

# Racism, Hate and Free Speech: The Search for New Boundaries of Sensitivity

Throughout North American society calls for the creation of legal limits to the range of permissible expression in order to protect against racism and hate propagation are being countered by staunch defenders of the principle and practice of freedom of speech. While the debate is far from new, the parameters of the conflict appear to have changed. With such a volatile and sensitized atmosphere, is the room for meaningful debate disappearing?

by Brent Barclay

In 1990, Michael Levin, a professor of philosophy at the City University of New York (CUNY), came dramatically into the public spotlight for his belief that “on average, blacks are significantly less intelligent than whites.” In print, his racial views had already appeared in a book review published in Australia as well as in letters published in the *New York Times* and a philosophical journal. Levin’s declarations led to protests and demonstrations at CUNY, and college officials formed a committee to investigate.

Despite committee findings that Levin had not expressed the questionable views in the classroom, the CUNY administration made little effort to discipline protesters who violated school rules by disrupting Levin’s classes, and further established separate course sections for students who might have been offended by the professor’s ideas. In response, Levin sued the college president and dean for the violation of his civil and constitutional rights. Presiding Judge Kenneth Conboy found CUNY in violation of Levin’s freedom of speech and barred the university from taking any disciplinary action against him for his beliefs.

Not more than a year later (July 1991)—in a separate, though ultimately related case—Professor Leonard Jeffries, chairman of the African-American studies department at CUNY, delivered a speech on high school curriculums at the Empire State Black Arts and Cultural Festival in Albany, New York. The speech contained what many con-

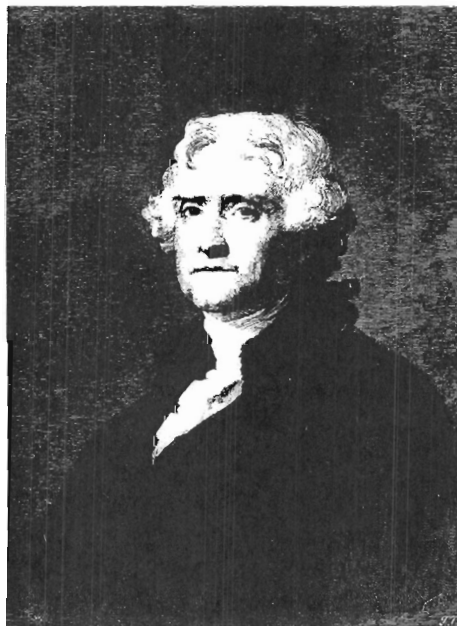
sidered anti-semitic and otherwise racist statements. A public uproar followed Jeffries’ speech, and high-profile figures from Governor Mario Cuomo, to several New York state legislators, and at least two university trustees joined in a groundswell of criticism. Further accusations popped up that Jeffries had, on other occasions (including in his classroom), espoused racist theories about black superiority. Supporters of Jeffries claimed that the purported comments were taken out of context and were not, in any case, anti-semitic.

A panel convened by CUNY recommended that Jeffries’ choice of words be criticised, but that the university should defend his right to express his beliefs without initiating further punishment. Despite the panel’s decision, university trustees removed Jeffries as chair of the department on the grounds that he was a “poor administrator.”

When Jeffries filed suit challenging the removal, Michael Levin—not surprisingly, though ironic nonetheless—supported Jeffries’ right to make his speech. A federal jury ruled that CUNY had removed Jeffries from his position not for poor administration, but due to his speech and the public pressure that had ensued. CUNY had violated his rights to free speech under the first amendment.

The Levin and Jeffries cases point out the challenge faced by universities to uphold academic freedom while meeting

the demands of the academic community to curb racist or hate-based speech. Yet, these cases reflect more than the battles raging today on college campuses. The social struggle to find an acceptable compromise between the cherished, and constitutionally enshrined, ideals of free speech and the need to foster a non-threatening environment for all members of a nation



Thomas Jefferson (1743-1826): “A bill of rights is what the people are entitled to.”

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is prevalent in North American society as a whole.

