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## A Universal Standard for Obscenity? The Importance of Context and Other Considerations

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### ABSTRACT

The U.S. Supreme Court's *Miller* test for obscenity states that there should be a "community standard" that defines what is obscene. The reliance on such a standard depends on a set of questionable assumptions about the both the existence of a consensus view in a given community and individual jurors' ability to utilize such a standard when it diverges from their own views. Utilizing an original survey experiment, I show that there are strong practical difficulties with these assumptions that question the implementability of the *Miller* test.

### KEYWORDS

obscenity; pornography;  
*Miller* test; public opinion;  
First Amendment

What is obscene? This seemingly simple question presents a puzzle for public officials and legal scholars who grapple with its answer. Judges must apply and define legal standards. Elected officials regulate materials they deem unfit for their communities without running afoul of the First Amendment. Scholars must navigate the myriad issues involved in measuring the views of the mass public on such a highly personal and controversial area. Moreover, this remains a hotly debated topic in public discourse. As the 2011 controversy over a Northwestern University professor's decision to allow a live "sex show" as part of his course in human sexuality illustrates, one individual's perception of a relevant educational exercise may be considered obscene by another,<sup>1</sup> and furthers the perception that a uniform standard for determining what is obscene is likely to be chimerical.

A key part of the standard set by the U.S. Supreme Court in *Miller v. California*<sup>2</sup> for determining obscenity involves a determination of whether the average person finds that the material in question appeals to the prurient interest under contemporary community standards. However, determining what constitutes a community standard is no simple task, and the Court provides little guidance regarding how to infer this community standard. Moreover, as recent research reveals, there exists tremendous variation at the individual level in simply defining what constitutes having "had sex" (Sanders et al. 2010), thus defining what material crosses the line between acceptable and obscene may be near impossible. If a justice of the Court can no better specify a definition of the obscene apart from noting that "I know it when I see it,"<sup>3</sup> then how can we expect an entire community—or even twelve individuals on a jury—to agree on a given standard?

Further, if the task of determining whether a particular piece of pornography is obscene for a single community at a single point in time not complex enough, then the additional levels of complexity added to this puzzle when we consider variation in attitudes over time, space, and context would seem to reinforce the Sisyphean nature of this task. As the evolution of the Internet and other media forms

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<sup>1</sup> The media coverage of this event was world-wide and illustrated that views toward what happened ranged from clear support to outright hostility. See, for example, "Northwestern University Defends After-class Live Sex Demonstration" by Kara Spak in the Chicago Sun-Times 2 March 2011, and "Live Show Spices Up Sex Ed Class" in the Sydney Morning Herald on 4 March 2011.

<sup>2</sup> 413 U.S. 15 (1973).

<sup>3</sup> From Justice Stewart's concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

have made the spread of potentially obscene videos, pictures, and other pornographic items easily available to individuals around the nation and world, individuals may become desensitized to images that once would have been rare and shocking as they become more commonplace and “normal.” Therefore, even if a consensus definition could be determined for any given community at any given time, the stability of that definition would likely be weak and constantly evolving. Additionally, pornographic materials are rarely considered devoid of the context in which they are placed. Individual perception of whether particular materials are obscene or not is largely dependent on specific factors about the images/video depictions and the context in which the material is presented.

In this article, I argue that the existence of a uniform community standard is unlikely to exist for most types of pornography in a defined “community.” Additionally, I seek to examine specific trends that exist in the disconsensus related to material type and context, along with individual factors such as gender and sociosexual orientation. Specifically, I utilize data from an original survey conducted on a sample of students at a large public university in a metropolitan area in the U.S. Southeast to see: (1) if there are certain materials or activities where there is relative consensus on what constitutes obscene that could serve as a community standard, (2) whether expected demographic variation exists across all types of materials, and (3) whether the context and intended audience matters for those materials or activities in the absence of a uniform community standard.

### Legal Definitions of Obscenity

Like with many other civil liberties issues, the U.S. Supreme Court did not address the question of obscenity until the late nineteenth century. As the First Amendment had yet to be incorporated, and there were no federal laws dealing with the topic until the passage of the Comstock Act<sup>4</sup> in 1873, these issues were largely left to the states to sort out. Defining obscenity for the first time in *Rosen v. United States*,<sup>5</sup> the Court adopted the *Hicklin* rule, which classified material as obscene if it had a tendency to “deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.”<sup>6</sup> As the Court later noted, this standard essentially “reduce the adult population . . . to reading only what is fit for children.”<sup>7</sup> While the *Hicklin* rule’s disregard for the literary value of the work was questioned by lower federal courts in subsequent years,<sup>8</sup> it was not until 1957 in *Roth v. United States*<sup>9</sup> that the Supreme Court formally replaced the *Hicklin* rule as the standard for determining whether material was obscene.

In replacing the *Hicklin* Rule, the Court in *Roth* put forth a seemingly simple standard for determining whether material was obscene and thus lacking any First Amendment protection. That standard relies on one central question: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>10</sup> In adopting this new standard, the Court explicitly recognized the need to look at more than just “isolated passages” in evaluating whether a work of literature is obscene, recognizing the need to consider the context in which sexual conduct is portrayed in the broader work. While this standard offered a more nuanced view of potentially obscene material, it still was quite vague. Moreover, later decisions attempting to add clarity to the *Roth* test in many ways simply muddied the waters even further. Two examples exemplify this. First, in *Jacobellis v. Ohio*<sup>11</sup> the Court attempted to untangle the problem of what constituted a community for purposes of locating a contemporary community standard by setting a national standard based on the logic that “[i]t is, after all, a national Constitution we are

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<sup>4</sup> 17 Stat. 598 (1873).

<sup>5</sup> 161 U.S. 29 (1896).

<sup>6</sup> *Queen v. Hicklin*, L.R. 2 Q.B. 360 (1868).

<sup>7</sup> *Butler v. Michigan*, 352 U.S. 380 at 383 (1957).

<sup>8</sup> The most notable case of this nature was *United States v. One Book Called Ulysses*, 5 F. Supp. 182 (S.D.N.Y., 1933).

<sup>9</sup> 354 U.S. 476 (1957).

<sup>10</sup> *Roth* at 489.

<sup>11</sup> 378 U.S. 184 (1964).

expounding.”<sup>12</sup> This, however, presupposes that the same standard for the types of material that are acceptable can and should be the same in New York City as they are in rural Georgia. The second example was an attempt to further elucidate the requirement that the material be taken as a whole by stating that for the material in question to be obscene, it must be “utterly without redeeming social value,”<sup>13</sup> a standard that could never garner the support of more than three justices.

