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## **THE SEVENTH CIRCUIT FINDS THE FUNDAMENTAL RIGHT TO MARRY INCLUDES THE RIGHT TO CHOOSE ONE’S SPOUSE, EVEN IN PRISON**

LAUREN B. WRIGHT\*

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### INTRODUCTION

In recent years, the Supreme Court has continuously reiterated the importance of the right to marry, finding it to be a fundamental right protected by the Constitution. Activists across the nation have celebrated the Court’s continued protection of this fundamental right as it has expanded the rights of same-sex couples. What has received somewhat less attention is how the Court’s right-to-marry doctrine has affected a different segment of the population—prisoners. In the United States, there are currently 2.2 million people serving time in our nation’s prisons or jails.<sup>1</sup> For many of us, prisoners are people we would rather not think about. These are individuals who have violated the laws of our society. However, these individuals have rights protected by the Constitution and that we cannot ignore.

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<sup>1</sup> THE SENTENCING PROJECT RESEARCH AND ADVOCACY FOR REFORM, INCARCERATION, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Jan. 18, 2016).

In its landmark decision in *Obergefell v. Hodges*,<sup>2</sup> the Supreme Court held that the right to marry is fundamental and includes the right to choose one's spouse, even if that spouse is of the same sex.<sup>3</sup> In *Riker v. Lemmon*,<sup>4</sup> the Seventh Circuit recently faced a related question: does the right to marry—and choose one's spouse—apply to prisoners?<sup>5</sup> In a case dealing with factual circumstances that could be right out of the hit television show “Orange is the New Black,”<sup>6</sup> the Seventh Circuit considered whether the right to marry, specifically the freedom to select a spouse, applies even to prisoners.<sup>7</sup> The Seventh Circuit also examined the proper standard for reviewing any government policy that infringes on this fundamental right to marry.<sup>8</sup>

*Riker v. Lemmon* involves a former prison employee who became romantically involved with a prisoner while employed at the prison.<sup>9</sup> The former employee quit her job after their romantic relationship was discovered, but she continued to correspond with the prisoner through letters and phone calls.<sup>10</sup> The former employee later applied to be placed on the prisoner's visitation list, but she was denied on the basis that prison policy forbids former employees from visiting prisoners at facilities where they worked if they began a relationship during their employment.<sup>11</sup> The prisoner then submitted an application to marry the former employee, which was denied by the prison's chaplain.<sup>12</sup> The former employee filed suit in the United States District Court for the

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<sup>2</sup> 135 S. Ct. 2584 (2015).

<sup>3</sup> *Id.* at 2598–99.

<sup>4</sup> 798 F.3d 546 (7th Cir. 2015).

<sup>5</sup> *Id.* at 555–56.

<sup>6</sup> “Orange is the New Black” is a popular Netflix original series chronicling the lives of women as they serve sentences in a federal prison. *See* IMDB, ORANGE IS THE NEW BLACK, <http://www.imdb.com/title/tt2372162/> (last visited Dec. 6, 2015).

<sup>7</sup> *Riker*, 798 F.3d at 555–56.

<sup>8</sup> *Id.* at 551–54.

<sup>9</sup> *Id.* at 548.

<sup>10</sup> *Id.* at 548–49.

<sup>11</sup> *Id.* at 549.

<sup>12</sup> *Id.*

Southern District of Indiana, alleging that the denial of the marriage application was an unreasonable burden on her right to marry.<sup>13</sup>

The district court granted summary judgment in favor of the prison, concluding that the burden on Ms. Riker's right to marry was not substantial.<sup>14</sup> The district court emphasized the fact that Ms. Riker was still free to marry a large portion of the population and was only prohibited from marrying Mr. Vest.<sup>15</sup> In addition, the district court stressed that allowing Ms. Riker to visit inmates could pose a legitimate security risk as she was trained in Indiana Department of Corrections (IDOC) security protocols, and the court would not second guess the IDOC's security concerns.<sup>16</sup>

In reversing the district court's ruling, the Seventh Circuit held that the right to marry includes the right to choose one's spouse, even in prison, and thus, the prison's denial of the former employee's application to marry was an unreasonable burden on that right.<sup>17</sup>

#### THE RIGHT TO MARRY AS A FUNDAMENTAL RIGHT

The Supreme Court has held certain liberties to be so important that they are deemed "fundamental rights," which the government cannot infringe unless the high strict scrutiny standard is met.<sup>18</sup> In order to meet the strict scrutiny standard, the government must demonstrate that its action is necessary to achieve a compelling purpose.<sup>19</sup>

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<sup>13</sup> *Id.* at 550.

<sup>14</sup> *Riker v. Lemmon*, 2014 U.S. Dist. LEXIS 103558, at \*21 (S.D. Ind. July 30, 2014), *rev'd*, 798 F.3d 546 (7th Cir. 2015).