How are we to interpret the intentions of people speaking of race, and who is entitled to do so? How do we encourage communication yet remain sensitive to the concerns and fears of all involved? Is it better to suppress racism and hatred by restricting speech, or should we expose it so that it may be confronted and defeated by education and the superiority of argument?

## Freedom of Expression Meets the Speech Code

In response to speech considered racist or intolerant towards other dispossessed groups in society, certain restrictions of expression have been codified and put in place. Anti-hate laws and speech codes are predicated on the notion that there are identifiable speech acts that can and must be suppressed in the interests of equality and eliminating discrimination. Over three hundred universities across North America have instituted speech codes. Racial and sexual harassment have come under media scrutiny and the boundaries of acceptable speech are changing.

First Amendment advocates, while careful to appear sensitive to minority and racial issues, cite the dangers of the restriction of questionable speech to individual liberty and are concerned over the creation of an atmosphere of fear on campus and in society as a whole. They worry that this “political correctness” or “new puritanism,” and the consequent “expression chill,” will suppress potentially valuable additions to discourse on a wide range of topics and result in a rigid and stagnant conformity. Nat Henthoff, author of *Free Speech for Me—But Not for Thee*, argues that “when [a speech code] reaches the point where sensitivity stifles communication, it has gone too far.”

In turn, supporters of speech codes and restrictions on hate propaganda accuse First Amendment devotees of avoiding the still-prevalent issues of discrimination and prejudice. Allowing for the expression of racism and hatred, they argue, does not confirm the principle of liberty, but restricts the liberties of the individuals and groups targeted. The atmosphere of fear and social denigration that results does much greater harm to the society as a whole than would the imposition of certain restrictions of expression. They counter the charges of the tyranny of a “new orthodoxy” by pointing to “media hype” and “right-wing disinformation.”

Events on a U.S. university campus recently brought the speech code debate into sharp relief. In an unexpected action,



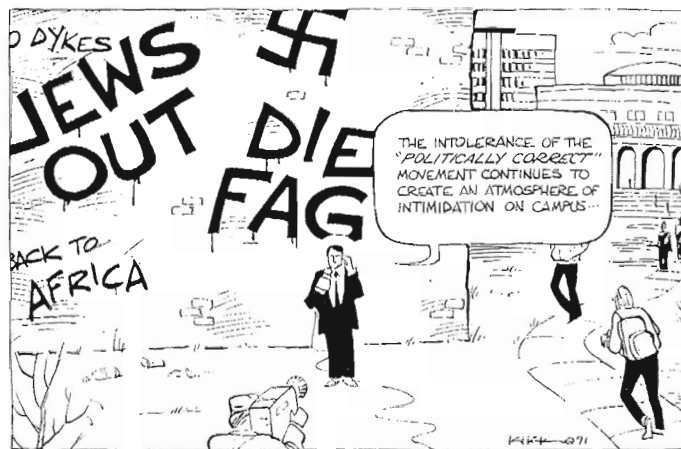
*Free speech: creating an atmosphere of fear?*  
[Kirk Anderson]

the university’s administration announced its intention to suspend—and consider permanently rescinding—the school’s existing speech code. In support of the established legislation, a student group put up posters throughout the campus on which racially derogatory names and unsettling gender stereotypes were printed in no uncertain terms. The posters strove to demonstrate the need for codes to prevent such speech from threatening community members.

Reaction to the posters underscored the complexities of the free speech/speech code

debate. Many avowed “free speakers” agreed that while they supported the rights of individuals to speak as they wished, it could not be denied that there existed speech which was simply unacceptable. At the same time, one student, arguing from the free speech perspective, pointed out the ironic reality that under the speech code in question, those students who had put up the posters would have been guilty, and punished, for violating the very code they strove to protect. While the free speech/speech restriction debate rages on throughout North America, the juridical underpinnings and history of the conflict show that it is far from new. The legal history of free speech in the United States has been alternately charted by vindications of, and exceptions to, the First Amendment. Despite the apparent clarity with which this amendment was set forth, it has been interpreted, re-interpreted, ignored, manipulated and abused throughout its more than two hundred years of existence. Likewise, the legalities of free speech in Canada have also been complex and inconsistent. Tensions between the recent Charter of Rights and Freedoms and the Criminal Code reflect the complications in combing the right to expression and the freedom from hatred based upon color, race, religion, ethnic origin or gender.

