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### First Amendment - The Expansion of the Obscenity Doctrine in New Mexico; Is It Tolerable - *City of Farmington v. Fawcett*

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# FIRST AMENDMENT—The Expansion of the Obscenity Doctrine in New Mexico; Is it Tolerable? *City of Farmington v. Fawcett*

## I. INTRODUCTION

In *City of Farmington v. Fawcett*,<sup>1</sup> the New Mexico Court of Appeals held that for obscene material to constitute an abuse of free speech under the New Mexico Constitution, the jury must find that the community would find the offensive materials “intolerable.”<sup>2</sup> The court held that the New Mexico Constitution extends broader protection to freedom of expression than does the First Amendment of the United States Constitution and, therefore, the traditional “unacceptable” standard is not applicable.<sup>3</sup>

Prior to *Fawcett*, New Mexico courts consistently relied on the definition of obscenity set forth by the United States Supreme Court in *Miller v. California*.<sup>4</sup> However, the court in *Fawcett* held that because the free speech clause in the New Mexico Constitution differs from the First Amendment, defendants in New Mexico are entitled to a standard that is broader than the *Miller* standard of “accepted in the community as a whole.”<sup>5</sup> This Note provides an overview of the obscenity doctrine, examines the rationale of *Fawcett*, and examines the implications of the decision.

## II. STATEMENT OF THE CASE

Tom Fawcett sold a variety of books and magazines from the Farmington Magazine and Book Store. In 1990, two City of Farmington (City) residents investigated Fawcett’s book store for possible violations of its obscenity ordinance.<sup>6</sup> The City residents filed a complaint against Fawcett and one of his employees in municipal court alleging that five magazines violated the Ordinance. The municipal court convicted the defendants of disseminating obscene materials under the Ordinance.

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1. 114 N.M. 537, 843 P.2d 839 (Ct. App.), cert. quashed, 114 N.M. 532, 843 P.2d 375 (1992).

2. *Id.* at 526, 843 P.2d at 848.

3. *Id.* at 547, 843 P.2d at 849.

4. 413 U.S. 15 (1973). See *infra* notes 33-36 and accompanying text. See also *State v. Johnson*, 104 N.M. 430, 722 P.2d 681 (Ct. App.), cert. denied, 104 N.M. 378, 721 P.2d 1309 (1986) (using the *Miller* definition of obscenity to affirm a conviction for distribution of obscene material although the defendant did not contend that the ordinance under which he was convicted violated article II, § 17 of the New Mexico Constitution); Op. Att’y Gen. 90-24 (1990) (citing the *Miller* definition with approval for cases involving child pornography); N.M. STAT. ANN. § 30-6A-2 (Repl. Pamp. 1984) (New Mexico legislature using criteria similar to those in *Miller* in prohibiting the sexual exploitation of children).

5. *Fawcett*, 114 N.M. at 546, 843 P.2d at 848.

6. *Id.* at 539, 843 P.2d at 841 (citing Farmington Ordinance Number 89-920, § 21-50.1 (1989) [hereinafter the Ordinance]).

Fawcett appealed to the district court and received a trial de novo. Prior to trial, he filed a motion to dismiss alleging that the City Ordinance violated Article II, Section 17 of the New Mexico Constitution. The trial court denied the motion as untimely. A jury subsequently found the Defendant guilty of five counts of dissemination of obscene materials.

Fawcett appealed his conviction, including the denial of his motion to dismiss. The New Mexico Court of Appeals held that an "abuse" of free speech occurs when the community cannot tolerate the obscene material, and not merely when the material would be unacceptable by community standards.<sup>7</sup> Thus, the court remanded for a new trial.<sup>8</sup> The New Mexico Court of Appeals in *Fawcett* has demonstrated the pervasive problem of establishing and refining a definition of obscene material which is beyond the protection of the First Amendment.

