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ONE STEP FORWARD, TWO STEPS BACK

I. INTRODUCTION

On August 2, 2002, the Court of Appeals for the Ninth Circuit held in *California First Amendment Coalition v. Woodford*¹ that the public has a First Amendment right to view lethal injection executions from the moment an inmate enters the execution chamber until their death.² Prior to this decision, all events were held behind the curtain. Witnesses can now view the inmate entering the chamber, being secured on a gurney, and having intravenous lines inserted into his veins.³

This decision marks a departure from the manner in which executions were normally carried out since 1992.⁴ In 1992, the San Quentin State Prison implemented Procedure 770, which allowed witnesses to view the execution only from the moment the prison officials strapped the inmate to the gurney with the saline intravenous lines already inserted in the inmate's veins.⁵

Extending the right to view executions by holding Procedure 770 unconstitutional⁶ raises issues concerning (1) the history of public executions; (2) the interests and rights involved in extending the right to view executions; and (3) the effect this decision may have in the future. The purpose of this Comment is to analyze the significance and impact of *Woodford* upon the interests and rights of the public, the media, the inmate, and the government via the prison officials.

1. 299 F.3d 868 (9th Cir. 2002).

2. *Id.* at 877.

3. *See generally id.* at 871 (describing the events of the execution process).

4. *See Cal. First Amendment Coalition v. Calderon*, 150 F.3d 976, 979 (9th Cir. 1998).

5. *Id.*

6. *Woodford*, 299 F.3d at 885.

II. STATEMENT OF THE CASE

The procedural history of *Woodford* dates back to 1996, when witnesses viewed lethal injection executions after the execution team members left the execution chamber and the prison officials secured the inmate on the gurney.⁷ The first lethal injection execution following the adoption of Procedure 770 was administered to William Bonin.⁸ First Amendment Coalition (Coalition) filed a suit in federal court following Bonin's execution challenging Procedure 770, and the court issued a preliminary injunction that the Ninth Circuit affirmed.⁹ The injunction prohibited prison officials from preventing witnesses from observing executions before the time the prison officials inserted the intravenous lines until just after the inmate's death.¹⁰

After issuing the preliminary injunction, the district court ordered a permanent injunction allowing witnesses to view executions "at least from the point in time just prior to the condemned being immobilized, that is strapped to the gurney or other apparatus of death, until the point in time just after the prisoner dies."¹¹ However, on appeal the Ninth Circuit reversed and remanded the decision.¹² Although the appellate court found Procedure 770 constitutional based on the limited record before it, it needed further analysis by the district court to determine if substantial evidence existed to show that Procedure 770 was an exaggerated response to the prison officials' concerns.¹³ The district court subsequently held that the findings supported a permanent injunction "from preventing uninterrupted viewing of executions from the moment the condemned enters the execution chamber . . . [until] the time the condemned is declared dead."¹⁴

7. See *Calderon*, 150 F.3d at 979.

8. *Woodford*, 299 F.3d at 871.

9. *Id.* at 871-72.

10. *Id.* at 871.

11. *Id.* at 872 (quoting *Cal. First Amendment Coalition v. Calderon*, 956 F. Supp. 883, 890 (N.D. Cal. 1997)).

12. *Id.*

13. *Woodford*, 299 F.3d at 872 (citing *Cal. First Amendment Coalition v. Calderon*, 150 F.3d 976, 982-83 (9th Cir. 1998)).

14. *Id.* (quoting *Cal. First Amendment Coalition v. Woodford*, No. C-96-1291-VRW, 2000 WL 33173913, at *11 (N.D. Cal. July 26, 2000)).

Coalition appealed the decision, seeking to prevent prison officials from restricting witnesses from viewing the execution from the time the inmate enters the execution chamber.¹⁵ This was the issue in *Woodford*. On appeal, the Ninth Circuit reviewed the district court's findings under the clear error standard. Under this standard, findings are left undisturbed unless there is a "definite and firm conviction that a mistake has been committed."¹⁶ In addition, the appellate court reviewed de novo whether Procedure 770 was constitutional.¹⁷

III. REASONING OF THE NINTH CIRCUIT

The Ninth Circuit began its reasoning by establishing that the press has a First Amendment right to access information available to the general public.¹⁸ Additionally, the press and the public have a statutory right to witness executions.¹⁹ The appellate court found that Coalition could challenge the constitutionality of Procedure 770 by asserting a First Amendment right of access to view executions.²⁰