## Congress Shall Make No Law...Abridging the Freedom of Speech



*Speech codes: creating an atmosphere of fear?*  
[Kirk Anderson]

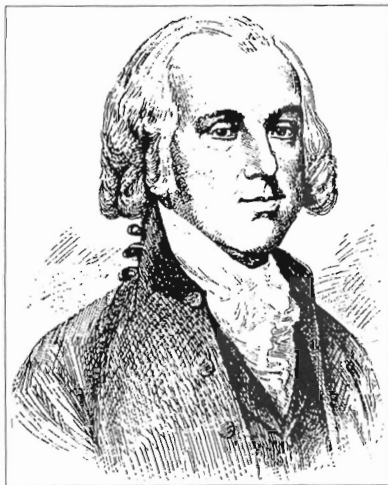
Even while the Constitution of the new United States awaited ratification in the late 1780s, questions whether this document would go far enough in protecting civil liberties persisted. Many state constitutions already provided protections for individual rights, but advocates for a federal bill of rights worried that it was dangerous to leave unchecked the potentially coercive powers of the federal government. Thomas Jefferson, writing to James Madison in 1787, expressed his conviction that a federal bill of rights was necessary: “I will tell

you now what I do not like. First the omission of a bill of rights...[A] bill of rights is what the people are entitled to against every government on earth...and what no just government should refuse, or rest on inference.”

The shapers of the United States’ Bill of Rights, no doubt with their own struggles for individual liberty firmly in mind, set out to guarantee that government power would be sufficiently limited in the newly-formed nation. After a prolonged process of debate the first ten amendments (the Bill of Rights) were ratified on December 15, 1791. Underlying the First Amendment’s support of free speech was the conviction that falsehood would be struck down and truth would prevail as ideas and doctrines found expression in the public domain.

However, for nearly one hundred and thirty years after the ratification of the Bill of Rights, no definitive expression or application of the meaning of the First Amendment was achieved, nor, for that matter, were definitive standards to deal with free speech established. In this environment prosecution of certain types of speech continued unabated.

### Curbing Opposition: Sedition and Politics



*James Madison (1751-1836): Helped frame the Bill of Rights.*

Like most of the legal framework of the newly-independent United States, early American notions of freedom of speech were derived from the English system, particularly the English Bill of Rights (1689) and the common law. Under common law, free speech was considered a parliamentary privilege, not the absolute right of all citizens. Furthermore, the liberty of the press was understood only as a freedom from prior restraint (i.e. freedom from censorship), but not immunity

from later prosecution. As a general rule, issues of freedom and censorship of speech were only of importance with regard to politics, where the intent of the government was to protect itself from seditious libel—often broadly defined to include any criticism of the government.

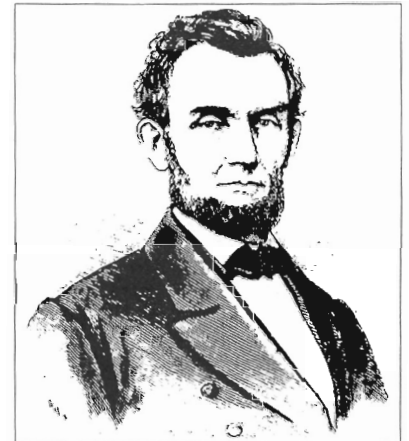
America’s Founding Fathers upheld this pattern even while they enshrined free speech in the First Amendment of the Bill of Rights (1791). Historian Arthur M. Schlesinger has succinctly described the paradox of free speech in revolutionary America: “liberty of speech belonged to those who spoke the speech of liberty.” All of the former colonies, save Connecticut, included a right of free speech in their new state constitutions, but Loyalists and pacifists (such as the Quakers) were relentlessly censored and intimidated in spite of these formal guarantees.

