MEMORANDUM

TO: Patrick Reilly, Cardinal Newman Society

FROM: Dale Schowengerdt

DATE: July 5, 2011

RE: Whether Religious Colleges are Legally Required to Maintain Co-Ed Dorms

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Introduction

Catholic University of America's president, John Garvey, recently announced that the school will end its experiment with co-ed dorms next fall when it will begin its transition back to single-sex sleeping quarters for all campus housing. Although the announcement delighted many parents who are trying to decide where to send their children to college, it also had one vocal critic. Professor John Banzhaf—who made news a few years ago for suing McDonald's, claiming that it should be legally liable for making kids obese—has threatened a lawsuit against CUA, arguing that it *must* have co-ed dorms or the school will be engaging in illegal sex discrimination.

Is he right? No, not by a long shot. As long as a college does not subject either men or women to particular disadvantages or unequal burdens, there is no sex discrimination. Moreover, a religious school's right to maintain separate living quarters for men and women is protected by the Constitution and federal law.

In short, Catholic colleges should not feel compelled to maintain co-ed dorms simply because a lone attorney in D.C. is threatening to sue. No court has ever held that a college *must* maintain co-ed dorms. And based on well-established law, it is very unlikely that a court would do so.

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The 1960's Co-ed Revolution

Single-sex college dormitories were the norm until in the 1960s and 70s some colleges started experimenting with co-ed dorms, which Time Magazine labeled as an "innovation in campus living" that was a "revolutionary departure" from the past.[1] Some colleges followed the trend, but many resisted, believing that co-ed dorms would present serious problems such as difficulty maintaining modesty, increased sexual assault and harassment, and decreased academic performance. But today, only about 10% of colleges and universities continue to maintain only single-sex dorms.

That trend may start to reverse, as many colleges are finding that the experiment hasn't worked—a position that is supported by new studies. CUA's President Garvey announced the decision in a Wall Street Journal piece and makes a compelling case for the school's return to single-sex dorms, citing huge increases in binge drinking and "hooking up" when students live in co-ed housing.

> Christopher Kaczor at Loyola Marymount points to a surprising number of studies showing that students in co-ed dorms (41.5%) report weekly binge drinking more than twice as often as students in single-sex housing (17.6%). Similarly, students in co-ed housing are more likely (55.7%) than students in single-sex dorms (36.8%) to have had a sexual partner in the last year—and more than twice as likely to have had three or more.

So in witness to CUA's Catholic faith and in accord with its serious obligations to its students, CUA will no longer have co-ed dorms.

But shortly after President Garvey's announcement, Professor John Banzhaf issued a press release stating that he intended to sue CUA because, in his view, single-sex dormitories are illegal under the D.C. Human Rights Law. Professor Banzhaf's claim, however, is a novel one. It is very unlikely that a court will rule that a school is legally required to have co-ed dorms for the reasons that follow.

CUA's Policy Is Not Sex Discrimination Because It Treats Men and Women Equally

Professor Banzhaf's claim seems to be based on the false premise that that maintaining separate male and female policies or facilities is sex discrimination. But courts have been clear that "discrimination" means subjecting members of one sex "to disadvantageous terms or

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1 http://books.google.com/books?id=2FMEAAAAMBAJ&pg=PA32&lpg=PA32&dq=history+of+co-ed+dorms&source=bl&ots=vY0KrIp6nR&sig=uLwehrthvorb8hCOTGJVGHG0exE&hl=en&ei=o7AETqaAG4au0AGUouj4Cg&sa=X&oi=book_result&ct=result&resnum=7&ved=0CE8Q6AEwBg#v=onepage&q=history%20of%20co-ed%20dorms&f=false

conditions." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).[2] In other words, before a plaintiff can even cross the threshold of a sex-discrimination claim, he must show that either men or women are subjected to particular disadvantages because of their sex. *Id.*

This principle is firmly rooted in case law, as well as common experience. For example, certainly CUA maintains separate bathrooms for men and women. Not surprisingly, no court has required co-ed bathroom facilities, or otherwise held that simply maintaining separate bathroom facilities would constitute sex discrimination.[3] Likewise, no court has held that schools must maintain co-ed housing. Unless either males or females are treated unequally or subjected to some special burden to which the opposite sex is not subject, there simply is no sex discrimination. *Id.*

This principle is perhaps best highlighted in an area that has been subject to a bevy of litigation over the years: sex-specific corporate dress and grooming policies. Many companies require women to wear a uniform or have grooming requirements that differ for men. For example, a company may require women to wear skirts, while requiring men to wear a tie. It may require women to wear makeup, but prohibit men from doing so.

