *Hitman*, published by the defendant Paladin. The killer testified that he was inspired by the book's "seductive adjurations." Using the instructions received from *Hitman*, Perry shot Mildred Horn and nurse Saunders through the eyes, and brutally strangled the helpless Trevor Horn in accordance with the book. An investigation revealed that Perry had been hired by Mildred Horn's husband, Lawrence Horn, to murder Horn's family so that Horn would receive the $2 million settlement that his eight-year-old son received for the injuries which caused him to become a paraplegic. With those facts in mind, and with detailed factual evidence that Perry followed *Hitman* to the letter, the publisher of *Hitman* boldly admitted that they not only knew people like Perry would buy this book, they actually intended to have persons such as Perry use the book.

The Court of Appeals distinguished *Brandenburg v. Ohio* on two separate grounds. First, the court found the stipulations made by the publishers regarding their knowledge that persons would use the book to commit murder was "astonishing," and found such stipulations

35. See id. at 240.
36. See id.
37. See id. at 233.
38. Id. at 239.
39. See id. at 240.
40. See id.
41. See id. at 241.
were sufficient to avoid the application of Brandenburg.\footnote{See id. at 268.} After a detailed analysis of the book, the Paladin court denied the publisher's motion for summary judgment and found there was a triable issue of fact as to whether the publisher, in publishing the manual, had the reckless intent required to meet the Brandenburg exception.\footnote{See id. at 254.} As a second and distinct reason why Brandenburg should not apply, the court noted that Brandenburg does not apply where the speech is not artistic expression, but, rather, the careful instruction on how to commit a crime.\footnote{See id. at 244.}

**D. The Byers Opinion**

The Paladin opinion was recently extended and misapplied in a way that does not follow the Brandenburg and Hess opinions. In Byers v. Edmondson,\footnote{712 So. 2d 681 (La. Ct. App. 1998).} the court, without making any attempt to distinguish McCollum, simply refused to follow the McCollum opinion.\footnote{See id. at 244.} The Byers court drafted an ambiguous opinion—with no clear test—under which any author, composer or filmmaker can be held liable.

The plaintiff in Byers, Patsy Ann Byers, claimed the speech within a film contributed to her being shot by a deranged killer.\footnote{See id.} Byers was rendered a paraplegic after she was shot by a woman named Sarah Edmondson.\footnote{See id. at 683.} Prior to the shooting, Edmondson, along with her male accomplice, Benjamin Darrus, participated in a shooting spree which Byers claimed was similar to that of the film Natural Born Killers.\footnote{See id. at 683.} The Byers shooting took place during an armed robbery of the convenience store where Byers worked.\footnote{See id. at 683.} The complaint sought to hold Oliver Stone and the other producers of Natural Born Killers (collectively known as the “Hollywood Defendants”) liable

\footnote{See id. at 268.} \footnote{See id. at 254.} \footnote{See id. at 244.} \footnote{712 So. 2d 681 (La. Ct. App. 1998).} \footnote{See id.} \footnote{See id.} \footnote{See id. at 683.} \footnote{See id.} \footnote{See id. at 683.}
for contributing to the shooting. The complaint alleged in
conclusory terms that the film incited imminent lawless
activity.\textsuperscript{51}

The \textit{Byers} court did not even attempt to distinguish
the \textit{McCollum} opinion, and it relied heavily on the
\textit{Paladin} opinion to reach the conclusion that the First
Amendment exception for inciting unlawful activity
applied.\textsuperscript{52} Yet, unlike the \textit{McCollum} court, and unlike the
\textit{Paladin} court, the \textit{Byers} court did not in any way
analyze the speech within the film to determine if there
was a factual basis for applying the exception for
intention to incite imminent lawless activity.\textsuperscript{53}