This pattern continued as the Federalist party, which controlled the presidency and Congress until 1800, attempted to censor the rival Republican party. The culmination of this policy lay in the Alien and Sedition Acts of 1798, which broadly

construed seditious speech as any criticism of Federalist policies or personalities. Out of this conflict, and with the triumph of Thomas Jefferson and the Republicans in the election of 1800, came a more libertarian interpretation of the First Amendment.

The fact that no firm guarantee of free speech existed was demonstrated again during the next national political crisis: the debate over slavery and states’ rights, which led to the Civil War. From 1830 to 1861, the right of abolitionists to speak and publish their views, and to disseminate these views through the postal system, was consistently violated in northern and southern states alike. On top of which, the federal government often exercised prior restraint over abolitionist literature. The supposed inflammatory nature of abolitionists’ pamphlets and speeches were regarded as just cause for preventing their expression.

The crisis of the Civil War itself also prompted federal limitations on the right of free expression. Speech and literature deemed damaging to the Union cause was often censored and/or prosecuted. Constitutional scholar Robert E. Cushman, noting that President Abraham Lincoln (1861-1865) himself initiated much of this activity, claims that “no President has ever invaded private constitutional rights more flagrantly, or from worthier motives, than he.” On the whole, the history of this period demonstrated that without clear precedents established by the court to define and apply the Constitution, the written guarantees of personal freedom and individual justice promised by the amendments meant very little. Yet, as the following years demonstrate, efforts at such defined precedents did not themselves settle the problem.



*Abraham Lincoln (1841-1865): Worthy invasions of constitutional rights.*

### The Evolution of First Amendment Jurisprudence Since World War I

It is clear that government protection of the right to free speech has long been dependent on the atmosphere of the times. Periods of real or imagined crisis prompted the most active attempts by government to restrict speech deemed dangerous. A combination of crises in 1917 touched off a firestorm of free speech controversy, and set the wheels of jurisprudence in motion toward creating the current standards of freedom of expression.

Since World War I, the Court has made a much clearer effort to construct definitive standards by which to judge speech. Criteria such as “fighting words,” “bad tendency,” “clear and present danger,” and culminating in the “incitement” standard, were created in order to set down clear doctrines and tests of what constituted unacceptable speech. The development of these criteria marked a departure from strict control on a variety of speech acts to an attempt to maximise freedom of expression and provide less subjective restrictions on speech.

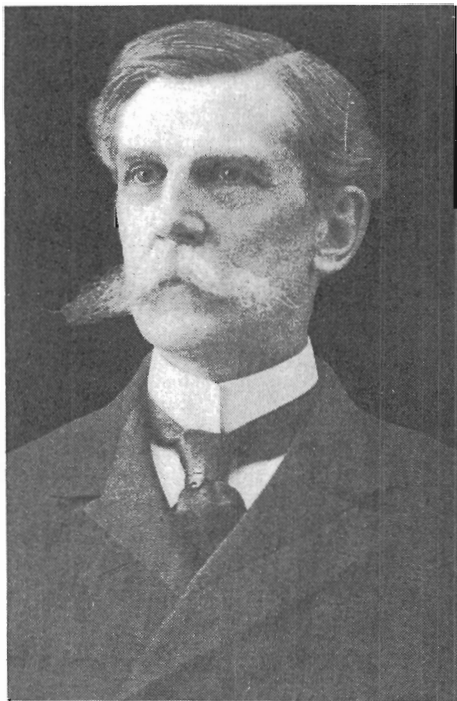
Sedition trials involving protesters against America’s

involvement in the First World War ushered in what can be called the modern era of First Amendment jurisprudence. President Woodrow Wilson, like his predecessor Lincoln during the Civil War, reacted to the crisis of World War I by limiting the criticism of opponents to American involvement in Europe. Adding to the government's suspicion of anti-war protesters—many of whom had ties to communist or socialist organizations—was the Bolshevik Revolution of October 1917. Now they were seen as doubly dangerous to America's security. During the war, and throughout the first "Red Scare" of 1919-1920, the right of free speech of these individuals was regularly infringed upon.

