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Noreen M. Evans

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18. Franko v. State, 94 Nev. Adv. Op. 171, 584 P.2d 678, 680 (1978); Morrell v. State, 93 Nev. 449, 451 567 P.2d 60, 61 (1977).

19. 91 Nev. at 762, 542 P.2d at 1400.

20. Id.

21. 94 Nev. Adv. Op. 101, 581 P.2d 842 (1978).

22. Id., 581 P.2d at 848.

CRIMINAL LAW; OBSCENITY

Adds to NRS Chapter 201
Amends NRS 201.250
AB 143 (Stewart); STATS 1979, Ch 267

Chapter 267 amends and restructures Nevada's law on obscenity by amending NRS 201.250 and adding several new sections to NRS Chapter 201.

Standards of Obscenity

In response to the United States Supreme Court's decision in Miller v. California,[1] NRS 201.250 has been amended.[2] Prior law[3] applied the tests created in Roth v. U.S.[4] and Memoirs v. Massachusetts.[5] Chapter 267 discards the Roth-Memoirs tests and incorporates the Miller standards.[6] Now obscenity is defined as that which, taken as a whole, appeals to prurient interests and lacks serious literary, artistic, political, or scientific value.[7] This standard is measured by the average person applying contemporary community standards.[8]

Chapter 267 further incorporates the examples of obscenity suggested in Miller[9] and in Ward v. Illinois.[10] Material is obscene if it lewdly exhibits the genitals[11] or depicts in a patently offensive way a) ultimate sexual acts;[12] b) masturbation or excretory functions;[13] or c) sadism or masochism.[14]

Procedure

Chapter 267 adds several provisions to NRS Chapter 201. Those new sections provide both civil and criminal procedures for the prosecution of obscenity.

Civil

Chapter 267 provides that a district attorney or city attorney may file a complaint in the district court, seeking to have materials declared obscene and to enjoin their sale, manufacture, distribution, and possession, except for personal use.[15] Ordinarily when an injunction is sought, the plaintiff must file security for costs and damages which may be caused by wrongful restraint.[16] In an action to enjoin the sale or distribution of obscenity, however, such an undertaking need not be filed.[17] Furthermore, threat of irreparable injury need not be shown before a preliminary injunction is issued.[18] Previously, NRS 201.250 provided that the person sought to be enjoined was entitled to a trial within ten days of injunction and a decision within ten days of trial. Chapter 267 deletes this requirement without substitution.[19] If the material is found to be obscene, the final judgment shall order the material surrendered to the sheriff who is to destroy it.[20] The sheriff is not liable for damages if judgment is ultimately rendered in favor of the enjoined party.[21] After the judgment, if the defendant sells the obscene material, or a substantially identical item, the value of the consideration received must be paid to the prosecuting city or county.[22]

Criminal

Chapter 267 provides that a person is guilty of a misdemeanor who knowingly a) produces obscene material for commercial distribution; b) publishes, sells, rents, or transports obscene material in intrastate commerce; c) distributes or offers to commercially distribute obscene material; or d) possesses obscene material with intent to commercially distribute.[23] The defendant is charged with knowledge of the contents of the material after being served with the summons and complaint in an action to declare the material obscene.[24]

Additionally, anyone who requires a purchaser to accept obscene materials as a condition to the purchase of other materials is guilty of a misdemeanor. In such a case, it is also a misdemeanor to threaten a penalty for refusual to accept obscene materials.[25] Chapter 267 does not provide a penalty for conviction.[26] Therefore, NRS 193.150 would probably apply: anyone convicted of violating the provisions of Chapter 267 could be punished by imprisonment for up to six months or a fine of up to $500 or both.

In an action to declare material obscene, the circumstances of its production and distribution may be considered. Evidence that the material was commercially exploited for its prurient appeal (pandering) is probative of its obscene character

and can justify a conclusion that the material is without serious literary, artistic, political, or scientific value.[27]

Regulation

Counties, cities, and towns are free to adopt ordinances regulating obscenity so long as they are not in conflict with Chapter 267.[28]

Chapter 267 exempts certain organizations from its provisions. NRS 201.250 through NRS 201.254 and Chapter 267 sections 3 through 9 do not apply to state universities, schools, museums and libraries, state political subdivisions, and employees of these organizations.[29]

Comment

The Supreme Court has held that obscenity is not within the area of constitutionally protected speech or press.[30] Additionally, freedom of speech is not an absolute right[31] and certain forms, specifically obscenity, may be regulated by the state.[32] Nevada has historically, through NRS 201.250 and similar laws, regulated obscenity within its borders.[33] The purpose of this Comment is to describe the case law from which Nevada's present obscenity law is derived, how Chapter 267 conforms to that case law, and how it differs.

