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MONOPOLY—UNIVERSITY EDITION: THE CASE FOR STUDENT HOUSING INDEPENDENCE

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I. INTRODUCTION

Departing for college often marks the first time Americans live independently, although students often move into university housing and live within sight of their classrooms. Perhaps the main reason why students live on campus is that many universities impose housing requirements on their students, mandating that, at least for the first year of college, virtually all students reside within university housing complexes.

Universities implement different kinds of student housing policies, but they are often very similar in nature, usually binding all first-year (and often also all second-year) students to agree to reside within the university housing complexes. Exceptions to these policies also vary, although common exceptions are provided for married students, students with children or other dependents, students with disabilities that present obstacles for university housing arrangements to accommodate, and sometimes students with religious beliefs or needs that a university housing system cannot adequately accommodate.²

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2. For example, consider universities within the Washington, D.C. area. George Washington University requires all first- and second-year undergraduates to reside in the university dormitories; students may choose to opt out of living on campus if they can prove that they resided at a local address outside of the Foggy Bottom area prior to enrollment, if they have established permanent residency prior to enrollment, if they are married or have children, if they have disabilities that the university dormitories cannot accommodate, if they are veterans of the armed forces and over the age of twenty, or if they have religious beliefs that cannot be accommodated within the residence halls. See GEORGE WASHINGTON UNIV., GEORGE WASHINGTON UNIVERSITY RESIDENCY REQUIREMENT EXEMPTION REQUEST FORM, <http://living.gwu.edu/merlin-egj/p/downloadFile/d/22298/n/off/other/1/name/ResidencyRequirementExemptionForm2009-2010-F/> (last visited Dec. 18, 2012). Georgetown University requires all first- and second-year students to live on campus and does not allow for religious exemptions. See Georgetown Univ., *Exemption from Living On Campus (First-Year and Transfer On Campus Living Requirement)*, GEORGETOWN UNIVERSITY HOUSING, <http://housing.georgetown.edu/academic/new/index.cfm?fuse=exempt>. (last visited Jan. 20, 2011). Georgetown University only exempts students who are at least age twenty-one, live with their parents or immediate family, have documented medical conditions that necessitate

Universities have implemented and, in recent years, expanded their housing policies because university administrators have argued that dormitory mandates are beneficial for students for a number of reasons. For example, administrators at Yale College have declared that “the colleges are more than living quarters; they are small communities of men and women, whose members know one another well and learn from one another.”³ In other words, administrators claim that university housing complexes foster a sense of community, a home away from home (“[e]ndless opportunities to meet new people and develop lasting friendships”), academic success (“[s]tudy groups can meet easily”), and unparalleled convenience (living “[w]ithin walking distance to all campus buildings”).⁴ University administrators have relied on factors such as these in order to require that their students live on campus within university approved housing complexes.

Although university administrators claim these mandatory housing policies are for their students’ benefit, case law demonstrates that not all students are happy with such housing requirements. Litigation contesting these policies has focused on two areas of injustice: students’ civil and economic rights. In the area of civil rights, students have brought suits claiming that housing policies impede upon their First Amendment rights to practice their religion in ways they deem fit by forcing them to live in an environment which is antithetical to their religious ways of life. In the area of economic rights, students, as well as off-campus housing competitors, have alleged that the actual, hidden motive of the university administrators is making money and increasing profits, as opposed to providing additional benefits to students. They claim that

off-campus housing, or are married or live with a dependent. *Id.* Catholic University requires all first- and second-year students to live in on-campus housing and only makes exceptions for students “who are 21 years of age or older, married, reside with a parent or legal guardian within 20 miles of campus or have demonstrable financial or other hardship.” Catholic Univ. of Am., *Housing Requirement for Freshman and Sophomore Students*, POLICIES, <http://policies.cua.edu/studentlife/housing/housingreq.cfm> (last visited Dec. 18, 2012). American University even requires all first- and second-year students who reside on campus to be enrolled in a university-approved meal plan. *See* Am. Univ., *Meal Plan Options*, DINING SERVICES (2012), <http://www.american.edu/ocl/dining/mealplans.cfm>.

3. Una Au, *Supreme Court Denies “Yale 4” Appeal*, YALE HERALD, Oct. 12, 2001, <http://www.yaleherald.com/archive/xxxii/10.12.01/news/p6supreme.html>, quoting YALE COLLEGE BLUE BOOK.

4. DeSales Univ., *Benefits of Living on Campus*, RESIDENCE LIFE (2010), <http://www.desales.edu/default.aspx?pageid=6248>.

such housing policies disadvantage students by restricting any potential competition to on-campus housing, thus allowing universities to overcharge their students for housing.

As this Note will demonstrate, courts have been reluctant to invalidate university housing requirements based on claims that they infringe upon students' civil rights. A court may be more inclined to invalidate a university housing requirement based on an economic challenge, but this issue has yet to be resolved through the judicial process. Therefore, because the courts have not protected students from housing practices that appear to be predatory and unfair, this Note argues that there should be a uniform federal standard pertaining to how universities should regulate their on-campus housing practices in order to protect the students from exploitation.

