IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROBERT EUGENE CRAIN, et al., Plaintiffs, VS. CITY OF MEMPHIS, et al., Defendants.	)	NO. 90-2292-TUBRO
AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, et al., Plaintiffs, VS. RICHARD C. HACKETT, et al., Defendants.	)	NO. 90-2315-TUBRO

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Crain and American Civil Liberties Union of Tennessee ("ACLUT")[1] filed this action pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Memphis City Ordinance No. 3957 ("Ordinance") which restricts a minor from attending certain live performances conducted within the City of Memphis, Tennessee.

[1] ACLUT filed this action with Larry McDaniel, an adult resident of Memphis, Tennessee, who is the father of three minor children. By order of this court dated August 27, 1990, ACLUT was voluntarily dismissed from this action for lack of standing, while Larry McDaniel remained a party. Therefore, any references to the ACLUT plaintiffs should be interpreted as referring only to Larry McDaniel.

Plaintiffs allege that the Ordinance violates both the United States and Tennessee Constitutions. Defendants City of Memphis and its mayor contend that the Ordinance is a constitutional exercise of the government's right to protect juveniles from harmful influences. Presently before the court are cross-motions of the parties for summary judgment.

I. Facts

On April 10, 1990, the Memphis City Council convened to discuss for the third and final time the passage of the challenged Ordinance. During this meeting Dr. Leon Lebovitz, a psychologist with thirty-five years of professional experience, stated that in his opinion descriptions or representations of sexual conduct and/or excess violence, when presented in the wrong context, are harmful to minors. Following additional commentary from various council members and the Memphis city attorney, the challenged Ordinance was passed by the Memphis City Council pursuant to an eight to three vote. The Ordinance became effective on April 19, 1990, when it was signed into law by the Mayor of the City of Memphis.

The challenged Ordinance prohibits a promoter, performer, producer or director from allowing a minor to be present during a live performance that is harmful to minors within the definition of the Ordinance. Ordinance at § 20-126 (1990). The Ordinance also proscribes a parent or legal guardian from allowing their minor(s)

to attend such a live performance.[2] Id. at § 20-127. Further, it is unlawful under the Ordinance for minors to either attempt to or actually purchase a ticket to such a performance, or attempt to or actually attend such a performance. Id. at § 20-128. The Ordinance provides that juvenile violators will be "taken before the Juvenile Court for appropriate disposition." Id. at § 20-128(c).

Contending that the Ordinance violates the First and Fourteenth Amendments to the United States Constitution, the Crain plaintiffs filed the current action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief. The ACLUT plaintiffs filed a separate section 1983 action challenging the Ordinance on similar grounds.[3] Both actions were subsequently consolidated by this court.

Plaintiffs contend that the Ordinance is constitutionally deficient for many reasons. The court, however, will limit its analysis to addressing the following arguments: the Ordinance is constitutionally overbroad because it proscribes both protected and unprotected speech; the Ordinance is void for vagueness; and the

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[2] Under the Ordinance adult violators will be subjected to a fifty dollar ($50) fine.

[3] The ACLUT plaintiffs additionally contend that the challenged Ordinance violates Article I, sections 1, 3, and 19 of the Tennessee Constitution. However, since the plaintiffs do not argue that the Tennessee Constitution grants Tennessee citizens greater freedoms of speech than those contained within the First Amendment to the United States Constitution, this court declines to address the Tennessee constitutional issue. See generally Leech v. American Booksellers Ass'n, Inc., 582 S.W.2d 738, 745 (Tenn. 1979).

Ordinance interferes with constitutionally protected parental rights. The Crain plaintiffs also contend that the Ordinance conflicts with Tennessee Code Annotated § 39-17-911 which makes it unlawful for any person to sell or loan defined materials to a minor, but provides for an affirmative defense to prosecution if the minor at the time of sale or loan was accompanied by a specified adult. See Tenn. Code Ann. § 39-17-911 (1990).

Conversely, the defendants contend that the Ordinance is constitutionally sound because the state has a compelling interest in safeguarding the physical and psychological well-being of its resident youth and the Ordinance is narrowly tailored to achieve that end. The defendants further argue that the right of parents "to raise children as they see fit" is not absolute.

Thus, presented to this court is an issue which requires the consideration of three firmly recognized and competing interests: the First Amendment freedom of speech; a state's right to protect its youth; and parents' rights to supervise the upbringing of their minor children.