In order to decide whether the right to witness executions overrides the rights of the media and penological objectives, the appellate court utilized the test articulated in *Turner v. Safley*,²¹ as well as an additional requirement iterated in *Thornburgh v. Abbott*.²² The Ninth Circuit conceded that courts have used the *Turner* test when "reviewing a challenge to a prison regulation."²³ The court in this case applied the test "where the regulation promulgated by prison officials [was] centrally concerned with restricting the rights of [the media] rather than prisoners."²⁴

15. *See id.*

16. *Id.* at 873 (quoting *Jones v. United States*, 127 F.3d 1154, 1156 (9th Cir. 1997)).

17. *Id.* at 872.

18. *See id.* at 873 n.2.

19. *See* CAL. PENAL CODE § 3605 (Deering 2002).

20. *Woodford*, 299 F.3d at 873.

21. 482 U.S. 78, 89-91 (1987).

22. *Woodford*, 299 F.3d at 879 (explaining that when "regulations . . . are broad in nature and do not require substantial case-by-case discretion must exhibit a closer fit to their purported purposes.").

23. *See id.* at 878.

24. *Id.*

The Ninth Circuit's first inquiry was whether the restriction was reasonable or exaggerated considering the asserted interests.²⁵ The appellate court analyzed this first inquiry by answering the four questions of the *Turner* test: (1) is there a rational connection between the government interest and the prison regulation; (2) are there alternate means of exercising the rights open to inmates; (3) what is the impact of accommodating the asserted rights on inmates and guards; and (4) are there alternatives "that fully [accommodate] the prisoner's rights at *de minimis* cost to valid penological interests."²⁶ However, the appellate court substituted the rights of the *prison inmates* for the rights of the *media*.²⁷

The Ninth Circuit added a second inquiry to the analysis because it was the first time the court applied the *Turner* test to the media's rights.²⁸ As articulated in *Abbott*, the appellate court required "a 'closer fit' between Procedure 770 and defendants' legitimate penological interest in the security of the execution team."²⁹

The Ninth Circuit found that because the connection between the penological interest and the regulation was too remote, the first prong of the *Turner* test failed.³⁰ The appellate court reasoned that the prison officials' concern for safety and security was not supported by evidence showing that they could be subject to danger.³¹ Additionally, Coalition showed that at the time before the prison officials inserted the intravenous lines and fastened the inmate securely on the gurney, the officials had their backs turned to the witnesses, making identification unlikely.³² Coalition argued that the inmate also had the opportunity to tell others who the staff members were before the execution took place, which posed more of a danger than when the public witnessed the execution after the inmate was

25. *Id.* at 873.

26. *Turner*, 482 U.S. at 89–91 (alteration in original).

27. *See Woodford*, 299 F.3d at 878.

28. *See id.* at 878–89.

29. *Id.* at 878–80; *see also* Entm't Network, Inc. v. Lappin, 134 F. Supp. 2d 1002, 1017 (S.D. Ind. 2001) ("*Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." (quoting *Washington v. Harper*, 494 U.S. 210, 224 (1990))).

30. *Woodford*, 299 F.3d at 881–83.

31. *Id.* at 880.

32. *Id.* at 881.

strapped to the gurney.³³ With this evidence, Coalition was able to refute the government's claim under the first prong.

The Ninth Circuit considered *arguendo* that the first prong was met and continued analyzing the rest of the *Turner* test. The appellate court found that the government did not sufficiently meet the second prong of the *Turner* test.³⁴ The government argued that there was an alternative solution, to have the staff inform the public about the pre-gurney events in order to eliminate "independent, public eyewitness observation[s]," but the appellate court found the alternative would impede the public's right to view executions.³⁵

The Ninth Circuit also found that the third prong was defeated. The appellate court considered the impact of accommodating the media's rights and held that there was insufficient evidence to show that staff would be unwilling to carry out the execution process because they feared identification and "threats or violence."³⁶ The appellate court also reasoned that speculation alone was not enough to show that extending media the right to view would "strain prison resources."³⁷

Lastly, the Ninth Circuit found the fourth prong requiring low-cost alternatives to accommodate the public's right of access without diminishing the concerns of the government was not satisfied. The appellate court found that "[t]he use of surgical garb is a practical alternative to restricting access to witness lethal injection executions in order to conceal the identity of such execution staff"³⁸

The Ninth Circuit held that the *Turner* test was not met because each of the prongs were not satisfied.³⁹ As a result, the appellate court found that Procedure 770 "is [not] reasonably related to the prison officials' legitimate interest in the safety of prison staff and . . . viewing restrictions are an exaggerated response."⁴⁰ Thus, the appellate court held that Procedure 770 was both an exaggerated

33. *Id.* at 881–82.

