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# **FIRE QUARTERLY**

**SUMMER 2020**



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# It's crunch time for civil liberties on campus

A message from FIRE Executive Director Robert Shibley

**If you are wondering if it's just you or if things really have gotten crazy out there, let me offer some reassurance: It's not just you.**

FIRE is unquestionably the busiest we have ever been in our two decades of existence. Since George Floyd's killing in Minneapolis on May 25, FIRE has reviewed more than 280 cases dealing with expression about his death and subsequent events, with many more coming in each week. Some cases are public and make big news, but the real work is happening behind the scenes.

Because of the fear of "doxing" and further risks to their education, livelihoods, and sometimes physical safety, many of those who come to FIRE for help don't wish to make their cases even more public. So like the proverbial iceberg, the part of FIRE's work you can't easily see is much larger than what you can. We have sent dozens of comprehensive letters to universities, made countless phone calls, talked to policymakers, and much more.

Sometimes what students or faculty members have said to get themselves in trouble is, frankly, what nearly everyone would call racist and/or offensive. Sometimes it's merely a political disagreement that's been labeled as offensive. When it comes to protecting free speech, this doesn't matter: FIRE zealously advocates for free speech regardless of viewpoint.

I was recently asked if FIRE's nonpartisan stance in defense of expression, regardless of viewpoint, was itself an example of "privilege." It's not a surprising question at a time when many believe that every business and organization should take a stand on the social issues of the day. My answer was that there are thousands of organizations in our country dedicated to advocating for a wide variety of social platforms related to race, policing, et cetera. FIRE was specifically designed not

to take positions on such issues so that people would feel comfortable coming to us for help regardless of their views.

Those who come to FIRE — especially many of those coming to us now — have nowhere else to turn to defend their rights. If FIRE does not defend them, no one will, and the rights of all of us will suffer for it.

Any one of these cases or lawsuits would, at a normal time, be a reason to send out a press release or to email donors. In the current environment, though, legitimately big-deal events are turning into "just another day at the office." We'll let you know about them through our FIRE Update emails, our social media channels, the FIRE Quarterly, and of course you can find out about what we're doing any time at [thefire.org](http://thefire.org). If you're so moved, please consider supporting us with a donation so that we can continue this vital work.

Most of all, though, thank you for your continued support of FIRE and of the many folks that we

help. It's crunch time for civil liberties on campus — and your support is appreciated now more than ever.

**If FIRE does not defend them, no one will, and the rights of all of us will suffer for it.**

Regards,  
Robert Shibley  
Executive Director



In June, FIRE fielded 289 incidents and submissions, representing nearly 30% of cases we would normally receive in an entire year! Our team has been busy working with students, professors, administrators, and the media to restore and defend individual rights. Here's just a sampling of what kept us so busy this summer.



(Credit: Michael Gordon / Shutterstock)

On June 10, FIRE called on the University of California, Los Angeles to immediately reinstate a professor put on mandatory leave after he, following institutional policy, declined to alter his final exam schedule or grading policies for black students during the protests surrounding the killing of George Floyd.

Days earlier, a student emailed lecturer Gordon Klein to suggest he adjust final exam requirements for black students. Klein thanked the student and declined to alter exam procedures, citing UCLA's own policy and logistical concerns with identifying which students would be granted accommodations.

Klein's email went viral on Twitter, leading to a petition calling for his termination and garnering more than 20,000 signatures. UCLA placed Klein on mandatory leave effective June 3, apparently stemming from the tone of his response to the student. In an email to the UCLA community on June 4, an administrator characterized Klein as having "a disregard for our core principles" and called Klein's email an "abuse of power." Under federal law and university policy, however, the only actor abusing its power is UCLA. Stay tuned for updates.

## Nicholls State University

On June 8, the president of Nicholls State University showed he has no idea how the First Amendment works by writing in a campus email that "[f]ree speech does not protect hate speech" and promised "the swiftest, harshest action" for any speech that doesn't support the public institution's values.



