

Response Memo #1

In an essay of no more than four pages (double spaced), answer both of the following questions.

#1 - Your client, Sam Sovereign, has come to see you early on a Monday morning. He looks worried. Sam is a member of the “sovereign citizen” movement, and he believes that the government of the United States, and particularly its taxation powers, are illegitimate impositions on his and others’ rights. He was arrested on Friday for standing outside his local post office, distributing leaflets urging people to protest this “illegitimate” government by refusing to pay their taxes. The leaflets had printed on them the claims “sovereign citizens should take back what is rightfully theirs,” and “one day this house of cards will fall.” Sam was charged with violating his state’s Stop the Terrorists Act, which makes it a crime to advocate the overthrow of the government. At his arraignment, the presiding judge told him that he had been arrested because the speech in his leaflets has a “bad tendency.” Sam wants to know whether his rights under the Bill of Rights have been violated, or whether he should plead guilty. What is your advice?

#2 - Your client, Nancy Novelist, visits you later that day. She’s also very upset. Her latest romance novel, published last year, has recently been declared obscene under a state law called the Keep Our Children Safe Act. This means that it is no longer available for purchase, and Nancy will lose her substantial income from sales and licensing. The notice announcing the decision informed Nancy that sections early in the novel “appealed to the prurient interest,” and that the novel “lacks redeeming social value,” but it does not give additional details or cite specific passages. Nancy informs you that the novel was recently shortlisted for the National Book Award, and she complains that the allegedly obscene passages are commonplace topics of discussion in her hometown. She asks whether the state’s decision violates her rights under the Bill of Rights, or whether she should plead guilty. What is your advice?

Extra Credit: In three sentences or less, explain why Barron v. Baltimore has never been overturned.

Note: in the course of giving your advice, please draw on the assigned cases as much as possible.

Commented [MD1]: It’s unlikely that very many people were at the post office, and certainly not enough people to start an insurrection. The urged lawlessness is not likely (Brandenburg).

Commented [MD2]: Clear indication of intent (Brandenburg).

Commented [MD3]: The urged lawlessness is not imminent (Brandenburg).

Commented [MD4]: While a prosecutor might argue that this advocates imminent lawlessness, in the context of the leaflets it’s probably merely incitement to not pay taxes.

Commented [MD5]: Another indication that the urged lawlessness is not imminent (Brandenburg).

Commented [MD6]: Overbroad (Brandenburg).

Commented [MD7]: The state court is applying the Whitney standard, which was ruled unconstitutional in Brandenburg.

Commented [MD8]: His rights under the First Amendment’s freedom of speech clause (and possibly also freedom of assembly) have been violated. These rights apply against the actions of the state because they have been incorporated via the due process clause of the 14th Amendment (Gitlow).

Commented [MD9]: No prior restraint.

Commented [MD10R9]:

Commented [MD11]: The state court is using a Hicklin-style test. Unconstitutional after Miller.

Commented [MD12]: Part of the Memoirs test, Miller’s definition is narrower.

Commented [MD13]: Indication that the work does not lack “serious literary...value” (Miller).

Commented [MD14]: Indication that contemporary community standards would not find the book obscene (Miller).

Commented [MD15]: Possibly. The state has a legitimate interest in regulating obscenity (Hicklin and after), and the Miller criteria are not all met in this case, especially #1 and #3. This may mean that Nancy’s rights under the First Amendment’s freedom of speech clause have been violated. This right applies against the actions of the state because it has been incorporated via the due process clause of the 14th Amendment (Gitlow).

Commented [MD16]: The holding in Barron is that the provisions of the Bill of Rights do not apply directly to the states. They still don’t. They just apply to the states via the due process clause of the 14th amendment. So Barron is still correct that they do not apply directly, which is why it’s never been overturned.