### III. HISTORICAL AND CONTEXTUAL BACKGROUND

#### A. *The United States Supreme Court's Obscenity Doctrine*

The United States Supreme Court has struggled for the past thirty-five years to define obscenity. As one Justice has noted, this area of jurisprudence has produced a variety of views among members of the Supreme Court "unmatched in any other course of constitutional adjudication."<sup>9</sup> In 1957, the Court in *Roth v. United States*<sup>10</sup> first held that the government could regulate obscene speech. In formulating the first test for obscenity, the *Roth* Court rejected the earlier English test for obscenity which judged material by the effect of an isolated excerpt upon particularly susceptible people.<sup>11</sup> Instead, the Court adopted a three-prong test. First, the *Roth* test required that the jury must evaluate the material according to its effect on an average person, applying contemporary community standards, and find that the dominant theme of the material taken as a whole appeals to prurient interest.<sup>12</sup> Second, the jury must evaluate the material according to present-day community standards rather than obsolete moral standards.<sup>13</sup> Third, the jury may not focus on isolated portions of a work, but on the effect of the entire work.<sup>14</sup> The Court's "contemporary community standards" test did not describe the geographic scope of "community."<sup>15</sup>

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7. *Fawcett*, 114 N.M. at 549, 843 P.2d at 851.

8. The court rejected the City's argument that the Defendant was precluded by his untimely motion from arguing the issue because in a criminal prosecution, the constitutionality of a statute may be argued on appeal as a matter of law even though it has been raised for the first time. *Id.* at 540, 843 P.2d at 841 (citing *State v. Aranda*, 94 N.M. 784, 617 P.2d 173 (Ct. App. 1980)).

9. *Interstate Circuit v. Dallas*, 390 U.S. 676, 704-05 (1968) (Harlan, J., dissenting).

10. 354 U.S. 476 (1957).

11. *Id.* at 489 (citing *Regina v. Hicklin*, 3 L.R.Q.B. 360 (1868)).

12. *Roth*, 354 U.S. at 488-89.

13. *Id.* at 488.

14. *Id.* at 489.

15. *See id.* at 488-90.

The next significant case decided by the Supreme Court dealt with whether a license to show the motion picture "Lady Chatterly's Lover" could be denied under a New York Statute authorizing the issuance of licenses for motion pictures "unless such a film or a part thereof is obscene, indecent, immoral . . ."<sup>16</sup> The Court held that the statute denied the exhibitor's rights under the First Amendment and made it clear that a work could not be banned for its sexual immorality.<sup>17</sup> The Court found that if the charge could be construed as being directed at ideas, then artistic expression is protected.<sup>18</sup>

In 1964, the Supreme Court renewed the *Roth* test in two obscenity cases, *A Quantity of Copies of Books v. Kansas*,<sup>19</sup> and *Jacobellis v. Ohio*.<sup>20</sup> The Court in *Jacobellis* repeated that obscenity is excluded from constitutional protection only if it is "utterly without redeeming social importance."<sup>21</sup> In addition, the Court reaffirmed its position in *Roth* that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard rather than local or state community standards.<sup>22</sup> Justice Brennan, writing the plurality opinion, conceded that the *Roth* test was not perfect, but that any substitute would raise equally difficult problems.<sup>23</sup>

In 1966, the Supreme Court decided three obscenity cases in one day.<sup>24</sup> In *Memoirs v. Massachusetts*, the Justices essentially articulated a new test of obscenity which retained only the first two parts of the *Roth* test. The third element required that a book cannot be proscribed unless it is found to be utterly without redeeming social value.<sup>25</sup> As a result, if allegedly obscene material had an iota of social value and was not unqualifiedly worthless, as the Massachusetts Supreme Court in *Memoirs* conceded of the material in question, it could not be held obscene.<sup>26</sup>

In the years between *Memoirs* and *Miller v. California*,<sup>27</sup> the Court summarily reversed obscenity convictions as each member of the Court applied his separate test and found the work to be protected by the First Amendment.<sup>28</sup> The Court decided thirty-one cases by what was known

16. *Kingsley Int'l Pictures Corp. v. Regents of N.Y. Univ.*, 360 U.S. 684 (1959).