\footnotesize
\begin{itemize}
\item \textbf{51.} The \textit{Byers} complaint, in relevant part, charged:
All of the Hollywood Defendants are liable, more particularly but not
exclusively:
A) For producing and distributing a film (and marketing same on video
tape) which they knew, intended, were substantially certain, or should
have known, would cause or incite persons such as defendants Sarah
Edmondson and Benjamin Darrus (via subliminal suggestion or
glorification of violent acts) to begin shortly after repeatedly viewing
same, a crime spree such that which lead to the shooting of Patsy Ann
Byers;
B) For negligently and/or recklessly failing to take steps to minimize
violent content of the video or minimize glorification of senselessly
violent acts and those who perpetrate such conduct;
C) By intentionally, recklessly, or negligently including in the video,
subliminal images which directly advocated violent activity or which
would cause viewers to repeatedly view the video and thereby become
more susceptible to its advocacy of violent activity; (footnote omitted.)
D) For negligently and/or recklessly failing to warn viewers of the
potential deleterious effects upon teenage viewers caused by repeated
viewing of the film/video and of the presence of subliminal messages
therein; and
E) As well as for other such intentional, reckless, or negligent acts will
\[sic\] be learned during discovery and shown at trial of this matter.
\textit{Id.} at 685.
\item \textbf{52.} \textit{See id.} at 690-691; part of the reason the court may have placed
so much reliance on that opinion is the fact that Stone and the other
defendants relied upon the District Court opinion in \textit{Rice v. Paladin}, 940
F. Supp. 836 (D. Md. 1996), to support their position that,
unquestionably, they could not be held liable for the speech within their
film. \textit{See Brief for the Appellees at 19, Byers v. Edmondson}, 712 So. 2d
unexpectedly reversed that opinion which may have had some impact on
the \textit{Byers} court. Here, it was the failure by the \textit{Byers} court to undertake
an analysis of the speech in the film which was the error.
\item \textbf{53.} \textit{See id.} at 691.
\end{itemize}
II

Comparative Analysis of the Byers Opinion

In *McCollum*, an original demurrer was filed, which was replaced by a First Amended complaint. A demurrer was sustained without leave to amend as to the first amended complaint. However, the court gave the plaintiffs permission to file, within 60 days, a motion for leave to file a second amended complaint. Such motion for leave to file a second amended complaint essentially required the plaintiff to state facts which could constitute a cause of action. As such, the court did not permit the type of conclusory allegations found in the *Byers* case.55

A. The *Byers* Court Erred Because It Did Not Analyze the Speech Prior to Allowing the Case to Proceed.

The first error by the *Byers* court is that, unlike the *McCollum* and the *Paladin* courts, the *Byers* court did not in any way analyze the speech itself to determine if it fell within the First Amendment exception for the incitement of imminent, lawless activity. Rather, the *Byers* court allowed the conclusory pleading that the film fell within that exception. The main paragraph alleging intentional conduct in the *Byers* complaint (note the subliminal messages theory was abandoned—and that was the only other paragraph claiming intentional conduct) merely claims in conclusory terms that Oliver Stone and the other film producers intended to incite and intentionally cause injury.56

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55. See id. The *McCollum* opinion specifically addressed whether the Plaintiffs could state a claim for intentional conduct against Ozzie Osbourne for singing of a song which promoted and encouraged suicide. The plaintiffs in that case (the parents of the child who committed suicide while listening to an Osbourne song) had an even stronger case than the *Byers* case, because California has a Penal Statute which makes it unlawful to aid or abet suicide. They alleged that Osbourne, through his song's lyrics, intentionally stated "suicide is the only way out," and further stated "Get the gun and try it, shoot, shoot, shoot." *Id.* at 190-91. Nonetheless, the court rejected the arguments that a claim for intentional conduct could be stated.

56. See *Byers*, 712 So. 2d 681.
alleges, in its strongest paragraph:

Defendants are liable . . . for producing a film . . . which they intended . . . would cause or incite persons such as defendants Sarah Edmondson and Benjamin Darrus (via subliminal suggestion or glorification of violent acts) to begin shortly after repeatedly viewing same, a crime spree such as that which lead to the shooting of Patsy Ann Byers.57

Thus, under the Byers test, any song, book or film can face tort liability— as long as there is a conclusory pleading— because there is no analysis of the speech.