<sup>15</sup> *Id.* at \*22.

<sup>16</sup> *Id.* at \*22–23.

<sup>17</sup> *Riker*, 798 F.3d at 549–50.

<sup>18</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 812 (Vicki Been et al., eds., 4th ed. 2011).

<sup>19</sup> *Id.*

*A. Cases Defining the Right to Marry*

The Supreme Court recognized the right to marry as a fundamental right for the first time in *Loving v. Virginia*.<sup>20</sup> In *Loving*, the Court struck down as unconstitutional a Virginia statute that prohibited a white person from marrying a person of any other race.<sup>21</sup> The Plaintiffs in the case were the Lovings, an interracial couple who were prosecuted for violating the statute.<sup>22</sup> The Court held that the Virginia statute deprived the Lovings of their “constitutionally protected liberty without due process of law.”<sup>23</sup> The Court avowed, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>24</sup> The Court concluded that “[t]o deny this fundamental freedom . . . is surely to deprive all the State’s citizens of liberty without due process of law.”<sup>25</sup>

The Supreme Court again visited the issue of the right to marry in *Zablocki v. Redhail*.<sup>26</sup> *Zablocki* involved a Wisconsin statute which prevented individuals from marrying if they were behind on their child support payments.<sup>27</sup> These individuals were required to obtain a court order granting permission to marry.<sup>28</sup> A court order would be granted only if the individual could show proof that he or she had complied with their child support obligations.<sup>29</sup> In *Zablocki*, the Court reaffirmed the right to marry as a fundamental right.<sup>30</sup> While the Court

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<sup>20</sup> 388 U.S. 1 (1967).

<sup>21</sup> Chemerinsky, *supra* note 18, at 818.

<sup>22</sup> *Id.* at 818.

<sup>23</sup> *Id.* at 819.

<sup>24</sup> *Loving*, 388 U.S. at 12.

<sup>25</sup> *Id.*

<sup>26</sup> 434 U.S. 374 (1978).

<sup>27</sup> *Id.* at 375.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 386.

accepted that the state had a substantial interest in ensuring child support payments were paid, the Court found the law was not a sufficient means to accomplish that end.<sup>31</sup> Thus, the statute violated the equal protection clause.<sup>32</sup>

The Supreme Court most recently addressed the fundamental right to marry in *Obergefell v. Hodges*.<sup>33</sup> In *Obergefell*, the petitioners challenged state laws in Michigan, Kentucky, Ohio, and Tennessee that defined marriage as between a man and a woman.<sup>34</sup> The petitioners argued that these laws violated their constitutional right to marry.<sup>35</sup> Relying on precedents including *Loving* and *Zablocki*, the Court stated that it had “long held the right to marry is protected by the Constitution.”<sup>36</sup> The Court then concluded that same-sex couples must be able to exercise the right to marry.<sup>37</sup>

### *B. The Right to Marry in Prison*

The Supreme Court directly addressed the issue of marriage in the prison context in *Turner v. Safley*.<sup>38</sup> In *Turner*, prisoners challenged a marriage regulation that permitted them to marry only with permission from the prison superintendent.<sup>39</sup> The superintendent would approve marriages only for compelling reasons.<sup>40</sup> The Court emphasized the need “to formulate a standard of review for prisoners’ constitutional claims that is responsive both to the ‘policy of judicial restraint regarding prisoner complaints and [to] the need to protect

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<sup>31</sup> Chemerinsky, *supra* note 18, at 820.

<sup>32</sup> *Id.*

<sup>33</sup> 135 S. Ct. 2584 (2015).

<sup>34</sup> *Id.* at 2593.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2598.

<sup>37</sup> *Id.*

<sup>38</sup> 482 U.S. 78 (1987).

<sup>39</sup> *Id.* at 82.

<sup>40</sup> *Id.*

constitutional rights.”<sup>41</sup> The standard articulated by the Court in *Turner* was “whether a prison regulation that burdens a fundamental right is *reasonably related to legitimate penological objectives*.”<sup>42</sup> The court in *Turner* identified four factors to be considered in determining the reasonableness of a prison regulation restricting the right to marry:

(1) whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule; (2) whether there are alternative means of exercising the right in question; (3) what impact accommodation of the asserted constitutional right would have on guards, other inmates, and on the allocation of prison resources; and (4) what easy alternatives exist to the regulation because, although the regulation need not satisfy a least restrictive alternatives test, the existence of obvious alternatives may be evidence that the regulation is not reasonable.<sup>43</sup>

#### DISTRICT COURT DECISION OF RIKER V. LEMMON

##### A. *Factual Background*

Rebecca Riker was employed by Aramark Correctional Services, Inc. (Aramark) from December 2007 until April 2008.<sup>44</sup> As a contractor with the Indiana Department of Corrections (IDOC or the Department), Aramark was required to abide by IDOC’s policies and procedures.<sup>45</sup> Ms. Riker worked at the Wabash Valley Correctional Facility, a prison facility that Aramark operated.<sup>46</sup> The Wabash Valley Correctional Facility (WVCF) is a level-four maximum-security

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<sup>41</sup> *Id.* at 85 (alteration in the original).