II. Standard for Summary Judgment

Upon a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); accord Matsushita Electric Industrial Co., Ltd v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When considering cross-motions for summary judgment, the court addresses "each party's

motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broadcasting Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991) (quoting Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987)). Moreover, the fact that both parties have submitted motions for summary judgment does not require the court to find that no issue of material fact exists. Id. (citing Begnaud v. White, 170 F.2d 323, 327 (6th Cir. 1948)). However, because the matter before the court involves a challenge to the legality of a city ordinance itself, it is particularly well suited to summary judgment.

III. The First Amendment Freedom of Speech

The First Amendment to the United States Constitution, as applicable to the states through the Fourteenth Amendment, states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It is well settled that this freedom is a fundamental personal right which is protected from both state and federal abridgment. Chaplinsky v. New Hampshire, 315 U.S. 568, 570-571 (1942). Underlying this constitutional principle is the notion that freedom of speech promotes democracy through an open "marketplace" of competing ideas, thereby encouraging the advancement of truth, science, morality and the arts. See Roth v. United States, 354 U.S. 476, 484 (1957); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J. dissenting); see also 3 R. Rotunda, J. Nowak, J. Young, Treatise on Constitutional Law, § 20.6 (1986).

Artistic expression and entertainment are included within the rubric of First Amendment protections.[4] Winters v. New York, 333 U.S. 507, 510 (1948); Schad v. Mt. Ephraim, 452 U.S. 61, 65 (1981). Thus, motion pictures, Times Film Corp. v. City of Chicago, 365 U.S. 43, 46 (1961), theatrical performances, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975), dance, Schad, 452 U.S. at 65; and music, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989), are protected forms of expression.

However, the First Amendment's protection of freedom of speech is not absolute. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-50 (1961); Chaplinsky, 315 U.S. at 571. The Supreme Court has identified six areas of speech that fall outside the scope of the First Amendment. These six areas include: communications which incite imminent violence, Hess v. Indiana, 414 U.S. 105, 108 (1973); "fighting words," defined as words which have a direct tendency to cause acts of violence by the person to whom the remark is addressed, Gooding v. Wilson, 405 U.S. 518, 524 (1972); libelous utterances, Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952),

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[4] There is a distinction between government regulation of protected speech on the basis of its content and government regulation that is content neutral. Content based regulations, in which the government seeks to regulate the protected speech upon the basis of its message, are analyzed according to First Amendment principles. See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 112 S. Ct. 501 (1991). In contrast, content neutral regulations, also referred to as time, place or manner restrictions, are subjected to a less rigorous standard. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450-51 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). Because the challenged Ordinance regulates protected speech on the basis of its content, it must conform to the constitutional requirements of the First Amendment.

as restricted by New York v. Sullivan, 376 U.S. 254 (1964); untruthful commercial advertising, Central Hudson Gas v. Public Service Comm'n., 447 U.S. 557, 563 (1980); materials containing child pornography, Osborne v. Ohio, 495 U.S. 103 (1990); and obscenity as defined by Miller v. California, 413 U.S. 15, 24 (1973). The rationale for depriving such communications of First Amendment protection is that "[these ideas] 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." Chaplinsky, 315 U.S. at 572.

Therefore, speech that falls within one of these clearly delineated exceptions is subject to government regulation. Id. Conversely, if a particular communication lies outside a defined exception, the expression is presumptively protected against government interference. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986). Obscenity, because it is an enumerated exception, can be regulated by legislation. Further, the state has even greater power to monitor the dissemination of materials deemed obscene for minors even if such materials would not be obscene for adults. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

IV. The Ordinance

A. The Excess Violence Provision

The Ordinance defines excess violence as:

> [T]he depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is violence for the sake of violence.

This provision clearly does not fall within the obscenity exception to the First Amendment since it does not contain any language targeting sexually explicit materials. See Erznoznik, 422 U.S. at 214 n.10 ("[T]o be obscene '[even for minors] such expression must be, in some significant way, erotic.'") (quoting Cohen v. California, 403 U.S. 15, 20 (1971)). Thus, depiction of violence in an artistic context, unlike obscenity, is speech protected by the First Amendment. Hudnut v. American Booksellers Ass'n, Inc., 771 F.2d 323, 330 (7th Cir. 1985). It follows therefore that any regulation proscribing its dissemination must be narrowly tailored to achieve a compelling state interest. The court finds that although the government's compelling interest in protecting its minor citizens from detrimental influences is clear, the Ordinance's excess violence provision is not narrowly tailored to achieve that end.

