

REGULAR CALENDAR Agenda Item K-1 - Consideration of request for passage of Ordinance and Resolution re Cable TV Programming.

CONSIDERATION OF REQUEST FOR PASSAGE OF ORDINANCE AND RESOLUTION RE CABLE TV PROGRAMMING This agenda item was introduced by City Manager Glaves. City Attorney Stein then addressed the Council advising that it would be his recommendation that the Council refer the matter to the Attorney General for an opinion as to the legality of the proposed Ordinance.

The following persons spoke on behalf of the request for passage of the proposed ordinance and resolution re Cable TV Programming:

- 1) Brenton Bleier, Attorney-at-law, 1764 LeBec Court, Lodi
- 2) LaDon Bader, 1808 Reisling Drive, Lodi
- 3) Dr. Wayne Kildall, Center of Hope, 307 W. Lockeford St., Lodi
- 4) Mr. Hoffman, 805 Pinot Noir Drive, Lodi
- 5) John Von Kuhlmann, 729 Howard St., Lodi
- 6) Jim Baum, 1420 Edgewood Drive, Lodi
- 7) Kevin Finn, 6244 Greenback Lane, Citrus Heights, California
- 8) Clint Hollworth, Lodi
- 9) Nancy Bleier, 1764 LeBec Court, Lodi
- 10) Marshall Hunt, 724 S. Church St., Lodi
- 11) Patsy Jackson, 1615 Scarborough, Lodi
- 12) Connie Simfenderfer, 1238 S. Sunset Drive, Lodi
- 13) Ross Schmiedt, 1231 S. Church Street, Lodi
- 14) Clarence Hartley, 838 S. Mills Avenue, Lodi

The following persons spoke in opposition of the request for passage of a proposed Ordinance and Resolution re Cable TV Programming:

- 1) Deanna Enright, Manager, Lodi Cable TV, 1521 South Stockton Street, Lodi
- 2) Don Garrison, 1825 S. Church Street, Lodi
- 3) Leonard Lachendro, 531 Virginia Avenue, Lodi
- 4) Cathy Nightengale, 588 N. Loma Drive, Lodi
- 5) Phil Polenske, 1443 Holly Drive, Lodi
- 6) Nancy Miller, 791 E. Armstrong Rd., Lodi
- 7) Victor Goehring, Attorney-at-law, 125 N. Pleasant Avenue, Lodi
- 8) Nancy Dembek, 218 Rainier Drive, Lodi

There being no other persons wishing to speak on the subject the public portion of the hearing was closed.

A lengthy discussion followed.

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Continued January 19, 1983

On motion of Mayor Reid, Olson second, Council by the following vote directed City Attorney Stein to seek a State Attorney General's opinion as to the legality of the proposed Ordinance prohibiting the showing of sexually explicit cablecast programming to minors without parental presence or permission:

- Ayes: Council Members - Olson, Pinkerton, and Reid
- Noes: Council Members - Snider
- Absent: Council Members - Murphy

Lodi City Council

750.1

Lodi, Calif.

Dear Sir or Madam:

RECEIVED

After reading quite a few letters and hearing a very informative sermon as pornography I am compelled to write a letter to the Members of our City Council in regard to the "Play Boy" Channel as it is so nicely called. There is already much to much see or violence on T.V. Why couldn't there be something constructive and inspiring such as Bible Stories, which never do go out dated, on Cable T.V.? It would be a matter of a few years no doubt, but some time away, when we as citizens of beautiful, liveable, Lodi would be able to leave our homes without the fear of some one breaking in before we got home.

Children when taught Love as the Bible teaches it would then be looking for, something worth while to do instead of looking for destructive things to do, to serve their Lord &

Saviour, who gave His Life for all.

A God who loved the world so much that He gave His Only Begotten Son, to save us, would ~~be~~ ^{think} be the Saviour of all mankind. This is very possible if our children from early childhood are taught the Law of God from the Bible, instead of set a crime.

What a wonderful place not only Live-able, Loveable, Ladi would be, but the entire world can experience Love as God teaches it in His Word.

Very sincerely
Hilda Mueller

Jer. 18: 7-8, Living Bible; "Remember I announce that a certain nation or kingdom is to be taken up and destroyed, then if that nation renounce its evil ways, I will not destroy it as I had planned."

1451 W. Vine St

Los Angeles Cal

Jan - 26

Dear Mr Pinkerton

What do you think ~~if you~~
your parents would say if
they would read this clipping
enclosed. How would you feel
if some day while you watch
the filthy playboy you would
see some little girl or boy
being raped. May somebody's
child that you ^{know} or how about
your own grandchild or a
daughter or your wife. If the
people that think they have
their rights to ~~watch~~ watch
horrible things like rape. There
must be something wrong with
their brains. I'm sorry that
I ever voted for you. I
did think you were a

decent men ———— It
people would quit watching
~~that~~ trash like that then
would not be a market for
it.

Let's stop the crime of
trash and let it begin
with you and me.

The crazy people don't care
how old the victim is Baby to 100%
add

We are looking for the
City Council for protection
not encouragement from the
Crazy rapist. that seem
to get encouragement from
you at city hall

Dejected
Martha Dahlgren

RECEIVED

1983 JAN 31 AM 9 11

ALICE M. REBICHE
CITY CLERK
CITY OF LODI

511 S. Mills
Lodi, Calif.
95240



Lodi City Council
221 W. Pine
Lodi
California

95240

Censoring TV

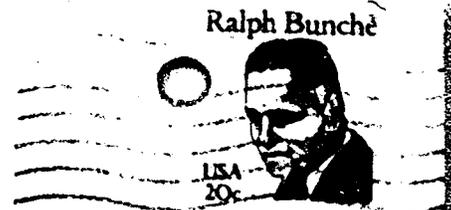
If they gave grades to such things, the people in Loud who are trying to regulate what people watch on TV in their own homes would get an X — and not for the X-rated fare to which they object.

It is censorship to matter what proposition call.

No one is forced to subscribe to Loud Cable Television or its "Playboy Channel." Subscribing and viewing are strictly voluntary choices.

If you don't like it and don't want your children watching it, don't subscribe or don't turn it on.

Councilman James Pinheron is correct when he objects "to anybody telling me what I can do in my own home."



Jim Pinkerton
City Hall
Lodi Cal 95240

CITY COUNCIL

FRED M. REID, Mayor
ROBERT G. MURPHY,
Mayor Pro Tempore
EVELYN M. OLSON
JAMES W. PINKERTON, Jr.
JOHN R. (Randy) SNIDER

CITY OF LODI

CITY HALL, 221 WEST PINE STREET
POST OFFICE BOX 320
LODI, CALIFORNIA 95241
(209) 334-5634

HENRY A. GLAVES, Jr.
City Manager
ALICE M. REIMCHE
City Clerk
RONALD M. STEIN
City Attorney

January 20, 1983

Mr. Jack R. Winkler
Chief Opinion Unit
State of California
Office of the Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814

Re: Draft Ordinance Regarding Cable Television
Viewing by Minors

Dear Mr. Winkler:

Attached hereto is a copy of a draft ordinance relative to the above-referenced subject which a citizen brought to the Lodi City Council and asked Council to adopt.

The Council has taken the position that prior to any consideration of the ordinance, they would ask your office, through my office as City Attorney, for an opinion as to the legality of the attached draft ordinance.

The two questions which I would request your opinion on are:

- (1) Whether there has been preemption by the State through Penal Code Sections 313 et seq. which prohibit the distribution of harmful material to minors; and
- (2) Assuming that there is no preemption, whether the draft ordinance is violative of the First Amendment, or if there are other Constitutional problems with the ordinance therefore making the ordinance invalid.

For your information, I am attaching hereto a copy of two memos which were based on said ordinance - one by my office and the second, by counsel for the Lodi Cable Television Company.

I would appreciate your opinion at your earliest convenience. Thank you.

Sincerely yours,



RONALD M. STEIN
City Attorney

RMS:vc

Attachments

M E M O R A N D U M

DATE: January 5, 1983
TO: Lodi Cable TV
FROM: Jacobs, Sills & Coblantz
RE: Proposed Lodi Ordinance/Regulation of
Program Content and Viewers

On January 19th the Lodi City Council will consider an ordinance which is designed to prohibit the showing to minors of "sex programming" as therein defined through the use of cable television facilities without the express written consent or presence of the minor's parent. While limited to cablecast programming, the proposed Ordinance imposes strict liability on any person violating its proscription.

The following constitutes our analysis of the substantial legal impediments to the enforceability of the proposed Ordinance, should it be adopted by the Lodi City Council.

Summary:

There are no less than six different theories under which the proposed Ordinance would be found defective. First, the Ordinance will be deemed preempted by pervasive state regulation pertaining to the exposure of obscene materials to

minors. Second, the proposed Ordinance restricts materials which are not obscene within the meaning of the First Amendment. Third, the proposed Ordinance violates the right of privacy to read, view and enjoy whatever one pleases in his or her own home. Fourth, it violates the parent's liberty interests in rearing their children without governmental intervention. Fifth, the proposed Ordinance lacks the essential element of scienter. Finally, it violates equal protection because it is both underinclusive and overbroad.

Discussion:

I. State Preemption

The draft Ordinance is preempted by state legislation. Under Article XI, Section 7 of the California Constitution, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." See Bishop v. City of San Jose, 1 C.3d 56, 61-62, 81 Cal.Rptr. 465, 460 P.2d 137 (1969). A municipal law not within the home rule purview of protection of Article XI, Section 5 of California Constitution, as would be the case here, "cannot be given effect to the extent that it conflicts with general laws either directly or by entering a field which general laws are intended to occupy to the exclusion of municipal regulation." Birkenfeld v. City of

Berkeley, 17 C.3d 129, 141, 130 Cal.Rpt. 465, 550 P.2d 1001 (1976).

A local ordinance will be preempted by state law if:

(1) it attempts to legislate in an area preempted by state law; (2) duplicates existing state law; or (3) contradicts existing state law. Lancaster v. Municipal Court (1972) 6 C.3d 805, 807-08.

Here, the draft Ordinance is squarely in conflict with California Penal Code Section 313, et. seq., which prohibits the distribution of "harmful matter" to minors. As therein defined, "harmful matter" means:

matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors.

The statute goes on, however, to expressly exempt parental action by providing:

A. Nothing in this chapter shall prohibit any parent or guardian from distributing any harmful matter to his child or ward or permitting his child or ward to attend an exhibition of any harmful matter if the child or ward is accompanied by him.

B. Nothing in this chapter shall prohibit any person from exhibiting any harmful matter to any of the following:

1. A minor who is accompanied by his parent or guardian.

2. A minor who is accompanied by an adult who represents himself to be the parent or guardian of the minor and whom the person, by the exercise of reasonable care, does not have reason to know is not the parent or guardian of the minor. Cal. Penal Code Section 313.2.

Carl v. City of Los Angeles (1976) 61 Cal.App.2d 265, 269-270, 132 Cal.Rptr. 365, held that Section 313.1 of the Penal Code preempts the field of offering and selling "harmful matter" to minors. One portion of the Los Angeles ordinance there in question, prohibited any person to sell, offer to sell or keep for sale any harmful matter as defined by Section 313 of the Penal Code in any newsrack on a public sidewalk unless the sale was made in the presence of an adult person authorized to prevent the purchase of such matter to a minor. The court found that section of the ordinance conflicted with Section 313.1 by "criminalizing conduct connected with the distribution of harmful matter that is not prohibited by Section 313.1." 61 Cal. App.3d at 270. For instance, the L.A. ordinance extended the prohibition to persons who merely kept or maintained for sale any harmful matter, whereas Section 313.1 prohibits only the distribution or offer to distribute such material. Furthermore, Section 313.1 contains scienter requirements not contained in the L.A. ordinance. The court thus concluded that "subsection 7 imposes additional requirements on distributors

of harmful matter not found in Section 313.1 . . . and [was] therefore void." Id. at 271.

Carl seems dispositive. Like the L.A. ordinance in Carl, the draft Lodi Ordinance criminalizes conduct which is expressly exempt from criminal liability under Section 313.2 of the Penal Code and extends criminal liability beyond that covered by §313.1. The draft Ordinance imposes liability where the parent "distributes" or allows his child to view "sex programming" in his own home when he is not present or has not given written permission. Such conduct is exempt from punishment under Penal Code Section 313.2(a), whose literal language allows the parent to distribute "any harmful matter to his child," without condition or qualification.

A case subsequent to Carl held that the State has not preempted the field of regulating material that is not obscene as to minors or adults. Gluck v. County of Los Angeles (1979) 93 Cal.App.3d 121, 155 Cal.Rptr. 435. The court in Gluck held that reasonable regulation of the time, place or manner of speech, such as those restricting the display in newsracks placed on the public streets of certain nudity, is not preempted by state regulation. The regulation of the use of streets and sidewalks has been a traditional function of local government. Although Gluck contained broad language hostile towards the pre-emption doctrine ("if there is a significant local interest to be served which may differ from one locality

to another then the presumption favors the validity of the local ordinance against an attack of state pre-emption." ~~93~~ 109
Cal.App.3d at ~~133~~¹⁹⁷, American Booksellers Association, Inc. v. Superior Court* limited Gluck to the regulation of the use of public streets and sidewalks. The draft Lodi Ordinance is not such a regulation, and thus is not immune from state pre-emption.**

II. Violation of the First Amendment

While obscene material is unprotected by the First Amendment, the Supreme Court in Miller v. California*** established a stringent definitional test which must be overcome before First Amendment protections may be found inapplicable.

Miller defined obscenity as:

Works which, taken as a whole, appeal to the prurient interests in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

~~109~~
* ~~192~~ Cal.App.3d 197, 201-02 (1982). ¹⁹⁷

** Cf. Music Plus Four, Inc. v. Barnet (1980) 114 Cal.App.3d 113, 123-125, 170 Cal.Rptr. 419 (city ordinance governing the display of drug paraphernalia in stores not preempted since the ordinance is a time, place and manner regulation).

*** 413 U.S. 15, 93 S.Ct. 2706, 37 L.Ed.2d 419 (1973).

The draft Ordinance defines "sex programming" quite broadly to include not only sexual acts but also "female or male genitalia, the anus of a male or female or that portion of the female breasts which includes the nipple." It is certainly conceivable that programming which contains the mere exposure of a female breast may not "taken as a whole appeal to the prurient interest" or "lack serious literary, artistic, political or scientific value." The proposed Ordinance would appear to restrict viewing of many "R" rated movies which would not be obscene within the meaning of the First Amendment. Conceivably it could also restrict the viewing of scientific programming which involve exposure of the human anatomy. In short, "sex programming" as regulated by the proposed Ordinance, would undoubtedly include non-obscene programming protected by the First Amendment.

At first blush, the proposed Ordinance's restrictions on viewing of "sex programming" to only juveniles under the age of 18 years appears to tack the Supreme Court's solicitous attitude towards the protection of children from exposure to pornography.*

* See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, where the court noted:

We have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting

[Footnote Continued on Next Page]

However, as explained below, the draft Ordinance far exceeds the permissible regulation in this area. Simply put it fails to pass constitutional muster even under the more generous standards applicable to minors.

The Supreme Court's view of the special considerations attendant exposure of minors to obscene material was most recently reflected in New York v. Ferber, 50 U.S.L.W. 5077 (June 29, 1982), where the court upheld the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances. The court relied heavily upon the state's interests in "safeguarding the physical and psychological well-being of a minor". See Globe Newspapers v. Superior Court, 50 U.S.L.W. 4759 (June 23, 1982). The court noted that it had sustained legislation aimed at protecting the physical and emotional well-being of youth even when those laws touch upon constitutionally protected rights. See Prince v. Massachusetts, 321 U.S. 153, 168 (1944). The fact that the use of children as subjects of pornographic materials was

[Continued From Preceding Page]

adults. . . .; see also FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (the court upholding the constitutionality of the FCC's restriction of broadcasts which contain material that was indecent but not obscene).

found by the legislature to be harmful to the psychological, emotional, and mental health of the child, justified application of a different standard of obscenity.*

The seminal case in the area of the state's right to regulate the exposure of obscene materials to minors is Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). There, the Supreme Court upheld the constitutionality of a criminal obscenity statute which prohibited the sale to minors of material defined to be obscene on the basis of its appeal to minors, even though such material would not be obscene to adults. The defendant was charged with selling to a 16 year old boy, two "girlie" magazines which contained pictures depicting female nudity. The statute in question prohibited the sale to minors of, inter alia, materials which contain nudity and which is "harmful to minors." Nudity was defined as the showing of the human male or female genitals, pubic area or buttock with less than a full opaque covering, or the showing of a female breast with less than a fully opaque covering of any portion thereof below the top of the nipple. . . . "Harmful to minors" was defined as material which:

* See also Miller, supra, 413 U.S. at 27; Stanley v. Georgia, 394 U.S. 557, 565, 22 L.Ed.2d 542, 89 S.Ct. 1243; U.S. v. Reidel, 402 U.S. 351, 357, 91 S.Ct. 1400, 28 L.Ed.2d 813; U.S. v. Orito, 413 U.S. 139, 143, 93 S.Ct. 2674, 37 L.Ed.2d 513.