In 1973 the Supreme Court set a new standard for determining whether particular material constitutes obscenity in *Miller v. California*.<sup>14</sup> The *Miller* test formulates a three-pronged test that defines something as obscene if all of the following conditions are met:

1. whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest
2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value<sup>15</sup>

This new standard modifies the *Roth* test in two important ways. First, the *Miller* test utilized the more transparent requirement that material “must have serious literary, artistic, political, or scientific value to merit First Amendment protection,”<sup>16</sup> in place of the ambiguity of *Roth*’s “dominant theme” or the “utterly without redeeming social value” standard from *Memoirs*. Second, and more relevant for this research, unlike the prior standard in which the “community” in community standards was defined as the nation as a whole, this new standard allowed states the flexibility to set their own standards for what constitutes patently offensive sexual conduct.

While the *Miller* standard offered greater flexibility and a recognition that individuals in culturally distinct areas may not share the same view of what is obscene, to some even that was insufficient to recognize the need to account for local mores. This is exemplified in the following rhetorical crusade against the *Miller* decision unleashed by the Utah Supreme Court in *Salt Lake City v. Piepenburg*:<sup>17</sup>

... certain justices of the Supreme Court of the United States have said that before a matter can be held to be obscene, it must be “... when taken as a whole, lacks serious literary, artistic, political, or scientific value.” Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only to be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste.

Even ignoring the existence of judges and others who disagreed with the very premise of the *Miller* decision, its implementation is seriously limited by more practical concerns with the concept of a community standard. For such a standard to function in a way that allows consistency and uniformity in the law, it depends heavily on three unstated, but likely problematic, assumptions. First, it assumes that there is a single community whose standards can be applied. Second, it assumes that either this community is uniformly homogeneous in its view of obscenity and that this standard can be determined and applied by a randomly selected jury, or that if the community is more heterogeneous in its views, that a jury can ascertain a single standard representative of the diverse views of the broader community. Finally, it assumes that if the requisite condition with respect to the jury’s *ability* to determine the community standard is met, then the jury will choose to utilize the standard rather than simply replacing it with their own personal views when the two are at odds (Scott, Eitle, and Skovron 1990).

Even the simplest of these assumptions is difficult to meet in the contemporary United States. Modern technological advances in the ability to distribute pornographic material raises new issues with respect to defining what constitutes a community as the transmission of electronic communications is

<sup>12</sup> *Jacobellis* at 195.

<sup>13</sup> *Memoirs v. Massachusetts* 383 U.S. 413 at 419 (1966).

<sup>14</sup> 413 U.S. 15 (1973).

<sup>15</sup> *Miller* at 24–25.

<sup>16</sup> *Miller* at 26.

<sup>17</sup> 571 P.2d 1299 (Utah 1977).

not limited by borders. Courts are already dealing with this issue.<sup>18</sup> For example, the Federal District Court for the Western District of Pennsylvania in *United States v. Extreme Associates*<sup>19</sup> was forced to determine which community's standards—where the material was produced, where it was consumed, or some vague “World Wide Web community”—was to be used for materials placed on the Internet that could potentially be viewed by customers all around the world.<sup>20</sup>

### Prior Research on Public Attitudes toward Obscenity

Prior work on the study of attitudes toward obscenity is quite limited. The only national-level survey on the topic was carried out as part of a larger study by the Commission on Obscenity and Pornography (Commission) commissioned by President Johnson in 1969 to report on a variety of topics relating to pornography and the regulation thereof (Abelson et al. 1970). The design of the survey items combined with the overall purpose of the Commission's study limited the broad use of the survey. The analyses included in the report and other research relying on the survey (e.g., Glassman 1978) largely focused on the relationship between demographic characteristics and support for limits on the availability of certain classes of pornographic material (visual/textual), rather than attempting to determine general agreement for what types of material are obscene. Moreover, the study concluded that the groups with the most restrictive views toward pornographic materials were in decline, and those with the most tolerant views were on the rise (Abelson et al. 1970, 86). Taking this finding alongside the fact that this study was conducted over 40 years ago provides ample reason to believe that societal views have changed.

Due to the central role of the concept of community standards in determining whether specific pornographic material is deemed obscene or not, much of the scholarship following the *Miller* decision has focused on studies of single communities rather than on attempts to define or determine a national standard (but see Winick and Evans 1994). While it is not surprising that the results of the community-level studies exhibit variation in the consensus (or lack thereof) among local populations in evaluating certain material, the lack of consistency in survey instruments makes the drawing of general conclusions virtually impossible. Rather than adopting a single convention for wording questions designed to measure individual views on obscene material, a wide array of phrases are utilized. Three examples illustrate the substantial variation in question wording. Herrman and Bordner (1983) ask respondents if they feel the depiction of various acts are “blatantly offensive, offensive, neutral, usually not offensive, or never offensive when presented or depicted in the mass media” (368). Scott, Eitle, and Skovron (1990) ask whether it is “tolerated in your community for the average adult to obtain and see adult movies, video cassettes, and magazines showing nudity and sex if they should want to” (143). Finally, Brown et al. (1978) simply ask respondents to answer yes or no to whether each of a set of images was “pornographic,” although they were told to do so while “paying particular attention to the legal definitions of obscenity and prurient interest” (84).<sup>21</sup>

Despite the issues with question wording and the resulting limits on generalizability, these studies have highlighted the importance of demographic factors, specific content type, and the context in which the material is presented on individual perceptions of what is obscene. The existing literature

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<sup>18</sup> A thorough examination of the issue of what constitutes a community in the Internet age is beyond the scope of this article. While a few legal scholars have examined this question (see, e.g., Laird 2012), it is an area in need of further study.

<sup>19</sup> 2009 U.S. Dist. LEXIS 2860 (W.D. Pa., Jan. 15, 2009)

<sup>20</sup> The court ruled that in the particular cases the defendants were aware that the material in question would be used in Pittsburgh as the buyer provided an address both for the materials ordered to be delivered via mail and a billing address for their subscription to “members only” online content. The specific facts allowed the court to avoid addressing the more general question regarding material put on the Internet for the general consumption of individuals across the country (and world) where no billing or shipping was involved and where the distributor would have no way to know where the materials would be viewed. As the proliferation of Internet pornography is not likely to end in the near future, this legal quagmire is likely to be revisited.