<sup>42</sup> *Id.* at 87 (internal citations omitted) (emphasis added).

<sup>43</sup> *Id.*

<sup>44</sup> *Riker v. Lemmon*, 798 F.3d 546, 552 (7th Cir. 2015).

<sup>45</sup> *Riker v. Lemmon*, No. 1:13-cv-00571-TWP-DML, 2014 U.S. Dist. LEXIS 103558, at \*3 (S.D. Ind. July 30, 2014).

<sup>46</sup> *Riker*, 798 F.3d at 552.

correctional facility located in Carlisle, Indiana.<sup>47</sup> Ms. Riker worked as a kitchen supervisor.<sup>48</sup> In that capacity, she supervised roughly twenty inmates in preparing and serving meals.<sup>49</sup> As a part of her job training, IDOC instructed Ms. Riker in “security, first aid, and personal protection skills.”<sup>50</sup> In addition, she received “training on WVCF emergency security procedures, including procedures for evacuation, riots, bomb threats, escape prevention, security sweeps, hostage scenarios, and emergency transport.”<sup>51</sup>

Ms. Riker met Paul Vest while working as his supervisor.<sup>52</sup> Mr. Vest is an IDOC inmate serving a fifty-year sentence for robbery;<sup>53</sup> his projected parole date is December 18, 2030.<sup>54</sup> Mr. Vest and Ms. Riker began a romantic and physical relationship a few months after she started working at the prison.<sup>55</sup> On multiple occasions, Mr. Vest and Ms. Riker kissed and had sexual intercourse in a walk-in cooler in the kitchen area.<sup>56</sup> One day, a co-worker witnessed the two kissing and informed Ms. Riker that she had to report her.<sup>57</sup> Ms. Riker left work that day and did not return to her employment at the prison.<sup>58</sup>

After Ms. Riker left her job at the prison in April 2008 she continued to maintain contact with Mr. Vest.<sup>59</sup> In May of 2008, she submitted an application to be placed on Mr. Vest’s visitor list.<sup>60</sup> Her application was denied because she had previously worked at the

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<sup>47</sup> *Id.*

<sup>48</sup> *Riker*, 2014 U.S. Dist. LEXIS 103558, at \*3.

<sup>49</sup> *Riker*, 798 F.3d at 552.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Riker*, 2014 U.S. Dist. LEXIS 103558, at \*5–6.

<sup>53</sup> *Id.* at \*3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*6.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Riker v. Lemmon*, 798 F.3d 546, 550 (7th Cir. 2015).

<sup>60</sup> *Id.*



facility.<sup>61</sup> In 2008 and 2009, Ms. Riker wrote letters to prison officials, again requesting that she be placed on Mr. Vest's visitor list.<sup>62</sup> In support of her request, Ms. Riker pointed out that while she had worked at the facility, she was an employee of Aramark, a contractor.<sup>63</sup> Prison officials responded that prison policy prohibited former employees from visiting prisoners at the facility where they were previously employed.<sup>64</sup> Ms. Riker was also informed of the appeal process for the denial of her application.<sup>65</sup> In 2009, Mr. Vest submitted a request to marry Ms. Riker through the Religious Service Department.<sup>66</sup> The prison chaplain denied Mr. Vest's request because "Ms. Riker was not on Mr. Vest's approved visitation list."<sup>67</sup> Thereafter, Ms. Riker submitted multiple additional applications to visit Mr. Vest, which were also denied.<sup>68</sup>

### *B. The District Court's Ruling*

In April 2013, Ms. Riker filed suit in the Southern District of Indiana against IDOC officials based on the denials of her requests to visit and marry Mr. Vest.<sup>69</sup> The IDOC officials, in turn, moved for summary judgment arguing that "the Department's refusal to permit Ms. Riker to marry Vest did not violate [Ms.] Riker's qualified constitutional right to marry."<sup>70</sup>

The district court noted that Ms. Riker brought two causes of action based on the First Amendment.<sup>71</sup> The first cause of action,

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Riker*, 2014 U.S. Dist. LEXIS 103558, at \*6.

<sup>64</sup> *Id.* at \*7.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*7–8.

<sup>69</sup> *Riker v. Lemmon*, 798 F.3d 546, 550 (7th Cir. 2015).

