

Veney v. Wyche: Not in My Cell—The Constitutionality of Segregating Prisoners Based on Their Sexual Orientation

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I. INTRODUCTION

Daniel L. Veney, a prisoner at Virginia’s Riverside Regional Jail (Riverside) brought an action against the jail and named as defendants Lieutenant T.V. Wyche and Superintendent Darnley R. Hodge, claiming that they violated his rights under the Equal Protection Clause of the United States Constitution by treating him differently based on his sexual orientation and gender.¹ Veney had been incarcerated at Riverside since 2000 and alleged that he was repeatedly denied the right to move into a double occupancy cell based on his sexual orientation.² In December 2000, Veney filed a grievance with Riverside, but the institution found no evidence of discrimination.³ Subsequently, he filed a *pro se* complaint in the United States District Court for the Eastern District of Virginia alleging a violation of equal protection.⁴ The district court found that Veney failed to state a claim sufficient to grant relief and dismissed his complaint.⁵

Veney appealed the dismissal of his suit, claiming that he was being treated differently from similarly situated heterosexual male and homosexual female inmates without a legitimate penological justification.⁶ The United States Court of Appeals for the Fourth Circuit *held* that legitimate penological interests justified both the segregation of homosexual male inmates and any disparate impact based on gender that may have arisen from that penological interest; the court also found that the absence of ready alternatives was further evidence of the

1. *Veney v. Wyche*, 293 F.3d 726, 729 (4th Cir. 2002). Veney filed his action under 42 U.S.C.A. § 1983 (West 1994). *Id.* at 729.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 729-30. The district court was required to consider Veney’s complaint under the Prison Litigation Reform Act of 1996. *Id.* at 730 (citing 28 U.S.C.A. § 1915A (West Supp. 2001)).

6. *Id.* at 730.

reasonableness of Riverside's segregation system. *Veney v. Wyche*, 293 F.3d 726, 734 (4th Cir. 2002).

II. BACKGROUND

This case illustrates the implications of an equal protection claim arising within the context of the prison system. While Section 1 of the Fourteenth Amendment guarantees equal protection under the law, claims that it has been violated within the prison arena face an additional obstacle, given courts' deference to security interests and concerns inherent in prison officials' decisions.⁷ Prisoners often find that their equal protection claims will be dismissed because courts will apply special deference, similar to a rational basis standard of review, to decisions made and systems established by prison officials.⁸

While a state may not "deny to any person within its jurisdiction the equal protection of the laws,"⁹ it may still use the power of classification.¹⁰ In *Personnel Administrator of Massachusetts v. Feeney*, female plaintiffs brought suit against the state of Massachusetts alleging that a veterans' preference statute violated their equal protection based on sex discrimination.¹¹ While the Supreme Court found that disparate impact existed because more men received the benefits of the statute, it held that the Massachusetts legislature had no invidious intent to discriminate when it made the law and, thus, found no sex discrimination.¹² *Feeney* reaffirmed the doctrine that disparate impact alone is insufficient to show invidious discrimination and that some

7. See generally *Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (discussing how prisoners enjoy a somewhat limited scope of constitutional protection in the interests of prison security); *Morrison v. Garraghty*, 239 F.3d 648, 655 (4th Cir. 2001) (emphasizing that courts should apply deferential review to decisions made by prison officials).

8. See *Shaw*, 532 U.S. at 229 (finding that courts may not be equipped to handle the complicated problems of the prison system); *Turner v. Safley*, 482 U.S. 78, 85 (1987) (noting that prison officials need discretion in order to maintain prison security); *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (discussing how day-to-day management of the prison requires a lesser degree of scrutiny by courts).

9. U.S. CONST. amend. XIV, § 1.

10. The Supreme Court has found that some classifications by the government can serve a benign purpose and, thus, are not invidious and do not violate the Equal Protection Clause of the Fourteenth Amendment. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979).

11. *Id.* at 259.