<sup>21</sup> The use of the term “pornographic” is especially problematic in a survey of this nature, as all pornography will not necessarily be obscene. The *Merriam-Webster Dictionary* defines pornography as “the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement,” which encompasses some material that will possess First Amendment protection. For example, individual “sex scenes” in a film could obviously stimulate sexual excitement, yet the work as a whole could have unquestionable literary, artistic, political, or scientific value. In fact, multiple Academy Award-winning films contain scenes of sex or nudity.

shows that demographic characteristics, specifically gender and religiosity, tend to be strongly related to individual views on obscenity, with females and more religious individuals showing stronger opposition to obscenity or a greater willingness to classify a wider array of items as being unacceptable or inappropriate (Abelson et al. 1970; Herrman and Bordner 1983; Lambe 2004; Tibbetts and Blankenship 1999). However, other factors related to the content and context of the material tend to matter as well. For example, Bedard and Gertz (2000) find differences in perceptions of homosexual and heterosexual pornography based on the religiosity of respondents. Similarly, other studies show that actually viewing the material in question (Linz et al. 1991), the geographic proximity of the material to the respondent's home (Tibbetts and Blankenship 1999), and a variety of psychological factors (Lambe 2004) can influence an individual's level of tolerance for material of this nature.

It is also highly likely that the views individuals possess with respect to potentially obscene material may reflect their overall sociosexuality or sociosexual orientation (Kinsey, Pomeroy, and Martin 1948; Kinsey et al. 1953). Sociosexual orientation reflects an individual's willingness to engage in sexual relations outside of a committed relationship. This concept is widely used in the social psychology literature as an indicator of attitudes toward various types of sexual behavior. For example, research on sociosexual orientation utilizing various inventory measures (Penke and Asendorph 2008; Simpson and Gangestad 1991) has found a relationship between the sociosexual orientation of individuals and romantic partner choice (Simpson and Gangestad 1992), alcohol consumption (Clark 2004), and the extent of participation in "hookups" (Aubrey and Smith 2011). It seems intuitive that it would also be related to views toward obscenity, yet this measure has not been incorporated into any study directly looking at attitudes toward obscenity.

## Do Community Standards Exist?

On paper, the three-part test for defining obscenity set by the Supreme Court in *Miller v. California* seems clear. However, as discussed above, the practical application of this standard in individual cases depends on the existence of a single, unified concept of community standards. Do individual communities possess a shared set of values with respect to the types of material they consider to be obscene? Or does individual-level variation among members of a given community preclude the existence of such a standard? If the latter, the *Miller* test may be an insufficient standard for assuring procedural fairness in the law. If every potential judge and juror could theoretically have a different idea of what is obscene, and if they project their personal standard onto the larger community, then there will be a total lack of uniformity in the law in that community.<sup>22</sup>

Despite some mixed results and tremendous variation in survey instruments, the existing literature leads us to expect a lack of consensus with respect to whether most types of pornographic material are obscene or not, thus making the determination of a community standard an impossibility.<sup>23</sup> However, I also expect that there will be variation across different types of pornographic images consistent with prior work (e.g., Brown et al. 1978). Recognizing that standards have changed over time and exposure to material of a sexual nature has increased dramatically, I further expect that if any consensus does exist that it will be with respect to the mildest forms of pornography (e.g. images of a single nude adult), and the consensus will be that these materials are not obscene. From this, I derive my first set of hypotheses:

**Hypothesis 1a:** For most types of pornographic materials, there will be a lack of consensus among respondents in a given community as to whether the material is inappropriate.<sup>24</sup>

<sup>22</sup> Much of my central argument here is consistent with the approach taken by postmodern legal theorists with respect to tiered scrutiny approaches (see, e.g., Massey 2007). However, the central tenet of the postmodern approach—that the subjective nature of these tests renders their application problematic—could be easily applied to *Miller* as well.

<sup>23</sup> While most criminal proceedings require a unanimous jury, for purposes of this research I rely on a more relaxed definition of consensus of agreement by 75% or more of respondents.

<sup>24</sup> I utilize the term "inappropriate" rather than "obscene" out of concern that the common usage of the term obscene is distinctly different than its legal definition. The common usage of obscene is closer to that of pornographic (i.e., any material of a sexual nature). By using the term inappropriate, I am attempting to tap a concept closer to the legal definition of obscene.

**Hypothesis 1b:** There will be relative consensus regarding whether the depictions of individual nude adults is inappropriate.

Despite the relative lack of consensus overall, I do believe that certain factors will influence individuals' overall perceptions of whether specific types of materials are obscene. Specifically, gender and religiosity should have the largest effects on individual views. While Bedard and Gertz (2000) find that religiosity influences perceptions of homosexual versus heterosexual pornography; I argue that all pornography contrasts with the value structure imposed by most religions. Therefore, I expect that more religious individuals will be less accepting of all types of pornography compared to their less religious counterparts. I expect that gender will have a similar effect. As noted by Herrman and Bordner (1983) and others, pornography is overwhelmingly marketed toward heterosexual males. This has led to a cultural view that consumption of pornography is more acceptable for males. This may be changing to a degree as more "porn for women" is currently being produced, yet the entrenched nature of this double standard still leads to the expectation that females will be less accepting of pornographic material overall. However, the impact of gender is likely not to be uniform across all types of materials. Specifically, I expect males to be less accepting of male homoerotic material. Thus, my second set of hypotheses are:

**Hypothesis 2a:** For all types of pornographic materials, individuals with higher levels of religiosity will rate materials as less appropriate.

**Hypothesis 2b:** For all types of pornographic materials, females will rate materials as less appropriate.

**Hypothesis 2c:** For pornographic material containing only male models/actors, males will rate materials as less appropriate.

The relationship between individuals' views on the appropriateness of personally viewing various types of pornographic material is likely to color their views of the appropriateness of that material for society as a whole. If this is true, it casts strong doubts on one of the central assumptions necessary for the *Miller* test to be implemented as the Court intended. Thus, it is of fundamental importance to understand whether judges and jurors are capable of separating their own views on what they feel is appropriate to them personally from what they think reflects the true standards of their broader community. Prior work suggests that individuals cannot (or will not) make this distinction (Scott, Eitle, and Skovron 1990)—thus my third hypothesis:

**Hypothesis 3:** For all types of pornographic materials, individuals rating materials less (more) appropriate for them personally will rate materials less (more) appropriate for adults in the general population.

Prior work has shown that it is not simply the content of the material that affects perceptions of obscenity, but also the context in which the material is presented (e.g., Tibbetts and Blankenship 1999). One context that has not been previously examined, but which possesses interesting implications, is that of education. As recent public controversy illustrates, there is a great deal of variation on what types of materials individuals view as appropriate for use in a university classroom. While I can see arguments why individuals might feel that potentially obscene material would be either more or less appropriate in a relevant educational context than for use in the general population, I expect that there will be a significant difference in individuals' views. My fourth hypothesis reflects this as follows:

**Hypothesis 4:** For all types of pornographic materials, individuals will rate the appropriateness of material in a relevant educational context differently than they rate materials in other contexts.