(1) Predominantly appeals to the prurient, shameful or morbid interests of minors, and

(2) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable materials for minors, and

(3) Is utterly without redeeming social importance for minors.

The Supreme Court held the magazines involved were not obscene for adults. But the court rejected defendant's argument that the scope of the First Amendment cannot be made to depend upon whether the person is an adult or minor. Noting that the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, the court found two interests justifying the limitations of the statute. First, the court recognized the parent's claim to authority in their own household to direct the rearing of their children. The court found the legislation supported that parental claim and was designed to aid in the discharge of that responsibility. The court noted, "The prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Second, the state had an independent interest in the well-being of its youth, and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens." The court found that the state legislature could have rationally

concluded that the exposure to the materials proscribed constitutes such an "abuse".

Ginsberg points up the failing in the draft Ordinance. The critical distinction between the draft Ordinance and that involved in Ginsberg is that the draft Ordinance does not require the essential elements of the Supreme Court's definition of obscenity as adopted with respect to minors, i.e., the draft Ordinance does not require that: 1) the proscribed material predominantly appeal to the prurient interest of minors; 2) is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and 3) is without redeeming social importance for minors. While Ginsberg did not explicitly state whether the inclusion of those elements in the statute at issue were essential to its constitutionality, the Supreme Court has more recently held there are constitutional limits to what the legislature can do in this field.

In Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), a city ordinance prohibited the showing of films containing nudity by a drive-in movie theatre when its screen is visible from a public street or place. It was conceded that the ordinance swept far beyond the permissible restraints on obscenity under Miller, and applied to films that were protected by the First Amendment. The court then rejected the argument that the ordinance was a

reasonable means of protecting minors from visual nudity. Admitting that a state or municipality can adopt more stringent controls on communicative materials available to youth than on those available to adults, the court stated that minors are nevertheless entitled to "a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar a public dissemination of protected materials to them." 422 U.S. at 212-213. The court found the restriction was broader than permissible:

The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttock's, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly all nudity cannot be deemed obscene even as to minors. See Ginsberg v. New York, supra. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. (Citations and footnotes omitted.) 422 U.S. at 213-214.

The court noted that to be obscene as to minors, material must be "in some significant way, erotic." Id. at footnote 10.

Thus, the draft Ordinance does not contain the essential elements of obscenity. What was objectionable about the ordinance in Erznoznick is objectionable here. The draft Ordinance only specifies certain types of depictions which are deemed offensive. It fails to require that these depictions appeal to the prurient interests of children or is without serious literary, artistic, political, or scientific value to children. In short, it does require the material be "in some significant way, erotic." Therefore, the Ordinance as proposed is overbroad in restricting materials which are protected by the First Amendment.

The California courts have stricken other statutes on similar grounds. In Carl, supra, 61 Cal.App.2d at 273, one section of the L.A. ordinance prohibited the exposure to the public view of any photograph or drawing displaying nudity. The court stated, "Nudity alone is not enough to make material legally obscene," id. at 273, quoting Jenkins v. Georgia, 418 U.S. 153, 161. The ordinance contained no qualifications: the depicted nudity need not have had sexual arousal, gratification or affront as its purpose or affect. Hence the court found that subsection overbroad and unconstitutional. See also American Booksellers Association, supra, 192 Cal. App.3d 197.

III. Violation of Minor's Right to Privacy

The proposed Ordinance violates the privacy rights of individuals to do as they please in their own homes. The seminal case in this area is Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243. In that case, authorities were searching defendant's home pursuant to a search warrant issued in respect to alleged bookmaking activities. In the course of the search the officers discovered films which they considered obscene and seized them. Defendant was charged with "knowingly having possession of . . . obscene matter" in violation of Georgia law. The court held that the obscenity statute, insofar as it punished mere private possession of obscene matter, violated the First Amendment.

The court distinguished prior cases, as dealing with the power of the state and federal governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter. None had dealt with mere private possession.

In its analysis, the court first discussed the constitutional right to receive information and ideas, regardless of their social worth. The court then identified the additional dimension of the right to be free from unwanted governmental intrusions into one's privacy. In this regard the defendant asserted the right to read or observe what he pleases - the

right to satisfy his intellectual and emotional needs in the privacy of his own home. The court held:

"Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government power to control men's minds." 394 U.S. at 565.

The progeny of Stanley have reaffirmed its holding as applicable to essentially privacy issues. In U.S. v. Twelve 200 Foot Reels, 413 U.S. 123, 126, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the court stated:

Stanley depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home.

Similarly, United States v. Reidel, supra, in upholding the constitutionality of a federal statute which prohibited the knowing use of mails for the delivery of obscene matter, the court characterized Stanley as focusing on the freedom of mind and thought and on the privacy of one's home.* Stanley,

* 402 U.S. at 355-356. In U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 376, 28 L.Ed.2d 822, 91 S.Ct. 1400, where the court held that "whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, . . . does not extend to one who is seeking . . . to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution."

while limited to establishing the constitutional right of privacy in one's own home to possess obscene materials, has nonetheless been consistently reaffirmed as to that essential right of privacy.

The key issue is whether Stanley would extend to the privacy rights of minors in the context of the draft Ordinance.

That minors enjoy numerous constitutional rights is well settled.

Students, for instance, have a First Amendment right not to be compelled to salute the flag. West Virginia v. Barnette, 319 U.S. 624, 637 (1943). Students also have free speech rights to wear black arm bands in class as a protest against the government's policy in Viet Nam. Tinker v. Des Moines School District, 393 U.S. 503, 507 (1969). The Supreme Court recently held in Board of Education v. Pico, 50 U.S.L.W. 4831, 4836 (June 25, 1982), that students have First Amendment protection against a school board's suppression of ideas by removing books from a school library for partisan or political reasons (plurality opinion of Justices Brennan, Marshall, Stevens and concurring opinion of Justice Blackman). Children also enjoy certain First Amendment rights. See School District of Amington Township v. Schempp, 374 U.S. 203, 224, 82 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (school prayer violates establishment clause); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (same). In addition, minors enjoy many

constitutional procedural due-process rights. See In re Winschip, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

To be sure, the court has limited the privacy and First Amendment rights of minors under certain circumstances. For example, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the court upheld the constitutionality of child labor laws which prohibited the sale of newspapers in any street or public place by a boy under 12 or a girl under 18, as applied to Jehova's Witnesses.

However, a minor's privacy right has been established in numerous circumstances. In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74-75, 96 S.Ct. 2831, 49 L.Ed.2d 788, the court stated:

Constitutional rights do not mature and come into being magically only when one obtains the state-defined age of majority. Minors, as well as adults, are protected by the constitution and possess constitutional rights. (Citations omitted.) The court, indeed, however, long has recognized that the state has somewhat broader authority to regulate the activities of children than of adults. (Emphasis added.)

Similarly, in Bellotti v. Baird, 443 U.S. 662, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), a plurality of the court held that a state may require a pregnant minor to obtain parental consent to an abortion but only if it also provides an

alternative procedure whereby authorization for the abortion can be obtained if the parents do not consent.*

While the court has given special consideration and weight to the reasonable judgment of the state in protecting the health and welfare of children, it is not a limitless deference. The court in Bellotti has recognized that there are limits in the state's enactment of laws affecting minors on the basis of their lesser capacity for informed choice, and suggested that the state "may not arbitrarily deprive them of their freedom of action altogether." Bellotti, supra, 443 U.S. at 637, footnote 15.

The Ordinance in question clearly exceeds permissible regulation.

Furthermore, there are two additional points that must be evaluated in reference to the considerations pertaining to state regulation of minors articulated in Bellotti. First, the draft Ordinance is overbroad in that it applies to all children under the age of 18, regardless of their "vulnerability" and maturity and ability to make an informed choice for themselves. Bellotti held that a minor has the right to obtain an abortion

* It is noteworthy that a strong dissent of four justices opined that minors had a constitutional right to receive an abortion without first having to obtain the consent of third parties, be it parents or a judge. Furthermore, those justices were critical of the burden upon minors' individual interests in avoiding disclosure of personal matters and the right to exercise the abortion decision without public scrutiny.

notwithstanding the contrary views of her parents if she is mature enough and well enough informed to make the decision. Certainly, the abortion decision is a much more serious and consequential decision than a minor's decision to observe the programming at issue. It is noteworthy that the Supreme Court in H.L. v. Matheson* (upholding a Utah parental notification statute), took great pains to narrow its holding so as to apply to girls who, inter alia, have made no showing as to their maturity. Furthermore, the court in Erznoznick strongly suggested a minor's right to observe obscene materials must depend upon his or her relative maturity. Specifically, in measuring the scope of a minor's First Amendment rights, the court suggested that the capacity for individual choice is an important consideration:

In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor. 422 U.S. at 213, footnote 11.

As in Bellotti and Erznoznick, there are mature minors whose First Amendment rights and/or privacy rights that would be unduly restricted by the draft Ordinance. Furthermore, the Ordinance does not require mere parental consultation as in Bellotti, but gives parents complete veto power. Cf. Planned Parenthood of Missouri v. Danforth, supra.

* 450 U.S. 398 (1981).

Second, as discussed infra at Part IV, while the Ordinance appears at first blush to be supportive of parental role in child rearing, as a practical matter it adds little to their authority and instead imposes potential criminal liability for the failure to rear their children in a prescribed fashion.

Perhaps the most important facet of the draft Ordinance is the fact that the activity in question takes place in the privacy of a home, and not in a public accommodation or area. Therefore, whatever constitutional right a minor may have in viewing such programming, the strength and scope of that right is maximized under these circumstances. This is not a case where the strong interests of the state, distinct from an asserted interest in regulating the morality and protecting the perceived welfare of a child, can provide substantial justification for the challenged state action. For instance, the "long-recognized" power of local school boards in exercising "broad discretion in the management of school affairs" is not involved. Cf. Board of Education v. Pico, supra, 50 U.S.L.W. at 4834. Nor is this the case which involves state regulation over public activities or matters of employment. In Prince, supra, 321 U.S. at 168, the court observed:

The state's authority over children's activities is broader than over like actions of adults. This is particularly true of public activities and in matters of employment. . . . Among evils most appropriate

for [state regulation] are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all of the diverse influences of the street.

The court's concern of the dangers of the "diverse influence of the street" has little applicability to the instant case. In contrast to the state's concedely broad powers over the regulation of public conduct, the unique sanctity of the home is involved here. At bottom, it will appear that the teaching of Stanley v. Georgia apply to adults and children alike. When the state attempts to regulate the conduct of children where privacy expectations are the greatest, and where there are no collateral state interests involved, such as in Pico, supra, the state's naked assertion of its parens patriae power stands on tenuous grounds.

In sum, the privacy rights of minors in their own home, the fact that the draft Ordinance restricts the privacy and First Amendment rights of minors regardless of their maturity and ability to make a reasoned choice, and the fact that there is no demonstrable connection between the ends and means of the Ordinance render it violative of minor's constitutional right of privacy.

.IV. Parents' Liberty Interest in Rearing Their Children

The fourth defect is that the draft Ordinance interferes with the parents' constitutional right of liberty in

rearing their children without unjustifiable governmental interference. This liberty interest was first established in Myer v. Nebraska, 262 U.S. 390, 391-401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). The court held that the due process clause of the Fourteenth Amendment guaranteed the right of the individual to "establish a home and bring up children." The court held unconstitutional a Nebraska statute which outlawed the teaching of any language other than English in any school. The defendant school teacher's right to teach and "the right of parents to engage him to so instruct their children" were held to be within the liberty of the Fourteenth Amendment. In Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the court struck down a statute which compelled the attendance of children between the ages of 8 and 16 in a public school. The statute prohibited attendance in private schools, and thus conflicted with the right of parents to choose schools for their children. The court held:

The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The court held the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."

In Prince v. Massachusetts, supra, the Supreme Court recognized that "it is cardinal with us that the custody, care

and nature of the child reside first in the parents, whose primary function and free include the preparation for obligations the state can neither supply nor hinder."

Of course, the parents' liberty interests in directing the rearing of their children are not unlimited. The state as parens patriae may restrict the parental control by requiring school attendance, regulating or prohibiting the child's labor, or requiring compulsory vaccination. Prince upheld a statute which prohibited sale of newspapers and magazines in any street or public area by children, even though it conflicted with the guardian's religious desire to have the child distribute religious materials.*

Where there is a conflict between the desires of the parents and conduct required by the state, there is a clear governmental intrusion upon the parents' liberty interests. Thus, a clearer constitutional challenge could have been made had the Ordinance strictly prohibited the viewing by minors of "sex programming" notwithstanding parental desire to grant consent. In Ginsberg, supra, 390 U.S. at 639, the court noted that "the prohibition against sales to minors does not bar

* Cf. Wisconsin v. Yoder, 406 U.S. 205, 233-34, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (court holds unconstitutional a state statute requiring education to age 16 in some private or public school which, as applied to Amish children, interfered with the exercise of their religious beliefs and interests of the parents in directing the upbringing of their children).

parents who so desire from purchasing the magazines for their children." That observation seems to imply conversely that had parents been barred from purchasing magazines for their children, the statute may have been unconstitutional.

Moreover, any contention that the Ordinance is supportive of parental control is illusory. In actuality, it adds nothing to the parents' ability to control their children. Instead, it penalizes parents for failing to rear their children in a manner prescribed by the Ordinance. The statute dictates the formalization of parental consent. Parents, for some reason, may desire the relationship with or communication to their children be so formalized. The procedure prescribed by the draft Ordinance may be embarrassing to either or both parent and child. Furthermore, since the consent is formally memorialized, there is a danger that third parties will discover the fact that the parent explicitly gave his or her child consent; it is conceivable that a parent might desire to permit his or her child to observe "sex programming" but would prefer others not know of that desire. It might be asserted that there is a particularly important privacy interest in communications between parent and child. Such communications ought to remain confidential and not subject to governmental regulation or intrusion. To be sure communications between parents and

child are not privileged within the meaning of the law of evidence,* but nothing seems more deserving of privacy than communications between a parent and child in their own home.

Thus, more than the mere liberty interests of a parent to direct the upbringing of his child is at stake. The draft Ordinance subjects intimate conversations to intrusive governmental regulation. The statute "would allow the state 'to inquire into, prove, and punish,' the exercise of this parental responsibility." Carey, supra, 431 U.S. at 708.

Moreover, the parents' liberty claim is coupled with other interests; viz. the child's First Amendment right to view the programming, and the privacy interests of both parents and child in familial communications within their own home, discussed below. If the combined effects of these claims is recognized, then Wisconsin v. Yoder, supra, would direct that the government cannot legally intervene into the parent-child relationship unless the parental conduct in question (i.e. the mere failure to be present or provide written consent) "will jeopardize the health or safety of the child, or have a potential for significant social burdens." Under such a standard, the constitutional challenge based upon liberty would succeed.

* See McCormick on Evidence, p.166 and note 34; Jefferson, California Evidence Bench Book Supplement, §35.4 (1978).

Furthermore, the fact that the exercise of parents of their liberty right to direct the upbringing of their children relates primarily to conduct within their home is of great significance. None of the aforementioned Supreme Court cases have dealt with similar circumstances. All pertain to child's conduct, as desired by the parent, outside the home. Where the liberty interest of the parent in rearing their children pertains to conduct or activities within the home, a special privacy interest, one which emanates from Stanley v. Georgia, obtains. The allusion made by Justice Powell in Carey to the state's inquiry into, proof, and punishment of the exercise of the parental responsibility of distributing contraceptives to their children, presumably in the privacy of their own home, supports the argument. So does the court's observation in Ginsberg, supra, that the statute in question did not prohibit parents from purchasing nude magazines for their children. It seems noteworthy that the court in Ginsberg was aware of the dangers that obscene material might fall into the hands of children as a result of public distribution of obscene materials, but made no mention of the same thing happening where an adult privately possesses obscene materials in his home. Stanley, supra, 394 U.S. at 567. Thus, Stanley may be read as implicitly holding the privacy interests that obtains in one's own home precludes governmental regulation of the right of parents to obscenity to minors within the home.

