



## Foundation for Individual Rights in Education

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February 22, 2006

President Steven B. Sample  
Office of the President  
University of Southern California  
University Park Campus  
Los Angeles, California 90089

*Sent by U.S. Mail and Facsimile (213-821-1342)*

Dear President Sample:

As you can see from our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, freedom of religion, academic freedom, due process, and, in this case, freedom of speech and expression on America's college campuses. Our website, [thefire.org](http://thefire.org), will give you a greater sense of our identity and activities.

The recent controversies surrounding George Weiss Vando's performance of "ManLady" and the two free speech protests that resulted from the censorship of Vando have drawn FIRE's attention. FIRE is concerned both that a "free speech zone" exists on USC's campus and that USC maintains policies—oral and written—that impermissibly restrict certain types of constitutionally protected expression.

This is our understanding of the facts, based on written reports in the *Daily Trojan*. Please inform us if you believe we are in error. On January 23, 2006, as a part of USC's Gender and Sexuality week, George Weiss Vando performed "ManLady" within the free speech zone. After receiving several complaints about Vando's use of the word "motherfucker," Eddie Marquez, Assistant Director of Topping Student Center, shut down "ManLady" in the middle of Vando's performance. According to the *Daily Trojan*, Marquez cited the vulgar content and improper registration (organizers did not inform Marquez of the controversial nature of the performance) as the reasons for his decision. The *Daily Trojan* also reported that "[w]hen asked whether vulgar language is allowed in the free-speech zone, Marquez flat-out said that profanities may not be used. 'We do this to protect the students and make sure we maintain the integrity of the university,' Marquez said."

In response to this censorship, students staged two free speech protests on January 26, 2006. First, a student stood in the free speech zone with a four-foot sign bearing the word “fuck.” Marquez asked the student to lower his sign, and when he refused, Department of Public Safety (DPS) officers descended upon him and briefly detained him. One of the DPS Officers, Bryan Hunt, told him that he violated California Penal Code 415 and could go to jail.

Later that day, six other students held up signs reading, “Fuck freedom of speech,” “I’m with motherfucker,” and “Questions? Concerns? Comments? Go fuck yourself.” Officer Hunt returned and asked the students to lower their signs. Hunt also told the students that the area is only a free speech zone between 12:00 and 1:00 p.m. The students read Hunt sections from the *SCampus* student handbook showing that Hunt had given them incorrect information. Marquez and Lori White, Associate Vice President of Student Affairs, called the DPS officers aside, and then White told the students that they were allowed to continue with their protest. White said that Student Affairs and DPS do not have clear policies on free speech and protests and added that “Student Affairs, students and DPS would have a conversation to ‘come up with something that makes sense for this community, and keeps the focus on protecting students’ rights to free speech.’”

These events concern FIRE for several reasons. First, in the course of these events, administrators at USC made public statements that have a chilling effect on campus free speech. Second, USC maintains a small “free speech zone” that effectively turns the rest of the campus into a “censorship zone.” Finally, in the course of researching this incident, FIRE has learned that USC maintains several written policies that infringe upon students’ right to freedom of speech. Although USC is a private institution, California’s Leonard Law promises all students at private secular postsecondary institutions the same First Amendment rights as students at public universities. Moreover, USC promises its students the right to free speech, proclaiming that “[t]he University of Southern California is committed to fostering a learning environment where free inquiry and expression are encouraged and celebrated” and that “[t]he university recognizes the crucial importance of preserving First Amendment rights....”

USC must clearly repudiate Eddie Marquez’s statement that profanities are not permitted in the free speech zone, a policy that is inconsistent with the principles of free speech and the First Amendment.

In *Cohen v. California*, the Supreme Court ruled that the First Amendment protected a man wearing a jacket that read “Fuck the Draft.” Ironically, Cohen had been convicted under California Penal Code 415, the same code that DPS officer Hunt used to threaten students while they protested within the free speech zone. In response to Vando’s use of the word “motherfucker,” Marquez claimed that vulgar language is prohibited in order to protect the students. In *Cohen*, Justice Harlan countered this very argument by writing that “[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon showing that substantial privacy interests are being invaded in an essentially intolerable manner.” Harlan further explained that one does not have a claim to a substantial privacy interest when walking through, for example, a courthouse or a public park. A public area of a major university campus most certainly falls into this same category.

In *Cohen*, the Court wrote of the dangers of censoring even the word “fuck”:

How is one to distinguish this from any other offensive word? Surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.... For while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.

And, as if anticipating Marquez’s claim that censoring vulgarity protects the integrity of the university, the Court wrote:

That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Censoring students does not, to use Marquez’s words, “maintain the integrity of the university.” Rather, it undermines the unique role of the university as a marketplace of ideas and a “vital center[ ] for the Nation’s intellectual life....” *Rosenberger v. Rector & Visitors of the University of Virginia* (1995).