34. *See id.* at 883.

35. *Id.* at 883.

36. *Id.* at 884.

37. *See id.*

38. *Id.* at 885 (quoting *Cal. First Amendment Coalition v. Woodford*, No. C-96-1291-VRW, 2000 WL 33173913, at *6 (N.D. Cal. July 26, 2000)).

39. *Id.*

40. *See id.* at 885.

response by prison officials to safety and security, and an unconstitutional restriction on the media's First Amendment rights.⁴¹

IV. ANALYSIS

This Comment addresses the method of reasoning the Ninth Circuit used to conclude that Procedure 770 is unconstitutional. The appellate court utilized the *Turner* test for the first time as applied to the media's asserted rights as opposed to those of the prisoner.⁴² However, the appellate court overlooked prisoners' rights in applying the test by balancing only the interests of the prison officials and the media. This Comment analyzes each of the prongs of the *Turner* test and balances the rights and interests of the prison officials, the media, and the inmates. If the Ninth Circuit had balanced the interests of all individuals affected by Procedure 770, it may have reached a different result, finding Procedure 770 constitutional.

A. *The Development and Purpose of Right to View Statutes*

Public executions originated in England, where the purpose was to "deter the commission of further crimes by other persons."⁴³ In this country, the purpose is to give assurance to the public that the judicial system is fair, to convey that "both the *process and its results*" are adequate, and to ensure justice has been accomplished.⁴⁴ By the mid-1800s, the public became concerned with violence in the streets due to public executions, and the states began moving executions behind prison walls.⁴⁵ Nonetheless, the right to view executions was preserved.

The right of certain members of the public, chosen by the Attorney General, to view executions was established by the

41. *See id.*

42. *See id.* at 878.

43. John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283, 290 (1998).

44. Jeff Angeja, Note, *Televising California's Death Penalty: Is There a Constitutional Right to Broadcast Executions?*, 43 HASTINGS L.J. 1489, 1491-92 (1992) (alteration in original) (quoting *Richmond Newspapers v. Virginia*, 488 U.S. 555, 571 (1980)).

45. *See* Rutledge, *supra* note 43, at 290-92 (explaining that in 1891 California moved public executions to county jails because of various reasons including violence in the streets and public opposition of the death penalty).

California Penal Code.⁴⁶ There are various arguments supporting the enactment of such statutes.⁴⁷ In addition to the public's education with respect to law and methods of government, public viewing of executions also provides assurance that the judicial system is at work.⁴⁸

Historically, the media's main purpose during executions was to communicate to the public governmental functions, thus performing one of the many checks on the system and assuring that justice was being conducted fairly.⁴⁹ Up until the 1900s, the media continued to fulfill this purpose, but in a limited way.⁵⁰ "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public."⁵¹ This limitation is largely due to the presence of other rights and interests involved.

The interests and rights of the inmates, the public, and the prison officials are implicated when the public encounters inmates in a prison.⁵² Therefore, since the execution process occurs in a prison, it involves First Amendment rights of the media, privacy rights of the inmates awaiting execution, as well as penological interests of government, prison officials, and staff. To understand the constitutionality of Procedure 770, each of the above-mentioned interests must be weighed and balanced.

B. The Substantially Affected Interests Surrounding an Execution Process

In general, the prison system is "both newsworthy and of great public importance,"⁵³ and thus deserving of a constitutionally

46. See CAL. PENAL CODE § 3605 (Deering 2002).

47. See generally Michael L. Goodwin, Note, *An Eyeful for an Eye—An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585 (1997) (explaining various policy and constitutional arguments including lack of satisfaction and cruel and unusual punishment).

48. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

49. See Angeja, *supra* note 44, at 1497.

50. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

51. *Id.* at 7 (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974)).

52. See *Pell v. Procunier*, 417 U.S. 817, 830–32 (1974) (discussing the various rights implicated in association with prison visitations).