Currently, the federal government regulates monopolies and attempts to monopolize the market⁵ in areas ranging from the sports industry to phone companies in order to protect consumers.⁶ A monopoly exists when an institution possesses enough control over a particular market to be able to unilaterally establish the terms for consumers who wish to use or benefit from the market. When an institution establishes a monopoly in a market, it is able to charge artificially high prices because consumers have no competitors to buy from instead. When universities are able to restrict student housing options and force students to live on-campus, the universities create a housing monopoly, giving them license to charge students higher prices and provide fewer services than the students would be able to obtain off campus. Therefore, the federal government should also regulate university housing, as it has done in an array of other sectors, in order to prevent consumer exploitation.

University housing requirements should be considered illegal monopolies because they exclusively control the housing markets, which results in impeding upon students' civil rights and economic freedoms. Part II of this Note demonstrates that university housing requirements impede upon students' freedom of religion, even if a university provides for a religious exception to a housing requirement. It also evaluates current case law such as the Fair Housing Act and exposes its weaknesses. Part III demonstrates that

5. *See, e.g.*, The Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1890).

6. *See generally* THOMAS D. MORGAN, MODERN ANTITRUST LAW AND ITS ORIGINS (4th ed. 2009) (discussing the concept and effects of monopolies and presenting relevant case law in which the government has regulated monopolies).

university housing requirements also impede upon students' economic freedoms, as universities should be prohibited from producing monopolies in the student housing market that artificially inflate prices and financially disadvantage students. Part III also illustrates why the economic arguments for regulation appear stronger than the civil rights arguments. Part IV suggests that government action is needed to solve the problem caused by university housing requirements. This Note ultimately proposes the following solution: the Department of Education should cut federal student grant and loan programs from all universities that impose mandatory housing requirements on their students.

II. UNIVERSITY HOUSING REQUIREMENTS SHOULD BE PROHIBITED BECAUSE THEY IMPEDE UPON STUDENTS' CIVIL RIGHTS

Mandatory university housing requirements impede upon students' civil rights and should therefore be prohibited. An analysis of two cases, *Rader v. Johnson*⁷ and *Hack v. President and Fellows of Yale College*,⁸ illustrates the extent of the damage that the housing policies cause, most blatantly in regard to students' freedom of religion. *Rader* demonstrates that universities cannot be trusted to fairly grant exemptions to their housing policies. Both *Rader* and *Hack* also illustrate a key shortcoming in the current status of the law, which is that the current law only protects students in need of religious accommodations at public universities and not at private institutions.

A. Students' First Amendment Rights

By forcing students to reside in dormitory environments, university housing policies unjustly infringe upon students' First Amendment freedoms, specifically the right of students to freely exercise their religious beliefs.⁹ In two seminal cases, students challenged their university housing policies, which required all first-

7. *Rader v. Johnson*, 924 F. Supp. 1540 (D. Neb. 1996).

8. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001).

9. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; 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.").

year students to reside on campus. In both cases, the students claimed that by being forced to live in an environment antithetical to their religious beliefs, they were being denied their First Amendment rights. Although their arguments were compelling, courts have been reluctant to strike down housing policies solely due to their infringement of First Amendment rights.

The case, *Rader v. Johnson*, demonstrates the effectiveness, as well as the limitations, of the current law. Douglas Rader, an incoming student at the University of Nebraska-Kearney (“UNK”), challenged the university’s “parietal rule,” which required all first-year undergraduate students to live on campus unless they applied for, and were granted, an exemption¹⁰ under one of the university’s “established exceptions”:

- (a) the freshman student will be living with his/her parents or legal guardians and commuting from within the local Kearney community,
- (b) the freshman student is 19 years old or older on the first class day of fall semester, or
- (c) the freshman student is married.¹¹

Although these were the only exceptions outlined in the university policy, the university administrators had previously granted additional exceptions on an ad hoc basis.¹² If a student was denied an exception to the housing requirement and did not sign a housing contract with the university, the university had the ability to “suspend the student’s course registration, grades, and other University services provided to him or her.”¹³

Douglas Rader was raised in a “distinctly religious environment” and was a member of the Christian Church of Thrumbull, Nebraska.¹⁴ His religious beliefs mandated that he abstain from consuming alcohol and other drugs, smoking, and having premarital sex.¹⁵ Although he knew that he would most likely be subjected to UNK’s parietal rule before he applied for admission, Rader chose to attend UNK because the school offered a four-year agribusiness

10. *Rader*, 924 F. Supp. at 1543-44.