12. *Id.* at 279-80. The Court found that the Massachusetts Legislature acted "in spite of" and not "because of" the anticipated results the veterans' preference statute would have on women. *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The Court stated "nothing in this record demonstrates that this preference for veterans was originally designed or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." *Id.* at 279.

classifications by states are indeed benign and might serve an important or legitimate governmental interest.¹³ Rather than taking away all powers of classifications by the states, the Equal Protection Clause prevents state officials from treating similarly situated people differently.¹⁴

Determining which level of scrutiny to utilize when reviewing an equal protection violation is dependent upon the classification of the harmed individual or group.¹⁵ In *Craig v. Boren*, male plaintiffs challenged the constitutionality of an Oklahoma statute that allowed females over the age of eighteen and males over the age of twenty-one to buy 3.2% beer.¹⁶ The court found that evidence linking increased driving under the influence by males to the 3.2% beer was unconvincing and insufficient to justify implementing a gender division within the law.¹⁷ The law could not survive intermediate scrutiny because classification by gender, while serving the important governmental objective in reducing arrests for driving under the influence, was not substantially related to achieving that goal.¹⁸ *Craig* established that any law discriminating based on sex would have to survive intermediate scrutiny.¹⁹

Determining the standard of review employed for equal protection claims brought by homosexuals is more problematic. In *Romer v. Evans*, the Court invalidated Colorado's Amendment 2 under rational basis review.²⁰ Amendment 2 denied homosexuals any special legal protection against discrimination adopted at either the local or state levels of government.²¹ The Court found the statute unconstitutional because it failed to serve any important governmental interest: the motivation

13. *Id.* at 272.

14. *Id.* at 271-73.

15. *See generally* *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing that the use of intermediate scrutiny is appropriate in cases involving sex and gender discrimination). *See also* *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995) (finding that strict scrutiny is the appropriate standard of review for any law utilizing a racial classification or preference); *Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (utilizing rational basis review for Colorado's Amendment 2, which singled out homosexuals as receiving no special protection against discrimination).

16. 429 U.S. 190, 192 (1976). Oklahoma justified the difference in age requirements based on statistics that showed males arrested for driving under the influence of alcohol substantially exceeded the number of females arrested for the same crime. *Id.* at 200.

17. *Id.* at 202-03.

18. *See id.* at 200.

19. *See id.* at 204.

20. 517 U.S. 620, 635 (1996).

21. *Id.* at 624. Colorado had passed the amendment by referendum in response to several city ordinances, such as those passed in Denver and Boulder, that granted homosexuals protection against discrimination. *Id.*

behind the statute to be one of irrational fear and prejudice.²² Furthermore, the Court found the sheer breadth of Amendment 2 to be too extensive; by virtue of Amendment 2, Colorado could deny any type of protection afforded to homosexuals.²³ *Romer* illustrated that animosity and fear as legislative motivations will not survive the most deferential standard of review: the rational basis standard.²⁴ While a victory for homosexuals in Colorado, *Romer* failed to guarantee the label of a suspect class to homosexuals, thus denying them any heightened scrutiny for equal protection claims.²⁵

Despite these established levels of scrutiny as applied to equal protection claims, courts have approached these cases differently when they arise in the prison context.²⁶ In essence, courts have given deference to decisions made by prison officials in an effort to maintain safe and secure facilities.²⁷

The leading case for equal protection claims made by prisoners is *Turner v. Safley*.²⁸ The plaintiffs in *Turner* brought a class action against the Missouri Department of Corrections, challenging regulations that limited correspondence between inmates and the inability of an inmate to enter into marriage as violations of both their First Amendment rights and guarantee of equal protection under the Fourteenth Amendment.²⁹ The Court found that the rule limiting correspondence was rationally related to the important governmental interest of preventing escapes and uprisings, but found the limitations on an inmate's right to marry to be

22. *Id.* at 635. The Court stated, "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

23. *Id.* at 629. The Court believed Amendment 2 would make homosexuals a solitary class in Colorado and would interfere with any legal protection they might have involving "all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.*

24. *See id.* at 635.

25. *See id.*

26. *See, e.g.,* *Turner v. Safley*, 482 U.S. 78, 81 (1986).

27. *See Morrison v. Garraghty*, 239 F.3d 648, 654-55 (4th Cir. 2001). In *Morrison*, the Fourth Circuit found that prison officials require the necessary discretion to obtain such a goal. *Id.* For example, the court agreed that prohibiting certain objects for religious ceremonies was necessary to diminish the possibility of violence by inmates. *Id.* at 660.

28. *See* 482 U.S. 78 (1986).