Obscenity Standards

Chapter 267 adopts the definition of obscenity formulated in Miller.[34] However, many problems remain unresolved in applying the Miller standard. Chief among the issues not yet fully resolved in the problem of defining "community." As explained in Hamling v. U.S.,[35] Miller rejected a nationwide standard for defining obscenity.[36] For basically the same reasons that a nationwide standard is not required, neither is a statewide standard.[37] The problem lies in determining the size and composition of "community." Nevada defines "community" as the area from which a jury would be selected for the court in which the action is tried.[38] Once the community is defined, the jurors must determine its standards. Smith v. U.S.[39] defined "community standard" as the measure against which the jury determines appeal to prurient interests and patent offensiveness.[40] The jurors must draw upon their own knowledge of the views of the average person in the community.[41]

In addition to the problem of defining community standards, there is a question as to whose standards within the community are to be applied. Chapter 267 states that prurient appeal is to be measured against ordinary adults, unless the material appears to be designed for a clearly defined group.[42] The court in Mishkin v. N.Y.,[43] although applying the Roth[44] test prior to Miller,[45] held that prurient appeal may be measured against members of the deviant group to which the material is directed.[46] The reference to the "average" person in Roth did not prevent this holding.[47] Chapter 267 appears to be following this line of reasoning.[48]

Additionally, Chapter 267 allows prurient appeal to be measured against standards for children.[49] However, NRS 201.265 prohibits the sale or exhibit of materials which are harmful to minors in such a manner that a child could view the materials. "Harnful to minors" is defined as materials which appeal to the prurient interest of minors, are patently offensive to community adult standards of what is suitable for minors, and are utterly without redeeming social importance for minors (NRS 201.257). Chapter 267 does not amend these sections. This creates a variable standard of obscenity: one for adults and one for minors. As a result, materials not obscene for adults might be found "harmful to minors" and could therefore be restricted.[50]

A New York statute similar to NRS 201.265 was upheld in Ginzburg v. New York.[51] The court held that the well-being of children was within the State's constitutional power to regulate,[52] and that the term "harmful to minors" is not unconstitutionally vague.[53] Nevada's variable standard, then, appears proper.[54]

These remains, however, a discrepancy between NRS 201.250 and NRS 201.257. NRS 201.250 requires the obscene character of an item to be determined by the Miller standard as applied to children.[55] NRS 201.257, however, does not conform to the Miller standard: it contains the utterly without redeeming social importance test of Memoirs v. Massachusetts[56] which was expressly rejected in Miller,[57] and applies this test to an expanded realm of sexual conduct.[58] The questions are whether the Miller standard wil be applied in NRS 201.265 regulating material which is harmful to minors, and if so, whether potential violators will have sufficient notice of the proscribed conduct.[59]

Chapter 267 further expands upon the Miller standards by incorporating sado-masochism in its definition of obscenity.[60] Miller did not include sado-masochism in its examples of obscenity.[61] However, in a later case the court held that sado-masochistic materials are not protected by the First Amendment solely because they were not included in the Miller example.[62] Evidently, then, the Miller

examples are not exclusive. The question remains as to whether Chapter 267 as worded applies only to the materials specified in Section 10.

Prior Restraint

Although obscenity is not protected speech, as established by Roth v. U.S.,[63] speech is protected until it is determined to be obscene. Chapter 267 allows a prelimnary injunction to be issued before trial of the issue of obscenity.[64] The question arises as to whether this is an invalid prior restraint. Because prior restraint freezes speech,[65] any system of prior restraints carries a heavy burden against its constitutional validity.[66] In Freedman v. Maryland[67] the Court established some guidelines to prevent censorship of protected speech: a) restraint must be limited to preserving the status quo and for the shortest period compatible with sound judicial procedure;[68] b) prompt final judicial determination must be assured;[69] c) adequate safeguards against undue inhibition of protected expresssion must be provided.[70] Previous law in Nevada required a trial within ten days of injunction and a decision within ten days of the trial.[71] This requirement has been deleted by Chapter 267; there is no longer a requirement that the issue be brought to trial within a certain time. It apepars that Nevada has created a system of prior restraint without incorporating the safeguards suggested in Freedman v. Maryland.[72]

Pandering

Chapter 267 allows evidence of the circumstances of the sale of publicity of an item to be considered in determining its obscene character. Evidence that it is being commercially exploited for its prurient appeal is probative of obscenity. Furthermore, this evidence can justify the conclusion that the item is without serious literary, artistic, political, or scientific value.[73] In Memoirs v. Massachusetts,[74] the court held that evidence of commerical exploitation of a book's prurient appeal could justify the conclusion that it was utterly without redeeming social importance.[75] Nevada adopts this holding, substituting the "without serious value" test of Miller.[76] Splawn v. California[77] also held that pandering to prurient interest is relevant to determining the obscene character of an item.[78] In Splawn the court upheld instructions directing the jury to consider the circumstances of sale in making its decision. The wording of these instructions is substantially the same as that of Chapter 267, section 6.[79]