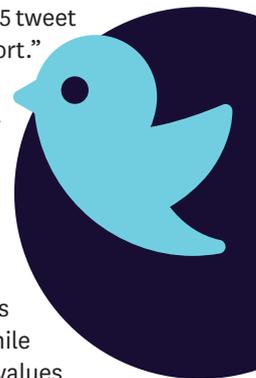
FIRE reminded President Jay Clune that there is no hate speech exception to the First Amendment and that his false characterization of free speech not only impermissibly chills speech, but also can open up the public university to costly lawsuits and criticism from civil liberties organizations. Days later, Clune walked back his statement, saying he didn't think protesting students "really wanted a teaching moment on the First Amendment."

If students weren't looking for a teaching moment on the First Amendment, perhaps Clune — the leader of a government institution — shouldn't have given them an incorrect one to begin with. FIRE will continue to watch to ensure that college leaders who don't respect or don't understand the First Amendment at the very least don't violate it.



Catholic University of America professor John Tieso announced June 25 that the Washington, D.C. university fired him for his political social media posts. According to a local news station, one tweet called former President Barack Obama "incredibly impotent and vain" and suggested that Obama, who was at an event in South Africa, "might consider staying in Africa and giving all his money to his people." Though the content of the other two tweets is unclear, one may be his May 5 tweet describing Sen. Kamala Harris as a "former escort."

The university investigated him, resulting in a suspension May 18. That's when FIRE stepped in to remind President John Garvey that Tieso's tweets were made as a private citizen and in compliance with the university's own policies. They also addressed matters of public concern, meaning they're protected speech regardless of whether others found them offensive. While CUA is private and may commit itself to any values it wishes, since it promises expressive rights, it is morally and contractually bound to uphold those promises. As of press time, CUA had not responded to FIRE's letter, but Tieso indicated he will sue the university. FIRE will closely follow Tieso's litigation prospects.



# FIRE defends crucial Title IX regulations as lawsuits threaten due process



Betsy DeVos, U.S. Secretary of Education  
(Credit: Gage Skidmore / Flickr)

Advocates for free speech and due process on campus won one of their biggest-ever victories May 6 with the finalization of the Department of Education’s new Title IX regulations. The regulations guarantee critical due process protections that Americans recognize as essential to securing justice, but that have for too long been denied to students accused of sexual misconduct on college campuses.

Now, FIRE is fighting against a series of lawsuits that threaten the regulations’ implementation.

In June and July, FIRE joined with Speech First and the Independent Women’s Law Center to file in federal court three petitions to intervene in defense of the regulations. As we write, one has already been granted.

The coalition’s first petition was filed June 24 in response to a lawsuit filed by the ACLU that, if successful, would stop the protections from going into effect. The trio asked the court’s permission to “intervene” in the lawsuit in order to argue that the Department of Education’s definition of peer-on-peer harassment is not simply permissible but required by the First Amendment. (A crucial part of the regulations was the adoption of the Supreme Court’s definition of “sexual harassment,” which provides a clear path for institutions to

respond to allegations of misconduct while also protecting students’ expressive rights.)

A second petition filed two days later sought to defend the regulations against a lawsuit filed by the Democratic attorneys general of 17 states and the District of Columbia. On July 21, the groups filed a third intervention in Massachusetts. The petition aims to intervene in a lawsuit from the Victim Rights Law Center, and argues that many of the department’s protections for college students are not just reasonable policy decisions — but are constitutionally required.

FIRE expects to file additional petitions in defense of the Title IX changes in the coming months.

“It is intensely disappointing to see this partisan group of attorneys general spend taxpayer dollars not only to defend colleges’ ability to put students on trial for their speech, but also to make sure those trials don’t even have to be fair,” said FIRE Executive Director Robert Shibley.

The regulations are set to take effect on Aug. 14. Among the procedural protections guaranteed by the regulations are an express presumption of innocence; live hearings with cross-examination conducted by an adviser of choice; sufficient

on that note...