17. *Id.*

18. *Id.* at 688. The constitutional "guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." (opinion of Stewart, J.).

19. 378 U.S. 205 (1964).

20. 378 U.S. 184 (1964).

21. *Id.* at 191.

22. *Id.* at 194.

23. *Id.* at 191. Justice Stewart, in his concurring opinion, adopted the jurisprudentially entertaining "I know it when I see it" test for "hard core pornography." *Id.* at 197 (Stewart, J., concurring).

24. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413 (1966) [hereinafter *Memoirs*]; *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966).

25. *Memoirs*, 383 U.S. at 419.

26. *Id.*

27. 413 U.S. 15 (1973).

28. *See id.* at 22 n.3 (citing *Redrup v. New York*, 386 U.S. 767 (1967)).

as the *Redrup* procedure.<sup>29</sup> Finally in 1973, the Supreme Court in *Miller* announced that it would formulate "standards more concrete than those in the past" to end the unacceptable "*Redrup* procedure."<sup>30</sup> The Court also reaffirmed the principle in *Roth*: "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."<sup>31</sup>

The *Miller* Court drew on and diverged from principles formulated in *Roth* and *Memoirs* to establish new standards for determining obscenity.<sup>32</sup> The first prong of the three-prong test requires the trier of fact to determine that an "average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest."<sup>33</sup> The second prong requires a finding that "the work depicts or describes, in a patently offensive way, sexual conduct" as described by state law according to contemporary community standards, rather than national standards expressed in *Roth*.<sup>34</sup> The third prong requires that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>35</sup> This last prong replaced the *Memoirs* test of "utterly without redeeming social value."<sup>36</sup>

The Court later concluded that the serious value prong could not be evaluated by community standards since the value of material does not vary from community to community as do the prurient appeal and patent offensiveness prongs.<sup>37</sup> As a result, "obscene" materials are the single class of expression that may be constitutionally protected in one part of the country, yet be illegal in others.<sup>38</sup> In adopting the "community standards" test in the first two prongs, the *Miller* Court reasoned:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.<sup>39</sup>

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29. *Id.* at 22 n.3 ("The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.").

30. *Miller*, 413 U.S. at 20.

31. *Id.* at 23.

32. *Id.* at 36.

33. *Id.* at 24. The Supreme Court has defined the term "prurient interest" to mean, generally, a shameful, morbid, or unhealthy interest in sex. *Roth*, 354 U.S. at 487 n.20. However, no distinction has been made between a "shameful, morbid, unhealthy" sexual interest and one that is normal and healthy.

34. *Miller*, 413 U.S. at 24. The Court defined "patent offensiveness" in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482 (1962) as materials that are "deemed so offensive on their face as to affront current community standards of decency." See also *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Material is patently offensive when it "goes substantially beyond customary limits of candor in description or representation of such matters.") "Community standards" are set by what is in fact accepted in the community. *Smith v. United States*, 431 U.S. 291, 297-98 (1977).

35. *Miller*, 413 U.S. at 24.

36. *Id.* at 24-25 (citing *Memoirs*, 383 U.S. at 419).

37. *Pope v. Illinois*, 481 U.S. 497, 500 (1987) (Scalia, J., concurring). The Court reasoned that because the artistic value of sexually explicit material does not vary from community to community based on the degree of local acceptance that the material has won, the serious value of the work, as a matter of constitutional law, must be constant throughout the United States.

38. *Smith v. United States*, 431 U.S. 291, 312-14 (1977) (Stevens, J., dissenting).

39. *Miller*, 413 U.S. at 32 (emphasis added).