In order to establish that the speaker intentionally intended to incite unlawful conduct (the First Amendment exception at issue), it is necessary to establish that the speaker intended not only to do an act, but also intended to cause injury.58 At best, the Hollywood defendant’s conduct in Byers was a “glorification of violent acts.”59 That does not constitute the incitement of imminent, lawless activity under Brandenburg. As stated by the McCollum court, “it is not sufficient simply to allege that defendants intentionally did a particular act. It must also be shown that such act was done with the intent to cause injury.”60

The Brandenburg test requires Byers to allege specific facts to show that Oliver Stone intended to cause Byers’ injury and “made the subject [film] . . . available for that purpose.”61 Alleging that Stone intentionally engaged in the “glorification of violent acts” is quite different than showing Stone intended to cause injury and “made the subject [film] . . . available for that purpose.”

A test requiring that a plaintiff cite specific facts in a film tending to show that speech is not protected is the only workable test that would allow the correct application of the First Amendment. It is the test used by opinions properly following Brandenburg and is supported by the treatises on this subject. Such a test allows plaintiffs who are truly injured by speech not

57. Id.
58. See McCollum, 249 Cal. Rptr. at 193.
59. Id.
60. Id.
61. Id.
protected by the First Amendment to obtain recovery, but prevents a massive flood of lawsuits against producers and studios.\textsuperscript{62}

As stated in \textit{Smolla and Nimmer on Freedom of Speech}, a court must thoroughly review the speech before allowing the matter to proceed.\textsuperscript{63} In commenting on the Court of Appeals' analysis in \textit{Paladin}, Smolla states, "The Court of Appeals, conscientiously exercising its obligation to engage in a careful independent review of the First Amendment standard as applied to the \textit{Hitman} tactics, painstakingly dissected the manual, chapter-by-chapter, page-by-page."\textsuperscript{64} It was only after summarizing and undertaking that "prodigious effort" that the \textit{Paladin} Court concluded that the Brandenburg test was met.\textsuperscript{65}

Lawyers representing injured plaintiffs can hardly argue that Smolla is incorrect in his statement that the Court of Appeals should undertake a thorough analysis of the speech before the speaker can be held liable, because Smolla was actually the attorney for the plaintiff in the \textit{Paladin} case.\textsuperscript{66}

The rule requiring the pleading of specific facts also distinguishes between the \textit{Paladin} opinion relied upon by the \textit{Byers} court and cases where there is an attempt to bring suit against books, such as \textit{The Catcher in the Rye} and films, such as \textit{Saving Private Ryan}, \textit{Schindler's List},\textsuperscript{67} or even \textit{Bambi}.\textsuperscript{68} In the \textit{Paladin} case, the publisher stipulated that the \textit{Hitman} instructions might be used by murderers, and further stipulated that it intended the instructions to be used to provide assistance to murderers.\textsuperscript{69} That opinion is completely different than a

\begin{itemize}
\item \textsuperscript{62} The case relied upon by the \textit{Byers} court, \textit{Rice v. Paladin Enterprises Inc.}, 128 F.3d 233 (4th Cir. 1997), is a classic example of the line which should be drawn, because the objective facts established the actual incitement exception to the First Amendment.
\item \textsuperscript{63} \textit{See Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech, § 10:36, at 10-65 (1998).}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{See id. at 10-42, fn.1.}
\item \textsuperscript{67} \textit{Schindler's List} (Universal Pictures 1993).
\item \textsuperscript{68} \textit{Bambi} (Walt Disney Pictures 1992).
\item \textsuperscript{69} \textit{See Rice v. Paladin Enterprises Inc., 128 F.3d 233, 241 (4th Cir.}
film in which violence is merely depicted and such violence is copied by a deranged viewer.

B. The Byers Court Also Erred Because the Plaintiff Merely Alleged the Glorification of Violent Acts, Rather Than an Actual Intention by Oliver Stone to Create Violent Acts.