53. See *id.* at 830 n.7 (quoting Warren Burger, *Our Options are Limited*, 18 VILL. L. REV. 165, 167 (1972)).

protected right of access. The Ninth Circuit in *Woodford* sufficiently analyzed the *Turner* test by addressing the concerns of the prison officials when evaluating the constitutionality of Procedure 770.⁵⁴ However, the appellate court should have given more credence to the prison officials' opinions regarding the penological interests because of their expertise in administering and regulating prisons.⁵⁵

1. Great deference should be given to the expertise
of prison officials

In 1992, prison officials enacted Procedure 770 in light of major concerns for staff and institutional safety. Prison officials believe Procedure 770 is necessary to protect the identity of the execution team from threats and retaliation by prisoners and death penalty opponents.⁵⁶ In *Entertainment Network, Inc. v. Lappin*, the court analyzed First Amendment rights in filming and broadcasting executions.⁵⁷ By holding that the prohibition of broadcasting executions does not infringe on First Amendment rights, the court recognized that broadcasting would "violate the privacy and seriously put at risk the safety of those charged with implementing the sentence of death."⁵⁸ Similarly, without Procedure 770 there is a risk for the safety and anonymity of prison officials.

In California, the warden has the authority to operate and control the prison and execution process.⁵⁹ Many wardens have expressed that during execution time, safety is of heightened concern because the prisoners become "extremely tense, hostile and aggressive."⁶⁰ By holding Procedure 770 unconstitutional, the prison staff's safety is now of even greater concern. The appellate court has given

54. See *Woodford*, 299 F.3d at 878-79.

55. *Entm't Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1018 (S.D. Ind. 2001). This court suggests that courts should defer to the expert judgments of correctional officials. *Id.* (citing *Cal. First Amendment Coalition v. Calderon*, 150 F.3d 976, 982-83 (9th Cir. 1998)); see also *Woodford*, 299 F.3d at 884 (recognizing that deference should be given to the discretion of prison officials when considering the impact of accommodating the media's rights would have on the prison system).

56. *Woodford*, 299 F.3d at 880.

57. *Lappin*, 134 F. Supp. 2d at 1018.

58. *Id.* (quoting Warden Lappin's affidavit).

59. See *KQED, Inc. v. Vasquez*, No. C 90-1383 RHS, 1991 U.S. Dist. LEXIS 21163, at *7 (N.D. Cal. Feb. 12, 1992).

60. *Id.*

witnesses the ability to view the inmate entering the execution chamber, prison staff strapping the inmate to the gurney and inserting the intravenous lines.⁶¹ As a result, the extension of viewing time increases the possibility of the witnesses identifying the staff, whereas before, the witnesses only observed the inmate after the execution team exited the chamber.⁶²

The safety concern stemming from prisoner hostility was considered in *Woodford* when the prison officials argued that the staff has their backs turned away from the witnesses so that the inmate has the opportunity to seek retaliation by identifying the staff to the outside world.⁶³ Nonetheless, the Ninth Circuit found that even with the regulation in place, the inmate has the ability to reveal the identity of the staff before the execution.⁶⁴

Another concern that the prison officials raised is that staff will be deterred from participating in the execution process.⁶⁵ This is largely due to fear for their lives as well as those of their family. As Coalition argued, it is possible for the staff to wear masks to safely conceal their identity without hindering the execution process.⁶⁶ However, considering that the inmate will be aggressive during the process of being placed on the gurney, there is a valid risk that the mask will be dislodged or become a distraction.⁶⁷ Although it is difficult to predict accurately what would happen if this alternative were adopted, the mere presence of risk should lead the appellate court to defer to the judgment of the prison officials because they are familiar with the execution process. Instead, the Ninth Circuit found that a speculative fear is insufficient to be a legitimate governmental concern.⁶⁸

An additional factor to consider is the effect upon the inmate awaiting execution. When witnesses view the inmate being led to the chamber, being strapped to the gurney and given the intravenous

61. See *Woodford*, 299 F.3d at 871.

62. See *id.*

63. *Id.* at 881.

64. *Id.* at 881–82.

65. *Id.* at 884.

66. *Id.* at 884–85.

67. See *id.* at 871, 883, 885 (explaining the process of securing the inmate on the gurney and describing how hostile, combative, and forceful the process may become).