29. *Id.* The Missouri Department of Corrections promulgated the correspondence rule because of the fear of escape plans and the growth of prison gangs. *Id.* at 92. The prison believed correspondence between inmates contributed to these problems. *Id.* The Missouri Department of Corrections contended the marriage limitation simply limited or delayed, rather than prohibited, the right to marry. *Id.* at 94-95.

unduly burdensome and, thus, a violation of the prisoners' fundamental right to marry.³⁰

In an effort to establish a test to evaluate the reasonableness of a prison regulation, the Court created a four factor test.³¹ The first factor resembles the rational basis standard of review: there must be a rational nexus between the "prison regulation and the legitimate governmental interest put forward to justify it."³² Second, a court should consider whether alternative methods exist for a prisoner to practice the challenged right.³³ A third relevant factor is the impact that accommodation of such a right could be expected to have on all other interested parties.³⁴ The Court in *Turner* held that if such accommodation would have a significant effect on other inmates and prison officials, courts should then give deference to decisions made by prison officials.³⁵ The final consideration is whether readily available alternatives exist to the challenged regulation.³⁶ If there are obvious alternatives, then the regulation should not be viewed as reasonable. The Court, however, cautioned that this should not be viewed as a "least restrictive alternative" standard.³⁷ By emphasizing this point, the Court appears to have reaffirmed the necessary deference owed to the decisions of prison officials.³⁸

30. *Id.* at 93-95. The Court affirmed the fundamental right to marry set forth in *Loving v. Virginia*, 388 U.S. 1 (1967), and *Zablocki v. Redhail*, 434 U.S. 374 (1978), but unequivocally stated: "It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Turner*, 482 U.S. at 95 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

31. *Id.* at 89-91. The Court believed such factors to be necessary because "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems." *Id.* at 89.

32. *Id.* at 89 (citing *Block v. Rutherford*, 468 U.S. 376 (1984)).

33. *Id.* at 90.

34. *Id.*

35. *Id.* In emphasizing this factor, the court looked to its decision in *Jones v. N.C. Prisoners' Union*. *Id.* (citing 433 U.S. 119, 132-33 (1977)). In *Jones*, the Court found that the prohibition of mass prisoners' union meetings was related to a penological interest of security and that allowing such meetings would significantly impact the overall internal workings of the prison. *Turner*, 482 U.S. at 86 (citing *Jones*, 433 U.S. at 129).

36. *Id.* at 90.

37. *Id.* at 90-91. According to the Court, "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.*

38. *See id.*

III. THE COURT'S DECISION

In the noted case, the Fourth Circuit relied heavily on the factors set forth in *Turner* and held that the segregation of homosexual male inmates was based upon legitimate penological concerns, and that any disparate impact based on gender as a result of such segregation was rationally related to concerns over homophobic violence and the spread of sexually transmitted diseases, including HIV.³⁹ Furthermore, the court ruled that the absence of ready alternatives to Veney's asserted interest in living in a double occupancy cell was further evidence of the reasonableness of Riverside's segregation plan.⁴⁰ In reaching this conclusion, the court proceeded through a three-step analysis: (1) determining the initial sufficiency of Veney's claim; (2) deciding the level of scrutiny to apply to Veney's equal protection claim; and (3) applying the *Turner* factors to the challenged prison regulation.⁴¹

Under the Prison Litigation Reform Act of 1996,⁴² the United States District Court for the Eastern District of Virginia was required to review Veney's complaint for any identifiable claims.⁴³ Because the district court dismissed the complaint based on a failure to state a claim, the Fourth Circuit was required to review the dismissal *de novo*.⁴⁴ The court acknowledged that when a civil rights complaint is at issue, the complaint should receive heightened attention unless it is fairly certain that no legal theory will support relief sought under the facts asserted.⁴⁵ Applying *Morrison v. Garraghty*, the court found that the plaintiff was required to demonstrate that he was similarly situated to other inmates at Riverside, and that the segregation was intentional discrimination because of his homosexuality.⁴⁶ The court diminished this hurdle for Veney and assumed that he was similarly situated to the other inmates at Riverside and that Riverside's denial of his request for a double occupancy cell was because he is a homosexual male.⁴⁷

39. *Veney v. Wyche*, 293 F.3d 726, 733 (4th Cir. 2002).

40. *Id.*

41. *Id.* at 730-35.

42. 28 U.S.C.A. § 1915A (West Supp. 2001).

43. *Veney*, 293 F.3d at 730.