Under the Espionage Act of 1917, many anti-war protesters were brought to trial for publicly expressing their views. In what is likely the most famous of the Espionage Act prosecutions, that of *Schenk v. U.S.* (1919), the Supreme Court, while upholding the Act, set forth the first critical test for speech. First Amendment protection, wrote Justice Oliver Wendell Holmes, did not extend to speech posing a "clear and present danger" to national security and public safety.

### Towards a Clearer Understanding: Refining Protection Under the First Amendment

However, the existence of the "clear and present danger" standard did not, in and of itself, prevent further excesses in the restriction of speech, since the criterion could be interpreted as broadly as earlier governments had interpreted seditious speech. This was especially true because it was originally understood according to the "bad tendency" rule. This rule stated that if the words *tended* towards "clear and present danger," then the defendant fell outside the protection of the First Amendment and prosecution was legitimate. Thus, the Smith Act of 1940 (like the Espionage Act, intended to muzzle aliens and potential subversives) also spawned its share of abuses. It



Oliver Wendell Holmes (1841-1935): "clear and present danger." [Metro Toronto Library]

proved to be an important precedent for McCarthyites to call upon during the second "Red Scare" of the late 1940s and early 1950s—a poignant example of censorship outgrowing its intended scope.

In fact, it was not until 1969, in *Brandenburg v. Ohio*, that "clear and present danger" was refined to include only the advocacy of force or violation of law, "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This landmark decision was the strictest application to date of the "clear and present danger" criterion and established what is now known as the "incitement" standard.

With the juridical notion of "incitement"—a more precise clarification of what expression would be prosecuted—came an expansion of the boundaries in which free speech would be protected. In this vein, the juridical criterion of "fighting words" was introduced in 1942, in *Chaplinsky v. New Hampshire*, when unprotected speech was defined as:

the lewd, the obscene, the profane, the libelous and the insulting or "fighting words"—those which by their very utterance [1] inflict injury or [2] tend to incite an immediate breach of the peace...[S]uch utterances [which] are no essential part of any exposition of ideas, and are of such slight social value...that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The "fighting words" criterion also characterized some speech as "worthless speech" or speech not deserving constitutional protection under the First Amendment. However, it quickly became clear that less subjective terms were warranted as it was unclear what constituted "worthlessness."

In the 1971 trial of *Cohen v. California*, "fighting words" was redefined as "fight-provoking language that tends to incite violence." In this case, Supreme Court Justice Harlan argued that it was impossible to articulate a principle by which citizens will know which words are permissible and which are not, and that when the state attempts to prohibit certain words, it inevitably creates a substantial risk of suppressing ideas. Justice Harlan concluded that "one man's vulgarity is another's lyric." While the *Cohen* decision resulted in a stricter definition of speech not protected by the First Amendment, the definition of "fighting words" still remains under debate.

### Tackling Racist Speech and Hate Propagation

Although the evolution of more clearly defined restrictions on speech have reduced confusion and ambiguity, hate propagation and racist speech remain to a great extent protected. The legal roots of the attempt to fight the propagation of racism and hatred, particularly as a form of group libel, are found in the 1952 case of *Beauharnais v. Illinois*. These roots, however, have not taken hold—for better or worse depending on your evaluation of the primacy of the First Amendment.

The state of Illinois had established a statute that made it unlawful for any person to communicate a message portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" or which exposed the "citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots." A group called the White Circle League, of which *Beauharnais* was the president, distributed a leaflet urging city officials to prevent blacks from moving into white neighborhoods, with accompanying racist descriptions of



the “dangers” blacks posed.

Beauharnais was convicted of violating the state’s group libel laws, and the conviction was upheld by a 5-4 vote in the Supreme Court, though with strong dissension. Justice Hugo Black, dissenting, stated that “the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilised to send people to jail in other states for advocating equality and nonsegregation.” Through the 1950s and 1960s and a variety of cases, Justice Hugo Black stood as a steadfast protector of absolute free speech, while many other judges worked to construct tests and standards for acceptable speech.