As indicated by Smolla and Nimmer on Freedom of Speech, Paladin is completely different from the Byers case, or any other case where a criminal copies a film or book. Smolla states, "Unlike Paladin, which stipulated to its intent, in these copycat cases, the publisher or broadcaster clearly did not intend that others follow or act upon their depictions. In all of these cases, the underlying speech at issue is on matters of public concern, serving a plausible legal purpose - such as art or entertainment - some credible purpose other than instruction in professional assassination." 70 As stated by the Rice v. Paladin court:

In the 'copycat' context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crimes; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended.71

There has never been any evidence that Stone ever intended any injury. Rather, Stone says that his intent was to create a satire about the way the American culture and its media crave violence.72

C. Several Other Opinions Are in Direct Conflict with Byers, Including Opinions Analyzing the Film Natural Born Killers.

The opinion in Byers was not the first attempt to bring a lawsuit against the producers of the film Natural Born Killers. Another lawsuit which made identical allegations about the film Natural Born Killers was dismissed one month before the trial court's ruling in

1997).
70. SMOLLA, supra note 63, at 10-59.
71. Paladin, 128 F.3d at 265.
Byers. That case, *Miller v. Warner Brothers, Inc.*,\(^7\) was filed in Georgia, but was dismissed on the grounds that the film could not meet the immediacy requirement of *Brandenburg*. In *Miller*, a woman claimed that her husband had been murdered by two young people who had repeatedly watched *Natural Born Killers*.\(^4\) In a petition using language identical to the *Byers* complaint, the plaintiff claimed that the movie proximately caused the murder. Specifically, among other things, the petition alleged the assailants "continued on a crime spree which included kidnapping, car-jacking, and theft as they emulated the characters in *Natural Born Killers*."\(^5\) It further alleged the assailants, "Ronnie Beasley and Angela Crosby continued to emulate the characters [in the film] after they were apprehended by writing each other letters signed Mickey and Mallory, who were the characters in *Natural Born Killers*."\(^6\) Judge Westmoreland granted the film producers' motion to dismiss, holding that "the lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which protects statements except direct incitement to imminent unlawful action. See *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402 (La. 1981)."\(^7\)

Had a proper analysis of the speech contained in *Natural Born Killers* been undertaken, it is likely the court would have found the *Brandenburg* test was not met. According to the dissent's view, the purpose of *Natural Born Killers* was to mock the way the media and the public respond to killings.\(^8\) Quoting a Chicago Sun-Times movie review, Justice Fletcher writes "[t]he movie is not simply about their killings, however, but also about the way they electrify the media and exhilarate the

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73. No. 96VS117599-F (Fulton County Ct., Ga., filed Dec. 3, 1996).
74. See *id*.
76. *Id.* at ¶ 27.
77. *Id*.
In Zamora v. CBS, the plaintiff alleged that exposure to television violence caused him to murder a neighbor. His complaint was dismissed on the pleadings because of a lack of duty. The court there refused to impose a duty on the television defendants because:

Reduced to basics, the plaintiffs ask the Court to determine that unspecified "violence" projected periodically over television (presumably in any form) can provide support for a claim for damages where a susceptible minor has viewed such violence and where he has reacted unlawfully. Indeed, it is implicit in the plaintiffs' demand for a new duty standard, that such a claim should exist for the untoward reaction of any "susceptible" person. The imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court in any event. To permit a claim by the person committing the act, as well as his parents, presents an a fortiori situation which would, as suggested above, give birth to a legal morass through which broadcasting would have difficulty finding its way.

III

Byers May Be Distinguished

Short of arguing the Byers opinion is flatly incorrect, counsel may distinguish the Byers opinion. The Byers court specifically indicated that the video for Natural Born Killers was not before the court. Thus, counsel may argue the Byers opinion is distinguishable because the court did not have access to the speech. This argument should be somewhat unnecessary because all authorities - with the exception of Byers - indicate that the speech should be analyzed. Thus, the plaintiff in Byers should have been required to plead the speech.