11. *Id.* at 1544.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

program and recruited him to play varsity basketball.¹⁶ After he was accepted to UNK, he petitioned the university to be granted a religious exception to the housing requirement and expressed his desire to live in alternative housing at the Christian Student Fellowship, an organization associated with his family's church.¹⁷ The Christian Student Fellowship maintained a facility that was closer to the heart of the university's campus than many of the university's own residence halls.¹⁸ Unlike the university dorms, in which students were virtually unsupervised with regard to their consumption of alcohol and other drugs and where students were given access to condoms and had the right to allow members of the opposite sex into dorm rooms at any time, the Christian Student Fellowship living arrangements mandated that student's dormitory doors be left open while entertaining friends of the opposite sex and also mandated abstention from consuming alcohol or other drugs and from using profanity.¹⁹

The university's Directors of Residence Life decided to deny Rader's request for an exemption to the housing policy, claiming that nothing about living in the residence halls would prevent Rader from "praying, worshiping, reading his bible, or engaging in other similar religious activities at any time he desired."²⁰ After making this decision, one of the Directors of Residence Life sent Rader a letter threatening to drop him from his classes unless he agreed to live in a university-recognized residence hall.²¹ Rader subsequently filed suit.²²

The United States District Court of Nebraska held that Rader was, in fact, entitled to live off campus.²³ The court noted that UNK had frequently granted exceptions to students making claims that fell outside the reasons enumerated in their housing policy.²⁴ "When all of the exceptions to the freshman housing policy . . . are taken into account, only 1,600 of the 2,500 freshmen attending UNK are

16. *Rader*, 924 F. Supp. at 1544.

17. *Id.* at 1544-45.

18. *Id.*

19. *Id.* at 1545-46.

20. *Id.* at 1546, 1548.

21. *Id.*

22. *Rader*, 924 F. Supp. at 1548.

23. *Id.* at 1553.

24. *Id.* at 1533, 1546-47 ("[I]n practice, exceptions have been granted in a variety of circumstances that cannot fairly be said to 'make living on campus impossible'").

required by the University to comply with this parietal rule.”²⁵ If the university felt so strongly about the added educational value of housing on students’ education, the court reasoned, it would have required all freshmen to reside on campus, even if they were over the age of nineteen, and it would have better enforced its policy when granting exceptions not pertaining to religion.²⁶

Because the university was a public institution, Rader’s claim was successful because he was able to present his case under the Establishment Clause of the First Amendment. The court decided that because the university was so lax about granting exceptions to the housing requirement for non-religious individuals, in denying Rader’s request, UNK was selectively imposing a burden on conduct exclusively motivated by religious belief.²⁷ The court observed, “In this case UNK has selectively refused to confer benefits—exceptions to the policy—upon religious observers who wish to live at [Christian Student Fellowship].”²⁸ Thus, although the housing policy appeared neutral on its face, the university administration had selectively enforced it, and, as the court noted, “the state may not unequally condition access to public education on performance of an act—here residing in a residence hall—that infringes the exercise of First Amendment rights.”²⁹

Although *Rader v. Johnson* represents a personal victory for Douglas Rader, the court’s limited holding also means that it will only narrowly affect undergraduate housing requirements generally. The case also illustrates that unless a plaintiff can demonstrate that the administrators only selectively enforced the university housing policy to the student’s disadvantage, civil rights arguments presumably fail. As discussed above, the court relied on two key aspects of the case to reach its holding: first, the public nature of the state university, making it a state actor with an affirmative duty to respect students’ First Amendment rights, and second, that the university enforced its housing requirement policy seemingly arbitrarily. Because the court based its holding on these two factors, *Rader* does little to combat the general enforcement of housing

25. *Id.* at 1547.

26. *Id.* at 1557 (“Indeed, UNK’s freshman housing policy is fraught with contradictions”).

27. *Rader*, 924 F. Supp. at 1552-53.

28. *Id.* at 1553.

29. *Id.* at 1558.

requirements by universities across the country for two main reasons: first, it motivates schools to strictly enforce their housing requirements to preclude religious exceptions, and second, it does not pertain to private schools.

Rader actually provides incentives for universities to enforce their housing requirements *more strictly*, so as to preclude a student from claiming that he or she was denied an exception based on a legitimate need, while others were granted exceptions for questionable reasons. Furthermore, because the court held that only public universities have a burden to respect and accommodate students' First Amendment religious freedom, the question of whether private universities not acting as state actors are able to deny students religious exemptions from on-campus housing requirements was unanswered by the *Rader* ruling. The answer to this question came four years later in *Hack v. President and Fellows of Yale College*.³⁰

The *Hack* decision further demonstrates the problems with current student housing laws, or lack thereof, and highlights the ability of a private university to take advantage of its students through a mandatory on-campus housing requirement. The seeds of the *Hack* case were planted by Yale College's policy requiring freshmen and sophomores to live on campus in co-educational dorms.³¹ The Yale administrators justified this policy by stating, "[T]he colleges are more than living quarters; they are small communities of men and women, whose members know one another well and learn from one another."³² Yale had altered the specifics of its housing requirement over time; residents of New Haven (the town where Yale is located) used to be excluded from the residency requirement, but in 1995, Yale also required residents of New Haven to live on campus.³³ After this policy adjustment, Yale College granted exceptions to the mandatory on-campus freshmen and sophomore housing requirement only to married students or students over the age of twenty-one.³⁴

In 1997, five Orthodox Jewish freshmen sought an exemption to the Yale housing requirement based on their religious beliefs and

30. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001).

31. *Au*, *supra* note 3.