Supreme Court decisions following the Beauharnais case served to gradually undermine it as a precedent. The 1954 trial of *New York Times v. Sullivan*, for example, brought certain types of defamation, considered absent of malice, under the protection of the Constitution—largely in the face of the ramifications of potential law suits. In the well known Skokie case of 1978, the Supreme Court refused to hear an appeal of a lower court decision that had struck down a local ordinance prohibiting the distribution of material promoting racial or religious hatred.

Nonetheless, *Beauharnais* serves as a useful example of an instance where the interpretation of the First Amendment reflected an attempt to balance between the interests of the individual and the community at large. This approach has often been described as communitarianism which, as Nat Henthoff explains, “argues that the values and priorities of the community—or a group—should prevail over an ‘undue’ emphasis on individual rights and values.” This approach is gaining currency in the U.S. and is receiving even greater attention in Canada.

### Canada: The Approach to Hate Propagation

The Canadian Charter of Rights and Freedoms (1982), Section 2(b) provides for the “fundamental freedom” of “opinion and expression.” Section 1 states that the Charter’s protected rights and freedoms are “subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In this connection, section 319 (2) of the Canadian Criminal Code (1970) criminalizes the propagation of hatred towards any identifiable group defined by colour, race, religion or ethnic origin. The relationship of this criminal code section to the Charter is problematic, and poses a variety of difficulties

in their overlapping and, some have said, mutually exclusive contents.

In 1990, the Canadian Supreme Court rendered a decision on *R. v. Keegstra* that attempted to resolve the contradictions between these principles. James Keegstra was a school teacher in Alberta who taught anti-semitic and racist doctrines to his students. After being dismissed from his teaching position, Keegstra was charged under Section 319 (2) of the Criminal Code. He, in turn, challenged the constitutionality of the Criminal Code provision. The majority decision of the Supreme Court, reversing an earlier verdict, held that while the provision violated Section 2(b) of the Charter, it was saved by Section 1.

In other words, the restriction of hate propagation, while a violation of the guarantee of free expression, was nonetheless justifiable because of the strong community interest in preventing the spread of hate. The *Keegstra* decision reflects a growing consensus in Canada that racist or hate-based speech does not, or should not, fall within the purview of constitutionally or institutionally protected speech—that hate propagation restricts the interests and liberties of the the minority group under attack because it marginalizes and denigrates their position in society.

Prior to *Keegstra*, a report from the Special Committee on Hate Propagation in Canada, published in 1966, defined hate propagation as “constituting a ‘clear and present danger’ to the functioning of a democratic society. For in times of social stress such ‘hate’ could mushroom into a real and monstrous threat to our way of life.”

Yet, the application of section 319 (2) of the Criminal Code has had results that many Canadians find peculiar. As Alan Borovoy writes in his article “How Not To Fight Racial Hatred”: “in 1986 a film sympathetic to Nelson Mandela in South Africa was held up at the

border for more than a month because of allegations that it promoted ‘hatred’ against white South Africans.... A Jewish leader became the target of a hate propaganda investigation. He had expressed anger against the Austrians for having elected Kurt Waldheim as their president despite reports of Waldheim’s pro-Nazi activities during World War II. And Salman Rushdie’s book, *The Satanic Verses*, was ordered detained at the Canadian border.” In response, analysts now question whether it is possible to define hate propagation or racist speech without it being subject to the shifting meanings of history and the distinctions between intent and received meaning.



Missionary photograph of an elder, Ivory Coast, 1927: on exhibit in “Into the Heart of Africa”. [Royal Ontario Museum]

## The Royal Ontario Museum: "Into the Heart of Africa"

In June 1989, Toronto's Royal Ontario Museum (ROM) announced plans to mount the exhibit entitled "Into the Heart of Africa." It was to consist of a collection of African artifacts



Wooden mask, Nigeria: on exhibit in "Into the Heart of Africa". [Royal Ontario Museum]

that had remained in the museum's basement for close to one hundred years. The exhibit, described by curator Jeanne Cannizzo, "offered the history of the museum's African collection through a critical examination of the role played by Canadians in the European colonization of Africa while displaying the rich diversity of African cultural practices and traditions."