My final hypothesis relates to the relationship between the sexual behavior of individuals and their views on pornography. Previous research has shown that individuals with an unrestricted sociosexual orientation (i.e., those who are more comfortable with "casual" sexual encounters) tend to have more liberal attitudes toward sex in general, yet the specific relationship between sociosexual orientation and views on pornography has not been examined. As sociosexual orientation is a combination of individuals' sexual behaviors, attitudes, and desires (Penke and Asendorph 2008; Simpson and Gangestad 1992), individuals with unrestrictive sociosexual orientations possess a value structure that is largely accepting of aspects of sexuality that would not be accepted generally. I expect that this would follow for views on pornography consumption as well. Therefore, it seems highly likely that individuals with more unrestricted sociosexual orientations will be more accepting of pornographic material of all types and less likely to find them to be obscene. Hypothesis 5, therefore, states:

**Hypothesis 5:** For all types of pornographic materials, individuals with unrestricted sociosexual orientations will rate materials as more appropriate.

## Methodology

In order to test my hypotheses, a survey was designed and carried out with 431 undergraduate students enrolled in introductory political science courses at Georgia State University. The survey covered a wide range of topics; my questions about sexual behavior and attitudes toward obscenity comprised only a small section of the full questionnaire. Students were given extra credit for completing the survey. The survey was administered online using the Qualtrics system, with students having the ability to complete it at any time from any location of their choosing. Approximately 399 students completed my survey, with exact response counts ranging from 372 to 399 depending on the question. This means

that participation rates were 86 and 92 percent—a very high rate, no doubt driven by the extra-credit incentive. The sample was approximately 57 percent female, 41 percent white, and 41 percent African American.

My section of the survey began by asking students questions about their own sexual behavior to get an idea of where they fit on the sociosexual orientation index. I utilized the questions from the Sociosexual Orientation Inventory (SSI) of Simpson and Gangestad (1991). Specifically, participants were asked about their number of sex partners in the past year, anticipated number of partners in the next year, number of partners with which they have only had sex on one and only one occasion, and the frequency with which they do (or did) fantasize about someone other than their current (or most recent) dating partner. In addition to these behavioral questions, an additional three questions in the SSI ask students to agree or disagree with statements designed to gauge their general sexual attitudes.<sup>25</sup>

After these questions, respondents were asked about their opinion regarding personally viewing potentially obscene material. These questions served a twofold purpose. First, they are necessary for evaluating my hypotheses regarding demographic difference. Second, they provide a baseline for comparing how the context in which the materials are viewed affects responses. The prompt instructed respondents to answer six items by asking: “How appropriate or inappropriate do you think it is for you personally to view photographic depictions or video of \_\_\_\_\_?” To get variation to reactions to different types of pornographic images, I asked about six types of images/video depictions that range from relatively mild or soft-core items to those that are a bit more unconventional and more hardcore or fetishistic. The specific descriptions I used were: (1) a nude adult female; (2) a nude adult male; (3) an adult female performing fellatio on an adult male; (4) two adult males engaged in sexual intercourse; (5) two adult females engaged in sexual intercourse; (6) adults engaged in S&M, bondage, or violent sexual activities.<sup>26</sup> Answer options were on a six-point scale: very inappropriate, inappropriate, somewhat inappropriate, somewhat appropriate, appropriate, very appropriate.

Following the set of six questions designed to measure respondents’ personal views on obscenity, the sample was randomly split into two different tracks. Both tracks presented the same six items listed above, but the prompt differed. One track was asked: “How appropriate or inappropriate do you think it is for adults in the general population to view photographic depictions or video of \_\_\_\_\_?” The other track was asked: “How appropriate or inappropriate do you think it is to view photographic depictions or video of \_\_\_\_\_ in a relevant educational context?”<sup>27</sup> The specific items asked about in both tracks and the response options for both tracks mirrored those used in the questions gauging individual views about the appropriateness of personally viewing pornographic material. There were between 191 and 208 responses to these questions for each track. This allowed for an examination of individuals’ ability to separate their views on what is appropriate for themselves from what they feel others should have the right to do and to examine differences in views of obscenity based on context. In other words, are respondents’ views influenced when I present the viewing of the materials in question in an educational, rather than a more general, context?

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<sup>25</sup> The three statements are:

1. “Sex without love is ok.”
2. “I can imagine myself being comfortable and enjoying casual sex with different partners.”
3. “I would have to be closely attached to someone (both emotionally and psychologically) before I could feel comfortable and fully enjoy having sex with him or her.”

<sup>26</sup> An alternative approach would have been to show respondents actual images rather than relying on descriptions. However, doing so would have been limiting as respondents may have been opposed to specific aspects of individual images that would have led to respondents that were not indicative of their views toward a broader class of images.

<sup>27</sup> While the question did not specify that the educational context referred to a college or university setting, given the fact that (1) respondents were themselves college students and (2) one would be hard pressed to imagine a scenario where there would be a relevant educational context to show high school students most of these materials, it is reasonable to assume that respondents receiving the educational context condition would have made the inference.



Finally, subjects were asked two final questions about how uncomfortable the questions made the students, and how likely they were to provide inaccurate or false answers to questions that make them feel uncomfortable. Just over 56 percent of the students reported that the questions made them uncomfortable to some degree, and almost 40 percent stated that they were somewhat or very likely to not be completely truthful when a question makes them feel uncomfortable. Responses to these questions indicate the need for caution in interpreting the results, as students may have under-reported their own behavior or views. The high percentage of students willing to give incorrect responses is likely due in part to the extra-credit nature of the survey: in a general population survey, people who are uncomfortable with questions are more likely to simply not answer the question. However, since students were awarded extra credit for completing this survey, they could have felt compelled to answer the questions even though they were told that they were free to skip any questions that made them uncomfortable.<sup>28</sup>