44. *See id.* The court in the noted case found that *de novo* review was appropriate when reviewing a dismissal for failure to state a claim under the Prison Litigation Reform Act of 1996. *Id.* This is the same standard of review for dismissals under Rule 12(b)(6). *Id.* (citing *Sanders v. Sheahan*, 198 F.3d 626, 626 (7th Cir. 1999)).

45. *Id.* (citing *Harrison v. U.S. Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988)).

46. *Id.* (citing *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)).

47. *Id.* at 731. The court found that the record lacked sufficient information to truly determine similarity between Veney and the other inmates at Riverside. *Id.* Also, while assuming that the intentional discrimination against Veney by the prison occurred, the court

Because Veney satisfied the initial requirements of his claim, the court turned to the question of which standard of review to apply.⁴⁸ Veney asserted that the discrimination by Riverside in their housing policy was based on both his sexual orientation and gender.⁴⁹ Gender discrimination merits intermediate scrutiny, therefore Riverside's housing policy would have to be substantially related to an important governmental interest.⁵⁰ Veney's claim of sexual orientation discrimination, however, was subject only to rational basis review.⁵¹ For Veney to succeed with this component of his equal protection claim, he needed to show that no rational connection between the prison's housing policy and any governmental interest existed.⁵²

The plaintiff's status as a prisoner, however, added a new, yet critical, element to the standard of review issue. The court found that prisons should be accorded additional discretion in their decisions in order to maintain necessary penological interests.⁵³ In order to evaluate whether Riverside's segregation of homosexual male inmates was rationally related to any legitimate penological interests, the court utilized the *Turner* factors.⁵⁴

The first *Turner* factor the court considered was the rational connection between Riverside's segregation of homosexual males and any legitimate penological interests.⁵⁵ The court found that such a connection existed, and noted several legitimate penological interests justifying the housing policy and supporting the accordance of deference to the prison officials.⁵⁶ The court agreed with Riverside and found that housing homosexuals together would lead to increased sexual activity,

nonetheless added the defendant's assertion that no such discrimination policy existed and that most prisoners' requests for cell relocation are denied. *Id.* at 731 n.1.

48. *See id.* at 731.

49. *Id.* at 731-32. Veney claimed gender discrimination because similarly situated female inmates, without consideration of their sexual orientation, are allowed to reside in double occupancy cells. *Id.* at 734.

50. *Id.* at 732. *Craig* established the use of intermediate scrutiny in sex discrimination cases. *Id.* (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

51. *See id.* *Romer v. Evans* seemingly reaffirmed the use of rational basis review for claims of sexual orientation discrimination. *Id.* (citing 517 U.S. 620, 631 (1996)).

52. *See id.*

53. *Id.* The court found that only legitimate penological interests could justify the type of disparate impact that was present at Riverside. *Id.* (citing *Shaw v. Murphy*, 532 U.S. 223, 225 (2001)).

54. *Id.* at 732. The court excluded the use of the final *Turner* factor, which examined if other means existed by which the other inmates could assert their right, because no such inquiry was necessary due to the nature of Veney's complaint. *Id.* at 732 n.5.

55. *Id.* at 732-33.

56. *Id.* at 733.

which would jeopardize prison security.⁵⁷ A further implication was the increased possibility of HIV transmission and other sexually transmitted diseases, which would likely result in greater cost to prisons that are required to treat medical conditions.⁵⁸

While the implications of sexual activity constituted a legitimate penological concern, the court also found other arguments by the prison to be persuasive.⁵⁹ Riverside argued that housing heterosexuals with homosexual males could lead to tension, and possibly violence.⁶⁰ The court found that anti-homosexual feelings and violence are prevalent in our society and that such evidence should influence the constitutionality of laws and regulations.⁶¹ Riverside used evidence of hate crime statutes that have been passed in nearly half of the states to support their contention that violence against homosexuals is not only a fact within our society, but also warrants the segregation of homosexual males in prisons.⁶² To further its position, Riverside also presented statistics that reflected the probability that known homosexuals are more likely to be sexually assaulted in prison.⁶³ The court agreed with these two lines of argument, and held that the fear of anti-homosexual violence is a legitimate penological concern.⁶⁴

The plaintiff also alleged that he was the victim of gender discrimination because the prison only relegated homosexual males to single occupancy cells.⁶⁵ To justify this disparate impact, Riverside presented evidence that male inmates are more likely than female inmates to have homophobic attitudes, thus placing homosexual male inmates in a more vulnerable position for violence and other attacks.⁶⁶ The court, believing it more likely that homosexual male inmates would be victims of violence, found that legitimate concerns over prisoner

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (citing *Dickerson v. United States*, 530 U.S. 428, 433 (2000)).

