



The Ugly Business Of Defending Free Speech In 2017

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November 21, 2017

Charlottesville, Va. — From the outside, the Thomas Jefferson Center for the Protection of Free Expression looks like the idyllic Southern home you never had. Located on a grassy hill, the white building with black shutters is surrounded by silence and crowned by rustling trees. Inside the main house, which was built in 1938, employees and volunteers work to protect one of the most essential tenets of American freedom: the First Amendment. The land beneath their feet was once owned by Thomas Jefferson, the primary author of the Declaration of Independence, who inherited the estate from his father in 1756. As a paragon of free speech as well as a slave owner, Jefferson embodies many of the inconsistencies that have historically plagued the free speech movement since its emergence.

The First Amendment governs the right to express an opinion or idea without fear of government retaliation or censorship. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;” it reads, “or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

However, despite the universal ideals espoused in its terminology, when the amendment was ratified, the full protection of its constitutional rights was extended primarily to a select pocket of the population: white, propertied men. The lingering effects of this foundational inequality persist. As a result, the present-day job of protecting free speech can get ugly.

Clay Hansen is executive director of the Thomas Jefferson Center (TJC) and, as such, a professional advocate for free speech and expression. Hansen, a man of imposing stature and rosy complexion, speaks in a measured tone that’s at once authoritative and congenial. On the day we spoke at his place of work, pro athletes around the country were exercising their First Amendment rights by kneeling during the national anthem. They were following the example set by former 49ers quarterback Colin Kaepernick, who in 2016 began protesting racial injustice in America by taking a knee during the national anthem.

Many mainstream media outlets, politicians and celebrities have valorized Kaepernick’s protests and his invocation of the First Amendment. At the TJC, however, Hansen is tasked with defending both the Kaepernicks of the country and far less palatable practitioners of free speech. “This job is not one you go home and brag about at Thanksgiving dinner,” he explained.

“I don’t get to go home and regale my family with stories of defending the Westboro Baptist Church. It’s Nazis and funeral protesters, and it’s tough.”

Hansen fights for such individuals’ inalienable right to speak freely because, in his mind, “If we don’t defend these people now, it could be you next.”

Since it was inaugurated in 1991, the nonpartisan, nonprofit TJC has fought to protect the right to free expression, no matter how offensive and abhorrent that expression might seem. “The First Amendment applies to everyone,” Hansen said. “It applies to the ignorant and the hateful and everybody else, regardless of how much you disagree with them personally.”

Hansen has worked at the center for six years now. Interested in theater and visual art early in his career, he initially tried his luck in New York City’s publishing industry. Eventually he went to law school, had kids and began working as a free speech defender, thinking if he wasn’t making art professionally himself, at least he could champion the rights of those who did.

As an institution, the TJC provides legal advocacy in First Amendment court cases. In 2015, Hansen worked on the Supreme Court case *Elonis v. United States*, in which he argued that “criminal convictions for threatening another person online should require a subjective intent to threaten the recipient of the message, rather than merely showing that a reasonable person would find the message threatening.” Earlier this year, he also represented an Asian-American rock band, The Slants, that was denied federal trademark registration because of the racial slur in the group’s name.

The TJC also engages in public outreach and education, and attempts to spread awareness of First Amendment principles nationwide. Other U.S. organizations with similar missions include the [James Madison Center for Free Speech](#) in Indiana and [The Tully Center for Free Speech](#) at Syracuse University. In particular, the TJC focuses its attention on high school and college campuses, where freedom of expression is regarded with ever-increasing skepticism in 2017.

Antoine Bethea and Rashard Robinson raise their fists during the national anthem as Eli Harold, left, Colin Kaepernick and Eric Reid take a knee prior to a game against the Dallas Cowboys on Oct. 2, 2016.