Furthermore, the school’s designation of a small area of campus as a free speech zone is itself an impermissible act of censorship. Although universities are allowed to enforce “reasonable time, place and manner restrictions” on activities that would significantly disrupt university functioning, there is nothing “reasonable” about transforming the vast majority of a university’s property into a “censorship zone.” Therefore, we offer you the following guidelines to help you revise your speech policies:

1. The default position of any policy should be that free speech is the norm all over the campus. In general, policies should say what a university *cannot* do in specific language, and, to a lesser extent, what restrictions are permissible and when. A truly progressive policy would mirror the Bill of Rights.
2. Schools cannot restrict speech to a small portion of campus (such as USC has done by limiting free speech to Trojan Square) nor to inaccessible or sparsely used/populated areas of the campus only. The speech must be generally accessible to the population at large—and especially to the target audience.
3. Speech may not be unduly restricted by pre-registration regulations, onerous monetary deposit requirements, or expensive insurance requirements. No rule that allows the school substantial discretion to impose conditions on speech for groups or individuals is allowable. Discretionary decisions need to be “content and viewpoint neutral,” meaning they implicate factors like noise or interference with traffic flow, and nothing relating to the substance of the speech.
4. Speech activities should not be unduly restricted by “neatness” and “cleanliness” considerations. A school may require that students clean up after a rally or a leafleting. A school may not stop leafleting because of a general fear that students might not clean up afterwards. Of course, if a particular group has a demonstrated history of not cleaning up

after its own mess, then modest restrictions might be in order—such as a monetary bond to cover the cost of a clean-up service. Only in light of past failures should a group be saddled with such pre-conditions.

5. Demonstrative activities should not be restricted in the name of aesthetics. It is reasonable to ask students to restore the campus area to its original condition after a large demonstration or leafleting (beyond normal wear and tear, which is a normal cost of operation for a university), but it is unreasonable to prohibit an expressive activity in advance for fear that it will make a mess or be unaesthetic. (This is related to No. 4, above.)

6. Virtually all universities already have the power, through existing rules, to prevent the type of disruptive conduct they might fear would take place. They can stop demonstrations that substantially impede the function of the university, block traffic flow, or prevent students from sleeping or studying. They can punish students who engage in vandalism or violence. The university also has increased power to regulate the presence of those speakers who have not been invited to campus and who are otherwise unaffiliated with the university. The university should not simply assume before the fact that student or faculty expression will be impermissibly disruptive. Rather, the university should accept its role as the ultimate free speech zone.

When one steps back from the formal analysis, one is left with the uncomfortable feeling that even a “free speech zone” policy that comports in all details with minimum First Amendment requirements is somehow inappropriate for a college campus. After all, the establishment of “free speech zones” connotes that the administration has decided to designate large areas of the campus as “censorship zones.” It is both inappropriate and unnecessary to ban unfettered free speech from so many areas of the campus.

Finally, USC maintains several written policies that impermissibly infringe on the right to freedom of speech guaranteed to USC students by California’s Leonard Law and promised to USC students by the university.

USC’s “Advertising, Promotion and Literature Distribution” policy provides that “all printed materials posted or distributed on campus” must “contain no derogatory language.” This is unconstitutionally overbroad because it bans a great deal of constitutionally protected speech. As courts have held in cases too numerous to list, the state (or, in this case, a private institution subject to the Leonard Law) cannot ban communication simply because someone finds it offensive or derogatory.

USC also bans, as sexual harassment, “derogatory comments” and “sexist comments” (among other things). Again, this is unconstitutionally overbroad, as derogatory and/or sexist comments are protected by the First Amendment. The Supreme Court has held that for student conduct to constitute unprotected sexual harassment, it must be “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). By contrast, USC’s policy bans certain types of communication outright. This contradicts both Supreme Court precedent and the federal government’s interpretation of the relevant harassment laws. In its July 28, 2003, open letter to college and university administrators, the Department of Education’s Office for Civil Rights

(OCR) stated that “the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”

USC should do three things to uphold its First Amendment obligations as well as its stated dedication to free speech. First, the university should swiftly and clearly repudiate Eddie Marquez’s pronouncement that vulgar language and profanities are not permitted on campus. Second, the university should open its campus to free speech to the fullest extent consistent with the university’s need to maintain its proper functioning as an educational institution. Finally, the university should revise the unconstitutional written policies cited in this letter.

FIRE sincerely hopes that in making a decision about these policies, the University of Southern California will consider the legal precedent cited in this letter, along with the moral ramifications of infringing upon the fundamental rights of USC students. USC should take note that every challenge FIRE has posed to “free speech zones” has been successful, and has met with overwhelming public approval. We urge USC to remember America’s tradition of toleration of public dissent. Let your students exercise their basic legal, moral, and human rights; let them peacefully protest as their consciences dictate. Because these recent events may be impermissibly chilling student speech at USC, we request a response on this matter by March 8, 2006.

Sincerely,



Samantha Harris  
Program Officer

cc:

Eddie Marquez, Assistant Director, Topping Student Center, University of Southern California

Lori S. White, Associate Vice President, University of Southern California

Carey Drayton, Assistant Chief, Department of Public Safety Career & Protective Services, University of Southern California

Bryan Hunt, Public Safety Officer, University of Southern California