V. The Requirement of Scierter

The fifth obstacle is that the draft Ordinance does not require scierter, as mandated by Smith v. California,, 361 U.S. 147, 80 S.Ct. 15, 4 L.Ed.2d 205 (1959). The court in Smith struck down the California statute imposing strict liability for the possession for sale of obscene materials without requiring the defendant's knowledge as to the contents of the materials possessed. Since it was practicably impossible for a bookstore owner to have knowledge of the contents of all of his inventory, there was a danger that public access to materials would be overly restricted through self-censorship compelled by the statute. The resulting chilling effect upon the First Amendment rendered the strict liability statute unconstitutional.

The draft Ordinance does not require knowledge or scierter. If a child choses to watch "sex programming" in the absence of his or her parent, and without the knowledge of his or her parents, the parents could nonetheless be prosecuted. Furthermore, as a factual matter, the Playboy Channel does not broadcast exclusively "sex programming." Interviews and other programming which do not involve nudity are mixed with "sex programming." Like radio broadcasting involved in Pacific Foundation, supra, 438 U.S. at 748, "prior warnings cannot completely protect the listener or viewer from unexpected program

content." This fact increases the danger and unfairness of strict liability imposed upon the parents.

In an attempt to avoid unwitting liability, parents would have to terminate subscription to the Playboy Channel. But, the overbroad effect of the statute which would result as a practical matter, would intrude upon the First Amendment right of children to observe materials not deemed obscene with respect to children, as well as burden the unlimited privacy right of adults to observe and view any materials in his own home, as established in Stanley v. Georgia. In sum, the same "chilling effect" which infected the strict liability statute in Smith, obtains in the instant case.*

VI. The Ordinance is Underinclusive or Overbroad

The draft Ordinance is underinclusive and overbroad. Various aspects of overbreadth have already been discussed. To recapitulate, the chief aspects of the Ordinance's overbreadth is: (1) it regulates the viewing of "sex programming", much of which may not be deemed obscene even with respect to minors; (2) it applies to minors who are mature and are capable of making an informed decision as to the propriety of viewing "sex programming"; and (3) it may have a "chilling effect" upon the

* Note also that the statute contains no scienter requirement with respect to the minor's actual

rights of other viewers. As a result, not only is the Ordinance, if enacted, subject to suit by an appropriate plaintiff (e.g., a mature minor who does not wish to obtain the express written consent of his or her parent), but it might be attacked on its face by anyone within the permissible purview of the Ordinance. See Nowak, et al., Constitutional Law, pp.722-726. A facial attack upon the statute as a whole on grounds of overbreadth will be upheld where the "overbreadth of the statute [is] not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Ferber, supra, 50 U.S.L.W. at 5084, quoting Broadrick, 413 U.S. 601, 615 (1973). The requirement of substantial overbreadth is met here. The number of mature minors, against whom the state's parens patriae power is limited, is undoubtedly substantial. So is the amount of "sex programming" which is not obscene with respect to minors. See Miller, supra, 413 U.S. at 27. In criticizing Justice Brennan's argument that the suppression of obscene material is permissible only to avoid exposure to consenting adults and to juveniles, Justice Burger, speaking for the court, states:

Nor does he indicate where in the constitution he finds the authority to distinguish between a willing 'adult' one month past the state age of majority and a willing 'juvenile' one month younger.

Thus, the Ordinance as drafted "reaches a substantial number of impermissible applications." Ferber, supra, 50 U.S.L.W. at

5084. Furthermore, in view of the specificity of the statute it is not "readily subject to a narrowing construction by the state courts, and its deterrent affect on legitimate expression is both real and substantial." Erznoznik, supra, 422 U.S. at 216.

The draft Ordinance is also underinclusive inasmuch as it does not prohibit or safeguard the exposure without parental consent to minors of other forms of obscene materials. For instance, nothing is said about the display of sex newspapers in public newspaper stands, nor the display of nudity outside of movie theatres. Furthermore, the statute does not require express written parental consent before a minor can view "girlie" or even obscene materials other than television programming within the home. Cf. American Booksellers Association, supra, 192 Cal.App.3d 197 (the ordinance was underinclusive and not rationally tailored to accomplish the asserted purpose because it permitted the unrestricted sale to minors of the very materials sought to be restricted). Although the court has frequently upheld underinclusive classifications on the theory that a legislature may deal with only one part of a problem without addressing all of it, the "presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression." Erznoznick, supra, 422 U.S. at 215. Under these circumstances, the government must

offer some justification for distinguishing treatment of television "sex programming" from other forms of nudity left unregulated.

VII. Application of California Constitution

The preceding discussion has been based almost exclusively upon federal constitutional law. Consideration should also be given to the free speech and privacy rights contained in the California Constitution.

A. Free Speech.

Article 1, Section 2 of the California Constitution provides in pertinent part:

Every person may freely speak, write or publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

The State Legislature has defined obscenity with respect to adults under Penal Code Section 311. As discussed above, it has also defined obscenity with respect to minors in Penal Code Section 313. The constitutionality of Section 311 under both the First Amendment and the California Constitution has been upheld.* Although the California Supreme Court has observed that Article 1, Section 2 is "more definitive and

* See People v. Wiener (1979) 91 Cal.App.3d 238, 246-47, 154 Cal. Rptr. 110. See generally 5 Witkin, Summary of California Law, Constitutional Law, §§185-196.

inclusive than the First Amendment", Wilson v. Superior Court (1975) 13 C.3d 652, 658, 119 Cal.Rptr. 468, 532 P.2d 116, it appears that the constitutionality of pornography legislation is not determined by standards different from those that apply under the Federal Constitution. See Bloom v. Municipal Court (1976) 16 C.3d 71, 81-82, 127 Cal. Rptr. 317, 545 P.2d 229. It is noteworthy that Bloom rejected the argument that Stanley v. Georgia protects the right to sell and distribute obscene materials outside the home. It is apparent from American Booksellers Association, supra, and Carl, supra, that no differing state constitutional analysis applies when the constitutionality of a statute regulating the exposure of obscenity to minors is at issue. The definition of "harmful matter" under Penal Code Section 313 is narrow (the material "taken as a whole [must be] utterly without redeeming social importance for minors."), and its constitutionality has not been challenged. See American Booksellers Association, supra, 129 Cal.App.3d at 201. Therefore, it would appear that the guarantees of free speech under the California Constitution adds little to the federal doctrines.

B. Privacy.

Article 1, Section 1 of the State Constitution provides:

All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life

and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy.

Although the California courts have not addressed the question whether the State Constitution affords minors an unlimited privacy right to possess or view "harmful" materials in their homes, the right of privacy generally is more expansive under the State Constitution than under the Federal Constitution. See Committee to Defend Reproductive Rights v. Myers (1981) 29 C.3d 252, 172, Cal.Rptr. 866, 625 P.2d 779 (legislation restricting the circumstances under which public funds were authorized to pay for abortions for Medi-Cal recipients held unconstitutional). Compare Parrish v. Civil Service Commission, 66 Cal.2d 260 (government practice of conditioning the receipt of welfare benefits upon recipient's waiver of his constitutional right of privacy in his home held unconstitutional) with Wyman v. James, 400 U.S. 309 (1971) (similar government policy upheld). Furthermore, the California courts have placed special emphasis upon the right of privacy in the home. See Annenberg v. Southern Cal. Dist. Council of Laborers (1974) 38 Cal.App.3d 637, 645, 113 Cal.Rptr. 519, in which the court observed:

. . . we have the unquestioned right of the householder or the homeowner to privacy, to a sanctuary reasonably secure from outside intrusion, and to a sheltered place for the family. As our society desparately attempts to drown itself in overpopulation, this

right of privacy, if not becoming more important, is, at least, receiving better recognition. It has been judicially declared that this right of privacy is well within the penumbra of the Bill of Rights. . . .

As our society and population problems become more acute, we are becoming increasingly more aware of the importance of this right to be free from outside intrusion either by the state or by other individuals.

See also People v. Dumas, 9 Cal.3d 871, 882, 109 Cal.Rptr. 304, 512 P.2d 1208 ("the courts have implicitly recognized that man requires some sanctuary in which his freedom to escape the intrusions of society is all but absolute."). Thus, whatever the privacy rights enjoyed by minors under the Federal Constitution, it is at least, if not more, expansive under the California Constitution. A persuasive argument could be made that the California Constitution affords adults and minors an absolute privacy right in their home to view obscene matters.

RECEIVED
1982 DEC 10 PM 4: 28

ALICE M. REIMCHEZ
CITY CLERK
CITY OF LODI

MEMORANDUM

To: Marc Yates, Police Chief
From: Ron Stein, City Attorney
Re: Draft Ordinance and Resolution re Cable
TV Programming
Date: December 9, 1982

Marc, enclosed are copies of the above-referenced drafts presented to Council at the December 8, 1982 meeting by Brent Bleier, Attorney at Law.

After reading them, you will probably understand why I would say we would probably have to add 36,000 police officers to enforce the ordinance if it were to go into effect.

On a more serious note, I would appreciate your comments and thoughts on these drafts. Thank you.



RONALD M. STEIN
City Attorney

RMS:vc

attachments

DRAFT

ORDINANCE NO. _____

Adopted by the City Council of the City of Lodi on date of:

**DRAFT ORDINANCE PROHIBITING SHOWING OF
SEXUALLY EXPLICIT CABLECAST PROGRAMMING
TO MINORS WITHOUT PARENTAL PRESENCE OR
PERMISSION**

WHEREAS, certain television signal providers, hereinafter "Providers", are providing signals by means other than the use of the public airwaves including but not limited to cablecasting and microwave broadcasting; and

WHEREAS, these Providers are offering programming to the general public which is inimical to the mental health and welfare of children under the age of 18 years; and

WHEREAS, the City Council finds that many parents within the City of Lodi wish to prohibit their own children under the age of 18 years from viewing such unhealthy and inappropriate programming.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF LODI DOES HEREBY ORDAIN, as follows:

1. It shall be unlawful for any person to display, cause to be displayed, or allow to be displayed upon a television receiver under his responsibility, ownership or control certain sexually explicit adult programming, hereinafter "sex programming" as defined below, within the City of Lodi to any child under the age of 18 years unless the parent of said child shall be physically present during such showing or unless the parent of said child shall have given said person the parent's prior written permission for said child to view the sex programming. Said written permission shall be within the physical custody of the person displaying, causing to display or allowing to be displayed such sex programming at the time of the display and shall be available for presentation to any law enforcement officer or official upon request.

2. "Sex programming" as the phrase is used within this ordinance shall be defined as any graphic or pictorial depiction of sexual intercourse or copulation between males and females,

males and males, females and females, males and animals, or females and animals, female or male genitalia, the anus of a male or female or that portion of the female breast which includes the nipple, masturbation or simulated masturbation, oral copulation of the mouth of any person to the genitalia of any other person or animal or that portion of the female breast which includes the nipple, or artificial or simulated sexual organs or genitalia.

3. This ordinance shall have no application to any showing or display of sex programming as defined herein which shall occur as part of an educational program of any institution under the supervision of the State Superintendent of Public Instruction.

4. Violation of this ordinance shall be punishable by imprisonment in the County Jail for a period not to exceed one (1) year or a fine of not to exceed One Thousand Dollars (\$1,000) for each such showing or display.

5. It is the express intent of the City Council in adopting this ordinance to prohibit only the viewing of sex programming as defined herein by children under the age of 18 without the presence or permission of their parents. This ordinance shall not be deemed or construed to affect or restrict in any way whatsoever the right of adults over the age of 18 years to view such sex programming.

ATTEST:

DRAFT

RESOLUTION NO. _____

DRAFT RESOLUTION RELATING TO THE PROVISION
OF SO-CALLED ADULT ENTERTAINMENT CHANNELS
BY LODI CABLE TELEVISION

WHEREAS, this Council has learned of the plans of Lodi Cable Television to provide "the Playboy Channel" as a premium service to its subscribers in Lodi; and

WHEREAS, "the Playboy Channel" is typified by explicit pictorial representation, display and discussion of male and female frontal nudity, male and female genitalia, deviant sexual behavior and practices, copulation, fornication and marital infidelity; and

WHEREAS, the Council finds that such presentations within the homes of the people of the City of Lodi will have a marked and deleterious effect upon the quality of life of all of the citizens of Lodi and particularly its minor children; and

WHEREAS, the Council believes that Lodi Cable Television may not have fully considered the adverse societal impact of this type of presentation.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LODI that:

1. It is the sense of the Council that the provision of explicit, so-called adult entertainment programming, such as "the Playboy Channel" is an unfortunate degradation of the cultural life of the City of Lodi and its citizens and is to be deplored.

2. It is the sense of the Council that Lodi Cable Television is to be encouraged to reconsider its decision to cablecast such programming to the homes of Lodi.

3. It is the sense of the Council that Lodi Cable Television, if it should persist with such programming, should assure the citizens of the City of Lodi, its subscribers and this Council clearly and unequivocally in writing that it will not display such programming on a "preview" or "promotional" basis to its regular subscribers.

4. It is the sense of the Council that if Lodi Cable Television should persist with such programming, it should, at a minimum, mandatorily provide lock box security devices to prevent the unauthorized viewing of this distasteful and unhealthy programming by children who may otherwise have access to the television set.

ATTEST:

CONFIDENTIAL

MEMORANDUM

To: Honorable Mayor Fred Reid
From: City Attorney
Re: Cable TV Programming
Date: January 14, 1983

I would ask that you review and consider some additional thoughts I have in addition to those previously furnished relative to the above-referenced subject.

- (1) Either the Mayor or myself should consider limiting debate only to the issue of whether or not the City can regulate in order to protect minors. The reason for this thought is because the ordinance which was submitted by Mr. Bleier deals only with prohibiting the showing of sexually explicit programming to minors without parental presence or permission. It does not deal with the question as to whether or not we should have the Playboy Channel or whether or not we should limit the viewing by adults of the Playboy Channel.
- (2) Using the California Environmental Quality Act as an example, where someone is attempting to limit a project because of environmental concerns, there must be substantial evidence on the record, of said concerns (environmental impacts). For example, if a developer wanted to put a development in, it would not be enough for a person to object on the grounds of a noise impact without having substantial evidence on the record of what that noise impact would be. In the same way, it could be argued that the City cannot limit the First Amendment rights of its citizens without substantial evidence on the record of the harm which is caused by the viewing of bare breasts.
- (3) At present, there are Federal laws dealing with obscene material being sent through the mails. In order to prosecute under those statutes, the individual who receives obscene material through the mail and objects to receiving said obscene material, must send a letter to the firm sending said material, asking that no further material be sent. If the firm then again sends the material, then that firm can be prosecuted.

If the evil that we are trying to get at is an individual allowing another person's child to view sexual programming, then the parents whose child might be subject to viewing that objected-to material, should be required under this ordinance to give his child a note to carry with him at all times, advising people that the child is not allowed to watch said programming; and, if that person after seeing said note allows the child to view the programming - or, in the alternative, the parent would have to give notice to the other party of their objection (as an example, it would be similar to a trespassing statute wherein you must give notice that someone cannot be on your property, and if they persist in remaining on your property after having been given notice) - then that person could be prosecuted under the terms of the ordinance.

RONALD M. STEIN
City Attorney

RMS:vc

PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

To: Honorable Mayor Fred Reid

From: Ronald M. Stein, City Attorney

Re: Regulation of Cable Broadcast Programming to
Minors Without Parental Presence or Permission.

Date: January 13, 1983

There are a number of points and thought-provoking comments that I wanted to stress regarding the attached Memorandum. The foremost thought of the Memo which I will stress is the preemption issue.

PREEMPTION ISSUE

The fact is that the State has already regulated in this area and therefore any ordinance the City would adopt would be invalid. Mr. Bleier would probably argue that:

1. It has not been preempted and at that point, you could now suggest that you could request an Attorney General's Opinion. Mr. Bleier said the problem with an Attorney General's Opinion is that it would take 3 - 4 months to get same and at that time, public sentiment would be lost;
2. That we have a new Attorney General; and
3. It would require briefing on my part and the Attorney General could fail to come down in favor of same, saying that it was preempted;
4. That an Attorney General's Opinion is - just that - an opinion.

ATTORNEY GENERAL'S OPINION

The response that you might have to that, Fred, is that it would certainly be more inexpensive and less time-consuming to get an Attorney General's Opinion prior to considering the passage of any ordinance, rather than preparing an ordinance and spending 3 - 5 years in court defending the ordinance and possibly having to pay the other sides' attorney's fees.

It could be argued that the Attorney General's Opinion does have some weight with the courts and that the Attorney General would have more time to research the issue.