According to a recent survey conducted by [The Cato Institute](#) (in collaboration with [YouGov](#)), Americans hold varied and contradictory beliefs regarding the First Amendment. However, the results of the institute’s 2,300-person survey showed that, across political and racial divides, a significant portion of respondents agreed that “a big problem this country has is being politically correct,” pointing to college campuses as the issue’s focal point. Campuses have a long history of playing focal point to freedom of expression debates of all kinds. In December 1964, students at the University of California, Berkeley, began protesting political speech restrictions on campus. The demonstrations continued for months, solidifying UC Berkeley’s symbolic status as the nucleus of the free speech movement. In the years since, the campus’s Sproul Plaza and Mario Savio Steps have been marched on, sat upon and otherwise occupied by an assortment of protests.

This past year, though, the famously liberal-leaning university was criticized for censoring conservative voices after canceling speaking engagements by people including Ann Coulter, Steve Bannon and Milo Yiannopoulos. Right-wingers have adopted the fight for free speech as their own, often battling a campus community with an intolerance for intolerance.

In September 2017, Yiannopoulos announced his own “Free Speech Week” at Berkeley. Though it was eventually canceled due to safety concerns, the rally was meant as a platform for the “alt-right” media personality, known for, among other things, calling Black Lives Matter a “terrorist organization” and likening feminism to a “cancer.” Hordes of students and Berkeley citizens protested Yiannopoulos’s presence on campus, chanting, “Nazi scum off our streets!” and “Right-wing fascists go away!” Berkeley’s faculty called for a complete boycott of classes and campus activities, arguing that personalities like Yiannopoulos disfigure the idea of “free speech” to shame and threaten marginalized members of the campus and community. “There are forms of speech that are not protected under the First Amendment,” members of Berkeley’s faculty wrote in an open letter. “These include speech that presents imminent physical danger and speech that disrupts the university’s mission to educate. ... As faculty, we reject both the administration’s rhetoric of false equivalency that all speech — including ‘hate speech’ — merits value and respect.”

Hansen stands on the opposite side of this debate. He believes firmly that, no matter how contemptible an idea may be, Americans have the constitutional right to express it. “It’s a difficult time right now to convince people that free speech isn’t only a good idea but one worth fighting for,” Hansen said. “Especially when you’re defending people when you hate what they are saying.”

According to Hansen, one of the most common misconceptions when it comes to free speech is that hate speech is excluded from the First Amendment. The Cato Institute found a quarter of Americans erroneously believe it’s against the law to make a racist statement in public. There are certain speech acts that are not permitted by the law — libel, defamation, true threats and incitement, to name a few — but hate speech is not among them.

That is why earlier this summer, when white nationalist organizer Jason Kessler began securing permits for a “Unite the Right” rally, there wasn’t much that someone like Hansen could legally do to prevent it.

A Chicago demonstrator holds a banner in memory of Heather Heyer, who was killed Aug. 12 by a driver in Charlottesville, Virginia, during a protest against racism and hate on Aug. 27. “Was the ‘Unite the Right’ rally hate speech as most people would define it? Yes, but that didn’t get us anywhere when it came to the question of whether the city could prevent it preemptively,” Hansen explained. “That’s the most difficult thing for a government to do. There are plenty of things you can do after the fact if a speaker crosses the line. But to silence a speaker before anything comes out of his or her mouth [...] you have to meet an extraordinarily high burden and it’s almost never admissible.”

Hansen said that he met with Charlottesville city officials a week before the “Unite the Right” rally took place on Aug. 11 and 12. City attorney Craig Brown confirmed that he reached out to

the TJC for counsel after Kessler filed a lawsuit to move the rally from Emancipation Park to the larger McIntire Park. Brown said it's not unusual for the city to use the TJC as a "sounding board" for First Amendment issues, as "they are experts in the field."

"First Amendment case law favors reactive, rather than proactive, remedies to offensive or even potentially dangerous expression," Hansen clarified. "The exception to this general rule, of course, is that the government is allowed to place reasonable restrictions on the time, place and manner in which such speech may occur."

You can't stop a person from speaking, Hansen said, but you can try to shape when, where and how loud they do it. It's illegal, for example, to shout your opinion using a megaphone in a private neighborhood at night. So while Hansen didn't expect the city would be able to prevent the rally completely, he hoped to work with officials in order to make the event as safe, contained and manageable as possible.