<sup>70</sup> *Id.* at 551 (alteration in the original) (internal quotations omitted).

<sup>71</sup> *Riker*, 2014 U.S. Dist. LEXIS 103558, at \*17.

Count I, was based on Ms. Riker’s right to associate with a prisoner—Mr. Vest.<sup>72</sup> The district court found that Ms. Riker’s complaint and summary judgment briefings failed to demonstrate any First Amendment expression that the Defendants had in some way limited.<sup>73</sup> The second cause of action, Count II, was based on Ms. Riker’s right to an intimate association with Mr. Vest through marriage, which she asserted was based on the First Amendment.<sup>74</sup> However, as the district court noted, the right to form an intimate relationship is not analyzed under the First Amendment.<sup>75</sup> The right to form an intimate relationship, such as marriage, is analyzed as a liberty interest under the Due Process Clause, which Ms. Riker alleged in Count III.<sup>76</sup>

In analyzing Ms. Riker’s right to marry claim, the district court relied on the standard articulated in *Zablocki*.<sup>77</sup> The *Zablocki* standard requires a two part inquiry: “if the challenged policy imposes a direct and substantial burden on an intimate relationship, it is subject to strict scrutiny; if the policy does not impose a direct and substantial burden, it is subject only to rational basis review.”<sup>78</sup> Here, the district court found “that the burden on Ms. Riker’s right to marry was not substantial or direct,” but was moderate at best.<sup>79</sup> In reaching this conclusion, the court relied on the fact that Ms. Riker herself had not made a formal request to marry Mr. Vest.<sup>80</sup> The court also relied on a Sixth Circuit case that defined a direct and substantial burden as one where either a large percentage of the individuals affected “are absolutely or largely prevented from marrying” or the individuals

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*18.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*19.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at \*19–20.

<sup>78</sup> *Id.* at \*20 (citing *Zablocki v. Redhail*, 434 U.S. 374, 383–87 (1978); *Montgomery v. Stefaniak*, 410 F.3d 933, 938 (7th Cir. 2005)).

<sup>79</sup> *Id.* at \*21.

<sup>80</sup> *Id.*

affected “are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.”<sup>81</sup> The court concluded that the burden on Ms. Riker’s right to marry was not substantial because she was not prevented from marrying a large portion of the eligible population of potential spouses.<sup>82</sup> Thus, the district court applied only a rational basis standard of review in analyzing the IDOC’s policies at issue in this case.<sup>83</sup>

Applying rational basis review, the district court first noted that the Defendants’ argued “legitimate penological interests” supported the policies.<sup>84</sup> The IDOC argued that since Ms. Riker was trained in its security protocols, allowing her, or any other former employee, to visit an inmate would create “legitimate security risks.”<sup>85</sup> In addition, the IDOC also argued that Ms. Riker had already violated prison policies by engaging in a sexual relationship with an inmate while employed at the prison.<sup>86</sup> The court found these rationales sufficient to pass rational basis review, and refused to “second guess the security concerns expressed by the correctional authorities.”<sup>87</sup> Based on the foregoing, the district court granted defendants’ motion for summary judgment.<sup>88</sup>

Ms. Riker appealed the lower court’s decision.<sup>89</sup> Ms. Riker’s appeal related only to “the district court’s decision that the defendants did not unreasonably burden her constitutional right to marry.”<sup>90</sup>

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<sup>81</sup> *Id.* at \*22–23 (citing *Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003)).

<sup>82</sup> *Id.* at \*22.

<sup>83</sup> *Id.* at \*23.

<sup>84</sup> *Id.* at \*22.

<sup>85</sup> *Id.* at \*22–23.

<sup>86</sup> *Id.* at \*23.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See Riker v. Lemmon*, 798 F.3d 546 (7th Cir. 2015).

<sup>90</sup> *Id.* at 550.

THE SEVENTH CIRCUIT'S OPINION IN *RIKER V. LEMMON*A. *Prior Seventh Circuit Cases Involving the Right to Marry in Prison*

The Seventh Circuit has previously addressed the issue of the right to marry in the prison context in *Keeney v. Heath*<sup>91</sup> and *Martin v. Snyder*.<sup>92</sup>

In *Keeney*, the plaintiff was a guard at the prison who became acquainted with one of the prisoners.<sup>93</sup> A supervisor at the jail became suspicious that the two were romantically involved and had the prisoner transferred to a different facility.<sup>94</sup> The two began a correspondence, and the guard began to frequently visit the prisoner.<sup>95</sup> The supervisor who had transferred the prisoner asked the guard about her relationship with the prisoner.<sup>96</sup> The guard admitted that she was in a relationship with the prisoner and planned to marry him.<sup>97</sup> The supervisor told the guard that she either had to stop her relationship with the prisoner or quit her job because of a prison regulation that prohibited employees from being socially involved with prisoners either inside or outside of the prison.<sup>98</sup> The guard resigned from her position and married the prisoner the following year.<sup>99</sup> The guard filed suit alleging that the defendants violated her constitutional right to marry by forcing her to choose between her job and marrying the man

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<sup>91</sup> 57 F.3d 579 (7th Cir. 1995).