62. *Id.* The court utilized examples of hate crime statutes from Kentucky and Florida to illustrate this point. *Id.* (citing FLA. STAT. ch. 775.085 (2001); KY. REV. STAT. ANN. § 532.031 (Banks-Baldwin 2001)).

63. *Id.* (citing Robert Dumond, *Inmate Sexual Assault: The Plague That Persists*, 80 PRISON J. 407, 408 (2000)).

64. *Id.* at 734.

65. *Id.*

66. *Id.* (citing Christopher Hensley, *Attitudes Toward Homosexuality in a Male and Female Prison*, 80 PRISON J. 434, 440 (2000)). Riverside Prison houses males and females separately. *Id.*

safety and security outweighed the resulting disparate impact in the housing policy.⁶⁷

The court was more cursory in its assessment of the remaining two *Turner* factors. When it weighed the impact the accommodation of Veney's asserted right to be housed in a double occupancy cell would have on other parties, the court found that the effect would be significant.⁶⁸ The court hypothesized that prison officials would have to invest additional time monitoring the placement of prisoners so as not to house a homosexual inmate together with a possibly violent, homophobic cellmate.⁶⁹ It also found that guards would assume a greater burden in their responsibilities if they were forced to monitor possible conflicts between heterosexual and homosexual male inmates.⁷⁰ The court held that administrative challenges and security concerns outweighed accommodating Veney's asserted right to live in a double occupancy cell.⁷¹

The third *Turner* factor considered in this case is the "absence of ready alternatives as evidence of the reasonableness" of Riverside's regulation.⁷² The court found that allowing Veney to reside with another inmate would create the exact situation that the prison was attempting to prevent: conflicts and possible bias-motivated violence.⁷³ Therefore, the absence of ready alternatives in this case demonstrated to the court the reasonableness of the Riverside regulation.⁷⁴

IV. ANALYSIS

In order to justify Riverside's housing policy on the grounds of protecting homosexual male inmates, the court apparently ignored several important questions and utilized broad assumptions regarding not only the homosexual lifestyle, but also prison culture. While the court in the noted case correctly applied the *Turner* factors to this equal protection claim arising out of the prison context,⁷⁵ it failed to closely

67. *Id.* The court stated "we must allow prison authorities the discretion to take into account the particular safety and security concerns facing male inmates, even though such considerations result in disparate impact treatment upon gender." *Id.*

68. *Id.*

69. *Id.* at 735.

70. *Id.*

71. *See id.*

72. *Id.* (quoting *Turner v. Safley*, 402 U.S. 78, 90 (1986)).

73. *Id.*

74. *See id.*

75. *See id.* at 732-35.

examine other alternatives to the regulation, and in turn may have helped promote long-established stereotypes regarding homosexuals.

Allowing special deference to prison officials does have a rational basis, especially given the various social dynamics among inmates, including race, sexual orientation, and age.⁷⁶ Prison officials are the appropriate parties to regulate these situations given their proximity to the day-to-day routines and nuances of the system.⁷⁷ While deference to prisons such as Riverside may be necessary, the court in the noted case may have been too hasty in finding Riverside's housing policy appropriate.

Riverside asserted that segregating homosexual males would prevent transmission of diseases, sexual orientation-motivated violence, increased sexual activity, and further security concerns.⁷⁸ The court and Riverside assumed that housing two homosexual inmates in the same cell would result in not only a sexual relationship, but also in a future conflict.⁷⁹ This type of assumption seems to promulgate the stereotype that homosexuals are hypersexual.⁸⁰ The court offered no support for the myth that a homosexual male inmate will have sex with every other homosexual male inmate.

While preventing the transmission of diseases is a laudable goal, the segregation of homosexual male inmates may not be the most effective method of achieving such a result. Prison subculture often involves many sexual relationships, not exclusive to identifiable homosexual individuals.⁸¹ Inmates who would label themselves as heterosexual will, at times, participate in sexual activities with another inmate of the same sex, or, unfortunately, be an aggressor or victim in a prison sexual

76. See John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Interference"*, 92 J. CRIM. L. & CRIMINOLOGY 127, 156-58 (2001) (finding race, age, and sexual orientation to be "polarizing" factors).