The "Unite the Right" rally ended up bleeding beyond its zoned location into multiple parks and private properties, with white supremacists passing by a synagogue and a funeral home. Tensions between neo-Nazis and the groups of counterprotesters eventually escalated, resulting in the death of 32-year-old counterprotester Heather Heyer.

"The next time this comes up we can't have the same outcome," Hansen said. "I think our biggest task right now is providing some kind of reasoned guidance to both cities and courts going forward. We need to figure out a better way of articulating the standards for these things."

The TJC is serious about regulating the ways that rallies like "Unite the Right" take shape moving forward, but Hansen's organization will continue to protect their right to existence otherwise. His reasoning is practical. "If you keep these people in the dark, you lose track of them, you allow them to fester in the shadows. It's better to keep a spotlight on them." Hate speech out in the open, Hansen asserts, is more difficult for people to repudiate or sweep under a rug. "You start denying these people the right to speak publicly and you're just providing evidence that things like racism and anti-Semitism aren't problems. You let these guys come out and speak, and all of a sudden you can't deny it. All these guys marching down the lawn chanting 'Jews will not replace us,' and, well, your uncle can't claim that anti-Semitism is fake news anymore."

Prominent displays of hate speech, however, are not without their inherent dangers. The line between language that is intolerant and language that is threatening or inciting violence can be blurry. And even speech acts unaccompanied by physical violence can trigger, intimidate and terrorize certain individuals.

In an opinion article for the Los Angeles Times, Northwestern University sociology professor Laura Beth Nielsen described some of hate speech's negative consequences: "Racist hate speech has been linked to cigarette smoking, high blood pressure, anxiety, depression and post-traumatic stress disorder, and requires complex coping strategies. Exposure to racial slurs also diminishes academic performance."

Even without violence, hate has its physical repercussions. But as David Straughn, a Black Lives Matter activist in Charlottesville, explained, the “Unite the Right” rally hardly qualified as nonviolent.

“White people always talk about free speech and how they have a right to be heard,” Straughn said. “But during the weekend of Aug. 12, I did not see one microphone, one public amplification system or one generator. They weren’t coming for free speech. They were coming to intimidate and harm and beat and and murder Charlottesville civilians and community members, predominantly people of color. They were coming to hurt people.”

Straughn is skeptical of the idea that free expression is, in reality, a right afforded to all Americans. “I think that if 1,000 members of Black Lives Matter put together a rally, the police would have been much more present. There would have been more of a pushback from elected officials. They wouldn’t have told people, like they told us [about the ‘Unite the Right’ rally], to ‘just ignore it.’”

In Straughn’s view, free speech privileges whiteness. “White men were the first people to speak for this country and the last people to speak for this country. White supremacists have been protected for hundreds of years. We’re just trying to catch up. The truth of the matter is, they will always be protected.”

Nielsen makes a similar argument in her piece, highlighting instances when freedom of speech has been waived to protect the powerful. It is illegal, for example, to panhandle, the logic being that asking for money is a distraction to the commuters, business owners, workers and shoppers navigating public city space. Yet catcalling or hurling a racial slur at a woman or person of color is entirely legal.

Hansen believes in the First Amendment’s ability — and, more so, responsibility — to protect all Americans. Yet in practice, online and off, the universal mandate can fail to sufficiently challenge the racism, sexism and classism embedded in everyday life. Has free speech truly transcended its original scope of protecting, first and foremost, white men? Perhaps not. According to critics like Nielsen, at least, insisting upon First Amendment absolutism runs the risk of further entrenching those inequities.

Signs posted throughout Charlottesville’s downtown area in September, a month after the violence of the “Unite the Right” rally.

The shadow of the “Unite the Right” rally still looms large in Charlottesville. Signs reading “Heather,” “Unite C’ville” and “If equality and diversity aren’t for you then neither are we” can be seen in storefronts across the downtown mall area. The horrific events in August left a dark imprint on the city’s morale, as well the city’s perception of free speech.