NEW LEGISLATION

Fred, you might suggest to Mr. Bleier that if he feels that the problem of cable television is a pervasive one, that the problem may be greater than that in Lodi. You might suggest the possibility of legislation which would specifically permit the cities to regulate cable television. Of course, Fred, the problem with this suggestion is that I doubt that the Legislature would consider such a pervasive kind of enabling legislation. The new legislation argument could, however, be an answer to Mr. Bleier's and my argument regarding preemption. The example that you could use to Mr. Bleier is the issue dealing with cruising, wherein the courts held that there was a preemption by the Vehicle Code and the Legislature then passed legislation which would permit the cities to regulate cruising.

UNENFORCEABILITY

Fred, I spoke with Marc Yates, and he feels that the ordinance as presently written is quite unenforceable. Mr. Bleier might argue that there are many laws on the books which are unenforceable and that the City should pass this ordinance just for the principle of same. Your response to that could be - (1) why add another unenforceable statute to the books?; and (2) that even though it is unenforceable, it does not mean that someone could not attack the ordinance as having a chilling effect on First Amendment rights regardless of its unenforceability and, if said ordinance were attacked, the City would not have the defense that it was unenforceable, therefore, we do not have to defend it.

Fred, you might also mention to Mr. Bleier that there is the possibility that someone could attack the ordinance as unconstitutional and be awarded attorney's fees.

LA MIRADA

Mr. Bleier could mention also that he has spoken with someone in La Mirada and was told that they banned the Playboy Channel by ordinance. I have spoken with the City Manager in La Mirada and I was told that in fact, the issue of the Playboy Channel never even came to the City Council. La Mirada has select TV and to quote the City Manager, "At 11 p.m., the clothes come off". It would be my suggestion that between now and the Wednesday Council meeting, that you call the City Manager in La Mirada and speak to him so that if Mr. Bleier mentions La Mirada, you could say you have spoken with the City Manager down there. (His name is Gary K. Sloan, telephone (213) 943-0131, extension 35.)

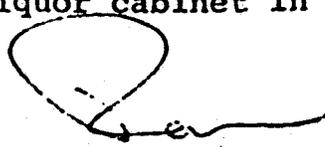
If the evil that Mr. Bleier is attempting to get at is the evil to minor children, then in lieu of this ordinance, could not you suggest that if he does not want his children watching cable television in your home, he need merely call

you and ask you not to allow his children to watch said channel when they are visiting. If he does not trust you, then he can keep his children home.

Fred, the best example of the aforementioned is a situation dealing with barking dogs. Oftentimes, I will get a call from someone concerning their neighbor's barking dogs. My first response is to ask the party if they have called their neighbor regarding the problem, and quite often, the answer is "no"; and when I call the neighbor or ask the complaining party to call the neighbor, this normally does resolve the problem.

LOCKBOX

The proposal by the Lodi Cable Television to sell lockboxes for \$16.00 and buy back same, seems to be a reasonable response to Mr. Bleier. Unfortunately, Mr. Bleier has told me that he wants to require any person who has cable television to have the lockbox regardless of whether they want to take the lockbox, or not. Again, he claims this is for the protection of minors. Fred, this is similar to our requiring the liquor companies to supply liquor cabinets with each bottle of alcohol sold. I would argue that I have alcohol in my home; my child does not drink alcohol, nor do my child's friends drink alcohol. I don't need Government requiring me to have a liquor cabinet in my home.



RONALD M. STEIN
CITY ATTORNEY

RMS:vc

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ection 311.2 or
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one thousand
(\$5) for each
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e day for each
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of this chapter, and which is involved in the
such basic maximum and additional days
exceed 360 days in the county jail, or by
fine and imprisonment. If such person
has previously been convicted of any offense in this
chapter or of a violation of Section 313.1, a viola-
tion of Section 311.2 or 311.5, except subdivision
of Section 311.2, is punishable as a felony.

Every person who violates Section 311.4 is
punishable by fine of not more than two thousand
dollars (\$2,000) or by imprisonment in the county
jail for not more than one year, or by both such
fine and such imprisonment. If such person has
previously been convicted of a violation of former
Section 311.3 or Section 311.4, he is punishable by
imprisonment in the state prison.

Every person who violates Section 311.7 is
punishable by fine of not more than one thousand
dollars (\$1,000) or by imprisonment in the county
jail for not more than six months, or by both such
fine and imprisonment. For a second and subse-
quent offense he shall be punished by a fine of not
more than two thousand dollars (\$2,000), or by
imprisonment in the county jail for not more than
one year, or by both such fine and imprisonment.
If such person has been twice convicted of a viola-
tion of this chapter, a violation of Section 311.7 is
punishable as a felony. Leg.H. 1961 ch. 2147,
1962 ch. 138, 1960 ch. 249, 1976 ch. 1139, opera-
tive July 1, 1977, 1977 ch. 1061, effective Septem-
ber 24, 1977.

312. Destruction of Obscene Matter.

Upon the conviction of the accused, the court
may, when the conviction becomes final, order any
matter or advertisement, in respect whereof the
accused stands convicted, and which remains in
the possession or under the control of the district
attorney or any law enforcement agency, to be
destroyed, and the court may cause to be de-
stroyed any such material in its possession or
under its control. Leg.H. 1961 ch. 2147.

A related 312 appears in chapter 8 below.

**312.1. Not Required to Introduce Expert
Witness Testimony Concerning Obscene or
Harmful Character of Matter—Evidence Which
Is Admissible.**

In any prosecution for a violation of the provi-
sions of this chapter or of Chapter 7.6 (commen-
ced with Section 313), neither the prosecution nor
the defense shall be required to introduce expert
witness testimony concerning the obscene or
harmful character of the matter or live conduct
which is the subject of any such prosecution. Any
evidence which tends to establish contemporary
community standards of appeal to prurient inter-
est or of customary limits of candor in the descrip-
tion or representation of nudity, sex or excretion,
or which bears upon the question of redeeming
social importance, shall, subject to the provisions
of the Evidence Code, be admissible when offered

by either the prosecution or by the defense. Leg.H.
1969 ch. 925, 1970 ch. 1072.

Ref.: W. Cal. Sum., "Constitutional Law" §196.

**§312.5. If Any Parts of This Chapter Are Held
Invalid, Such Invalidity Shall Not Affect Other
Parts.**

If any phrase, clause, sentence, section or provi-
sion of this chapter or application thereof to any
person or circumstance is held invalid, such inva-
lidity shall not affect any other phrase, clause,
sentence, section, provision or application of this
chapter, which can be given effect without the
invalid phrase, clause, sentence, section, provision
or application and to this end the provisions of this
chapter are declared to be severable. Leg.H. 1969
ch. 249.

**CHAPTER 7.6
HARMFUL MATTER**

- Definitions. §313.
- Distribution to minor a misdemeanor. §313.1.
- Exception of parents from act. §313.2.
- Defense in prosecution for violation. §313.3.
- Punishment. §313.4.
- Severability of provisions. §313.5.

§313. Definitions.

As used in this chapter:

(a) "Harmful matter" means matter, taken as
a whole, the predominant appeal of which to the
average person, applying contemporary standards,
is the prurient interest, i.e., a shameful or morbid
interest in nudity, sex, or excretion, and is patently
offensive to the prevailing standards in the adult
community as a whole with respect to what is suit-
able material for minors, and is utterly without
redeeming social importance for minors.

(1) When it appears from the nature of the
matter or the circumstances of its dissemina-
tion, distribution or exhibition that it is designed
for clearly defined deviant sexual groups, the
predominant appeal of the matter shall be
judged with reference to its intended recipient
group.

(2) In prosecutions under this chapter, where
circumstances of production, presentation, sale,
dissemination, distribution, or publicity indicate
that matter is being commercially exploited by
the defendant for the sake of its prurient appeal,
such evidence is probative with respect to the
nature of the matter and can justify the conclu-
sion that the matter is utterly without redeem-
ing social importance for minors.

(b) "Matter" means any book, magazine,
newspaper, or other printed or written material or
any picture, drawing, photograph, motion picture,
or other pictorial representation or any statue or
other figure, or any recording, transcription, or
mechanical, chemical, or electrical reproduction
or any other articles, equipment, machines, or ma-
terials.

(c) "Person" means any individual, partner-

PRIVILEGED AND CONFIDENTIAL
COUNCIL COMMUNICATION

TO: THE CITY COUNCIL

DATE

NO.

FROM: THE CITY MANAGER'S OFFICE

January 11, 1983

SUBJECT: REGULATION OF CABLE BROADCAST PROGRAMMING TO MINORS WITHOUT PARENTAL PRESENCE OR PERMISSION

PRIVILEGED AND CONFIDENTIAL

I begin this Council Communique with somewhat of a caveat. It is to be remembered that when Brenton Bleier presented this ordinance to the Council, he did say that it was a draft ordinance. With this in mind, I have chosen not to take the ordinance apart - word for word, but rather give to the Council somewhat of an overview of the question relating to censorship, pornography, harmful materials, etc. as they relate to cable television.

The First Amendment of the United States Constitution reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

However, it is to be remembered that not all speech is within the protection of the First Amendment. In Roth v. The United States cited at 354 U. S. 476 (1957) it was stated as follows:

"...There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem These include the lewd and obscene... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.... (Emphasis added). We hold that obscenity is not within the area of constitutionally protected speech or press. Roth v. United States, 354 U.S. 476 (1957)."

In 1973, the United States Supreme Court in Miller v. California at 413 U.S. 15, set forth the standard by which speech was determined to be within or without the protection of the First Amendment. Specifically, it dealt with the standard under which to evaluate the permissible regulation of communication. The Miller court found that:

"The basic guidelines for the trier of fact must be: "a) Whether 'the average person applying the contemporary community standards' would find that

the work, taken as a whole, appeals to the prurient interest ... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

I am therefore not saying that we can have no regulation of the cable television. In fact, at present there are a number of agencies which do regulate the content of the cable television.

FEDERAL

The rules of the Federal Communication Commission pertaining to cable television systems, prohibit the transmission of material that is obscene or indecent. (See the attached copies of 47 C.F.R. Section 76.215, and a form letter by the Cable Television Bureau of the FCC.) In addition, the general "public interest" standards for granting and retaining a broadcasting license (47 U.S.C. Sec. 307(a), 307(d)) and the criminal penalty for the broadcast of obscene, indecent or profane language (18 U.S.C. Sec. 1464) provide authority for content-related regulation by the Federal Government.

STATE

Under State law, specifically Penal Code Section 311 through 313.5, deals with obscene matter and prohibition against the same. It is to be noted that Section 313 through 313.5 specifically deals with harmful matter which might be exhibited or distributed to a minor. The aforementioned sections of the Penal Code become very significant in the determination as to whether or not the City of Lodi may pass an ordinance relating to the exhibition of "harmful matter".

The reason why these sections are important is because of the theory which is called "preemption". Basically, what we are talking about when we are discussing preemption is the theory that a local ordinance is invalid if it is an attempt to impose additional requirements in a field which is preempted by State law. Specifically, where the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by State legislation, ceases as far as local legislation is concerned.

In determining whether the Legislature intended to occupy a particular field to the exclusion of all local regulation, we may look at a whole purpose and the scope of the legislative scheme. Whitney v. Municipal Court 377 P.2d 80 (1963) and Carl v. the City of Los Angeles 61 Cal.App.3d 265 (1976).

It is interesting to note, both Carl and Whitney dealt with the area of pornography or harmful matter. Carl, dealt with the placements of the newspaper racks in the City

of Los Angeles and specifically with sexually explicit newspapers. In Carl, the Second District Court of Appeal held that the city ordinance prohibiting the sale or keeping or maintaining for sale, harmful matter in any unattended newspaper rack in a public sidewalk, was preempted by Section 313 through 313.5 of the California Penal Code and therefore was unconstitutional.

What the Court stated at page 269 is very convincing:

"After defining 'matter' in section 313 to encompass every conceivable mode of communication, section 313.1, subdivision (a), then provides: Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit any harmful matter to the minor is guilty of a misdemeanor. 'Distribution' is defined as any 'transfer (of) possession of, whether with or without consideration. (Pen. Code, Sec. 313, subd. (d).)

"The principles which govern our consideration of subsection (7) were summarized by the Supreme Court in Lancaster v. Municipal Court 6 Cal.3d 805, 807-808, 100 Cal.Rptr. 609, 610, 494 P.2d 681, 682, as follows:

'It is settled that a local municipal ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by general law. (Citations.) Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates (citations), contradicts (citation), or enters an area fully occupied by general law, either expressly or by legislative implication (citations). If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a 'municipal affair.' (Citations)'

"We think it obvious that section 313.1 of the Penal Code preempts the field of offering and selling harmful matter to minors. The parallel decisions holding that the statutes relating to adult obscenity preempt the field leave no room for argument on this point. (Whitney v. Municipal Court, 58 Cal.2d 907, 909-911, 27 Cal.Rptr. 16, 377 P.2d 80; In re Moss, 58 Cal.2d 117, 119, 23 Cal.Rptr. 361, 373 P.2d 425; Spitcauer v. County

of Los Angeles, 227 Cal.App.2d 376, 379, 38
Cal.Rptr. 710; Mier v. Municipal Court, 211
Cal.App.2d 470, 472-473, 27 Cal.Rptr. 602.)"

In light of the foregoing, it is the opinion of this City Attorney that any ordinance relating to cable television and the content of said cable television, would be at the minimum very circumspect. It is to be noted that if the evil that we are attempting to prohibit is "harmful matter", then arguably the District Attorney's office would be the person to whom a complaining party would necessarily go. It is the District Attorney's office who would prosecute a violation of Penal Code Sections 311 through 313.

If this Council were to adopt an ordinance dealing with the content of the cable television communications, or, if this Council were to attempt to regulate the viewing of the cable television by minors by specifically putting the onus on other parents (which appears to be the tenor of the ordinance which Brenton Bleier brought before this Council) this Council needs to be aware of a number of other problems which the Council might face:

(1) Any ordinance which regulates First Amendment rights, must require scienter. What I am referring to is an intent or a knowledge on the part of the person exhibiting or displaying the material or matter to the minor or in fact, any adult (Smith v. California 361 U.S. 147 (1959)). In Smith, Los Angeles had an ordinance which made it unlawful for any person to have in his possession any obscene or indecent writing.

The Court held that an ordinance imposing liability on a bookseller for the sale of obscene books with no requirement of proving knowledge, was unconstitutional. The Court held:

"There is no specific constitutional inhibition against making the distributor of foods the strictest censor of their merchandise, but the constitutional guarantees of freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the books on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For, if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the book he sells to those he has inspected; and thus the state will have imposed the restriction upon the distribution of constitutionally protected as well as obscene literature."

(See also Carl v. The City of Los Angeles 61 Cal.App.3d 65 (1976), at page 270.) (See also Butler v. State of Michigan 352 U.S. 380 (1957) wherein the United State Supreme Court held that an ordinance making the distribution of a book containing obscene, immoral, lewd, lascivious language...tending to incite minors to violent or depraved or immoral acts was unconstitutional as an unduly necessary restriction of freedom of speech as protected by the due process clause of the Fourteenth Amendment in that the prohibited distribution of the book to the general public on the basis of the undesirable passages without a sufficient definite standard of guilt, is to quote the Supreme Court "surely, this is to burn the house to roast the pig indeed". If such an ordinance was left to stand, it would "reduce the adult population of Michigan to reading only what is fit for children." The Court held at 384:

"It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the due process clause of the Fourteenth Amendment, that history was attested as the indispensable conditions for the maintenance and progress of a free society.")

The next question which might be presented to the Council would be:

(2) Why would the Council single out one form of communication from all others for special treatment. It poses questions of evenhandedness, equality before the law, and equal protection.

The Fourteenth Amendment of the United States Constitution provides, in part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"U. S. CONST. amend. XIV.

"See, e.g., Anderson v. Celebrezze, 499 F. Supp. 121 (D.C. Ohio 1980); Vendermark v. Housing Authority of City of York, 492 F. Supp. 359 (D. C.

Pa. 1980); Boothby v. City of Westbrook, 138 Me. 117, 23 A.2d 316 (1941).

"In Boothby the Maine Supreme Court stated that 'a regulatory ordinance passed (by a city) pursuant to a general legislative grant of power must be reasonable and not arbitrary and operate uniformly on all persons carrying on the same business under the same conditions."

"23 A. 2d at 319."

3. The third issue that may be presented to the Council is whether the ordinance is overbroad. It is to be remembered as I stated previously in this Communique, that any ordinance which would regulate communications must be narrowly drawn and must in fact be tested by the three-prong test of the Miller v. California decision. I start with the premise that a state or municipality can adopt more stringent controls or communicative materials available to minors than those available to adults. Ginsberg v. New York 390 U.S. 629 (1968). However, in a recent U. S. Supreme Court case, Erznoznik v. City of Jacksonville 422 U. S. 205, sets forth some standard to decide exactly what the city can or cannot prohibit in the name of protection of its minors. The Court stated after using the Ginsberg case as precedent that the minors are entitled to a significant measure of First Amendment protection, citing Tinker v. Des Moines School District 393 U.S. 503 (1969)..:

"... only in relatively narrow and well- defined circumstances may Government bar public dissemination of protected materials to them."