32. *Id.*

33. Samuel G. Freedman, *Yeshivish at Yale*, N.Y. TIMES, May 24, 1998, at 32.

34. *Au*, *supra* note 3.

obligations.³⁵ The students wanted to preserve “their personal commitment to the Orthodox Jewish practice of ‘tzinis,’ or purity.”³⁶ They explained to the dean of Yale College that “[t]heir religious convictions forbid them from residing in dormitories that are readily accessible to members of the opposite sex for extended periods of time, including overnight visits.”³⁷ One article describing the students’ concerns offers a vivid illustration of their unease:

[T]he problem of no genuinely single-sex dorms at Yale . . . is exacerbated by other aspects of campus life. Posters advertising safe-sex seminars accost students at every turn. Many bathrooms have condom dispensers. A guide to ‘Yalespeak’ published by the Yale Daily News contains such items of argot as ‘couch duty,’ defined as ‘being forced to sleep on a common-room couch because your roommate and his/her significant other want some time alone together,’ and ‘sexile,’ defined as ‘banishment from your dorm room because your roommate is having more fun than you.’ Yale is diverse, and many students shun the lifestyle implied by such arrangements and undergraduate witticisms. The protesting students, however, do not believe that such immersion is an acceptable way of living out the demands of their faith.³⁸

The Yale administration refused to provide the students with the accommodation they requested, offering only to assign them to a single-sex dorm, but making no guarantees that it would actually enforce a policy prohibiting male students from entering the residence hall.³⁹ Without a policy prohibiting such behavior, the female students feared that male students would inevitably spend the night in the residence hall and use the hallway bathrooms.⁴⁰ Rather than being thrown out of school for not paying the university housing fee, one student entered into a civil marriage to exempt herself from the housing requirement.⁴¹ The rest of the students paid

35. *Id.*

36. David Wagner, *Yale Experience Depravity for Some—Orthodox Jewish Students File Lawsuit*, INSIGHT ON THE NEWS, Nov. 10, 1997, available at <http://www.freerepublic.com/focus/f-news/1981011/posts>.

37. *Id.*

38. *Id.*

39. *Id.*

40. Freedman, *supra* note 33, at 32.

41. Eli Muller, *Orthodox Jews Relieved By “Yale 5” Loss*, YALE DAILY NEWS, Jan. 12, 2001, <http://www.yaledailynews.com/news/2001/jan/12/orthodox-jews-relieved-by-yale-5-loss/>.

the housing fee (amounting to approximately \$7,000 a year per student) and moved into off-campus housing arrangements that did not violate their religious obligations.⁴² They then filed a lawsuit against Yale, insisting on a “fundamental distinction” between the challenges of the classroom experience and the housing requirement.⁴³ The perceived response from Yale administrators was that Yale students must “live and learn together.”⁴⁴

The students’ main contentions were that Yale could not violate their First, Fourth, and Fourteenth Amendment rights. Because the law does not regulate private university housing policies, the Yale students were forced to argue that Yale was a state actor and therefore had a duty to respect the students’ constitutional rights.⁴⁵ Even before the case went to court, legal scholars considered this reasoning to be weak,⁴⁶ and the court ultimately rejected it.⁴⁷ To prove that Yale should be considered a state actor, and thus that Yale would have a duty to provide housing accommodations to the students on the basis of their religion, the students argued that there were “significant interrelationships” between Yale and the state of Connecticut.⁴⁸ Specifically, they argued that Yale was “created to further public, governmental objectives,” that Yale must submit its budget and financial reports to the Connecticut legislature, and that the Governor and Lieutenant Governor of Connecticut are members of the Yale governing board.⁴⁹ The court, however, rejected the idea that Yale could be considered a state actor because, as a private university, it was not acting under the color of law, and therefore was not subject to constitutional mandates:

Plaintiffs do not suggest that Connecticut had any involvement in establishing Yale’s parietal rules. It is equally clear that the state

42. *Id.*

43. *Id.*; Freedman, *supra* note 33, at 32.

44. John Cloud & Gabriel Snyder, *Ivy League Gomorrah?*, TIME, Sept. 22, 1997, <http://www.time.com/time/magazine/article/0,9171,987023,00.html>.

45. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 82 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001).

46. *See, e.g.*, Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 850 (1998) (“the case seems like an easy legal victory for Yale under Federal law. . . . Yale probably is not a state actor”).

47. *Hack*, 237 F.3d at 83 (“The threshold inquiry for plaintiffs’ constitutional claims is whether Yale can be considered a state actor or instrumentality acting under color of state law. The district court concluded that it could not. We agree.”).

48. *Id.*

49. *Id.*

could not control Yale's policies and operations even if it chose to become involved. Yale, as a private university, did not act under color of law.⁵⁰

Thus, because Yale was characterized as a private university, and not as a state actor, it was given permission to force religious students to pay for on-campus housing even if the students would never even step foot in the residence halls.