68. *Id.* at 882–83.

lines, the inmate may feel more degraded than when the inmate is already strapped to the gurney and sedated.⁶⁹ Furthermore, “[s]ociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others and therefore are more prone to violence toward themselves or others.”⁷⁰ Consequently, without Procedure 770, the aggression and tension in the prison population would be heightened, further supporting the prison officials’ concern for safety.

2. The right to privacy plays a crucial role during an inmate’s execution

According to the *Turner* test, the balanced interests are those asserted (First Amendment rights of the media) and legitimate penological interests. However, an inmate’s rights are involved to “the extent to which accommodation of the asserted right will have an impact on prison staff, [and] on inmates’ liberty”⁷¹ During the execution process, an inmate’s right to privacy is at issue. Death is personal and has been recognized to be a fundamental right.⁷² Therefore, the Ninth Circuit should not have overlooked the inmate’s right to privacy when public viewing of executions was at issue in the case.

The right to privacy is recognized implicitly by the United States Constitution and the California Constitution, which states that “all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursuing and obtaining safety, happiness, and privacy.”⁷³ Inmates retain constitutional rights as long as they are not inconsistent with other interests and concerns of the prison system.⁷⁴ Given that the prison system’s safety concerns are consistent with a prisoner’s right to privacy and that the judiciary has deferred to the

69. *Id.* at 883 (explaining the inmate’s demeanor before execution).

70. *Hudson v. Palmer*, 468 U.S. 517, 552–53 (1984) (Stevens, J., dissenting).

71. *Turner v. Safley*, 482 U.S. 78, 78 (1987).

72. *See Goodwin*, *supra* note 47, at 602.

73. *See* U.S. CONST. amend. XIV, § 1; *see also* CAL. CONST. art. I, § 1.

74. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974).

concerns of prison officials, there are arguments that weigh in favor of preserving an inmate's right to privacy.⁷⁵

By holding Procedure 770 unconstitutional, the Ninth Circuit denigrated the inmate's right to privacy because now witnesses can view the entire execution process, as they did in the historical public arena. In *Houchins v. KQED, Inc.*,⁷⁶ the media wanted uncensored access to a prison, but the court recognized that inmates "are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others."⁷⁷ By analogy, extending the right to view the execution from the moment the inmate enters the chamber leaves nothing censored, and leaves little, if any, privacy for an inmate.

C. *The Impact of Procedure 770 on the Right to Privacy*

The justification for allowing the public to view executions is that it deters individuals from committing inhumane and immoral crimes.⁷⁸ That justification is advanced when witnesses can view the details of the execution such as the demeanor, the procedure, and the process of securing the inmate on the gurney with intravenous lines in place.⁷⁹ Despite the importance of these interests, extending the right to view contradicts the reason why our nation moved to privatize public executions—to reduce public hostility stemming from viewing executions—and overlooks additional interests involved, including those of the inmate and prison officials.

1. The primary concern considered during an execution

There are strong arguments in favor of treating an inmate's right to privacy rather than the media and public's right to view executions, as a primary concern. In balancing the media's interests and the prisoner's interests, the prisoner's interests and rights far

75. See *KQED, Inc. v. Vasquez*, No. C 90-1383 RHS, 1991 U.S. Dist. LEXIS 21163, at *5 (N.D. Cal. Feb. 12, 1992); see also *Entm't Network Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1018 (S.D. Ind. 2001) (discussing arguments made by Warden Lappin such as maintaining safety and anonymity, and that courts should defer to correction officials for execution procedures).

76. 438 U.S. 1 (1978).

77. *Id.* at 5 n.2.

78. See Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 557 (1995).

79. See *Woodford*, 299 F.3d at 883; see also *supra* Part I.

outweigh those of the media. The right to privacy is a fundamental right recognized by the U.S. Constitution.⁸⁰ Allowing the media to view the entire execution process compromises this right to a great extent.

A prisoner's right to privacy is not comparable to a citizen's right to privacy due to a prisoner's societal status.⁸¹ However, this does not mean the courts should abrogate this right completely when faced with balancing constitutional rights of parties.