The void for vagueness doctrine prohibits the government from enacting laws that do not clearly define the conduct proscribed by the particular statute. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Statutes that regulate activity and speech within the scope of the First Amendment must contain even greater specificity than laws that seek to regulate conduct in other contexts. Buckley v. Valeo, 424 U.S. 1 (1976); Smith v. Goguen, 415 U.S. 566, 573 (1974). The test for determining whether or not a statute is actually vague is whether "men of common intelligence must necessarily guess at its meaning." Borderick v. Oklahoma, 413 U.S. 601, 607 (1973). Additionally, the language of the statute must

not "encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352 (1983). Defining "excess violence" as when the "predominant appeal of the material is portrayal of violence for the sake of violence" is circular and does not lend itself to clear and consistent interpretation.[5] Further, it could force persons of ordinary intelligence to guess at its meaning, as well as encourage discriminatory enforcement. Therefore, the court finds that the excess violence provision of the Ordinance is unconstitutionally vague.

B. The "Harmful to Minors" Provision

The second provision at issue in the Ordinance is entitled "Harmful to minors" and provides:[6]

> (2) "Harmful to minors" means that the quality of any description or representation, in whatever form, during a live performance, of nudity, sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse when it:

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[5] In 1976, a federal court in this same district held that an "excess violence" provision in a Memphis city ordinance, containing the exact same language as at issue here, was unconstitutionally vague. Allied Artists Pictures Corp. v. S. Alford, 410 F. Supp 1348 (W.D. Tenn. 1976). In striking the excess violence provision of the ordinance prohibiting dissemination of obscene materials to minors, the court concluded that the definition of excess violence required an "excessively subjective judgment as to what might be deemed 'obscene to juveniles.'" Id. at 1357.

In November 1993, the Supreme Court of Tennessee also found that a similar definition of excess violence was unconstitutionally vague. Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993).

[6] The court undertakes the consideration of this provision even after invalidating the excess violence provision because of the severability clause contained in the Ordinance. See Ordinance at § 2. The severability clause enables the court to sever the excess violence portion of the Ordinance leaving for consideration the balance of the Ordinance. The severability clause is discussed in greater detail in Part C. of this analysis.

(A) Predominantly appeals to the prurient, shameful or morbid interest of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(C) Is utterly without redeeming social importance for minors; . . . .

Ordinance § 20-125(2).

Plaintiffs contend that this provision is unconstitutionally overbroad. Overbreadth results when lawmakers define the scope of a statute to include both protected and unprotected speech. American Booksellers v. Webb, 919 F.2d 1493, 1582 (11th Cir. 1990). Because obscenity is not protected speech under the First Amendment, at issue is whether or not this Ordinance exceeds a prohibition on obscene speech and also proscribes protected speech. In contending that the Ordinance is constitutional, defendants rely on the proposition set forth in Ginsberg v. New York, 390 U.S. 629 (1968), and its progeny, that the government has significantly more power to regulate communications directed toward juveniles than adults. Thus, the pivotal question confronting the court is whether the subject Ordinance falls within the constitutional limits of the city's increased power to regulate materials considered obscene for juveniles. To properly determine whether the Ordinance can survive such constitutional scrutiny, a review of Supreme Court obscenity jurisprudence is necessary.

In Roth v. United States, 354 U.S. 476 (1957), the Supreme Court removed obscenity from the categories of speech protected by the First Amendment. Id. at 485. In so doing, the Court was faced

with the obvious task of defining obscenity, and in Roth the Court began to construct the legal framework for such a definition. Id. at 487. Most notably, the Roth Court construed obscenity to be "material which deals with sex in a manner appealing to prurient interest." Roth, 354 U.S. at 487. "Appeal to the prurient interest" continues to function as the hallmark of obscenity law and as one of its most critical defining characteristics. Miller v. California, 413 U.S. 15, 21 (1973).

Seven years later, in Memoirs v. Massachusetts, 383 U.S. 413 (1965), the Supreme Court adopted and then refined the obscenity standard developed in Roth. The Memoirs definition stated in relevant part:

> (a) [T]he dominant theme of the material taken as a whole appeals to a prurient interest in sex;
> (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Memoirs, 383 U.S. at 418. (citations omitted).