## RARELY A FAIR HEARING

**A study released by FIRE in December found that college students are routinely denied even the most basic elements of a fair hearing — forcing many of them to fight for their rights in campus kangaroo courts.**

- Nearly three-quarters of America’s top universities do not even expressly guarantee students that they will be presumed innocent until proven guilty.
- Just slightly more than half of schools require that fact-finders — the institution’s version of judge and/or jury — be impartial.
- Nearly 9 in 10 universities studied received a D or F rating from FIRE for at least one disciplinary policy.

Nearly 75% of universities **do not** guarantee a presumption of innocence.



time and information — including access to evidence — to prepare for interviews and a hearing; impartial investigators and decision-makers; and a requirement that all relevant evidence receive an objective evaluation. The regulations also affirm institutions’ ability to use the “clear and convincing” standard of evidence, which the government previously forced schools to abandon in 2011 for the lower “preponderance of the evidence” standard in sexual misconduct cases.

Reporters are covering FIRE’s work, and their coverage highlights how FIRE will not back down in defending the regulations. In recent months, FIRE’s work to defend strong due process protections has been covered in over 200 media outlets, including the Associated Press, New York Times, Wall Street Journal, ABC News, NBC News, and TV and radio stations around the country.

“Students shouldn’t have to relinquish their basic rights when they step foot on a college campus, but at almost every top university in this country, that’s exactly what happens,” said FIRE Senior Fellow Samantha Harris. “Sexual misconduct is a gravely serious offense for which the punishment must be substantial. The department’s new regulations require schools to provide students with a fundamentally fair process before imposing these life-altering consequences.”



“For nearly a decade, FIRE led the charge to introduce fairness to campus proceedings, first nearly alone, then with a growing number of allies. This year, we won an important victory. But our work is not over. We will continue to fight to ensure these protections are afforded to America’s college students.”

— Robert Shibley, FIRE executive director



“Over the past decade, the definition of sexual harassment has expanded on campus to encompass protected expression, creating a climate of fear and destroying students’ appreciation for the traditions of fairness upon which this country was built.”

— Nicole Neily, Speech First president



“Due process and free speech should not be partisan issues. They are American values. And when the representatives of one political party sue an administration of the other political party over the limits of these fundamental rights, it is necessary for groups without partisan affiliation to weigh in to ensure that these rights are upheld.”

— Jennifer C. Braceris, director of the Independent Women’s Law Center

2011

APRIL

The Department of Education’s Office for Civil Rights issues the controversial “Dear Colleague” letter, denying students important due process protections in campus sexual misconduct proceedings.

2013

MAY

The Departments of Justice and Education issued a findings letter announcing a “blueprint” for colleges and universities to protect students from sexual harassment and assault. The departments specifically articulated an overbroad definition of sexual harassment: “any unwelcome conduct of a sexual nature.”

2017

SEPTEMBER

The department rescinds the “Dear Colleague” letter; FIRE celebrates.

2018

NOVEMBER

The department proposes new regulations to address the problem, beginning what would become an 18-month process of seeking public input.

2019

JANUARY

FIRE submits formal comment on the proposed regulations.

2019

OCTOBER

FIRE debuts its Due Process Litigation Tracker, summarizing the most important of the more than 600 lawsuits filed by students alleging they were denied fair procedures.

2020

MAY

The Department of Education releases new regulations defending due process.

2020

JUNE

FIRE and coalition file petitions to defend the regulations’ protections in federal court, after they’re challenged by the ACLU and partisan elected officials.



# Leaving a Legacy of Liberty



I value my right to free expression and free thought; my right to research, to study, to propound, to argue, and to publish my views. But the widespread

agreement that these rights advance the general welfare of society is gone. Today, many seem to believe that being on the same planet where someone is permitted to say things we dislike is threatening, therefore, we're entitled to shut them down.