This seemingly benign comment has created confusion as to whether acceptance or tolerance was the determining factor of a community's "standards," with a number of federal courts adopting the standard of "acceptance."<sup>40</sup>

The Supreme Court has never acquired a majority opinion against obscenity. In fact, all of the 1973 obscenity rulings garnered only a 5-4 plurality.<sup>41</sup> However, it is unlikely that the Court will flatly overturn *Miller* in the near future.<sup>42</sup> The question remains whether the problematic standards of *Miller* will be refined with established guidelines to prevent the distribution of those materials which are not guaranteed constitutional protection.

### B. Free Speech and the Obscenity Doctrine in New Mexico

There has been a sparsity of First Amendment cases and a lack of obscenity cases in New Mexico's history. The State Constitution, however, provides:

Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right* . . . .<sup>43</sup>

The New Mexico Supreme Court first addressed free speech in *Blount v. TD Publishing Corp.*<sup>44</sup> Citing no prior authority, the court concluded that the New Mexico Constitution limits freedom of speech, and a citizen who "abuses" the right of free speech may be legally liable.<sup>45</sup> New Mexico courts later found that the State may regulate the place and manner of speech.<sup>46</sup>

40. See *Smith v. United States*, 431 U.S. 291, 297-98 (1977) (upholding jury instruction stating that contemporary community standards are set by what is in fact accepted in the community as a whole); *United States v. Battista*, 646 F.2d 237, 245 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981) (rejecting the "misplaced" defense's argument that "tolerance" is the only appropriate measure of "community standards"); *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971) ("Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance."); *United States v. Pryba*, 678 F. Supp. 1225, 1230 (1988) ("Community acceptance is the touchstone of admissibility. It is axiomatic that community tolerance or availability does not equate with acceptability").

41. See *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973). In addition, Justice Scalia has intimated that given the opportunity to reexamine the *Miller* test, he would have done so. *Pope v. Illinois*, 418 U.S. 497, 504 (1987) (Scalia, J., concurring) (joining the opinion because the Court's opinion "is the most faithful assessment of what *Miller* intended, and because we have not been asked to reconsider *Miller* in the present case").

42. See, e.g., *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57 (1989) (rejecting "an invitation to overturn *Miller*" where the Petitioner argued that the "inherent vagueness" of the standards established by *Miller* were the root of his objection to any RICO prosecution based on predicate acts of obscenity).

43. N.M. CONST. art. II, § 17 (emphasis added).

44. 77 N.M. 384, 423 P.2d 421 (1966).

45. *Id.* at 388, 423 P.2d at 424.

46. See *Nall v. Baca*, 95 N.M. 783, 626 P.2d 1280 (1980) (restricting nude dancing); *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979), *appeal dismissed*, 446 U.S. 930 (1980) (commercial billboard "speech"); *State ex rel. New Mexico Press Ass'n v. Kaufman*, 98

Prior to *Fawcett*, no case challenging the New Mexico Constitution's free speech clause had been presented to New Mexico courts. Thus, the court in *Fawcett* determined in a case of first impression that obscenity can be an "abuse" of free speech.<sup>47</sup> The court relied on dicta in various New Mexico cases,<sup>48</sup> language adopted by thirty-nine other state constitutions,<sup>49</sup> as well as an historical analysis of Article II, Section 17 to support the conclusion that obscenity constitutes an abuse of the right to freely speak and publish.

### C. Historical Analysis

The New Mexico court found that an historical analysis of Article II, Section 17 of the New Mexico Constitution produced no definitive answer.<sup>50</sup> However, the court cited with approval *People v. Ford*<sup>51</sup> in which the Colorado Supreme Court rejected the historical analysis in *State v. Henry*.<sup>52</sup> The court in *Ford* found that the status of obscenity regulation in the years immediately preceding the adoption of the Colorado Constitution was more relevant than the early nineteenth century English and American colonial laws which were the foundation for the Oregon court in *Henry*.<sup>53</sup> Unlike New Mexico, however, Colorado has a "consistent history of proscribing obscenity," including criminal penalties for disseminating obscenity that predated statehood.<sup>54</sup>

N.M. 261, 648 P.2d 300 (1982) (media's right to free speech may be limited when necessary to guarantee defendant a fair trial); *State v. Wade*, 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983) ("fighting words" are not constitutionally protected); *State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (Ct. App. 1986) (freedom of speech does not include the right to use the telephone with the intent to annoy and harass).