The Memoirs test operated as the legal definition of obscenity until 1973 when the Supreme Court altered the Memoirs formulation in Miller, 413 U.S. at 24.

However, in 1968, before the Supreme Court decided Miller, it decided Ginsberg, a case that dealt specifically with a state's power to regulate the dissemination of speech deemed harmful to minors. The legislation at issue in Ginsberg was a New York state statute that criminalized "the selling of girlie magazines to a minor under the age of seventeen" containing material deemed harmful to minors. Id. at 633. The definition of "harmful to

minors" was an adaptation of the prevailing obscenity definition which at that time was the Memoirs formulation. The New York statute borrowed the basic Memoirs framework and inserted the term "minors" to achieve a subjective obscenity standard.

The Ginsberg Court affirmed the constitutionality of the New York obscenity statute for minors by reasoning that the statute at issue "simply adjust[ed] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . ' of such minors." Id. at 638. (citations omitted). Thus, the overriding legal principle set forth in Ginsberg was that the "concept of obscenity may vary according to the group [i.e., minors] to whom the questionable material is directed . . . ." Id. at 636. This subjective approach has been labeled the variable obscenity approach for minors, and remains the law in this country.

Five years after Ginsberg, in Miller the Supreme Court repudiated the Memoirs conceptualization of obscenity for adults by making several significant modifications to that definition. The Miller Court revised Memoirs and established the following tripartite test:

> (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.

Miller, 413 U.S. at 24. (emphasis added). The most significant

difference between Memoirs and Miller to the instant analysis is the substitution of the phrase "utterly without redeeming social value" in the third prong of the test with "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The Miller Court provided several reasons for its reconceptualization of the third prong of the Roth/Memoirs test. First, the Miller Court concluded that proving a negative, that the work was "utterly without redeeming social value," was a "burden virtually impossible to discharge under the criminal standards of proof." Id. at 22. Deleting the "utterly" phrase operated to broaden the scope of obscenity and reduce the government's burden of proof in those cases. Because governments are free to narrow the scope of their obscenity definitions to protect more speech than is covered by the Federal Constitution, states can preserve the "utterly" language of Memoirs in their obscenity statutes.

Conversely, however, the court found that the notion of "social importance" was ambiguous and should be "rejected as a constitutional standard." Id. at 25 n.7. Social importance is therefore no longer an acceptable component of any obscenity definition. See Rushia v. Town of Ashburnham, 582 F. Supp. 900, 904 (D. Ma. 1983) (finding unconstitutional a bylaw aimed at proscribing "obscene" materials to minors which "prohibit access to a broad range of sexually explicit materials which may have some serious educational, artistic, or scientific value for minors."). That rejection of "social importance" as a constitutionally viable

concept is critical to this analysis because the Ordinance at issue adopts the term "social importance" and charges the court with affirming its constitutionality.

Further, the inclusion of the phrase "as a whole" in the third prong demonstrates that the Miller Court believed that no artistic work should be banned entirely simply because small portions of the speech qualified as obscenity.[7] Thus, although the Ordinance's use of the term "utterly" does not raise constitutional problems, the use of the term "social importance" (instead of "literary, artistic, and scientific value") and the rejection of the requirement that the work be "taken as a whole" do present insurmountable constitutional barriers to the legality of the Ordinance.[8]

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[7] In the years following Miller several courts have affirmed the significance of examining the "work as a whole" as a constitutional prerequisite. See Erznoznik 422 U.S. at 212 n.7; Hudnut, 771 F.2d at 324 (To be obscene under Miller, "publication must on the whole have no serious literary, artistic, political, or scientific value."). (emphasis added).

[8] In American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990), the court construes the Miller adjustment of the third prong of the Memoirs test as only a broadening of the obscenity definition. Id. at 1503 n.18 ("In other words Miller relaxed the third prong of the obscenity test."). (emphasis added). Therefore, the Webb court infers that maintaining the third prong of the Ginsberg definition only makes it more difficult for the government to prove obscenity and is therefore constitutional. The Webb court bases its conclusion on the Miller Court's statement that the prosecution is no longer required to satisfy the onerous burden of proving "utter" lack of social importance. Id.