A judicial notice request may be filed in conjunction with a motion to dismiss or a demurrer. Among the

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81. Id. at 206.
83. For example, California Code of Civil Procedure specifically authorizes the court to consider, as grounds for a demurrer, any matter in which the court may take notice under Evidence Codes § § 451 or 452. See CAL. CIV. PROC. CODE § 430.30(a).
matters for which the court can take judicial notice are matters of common knowledge and indisputable facts.\textsuperscript{84} Thus, in either a motion to dismiss or a demurrer, the film could file a judicial notice to distinguish Byers, short of arguing it is flatly incorrect.

IV

The Answer to Violence is Neither Byers Nor Legislation of Hollywood Violence—Which Would be Unconstitutional—But is to be Found in Parents and the Ratings System.

A. Governmental Legislation to Prevent Violent Content in Films Would be Unconstitutional.

As stated by Senator Joseph Lieberman, "[n]one of us want to resort to regulation, but if the entertainment industry continues to move in this direction and continues to market death and degradation to our children and continues to pay no heed to the real bloodshed staining our communities, then the government will act."\textsuperscript{85}

In another article, one author states "[H]ollywood types will obfuscate by pointing out that entertainment from \textit{Oedipus Rex} to \textit{Schindler's List} [has] contained violence. But there is a world of difference between presenting violence as a tragedy and presenting it as pornography."\textsuperscript{86}

However, as stated by one teen in a newspaper article following the Littleton, Colorado, incident, "[b]laming Hollywood is an easy way out," and another teen stated, "[w]e're all exposed to the same things—violence in the media, etc.—but we deal with it differently. We file it away as something for entertainment purposes only. The killers in Colorado

\textsuperscript{84} Thus, the jacket to the video of a film could be judicially noticed along with a warning on the cover of a graphically violent video.


couldn't just do that." 87 One possible difference between teenagers with such views, and the teenagers who commit violent acts, is the issue of parenting.

Generally, it is not the role of government to regulate the content of speech. "When the government, acting as a censor, undertakes to shield the public from some kinds of speech on the ground that it is more offensive than other kinds of speech, the First Amendment strictly limits its power." 88 "The difficulty in any regulation of violence or of the content of films is plain, because the United States Supreme Court has held that any statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on a speaker because of the content of its speech." 89

It has long been the role in the United States that criminal penalties, and not the regulation of speech, should be the way to handle crime. In *Kingsley Int'l Pictures Corp. v. Regents of the University of New York*, the defendants urged the U.S. Supreme Court to uphold a New York education law that had been interpreted to deny the exhibition of the motion picture *Lady Chatterley's Lover*, because the picture portrayed adultery as desirable. 90 The Supreme Court criticized the law, because it prevented exhibition of a motion picture simply because it advocated a particular idea. 91 The Court analyzed the First Amendment exception for the incitement of unlawful activity and found there was nothing within the advocacy of that film which would suggest that the unlawful acts advocated therein would be immediately acted upon. 92 The Court stated that criminal penalties, and not the abridgement of free speech, serve as a deterrent against crime. 93

91. See id.
92. See id. at 689.
93. See id.
Any legislation by Congress short of a Constitutional Amendment would be a violation of the First Amendment. Any such legislation would require a Constitutional Amendment to be valid. Any amendment to the United States Constitution must be ratified by both two-thirds of the House and Senate and then approved by three-quarters of the nation’s Legislatures, and it takes years to get such amendments ratified. The Constitution has only been amended 17 times in approximately 11,000 attempts.

B. Part of the Answer to Solving the Problem of Unnecessary Violence May Lie in a Coherent and Properly Applied Ratings System.

