Hate Speech in America (Part 1)
A talk with Lee Rowland

I. First Amendment

- *Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble*.
- Carve-outs of the right to free speech include:
  - Obscenity
  - Fighting words
  - True threats
  - Incitement

II. A clear and present danger

- Schenck v. United States[1]
  - Congress passed the Espionage Act in 1917 criminalizing the obstruction of the draft during wartime. Charles Schenck, a Socialist party leader, mailed anti-draft pamphlets to men who were conscripted during WWI. Mailers encouraged them to assert their rights to oppose the draft. Schenck was charged with conspiracy to violate the Espionage Act by obstructing recruiting and enlistment service. Schenck claimed the Espionage Act violated the First Amendment.
  - Justice Wendell Holmes upheld Schenck's conviction. Noting that the First Amendment would not protect a person from "falsely shouting fire in a theatre and causing a panic, and that speech that would otherwise be protected may not be if said during wartimes. Analysis is whether the speech in such circumstances would create a "clear and present danger."
- Feiner v. New York[2]
  - Irving Feiner, standing on a wooden box on the sidewalk, made derogatory statements about President Truman and other political officials. A large crowd gathered on the street, and pedestrians were forced to walk in the street to walk around the crowd. Police stepped in to control the crowd and arrested Feiner. Feiner was convicted for disorderly conduct. He appealed under the First and Fourteenth Amendments.
  - The Court upheld the conviction, noting that Feiner was arrested not for the content of his speech but the clear and present danger of riot on the public streets.

III. Obscenity

- Roth v. United States[3]

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[1] 249 U.S. 47 (1919):
https://scholar.google.com/scholar_case?case=8474153321909160203&hl=en&as_sdt=6&as_v

[2] 340 U.S. 315 (1951): https://supreme.justia.com/cases/federal/us/340/315/case.html

- Samuel Roth operated a business publishing and selling books, photos, and magazines and sent out circulars to advertise. He was convicted under a federal statute that criminalized mailing "obscene, lewd, lascivious, or filthy" materials. In the companion case, *Alberts v. Christopher Sommer*, David Alberts was convicted under a California law that criminalized selling or advertising "obscene or indecent" materials.
- The Court found that speech "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" was outside First Amendment protections.

- Miller v. California[4]
  - Miller sent out mass mailers containing adult material. He was convicted for violating a California law for distributing obscene material.
  - The Court ruled in favor of Miller. Created a three-pronged test:
    - Whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest;
    - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state lawl and
    - Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

IV. Fighting words

- Chaplinsky v. New Hampshire[5]
  - Walter Chaplinksy was convicted of violating a New Hampshire law that criminalized saying "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name," among other things. Chaplinksy was distributing pamphlets on the street denouncing religion as a "racket." While the exact ensuing events may be under dispute, there was no dispute that Chaplinsky called the City Marshall a "damned racketeer" and a "damned Fascist." Chaplinsky was convicted.
  - The Supreme Court upheld Chaplinksy conviction. The Court noted that there were certain limited types of speech that are outside First Amendment protections, including "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace."

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[3] 354 U.S. 476 (1957): https://www.law.cornell.edu/supremecourt/text/354/476
[4] 413 U.S. 15 (1973): https://supreme.justia.com/cases/federal/us/413/15/case.html
[5] 315 U.S. 568 (1942): https://www.law.cornell.edu/supremecourt/text/315/568

V. True threats

- Virginia v. Black[6]
  - Barry Black, a KKK member, organized a rally of 23-30 people on private property during which the attendees made violent and racist statements. At the end of the rally, they burned a cross about 30 ft. across. Black was arrested and convicted of violating a Virginia law that criminalized cross burning with the intent to intimidate another. Black objected on First Amendment grounds to a jury instruction given at his trial that the cross burning itself is sufficient evidence from which the jury may infer the required intent. In the consolidated case, Richard Elliot and Jonathan O'Mara were separately charged with the same Virginia statute.
  - The Supreme Court noted that while cross burning may have legitimate speech purposes, a state may ban cross burning with the intent to intimidate because it constitutes a true threat. "True treats" are statements that communicate an intent to commit violence against a particular individual or group. The Court struck down the prima facie evidence provision of the statute because it did not distinguish among cross burnings done with a legitimate purpose and cross burnings done with the purpose to intimidate an individual.

VI. Incitement

- Brandenburg v. Ohio[7]
  - Clarence Brandenburg, a KKK leader, invited a local news crew to a KKK rally where he made derogatory and violent statements against blacks and Jews. Brandenburg was convicted of Ohio's Criminal Syndicalism Act criminalized "advocate[ing] or teach[ing] the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Brandenburg appealed, challenging the Ohio law under the First and Fourteenth Amendments.
  - The Court struck down the Ohio law, noting that the constitutional right to free speech does not allow a state to forbid the advocacy of the use of force "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."
- NAACP v. Claiborne Hardware[8]
  - The NAACAP organized to boycott white-owned businesses in Claiborne County, Mississippi in the late 1960s to protest racial injustice. During the boycott, Charles Evers gave several speeches in which he indicated that there would be consequences for violators of the boycott, including saying at

[6] 538 U.S. 343 (2003): https://www.law.cornell.edu/supct/html/01-1107.ZO.html
[7] 395 U.S. 444 (1969): https://www.law.cornell.edu/supremecourt/text/395/444
[8] 458 U.S. 886 (1982): https://www.law.cornell.edu/supremecourt/text/458/886

once instance, “If we catch any of you going in any of them racist stores, we’re gonna break your dram neck.” While most practices used to encourage and support the boycott were nonviolent, there were several recorded instances of violence. Several of the white-owned businesses filed suit for economic losses and to enjoin the boycott. The lower courts found the boycott to be unlawful.

- The Supreme Court found that the boycott itself was constitutionally protected activity and noted that states do not have the power to prohibit peaceful political activity. About Evers’ speech specifically, the Court citing *Brandenbur*g noted that mere advocacy of violence in emotionally charged rhetoric does not remove it from First Amendment protection.