B. Students' Civil Rights Under The Fair Housing Act

The Fair Housing Act (FHA), also known as Title VIII of the Civil Rights Act of 1968, provides another compelling argument for why university housing requirements violate students' civil rights. The FHA prohibits a landlord from refusing to rent, sell, make available, or deny a dwelling on account of religion and forbids discrimination in the terms or conditions of the sale or rental of a dwelling on account of religion.⁵¹ Although the FHA clearly purports to combat unfair treatment in housing, courts have not applied the FHA to prohibit unfair university housing policies.

By way of illustration, the Yale students in *Hack* argued that Yale's refusal to exempt them from co-educational housing on the basis of their religious observations violated the FHA.⁵² However, by noting that the students "allege[d] no discriminatory intent on Yale's part, no facially discriminatory policy, and no facts sufficient to constitute disparate impact discrimination," the court denied this claim.⁵³ The students were not arguing that Yale's policy was intentionally discriminatory, but rather that, as applied to them, the policy resulted in a disparate impact against Orthodox Jews. Consequently, the court's decision focused on the requisite facts that the students needed to plead in order to prevail, and their inability to do so:⁵⁴

Plaintiffs do not ask us to force Yale to implement more conservative rules. Rather, they request . . . an injunction prohibiting the defendants from enforcing . . . Yale's mandatory on-campus housing policy against students who cannot reside in such

50. *Id.* at 84.

51. The Fair Housing Act, 42 U.S.C. §§ 3604(a) & 3604(b) (1988).

52. *Hack*, 237 F.3d at 83, 87.

53. *Id.* at 88.

54. *Id.* at 88-89.

housing because of their religious convictions.⁵⁵

The *Hack* court ultimately held that the students did not have a valid claim under the FHA because the FHA only applies to inclusion, not exclusion.⁵⁶ In other words, because the students wanted to be *excluded* from housing instead of *included*, the FHA was not to be used as a vehicle for forcing Yale to allow the students to reside off campus instead of in the Yale dormitories.⁵⁷ The court held that FHA “sections 3604(a) and (b) cannot be stretched to cover plaintiffs’ claim that the FHA gives them a right to be excluded from Yale housing.”⁵⁸ The court reasoned that “[t]he purpose of the FHA is to promote integration and root out segregation, not to facilitate exclusion.”⁵⁹ The Supreme Court did not overturn this holding.⁶⁰

C. Other Federal Civil Rights Statutes

Aside from the FHA, other federal civil rights statutes also fail to prevent universities from imposing housing policies that infringe on students’ religious freedoms. As explained above, the *Hack* ruling held that private schools do not possess a duty to protect students’ First Amendment rights⁶¹ and that the FHA likewise does not preclude a university from mandating that religious students reside in university housing, even if the housing arrangements are antithetical to the precepts of their faith.⁶² In the *University of Pennsylvania Law Review*, Joshua Weinberger explains the significance of these decisions and the relationship to other federal civil rights statutes.⁶³ He notes:

Since a private school is not a state actor, there is virtually no legal recourse for religious students in private schools who demand reasonable religious accommodations If Yale, whose

55. *Id.* at 89.

56. *Id.* at 90.

57. *Id.* at 89.

58. *Hack*, 237 F.3d at 89.

59. *Id.* at 90.

60. *Id.*, cert. denied, 534 U.S. 888 (2001); *Au*, *supra* note 3.

61. *See supra* Part II.A.

62. *See supra* Part II.B.

63. Joshua C. Weinberger, *Religion and Sex in the Yale Dorms: A Legislative Proposal Requiring Private Universities to Provide Religious Accommodations*, 147 U. PA. L. REV. 205 (1998).

relationship with the State of Connecticut predates the American Revolution by three-quarters of a century, is not a state actor . . . then neither is any other private university.⁶⁴

Because the court ultimately refused to recognize Yale College as a state actor, Weinberger notes that all private universities were basically given free rein to disregard students' constitutional protections, such as the right to religious accommodation in university housing.⁶⁵

Without a basis for constitutional claims, Weinberger states, "religious students must turn to the federal civil rights statutes for relief."⁶⁶ The civil rights statutes were designed to prevent private actors from discriminating against the general population.⁶⁷ However, the problem with pursuing this avenue is that, although civil rights laws oversee discrimination in education, they only protect individuals on the basis of race and gender.⁶⁸ Therefore, even conventional civil rights legislation does nothing to prevent universities from discriminating against religious students in their housing policies.

Weinberger thus argues that it was because of the lack of protection in the other civil rights statutes that the Yale students alleged a violation of the FHA.⁶⁹ However, as discussed above, the court also dismissed this claim.⁷⁰ Even though the court held that the FHA "prohibits discrimination in the sale or rental of housing, including discrimination on the basis of religion,"⁷¹ the FHA "does not contain any provision imposing an affirmative duty to accommodate religious requests."⁷² Therefore, current federal civil rights statutes do not prohibit universities from implementing mandatory housing policies that infringe upon the religious freedoms of their students.

64. *Id.* at 219-22.

65. *Id.* ("Since a private school is not a state actor, there is virtually no legal recourse for religious students in private schools who demand reasonable religious accommodations").

66. *Id.* at 219.