77. *Id.*

78. *Veney*, 293 F.3d at 733.

79. See *id.* (finding that "housing homosexuals with other homosexuals could lead to sexual activity between cellmates, which . . . would jeopardize prison security"). The court offered no support for its finding that prison security would be jeopardized as a result of sexual activity between homosexuals. See *id.*

80. James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 451 n.215 (2001). Park offered the stereotype of homosexuals as being hypersexual beings, which creates an image that rape of homosexuals can never occur, even within prison walls. *Id.*

81. Cronan, *supra* note 76, at 150.

assault.⁸² Therefore, the fear of sexually transmitted diseases is present for many, not just those inmates who label themselves as homosexuals. As a result of the reality of prison life, Riverside's segregation of male homosexual inmates may not be the best method for stopping the spread of disease within the prison.

Protecting inmates from violence should be a goal for all prisons. Homosexual inmates, as evidenced by statistical data, appear to be more likely victims of attacks within prison.⁸³ While placing a homosexual inmate in a cell with a known violent, homophobic inmate is no doubt dangerous, segregating all homosexual inmates seems to be an extreme solution. Prisons such as Riverside could take additional time and effort to research the backgrounds of inmates before making housing assignments. If an inmate is known to be homophobic, he should not be placed in a cell with a known homosexual. This extra research would likely place few new burdens on prison officials who are responsible for placing prisoners in cells.⁸⁴ The extreme position of segregating all homosexual males at Riverside might have the emotional effect of making those particular inmates feel isolated and on a different social level than their fellow inmates.

A further problem with Riverside's segregation policy that is ignored by the court is determining which inmates are homosexual. The court does not discuss how the prison makes these determinations.⁸⁵ If Riverside questions prisoners about their sexual orientation upon entry into prison, it would stand to reason that some inmates would lie or deny any homosexual tendencies.⁸⁶ If this is true, then Riverside's policy does little to prevent the transmission of disease for these "undercover" homosexual inmates who may be having sex with their cellmates. If a determination of homosexuality is based on observed behavior, then Riverside's policy faces additional problems: not all male prisoners who engage in sex with fellow inmates would label themselves as

82. *Id.* at 156. Cronan described the prison subculture involving "punks," who are often the victims of sexual assault, and the "trade for sex" culture, which involves exchanging sexual favors for money and other goods, such as cigarettes. *Id.*

83. *See id.* at 166. Cronan cited a study of California prisons that finds that homosexual inmates are five times as likely as their heterosexual counterparts to be the victims of sexual assault in violence during their prison terms. *Id.*

84. *See Veney*, 293 F.3d at 735. The court believed the sexual tension would be so great as to interfere with the daily duties of the prison guards at Riverside. *Id.*

85. *See id.* at 726-30 (offering no evidence outlining the determination of an inmate's sexual orientation).

86. *See id.* at 733 (citing evidence of homophobic violence in our society). If homosexual prisoners are aware of these prevailing attitudes, they may conceal their sexual orientation as a means of protection within the prison walls. *Id.*

homosexuals.⁸⁷ Defining sexual orientation within Riverside, or any other prison, presents too many problems that do not justify segregating homosexual male inmates.⁸⁸

The court, while giving appropriate and probably necessary deference to prison officials, failed to examine the inherent problems and unanswered questions underlying Riverside's policy of segregating homosexual male inmates.⁸⁹ While *Turner* anticipated that prisons would not be subject to a less restrictive alternative standard, allowing prisons to take radical measures such as segregating homosexual prisoners without constitutional criticism by courts seems outside the bounds of the Supreme Court's holding.⁹⁰ By not giving due attention to these issues, the *Veney* court has helped justify the isolation that homosexuals feel not only in prisons, but also in our society as a whole.

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87. Park, *supra* note 80, at 445-46. Park hypothesized that many men who do not label themselves as homosexuals submit to sexual intercourse with other male inmates because they feel resistance is futile and may result in further violence or attacks. *Id.*

88. See *Veney*, 293 F.3d at 732-35. With little or no information on how Riverside classifies prisoners, its segregation system is susceptible to questions of accuracy and effectiveness. *Id.*

89. *Id.* The court, by finding legitimate penological interests to exist and giving deference to the decisions of Riverside prison officials, opted not to explore the negative ramifications of its segregation system. *Id.*

90. See 482 U.S. 78, 91 (1986).