In this particular case (Erznoznik v. City of Jacksonville) the city had passed an ordinance which would prohibit the exhibiting of any movie in which the human male or female bare buttocks, female bare breasts or human bare public areas are shown. In order to uphold this ordinance, the city argued that they were attempting to protect minors. The U. S. Supreme Court held that the ordinance was not directed against sexually explicit nudity, nor was it otherwise limited:

"Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breast, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indiginous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach. Clearly, all nudity cannot be

deemed obscene even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."

Again, this Council should be aware of the language in Butler v. State of Michigan 352 U.S. 380 at page 414 in which the Court in effect held that if we made an ordinance so broad as to prohibit any exhibition of adult materials for fear that a child might see the same, what we then would do would be to "reduce the adult population to reading only what was fit for children".

Two recent Federal District Court cases are very significant in the area as it relates to the First Amendment rights and specifically in the area as it relates to the regulation of communication through cable television. In the first instance we have a State statute in Utah which was declared unconstitutional in Home Box Office, Inc. et al. v. Wilkinson 531 F. Supp. 987; and in the second instance we have a local city ordinance which in effect, after the State statute had been declared unconstitutional, adopted the statute as an ordinance of the City and said ordinance was also declared unconstitutional in Community Television of Utah v. Roy City Nos. NC 82-0122J and NC 82-0171J (D. Utah filed August 26, 1982).

As an aside, it is interesting to note that the Community Television of Utah case was brought as a declaratory relief action by the cable television industry and the cable television industry upon obtaining relief is now going to sue in the Federal Court for attorney's fees under the Civil Rights Act. I bring this to mind before discussing the case only for the thought that if the Council were to adopt an ordinance which was unenforceable but which would "show the cable television people that we mean business", the Council may very well end up in a lawsuit and be required to pay attorney's fees if we were unsuccessful in defending the ordinance (regardless of whether the ordinance is enforceable or not).

In looking at the two cases cited, I chose to start with the one that dealt with the State statute which was declared unconstitutional in Home Box Office, Inc. v. Wilkinson 531 F. Supp. 987 (1982) In the State of Utah, they had a statute which is very similar to our Penal Code Section 311 dealing with obscenity. However, the Legislature went a little further and passed an ordinance which prescribed the distribution of "indecent material" over a cable television system. The Plaintiff's local and national cable television distributors brought a declaratory relief action arguing

that the statute was unconstitutional and that it violated the First Amendment and that it was unconstitutional for reasons of overbreadth.

The Court goes on to state at 991, to wit:

"The reason for the special rule in First Amendment cases is apparent: an overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. (citations omitted) Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted."

As to the balancing which must be done, we look in the first instance to the State's right to regulate; and in the second instance, the individual's First Amendment rights. The Court at 991 continued:

"In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts (citations omitted) and its deterrent effect on legitimate expression is both real and substantial. (citations omitted)."

The analysis was held as follows:

"(1) ...delineate the constitutional bounds of protected and unprotected expression;

"(2) ...determined whether a challenged statute is facially overbroad; and

"(3) ...determine whether a limiting construction may be placed on the challenged statute to cure its constitutional infirmity."

The Court continues then its analysis by first discussing regulation of government of public dissemination of written or pictorial material. It first states that you must define the definitional boundaries of obscene or non-obscene material in light of Miller v. California 413 U.S. 15. Quoting from Miller at 993 the Court states:

"This much has been categorically settled by the Court, that obscene material is unprotected by the

First Amendment... 'The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted)' Bread v. Alexandria, 341 U.S. 622 at 642, 71 S.Ct. 920 at 932, 95 L.Ed. 1233 (1951), and cases cited.... We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited.... As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. (Emphasis added) (citations and footnote omitted)

"Having thus defined the appropriate sphere of the appropriate sphere of state regulation, the Court went on to set forth the procedural standards required to be followed in attempting such regulation:

'The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest, ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (citations omitted)'

"The inquiry in obscenity cases is thus confined. The Court left resolution of individualized questions of fact and law to 'the jury system, accompanied by the safeguards that judges, rules of evidence, (the) presumption of innocence, and other protective features provide...' (citations omitted, again reasserting that 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."

The Court continues at 994:

"States may not go beyond Miller in prescribing criminal penalties for distribution of sexually oriented materials. For better or worse, Miller establishes the analytical boundary of permissible state involvement in the decision by HBO and others to offer, and the decision by subscribers to receive, particular cable TV programming."

The Court then proceeds to look at the particular statute in effect. The statute in effect makes the display of "nude or partially denuded figures" encompassed within its reach. The Court states at 996 that:

"... it is well settled that nudity falls well within the protection afforded by the First Amendment, Jenkins v. Georgia, 418 U. S. 153 (citations omitted) even when viewed by minors. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)".

In a footnote on page 996, the Court states that the applying to nude or partially denuded figures would in effect apply the statute not only to cable television but also regular television when such films as "The Godfather", "Being There", "Coming Home", "Annie Hall" and "Coal Miner's Daughter" were exhibited.

The Court goes on at page 997 to state:

"While 'commercial exposure and sale of obscene materials to anyone, including consenting adults, is subject to state regulation,' (citations omitted) transmission and delivery of nonobscene TV programming is not, at least not through a state criminal statute that runs so far afield of the standards set forth in Miller v. California supra. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' (citations omitted)

The Court continued at page 1001, to wit:

"To extend the reach of the criminal sanction beyond the sphere described in Miller v. California in hopes of effectively corraling individuals into making only 'right', 'proper' or 'decent' choices runs counter to the settled constitutional rule that the States have no power to control the moral content of a person's thoughts. 'To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment' (citations omitted) As the Supreme Court said in Kingsley Int'l Pictures Corp. v. Regents 360 U.S. 684 (1959), 'this argument misconceives what it is that the

Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority... And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.' (citations omitted) 'Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability a person's private thoughts,' Stanley v. Georgia 394 U.S. 557 (1969) or directing the making of the best choices.'"

It should be noted that in Stanley v. Georgia the Court held unconstitutional a statute which would have made a crime, having pornographic movies in one's home.

What is important to note also from said case is that the Judge states that in rethinking the legislation, that the State statute on obscenity, similar to our State statute on obscenity (Penal Code 311-313) would in fact adequately resolve the problems of obscene or harmful material on the cable television and that "they may also find that drafting a special statute dealing with cable television amounts to a redundant duplication of what is already on the books".

As I said previously, subsequent to the Home Box Office, Inc. v. Wilkinson case, the City of Roy adopted an ordinance which prohibited the cable television distributor from sending signals which by the municipal ordinance definition, may be deemed indecent. The cable television owners again filed a declaratory relief action in Cable Television of Utah, Inc. v. Roy City Civil No. NC 82-0122J in the United States District Court for the District of Utah, Northern Division. The City argued that the power to restrict is found in the power to improve morals, concern for children who may hear and see things they should not, its power to control its streets, and its power to franchise and license. When the Plaintiffs (the cable television owners) argued that whatever the power the City may have, it is subject to the limitations of the First Amendment; and that the ordinance went beyond the boundaries set forth in Miller and applied in the Home Box Office v. Wilkinson and thus, the ordinance was overbroad and facially defective.

The Court then applies the Miller standard. It states at page 9 of the Memorandum Opinion:

"It is a national standard with a core of uniformity which allows for a degree of flexibility at a community level. It may be uniformly applied to almost all forms of publicly available communication. Books, magazines, cassettes, periodicals, movies, and cable

television are all treated essentially in the same fashion regardless of numbers."

The City argued that because of the number of cable television subscribers that there should be a different standard, rather than the Miller standard. The Court held at page 10:

"It seems an odd criterion. If numbers trigger application or not, the application of the Roy Standard or of the Miller Standard would depend on how many people subscribe to cable television. The irresistible analogy compels one to ask why the more restrictive standard should not then apply to large circulation newspapers, or magazines, popular motion pictures and plays, 'top ten' musical recordings or even best-selling books. It seems an irony of striking strangeness that the growing popularity of a work of art or authorship would in some fashion enlarge the power of government to restrict or suppress its content.

"Nothing in Miller v. California even hints that its carefully crafted standards are not to measure the content of even the obscure, the neglected, or the ignored. Even the F.C.C.'s power under Pacific to regulate broadcast radio does not rise or fall based upon a given station's share of the listening audience. ...

"Miller is not footed on numbers. To the contrary. In applying the Miller pornographic standard, one does not say something is dirty or patently offensive merely because more than fifty, or a hundred, or a thousand, or a million persons receive such communication.

"If a communication is dirty, patently offensive, or to use defendant's suggested label and standard, 'indecent', it seems to me that one transmission and one receiver ought to be enough to trigger application.

"There is no virtue in defendant's numbers standards -- at least in the context of this case. ...

"Why must a community tolerate? Because the first amendment, as interpreted by the High Court of this land, says so. The first amendment is the barrier that precludes others from taking from us what we cannot give away. There are areas of personal freedom that are so important they are inalienable. They belong not to the government but to the people. The first amendment shields us

from governmental excesses, no matter who occupies government offices.

The Court continues:

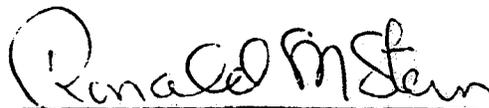
"...A monolithic social structure tolerant of nothing but approved ideas or points of view is too much akin to the horror of the German Reich. William Shirer, in his famous work, The Rise and Fall of the Third Reich, tells of being almost overwhelmed by the sameness of communication in homogenized Germany and his need for the fresh air of freedom.

"Diversity also is tolerated because the self-appointed monitor of purified communication may be in error. An American reviewer of the Walt Whitman classic, Leaves of Grass, a book that Ralph Waldo Emerson considered the work of genius, once wrote he would leave 'this gathering of much to the laws which ... must have power to suppress such obscenity.' Other works suggested for similar suppression at various locations over the years include: The New Testament, translated to English by William Tyndale; King Lear, by William Shakespeare; The Call of the Wild, by Jack London; and The Grapes of Wrath, by John Steinbeck. Even the Mickey Mouse Comic Strip by Walt Disney has not been immune from suppression."

In short, it is my recommendation that the City Council not undertake at this time, an ordinance prescribing cable television. If there are those who would suggest that the material on cable television is in fact as ascribed by the Penal Code Section and they feel that there is some enforcement necessary, the Penal Code provides for such enforcement.

I attach for your information a Lakewood, California ordinance which was put into effect prior to the awarding of a cable franchise which provided for a requirement in the first instance for the cable television owners to provide a lockbox at no cost to the citizens; and in the second instance, provided that prior to the showing of any material which would be considered X-Rated under the movie rating, would be required to make an announcement of the requirement of parental discretion.

Respectfully submitted,



RONALD M. STEIN
City Attorney

RMS:vc

attachments

Section 76.215 of the Commission's Cable Television Rules prohibits the presentation of obscene and/or indecent programs by cable television operators engaged in cablecasting on a local origination channel. The Commission's Rules do not and cannot prohibit the presentations of programs which are merely offensive or objectionable. Accordingly, unless a program is clearly shown to be obscene or indecent, it is entitled to protection under the First Amendment and its presentation cannot be restricted by the Commission under the Communications Act of 1934, as amended, or the United States Constitution.

Allegations of a violation of Section 76.215 of the rules may be brought to the Commission's attention pursuant to Section 76.9; a copy of which is enclosed. A petition for order to show cause must be accompanied by a certificate of service on any interested person who may be directly affected if such order to show cause is issued. The petition should also state fully and precisely all pertinent facts and conditions relied on to demonstrate that the issuance of an order to show cause would be in the public interest. Factual allegations should be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits should be verified by the person who prepares them. We should mention here that the system may also be subject to monetary forfeiture pursuant to Section 76.9 of the Commission's Rules.

We trust that the foregoing will prove informative. Thank you for taking the time to contact us.

Sincerely,

Cynthia Ward Jeffries, Chief
Complaints & Information Branch
Compliance Division
Cable Television Bureau

Enclosure

SESINGLTON:PS/SRM:EXX CTB-TYPED: 12/15/80

*Federal Communications
Commission*

§ 76.215

ceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting events or contests.

[37 FR 3278, Feb. 12, 1972, as amended at 40 FR 6210, Feb. 10, 1975; 42 FR 13947, Apr. 13, 1977]

§ 76.215 Obscenity.

No cable television system operator when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels material that is obscene or indecent.

[42 FR 19347 Apr. 13, 1977]

§ 76.217 [Reserved]

§ 76.221 Sponsorship identification; list retention; related requirements.

(a) When a cable television system operator engaged in origination cablecasting presents any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such cable television system operator, the cable television system operator, at the time of the cablecast, shall announce that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: *Provided, however*, That "service or other valuable consideration" shall not include any service or property furnished either without or at a nominal charge for use on, or in connection with, a cablecast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the cablecast. For the purposes of this section, the term "sponsored" shall be deemed to have the same meaning as "paid for."

(b) Each cable television system operator engaged in origination cablecasting shall exercise reasonable diligence to obtain from employees, and from other persons with whom the system operator deals directly in connection with any matter for cablecasting, information to enable such system

Title 47—Telecommunications

Chapter

operator to make the announcement required by this section.

(c) In the case of any political origination cablecast matter or any origination cablecast matter involving the discussion of public controversial issues for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a cable television system operator as an inducement for cablecasting such matter, an announcement shall be made both at the beginning and conclusion of such cablecast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such cable television system operator in connection with the transmission of such cablecast matter: *Provided, however*, That in the case of any cablecast of 5 minutes' duration or less, only one such announcement need be made either at the beginning or conclusion of the cablecast.

(d) The announcement required by this section shall, in addition to stating the fact that the origination cablecasting matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (c) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a cable television system operator on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the system operator, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the origination cablecasting material is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee,

association, group, or other entity, shall furnish the name of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (c) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a cable television system operator on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the system operator, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the origination cablecasting material is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee,

*

the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief.

(g) Where a petition for waiver of the provisions of §§ 76.57(a), 76.59(a), 76.61(a), or 76.63(a), is filed within fifteen (15) days after a request for carriage, a system community unit need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings.

(h) On a finding that the public interest so requires, the Commission may determine that a system community unit operating or proposing to operate in a community located outside of the 48 contiguous states shall comply with provisions of Subparts D, F, and G of this part in addition to the provisions thereof otherwise applicable. In such instances, any additional signal carriage that is authorized shall be deemed to be pursuant to the appropriate provision of §§ 76.61 (b) or 76.63(a) (as it relates to § 76.61(b)).

(i) [Deleted]

NOTE: Each party filing a petition, comments, opposition or other pleading pursuant to § 76.7 is responsible for the containing accuracy and completeness of all information in such document. The provisions of § 1.63 are wholly applicable to pleadings involving § 76.7, except that where specific provisions of the latter conflict with the former, the specific provisions of § 76.7 are controlling, e.g., where requirements for service on specified parties of certain information may vary.

§ 76.8 Dismissal of special relief petitions.

(a) A petition for special relief may, upon request of the petitioner, be dismissed without prejudice as a

matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition. A petitioner's request for the return of a petition will be regarded as a request for dismissal.

(b) Failure to prosecute a petition, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice if it occurs prior to the adoption date of any final action taken by the Commission with respect to the petition.

§ 76.9 Order to Show Cause: Forfeiture Proceeding.

(a) Upon petition by any interested person, the Commission may:

(1) Issue an order requiring a cable television operator to show cause why it should not be directed to cease and desist from violating the Commission's Rules;

(2) Initiate a forfeiture proceeding against a cable television operator for violation of the Commission's Rules.

(b) The petition may be submitted informally, by letter, but shall be accompanied by a certificate of service on any interested person who may be directly affected if an order to show cause is issued or a forfeiture proceeding initiated. An original and two copies of the petition and all subsequent pleadings should be filed.

(c) The petition shall state fully and precisely all pertinent facts and considerations relied on to support a determination that issuance of an order to show cause or initiation of a forfeiture proceeding would be in the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(d) Interested persons may submit comments or oppositions to the petition within thirty (30) days after it has been filed. For good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or circumstances relied on.

(3) A four (4) month period shall be provided to determine the Company's eligibility for renewal.

(4) If the Company's performance is found satisfactory, the Council may renew the franchise for a period not to exceed ten (10) years.

(5) In the event the Company is determined to have performed unsatisfactorily, the City Council may terminate the franchise and seek new applicants for evaluation.

✓ SECTION 8. POLICE POWERS.