67. *Id.*

68. *Id.*

69. Weinberger, *supra* note 63, at 220.

70. *Id.*

71. *Id.*

72. *Id.* at 221.

III. UNIVERSITY HOUSING REQUIREMENTS SHOULD BE PROHIBITED BECAUSE THEY IMPEDE UPON STUDENTS' ECONOMIC AND CONSUMER RIGHTS

Even when justified on other grounds, economic concerns seem to be the primary motivator for university housing requirements. However university administrators choose to justify their housing policies, none would deny that by restricting students from pursuing other housing options, universities can make a hefty profit through charging more money and offering fewer facilities. This section offers two primary contentions: first, that even when administrators claim that university housing programs are for their students' own good, their primary motive seems to be financial gain; and second, that these policies create housing monopolies and courts should consider them to be in violation of current antitrust laws.

A. The Purely Economic Motivations of Universities

Columbia Law School Professor Michael Dorf keenly noted, “[*Hack*] is only about money. Yale College does not actually insist that the students live in the dormitories—just that they pay the bill for the dormitory rooms.”⁷³ Professor Dorf is correct in his assessment of not only the *Hack* case, but also the *Rader* case previously discussed.⁷⁴

Professor Dorf essentially suggests that the *Hack* court not only granted Yale a license to infringe upon the students' religious rights by failing to provide them with reasonable accommodations, but also allowed Yale to charge its students an additional \$7,000 per year under the guise of “housing,” whether or not the students ever even stepped foot inside the residence halls.⁷⁵ Dorf crystallizes his point by noting that “Yale's willingness to accept the students' money regardless of where they actually live tends to undermine Yale's claim that the residence requirement serves important educational, as opposed to financial, objectives.”⁷⁶ This logic can also be applied to *Rader*. If the university in that case felt so strongly about the added educational value of housing for students' education, it could have required all freshmen to reside on campus, even if they were over the

73. Dorf, *supra* note 46, at 847.

74. *See supra* Part II.

75. Muller, *supra* note 41.

76. Dorf, *supra* note 46, at 848.

age of nineteen, and it could have better enforced its policy when granting exceptions not pertaining to religion. In fact, as the *Rader* court noted, “Indeed, UNK’s freshman housing policy is fraught with contradictions.”⁷⁷ The most plausible explanation in both of these cases is that the administrators were attempting to maximize university revenue wherever they could.

B. Students’ Economic Freedoms

Far from only infringing upon a minority of religious students’ civil rights, university housing requirements harm all students as consumers by producing monopolies on student housing and thus artificially inflating student housing prices. University housing requirements eliminate outside competition in the student housing market, thereby restraining students from taking advantage of lower-priced housing alternatives and allowing universities to charge whatever price they want for on-campus housing without the fear of losing their customers.

In *Hack*, the students presented an economic claim under the Sherman Antitrust Act,⁷⁸ stating that the court should prohibit Yale from imposing the housing requirement on them, yet the court dismissed this claim just as it had dismissed their civil rights claims.⁷⁹ The students argued that Yale’s housing requirement violated the Sherman Antitrust Act because it constituted an attempt to monopolize the student housing market in New Haven.⁸⁰ They argued that tying a Yale degree to the purchase of unrelated housing services constituted a violation of both sections one and two of the Sherman Antitrust Act, which prohibit forming contracts in restraint of trade and attempting to monopolize.⁸¹

The court dismissed the Sherman Antitrust Act claim for two main reasons. First, the justices began “with the observation that if a parietal rule requiring some students to reside in college or university housing runs afoul of the antitrust laws, it has largely escaped the notice of the many colleges and universities across the country.”⁸² Because on-campus housing rules had not been questioned from the

77. *Rader v. Johnson*, 924 F. Supp. 1540, 1557 (D. Neb. 1996).

78. The Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1890).

79. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 85 (2d Cir. 2000).

80. *Id.* at 83.

81. *Id.* at 85; *see also* The Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1890).

82. *Hack*, 237 F.3d at 85.

time the Sherman Antitrust Act was enacted until this case, the court expressed its unwillingness to declare such a policy illegal.⁸³

Second, the court dismissed the students' Sherman Antitrust Act claim because it held that Yale had not coerced the students into accepting a tied product when it mandated them to pay for on-campus housing.⁸⁴ The court noted that Yale's housing policies were "fully disclosed long before plaintiffs applied for admission" and therefore the students had no "lock-in" costs because they were free to apply to and enroll at a different school that did not impose such a rigid housing requirement.⁸⁵

The students had a possibility of prevailing only if the court had accepted the idea that a Yale education is unique and there are truly no other similarly situated options for the students. In fact, the students did argue this point, alleging that a degree from Yale "has unique attributes that make it without substitute or equal . . . [especially its] incomparable value to potential employers and graduate schools."⁸⁶ However, the court dismissed this assertion: "The annual rankings of colleges and universities in *U.S. News and World Report* . . . illustrates . . . [that] there are many institutions of higher learning providing superb educational opportunities. Those opportunities are not inherently local."⁸⁷ Therefore, because the Sherman Antitrust Act had never been invoked under such circumstances before, and because the students could have chosen to attend a different institution with a more lenient housing policy, the court rejected the students' claims presented under the Sherman Antitrust Act.