<sup>92</sup> 329 F.3d 919 (7th Cir. 2003)

<sup>93</sup> *Keeney*, 57 F.3d at 580.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

of her choice.<sup>100</sup> The district court granted summary judgment in favor of the prison and the plaintiff appealed.<sup>101</sup>

The Seventh Circuit noted that while the defendants did not outright forbid the plaintiff from marrying the prisoner, they made it costly for her to do so, which was undoubtedly a burden on her right to marry.<sup>102</sup> Thus, the court stated that the defendants could impose such a burden, but only if they articulated some justification for doing so.<sup>103</sup> The court emphasized that this justification need not be as strong as if they were forbidding marriage as in the *Turner* case.<sup>104</sup> In its opinion, the court stressed that “[j]udges should be cautious about disparaging disciplinary and security concerns expressed by the correctional authorities.”<sup>105</sup> Therefore, courts should not interfere “[a]s long as the concerns expressed by correctional authorities are plausible, and the burden that a challenged regulation of jail or prison security places on protected rights a light or moderate one.”<sup>106</sup> In *Keeney*, the court found that the burden on the right to marry was not substantial, but light or moderate at most, and thus, the prison did not violate the plaintiff’s constitutional right to marry.<sup>107</sup>

The Seventh Circuit once again confronted the issue of how the fundamental right to marry applies in the prison context in *Martin v. Snyder*.<sup>108</sup> In *Martin*, the prisoner’s visitation privileges were suspended for thirty days after an incident where the prisoner touched his girlfriend’s buttock during a visit at the prison.<sup>109</sup> The prisoner’s girlfriend was also placed on a restricted list for an unspecified period

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 580–81.

<sup>105</sup> *Id.* at 581.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 329 F.3d 919 (7th Cir. 2003).

<sup>109</sup> *Id.* at 920.

of time.<sup>110</sup> Around six months or so later, the prisoner and his girlfriend requested permission to marry from the warden.<sup>111</sup> Their request was denied because the prisoner's girlfriend was not, at that time, permitted to visit the prisoner.<sup>112</sup> They filed suit alleging that the prison violated their constitutional right to marry by preventing the couple from being able to see and marry each other.<sup>113</sup> The district court dismissed the case for failure to state a claim, concluding that although prisoners have a fundamental right to marry, prisons can restrict this right if there are valid penological reasons for doing so.<sup>114</sup> The court held that violating a prison rule was an acceptable justification for barring a marriage.<sup>115</sup>

In upholding the district court's decision, the Seventh Circuit emphasized that while the complaint alleged the couple was denied the ability to marry, the warden did not prevent their marriage, he merely postponed it.<sup>116</sup> Therefore, the court held that "[r]estrictions on visitation, though not enough to justify prohibiting marriage, may well justify deferment, so that the sanction for misconduct will have some sting."<sup>117</sup>

### B. *The Seventh's Circuit Opinion in Riker v. Lemmon*

In *Riker v. Lemmon*, the Seventh Circuit once again addressed the complexities in analyzing the application of the fundamental right to marry in prisons.<sup>118</sup> In an opinion authored by Judge Ripple, the court began by stressing that "courts must take cognizance of the valid constitutional claims of prison inmates" because "[p]rison walls do not

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 921–22.

<sup>117</sup> *Id.* at 922.

<sup>118</sup> 798 F.3d 546 (7th Cir. 2015).

form a barrier separating prison inmates from the protections of the Constitution.”<sup>119</sup> The court also noted that while a prisoner’s fundamental right to marry is protected by the Constitution, this right is subject to considerable restrictions.<sup>120</sup> The court then articulated the standard set forth in *Turner* for analyzing constitutional claims by prisoners, “a prison regulation [that] impinges on inmates’ constitutional rights . . . is valid if it is reasonably related to legitimate penological interests.”<sup>121</sup> To determine whether a regulation is reasonable, the court must “balance the constitutional right asserted against the legitimate penological goals of the prison.”<sup>122</sup> Although Ms. Riker is not a prisoner, the standard is the same for all challenges to prison regulations as violating constitutional rights whether the rights of prisoners or non-prisoners are at issue.<sup>123</sup> The court then reiterated the four factors articulated in *Turner* for determining if a prison regulation that restricts the right to marry is reasonable: (1) whether there is a valid, rational connection between the regulation and a legitimate government interest, (2) whether any alternative means of exercising the right are available, (3) what impact accommodating the right would have, (4) the existence of easy alternatives to the regulation.<sup>124</sup>