In accepting a franchise the Company acknowledges that its rights hereunder are subject to the police power of the City to adopt and enforce general ordinances necessary to the safety and welfare of the public; and it agrees to comply with all applicable general laws and ordinances enacted by the City pursuant to such power, and for the public health, safety and welfare.

The Company agrees to comply with all applicable FCC regulations, and that said franchise will not be used in violation of any applicable FCC regulations, or state and local law, including the provisions of Chapter 7.5 of Part 1, Title 9, of the California Penal Code, commencing with Section 311, and pertaining to obscene matter. "Matter" as therein defined shall include any transmission by the Company within the City of Lakewood, pursuant to said franchise, and the Company agrees not to violate the provisions of Sections 311, et seq., of the California Penal Code.

The City Council of the City of Lakewood finds that the City is primarily a residential community, and that a great majority of the subscribers to the Company's service will be the owners of single-family residential homes, many of which are occupied by minor children. The use of public streets and property to transmit to such homes materials, including sexually explicit materials that are not subject to

valid regulations or contr. by the FCC, or in violation of the California Penal Code, but which are detrimental to the public health, safety and welfare, would be contrary to the public interest and welfare, and public property and facilities should not be used for such purpose. Therefore, as a condition to the granting of any franchise to use such public streets, ways, places, any violation of which shall be grounds for revocation thereof, the following are imposed:

a. The Company shall provide each subscriber of a residential premise at no monthly charge with a parental control locking device, or digital code that allowed the subscriber by operating said device to prohibit the viewing of any transmission under subsection b and c pursuant to this franchise. No deposit shall be required for parental control locking device or code, except as authorized by the franchise. No person shall remove or disconnect such a controlling device, and the Company shall maintain the same in good working order during the term of this franchise.

b. All "x-rated" and "r-rated" movies shall be provided on separate tiers as specified more specifically in the franchise.

c. Applicant for a franchise agrees that by applying for this franchise said franchise, if granted to it, will be subject to the terms and provisions of this section, and that the Company will comply with all federal, state and city laws prohibiting the display of obscene material. The Company, in addition, agrees that applying for this franchise to use the public streets, ways and places of the City of Lakewood it declares its policy against the carriage of X-rated movies, or other such visual material to any residential home, unless said home is equipped with a parental control locking device, or digital control, in good working order; and, further, its policy to advise subscribers at least seven (7) days in advance of the transmission of any material that is either X-rated or obscene, or in its opinion parental advice should be exercised in determining whether said material should be viewed by anyone under eighteen (18) years of age. In addition, the City shall be advised at least

seven (7) days prior to the delivery of any such material to a subscriber of the contemplated transmission of any X-rated movie or such other visual material, or matters which the Company has rated as obscene, or pertaining to which parental control should be exercised. The Company further agrees that if the City Council at any time should determine that any contemplated transmission by the Company that has not been placed on seven-day (7) notice to the subscribers, aforementioned, should have been noticed to subscribers, it shall refrain from the transmission of such material to subscribers without such proper notification or, in lieu thereof, until a public hearing has been held before the City Council to determine whether such material, in order to protect the public health, safety and welfare, should be noticed for controlled locking device or digital control. The Company further agrees it shall provide immediately prior to the transmission to any subscriber within the City of any matter that is or should be rated under the provisions herein contained as "x-rated", "obscene", or "parental discretion advised", an audio announcement and a visual announcement, at least as long as audio, where appropriate containing the following language:

PG "The following feature has been rated "PG" by MPAA. Parental guidance advised."

R (Soft) "The following feature has been rated "R" by MPAA. It is intended for Mildly mature audiences. Parental discretion is advised. We will show this violent, some sex. feature only at night."

R (Hard) "The following has been rated "R" by MPAA. This indicates that the film contains mature material and parents may wish to consider whether it should be viewed by children under 17. For further information concerning this feature; please consult your program. We will show this feature only at night."

It shall be unlawful for any person to remove any such locking control or digital control device, or to intentionally render the same inoperative, except during the ordinary course of maintenance and repair.

"X-rated movie", as used herein, has reference to those movies "X-rated" by the Motion Picture Association of America (MPAA). The Company agrees that any movie or other video, with or without sound, or sound transmission by it, that has not been X-rated will be reviewed by it prior to its transmission to subscribers of said system for determination of whether the same meets the standards of the MPAA for x-rating, and if the same does meet the standards of the MPAA for x-rating the same shall be treated by it as "x-rated" for the purpose of notification required by this section. "Obscene" as used in this section has reference to those materials that meet the standards for regulation of obscenity established by the California and

United States Supreme Court. "Parental discretion advised" includes any motion picture or other video and/or sound material so rated by the Motion Picture Association of America and, in addition, any such material that includes photographic, pictorial, or sound representation of nudity, sexual conduct, sexual excitement, sado-masochistic abuse, or bestiality. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breasts with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such a person be a female, the breast. "Sexual excitement" means a condition of human male or female genitals when in a state of sexual stimulation or arousal. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed. "Bestiality" means the use of violence upon a person in such a manner that it is harmful to any person under the age of eighteen (18) by predominantly appealing to the prurient, shameful or morbid interest of minors, and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors.

No one shall knowingly violate the terms and provisions of this section. In any prosecution pursuant to Section 731 of the Code of Civil Procedure for injunctive or other relief, or in any proceeding for revocation of a franchise by reason of violation of a provision of this section, or in any criminal proceeding or prosecution for violation of a provision of this section pertaining to the installation or maintenance of parental control locking devices, or codes, or pertaining

to the notice herein required to be given by the Company, and the failure of the Company to give the required notice, or for violation of the provisions of this section prohibiting the transmission or display of material after notification of a public hearing thereon before the City Council, or for violation of any order of the City Council following such public hearing, the mens rea shall be the intent of the person charged with a violation of this section, of knowingly, or possessing or transmitting, distributing or receiving, as the case may be, of materials without complying with the provision of this section, or any order of the City Council issued pursuant thereto. In such a case, where a prosecution under Sections 311, et seq., of the Penal Code is not involved, the intent required for a conviction under Sections 311, et seq., of the Penal Code is inapplicable.

The distribution or possession for the purpose of distribution or transmission of any obscene or harmful matter, as defined in the California Penal Code, or any matter within the provisions of this section, except upon the compliance of the terms and provisions of this section, is hereby declared to be a public nuisance. In addition to any enforcement applicable under the Penal Code of the State of California, the Lakewood Municipal Code, and this ordinance, said public nuisance may be abated pursuant to the provisions of Section 731 of the Code of Civil Procedure of the State of California. Said abatement may include, where required, revocation of any franchise granted hereunder.

SECTION 9. CATV FRANCHISE REQUIRED

No CATV system shall be allowed to occupy or use the streets of the City of Lakewood, or be allowed to operate without a CATV franchise.

SECTION 10. USE OF COMPANY FACILITIES

The City shall have the right, during the life of this franchise, to install

LODI, CALIFORNIA
COMMUNITY STANDARD SURVEY
CONDUCTED BY BETA RESEARCH CORPORATION

METHODOLOGY

THE WEEK OF DECEMBER 17, 200 PHONE INTERVIEWS WERE CONDUCTED WITH BOTH CABLE AND NON-CABLE HOUSEHOLDS. HALF OF THE INTERVIEWS WERE HELD WITH MALES AND HALF WITH FEMALES. THE FOLLOWING TABLE OUTLINES THE RESULTS.

PERCENT AGREEING THAT PEOPLE SHOULD BE FREE TO VIEW ADULT ENTERTAINMENT IN THE PRIVACY OF THE HOME.....80%

PERCENT AGREEING WITH THE CONCEPT OF SEPARATING ADULT PROGRAMMING FROM FAMILY PROGRAMMING.....93%

PERCENT MENTIONING INDIVIDUAL VIEWER OR HEAD OF HOUSEHOLD AS PERSON WHO SHOULD HAVE PRIMARY RESPONSIBILITY TO DETERMINE WHICH T.V. PROGRAMS ARE ACCEPTABLE ON CABLE T.V.....81%

PERCENT MENTIONING CITY COUNCIL OR CABLE SYSTEM AS PERSON WHO SHOULD HAVE PRIMARY RESPONSIBILITY.....14%

PERCENT WHO WOULD OPPOSE OR IGNORE EFFORTS TO PREVENT THE PLAYBOY CHANNEL FROM BEING AVAILABLE.....67%

Cable TV

Judge: Cable TV different from broadcasting

SALT LAKE CITY (UPI) — A federal judge says a northern Utah town can't ban non-pornographic sex and bad language from cable television because cable subscribers "invite" the programs into their homes and may cancel at any time.

U.S. District Court Judge Bruce Jenkins Wednesday struck down Roy City's cable television ordinance, saying cable transmissions are different from broadcast signals and they enjoy the same First Amendment protections as books, magazines and movies shown in regular theaters.

"Cable signals travel over wires, not in the air. They are asked for. They are invited," he said.

Community Television of Utah, a cable company, and several subscribers challenged the ordinance which sought to ban what the city council defined as "indecent" material. It was aimed primarily at uncut films shown by cable movie channels.

Jenkins struck down a similar

state law one year ago for the same reason but several communities have adopted the controls on a local level.

"The court finds great difficulty in distinguishing (other than the popcorn) between going to the movies at a theater and having the movies come to me in my home through electronic transmissions over a wire," Jenkins wrote. "The choice is mine."

Jenkins likened cable television to a magazine mailed to his home. "I need not open its cover. I may pick and chose among the articles. If displeased, I may cancel my subscription."

"The same is true in subscribing to a cable television service. I need not hook up. I need not tune in. I may pick and chose among the programs and I may cancel."

Jenkins also said the proposed ordinance was an improper substitute for the responsibility of parents to supervise the television

viewing habits of their children.

"No police power or censorship power can be a substitute for the moral function of the parent and the family," he wrote.

The judge said Utah law already prohibits distribution of pornographic material by any means. But Jenkins said he believed the Roy ordinance was an attempt to use licensing laws to control communications that fall short of being legally pornographic.

"Merely calling something indecent, does not make it pornographic," he said.

Roy's definition of "indecent" was overly broad, he said, and could interfere with the right of free speech which is essential to maintaining a free society.

Jenkins added that a free society must sometimes tolerate ideas that are distasteful and unpopular. "A monolithic social structure tolerant of nothing but approved ideas or points of view is too much akin to the horror of the German Reich," he

said.

Roy City Attorney Roger Dutson had argued that city had the right to ban offensive material in addition to legally pornographic material, because cable went into 80 percent of Roy's homes and was, therefore, similar to a broadcast medium where a less strict standard applied.

Dutson had cited the case of a New York City radio station which got into trouble with the Federal Communications Commission because it aired a recording of a monologue by comedian George Carlin that contained several offensive words. The Supreme Court upheld the right of the FCC to ban such programming on grounds the public should not be "surprised and intruded" upon by offensive material.

But Jenkins said that case was irrelevant because "the transmission of electronic signals through private wires is not broadcasting."

Jenkins also said the fact that 80 percent of the homes subscribed to cable, did not reduce the private and voluntary nature of the medium.

"The cable signal is not pervasive in the sense of automatic availability to all," the judge wrote. "It is not in the air, present everywhere, transcending the walls of a house or a building."

Lodi City Council

Lodi, Calif.

Dear Madam:

RECEIVED

After reading your letter of 10/19/71 and
hearing a very informative sermon ac-
companying it I am compelled to write
letters to the Members of our City Coun-
cil in regard to the "Play Boy" Channel
as it is so nicely called. There is al-
ready much to much see on violence
on T.V. Why couldn't there be something
constructive and inspiring such as
Bible stories, which never do grow
out dated, on Cable T.V.? It would be
a matter of a few years no doubt,
but some time away, when we are
entirely of beautiful, lineable, Lodi
would be able to leave our homes
without the fear of some one breaking
in before we get home.

Children when taught Love as the
able teacher it would then be looking
for something worth while to do
instead of looking for destructive
things to do, to some their Lord's

Saviour, who gave His Life for all
I had who loved the world, however
that He gave His Only Begotten Son,
to save us, would ^{through} all the Saviour
of all mankind. This is very possible.
If our children from early childhood
are taught the Law of God from the
Bible, instead of see a crime.
What a wonderful place not only teach-
able, Lawable, Godly would be, but
the entire world can experience
Law as God teaches it in His Word.

Very sincerely
Hilda Mueller

Jer. 18: 7-8, Living Bible; "Behold I
announce that a certain nation or king-
dom is to be taken up and destroyed,
but if that nation renounce its evil
ways, I will not destroy it as I
had planned."

Jan. 17, 1983

Dear Mr. Reid,

As the Mayor of Lodi, I am sending this letter to you rather than each of the Council members.

I am opposed to Mr. Brenton Bleier's proposed Ordinance regulating the Playboy Channel.

Reasons:

1) I'm sick and tired of government regulating my personal life.

2) Too many restrictions are put on adults in the guise of protecting children.

3) It opens the door to more censorship.

4) It's a parent's duty to raise their children properly, but it doesn't give them the right to raise everyone else's children.

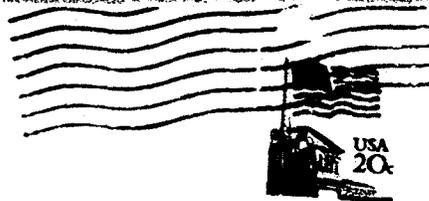
I realize the Council is reluctant to approve the ordinance. However, Mr. Bleier's survey of 3000+ Lodi residents (of which I was one) may ~~show~~ skew the opinion presented to you Wed. night, 1/19. Therefore this letter registering opposition and hopefully balancing the opinion presented by Mr. Bleier.

I urge you and the entire Council to say "No" to Mr. Bleier's entire ordinance.

Thank you.

Sincerely,
Kathleen M. Andrade

K. Andrade
314 N. Church St. #4
Lodi, CA 95240



Mr. Fred Reid
1168 Northwood Dr.
Lodi, CA 95240

Dear Mr. Bleier.

I am absolutely revolted, horrified + personally offended.

How can you throw this job of monitoring T.V. on children's parents? You can't follow them around twenty-four hours a day.

As for judges, our judiciary has reached an all time low that I never thought decent caring men could sink to.

That part of life that is rightfully a beautiful and sacred thing + should be taught as such is being dragged thru the gutter by men (or rather males; I do not want to insult men, any man of your caliber by referring to these males of the gutter as men).

Look at the vile crimes committed by children under 16. They've gotten their ideas from T.V.

and other services - printed matter
etc. I could go on + on.

Will try to make the meeting
but you have my card and my
letter if you care to show my
feeling with those others who are
concerned. Our children are our
future.

Sincerely
Pauline Street

MARY L. BENDER
53 Camino Real
Lodi, Calif. 95240

Lodi, Ca.

Jan, 10, 1983

Dear Mr. Bleier:

I received your letter today and I definitely agree on a stand against Cobb + v or any other programming that has already corrupted our viewpoint of sexual dev's. shorts on T.V. I have not signed with Cobb + v, although here in our mobile park we are hooked up outside. I could not see any improvement 6 yrs ago when I moved here & still feel that those adults who insist on airing their own feeling about sex - are sick and need the insight that God alone can give on these issues. Being the mother of a daughter who became a

② probation officer about 10 yrs. ago
through preparation in College just
to devote her life to helping
delinquents of all ages in heading
the battle against drug and
all the sex related problems
that stem from home back
grounds where parents either
mistreat their sons and daughters
by sexual abuse and all the
wrong things that mess up their
lives. Being just a concerned mom
who has been with these teenagers
at Christmas and otherwise gives
me a real burden. But my voice
is not heard. In our world only
loud mouths with money and greed
in mind Control, + V as well

3: as all bad advertising,
magazines and the like. I've
taken time to look into the
playboy business venture in
promoting the wrong literature
that any youngster can get
a hold of. I have no money
to contribute but I will mail
your card back and pray
that your stand on this issue
will surely help to stem this
evil tide. No parents are able
to control TV viewing by their
children at home or their
neighbors homes on a 24 hr basis

Sincerely
Mary L. Bender

January 10, 1983

Brenton A. Blevin
Attorney at Law
404 W. Pine St.
Suite 2
Lodi, Ca 95240

Dear Mr. Blevin;

I agree that the City Council should take action to limit the access of children and youth to sexually exploitive programming on cable television in Lodi. I support your program as outlined in your January 7, 1983 letter.

You are authorized to convey this indication of support to the Lodi City Council.