One of the ways Hansen is working to rehabilitate Charlottesville’s faith in free speech is through a public art project called the Free Speech Wall. Architects Peter O’Shea and Robert Winstead worked to mount a two-sided wall made of Buckingham slate outside of Charlottesville’s City Hall that measures about 54 feet long and 7.5 feet high. The wall operates

as a massive chalkboard, which passersby are permitted to adorn with any words or images they wish.

The wall is meant to serve as a physical manifestation of the First Amendment, a demonstration of free speech in action. “Our policy has always been that we don’t censor anything that’s up there,” Hansen said.

It is habitually wiped clean every few days by TJC employees and volunteers to make room for more messages. But aside from that, representatives do not remove any expressions that might be deemed “offensive” to some. Fellow Charlottesville residents, however, can erase, and even adapt, any inappropriate or derogatory remarks they find.

“As private citizens, you are free to write whatever you want,” Hansen explained. “To us, the project isn’t only about what’s written on the wall but what’s erased from the wall. Things are often changed and co-opted by others to make it their own. It’s a real, living process.”

This idea — that the project’s power resides not only in what is visible, but also in what is erased — extends, in Hansen’s mind, to another prevalent discussion concerning free expression today: what to do with Confederate monuments, the question that spurred the “Unite the Right” rally in the first place.

The answer, Hansen explained, is complicated. First of all, many monuments are protected by local laws that prevent their removal outright. But legal regulations aside, Hansen believes that neither keeping nor removing Confederate monuments is a sufficient response. “We see this idea of memorializing things as an evolving process. It’s not about the monument itself, but rather what message is conveyed, and how that changes over time.”

When discussing the statue of Confederate Gen. Robert E. Lee that incited so much controversy, Hansen claimed the removal of any statue “is equally important as a speech act as erecting it in the first place.” Instead of removing the Lee monument and leaving no trace, though, Hansen suggested that the city replace the statue with some kind of memorialization — a rundown of the statue’s entire history, outlining why it was erected and why citizens decided it no longer represented their community.

“I think that’s a better outcome than just making it disappear overnight and certainly better than it being left to the people to drag it down with ropes,” he added.

The Mobile Monument Project is a roving installation that began in 2015. The shipping container’s outside is a chalkboard on which participants can express themselves freely. The inside is an evolving gallery of First Amendment history, which is updated to incorporate specific cases relevant to each of the mobile monument’s destinations and audiences. Today, free expression can be a target for both progressive activists and conservative traditionalists. Some on the left see the amendment as enabling hate and bigotry, threatening those who are already marginalized and persecuted. Some on the right perceive acts of protest like kneeling during the national anthem as anti-patriotic. And perhaps most hazardous is a

president who has, as Hansen put it, demonstrated “a tenuous grasp on constitutional principles, particularly when it comes to the First Amendment.”

Between attacking the press and condemning protesters, President Donald Trump has exhibited, in Hansen’s words, a “very unfriendly view toward the principles of free speech and expression we are trying to uphold.”

Since Trump launched his presidential campaign in 2015, the number of hate groups in the United States has increased, from 892 in 2015 to 917 in 2016. Mark Potok, senior fellow of the Southern Poverty Law Center and editor of its Intelligence Report, called 2016 “an unprecedented year for hate.” “These extremists think they finally have an ally who has the president’s ear,” he reported, referring to Steve Bannon, former White House chief strategist. This swell corresponds with a surge of hate crimes and speech acts. Just last month a video surfaced — and quickly went viral — showing a white man on a subway drunkenly screaming obscenities at black passengers. In between racial slurs, the man chanted, “First Amendment! First Amendment!”

Hansen is often tasked with protecting these kinds of First Amendment advocates — from people who use speech to intimidate and menace people of a different ethnicity to those who express sexual, disparaging and humiliating opinions about female co-workers. And in 2017, with hate groups emerging and growing fortified by the current administration, the First Amendment is on the receiving end of some seriously bad PR.

However, the more the American public grows dubious of the First Amendment’s exigency, the more urgent Hansen considers his line of work.

“There are real, practical reasons to defend ugly speech. It’s not easy, though, and I admire people who do it way more publicly and directly than we are able to. It takes a lot of guts and internal resolve to commit to the positive outcomes you know will emerge from this.”