I've watched the fall of the old guard, and in their crusade to show their commitment to diversity and inclusion above all else, universities stomp out diversity of thought on campus. **The academy betrayed our nation's faith in our educational system, so I searched for an organization to support that would do the necessary and important work of defending free speech. That effective, nonpartisan advocate is FIRE.**

**John Vineyard**, Eternal Flame

John is a member of **FIRE's Eternal Flame Society**: a group of passionate supporters who stand for First Amendment rights by honoring FIRE with a legacy gift. By including FIRE in their wills and estate plans, Eternal Flames help ensure that FIRE has the resources needed to carry out our work for many more years to come.

John's legacy gift is the perfect way to ensure his grandchildren, their children, and generations to come are free to speak their minds on campus. You can learn more about the Eternal Flame Society at [thefire.org/legacy-giving](https://thefire.org/legacy-giving). You can also contact us at [support@thefire.org](mailto:support@thefire.org) or 215-717-3473.

## FIRE Opinion:

### Universities should not rescind admission for hateful speech

In recent months, Americans are reevaluating police practices and their disparate impact on communities of color. Unsurprisingly, many, including college applicants, are expressing their thoughts on social media, leading to predictable calls to rescind admissions offers to students who have engaged in racist, or allegedly racist, expression. Some institutions — including the College of Charleston, George Mason University, Xavier University, and Marquette University — rescinded admissions offers.

Colleges that withdraw admissions offers over controversial speech may believe that doing so will combat racism. They are mistaken. **Historically, censorship has not proven to be an effective tool in dismantling racism, and in fact, likely contributes to its spread.** When people are censored for their views, their views don't typically change. They instead learn to only share those views in echo chambers that reinforce their prejudices. Worse, censoring bigots makes free speech martyrs out of them, giving them legitimate grievances to seize upon and enhancing their appeal to those who might be on the fence.

Institutions may also believe that if they admit a bigot, their bigotry will spread, creating a discriminatory hostile environment. While America's colleges are obviously not devoid of those with racist thoughts, one would be hard pressed to find an institutional setting more dedicated to promoting diversity and inclusion than the modern-day American university. Moreover, the concern that the presence of a racist on campus will lead to racism's proliferation presumes that when students are exposed to racist ideas, they will be persuaded by them. This pessimistic view assumes that while we can see through the moral shortcomings of racism, those students will be easily misled. To the contrary, the extensive participation of college students in campaigns for racial justice overwhelmingly paints a picture of a broad generational desire for equality.

**Rather than reject college applicants for bigoted speech, colleges should realize that these young people are among those most in need of the college experience.** People are not born racist. Racism is taught. And because racism and other forms of bigotry are learned, they can also be unlearned.

We cannot overcome our racial divides without confronting them. There may be no better setting to confront our societal problems than in the classrooms and public squares of our college campuses.

—**Joe Cohn** is FIRE's legislative and policy director. Read the full op-ed at [Inside Higher Ed](#).

# Bye-bye blacklist

Harvard ends attack on single-sex groups



**Four years ago, Harvard University announced a stunning attack on freedom of association when it blacklisted members of independent, single-sex, off-campus organizations from certain scholarships and campus leadership opportunities. Now, after legal setbacks and years of intense public criticism, the blacklist is no more.**

On June 29, Harvard President Lawrence Bacow announced that the university will abandon the policy due to the “prevailing interpretation of federal law.” Last year, a federal judge ruled that a lawsuit brought by sororities, fraternities, and Harvard-specific “final clubs” could proceed with claims that the blacklist policy discriminated based on sex. Bacow said the move was in light of the “significant implications” from the Supreme Court’s decision in *Bostock v. Clayton County*.

“Harvard’s effort to crush one of America’s most fundamental freedoms for its students failed in the court of public opinion and was failing in the court of law,” said FIRE Executive Director Robert Shibley. “While this ‘Crimson Scare’ is finally over, lasting damage has been done to many cherished men’s and women’s groups that either shut down or were muscled into changing their policies against their wishes.”