Justice Brennan acknowledged that "concern for decency and human dignity . . . has compelled changes in the circumstances surrounding the execution itself. No longer does our society countenance the spectacle of public executions . . . we reject public executions as debasing and brutalizing to us all."⁸² If society understands that executions are "debasing and brutalizing to us all" and an inmate's privacy rights are challenged by the ability of the media to see the events behind the curtain, then inmates' privacy rights may be compromised by an abrogation of Procedure 770. Although inmates' rights are severely limited because of their status as criminals, case law and the California and U.S. Constitutions have suggested that they still retain privacy rights.

Case law and the California Constitution establish that criminals retain the right to privacy.⁸³ As expressed in *Meachum v. Fano*,⁸⁴ "even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore."⁸⁵ Additionally, commentators have suggested that the prisoner is punished by virtue of being a spectacle because this leads to feelings of shame and humiliation.⁸⁶ Thus a limitation to an inmate's right to privacy exists at the time of execution.

80. *Houchins*, 438 U.S. at 5 n.2; see also Goodwin, *supra* note 47, at 602.

81. See *Houchins*, 438 U.S. at 5 n.2 (observing that inmates lose many, but not all rights when lawfully confined).

82. *Furman v. Georgia*, 408 U.S. 238, 297 (1972) (Brennan, J., concurring).

83. *Angeja*, *supra* note 44, at 1507.

84. 427 U.S. 215 (1976).

85. *Id.* at 233.

86. Doug Janicik, Note, *Allowing Victims' Families to View Executions: The Eighth Amendment and Society's Justifications for Punishment*, 61 OHIO ST. L.J. 935, 944–45 (2000).

The right to privacy has been defined as a liberty interest including life, death, and marriage.⁸⁷ Death is personal, and when awaiting death a person feels vulnerable and anxious.⁸⁸ The Ninth Circuit in *Woodford* implicitly expresses that an inmate may feel humiliated and shamed as soon as he enters the chamber, while awaiting the end of life.⁸⁹ Without Procedure 770, witnesses will now view the inmate entering the chamber. At this time, the inmate is hostile and may struggle with the staff while resisting being secured on the gurney.⁹⁰ The struggle is probably a result of two factors. First, when the inmate enters the chamber with witnesses already present, the inmate is deprived of any right "to die with dignity and peace,"⁹¹ and he is left with a sense of depravity, humiliation, and shame. Second, the inmate has a build-up of anxiety, hostility, and tension since the time he becomes aware of the impending execution; this build-up contributes to the inmate's angst.⁹²

2. Limiting the media's First Amendment rights is justified

The media's First Amendment rights are limited, and rights of inmates are constitutionally protected. In light of Procedure 770, both the media's rights and prisoners' rights are limited in different respects. Today, the media is unable to bring cameras into the execution area, or participate in the selection method of executions.⁹³ Justification for such limitations includes avoiding the risk of danger and violence to both witnesses and prison officials.⁹⁴

Inmates' rights are not explicitly mentioned in the right-to-view statutes, and the rights consist of only limited privacy rights that are in accordance with their prisoner status.⁹⁵ However, according to

87. Goodwin, *supra* note 47, at 602.

88. *Id.*

89. See *Woodford*, 299 F.3d at 883 (describing the events taking place behind the curtain, and how "hostile and combative" the inmate is).

90. *Id.*

91. Janicik, *supra* note 86, at 944-45.

92. *KQED, Inc. v. Vasquez*, No. C 90-1383 RHS, 1991 U.S. Dist. LEXIS 21163, at *7 (N.D. Cal. Feb. 12, 1992) (explaining the tension occurring in the prison population during execution times).

93. *Id.* at *11.

94. *Id.* at *7-11.

95. See Angeja, *supra* note 44, at 1507.

Justice Stevens, the courts have a special obligation to protect prisoners because they are a “discrete and insular minority” who depend on the courts to make certain their rights are protected because prisoners are unable to assert their rights sufficiently while existing outside of society.⁹⁶

However, Coalition asserted that (1) the media should have the right to report the events behind the curtain in order to contribute to an informed public debate, and (2) without the media’s report, the “independent, public eyewitness observation of several crucial steps of the execution process” would be eliminated.⁹⁷ Nevertheless, contrary to this view is a recommendation from the Gerry Commission, an organization that investigated privatization of the penal system.

The Gerry Commission recommended that it should be a crime to report details of executions because it has been known “to stimulate others to the commission of crime.” This is so because repeating details of executions “creates with many a vicious and morbid appetite for the disgusting description.”⁹⁸ Coalition’s contention that the events behind the curtain are crucial for access to governmental proceedings may not be as crucial considering the effect it may have on the public.