47. *Fawcett v. City of Farmington*, 114 N.M. 537, 541, 843 P.2d 839, 843 (Ct. App.), cert. quashed, 114 N.M. 532, 843 P.2d 375 (1992). Although the Supreme Court's definition of obscenity was first adopted in New Mexico in *State v. Johnson*, 104 N.M. 430, 722 P.2d 681 (Ct. App.), cert. denied, 104 N.M. 378, 721 P.2d 1309 (1986), the defendant did not contend that the New Mexico Constitution had been violated. Therefore, the court in *Johnson* used the *Miller* definition of obscenity to affirm a conviction for distribution of obscene material. See also *Fawcett*, 114 N.M. at 544, 843 P.2d at 846.

48. See *Curry v. Journal Publishing Co.*, 41 N.M. 318, 328, 68 P.2d 168, 174-75 (1937) (quoting 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927) ("The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense . . ."); *State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (Ct. App. 1986) (upholding a statute proscribing malicious use of the telephone).

49. Although the language guaranteeing free speech in article II, § 17 of the New Mexico Constitution differs from the First Amendment of the United States Constitution, it is virtually identical to the language adopted by thirty-nine other states which also make citizens responsible for the "abuse" of the right. *Fawcett*, 114 N.M. at 541, 843 P.2d at 843.

50. *Fawcett*, 114 N.M. at 542, 843 P.2d at 844. (Although the historical context of the 1910 constitution was not "conclusive," the court analyzed the history extensively and found that it did "augur in favor" of the court's holding).

51. *Id.* (citing *People v. Ford*, 773 P.2d 1059 (Colo. 1989) (en banc)).

52. 732 P.2d 9 (Or. 1987).

53. *Fawcett*, 114 N.M. at 542, 843 P.2d at 844 (citing *Ford*, 773 P.2d at 1065).

54. *Id.*

*D. Constitutional Language: The Contrast Between the New Mexico and United States Constitutions*

Next, the *Fawcett* court analyzed the difference between the language of the New Mexico Constitution and the United States Constitution.<sup>55</sup> Recognizing that obscenity may be an abuse of free speech, the court of appeals nevertheless held that the New Mexico Constitution affords broader protection to freedom of expression than the First Amendment<sup>56</sup> because the framers “consciously chose to adopt a different formula” from the language of the United States Constitution.<sup>57</sup> The court went on to consider the significance of the “abuse” standard through a Maine Supreme Court decision.<sup>58</sup> In language similar to the New Mexico Constitution, the Maine Constitution sets different parameters than does the First Amendment.<sup>59</sup> The court in *Fawcett* quoted the “thoughtful” concurring opinion in *Jacobsky* which pointed out that the Maine Constitution protects not only the expression of ideas of values as the First Amendment does, but also “sentiments on any subject.”<sup>60</sup> The word “sentiments,” comporting elements of emotion and feeling, may, by itself, be broader than “ideas.”<sup>61</sup> As a result, the court in *Fawcett* concluded that Article II, Section 17 offers more protection than the First Amendment.<sup>62</sup> Consequently, the court concluded that *Miller* offered little guidance for determining community standards.<sup>63</sup> Instead, the court proposed a new, expanded obscenity test for the state.<sup>64</sup>

The Farmington obscenity ordinance in question tracked the language of *Miller*.<sup>65</sup> The trial court’s jury instructions defined “patently offensive” as “that which offends or affronts local contemporary community standards because it goes beyond the customary limits of candor and decency in describing or representing sexual matters.”<sup>66</sup> Contemporary community standards are set by what is in fact “accepted in the community as a whole.”<sup>67</sup> The court of appeals concluded that *Miller* offered little guidance for determining community standards and that the New Mexico Consti-

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55. *Id.* at 544-45, 843 P.2d at 846-47 (citing N.M. CONST. art. II, § 17 and U.S. CONST. amend. 1).