Motion picture studios and producers already voluntarily submit their films to an independent rating system for ratings based upon their violent content. It is within that rating framework that regulation of violence, if any, will take place. Violent films could be given an “NC-17” rating. The “NC-17” rating does exactly what law makers are attempting to accomplish; it means that most parents would consider the movie off-limits for their children. It is a well-known fact that motion picture studios and producers do anything they can to avoid receiving an “NC-17” rating, because the rating strongly hurts the value of a motion picture, as it limits the film’s audience. Thus, if violent films are given an “NC-17” rating, there is a natural monetary deterrent to the making of violent films.

However, the same problems that exist for legislation exist for determining whether a film should receive an “NC-17” rating. As noted, under a tightened system, a film such as Saving Private Ryan would have received an


95. See id.

96. See Richard M. Mosk, Motion Picture Ratings In the United States, 15 CARDOZO ARTS & ENT. L.J. 135, 137 (1997).

97. See id.

98. It should be noted that “X” ratings are not issued by the division of the Motion Picture Association of America which issues ratings, the classification and rating administration. See id. at 141.
“NC-17” rating. Perhaps there should be a coherent system which distinguishes between necessary/historical violence and unnecessary/gratuitous violence.

The question then becomes – how much violence generates an “NC-17” rating? As indicated by a chairman of the Motion Picture Association of America (“MPAA”) (the entity in charge of rating films): “there are generally no hard and fast rules for ratings.” As noted by that chairman, there is often criticism that CARA (the rating division of the MPAA) is more strict about sex than violence. However, “violence is a difficult area to rate, because there are an infinite number of variations of the type and intensity of such violence.” Thus, it is up to the parents of a child below the age of 17 to determine what that child is permitted to watch, because, if a film is rated “R,” it is not available to those under 17 without an accompanying parent or adult guardian.

President Clinton appears to agree with the strategy of solving the problem within the current framework of the rating system. In his speech at a fund raiser following the Littleton, Colorado incident, Clinton challenged the industry to enforce rating systems strictly at video stores and theaters, and challenge the industry to re-evaluate the ratings system itself, especially the PG rating, “to determine whether it is allowing too much gratuitous violence.”

V

Conclusion

The Byers opinion is not the answer to problems of violence among younger Americans. Byers departs from the established rule requiring an analysis of the speech before a complaint may be stated. Any debate over the First Amendment exception for the incitement of imminent lawless activity generally begins with the

99. Mosk, supra note 96, at 142.
100. See id.
101. Id. at 143.
102. See id. at 137.
famous quote by Justice Oliver Wendell Holmes: "The most stringent protection of free speech would not protect a man from falsely shouting fire in a theater causing a panic." Under the Byers opinion, any film could be sued. That type of tort-imposed censorship is certainly not what Oliver Wendell Holmes would have hoped for from his famed quote regarding the shouting of "fire" in a crowded theater. If Oliver Wendell Holmes was asked the question—is the creation of violent films the same as shouting "fire" in a crowded theater?—he would almost certainly have said, it is not. Holmes stated: "I... probably take the extremist view in favor of free speech (in which, in the abstract, I have no very enthusiastic belief, though I hope I would die for it)...." The recent incidents in Colorado, while deeply tragic, should not lead to incidents we will later regret. Reactionary law is always the worst law. Throughout history there have likely been a number of important reasons why books should be banned and books should be burned, but, years later, we applaud the nobility of those who stood against such acts. While it seems clear that Congress could not pass Constitutional legislation to regulate films, courts could apply the Byers ruling to allow films to be arbitrarily attacked. While we may neither enjoy certain films, nor understand them, that is no excuse to permit a flood of tort suits so that the films are not created. While this has not been linked to the lawsuit, Oliver Stone has recently stopped producing films. Under the Byers ruling, Oliver Stone's epic motion picture, Platoon, would face suit, and that was speech few would wish to silence.

105. MARK DE WOLFE HOWE, HOLMES-POLLOCK LETTERS (1946).
106. See Kirk Honeycutt, No Illusion: Stone Stops Producing, HOLLYWOOD REPORTER, May 4-10, 1999, at 3, 93.
107. PLATOON (Hemdale Film Corp 1986).