## Results

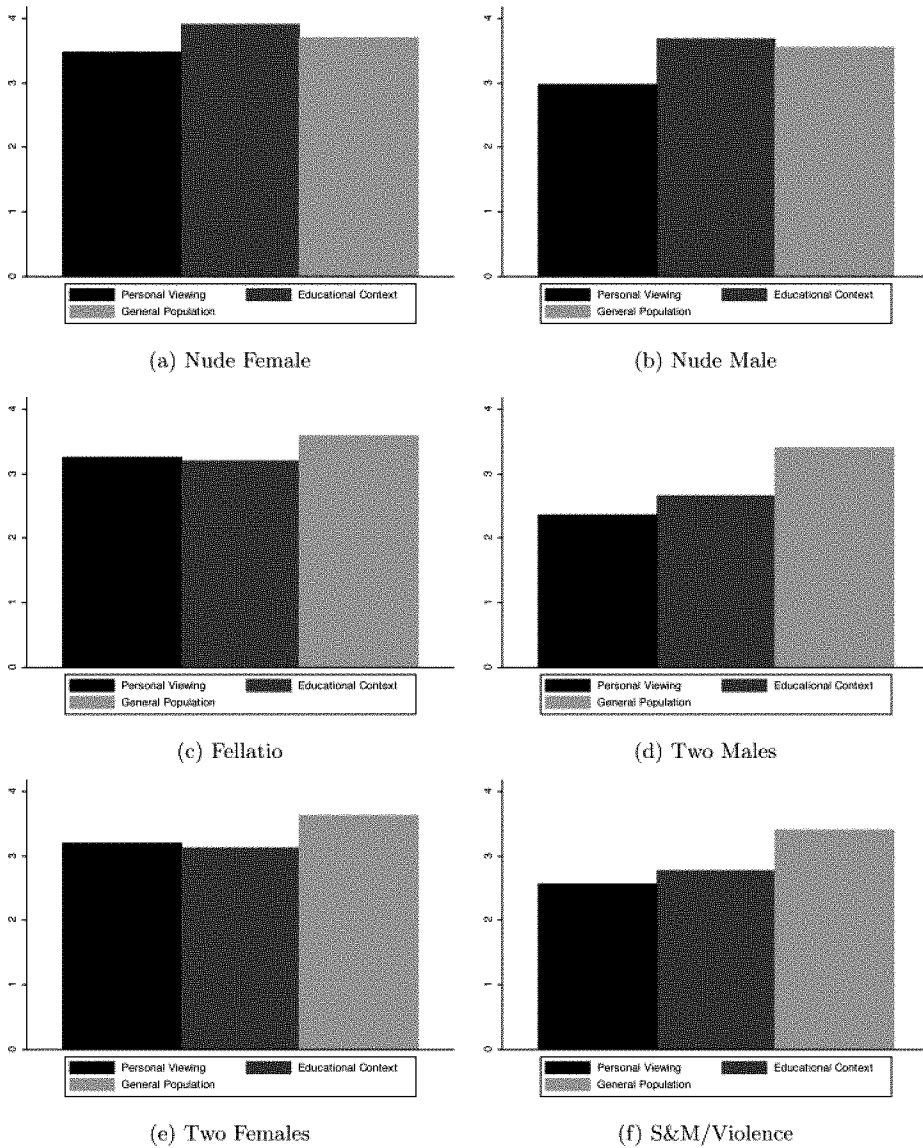
Figure 1 shows the mean responses across all three contexts, where lower scores represent greater consensus toward classifying the material as inappropriate and higher scores as greater consensus toward appropriateness. As is immediately apparent, responses varied greatly across answer options and the tracks. Hypothesis 1 stated that we would see a lack of consensus, which appears to be true, *prima facie*. The problem in evaluating this more formally becomes defining “consensus,” as the Supreme Court failed to do so. Since the inappropriate/appropriate division sets up a dichotomy, of necessity one category or the other will be above 50 percent, so that should not be used as an indicator of consensus. As virtually any choice of a cutoff could be deemed arbitrary and argued to be relevant or not based on the researcher’s viewpoint, I utilized both the widely used 75 percent level and a looser 65 percent level.

With respect to personal viewing of pornographic images, we see a consensus toward inappropriateness using the strict 75 percent cutoff for viewing two males engaged in sexual intercourse and for viewing S&M or violent sexual materials. There is no further consensus reached by loosening the definition to 65 percent, although viewing a nude adult male comes very close with 63.5 percent. Examining the other viewing contexts, we see that there is no consensus on the appropriateness of viewing any of the materials—either for educational purposes or in general—using a 75 percent requirement. Dropping the threshold for consensus to 65 percent results in some consensus in the educational purposes track as viewing two males engaged in sexual intercourse and viewing S&M or violent sexual materials are deemed inappropriate. However, even with the lower threshold, there is no consensus on materials being appropriate or inappropriate for consenting adults in the general population. In fact, in this track, no single material reaches even 55 percent appropriate or inappropriate, indicating that the respondents are very evenly divided on the issue when it is put in the general population setting. The second part of Hypothesis 1 stated that I would see consensus on the appropriateness of viewing individual nude adults, but this did not hold true even under the lower 65 percent threshold for consensus. The trend of these responses is toward the inappropriate side of the scale most of the time, but responses leaned most toward inappropriate for the items dealing with personal viewing. Respondents were a bit more permissive about viewing the materials in the educational context than their own personal viewing, while the general population context shows the highest levels of permissiveness.

Hypothesis 2 deals with the demographic correlates of these responses. Religiosity and gender are specifically expected to influence how the students rated viewing these potentially pornographic materials. Being female and more religious should result in ratings that lean more toward the inappropriate side of the scale, and I see that this is indeed true. Table 1 shows the correlations between responses and religiosity. The negative, significant correlations show that both self-reported religious importance and religious service attendance are correlated with ratings closer to the very inappropriate end of the

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<sup>28</sup> Additional analyses were conducted to examine whether respondent discomfort or potential lack of truthfulness when dealing with questions that made them uncomfortable influenced the results presented in the following section. All key findings were found to be robust after accounting for this.



**Figure 1.** Views on Appropriateness by Type of Material. *Note.* Measured on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate.

scale. Figure 2 shows the average score of responses to the materials questions among men and women. Averages among men are higher than averages among women, indicating that men lean more toward the appropriate side of the scale, for all materials except viewing a nude adult male and viewing two males engaged in sexual intercourse, as expected by Hypothesis 2c.

The next two hypotheses deal with the differences between responses toward personal viewing versus viewing in other contexts. Hypothesis 3 states that viewing materials as inappropriate personally should indicate that the respondent will think the materials are inappropriate in general. Table 2 shows the bivariate correlations between the sum of responses to the personal viewing items and the sums of the responses to the educational context and general population tracks. Overall, responses for items in the educational context and general population tracks correlate with the responses about personal viewing; the educational context responses correlate with personal viewing responses at a moderately strong level ( $r = 0.56$ ), and the general population responses highly correlate with personal viewing responses ( $r = 0.75$ ).