Although the court today agrees that the rejection of the word "utter" does indicate the Miller Court's attempt to broaden that portion of the test, such an analysis ignores the other changes involved in the restructuring of the third prong. The third prong also narrowed the Memoirs test by allowing a showing of literary, artistic, political or scientific value, instead of merely "social importance," to salvage the work from being defined as legally

The power of the states to "adopt more stringent controls on communicative materials available to youths than on those available to adults" was once again affirmed in Erznoznik, 422 U.S. at 212. However, the Court clarified its position on this issue by holding that in the area of obscenity the state is limited to proscribing only materials that are "obscene" as to minors. Id. at 213. Therefore, Erznoznik raises the most significant question presently before the court: whether or not Miller requires the adoption of its obscenity standard in cases involving regulation of speech directed toward minors. The Erznoznik Court acknowledged that it had "not [yet] had occasion to decide what effect Miller will have on the Ginsberg formulation."[9]

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obscene. The inclusion of the phrase "as a whole" is another indication of the Miller Court's attempt to narrow certain portions of the third prong. See generally, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) ("Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, . . . and for obscenity . . . ."). (emphasis added).

[9]It is interesting to note, however, that in 1974 the New York legislature, in response to Miller, rewrote the statute ruled constitutional in Ginsberg that was based on the Memoirs definition. N.Y Penal Law § 235.20 (McKinney 1994). The "Harmful to Minors" provision of the statute now reads:

> 6. Harmful to Minors means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
>
> (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

In synthesizing the reasoning of the Ginsberg, Miller, and Erznoznik Courts, the court today finds that in order to write a constitutional obscenity Ordinance for minors one would borrow the Miller framework, because Miller represents the present day legal definition of obscenity, and supplement it with the Ginsberg reasoning by creating a subjective standard to apply to minors. See American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50, 56 (N.D. Ga. 1981) (Miller must be applied even to statute regulating minors). Although the government has greater leeway in legislating material aimed at minors, the government is still limited to restricting only what is obscene as to minors. Erznoznik, 422 U.S. at 213. Thus, in order to be constitutional the subject Ordinance must conform to the definition of obscenity as set out in Miller. American Booksellers Ass'n, Inc. v. Comm. of Va., 882 F.2d 125 (4th Cir. 1989) (upholding a Virginia statute that interpreted the definition of harmful to juveniles in accordance with the legal definition of obscenity set out in Miller). As written, the Ordinance does not so conform.

More specifically, the Ordinance's third prong is unconstitutional because it adopts the Memoirs definition of obscenity that was overruled by Miller.[10] See McAuliffe, 533 F.

Id. at § 235.20(6).

Thus, the New York legislature abandoned the Memoirs framework and adopted the Miller language, while preserving the subjective standard for minors.

[10] The court notes that there may also be a problem with the Ordinance's first prong. The Miller Court also rejected the Memoirs language referring to "shameful or morbid interest[s]" that

Supp at 57 n.9 ("The third prong of the Ginsberg test may have to be reformulated in light of Miller). The court today reads Miller v. California as altering the framework of the obscenity test developed in Memoirs while simultaneously affirming the constitutionality of a subjective obscenity standard for minors.[11] Therefore, the Ordinance's failure to incorporate the Miller standards as applied to minors results in the prohibiting of material that is not obscene for minors, and is thus constitutionally overbroad. See Leech v. American Booksellers Ass'n, 582 S.W.2d 738, 745 (Tenn. 1979) (". . . [A]ny definition that is at variance with, or in any way expands, the meaning of obscene material, as it 'has been written into the Constitution' by the Supreme Court [i.e. Miller] is constitutionally unpermissible."). (citations omitted). Because the court finds

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was adopted by the first prong of the challenged Ordinance. The current legal definition of obscenity rests on the notion that the material in question must have a predominantly erotic appeal. Cohen v. California, 403 U.S. 15, 20 (1971). Thus, it is doubtful that a definition that incorporates terms such as "shameful" and "morbid" is still constitutional.

[11]The defendants contend that the "[Supreme] Court rather succinctly disposed of" the Miller standards in New York v. Ferber, 458 U.S. 747 (1982) by stating:

> We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem.