Federal courts have unanimously held that so long as grooming policies do not put unequal burdens on men and women, they do not constitute sex discrimination.[4] Only a few years ago the Ninth Circuit Court of Appeals reaffirmed this principle in *Jepperson v. Harrah's Operating Company, Inc*.[5] There, the Ninth Circuit considered whether Harrah's casino's policy requiring female employees to wear makeup, nail polish, and style their hair, while requiring male employees to wear their hair above their collar and prohibiting them from wearing makeup or nail polish was sex discrimination. *Id* at 1107. The Court noted that it had "long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits." *Id.* at 1110. "The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal

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[2] Most cases analyzing sex discrimination claims have come through the federal anti-discrimination law, Title VII. The local D.C. law under which Professor Banzhaf has threatened legal action has adopted the same analysis as federal Title VII cases. *See Elhusseini v. Compass Group USA, Inc.*, 578 F.Supp.2d 6, 10 n. 4 (Dist. D.C. 2008).

[3] In fact, Professor Banzhaf has recognized this in other contexts.

[4] *See Austin v. Wal-Mart*, 20 F. Supp. 2d 1254, 1255 (N.D. Ind. 1998) (listing cases and the "substantial list of judicial luminaries that have laid their hands on this issue" and concluded that sex-specific policies do not constitute sex discrimination unless they treat men or women less favorably because of their sex) (citing *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998) (upholding sex-specific grooming policy); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2d Cir. 1996) (same); *Willingham v. Macon Telegraph Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (same); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973) (same); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) (same); *Knott v. Missouri Pacific Ry. Co.*, 527 F.2d 1249 (8th Cir. 1975) (same); *Barker v. Taft Broad Co.*, 549 F.2d 400 (6th Cir. 1977) (same); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976) (same)).

[5] 444 F.3d 1104 (9th Cir. 2006) (en banc).

burden' for the plaintiff's gender." *Id.* In *Jespersen*, the Court ruled that because a female bartender did not prove that requiring women to wear makeup (and prohibiting men from doing so) was an unequal burden against women, she could not make out a prima facie case of sex discrimination. *Id.* at 1112.

Thus, so as long as CUA's housing is reasonably comparable for males and females, its single-sex dorm policy does not constitute sex discrimination.

CUA's Decision to Have Single-Sex Dorms Is Protected By Federal Law

The Constitution and federal statutory law protect CUA's ability to make policies for its student body that best accord with its Catholic faith. First, CUA would be protected under the Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb-1(b). RFRA prohibits the government from "substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006). In short, RFRA applies the most stringent standard possible to free exercise claims.[6]

RFRA applies here because President Garvey was clear that the school's decision was based on its concern that co-ed dorms impacted student morality, especially regarding sexuality and excessive drinking. CUA is trying to produce both virtuous *and* intelligent students. President Garvey explained in his op-ed that the two go together, which is a basic Catholic teaching. Binge drinking and the culture of "hooking up" has a deleterious effect on both, and CUA is well-within its rights to follow its moral principles to advance those goals by maintaining single-sex dorms. So even if a plaintiff could pass the threshold of proving that men or women are treated differently by having separate dormitories—an insurmountable hurdle in this case—the school's right to provide separate sleeping quarters for men and women is protected by RFRA.

Second, CUA would also have a claim that legally requiring it have co-ed dorms would violate the Free Exercise Clause of the First Amendment. Under the Free Exercise Clause, "[a] law burdening religious practices that is not neutral or not of general application must undergo the most rigorous scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). In general, a law that allows for exceptions is underinclusive and not generally applicable. *Id.* at 543. *Blackhawk v. Pennsylvania*, 381 F.3d 202 (2004) (law prohibiting keeping animals in captivity was not generally applicable because it exempted zoos and circuses); *Fraternal Order of Police Newark Lodge v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (law

[6] RFRA was struck down as unconstitutional as applied to the states (*City of Boerne v. Flores*, 521 U.S. 507 (1997)), but "RFRA remains applicable to the federal government, the District of Columbia, and non-state federal territories and possessions." *Nesbeth v. United States*, 870 A.2d 1193 (D.C. Ct. App. 2005). Thus, the D.C. Human Rights Act would be subject to RFRA's protections when the law places a substantial burden on religious practice, as it would if it were interpreted to prohibit CUA from maintaining single-sex sleeping quarters.

prohibiting police officers from wearing beards was not generally applicable because it offered exceptions). The D.C. Human Rights Law, like most laws, has several exemptions that would make it not generally applicable, including an exemption (ironically) for schools with single-sex admission policies.[7]

Finally, CUA also has a First Amendment right to be free to determine for itself that single-sex dormitories are most in accord with its faith. Religious institutions, such as CUA, have the "power to decide for themselves, free from state interference, matters of . . . government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952); *see also Pardue v. Center City Consortium Schools of Archdiocese of Wash, Inc.*, 875 A.2d 669 (D.C. Ct. App. 2005) (recognizing that D.C. Human Rights Law could not be applied against Archdiocesan school in race discrimination claim).

In addition to these defenses, a Catholic college may also have Free Association and Free Speech bases for providing single-sex dorms, as well as additional constitutional defenses.

Conclusion

CUA is on solid legal ground in its decision to return to single-sex dorms. So long as the dorm accommodations for each sex are reasonably comparable, there can be no credible claim that the school is engaging in sex discrimination.

[7] It would be an absurd result if a law that explicitly allows CUA to have a single-sex admission policy would then prohibit it from having single-sex sleeping quarters.