A word of caution, however: The Memoirs court suggested that all possible uses of the publication must be considered.[80] Although evidence of pandering may be determinative of obscenity, "where the purveyor's sole emphasis is on the sexually provocative aspects" of the publication,[81] it cannot change the fact that the publication may be of redeeming social importance "in the hands of those who publish or distribute it on the basis of that value."[82]

Scienter

Chapter 267 provides that the production, exhibit, or sale of obscenity is a misdemeanor.[83] In order to be convicted, the defendant must have knowingly performed these acts.[84] In Smith v. California,[85] the Court struck down a statute creating absolute liability for possession of obscene materials for sale. While holding that a statute must require an element of scienter for conviction, the Court declined to define the type of scienter required.[86] Other cases have held, however, that the defendant need only have had notice of the contents and character of the materials.[87] This could mean as little as mere "awareness."[88] Scienter does not depend upon the defendant's opinion or belief regarding the character of the materials.[89] Additionally, Chapter] 67 provides that the defendant is charged with knowledge of the contents of an item after service of summons and complaint in an action to declare the item obscent.[90] A similar statute in New York was upheld in Kingsley Books, Inc. v. Brown.[91]

Noreen M. Evans

FOOTNOTES

1. 413.U.S. 15 (1973).
2. 1979 Nev. Stats. ch. 267 (hereinafter "Ch. 267") §10.
3. Compare 1971 Nev. Stats. ch. 227 §1, at 493 (NRS 201.250) with Ch. 267 §10 (amending NRS 201.250). See Dunlap, Deep Thought: Last Tangle in Obscenity, 39 INTER ALIA (No. 3) 5 (1974).
4. 354 U.S. 476 (1957).
5. 383 U.S. 413 (1966).
6. Ch. 267 §10 (amending NRS 201.250).

7. Id. §10 (amending NRS 201.250(4)).

8. Id. §10 (amending NRS 201.250(1), (4)).

9. 413 U.S. at 25.

10. 431 U.S. 767 (1977).

11. See Summers v. Sheriff, 90 Nev. 180, 182, 521 P.2d 1228, 1228 (1974) (although the word "lewd" is not defined, it gives sufficiently definite warning so as not to be constitutionally invalid for vagueness).

12. See Miller v. California, 413 U.S. at 25.

13. Id.

14. See Ward v. Illiois, 431 U.S. at 773.

15. Ch. 267 §3 ¶1 (adding to NRS Ch. 201). See Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of obscenity is protected).

16. NRCP 65(c).

17. Compare 1971 Nev. Stats. ch. 277 §1, at 495 (NRS 201.250(4)(e), repealed by Ch. 267 §10) with Ch. 267 §4 ¶2 (adding to NRS Ch. 201).

18. Ch. 267 §3 ¶2 (adding to NRS Ch. 201).

19. Ch. 267 §10 (repealing NRS 201.250(4)(c); 1971 Nev. Stats. ch. 277 §1, at 494).

20. Ch. 267 §4 ¶1 (adding to NRS Ch. 201). See Kingsley Books, Inc. v. Brown, 354 U.S. 436, 444 (1957) (upholding a New York statute providing for seizure and destruction of obscene materials).

21. Ch. 267 §4 ¶3 (adding to NRS Ch. 201). Compare id. with 1971 Nev. Stats. ch. 277 §1, at 495 (NRS 201.250(4)(f)).

22. Ch. 267 §5 (adding to NRS Ch. 201).

23. Id. §7 (adding to NRS Ch. 201).

24. Id. §4 ¶4 (adding to NRS Ch. 201). Compare id. with 1971 Nev. Stats. ch. 227 §1 at 495 (NRS 201.250(4)(g)).

25. Ch. 267 §8 (adding to NRS Ch. 201). Compare id. with 1971 Nev. Stats. ch. 277 §1, at 494 (NRS 201.250(3).

26. See Ch. 267 §§7, 8 ¶3 (adding to NRS Ch. 201).

27. Ch. 267 §6 (adding to NRS Ch. 201).

28. Id. §9 (adding to NRS Ch. 201).

29. Id. §2 (adding to NRS Ch. 201).

30. Roth v. U.S., 354 U.S. at 485.

31. Near v. Minnesota, 283 U.S. 697, 708 (1931); Roth v. U.S., 354 U.S. at 483.

32. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973); Roth v. U.S., 354 U.S. at 485; Kingsley Books, Inc. v. Brown, 354 U.S. at 440; Near v. Minnesota, 283 U.S. at 716.