Considering the above-described factors, the Ninth Circuit should have regarded the prisoners’ right to privacy when considering the constitutionality of Procedure 770. Had the appellate court considered that holding Procedure 770 unconstitutional would abrogate prisoners’ right to privacy, it might not have given the media the right to view executions when the inmate is led to the execution chamber. The Ninth Circuit might also have noted that this would not be an infringement of the media’s constitutional rights, while maintaining prisoners’ constitutional right to privacy.

96. *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting) (quoting *Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984)).

97. *Woodford*, 299 F.3d at 883–84.

98. Madow, *supra* note 78, at 541 (quoting GERRY COMM’N, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES, S. REP. NO. 17, at 81 (N.Y. 1888)).

V. THE FUTURE AFTER *WOODFORD*

The Ninth Circuit's holding that Procedure 770 is unconstitutional may be analogous to viewing executions on television, or reading about them in detail in newspapers. A regression away from privatization occurs by extending the right to view executions and eliminating the restrictions that the prison system has imposed. The purpose of moving toward a more private execution is to avoid the degradation caused to prisoners and to deter the violence that erupts in the streets during and after executions.⁹⁹ By depicting the images and demeanor of the inmate in detail, from the time the inmate enters the chamber up until the time of death (whether on paper, on television, or by live and in-person speeches), the entire execution process may be conveyed to the public.

A. *The Regression Toward Public Executions*

Just as the public may be desensitized or appalled by violence on television, conveying the entire execution in detail with paper reports will likely lead to the same result, considering the history of public executions. For example, images of violence in various forms today still raise serious concerns about its influence of increasing incidents of violence in society.¹⁰⁰

If the Ninth Circuit held Procedure 770 constitutional, the media could still carry out the one essential function they were initially prescribed to carry out when they were given the right-to-view executions. One of the first right-to-view acts, passed in New York in 1835, gave the press the right to view private executions only with the permission of the sheriff and a sufficient explanation.¹⁰¹ The sheriff admitted the press in order to have them publish an "official certificate of execution-stating the bare fact that the death sentence had been carried out in accordance with the law."¹⁰² Thus, the role

99. *Id.* at 494.

100. Philip R. Wiese, Comment, *POPCORN and PRIMETIME vs. PROTOCOL: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257, 281-82 (1996).

101. See Madow, *supra* note 78, at 519.

102. *Id.* at 520.

of the media would remain intact while protecting the interests of the public, the prison officials, and the inmates.

B. The Uncertain Effect on the Public

As a consequence of *Woodford*, the public will now receive detailed descriptions of the violent struggle of the inmate while being secured on the gurney. The public will witness the force that may be necessary to insert the intravenous lines. The public might be horrified by the details, desensitized by them,¹⁰³ or “shamed into abolishing executions.”¹⁰⁴ It is also possible that the public will be strongly deterred from committing crimes because they are now knowledgeable about each detail of the execution process, and they are certain it is being carried out.¹⁰⁵ The effect on the public is speculative, but what is definite is that the inmate’s right to privacy has been eradicated.

VI. CONCLUSION

Extending the right to view executions affects the ideas of the public and denigrates the rights of both inmates and prison officials. In light of the *Turner* test, as applied to the media’s First Amendment rights, an inmate’s right to privacy should not be ignored. Detailed reporting and broadcasting of executions eliminates an inmate’s right to privacy by communicating each detail of their death to the world, with nothing kept private. Although right-to-view statutes generally limit an inmate’s rights, those rights are now wholly excluded from the execution process in California.

The unconstitutionality of Procedure 770 will also have an effect on the media, the public, and the prison officials. The media is now able to report executions in detail to the public, possibly leading to desensitized feelings about executions or motivation to abolish executions. Prison officials now need to rethink the execution process and expend prison resources for providing methods to ensure staff safety and institutional security. Unfortunately, the ramifications of *Woodford* seem grim and regressive. The extension

103. Wiese, *supra* note 100, at 281–84.

104. Rutledge, *supra* note 43, at 305.

105. See Angeja, *supra* note 44, at 1497–98; see also Weise, *supra* note 100, at 282.

of the First Amendment rights of the media, at the expense of the State's right to regulate prison facilities and the inmate's right to privacy, may be a dangerous step backward in constitutional law.

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