#### ANALYSIS

##### A. *The Seventh Circuit Correctly Found That the Fundamental Right to Marry Includes the Right to Select One’s Spouse, Even in Prison*

The IDOC argued that its denial of Ms. Riker’s marriage application did not infringe on Ms. Ricker’s right to marry because she

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<sup>119</sup> *Id.* at 551 (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 552.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

was free to marry anyone but Mr. Vest.<sup>125</sup> The district court agreed with the Department, finding that the burden on Ms. Ricker's right to marry was not substantial or direct because she had not been prevented from marrying a large portion of the population.<sup>126</sup> However, as the Seventh Circuit was quick to note, this argument can be readily dismissed.<sup>127</sup> Relying on the Supreme Court's holding in *Obergefell*, the Seventh Circuit found, "the right to marry includes the right to select one's spouse."<sup>128</sup> In *Obergefell*, the Court held that the right to marry is fundamental, and "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."<sup>129</sup> Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"<sup>130</sup> they are subject to substantial restrictions.<sup>131</sup> However, as the Seventh Circuit noted, the district court's analysis should have focused on whether the prison regulation prevented Ms. Riker from marrying Mr. Vest was an unreasonable burden. The district court's analysis should not have considered whether Ms. Riker was free to marry other members of society.

*B. The Seventh Circuit Failed to Properly Acknowledge the IDOC's Security-Related Justifications and Should Have Focused on the Existence of Alternatives to the Regulation*

The Seventh Circuit failed to adequately acknowledge the IDOC's security related justifications for the regulation, and the court should not have cast aside these concerns so readily. The IDOC also argued that its decision to deny Ms. Riker's request to marry Mr. Vest was in

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<sup>125</sup> *Id.* at \*20.

<sup>126</sup> *Riker v. Lemmon*, No. 1:13-cv-00571-TWP-DML, 2014 U.S. Dist. LEXIS 103558, at \*21 (S.D. Ind. July 30, 2014).

<sup>127</sup> *Riker*, 798 F.3d at 555-56.

<sup>128</sup> *Id.*

<sup>129</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

<sup>130</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>131</sup> *Id.* at 95.



furtherance of its “legitimate interest in maintaining security and institutional order.”<sup>132</sup> In support of this argument, the Department provided two “security-related justifications” for its decision.<sup>133</sup> First, the Department maintained that former employees previously found to have violated Department policies are “more likely to engage in other prohibited acts.”<sup>134</sup> Ms. Riker had already violated IDOC policies by beginning a relationship with a prisoner while employed at the prison.<sup>135</sup> The risks associated with the tendency for individuals to take drastic actions on behalf of someone they love can be catastrophic in the prison environment. The massive manhunt that occurred during the summer of 2015, after two inmates escaped with help from a prison employee, who was involved in a relationship with one of the inmates, demonstrates the serious consequences of inappropriate relationships between prison employees and prisoners.<sup>136</sup> Second, the Department argued that a former employee could share confidential information obtained during their employment at the prison with an inmate.<sup>137</sup> Concerns regarding a prison employee, or former employee, sharing confidential information with an inmate are heightened if the individuals are, or become, married because the marital communications privilege protects confidential communications between spouses from compelled disclosure.<sup>138</sup> In evaluating the IDOC’s security-related justifications for its regulation, the Seventh Circuit considered whether the Department’s decision to prevent Ms. Ricker from marrying Mr. Vest “was reasonably related to its

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<sup>132</sup> *Riker*, 798 F.3d at 549–50.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See Jesse McKinley, *Prison Worker Who Aided Escape Tells of Sex, Saw Blades and Deception*, NEW YORK TIMES (July 28, 2015), [http://www.nytimes.com/2015/07/29/nyregion/prison-worker-who-aided-escape-tells-of-sexual-favors-saw-blades-and-deceit.html?\\_r=0](http://www.nytimes.com/2015/07/29/nyregion/prison-worker-who-aided-escape-tells-of-sexual-favors-saw-blades-and-deceit.html?_r=0).

<sup>137</sup> *Riker*, 798 F.3d at 549–50.

<sup>138</sup> *Wolfle v. United States*, 291 U.S. 7, 14 (1934).

legitimate penological interests.”<sup>139</sup> The Department’s security-related justifications should not be hastily dismissed.

