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SB 434

Overview:

RSA 571-B in the topic of Public Justice should not be taken out of the context of the near duplicate rule in RSA 650:1 (previously 571-A) in regards to harmful material in the Criminal Code. The definitions are so intertwined as to be indistinguishable from each other. RSA 650:1 provides the legal basis for defining obscenity which RSA 571-B alone does not do.

This proposed legislation is a risk to the First Amendment under **both** Civil and Criminal case law.

Civil Context:

The risks under Civil Case law are that high school students that have reached the age of 18 can not be prohibited from accessing topics with adult materials. Regulations can be made, but the access cannot be restricted completely. Citing Dover News v. City of Dover (N.H. 1977) "Although RSA 571-B relates to materials which are protected as to adults by the first amendment to the Constitution of the United States, the states may reasonably control such materials with respect to minors." See Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) and Miller v. California, 413 U.S. 15, 18, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

Criminal Context:

In the Criminal Case law context this proposed legislation does not adequately define obscenity to overcome first amendment challenges. State v. Harding (N.H. 1974) defines obscenity using the test outlined in Miller v. California (1973) (cited above).

> **The Miller Test:** "Under the Miller Test, a statute regulating obscenity must be limited to works (1) which, taken as a whole, can be found to appeal to the prurient interest in sex by the average person applying contemporary community standards, (2) which depict or describe in a patently offensive way sexual conduct specifically defined by the applicable state law, as written or authoritatively construed, **and** (3) which taken as a whole, do not have serious literary, artistic, political or scientific value."
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> "The Miller opinion expressly limits the scope of state regulation to sexual conduct, depictions or descriptions of mere nudity or excrement without sexual overtones are protected by the First Amendment."
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> **Defining "Patently Offensive":** "Nevertheless, the thrust of the opinion is addressed to graphic representations or descriptions of (1) all forms of actual or simulated intercourse between humans or humans and animals in which the genitalis of one party is inserted into an orifice of another; (2) oral contact with the genitalia or manual contact with genitalia in a turgid state; (3) the insertion of any instrument or other device into the genital or anal passage in the course of activity designed to arouse or excite the genitalia; (4) the use of instruments or other devices by one party to inflict pain on another in the course of activity designed to arouse

> or excite the genitalia; or (5) the use of excrement or excretory functions in the course of activity designed to arouse or excite the genitalia; or (6) the genitalia in a turgid state. See United States v. Young, 465 F.2d 1096, 1098-1099 (9th Cir. 1972); United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1970); Armijo v. United States, 384 F.2d 694 (9th Cir. 1967); Annot., 5 A.L.R.3d 1158, § 6 (1966, Supp.1973). See also Hawaii Penal Code, Tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, 126-29; Oregon Laws 1971, ch. 743, Art. 29, §§ 255-62. In our view these enumerated categories are sufficiently concrete to describe patently offensive 'sex' or 'sexual conduct' and to provide fair warning under Miller as to the scope of RSA 571-A:1 (Supp.1972).” RSA 571-A:1 was repealed in 1974 and was reestablished as RSA 650:1.
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> State v. Harding, 114 N.H. 335, 320 A.2d 646 (N.H. 1974)

Conclusion:

Allowing a Superintendent or their designee(s) to make this type of determination devoid of the well-established definitions of obscenity would risk the First Amendment rights to information for all students in New Hampshire schools. Additionally, offensive opinions in written material are well-established protected speech under the First Amendment regardless of whether the reader agrees with the content absent obscenity concerns. For example teaching topics like: Slavery, The Holocaust, Racism, Native American History, and World History, would be in jeopardy simply because one parent and one Superintendent or Designee decided they were inappropriate for school. This legislation also does not clearly define a pathway for other parents to contest or appeal the original parent`s complaint before material is removed from schools. This would also violate the rights of the other parents in determining what information is appropriate for their child to consume. This proposed legislation without proper reference to such case law is unconstitutional as written, and in my opinion (as an attorney) would be subject to lawsuits.