56. *Fawcett*, 114 N.M. at 546, 843 P.2d at 848.

57. *Id.* at 545, 843 P.2d at 847.

58. *Id.* (citing *City of Portland v. Jacobsky*, 496 A.2d 646 (Me. 1985)).

59. *Id.*

60. *Id.* (quoting *Jacobsky*, 496 A.2d at 653 (Scolnik, J., concurring)).

61. *Fawcett*, 114 N.M. at 545, 843 P.2d at 847.

62. *Id.* at 546, 843 P.2d at 848. The court also noted that federal decisions do not control the nature and scope of the rights guaranteed by the New Mexico Constitution even if its language was almost identical to the Federal Constitution. *Id.* at 544-45, 843 P.2d at 846-47 (citing *State v. Cordova*, 109 N.M. 211, 784 P.2d 30 (1989) and *McCauley v. Tropic of Cancer*, 121 N.W.2d 545 (1963)).

63. *Id.* at 544, 843 P.2d at 846.

64. *Id.* at 549, 843 P.2d at 851.

65. *Id.* at 548, 843 P.2d at 850. See *id.* at 538-39, 843 P.2d at 841-42, for the language of the Ordinance.

66. *Fawcett*, 114 N.M. at 546, 843 P.2d at 848.

67. *Id.*

tution "requires a standard that is broader than 'decency' and 'accepted in the community as a whole.'"<sup>68</sup> Before materials may be considered an "abuse" of the right to freely speak, write, and publish sentiments on all subjects, the community must find them "intolerable," not merely "unacceptable."<sup>69</sup>

In reaching its decision, the *Fawcett* court was again persuaded by *People v. Ford*,<sup>70</sup> which had also held that obscenity could be an abuse of free speech but that "abuse" could only be defined in terms of speech that was intolerable and not merely unacceptable.<sup>71</sup> Additionally, the *Fawcett* court noted that the "'tolerance' standard has been advanced by legal scholars and adopted in other jurisdictions as the proper measure when 'abuse' is constitutionally mandated."<sup>72</sup> However, the court cited only two cases and one law review article in support of its position.<sup>73</sup> As a result, New Mexico now requires only one jury instruction defining community standards.<sup>74</sup> Under this standard, it is less likely that a jury would find materials obscene as a matter of fact.

## VI. ANALYSIS AND IMPLICATIONS

The *Fawcett* court clearly opposed limiting freedom of speech under the New Mexico Constitution. However, the court failed to unequivocally demonstrate that the plain language of article II, section 17 of the constitution extends a different scope of protection than the First Amendment. In particular, the court did not resolve past New Mexico decisions which have considered article II, section 17 similar to the First Amendment.<sup>75</sup> Nor did the court's historical analysis suggest that the New Mexico Constitution affords broader speech protection than the United States Constitution. Rather, the analysis of the history of the New Mexico Constitution focused on whether obscenity constitutes an "abuse" of the right to freely speak, write and publish.<sup>76</sup> The court noted that even if it "resorted to the historical setting" because the language of article II, section 17 was ambiguous, it would not accept the defendant's conclusion

68. *Id.* at 545-46, 843 P.2d at 847-48.

69. *Id.*

70. 773 P.2d 1059 (Colo. 1989) (en banc).

71. *Id.* at 1066-67.

72. *Fawcett*, 114 N.M. at 547, 843 P.2d at 849.