The Seventh Circuit concluded that because Ms. Riker is only seeking a one-time visit to the prison, the burden on her fundamental right to marry is significant and unconstitutional.<sup>140</sup> Ignoring the factual record from the district court proceedings, the Seventh Circuit criticized the Department’s position as equating “Ms. Riker’s one-time request to enter the prison to participate in a marriage ceremony with a request for general visitation rights.”<sup>141</sup> The court simply cast aside the Department’s contention that “the same security principles and concerns apply to the consideration of [Ms.] Riker’s request for marriage as it does her request for visitation.”<sup>142</sup> The IDOC relied on the same security related justifications in defending both its visitation and marriage policies.<sup>143</sup> Although on appeal Ms. Riker argued that she sought only a single visit to the prison for the sole purpose of marrying her fiancé,<sup>144</sup> the record below does not support Ms. Riker’s contention that her request was so limited. On the contrary, the record below indicated that Ms. Riker submitted multiple requests to be placed on Mr. Vest’s visitor’s list.<sup>145</sup> The Seventh Circuit relied on *Martin v. Snyder*,<sup>146</sup> another case in which the Court considered the right to marry in the prison context.<sup>147</sup> In *Martin*, the prison’s visitation privileges were revoked after he fondled his girlfriend during a visit at the prison.<sup>148</sup> While the prisoner’s girlfriend was still on his restricted visitation list, the prisoner requested permission to

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<sup>139</sup> *Riker*, 798 F.3d at 556–57.

<sup>140</sup> *Id.* at 554.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 550–51 (alterations in the original).

<sup>143</sup> *Id.* at 550.

<sup>144</sup> *Id.* at 551–52.

<sup>145</sup> *Riker v. Lemmon*, No. 1:13-cv-00571-TWP-DML, 2014 U.S. Dist. LEXIS 103558, at \*6–7 (S.D. Ind. July 30, 2014).

<sup>146</sup> *Martin v. Snyder*, 329 F.3d 919, 920 (7th Cir. 2003).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

marry her.<sup>149</sup> The request was denied because the prisoner’s girlfriend was not allowed to visit the prisoner.<sup>150</sup> Relying on *Martin*, the Seventh Circuit concluded, “a prison’s visitation policy, on its own, does not justify prohibiting an inmate’s marriage.”<sup>151</sup> However, the Department did not rely solely on its visitation policy in denying Ms. Riker’s request for marriage. IDOC policies clearly indicate that a request for marriage may be denied because “[t]he offender is requesting to marry either a staff member or former staff member of the department,” or “[t]he requested marriage would endanger the safety and security of the facility, the department, the individuals or the public.”<sup>152</sup> Although the court emphasized that the denials of Ms. Riker’s marriage applications did not reference the Department’s marriage policy,<sup>153</sup> the Department argued that the same security justifications support both its visitation and marriage policies.<sup>154</sup>

The Department cited specific security concerns that would result if a former employee were allowed to visit an inmate with whom they developed an inappropriate relationship during their employment.<sup>155</sup> Ms. Riker was “trained by the [IDOC] in security protocols, defense, and emergency security procedures” and might divulge such information to Mr. Vest “or assist him in other inappropriate ways.”<sup>156</sup> The Department also maintained that prohibiting Ms. Riker’s marriage served as a deterrent to other employees.<sup>157</sup> It is this kind of second-guessing by courts of policies implemented by prison administrators that previous precedents cautioned against. The Seventh Circuit “must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Riker*, 798 F.3d at 557.

<sup>152</sup> *Id.* at 550 n.11.

<sup>153</sup> *Id.* at 550–51.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 557.

legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.”<sup>158</sup> A statement by the Seventh Circuit that the prison officials did not demonstrate that they used their professional judgment in denying Ms. Riker’s marriage request is not sufficient.<sup>159</sup> It is unclear how the court could possibly come to the conclusion that the prison officials did not use their professional judgment in drafting and implementing the policies relating to the visitation and marriage of former employees to inmates at the prison.

The Seventh Circuit relied almost entirely on the first factor of the *Turner* test in reaching its conclusion. Near the end of its conclusion, the court once again missed the point by emphasizing that “the record does not reveal why prison officials would have difficulty monitoring the marriage ceremony to ensure that Ms. Riker does not violate prison regulations or relay sensitive information to Vest.”<sup>160</sup> The record does not reveal such difficulties because Ms. Riker raised this argument—that she seeks only a short marriage ceremony—for the first time on appeal. If the Department were to consider Ms. Riker’s request as a general request for the marriage, and all its benefits including visitations, a lengthier discussion regarding the other factors in the *Turner* test would be necessary. The second factor in the *Turner* standard is “whether there are alternative means of exercising the right that remain open to prison inmates.”<sup>161</sup> Here, there are no alternative means available for Ms. Riker and Mr. Vest to exercise their right to marry.

The third factor is “the impact accommodation of the asserted constitutional right would have on guards, other inmates, and on allocation of prison resources generally.”<sup>162</sup> The Seventh Circuit briefly addressed this factor, but focused its discussion solely on the impact of allowing Ms. Riker and Mr. Vest to have a brief one-time

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<sup>158</sup> *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

<sup>159</sup> See *Riker*, 798 F.3d at 557–58, 558 n.30.