Signed - Naomi E. Seabourne
Name - NAOMI E. SEABOURNE
Address - 328 Hilborn St.
Lodi, CA 95240



From the desk of

R. N. WHITE 13 Jan 83

R. N. WHITE
2110 W. Lodi Ave.
Lodi, Calif. 95240

Mr Bleier,
Attorney at Law
404 W. Pine St.
Suite Two
Lodi, Calif. 95240

Mr Bleier,
Thank you for being a
concerned Citizen, more so
than some of our City Council.
Who would be expected to give
a resounding "No" to The King
Broadcasting Co and our
"enterprising" local TV "PAY" promotion.
Starting now I think our City
Council or any other governing agency
should start looking for a replacement.

(2)



From the desk of

R. N. WHITE

R. N. WHITE
2110 W. Lodi Ave.
Lodi, Calif. 95240

Cable franchise just because
the present operators have
considered this type of obscene
TV.

The thinly veiled arguments
of some of our City Council
members that they could not
restrict this application for
programmatic public showing
in Lodi for pay as it would be
interfering with "free enterprise."

Public Gambling Casinos and
Whore-houses are also free
enterprise. Only they are much
older and a stand has been taken
that they are illegal.

Last, most parents don't have
complete supervision over their
children either at home or



From the desk of

R. N. WHITE

away from home.
There should be no stand
taken by the public and its
representatives that there will
be no showing on TV installation
of any kind that present this
kind of sexual pervasiveness.

Hopefully this will provide
a basis for future ^{rejection of} memorial
approaches by "dollar hungry"
entrepreneurs.

Thank you for your efforts
and time in bringing this to
the attention of Lodi citizens.

Yours truly
R. N. White

R. N. WHITE
2110 W. Lodi Ave.
Lodi, Calif. 95240

First Southern Baptist Church

2301 WEST LODI AVENUE — LODI, CALIFORNIA 95240 — TELEPHONE (209) 368-2576

Robert D. Lewis, Pastor

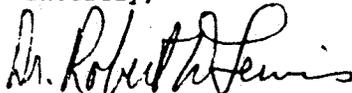
January 19, 1983

MR. BRENT BLEIER
1764 LeBec Court
Lodi, California 95240

Dear Mr. Bleier:

The executive committee of the Lodi Association of Evangelicals supports you in your effort to control the proliferation of anti-family activities by the Lodi Cable T.V. We stand opposed to the Playboy channel.

Sincerely,



Dr. Robert D. Lewis, Secretary
Lodi Association of Evangelicals

James W. Baum

1420 EDGEWOOD DRIVE
LODI, CALIFORNIA 95240

1/10/83

Lodi City Council

I would like it to be known that I am concerned about my children viewing R and X rated material on other peoples T.V.

We do not subscribe to the playboy channel and while I think it should not be available, it appears I can not stop it. I can, however, request you, council people, to require locks on the receivers so that adults who subscribe to this service can prevent their children, and perhaps mine, from watching it. The cost of

16⁰⁰ each seems small to me.

I would testify personally but my family and I will be out of the country when you consider this matter.

James W. Baum

January 4th
1983
no
card

My husband and I agree that the city Council should take action to limit the access of children and youth to sexually exploitive programming on cable television in Lodi. I support your program as outlined in your January 7th 1983 letter.

You are authorized to convey this indication of support to the Lodi City Council.

Thank you for your stand against Playboy TV.

Mr & Mrs. Allen B. Andoy
525 West Century Blvd.
Lodi, Calif.
95240

Mr. B. Bleier,

We are willing to help you take a stand for our community if we are able to help please feel free to contact us at anytime.
Mrs. Allen Andoy

Handwritten
to Mr. B.

File 1/5/83

RECEIVED
December 20, 1982
1982 DEC 21 AM 9:46

ALICE M. REYNOLDS
CITY CLERK
CITY OF LODI

Councilwoman Evelyn Olson
CITY OF LODI
221 West Pine Street
Lodi, California 95240

Dear Mrs. Olson:

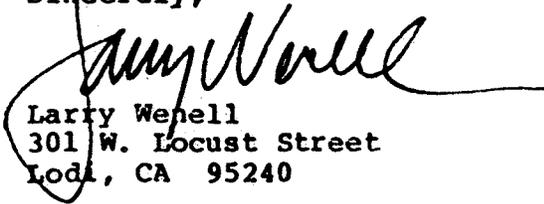
I am very concerned about the issue before the City Council having to do with the "Playboy" type programming option on the Lodi Cable channel. I am sensitive to the First Amendment issues involved with the rights of an individual to view what he will, but it is also my belief that it is well within the City Council's right to regulate the type of programming within the city boundaries; a right that many other cities have exercised in the regulation of this type of programming.

I am sure that I am typical of many people that chose Lodi and its surrounding area to live, work and raise a family in because of its conservative, moral and religious environment. I believe the uncontrolled availability of this type of programming seriously threatens these traditional values and I strongly oppose it.

As a concerned citizen, I would urge you to consider the following. First, make publically known your personal oppositions to this type of programming. Secondly, require that the cable operators install a lockbox type of receiver on all of their installations, not just as an optional accessory. This will go a long way in restricting the unsupervised viewing of adult programming by children. Thirdly, consider an ordinance making it illegal for a minor to view this adult programming without parental consent. It seems to me that the regulations imposed on this type of programming should be no less in the home than in a theatre.

I am appreciative of the decisions you have made in the past in regard to the welfare of our City and am confident that you will make the right decision concerning this crucial issue.

Sincerely,


Larry Wenell
301 W. Locust Street
Lodi, CA 95240

LAW OFFICES OF
BRENTON A. BLEIER
404 WEST PINE STREET, SUITE TWO
LODI, CALIFORNIA 95240
(209) 333-2146

January 7, 1983

Dear Fellow Lodian:

I am writing to solicit your support in placing some restraints upon the showing of sexually exploitive programming to minors by means of cable television in Lodi.

I recently attended the Western Cable Television Exhibition in Anaheim. There I learned that the Playboy Corporation, which has suffered financial reverses in recent years, is attempting to regain its profitability by undertaking extensive promotion of its sexually exploitive cable programming channel across the nation. At the Exhibition, I saw the promotional film for the channel and heard presentations from Playboy personnel regarding its profit potential for cable operators.

I discussed with several colleagues at the Exhibition the fact that the most likely markets for such programming would be large cities which already have substantially developed markets for porno movie houses and so-called adult bookstores. Additionally, even the larger cities in our area of California, Stockton and Sacramento, do not have this type of programming. You can well imagine my surprise when I returned home to Lodi to find that our local cable operator had launched a significant advertising campaign regarding their offer of the Playboy Channel in Lodi.

Based upon my review of the promotional material at the Cable Exhibition, there is no question in my mind that this type of programming exploits and degrades women, tends to harden and cheapen the treatment of women by men and is a strong negative influence on any society. However, the most disturbing impact of this programming, in my view, will be upon our young children and teenagers. It will clearly distort their perceptions of appropriate sexual behavior and will contribute to the problems that our children and youth are already experiencing in the area of sexual adjustment.

While this sexually exploitive material is clearly an unhealthy addition to television programming in Lodi, as a former prosecutor, I must admit that it probably does not meet the very

liberal, legal test of "obscenity" as it is interpreted in California. However, it does feature frontal nudity of both sexes, graphic depictions of sexual intercourse and extended and explicit "talk show" formats which encourage a wide variety of deviant sexual practices.

Unfortunately, with the permissiveness in sexual matters mandated by our liberal appellate judges in California there are really very few areas where city government can still have an impact on this major social problem. However, because cable television operators utilize public utility easements in local rights of way, local governments have been given a certain amount of latitude to regulate cable television.

On December 8, 1982, I presented the Lodi City Council with three specific steps which I feel can be taken by the Council legally and should be taken morally to help concerned parents in Lodi who want to protect their children and teenagers from this adverse influence.

1. The local cable operator, which is a division of King Broadcasting Company of Seattle, Washington, received a twenty-year franchise from the City of Lodi in 1967. This means that the cable operator's franchise will, absent a renewal, terminate in 1987. I believe the Council members can, and should, individually pledge to the community and inform the cable operator that when the current franchise expires in 1987, they will not vote to award or renew a franchise for any operator which has acted irresponsibly in handling sexually exploitive programming in Lodi.

It should be noted that King Broadcasting generates approximately 1.2 million dollars per year from regular cable programming in Lodi. I believe it is entirely possible that the company may not wish to endanger this entire revenue stream for the sake of a few thousand dollars more generated by sexually exploitive programming.

2. I believe the Council should adopt a "sense of the Council" resolution which, although not legally binding upon the cable operator, would "encourage" the cable operator to:

- a) reconsider the adverse impact of this type of programming upon a strong family market such as Lodi;
- b) promise in writing not to cablecast promotional "samples" or "previews" of this sexually exploitive programming upon the regular cable channels (as has occurred in other cities); and

- c) provide, free of charge and mandatorily, to every subscriber to sexually exploitive programming, keylock converters which can be used to prevent unauthorized viewing of this material. (This is commonly done by cable operators in other cities and can be accomplished at a very small cost.)

3. I believe the Council should adopt an ordinance which would make it unlawful in Lodi for any adult to display this sexually exploitive programming, as carefully defined in the ordinance, to a minor unless

- a) the minor's parent is physically present during the showing or
- b) the minor's parent has provided the displaying adult with the parent's permission for such a showing in writing.

I believe the ordinance is necessary because experience has shown that subscribers who wish to view this type of material themselves are often oblivious to the harm it can wreak upon developing personalities. I believe that the ordinance, even if it did not result in any prosecutions, would have a salutary effect in expressing the sense of the community, acting through its City Council, that this type of programming must not be displayed to minors.

At the Council meeting of December 8, the City Council seemed hesitant and uncertain. Mr. Pinkerton and Mr. Murphy expressed reservations about "legislating morality" for our children and indicated that it was up to the family to control such programming. However, I believe that we must attempt to deal with irresponsible adults who enjoy such sexually exploitive programming and may gain perverse satisfaction in making it available to naturally inquisitive minors without the permission or approval of the minor's parents. I stressed to Mr. Pinkerton that neither the resolution nor the ordinance I propose would interfere with his right, as an adult, to view such sexually exploitive programming.

However, I believe that most members of the Council will be receptive to the views of the community when the matter is brought back to them on Wednesday evening, January 19, 1983 at 8:00 p.m. This is where I need your help in two ways.

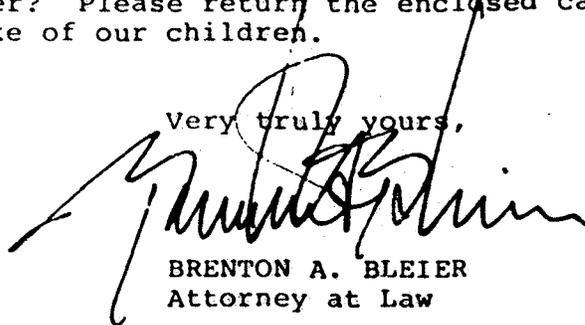
First, if you can possibly do so, please attend the meeting in person, express your own views, and lend support to the Council's consideration of these items.

Second, if you cannot attend, please complete and return the enclosed postcard to me giving me your name and address and indicating your willingness to stand with me against the Playboy Channel for our children. I hope to present these postcards to the Council that evening as evidence of the sense of our community against this programming.

Please keep in mind that Lodi Cable presently has only about 350 subscribers to the Playboy Channel out of 8,000 regular subscribers. But with the vast financial resources of the Playboy empire focused upon Lodi and with their slick promotional efforts, that total could grow to 1,000 or 1,500 subscribers quickly - a veritable epidemic of porn directed against the children of our community.

If you have any questions on the specific wording or provisions of the resolution or ordinance which I have proposed or on their legal effect, please feel free to call me during the day at my office, 333-2146, or in the evenings at my home, 334-4418. Will you join me in urging the Council to action on this matter? Please return the enclosed card to me today for the sake of our children.

Very truly yours,



BRENTON A. BLEIER
Attorney at Law

BAB/eab

RECEIVED

January 5, 1983

Lodi City Council members:

1983 JAN 10 AM 9:37

ALICE M. REIMCHE
CITY CLERK
CITY OF LODI

Ref: "Lodi Cable Television's Playboy Channel"

The subscribers to Cable Television dont need a Playboy channel added to, their viewing each evening starting at 5 p.m.

Lack of you have elected in good faith to keep Lodi a family community. As each of you know, the head of a family has to be strong and say "No" when he or she feels it's best for all members.

Don't let the First Amendment be a scare tactic in this issue! Should this issue go to court, at least you voted "no" and took a stand for decency in your community and that's important in this 20th century.

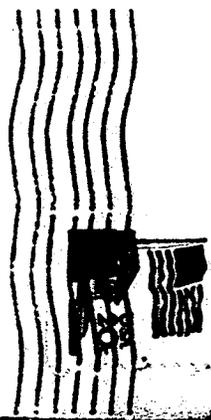
Many words, Pros and cons, can be written. Another law on the books, we dont need!

Sincerely,

Glenn Machado
Clemente-Aschford area

Mud.
MANUEL J. MACHADO, INC.
P. O. Box 336
Lockeford, California 95237

*Jose: City Mexico
P.O. Box 320
Jose, La
92411*



7



Lodi Cable TV

1521 South Stockton
Lodi, California 95240
209/369 7451
An Affiliate of King Broadcasting Company

January 5, 1982

Hon. Fred Reid
Mayor, City of Lodi
City Hall
Lodi, Ca. 95240

Mr. Mayor, members of City Council, Mr. Graves:

Lodi Cable TV began selling an adult movie pay-TV service called Escapade in October 1981. During November 1982 the service changed its name to the Playboy Channel. We have made parental control locks available at our cost (\$16) from the start of the service to enable people who wish to control viewing of the channel to do so. We installed and removed the locks without charge.

Due to the concern voiced by the city council, as representatives of the community, we will change effective immediately, our procedure to include a buy-back guarantee when the lock is no longer desired and when the lock and keys are returned in good working condition. We will continue to explain its availability to all new Playboy Channel customers and explain the buy-back policy. We feel strongly that the cost of the locks should not be borne by anyone other than persons desiring them, as the use of them is strictly voluntary. To date we have sold only 12 of the locks with over 800 customers trying the service in the 14 months it has been available.

The Playboy Channel is part of the choice of services we make available to our customers. It will not be previewed or descrambled at any time and is sold and marketed as viewing for mature adults. I want to thank the council and the city attorney for their consideration and attention to this topic.

Sincerely,

Deanna Enright

Deanna Enright, Manager Lodi Cable TV

Wednesday 1/12/83

Dear Honorable Mayor:

This letter is to inform you
I support Parent Blaine's request for
control regarding the May Day T.V.
channel. (in fact, I say, don't allow it
at all). We cancelled our subscription
to the H.B.O. channel for this very
same reason.

I urge you to please help
protect our children and my grand-
children from being exposed to this
smut by way of T.V.

Thank you,

Urvan Mackell
307 Eureka Blvd
Redi, Ca

RECEIVED

1983 JAN 13 AM 9 34

ALICE M. REMCHE
CITY CLERK
CITY OF LODI

RECEIVED

1311 Michigan Road
Lodi, CA 95240

1969 JUN 28 AM 8 52
ALICE M. REINCHE
CITY CLERK
CITY OF LODI

Mr. Fred Reid, Mayor, City of Lodi
City Hall
221 West Pine Street
Lodi, CA 95240

Dear Mayor Reid:

The Lodi City Council had an opportunity last evening to take a definitive stand on a very delicate matter. Unfortunately, the Council as a collective group lacked the fortitude to make that difficult decision and instead chose to pass the problem along to another bureaucratic agency.

I refer, of course, to the Council's decision to request an opinion from the Attorney General of the State of California as to whether or not the Council has the authority to pass an ordinance relative to the display of "Pornography" on our local cable tv channel. After public discussion ceased, the Council had an opportunity to express its view on the subject.

As I recall the commentary, Mr. Snider led off with a reading of a letter from his pastor which set forth an opinion that, while the television films in question may not be beneficial to the mental and moral development of children, the over riding question presented to the Council was the ability of a municipality to legislate morality for individuals in possible violation of the First Amendment. Mr. Snider indicated that he concurred with the thoughts set forth in the letter.

Mrs. Olson next addressed the audience and discussed her experiences relative to raising children and grandchildren and indicated she felt it was a parental, rather than governmental, responsibility to insure that children received a proper sense of values.

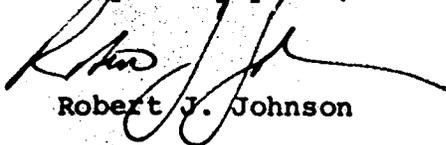
Your comments followed, and as I recall, they were centered about your confusion arising from the conflicting legal opinions presented to the Council. As such you indicated your preference in the form of a motion, seconded by Mrs. Olson, that the entire matter be presented to the Attorney General for possible clarification.