Thus, the exhibit was designed to describe the Canadian colonial experience historically and, among other goals, to bring attention to the racism of the period. Part of the strategy of the exhibit was to reveal this racism by ironically surrounding colonial and imperialist terminology with quotation marks. In an effort to ensure sensitivity, the ROM had contacted certain black organizations prior to the exhibition in order to incorporate their feedback.

Four months into the exhibit a demonstration was held outside the museum by a group of protesters denouncing the exhibition as "racist," one which presented "a colonial and white supremacist view of Africa." A group called The Coalition for the Truth about Africa charged the ROM with misleading the public by portraying the history of Africa in a deceitful manner. The protesters did not agree with the exhibit's representation of Africa as "backward" and believed that the ROM had no right to mount this exhibit without the full collaboration of black professionals in the field.

Other members of the black community offered contrary arguments, citing the value of the exhibit for its exposure of imperialist racism in nineteenth century Canada. Still others believed that the sophistication of the exhibit and its ironic pose failed to fully confront and make explicit the origins of racism during the colonial period. The controversy continued, resulting in further protests, arrests, and even injuries. It became unclear how representative the protesters were of the black community and the protests broadened their focus to other racial issues such as police brutality.

While implicitly underlying the ROM controversy, the issue of free speech was carefully avoided by many of the combatants. A multi-city tour which had been planned for the exhibit was ultimately cancelled due to the furor created in Toronto. Jeanne Cannizzo, upon returning to her teaching post at the University of Toronto, was forced to request a leave of absence after protests took place in front of her house and she was shouted

down as a racist, in explicit language, in the classroom. While this constituted a serious infringement of Cannizzo's academic freedom, little protest resulted—some have argued, because of the fear of being labelled a racist by association.

The protesters of the ROM exhibit fairly exercised their rights to free speech. Cancellation of the exhibit's tour serves as evidence of what free speech can accomplish without recourse to the law. Yet, supporters of the ROM argue that the museum, and Jeanne Cannizzo, were simultaneously denied their rights to free speech. Nonetheless, what many observers found the most disturbing was the absence of room for discussion. The ROM claimed that the exhibit was not racist, rather an exposure of racism in Canada's history. But it failed to take fully into account the black community's concerns. On the other hand, the protesters demanded "change it or close it" of the exhibit, and refused to negotiate alternatives. Neither side seemed able to concede to the other nor come to the table for discussion.

## Treading New Ground

The debate over freedom of speech versus legally controlled expression is by no means a new one. In fact, throughout the histories of the United States and Canada—and despite constitutional enshrinement—qualifications and restrictions have tended to prevent the application of absolute free speech. Nonetheless, the recent conflicts surrounding racism and hate propagation are, in many ways, new.

Past free speech debates tended to center around political conflict and dangers to national security. More recently, speech legislation has revolved around issues of sensitivity and the need to respect other individuals and communities within the nation. At the heart lie changing notions of community versus individual needs. This fundamental shift in the nature of the argument has left both legislators and society as a whole unsure of where to draw the lines of acceptable and unacceptable speech. Perhaps more importantly, they are also unsure who should decide.

By way of conclusion, however, a thought offered by George Orwell goes the farthest to underscore the complexities and difficulties of hate propagation—race-free speech jurisprudence: "If large numbers of people believe in freedom of speech, there will be freedom of speech, even if the law forbids it. But if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them." ●

### Suggestions for Further Reading

For seminal works on the First Amendment, read any of the following authors: Alexander Meiklejohn, Thomas Emerson (particularly *The System of Freedom of Expression* (1970), or Zechariah Chafee.

See also:

Nat Hentoff, *Free Speech for Me - But Not for Thee: How the American Left and Right Relentlessly Censor Each Other*. (Harper Collins, 1992).

James E. Leahy, *The First Amendment 1791-1991: Two Hundred Years of Freedom*. (McFarland & Co., 1991).

Leonard Levy, *Emergence of a Free Press* (1985).

Russell Nyr, *Fettered Freedom* (1963).

David Schneiderman, ed. *Freedom of Expression and the Charter*. (Thomson Professional Publishing, 1991).

Thomas Tedford, *Freedom of Speech in the United States*. (Southern Illinois University Press, 1985).