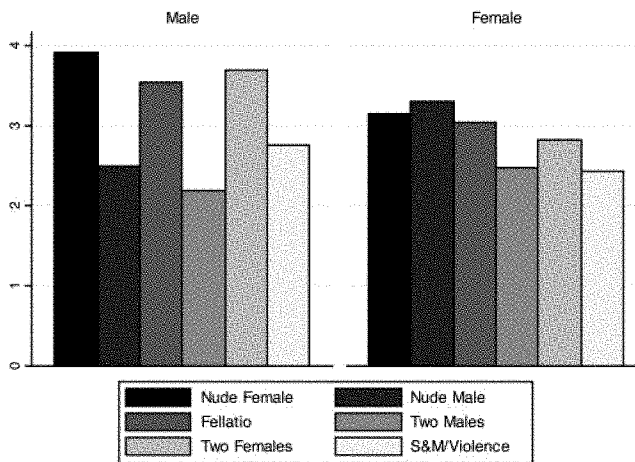
**Table 1.** Impact of religion on views towards obscenity.

	Importance of Religion	Religious Service Attendance
Average Obscenity	-0.424**	-0.408**

Note. Cell entries are Pearson's correlation coefficients. Importance of Religion is on a 0–10 scale where higher values correspond with "more important." Religious Service Attendance is measured on a 1–6 scale with higher values equal to more frequent attendance. Average Obscenity is scaled with higher values equal to viewing material as "more appropriate." \* $p < 0.05$ , \*\* $p < 0.01$ .

Hypothesis 4 addresses the difference between the educational context and the general population context. The definitive answer here is that, yes, context does indeed matter, and in some cases it matters a great deal. Table 3 shows the differences of mean responses among the different tracks for each item. The differences between personal viewing and educational context viewing are significant for three of the six materials—viewing a nude male, a nude female, and two males engaged in sexual intercourse. In all three cases, the educational context viewing is deemed more appropriate on average than personal viewing. Interestingly, even though the correlation is higher between the general population track and personal viewing than it is between the educational context and personal viewing, the differences between the general population track means and the personal viewing means are generally larger than the differences between the educational context track and personal viewing. This is likely because the means are pulled by responses at the extreme ends of the scale more than correlations. Responses to the items that address personal viewing and the educational context track are more extreme toward the inappropriate end of the scale than the responses to the general population track. Those who said a type of material was inappropriate for them personally and for educational viewing were more likely to say that it was "very inappropriate" than in the general population, whereas in the general population views were more in the "inappropriate" columns. When I move to the general population context and compare it to personal viewing, however, the differences are consistently significant, and the general population is viewed more appropriately than personal viewing across all materials on average. When the educational context and general population tracks are compared, four of the mean differences are significant—all except viewing the nude female and nude male are deemed more appropriate in the general population context (there is no significant difference in the ratings of appropriateness for the nude female and nude male).

To evaluate my final hypothesis, I generate a sociosexual orientation score utilizing the questions described in the methodology section. In accordance with the previous literature on the sociosexual orientation (Simpson and Gangestad 1991), the responses to these seven items were factor-analyzed,



**Figure 2.** Gender Differences in Views toward Obscenity. Note. Measured on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. All Male/Female means are statistically different ( $p < 0.05$ , one-tailed test).

**Table 2.** Relationship between personal views and appropriateness for others.

	Personal Viewing
Educational Context	0.558**
General Population	0.751**

Note. Cell entries are Pearson's correlation coefficients. Correlations are between the mean personal viewing obscenity score for all respondents and the mean obscenity score for either viewing in the educational context or for general population viewing, depending on which track the respondent was selected into. \* $p < 0.05$ , \*\* $p < 0.01$ .

**Table 3.** Variation in Average Responses Across Contexts.

	Personal	Educational	General
Adult female	3.48 <sup>b,c</sup>	3.91 <sup>a</sup>	3.71 <sup>a</sup>
Adult male	2.98 <sup>b,c</sup>	3.69 <sup>a</sup>	3.56 <sup>a</sup>
Fellatio	3.26 <sup>c</sup>	3.2 <sup>c</sup>	3.59 <sup>a,b</sup>
Two males	2.36 <sup>b,c</sup>	2.66 <sup>a,c</sup>	3.41 <sup>a,b</sup>
Two females	3.2 <sup>c</sup>	3.13 <sup>c</sup>	3.62 <sup>a,b</sup>
S&M	2.57 <sup>c</sup>	2.77 <sup>c</sup>	3.4 <sup>a,b</sup>

Note. Cell entries are average obscenity scores measured on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate.<sup>a</sup>Significantly different from personal viewing ( $p < 0.05$ ); <sup>b</sup>Significantly different from educational context ( $p < 0.05$ ); <sup>c</sup>Significantly different from general population ( $p < 0.05$ ).

which resulted in a single factor, as expected. Rotation was unnecessary since there was only one factor retained, and the scores were estimated using OLS regression based on that factor. These scores are utilized as an independent variable in the models in Table 4. The dependent variables are simple summed scales of the responses; as I did not expect one particular type of material to matter more than others, I opted for the simple scale that treats them all equally rather than a factor analysis or other type of scaling method.<sup>29</sup> Not surprisingly, the scores have the most influence on the model, although gender comes in as a close second in the general population model. The positive coefficients indicate that as the students' sociosexual orientations become more open (e.g., more partners expected, more partners in the past, more fantasizing about others, more open to sex without love, open to casual sex, not needing to be emotionally attached for sex), the students tend to view the materials as more appropriate. This pattern is consistent across all three models, although it is most pronounced in the general population track where gender and religion are not significant.

Since the tracks were assigned completely at random, I can assume that the differences in ratings between the educational context and general population models are solely due to context-based differences. The regression models in Table 4 can provide more insight into how the context affects how respondents rate the appropriateness of various materials. Again, the dependent variables are summed scales of the six items in each of the three models; separating the materials out into separate models makes very little difference in the results, and no difference in the substantive discussion. Sociosexual orientation consistently drives the models, but some interesting differences emerge in the demographics. For personal viewing, being female, more religious, and more ideologically conservative are associated with views that lean more toward the inappropriate side of the scale. Women also tend to say that viewing the materials in the general population is more inappropriate than men, but this is not true in the educational context. The same is true with religious importance—it matters for personal viewing and general population viewing, but not in the educational context. Somehow when the educational context is invoked, students no longer respond with religious and gender considerations either consciously or unconsciously. This is likely because the educational context takes the personalization of the materials out of the picture and offers a rationale for viewing the materials other than for the sake of viewing pornographic materials. The pattern could also be indicative of social desirability biases at work in responses to the personal viewing questions: the students might feel obligated to say that

<sup>29</sup> Separate models for each of the materials are presented in the appendix, Tables A-1–A-6.