Mr. Pinkerton spoke following your remarks and, in his usual less than civil manner, proceeded to speak of search warrants and trespassing while condemning the proposed ordinance which was the subject of discussion.

At this point in time it would appear to me that the Council was divided along the lines of three individuals who expressed their dissatisfaction with the proposed ordinance and one individual, yourself, who thought that additional help from the Attorney General should be sought prior to resolving the problem. Yet when the matter was called to a vote, I was totally surprised to find that the vote to pass the matter along to the Attorney General was three-to-one in favor, with Mr. Snider casting the only "no" vote. Unless my ears deceived me during the hearing, the preponderance of the Council set forth one opinion publicly and then voted to follow a contrary path.

If the Attorney General holds that the City of Lodi can preempt state law in this matter (which I doubt he will do), Council will only have to face this decision once again several months down the road. At that time you will be forced to make a decision, pro or con, and I hope you will give serious thought between now and then as to what your actions would be. Either way, the Council is not going to win in that they are going to offend the sensitivities of certain people within the community of Lodi. But you were not elected to satisfy all the members of the community. I would encourage you to have the strength of your convictions as a Council and to vote matters as you see fit regardless of the sensitivity of the issue.

Very truly yours,



Robert J. Johnson

RJJ:ld

cc: Mrs. Olson
Mr. Snyder
Mr. Pinkerton

Sacramento Citizens Against Trash

RECEIVED

January 21 1993 JAN 24 AM 8-52

ALICE H. REMICK
CITY CLERK
CITY OF LODI

City Council Members
City of Lodi
City Hall
221 West Pine
Lodi, Ca 95240

Dear City Council Members,

Your no vote last night concerning the Playboy Channel, pornography is to be commended. The proposed ordinance would not have been enforceable nor would it have significantly effected childrens access to the so called Adult Programming.

Please be aware, however, that new technologies are on the horizon and this will not be the first time you are confronted with the issue of home pornography. The peddlers of porn need the children of this nation to gain access to their SMUT. They are their future consumers.

The Playboy Channel has mild programming compared to what is presently shown on the MDS systems, such as Cal-Sat's programming in Sacramento. You can be sure that the Pay TV distributors will be competing with each other for the same audience and will be increasing the severity of their deviant programming.

Raising children in todays world of advance communication technology is not the same as twenty, thirty, or forty years ago. Please do not expect parents to have the same control over their children you had. Also, there are many negligent parents whose children will have access to the Hard-Core porn of the future. They will be interacting with other children. Parents cannot insulate themselves from this effect.

Indeed, the parents who today ignore this problem will be abdicating their children's future to those who could care less about the welfare of our youth. Our nation should not be flooded with pornography without adequate safeguards. None of us can imagine a future where Group Sex, Sadomaso-

CONCERNED CITIZENS AND PARENTS AGAINST MASS DISTRIBUTION OF PORNOGRAPHY IN FAMILY HOMES

6214 Greenback Lane • Citrus Heights, CA 95610 • (916) 722-3466

Sacramento Citizens Against Trash

cism, Incest, Bizarre Sex, and Sexual violence towards women are considered part of everyday life.

Are we to believe that Incest and child molestation are just another sexual preference? Is that what we want our children to believe?

Do we want our young boys to believe that women 'really do' enjoy being raped? Do we want young girls to believe that sticking ones finger into a light socket enhances orgasm?

Even though most parents do the very best they can to raise their children in a decent manner, one only need check the streets of New York or San Francisco to find some of those very children. We do not have total influence over our own children. The best parent can loose control over their child. Does that mean they are bad parents?

We have an obligation to future generations to do the best we can to protect the innocence of the youth. To say that the children of the future will just have to grow up sooner because of the garbage of deviant sexual material is shirking one's responsibility.

If no checks are placed on those who would ruin our future for the sake of monetary profits, Katy bar the door! If we allow the SMUT peddlers to run amock, our children (not us) will face the consequences. However, we cannot absolve ourselves from the responsibility.

As repulsive as I find it, I believe people have a right to watch the SMUT peddlers garbage, and to wallow in the pit, but they do not have the right to drag our youth into the mire with them!

Sincerely,

Kevin Finn
Executive Director

RECEIVED

1983 JAN 24 AM 8 52

ALICE M. REINCHES
CITY CLERK

CIT: 054-001
January 20, 1983

Fred Reid, Mayor
City Council Members

Gentlemen:

In my opinion, the city council in its decision to refer the Playboy Channel matter to the State Attorney General, let us down. You, as members of the council, were elected because of your leadership qualities and your desire to serve the interests of the community. Letting the Attorney General give you an "out" seems to me to reek of politics, the same accusation made of Mr. Bleier by Mr. Pinkerton.

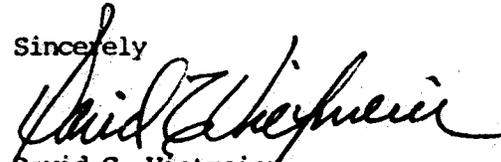
To me the solution is simple. The council should issue a resolution and a public statement to the cable TV company indicating your disfavor of the Playboy Channel type programing. None of you seemed to have a moral objection on that ground.

As far as an ordinance is concerned, it seemed clear to me, as well as acceptable, that the city council should not be directing what can or cannot be viewed in a persons home. A law for one soon becomes a loophole for another. Mr. Bleier's proposal was too restrictive in one way and not enough in another.

But, by taking a moral stand that you will reject pornographic material in our town through all legal means available, including the review of the cable TV license to do business, gives you the "back-bone" I thought you had!

My wife and I do the best we can in raising three children. But as much as we recognize that they are our responsibility, we need help. We are, after all, a community of people helping people. The council members, individually and collectively, can serve as examples. We prefer you to be good models of leadership.

Sincerely



David C. Vietmeier
2139 W. Pine

2139 Ws. Pine
Lodi, CA 95240



Mayor Fred Reid
City Hall
221 W. Pine
Lodi, CA 95240

Dear Mr. Reed.

although I am not, under the jurisdiction of Lodi, I feel that I should send you this article.

Lodi is a beautiful town, and it would be a shame, to cloud this (with the approval of the City Council) to allow pornography to make a foot hold here -

They are sick, and Country is feeling the impact of such depravity.

Women being raped, children being used, for porno-films etc.

I'm sure you are aware of all this. Use your judgment as a decent Christian human being to put a stop to all this.

Thanking you -
I remain Sincerely
Dor M. Porter

RECEIVED

1983 JAN 19 AM 8:54

ALICE M. HEINICHES
CITY CLERK
CITY OF LODI

Lee M. Barts
16315 N. Davis R.
Lodi, Cal. 95240

MR. Fred Reid
Mayor of Lodi.
City Hall
Lodi, Cal. 95240



'Accuracy for you, Mr. Bleier!!!'

Card
enclosed

It's so refreshing to have someone
finally stand up and say
'enough' to get the trash on
Cable TV

It takes courage to do what
you are doing. I'm sure you
will find a strong force of
parents and others who don't
want our children and teenagers
brainwashed by this kind of
propaganda.

Best wishes and God's speed
to you in your good work.

Worthy Pendleton

Please Read

MIM Target of the Month

YOUR MAYOR—ASK THAT HE WRITE PRESIDENT

The traffic in pornography is out of control. It is a \$6 billion plus industry, and growing—largely because the U.S. Department of Justice is not vigorously enforcing the federal laws prohibiting the interstate transportation, mailing and importation of obscene materials. We are at the point where only a directive from the President will bring about the aggressive enforcement that is necessary. Morality in Media suggests you write the Mayor of your city or town. Tell him that the vilest pornography imaginable is crossing state lines and coming into your city in violation of federal law. Tell him that vigorous enforcement of federal obscenity law could stop this traffic within 18 months. Ask him to write the President of the United States and request that he direct the Attorney General to enforce the federal obscenity laws to keep this vicious traffic out of your city.

Recently the Mayor of a New Jersey town wrote to the President, and then contacted 500 other New Jersey mayors asking them to take the same action. It is this sort of action on the part of Mayors that could bring about the Presidential directive that is needed to get the U.S. Department of Justice to move.

Ask your Mayor to write the President, telling him that the obscenity traffic has reached a level of national concern; that it is being shipped into your city and state in violation of federal laws; that enforcement of those laws has been wholly inadequate; and that federal enforcement must be more effective and aggressive if this social ill is to be cured.

Morality in Media suggests you write your Mayor now. Ask him to write the President requesting that he publicly announce that the federal laws relating to the mailing, importing, interstate transportation and broadcasting of obscenity is a matter of utmost importance; that he direct the Attorney General to issue instructions to the Federal Bureau of Investigation and all United States Attorneys to make this a matter of prime concern; and request that such instructions authorize and encourage all U.S. Attorneys to institute criminal proceedings of violations of such laws brought to their attention by the FBI, the U.S. Postal Service and U.S. Customs. Ask that your Mayor tell the President that aggressive enforcement of federal obscenity laws can and will stop the traffic in pornography that is flooding your state and your city. Suggest to your Mayor that he inform other Mayors in your state that he has written the President, and ask them to take the same action. Please send a copy of your letter to the Mayor and his or her subsequent reply to: Morality in Media, 475 Riverside Drive, New York, N.Y. 10115. Please write your Mayor now, while you have this Newsletter before you.

Porn Peddlers Invade Wall St. a 2nd Time

Last Spring it was reported in these pages that a cableporn programming service had gone to Wall Street with a stock offering, apparently designed to obtain financial backing for the production of new porno films and the maintenance of a "film library."

In early October, syndicated financial columnist Dan Dorfman, reported another invasion of Wall Street, this time by a newly formed firm calling itself Westar Productions Ltd. The firm was set to file a statement with the Securities and Exchange Commission seeking approval to sell \$5 million worth of limited partnerships to be used for the production of 30 pornographic films. Films are to be produced with an eye toward both video cassettes and cable television. Principals in

the new firm are the same as those in IFC Entertainment Ltd., which provides the Eros porn film service for subscription TV outlets.

The Dorfman column reviewed the profit potential of porno video cassettes, and quoted Roger Chan, sales manager of Caballero Control Corp. of California as saying, "...we're going to grow because we're putting a lot more quality into these films." Dorfman identifies Caballero Control Corp. as "one of the country's largest producers of" porno films for video cassettes.

Roger Chan and three associates at Caballero are defendants in an upcoming MIPORN trial, charged with conspiracy to transport obscene matter interstate, and interstate transportation of obscene material.

January 18, 1983
2115 Jackson St.
Lodi, Ca.

Dear Lodi City Council Members:

Relevant to the "Playboy" channel that King Broadcasting is currently promoting for programming in Lodi, and that is being debated by the Lodi City Council for possible regulatory action, may I please add my point of view.

Since following this issue I have made some inquiries into the complexities of passing a city ordinance. I spoke with the Sacramento City Attorneys office to hear how they handled the issue. I, also, have a copy of the ordinance they passed.

Given the laws and conditions, there is no doubt of the complexities of the issue. I know the members of the City Council are all moral people trying to do a "good" job for Lodi. However, in this time when our society has so many social problems I believe it is necessary to make value judgements when you are elected representatives, of course, within the framework of the law. It would seem clearly apparent that no responsible person would advocate children watching explicit sex, particularly if it is reasoned to be obscene or pornographic. Of course, the question is what is obscene? The Supreme Court had difficulty answering the question. However, as I read the decision, my understanding is that a community can decide that for themselves. I would like to see the City Council make such a resolution, as related to children viewing "Movie Vision", or "Playboy" programming.

My concern is that of adding any more explicit sex viewing to what is already available on our public airways. Children are not fully developed in their physical, mental, or emotional growth, and neither do they come equipped with a full set of value judgements when they are born. Peer pressures are, and always have been significant; now even more-so in our changing society, with many single parents and, two working parents. In many cases when two parents are working it is because of economic pressures, and the television becomes a "baby sitter" as well as the only form of recreation and entertainment. I agree with Deanna Enright, manager of Lodi Cable T.V. when she states that the responsibility for monitoring what a minor watches on Television lays with the parents. However, the unfortunate truth is that many parents in our society are not taking, or cannot take responsibility for their children. Re: teen-age promiscuity, teen-age birth-rate (the entire birth rate in the U.S. is highest among teen-agers), not to mention venereal diseases, among which herpes is at epidemic proportions. This is a social problem for which all who pay taxes are paying an economic price, not to add the tragedy of wasted human lives.

Where do moral attitudes develop, or for that matter any attitude? Some people would like to believe solely in the home. This is not true. After a certain very young age peers, and society have more affect. Children do not live in a parent controlled world. They are exposed to much more adult media than is desirable. Many children are growing up without a single appropriate role model in their life, and for that matter without a single person to discuss developmental problems with. Books, magazines, T.V., and peers become the parents. Some people say "Oh, I never did that with my child", or "that child is exposed to inappropriate behavior in their own home, so what's the difference?"

The difference is the quantity of exposure. The real problem with more "Playboy" programming is not specifically how obscene is it, or maybe it's not at all, for an adult, but that this type of programming has become commonplace. What becomes commonplace can seem normal, and especially to children who have little to compare with. In one study of teen-agers, 14 and 15 year olds said they felt "abnormal" if they had not engaged in sex by 15 years, this included boys and girls, and felt pressure to become involved even when not wanting to. There is no doubt, we are dealing with a social problem that has many implications. There are many in society ready to exploit economically, the weak and the young, and rationalize doing so. I cannot say this is true of King Broadcasting, or that the "Playboy" station is obscene, because I don't know.

My concerns are not to suggest limiting anyone's freedom, or suggest that The City Council legislate morality, although most of our laws have a moral foundation, but my concerns are to suggest that freedom under the First Amendment includes everyone. I have a right to say, as do others in our community that we want some restrictions on the use of our public airways, and some kinds of publically stated restrictions placed upon children viewing obscene or "sexually explicit material."

The Lodi Public Library has a policy that restricts children from checking out adult fiction. T.V. is much more powerfully graphic, and, also, interprets for us. Books have an inherent restrictive condition, which is readership is dependent upon vocabulary and comprehension.

I suggest that The City Council find a way, within the framework of the law to make an unmistakable resolution regarding this issue that will restrict, or limit more programming in Lodi, of the nature of the "Playboy" type, or make it more difficult for children to see.

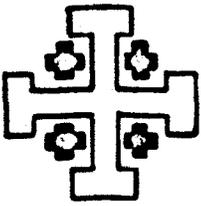
Thank you for listening.

Very truly yours,

Elizabeth A. Turvey

Pastor John Cockran
Bob Mattheis
January 17, 1983

701 S. Pleasant Avenue - Lodi, CA 95240 - (209) 368-2747



Dear Randy:

I would like to share my thoughts with you regarding the availability of the Playboy Channel in Lodi through Lodi Cable T.V.

Although I have not viewed the material proposed for broadcast, I understand that it is primarily concerned with graphic depictions of human sexual relations. I personally believe that sustained viewing of such material by adults as well as children is destructive to the emotional, mental and spiritual well being of such viewers. Should anyone seek my guidance regarding the decision to make such programming available in their home I would speak against it. I do not believe that a responsible, mature christian would make a decision to have this programming in their home.

I do, however, oppose any action by the Lodi City Council which would place restraints on what kinds of material are viewed by what persons in the privacy of an individuals home. Not only is such an ordinance unenforceable, it takes responsibility away from parents and citizens and places it with the City Council. There are other means by which concerned citizens can act to express their dislike for the presence of the Playboy Channel in Lodi.

There is abundant evidence that violence in T.V. programming (freely available over Channels 3, 10, 13,40) is also extremely harmful to children who have a heavy exposure to T.V. Programming. I personally believe that the outrageous morality depicted on "Soaps" is also destructive. We will not solve the morality problem by placing lock boxes on the Playboy Channel. We will begin to make a difference if we dare to face our own addiction to T.V. and move past it to selective T.V. viewing. Should we, as concerned citizens and/or committed christians strongly oppose the Playboy Channel, we can cancel our subscription to cable T.V. until such time as it is no longer offered here.

Surely we can live without cable! We do not need legislative action to make us do what we feel should be done. In this case, power does not reside in law, but in the convictions of the people of Lodi. Lets not make someone else be the "bad guy." It's our responsibility and we have the power entirely apart from the legislative process. It's called "subscription power." No one would be emotionally, spiritually, or mentally harmed if cable was removed from their homes or from the Lodi market. In fact, I strongly suspect that the quality of our life would improve if we chose to watch less T.V. Now, let's stop giving Lodi Cable T.V. and Playboy Channel free publicity and be about the business of being responsible citizens.

Thanks for listening. Feel free to share any of my views if you should care to do so.

Sincerely,

Pastor Robert Mattheis

RM/mh