73. *Id.* (citing *State ex rel. Collins v. Superior Court*, 787 P.2d 1042 (Ariz. 1986) (en banc); *Leech v. American Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979); Michael K. Curtis, *Obscenity: The Justices' (Not So) New Robes*, 8 CAMPBELL L. REV. 387, 410 (1986)). Minnesota recommends a tolerance standard, but allows an instruction based on "acceptance." *State v. Davidson*, 481 N.W.2d 51 (Minn. 1992).

74. *Fawcett*, 114 N.M. at 547, 843 P.2d at 849.

75. See *Nall v. Baca*, 95 N.M. 783, 787, 626 P.2d 1280, 1284 (1980); *Curry v. Journal Publishing Co.*, 41 N.M. 318, 328, 68 P.2d 168, 174-75 (1937).

In addition, the supreme court has interpreted other free speech cases consistent with the Federal Constitution. See *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982); *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979), *appeal dismissed*, 446 U.S. 930 (1980).

76. *Fawcett*, 114 N.M. at 542-43, 843 P.2d at 844-45.

that "the framers of the 1910 constitution intended no liability for obscenity as an abuse of free speech."<sup>77</sup> The type of material that constitutes an abuse, however, was absent from the historical analysis.

The court's decision thus expands constitutional protection to distributors of obscene materials without clarifying what is obscene. The court specifically rejected instructions that allow the factfinder to judge materials based on what is "acceptable" to the community.<sup>78</sup> Instead, the factfinder must find the materials "intolerable" to the community before they may be deemed an "abuse" of the right to freely speak.<sup>79</sup> New Mexico's use of the tolerance standard is a minority view.<sup>80</sup>

Numerous courts have noted the difficulties inherent in attempting to apply either an "acceptance" or a "tolerance" standard.<sup>81</sup> Regardless of the word used, however, a presumption still exists that jurors intuitively know the community standards.<sup>82</sup> A court in Farmington could theoretically convict a person for distributing sexually explicit material that more permissive cities in New Mexico might not find obscene.<sup>83</sup> Without clear guidance, juries will continue to have difficulty determining the community standards of "tolerance" or "acceptance" that they must apply when deciding whether material is patently offensive.

The *Miller* standard of obscenity, although vague in many respects, recognized the need to protect First Amendment rights. However, the "acceptance" standard does not necessarily allow jurors to summarily prohibit the dissemination of obscene material any more than a "tolerance" standard. In addition, the third prong of the *Miller* obscenity test prevents the literary, artistic, political, or scientific value of material "from being held hostage to a particular community's level of tolerance."<sup>84</sup> In this manner, constitutional protection of material which would not otherwise be tolerated in a community is preserved.<sup>85</sup>

## V. CONCLUSION

*Fawcett* has expanded but not clarified the obscenity doctrine in New Mexico. In doing so, the court has attempted to ensure that distributors of obscene material have the maximum protection afforded them under

77. *Id.* at 543, 843 P.2d at 845.

78. *Id.* at 546, 843 P.2d at 848.

79. *Id.*

80. See *supra* notes 72-73 and accompanying text.

81. See, e.g., *Womack v. United States*, 509 F.2d 368, 379 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975); *United States v. Petrov*, 747 F.2d 824, 832 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985). Some courts have used these terms interchangeably. See, e.g., *Sedelbauer v. State*, 428 N.E.2d 206, 211 (Ind. 1981), *cert. denied*, 455 U.S. 1035 (1982); *State v. Short*, 368 So. 2d 1078, 1082 (La.), *cert. denied*, 444 U.S. 884 (1979); *Asaff v. Texas*, 799 S.W.2d 329, 332 (Tex. Ct. App. 1990); see also *New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982); *Smith v. United States*, 431 U.S. 291, 297-98 (1977) (nevertheless requiring an instruction that the "community standards" are set by what is in fact accepted in the community); *Miller v. California*, 413 U.S. 15, 32 (1973).