<sup>160</sup> *Id.* at 557.

<sup>161</sup> *Turner v. Safley*, 482 U.S. 78, 80 (1987).

<sup>162</sup> *Id.*

marriage ceremony at the prison.<sup>163</sup> In its discussion, the court noted “the record does not reveal why prison officials would have difficulty monitoring the marriage ceremony to ensure that Ms. Riker does not violate prison regulations or relay sensitive information to Vest.”<sup>164</sup> However, as noted *supra*, the Seventh Circuit’s reliance on Ms. Riker’s contention that she seeks only a brief one-time visit to the prison for the purpose of holding a marriage ceremony is misplaced. Ms. Riker did not make such a limited argument in her case before the district court below,<sup>165</sup> and ignored the possibility that Ms. Riker and Mr. Vest would seek other marital benefits after the marriage ceremony. Thus, it is necessary to consider the impact of accommodating Ms. Riker’s general request to marry Mr. Vest, and the accompanying marital benefits—including visitation. Accommodating Ms. Riker’s general request for marriage would have a greater impact on the guards, other inmates, and prison resources. Allowing Ms. Riker, a former employee of the prison who has knowledge of the IDOC’s security protocols, to marry Vest could endanger the prison’s guards and make it more difficult for them to maintain security and order in the prison. Granting Ms. Riker’s request to marry Vest could also impact the other inmates housed at the facility, and it might lead other inmates to attempt to engage in inappropriate relationships with prison staff.

Finally, the last factor in the *Turner* standard is the existence, or absence, of easy alternatives to the regulation at issue.<sup>166</sup> The Court in *Turner* found that “if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”<sup>167</sup> The Seventh Circuit briefly addressed this issue as well, but once

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<sup>163</sup> *Riker*, 798 F.3d at 557–58.

<sup>164</sup> *Id.*

<sup>165</sup> *Riker v. Lemmon*, No. 1:13-cv-00571-TWP-DML, 2014 U.S. Dist. LEXIS 103558, at \*6–8 (S.D. Ind. July 30, 2014).

<sup>166</sup> *Turner v. Safley*, 482 U.S. 78, 90 (1987).

<sup>167</sup> *Id.* at 91.

again relied on Ms. Riker’s insistence that she sought only a brief marriage ceremony.<sup>168</sup> The court stated that the IDOC offered no justification for why it could not grant Ms. Riker’s marriage request while still maintaining the security of its facility.<sup>169</sup> Therefore, the court found it implausible “that a brief marriage ceremony [could not] be accommodated without threatening institutional security and without imposing more than a *de minimis* impact on prison resources.”<sup>170</sup> However, once again, the Seventh Circuit’s determination that Ms. Riker sought to return to the prison only to participate in a brief marriage ceremony is erroneous. The court’s analysis should have focused on whether there were easy alternatives to the IDOC’s regulation that prohibited former employees from marrying—or visiting—inmates housed at the same facility.

The fact that easy alternatives exist that would allow Ms. Riker to marry Mr. Vest demonstrates that the IDOC’s regulation is not reasonable. Here, although the IDOC’s regulation prohibiting former employees from engaging in relationships with prisoners at the same facility where they are employed serves a valid penological interest, the IDOC could allow for individuals who may become involved in these relationships to transfer facilities in order to alleviate any security related concerns. The IDOC could have transferred Mr. Vest to a different prison facility in order to allow Ms. Riker and Mr. Vest to become married. Transferring Mr. Vest to a different facility would alleviate any security related concerns because Ms. Riker would not have the same level of knowledge regarding the procedures at a different facility. Moreover, the transfer of prisons occurs quite frequently and would result in *de minimis* cost for the prison.

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<sup>168</sup> *Riker*, 798 F.3d at 557–58.

<sup>169</sup> *Id.* at 557.

<sup>170</sup> *Id.*

## CONCLUSION

The Seventh Circuit's holding requires the prison to show more than is required under the standard articulated in *Turner*.<sup>171</sup> Indeed, according to *Turner*, there must be a valid, rational connection between the regulation and a legitimate government interest behind the rule.<sup>172</sup> The prison has maintained rational security concerns related to Ms. Riker's requests for visitation and marriage. However, the prison has an alternative means of allowing Ms. Riker to exercise her right to marry while at the same time protecting the security interest of the prison. The prison could transfer Mr. Vest to another prison facility where Ms. Riker was never employed, which would alleviate any security related concerns while still allowing Ms. Riker to exercise her right to marry the spouse of her choosing.

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<sup>171</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>172</sup> *Id.* at 89.