Although the *Hack* students were unable to seek relief even when presenting economic arguments, a Colorado district court may have valid grounds for ruling in favor of a pending challenge to a University of Colorado housing requirement based on the Sherman Antitrust Act.⁸⁸

83. *Id.*

84. *Id.*

85. *Id.* at 86-87. The court's reasoning here is particularly questionable. As mentioned above, Douglas Rader was also informed of UNK's housing policy before he enrolled, yet the court nevertheless granted him an injunction.

86. *Id.* at 86.

87. *Id.*

88. See Complaint and Jury Demand of Plaintiff, *Auraria Student Housing at The Regency, LLC v. Campus Village Apartments, LLC*, No. 10-cv-2516-REB-KLM (D. Colo. 2010) (on file with the author) [hereinafter Complaint].

In 2005, the University of Colorado at Denver implemented a housing policy mandating that all first-year freshmen students under age twenty-one and all first-year international students enrolled at the University's Auraria Campus live at the Campus Village Apartments for at least one academic year, as well as purchase a university-approved dining plan.⁸⁹ The only exceptions to this requirement were for students who lived with a parent or guardian, were married or responsible for a child, were deemed medically excusable, were veterans of the United States Armed Forces, or were enrolled in less than ten credit hours per semester.⁹⁰ Students who refused to comply with this housing policy could be denied admission to the University of Colorado, face judicial hearings and sanctions, or have their admission revoked.⁹¹ In one case, the university threatened a student with the loss of financial aid for submitting a deposit to an unaffiliated apartment complex.⁹²

As a result of this housing requirement, the students and the owners of surrounding housing complexes have suffered harm. A freshman living at Campus Village explained: "It's overpriced. I can get such a better rent deal pretty much anywhere in the city."⁹³ Another student, who was classified as a freshman even though she was a transfer student, complained about the requirement to live at Campus Village: "I don't think it's fair at all."⁹⁴

The total housing and dining cost for students subject to the university's housing requirement totaled over \$9,500 per academic year.⁹⁵ Nearby apartment complexes offered similar housing arrangements for a fraction of the cost. For example, the Regency, a housing complex located near the campus, offered student housing and dining options for under \$7,000 a year.⁹⁶ The Regency decided to file suit challenging the university housing policy after experiencing "numerous situations where UCD students [had] submitted an application and a deposit to live at the Regency, or

89. *Id.* at *7.

90. *Id.* There was no exception based on religious needs.

91. *Id.* at *8-9.

92. *Id.* at *11.

93. David Migoya, *Freshman Requirement Suit Filed on UCD Housing Dictate*, DENVER POST, Oct. 27, 2010, at A-1, available at http://www.denverpost.com/business/ci_16442701.

94. *Id.*

95. Complaint, *supra* note 88, at *7.

96. *Id.* at *8.

[had] even signed leases, and only subsequently learned that living there would violate the [university] Restriction and so . . . ultimately [withdrew] their applications or sought to break their leases.”⁹⁷

The Regency’s lawsuit is an antitrust action that highlights the university housing policy’s detrimental effects on competition in violation of section two of the Sherman Antitrust Act.⁹⁸ The complaint alleges that students subject to the housing policy are “forced to pay more, and Campus Village is able to charge more, for rental rates and meal plans than otherwise would be the case in the face of free and open competition.”⁹⁹ Students are deprived of choosing lower-priced housing alternatives, alternative housing styles, living arrangements, meal arrangements, and housing locations:¹⁰⁰

First-time UCD freshmen and international students who would otherwise be able to choose between alternative competing lessors and living and meal arrangements based on price, amenities, quality, levels of service, location and other personal preferences now have and will continue to have no choice at all in that regard. The only lessor available to them now is and will continue to be Campus Village with whatever amenities—if any—that it chooses to offer, at whatever levels and quality of service it chooses to provide.¹⁰¹

The complaint also alleges that, aside from harming students and artificially raising prices, the Regency and other competitors have been directly injured as well: “[T]he Regency has lost an estimated 40-60 renters and revenues of \$250,000-\$400,000 per year—a total of \$1.25-\$2 million in all.”¹⁰²

Because this case is currently pending,¹⁰³ it is impossible to predict with absolute certainty how the court will rule and what effects, if any, the ruling will have on student housing policies at universities across the country. Moreover, even a ruling in the

97. *Id.* at *11.

98. *Id.* at *13, 17.

99. *Id.* at *14.

100. *Id.*

101. Complaint, *supra* note 88, at *15.

102. *Id.* at *16.

103. Jones & Keller, *Tom McMahon Represents Auraria Student Housing in Antitrust Suit*, NEWS & ANNOUNCEMENTS (Oct. 28, 2010), <http://www.joneskeller.com/news/2010/tom-mcmahon-represents-auraria-student-housing-antitrust-suit>.

