The United States Supreme Court has previously determined that First Amendment considerations are implicated by a school board's removal of books from school libraries. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866 (1982). The Eighth Circuit has understood the ruling in *Pico* to state that the First Amendment is violated if school board members intend, by their removal decision, to deny students access to ideas with which the school board disagrees. *Turkish Coal. Of Am., Inc. v. Bruininks*, 678 F.3d 617, 623 (8th Cir. 2012). This intent to deny students access must also be the decisive factor in the decision. *Id.* In *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, the Eighth Circuit addressed the removal of the film version and trailer film for "The Lottery," a short story by American author Shirley Jackson from the high school curriculum. 670 F.2d 771, 773 (8th Cir. 1982). This removal was based on citizen's objections that focused on the alleged violence in the film and "their purported impact on the religious and family values of students." *Id.* The court found that the board's objections had "religious overtones" and the films were banned because of their ideological content. *Id.* The Eighth Circuit determined that the school board could not constitutionally ban the films because "a majority of its members object to the film's religious and ideological content and wish to prevent the ideas contained in the material from being expressed in the school." *Id.* at 773, 776 (identifying First Amendment cases pertaining specifically to school libraries as well).

Accordingly, material in school libraries is protected by the First Amendment unless it falls into one of the limited categories outside of First Amendment protections. One of these categories is "obscene material." *Miller v. California*, 413 U.S. 15 (1973). The definition of "obscene" must be limited in order to afford broad protections to freedom of expression. *Id.* Regulation of obscene material is only limited to materials that "depict or describe sexual conduct" and, when taken as a

whole, (1) appeal to the "prurient interest in sex," (2) portray sexual conduct in a patently offensive way, and (3) do not have serious literary, artistic, political, or scientific value. *Id.*

"Sex" and "obscenity" are not synonymous under this framework. Distribution of sexually graphic but non-obscene material has previously been protected. *United States v. Williams,* 553 U.S. 285, 288 (2008). A benchmark for determining the first prong of the test is "whether the average person, applying contemporary community standards, would understand the dominant theme of the material taken as a whole appeals to the prurient interest." 5 A.L.R.3d 1158 (Originally published in 1966) (citing *Roth v. United States*, 354 U.S. 476 (1957)). In *Kois v. Wisconsin*, 408 U.S. 229 (1972), the U.S. Supreme Court held that a newspaper-published poem entitled "Sex Poem" was constitutionally protected, even though it depicted "an undisguisedly frank, play-by-play account of the poet's recollection of sexual intercourse" but had "earmarks" of an attempt at serious art. 10 Am. Jur. Trials 1 § 10 (Originally published in 1965) (December 2021 Update). The dominant theme of the poem did not appeal to the "prurient interest," which was been explained by the U.S. Supreme Court as material that has the tendency to excite "lustful thoughts." 10 Am. Jur. Trials 1 § 5 (Originally published in 1965) (December 2021 Update). Although "contemporary community standards" includes some room for a subjective element, the "dominance" of the theme of a work is a question of fact. *Kois*, 408 at 232. These standards should be considered at least state-wide. *Id.*

Juries do not have "unbridled discretion" in determining what is patently offensive or what appeals to the prurient interest. *Jenkins v. Georgia*, 418 U.S. 159-60 (1974). Examples provided by the U.S. Supreme Court of what could be "patently offensive" include "representations of descriptions of ultimate sexual acts, normal or perverted, actual or simulated and representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at

160. But in *Jenkins*, the U.S. Supreme Court held that the film "Carnal Knowledge" was not obscene even though it depicted some scenes in which sexual conduct, including "ultimate sexual acts," is understood to take place. 418 U.S. at 161. The Court explained that the camera did not "focus on the bodies of the actors" and there was "no exhibition whatever of the actors' genitals, lewd or otherwise." *Id.* Nudity alone was not enough to make the material obscene under *Miller* and the film could not be found to depict sexual conduct in a "patently offensive" way. *Id.* at 106-61.

Keep in mind that even though the first and second prongs of the *Miller* test (prurient interest and patent offensiveness) are determined by applying contemporary community standards, the question of the value of an allegedly obscene work is <u>not</u> determined by reference to community standards. *Pope v. Illinois*, 481 U.S. 497, 500 (1987). "The First Amendment protects works that have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Id.* The baseline is not whether an ordinary member of any given community would find value, but whether a reasonable person would find value in the work, ***taken as a whole***. *Id.* Additionally, the purpose of the "serious" modifier to literary, artistic, political, or scientific value, is there to ensure that "[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication," but should not be a bar that would regulate non-obscene depictions of sex. *United States v. Stevens*, 559 U.S. 460, 479, (2010).