**Table 4.** Determinants of individual views toward obscenity.

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	1.804* (0.916) [0.047]	1.931 (1.441) [0.183]	3.536* (1.494) [0.019]
White	-0.093 (0.941) [0.921]	-0.386 (1.565) [0.805]	-0.624 (1.478) [0.673]
Age	0.024 (0.084) [0.776]	-0.176 (0.134) [0.191]	0.196 (0.137) [0.153]
Sociosexual	3.545** (0.542) [0.000]	4.715** (0.939) [0.000]	3.702** (0.821) [0.000]
Religious importance	-0.611** (0.131) [0.000]	-0.038** (0.217) [0.861]	-1.138** (0.210) [0.000]
Ideology	0.604* (0.298) [0.043]	1.592* (0.464) [0.001]	0.553 (0.473) [0.244]
Democrat	-0.516 (0.919) [0.575]	-0.532 (1.575) [0.736]	-0.730 (1.409) [0.606]
Constant	17.928** (2.512) [0.000]	15.756** (4.081) [0.000]	20.233** (4.096) [0.000]
<i>N</i>	301	141	157
<i>R</i> <sup>2</sup>	0.301	0.312	0.360
Adjusted <i>R</i> <sup>2</sup>	0.284	0.275	0.330

Note. Dependent variable is the average obscenity score measured on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates. Standard errors are shown in parentheses, with *p* values in brackets. \**p* < 0.05, \*\**p* < 0.01

materials are inappropriate for them to view given social biases against viewing pornographic materials, but in abstract contexts they are freer to respond as they wish. While I have no way to determine whether the lower scores for personal viewing are due to social desirability bias with any confidence, the demographic differences in response patterns indicate that social desirability is a potential source of the observed differences.

Ideology shows a slightly different pattern. More conservative students view materials as more inappropriate for viewing personally and for educational purposes, but not for general population viewing. This could be evidence of an attitude that others can do what they want, but they view things as inappropriate for themselves. Ideology makes the biggest impact in the educational context, and this is likely because sex education and the role of sex in schools is a topic that is often prevalent in politics. Debates over whether sex education should be taught in public schools at any level, as well as what should be taught in schools if it is included in the curriculum, arise periodically. Students attending a state university are likely to have been exposed to these debates at some point, and would therefore see viewing any type of pornographic material in an educational context as a political issue, thus invoking their ideological leanings in answering these questions.

## Conclusion

In this article, I have presented strong evidence to doubt the efficacy of relying on contemporary community standards for defining obscenity. A centerpiece of the Supreme Court's *Miller* standard, the notion of community standards, presupposes both that a uniform standard exists for a single community and that a randomly selected subset of that community (e.g., a jury) can determine and apply that standard even when it differs from their own views. I show that both of these presuppositions are

problematic in practice. With respect to the assumption of the existence of a single community standard, my survey results reveal that there is a total lack of consensus for even the most extreme or most mundane types of pornographic materials. Additionally, the strong correlations between respondents' views on the appropriateness of the various types of materials for themselves and for the general population questions the practicality of the requirement that juries be able to allow the views of the community to supersede their personal views.

Given these potential issues with the application of the *Miller* standard, the question remains, What should be done? The inability to find a consensus toward inappropriateness with respect to the most extreme forms of pornography in this survey (S&M/violence) shows that finding any consensus is quite difficult. In fact, in this survey, a consensus was found only in the context of personal viewing, and then only with respect to images of two males engaged in sexual intercourse. Given that judges and juries have to formulate assessments of community standards in an area where it is quite likely such standards do not exist, the *Miller* tests potentially because no more than Justice Stewart's "I know it when I see it." This, combined with findings from prior work, suggest a need for the courts to revisit the community standards aspect of *Miller* and potentially replace it with a more objective standard. One potential approach would be to adopt something akin to Posner's (2005) pragmatic approach to constitutional law, focusing on the consequences to society, which in the case of obscenity could turn the focus to making a determination of whether granting First Amendment protection to a given piece of pornography will have a harmful impact on society. Such an approach would be heavily fact-based (Massey 2007), could make use of social science research, and would not require judges and juries to infer the values of—often quite heterogenous—communities. However, it should also be noted that these findings do not necessarily suggest a need to throw the baby out with the bathwater and abandon *Miller* altogether. In fact, even in its current form, this standard may still work for the most controversial types of pornography (e.g., bestiality or crush videos).<sup>30</sup>

Two notes of caution must be given with respect to the results I present herein relating to the generalizability of my findings. First, college students are a nonprobability convenience sample; therefore, the results are not necessarily generalizable to any other population. While it is possible that a natural community would be more likely to formulate consensus on a given type of material, I feel that that does not undermine our conclusions. Even if that possibility is an accurate reflection of reality, it would likely only be so for very homogenous communities. While there may be many communities in the United States where the citizens may share similar views about the type of materials that are appropriate and inappropriate, this is clearly not the case in larger and more urban areas, where the bulk of the population resides. Thus, the limits in the generalizability of our results are most problematic for small population centers, and stability in the law clearly requires standards that can be implemented in more than just small, homogenous communities. In many ways, my sample actually provides a more stringent test of our hypotheses. A student body at a university is a community in the practical sense, even though it is not a community in the legal sense, and as a community shares certain characteristics and values due to the nature of their membership in the community and shared socialization that make it likely to be more homogenous than all but very small, homogenous communities. Consensus on obscenity is likely difficult to find, and as our research demonstrates, assessments of appropriateness are likely to vary based on context. These findings suggest that considerable problems may exist in applying the *Miller* standard in a way that produces uniformity and predictability in the law due to the nonexistence of stable community standards.

A second, somewhat related issue has to do with the age of my sample. A random sample of adults in the general population would contain much greater variation in terms of age. Given that prior research beginning with Abelson et al. (1970) has consistently found older cohorts of individuals to have more conservative views with respect to the appropriateness of pornography consumption, a more representative sample will likely have more conservative views on average. However, as with the

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<sup>30</sup> It would likely also work for child pornography. However, since child pornography lacks any First Amendment protection at all, this is moot.

point above about college students not constituting a true community in the legal sense, this would actually bias against finding the lack of consensus I hypothesize. Therefore, while the broader implications of these results must be considered with some degree of caution due to the nature of the sample, it is likely that a sample of a legal community or a more representative sample would yield even less consensus in all but a handful of situations. These potential issues suggest some fruitful avenues for future research. The most important of these would involve the use of a more demographically diverse sample, either through a nationwide random sample or a random sample of individuals within a handful of distinct legal communities differing in size, region, population density, and other key factors likely to influence the degree of homogeneity in community members' views toward pornographic materials.