33. See Crimes and Punishment Act of 1911 §196, 1971 Nev. Stats. ch. 277 §1, at 493 (NRS 201.250) (amended by Ch. 267 §10) and NRS 201.253 through NRS 201.265.
34. Compare Ch. 267 §10 (amending NRS 201.250) with Miller v. California, 413 U.S. at 24. For an analysis of the effects of the Miller decision on Nevada law, see Dunlap, supra note 3, and on obscenity law in general, see Project, An Empirical Inquiry into the Effects of Miller on the Control of Obscenity, 52 N.Y.U.L.REV. 810 (1977).
35. 418 U.S. 87 (1974).
36. Id. at 104.
37. Id. at 105.
38. Ch. 267 §10 (amending NRS 201.250(1)).
39. 431 U.S. 291 (1977). See Esposito, Freedom of Speech, 1978 ANN. SURVEY AM.L. 135, 152 for an analysis of the Smith case.
40. 431 U.S. at 302. See also, Dunlap, supra note 3.
41. Hamling v. U.S., 418 U.S. at 104. See Bell, Determining Community Standards, 63 A.B.A.J. 1202 (1977), for a critique of this application of the "average person in the community" standard.
42. Ch. 267 §10 (amending NRS 201.250(4)).
43. 383 U.S. 502 (1966).
44. 354 U.S. 476 (1957).
45. 413 U.S. 15 (1974).
46. 383 U.S. at 508. See also, Hamling v. U.S., 418 U.S. at 127-130.
47. Mishkin v. New York, 383 U.S. at 508.
48. Ch. 267 §10 (amending NRS 201.250(4)).
49. Id.
50. Compare NRS 201.257 with Ch. 267 §10 (amending NRS 201.250(4)).
51. 390 U.S. 629 (1968).
52. Id. at 639.
53. Id. at 643.
54. See generally, Burns and Israel, Juvenile Obscenity Statutes: A Proposal and Analysis, 9 U. MICH.J.L.REF. 413 (1975-76), for an analysis of juvenile obscenity standards.
55. Ch. 267 §10 (amending NRS 201.257(4)).
56. 383 U.S. 413, 418 (1966).
57. 413 U.S. at 24.
58. Compare NRS 201.257 with Ch. 267 §10 (amending NRS 201.250(4)).

59. See Palmer v. City of Euclid, 402 U.S. 544, 546 (1971); Wright v. Georgia, 373 U.S. 284, 293 (1963) (conviction under statute not giving adequate notice of proscribed conduct is violative of due process).
60. Ch. 267 §10 (amending NRS 201.250(4)).
61. 413 U.S. at 24.
62. Ward v. Illinois, 431 U.S. at 773.
63. 354 U.S. at 485. See also, Glass v. Eighth Judicial District Court, 87 Nev. 321, 323, 486 P.2d 180, 1181 (1971).
64. Ch. 267 §3 ¶ 2 (adding to NRS Ch. 201).
65. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 559 (1976).
66. New York Times v. U.S., 403 U.S 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Talk of the Town Bookstore v. City of Las Vegas, 92 Nev. 466, 470, 553 P.2d 959, 961 (1976).
67. 380 U.S. 51 (1965).
68. Id. at 59.
69. Id. See also, Bantam Books, Inc. v. Sullivan, 372 U.S. at 70. See generally, Kingsley Books, INc. v. Brown, 354 U.S. 436 (1957).
70. Freedman v. Maryland, 380 U.S. at 60.
71. 191 Nev. Stats. ch. 277 §1, at 493 (NRS 201.250(4)(c)) (amended by Ch. 267 §10).
72. 380 U.S. at 59-60.
73. Ch. 267 §6 (adding to NRS Ch. 201).
74. 383 U.S. 413 (1966).
75. Id. at 420.
76. Ch. 267 §6 (adding to NRS Ch. 201).
77. 431 U.S. 595 (1977). See Esposito, supra note 39, for an analysis of the Splawn case.
78. 431 U.S. 598. See also, Casenotes, Constitutional Law-Obscenity, 55 U. DET J. URB L. 458 (1978) for a critique of the pandering test applied in Splawn.
79. Compare Splawn v. California, 431 U.S. at 598 with Ch. 267 §6 (adding to NRS Ch. 201).
80. 383 U.S. at 421.
81. Id.
82. Id.
83. Ch. 267 §7 (adding to NRS Ch. 201).
84. Id.
85. 361 U.S. 147 (1959).