82. *Miller*, 413 U.S. at 24; see also *Smith v. United States*, 431 U.S. 291, 300-01 (1977).

83. See *Miller*, 413 U.S. at 30-34 (discussing contemporary community standards test).

84. *People v. Ford*, 773 P.2d 1059, 1067 (Colo. 1989) (en banc).

85. *Id.*

the New Mexico Constitution, article II, section 17. The new standard for determining whether material is patently offensive is that the material must now be intolerable to the community. However, to utilize this subjective approach of determining what is "intolerable" successfully, courts must give clear guidelines to juries to eliminate the guesswork of defining what is intolerable.

Rather than using unascertainable standards of community tolerance, the New Mexico Court of Appeals could have improved on the standard of tolerance for sexually explicit material by establishing an objective, "explicit harm" standard.<sup>86</sup> An explicit harm standard would not unequivocally protect the circulation of all pornographic materials, but rather would require the factfinder to ask (1) whether, as depicted by the material, one person inflicted serious bodily injury upon another person in the course of sexual activity, or (2) whether one participant most likely did not consent to the sexual activity before the production of the material, or (3) whether, in fact or as depicted by the material, one participant in sexual activity was most likely a minor.<sup>87</sup> With this standard, the focus is on harm, not offense, and the injury is not to the government, nor to others possessing political, moral, or religious power.<sup>88</sup>

In *Fawcett*, the court did not rely on statutory regulation: the New Mexico legislature has been silent on the issue of obscenity. As a result, the definition of obscenity varies depending on a given municipal ordinance, if such an ordinance even exists. Instead of a uniform, state-wide regulation which bans the dissemination of obscene materials, distributors in select cities and towns can be targets of overzealous residents. An explicit harm standard, uniform in application, would provide a guaranteed minimum level of protection to distributors of sexually explicit materials.<sup>89</sup>

*Fawcett* appears to have paved the way for controlling the distribution of obscene material by unconditionally holding that obscenity can be an

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86. See *City of Urbana ex rel. Newlin v. Downing*, 539 N.E.2d 140, 152-53 (Ohio), cert. denied, 493 U.S. 934 (1989) ("[T]he law should be looking for the existence of 'harm,' not trying to define 'obscenity.'") (Brown, J., dissenting).

87. Scot A. Duval, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75 (1992); see *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) (noting that when the government has a "strong interest" in forbidding conduct that is the subject of the material, such as sexual acts involving minors, the government may restrict or forbid dissemination of the material to reinforce prohibition of such conduct); *Downing*, 539 N.E.2d at 140, 152 & n.13 (1989) (noting two examples of sexually explicit materials which cause harm: publications which utilize minors and publications whose production requires the commission of a crime; also noting that "extremely violent sexually oriented material" is a potential exception to the First Amendment) (Brown, J., dissenting); see also Catherine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 339 (1984) (noting that participants "are known to be brutally coerced into pornographic performances.").

88. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 18-19 (1992) ("Free speech doctrine has grown beyond the infant craving to be protected from all criticism, particularly 'blasphemous' criticism of mainstream religion, 'obscene' criticism of mainstream sexual morality, and 'seditious' criticism of mainstream politics.").

89. See FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 125 (1976) (noting the chilling effect on the distribution of generally acceptable materials when the distributor faces too many different community standards).

“abuse” of freedom of speech. Nevertheless, the *Fawcett* court leaves several policy and procedural questions unanswered. The extent to which the citizens of New Mexico will be protected from the harms of obscenity, as well as protection from those responsible for the distribution of pornographic materials remains uncertain. Because the court has broadened the United States Supreme Court’s standard governing the protection of freedom of expression, it is difficult to imagine that any material will be considered obscene under the new standard. Obscenity cases will continue to be a source of frustration for state and federal courts until the standards become less elusive. One thing is clear, the court has sent a message to the lower courts that prosecutors in obscenity cases will have a higher burden of proof if an obscenity conviction is to be sustained.

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