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## Appendix A: Individual Views by Specific Material Type

**Table A1.** Determinants of individual views toward obscenity: Nude female model.

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	−0.08 (0.19)	−0.21 (0.28)	0.35 (0.26)
White	−0.02 (0.20)	−0.16 (0.31)	−0.20 (0.26)
Age	0.00 (0.02)	−0.02 (0.03)	0.03 (0.02)
Sociosexual	0.69** (0.11)	0.73** (0.18)	0.58** (0.15)
Religious importance	−0.11** (0.03)	−0.01 (0.04)	−0.19** (0.04)
Ideology	0.10 (0.06)	0.28** (0.09)	0.03 (0.08)
Democrat	−0.16 (0.19)	−0.19 (0.30)	−0.05 (0.25)
Constant	3.79** (0.52)	3.28** (0.76)	3.97** (0.72)
<i>N</i>	310	149	162
Adjusted <i>R</i> <sup>2</sup>	0.26	0.21	0.26

Note. Dependent variable is response to the Nude Female item on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates (standard errors in parentheses). \* $p < 0.05$ , \*\* $p < 0.01$ .

**Table A2.** Determinants of individual views toward obscenity: Nude male model.

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	1.11** (0.19)	0.46 (0.29)	0.74** (0.25)
White	0.10 (0.10)	0.01 (0.32)	−0.07 (0.25)
Age	0.01 (0.01)	−0.01 (0.03)	0.04 (0.02)
Sociosexual	0.44** (0.11)	0.60** (0.19)	0.53** (0.14)
Religious importance	−0.07* (0.03)	−0.03 (0.04)	0.17** (0.04)
Ideology	0.19** (0.06)	0.28** (0.09)	0.22** (0.08)
Democrat	−0.02 (0.19)	−0.38 (0.31)	−0.34 (0.24)
Constant	1.74** (0.53)	2.77** (0.80)	2.46** (0.69)
<i>N</i>	313	149	162
Adjusted <i>R</i> <sup>2</sup>	0.19	0.16	0.32

Note. Dependent variable is response to the Nude Male item on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates (standard errors in parentheses). \* $p < 0.05$ , \*\* $p < 0.01$ .



**Table A3.** Determinants of individual views toward obscenity: Fellatio model

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	0.10 (0.19)	0.35 (0.30)	0.38 (0.26)
White	-0.06 (0.20)	-0.13 (0.33)	-0.01 (0.26)
Age	0.02 (0.02)	-0.02 (0.03)	0.02 (0.02)
Sociosexual	0.73** (0.11)	0.85** (0.20)	0.69** (0.15)
Religious importance	-0.09** (0.03)	0.02 (0.05)	-0.16** (0.04)
Ideology	0.07 (0.06)	0.24* (0.10)	0.09 (0.08)
Democrat	0.09 (0.19)	-0.06 (0.32)	0.01 (0.25)
Constant	3.05** (0.53)	2.21* (0.85)	3.47** (0.73)
<i>N</i>	311	147	163
Adjusted <i>R</i> <sup>2</sup>	0.23	0.16	0.28

Note. Dependent variable is response to the Fellatio item on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates (standard errors in parentheses). \* $p < 0.05$ , \*\* $p < 0.01$ .

**Table A4.** Determinants of individual views toward obscenity: Two males model

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	0.57** (0.18)	0.69* (0.27)	0.75** (0.27)
White	0.12 (0.19)	0.06 (0.31)	-0.16 (0.27)
Age	-0.01 (0.02)	-0.04 (0.03)	0.02 (0.03)
Sociosexual	0.43** (0.11)	0.65** (0.18)	0.64** (0.15)
Religious importance	-0.10** (0.03)	-0.08* (0.04)	-0.20** (0.04)
Ideology	0.21** (0.06)	0.28** (0.09)	0.10 (0.09)
Democrat	-0.01 (0.18)	0.05 (0.30)	-0.11 (0.26)
Constant	1.94** (0.50)	2.49** (0.76)	3.41** (0.75)
<i>N</i>	312	149	162
Adjusted <i>R</i> <sup>2</sup>	0.20	0.26	0.30

Note. Dependent variable is response to the Two Males item on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates (standard errors in parentheses). \* $p < 0.05$ , \*\* $p < 0.01$ .

**Table A5.** Determinants of individual views toward obscenity: Two females model.

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	-0.15 (0.19)	0.23 (0.28)	0.47 (0.25)
White	-0.13 (0.20)	-0.09 (0.32)	-0.10 (0.25)
Age	0.01 (0.02)	-0.05 (0.03)	0.03 (0.02)
Sociosexual	0.72** (0.11)	0.85** (0.19)	0.66** (0.14)
Religious importance	<0.12** (0.03)	-0.02 (0.04)	-0.19** (0.04)
Ideology	0.01 (0.06)	0.21* (0.09)	0.05 (0.08)
Democrat	-0.06 (0.19)	-0.06 (0.31)	0.04 (0.24)
Constant	3.92** (0.53)	3.24** (0.79)	3.58** (0.70)
<i>N</i>	312	148	161
Adjusted <i>R</i> <sup>2</sup>	0.26	0.20	0.31

Note. Dependent variable is response to the Two Females item on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates (standard errors in parentheses). \* $p < 0.05$ , \*\* $p < 0.01$ .

**Table A6.** Determinants of individual views toward obscenity: S&M model.

	Model 1 Personal viewing	Model 2 Educational context	Model 3 General population
Female	0.17 (0.18)	0.58* (0.28)	0.73** (0.26)
White	0.06 (0.18)	0.02 (0.31)	-0.14 (0.26)
Age	-0.03 (0.02)	-0.07* (0.03)	0.03 (0.02)
Sociosexual	0.57** (0.10)	0.74** (0.19)	0.59** (0.15)
Religious importance	-0.09** (0.03)	0.01 (0.04)	-0.21** (0.04)
Ideology	0.12* (0.06)	0.25** (0.09)	0.06 (0.08)
Democrat	-0.04 (0.18)	-0.18 (0.31)	-0.15 (0.25)
Constant	3.13** (0.49)	2.70** (0.79)	3.63** (0.73)
<i>N</i>	313	149	160
Adjusted <i>R</i> <sup>2</sup>	0.22	0.17	0.31

Note. Dependent variable is response to the S&M item on a scale from 1 to 6, where 1 is very inappropriate, and 6 is very appropriate. Cell entries are OLS coefficient estimates (standard errors in parentheses). \* $p < 0.05$ , \*\* $p < 0.01$ .