Regency's favor would almost certainly result in a very narrow holding. Specifically, the Regency alleges that the university and Campus Village, which is an independent housing provider, entered into the exclusive housing policy agreement in violation of the Sherman Antitrust Act.¹⁰⁴ However, unlike the arrangement in this case, most university housing policies seem to be exclusively maintained by the universities and do not involve agreements with independent housing providers. Therefore, even a favorable ruling for the Regency may only prohibit universities from entering into and forming agreements with independent housing providers in order to curb competition and would most likely not preclude universities from continuing to require their students to live in housing units owned and operated by the universities themselves. Since even a favorable ruling for the Regency would not fully remedy the broader problems caused by university housing requirements, a more aggressive solution is required.

IV. PROPOSED SOLUTION: A FEDERAL RESPONSE

Under the current law, it is difficult to regulate university housing requirements to guarantee that they truly benefit the students. Therefore, the federal government should reevaluate its policies pertaining to awarding student loans to universities. Current financial aid practices essentially cause the government to subsidize these housing policies by allowing schools to charge students artificially higher housing prices. Students receive loans and grants to be able to pay for overpriced student housing that they could not otherwise afford. Therefore, the government should make it a requirement for universities to allow their students to live where the students want in order for the schools to receive Pell Grants and other federally funded student loans. By addressing the economic effects of university housing policies and offering an economic response, the federal government can rectify the problem.

Because of their wide distribution and effects, federally funded student loans play a significant part in shaping university policies. The majority of student aid comes in the form of federal education loans and grants from colleges.¹⁰⁵ Around two-thirds of full-time

104. See Complaint, *supra* note 88.

105. The Coll. Bd., *Where to Find College Scholarships*, SCHOLARSHIPS & GRANTS (2012), <http://www.collegeboard.com/student/pay/scholarships-and-aid/8936.html>.

college students receive some kind of financial aid, such as Pell Grants.¹⁰⁶ Grants, unlike loans, do not have to be repaid to the government and are therefore basically free money that the government gives to universities on behalf of a student when the United States Department of Education (DOE) determines that a student cannot afford to pay the full cost of university expenses.¹⁰⁷

The DOE should adopt a policy or standard that universities that impose mandatory housing requirements on students will not be eligible to participate in federal student loan and grant programs. Under the current programs, universities can mandate that students live exclusively in university housing complexes, and then charge any price the universities want, since students have no choice but to pay. Thus, as universities have continued to implement these programs and increase housing prices, many students find themselves unable to pay the difference, and the federal government has stepped in to pay the difference to the schools. As long as the government keeps paying what students cannot afford, this federal subsidizing essentially provides incentives for universities to continue to raise tuition and housing costs. Since taking office, President Obama has increased spending on student aid by almost 50%, yet college room and board rates (as well as tuition) have only continued to rise as a result.¹⁰⁸ Because federal loans and grants have allowed universities to raise housing prices, giving students no recourse, eliminating these funding options for universities that insist on continuing to restrict student housing options would force the schools to either eliminate their policies or suffer a serious financial blow. As stated above,¹⁰⁹ university housing policies appear to be primarily economically motivated. As a result of their policies, universities make more money from their students than if they allowed them the freedom to choose the most affordable housing options. Therefore, if for no other reason than economic gain, universities would most likely respond to a shift in federal grant policies by eliminating their housing requirements.

106. The Coll. Bd., *What Is a Pell Grant?*, SCHOLARSHIPS & GRANTS (2012), <http://www.collegeboard.com/student/pay/scholarships-and-aid/36318.html>.

107. *Id.*

108. Stephanie Banchemo, *Tuition Costs and Pell Grants Rise in Tandem*, WALL ST. J., Oct. 28, 2010, <http://online.wsj.com/article/SB10001424052702303443904575578651983962836.html>.

109. *See supra* Part III.

Alternatively, if the DOE would not want to completely eliminate university housing requirements and would rather take a less pervasive approach, the government could at least mandate that education grants and loans be appraised. In the general housing market, properties must be appraised before loans are distributed in order to establish a property's actual value.¹¹⁰ If the government continues to allow universities to limit housing prices to federally subsidized educational programs, the government should also appraise the university housing costs before offering loans and grants to make sure that these costs are not artificially inflated.¹¹¹ This way, even if universities would mandate that their students live on campus, students would still pay a reasonable market rate value for their on-campus housing.

V. CONCLUSION

The federal government should restrict education loans and grants to universities that allow students to make their own housing choices. Presently, universities can mandate that students, as consumers of education, must also become consumers of specific housing and dining programs. The case law has resulted in students being forced to pay an artificially higher price for housing than the fair market value rate, even if their religious observances would otherwise prevent them from even stepping foot within the university housing complexes. The federal government should rectify this problem in the current law by proscribing federal financial assistance at universities that maintain student housing requirements.

110. *Facts About Residential Real Estate Appraisals*, ABOUT.COM (2012), http://homebuying.about.com/cs/appraisals/a/real_estate.htm.

111. Appraising housing costs is also a much more objective endeavor than attempting to appraise tuition costs because housing arrangements can be evaluated on an objective scale and can be compared directly to alternative arrangements available off campus.