Id. at 761. The court finds that although Ferber may have abandoned Miller in the context of child pornography, Miller remains good law in the area of obscenity. See id. at 764. Commercially distributing a film portraying young children engaged in sexual activity is vastly different from preventing children from attending live performances that contain lyrics deemed obscene for children. Therefore, the defendants' reliance on Ferber is misguided.

that the "Harmful to minors" provision is unconstitutionally overbroad, the entire Ordinance must be held unconstitutional.

C. Severability Clause

The Ordinance does contain a severability clause which provides that "[i]f any of these sections, provisions, sentences, clauses, phrases or parts is held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect." Ordinance at § 2. This legal principle of severability stems from the doctrine of elision, and is well established in Tennessee law. Mayor v. Aldermen v. Wilson, 367 S.W.2d 772 (Tenn. 1963). A federal court should follow this doctrine when deciding the constitutionality of Tennessee state or municipal legislation. Moore v. Fowinkle, 512 F.2d 629 (6th Cir. 1975). Therefore, the court recognizes that if it were to hold certain provisions of the Ordinance invalid, but others valid, the court would be required to sever those valid provisions from the invalid ones and uphold the statute. Brown v. Alexander, 516 F. Supp. 607, 620 (M.D. Tenn. 1981). However, the court believes that the "Harmful to minors" provision operates as the crux of the challenged Ordinance and that it would therefore be impossible for it to sever that portion and still salvage the Ordinance.

Additionally, although the court may sever the unconstitutional portions of the Ordinance, a federal court does not have the power to narrowly construe or rewrite a state statute or municipal ordinance. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972); American Booksellers Ass'n v. Schiff, 649 F. Supp 1009

(D.N.M. 1986) (Federal Court without power to conform state obscenity statute to Miller requirements). That power is reserved to the Tennessee Supreme Court and the state and municipal legislative bodies. Therefore, it is possible that portions of the Ordinance might be constitutional if it were rewritten to satisfy Miller,[12] however, it is not within the power of this court to achieve such a result.

D. Interference with Parental Rights

The plaintiffs also argue that the Ordinance may interfere with the rights of parents to raise their children as they see fit. It is well established by the laws of this country that parents are the primary decision makers in the upbringing of their children. Wisconsin v. Yonder, 406 U.S. 205, 232 (1972). In Prince v. Comm. of Massachusetts, 321 U.S. 158 (1944), the Supreme Court emphasized the importance of preserving parental freedom to make decisions for their minor children by stating that:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom includes preparation for obligations the state can neither supply nor hinder.

Prince, 321 U.S. at 166 (1944). (citations omitted). More specifically, in F.C.C. Communications v. Pacifica Found., 438 U.S. 726, 758 (1978), the Court applied that principle to the state's regulation of indecent speech directed toward minors. See id.

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[12] Although the court believes that the Miller framework adjusted to prohibit material obscene for children but not adults is constitutional, other problems with the Ordinance do exist. One such additional area of concern is addressed briefly in Part D. of this analysis.

("[S]ociety may prevent the general dissemination of such [indecent] speech to children, leaving to parents the decision as to what speech of this kind their children shall hear."). Even the Ginsberg court specifically notes that under the New York statute challenged parents who wished to purchase the proscribed materials for their children could do so themselves.[13] 390 U.S. at 639.

Similarly, the State of Tennessee recognizes parental choice in selecting materials suitable for children's entertainment, as reflected in section 39-17-911 of the Tennessee Code Annotated. Tenn. Code Ann. § 39-17-911 (Supp. 1990) (unlawful for any person to sell or loan certain materials to a minor while providing for an affirmative defense if child was accompanied by a specified adult). The challenged Ordinance precludes minors from attending prohibited live performances even when they are accompanied by a parent. Further, by subjecting parents to civil penalties for providing their children with "harmful" materials, the Ordinance removes parental discretion in determining whether such entertainment is suitable for their children. However, this issue deserves substantially more consideration which is unnecessary in light of the court's ruling herein with respect to the unconstitutionality of the Ordinance.

V. Conclusion

For the reasons stated above, Memphis City Ordinance No. 3957

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[13] Interestingly, the Ginsberg Court notes that the parental interest in raising children is compelling. 390 U.S. at 639-40.

is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Therefore, the plaintiffs are entitled to judgment as a matter of law. Accordingly, the plaintiffs' motions for summary judgment are granted and the defendants' motions for summary judgment are denied.

IT IS SO ORDERED this 21st day of October, 1994.

JEROME TURNER
UNITED STATES DISTRICT JUDGE

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