The policy, ostensibly enacted to foster “inclusion” and “address deeply rooted gender issues,” gutted students’ right to free association. Students found to have joined a single-sex social organization were forbidden from receiving certain fellowships as well as Rhodes and Marshall scholarships, and banned from leadership positions in other campus

organizations or on athletic teams. The policy ignored the fact that sororities, fraternities, and Harvard-specific “final clubs” are completely independent and receive no university benefits.

FIRE has been vocal in its opposition to the policy ever since it was first announced in 2016: The blacklist policy, which officially went into effect in 2018, repeatedly landed Harvard on FIRE’s “Worst Colleges for Free Speech” list. FIRE staff testified against the policy in Congress, took out advertisements in the student newspaper, and detailed in numerous media appearances and articles how the policy was an affront to student rights and a continuation of Harvard’s longstanding, worrisome tradition of violating the associational rights of disfavored campus groups.

All along, the policy and the messaging surrounding it was rife with double-standards and other shenanigans. At one point, the policy’s architect, Dean of Harvard College Rakesh Khurana, appointed himself to lead the policy’s oversight committee and, when the policy received only seven votes from the 27-member committee, implemented the policy anyway. There was also the snuffing out of an early faculty motion opposing the policy, an exemption for the student newspaper, and even a hush-hush suggestion to a single-sex female club that they could remain so — as long as they lied about being single-sex.

**“Although Harvard implemented this policy under intense secrecy, it’s no secret that other universities look to Harvard as an example,”** said Ryne Weiss, FIRE executive assistant and chief research officer to the president. “Our sincere hope is that other universities will look to Harvard’s abject failure to implement this misguided policy, and think twice before launching a similar attack on their students’ fundamental rights.”

**“ Harvard’s effort to crush one of America’s most fundamental freedoms for its students failed in the court of public opinion and was failing in the court of law. ”**

Robert Shibley, FIRE executive director



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## FIRE DEFENDS FORDHAM STUDENT ON PROBATION FOR HOLDING GUN IN INSTAGRAM PHOTO

On July 17, FIRE lambasted Fordham University for placing a student on probation for two images he posted on social media. In June, rising senior Austin Tong posted a photo of David Dorn, a retired St. Louis police captain killed by looters in the unrest following the killing of George Floyd. The following day Tong, who emigrated from China as a child, memorialized the anniversary of the Tiananmen Square massacre by posing for a photo holding a legally-obtained gun off-campus, with the caption “Don’t tread on me.” Tong’s probation bans him from physically visiting campus without prior approval, taking leadership roles in student organizations, and participating in athletics. He is also required to complete bias training and write an apology letter. As a private institution, Fordham is not bound by the First Amendment, but is bound by the explicit, repeated, and unequivocal promises of freedom of expression it makes to its students. On July 23, Tong sued Fordham. Stay tuned for updates.



## FIRE IN THE UNITED NATIONS

In a comment submitted to the United Nations in April, FIRE discussed two of the numerous threats facing academic freedom today: demands for faculty firings and overbroad governmental efforts to address anti-Semitism. FIRE offered the comment in response to a call for submissions on global academic freedom from David Kaye, the United Nations’ special rapporteur on the protection and promotion of the right to freedom of opinion and expression. The study will be reported to the 75th Session of the General Assembly this fall.



## FIRE DEVELOPS FRESHMAN ORIENTATION PROGRAM

FIRE and New York University’s First Amendment Watch have developed a program to help colleges teach incoming students about their free speech rights. Our hope is that universities will use the program — which includes written materials as well as video modules — during freshman orientation, first-year seminars, and other programs related to free speech. To ensure an open and robust campus climate, incoming students need to understand the importance of exercising their First Amendment rights and respecting the rights of others. FIRE and FAW’s modules cover such topics as offensive speech on campus, academic freedom in the classroom, the history of student protest, and talking across differences.

**BUT WAIT! There’s more...**