THE RECORDER

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Commentary

By DAVID B. NEWDORF

Prison Life and Death, *Close Up*

Decision enlarging access to executions should encourage free press advocates

U.S. District Court Judge Vaughn Walker's decision last week to permit media viewing of California executions-from the condemned's entry into the death chamber to his last breath-may seem morbid, but it is an encouraging result for First Amendment advocates.

Because the government exercises near-total control over prisoners, most of whom come from poor and disenfranchised backgrounds, media access to prisons is the proverbial canary in the mine shaft, an indicator of the overall health of the First Amendment and other civil rights. Where journalists may freely communicate with prisoners, freedom of the press is generally hale and hearty. In societies where prisoners are held incommunicado, all civil liberties tend to be sickly.

Judge Walker's decision in *California First Amendment Coalition v. Woodford*, No. C 96-1291 VRW, is a favorable portent, but California has some ways to go before it will have earned a clean bill of health.

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The irony of the decision is that journalists will now be able to observe executions from start to fatal finish, but they will not be able to conduct a face-to-face interview with the condemned-or any other prisoner-at any time during his incarceration.

That is because of a 1996 California regulation banning face-to-face media interviews with prisoners. However, Judge Walker's thoughtful and thorough opinion gives media advocates some hope that the interview ban eventually will fall, too.

At issue in California First Amendment Coalition was a prison policy that excluded media (and other legally required public witnesses) from viewing significant portions of executions by lethal injection compared with the observation that had been permitted of executions by lethal gas, the method employed in this state until 1996. Witnesses of deaths by gas observed the condemned man being taken into the gas chamber at San Quentin and all that followed.

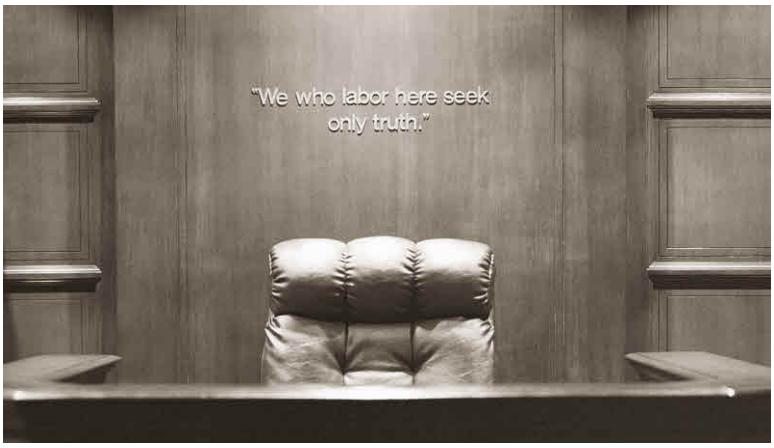
By contrast, the official procedure for viewing lethal injections required that the execution team take the condemned man into the chamber, strap him to a gurney and insert the intravenous lines into his arms outside of public view. Witnesses were admitted to the viewing area and the curtain to the execution chamber was opened after these steps had occurred.

At the execution of William George Bonin on Feb. 23, 1996, the first use of lethal injection by prison officials, Bonin was strapped down,

nearly motionless, and his eyes were closed when the curtain was drawn. Some witnesses said he appeared to be asleep.

Prison officials justified the restriction on observation on the ground that the safety and security of members of the execution team would be jeopardized if their identities became known. Media and other witnesses would be better able to identify staff members, officials argued, because lethal injection takes longer than lethal gas due to the time required to insert intravenous lines.

The media organizations challenging this regulation-officially known as "Procedure 770"-carried a difficult burden. For the past three decades, the U.S. Supreme Court has repeatedly instructed judges that prison officials' security concerns almost always outweigh a prisoner's civil liberties. As the court stated in 1974's *Pell v. Procunier,* 417 U.S. 817, upholding an earlier version of California's ban on face-to-face media interviews:



> In the judgment of the state corrections officials, this [interview] policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

As a result of *Pell* and similar precedents, few courts today engage in the kind of detailed examination and probing of prison officials' stated concerns that is evident in Judge Walker's decision. Applying the *Pell* standard, Judge Walker found that prison officials' restriction on observation of executions was an "exaggerated response" to any legitimate concern for safety.

In a detailed 20-page order, Judge Walker recounted the significant evidence presented by plaintiffs. The decision noted, among other damaging evidence, that the media have never attempted to reveal the identity of execution team members and there has been no violent attack or threat against a staff member based on participation in an execution.

In addition, no effort has been made in the past to conceal the staff's identities. Judge Walker reasoned that staff members could easily conceal their identities by donning surgical masks without limiting observation of the execution.

Judge Walker's reasoning likewise would support the conclusion that the media interview ban is an exaggerated response to officials' concerns. Prison officials contend that one-on-one media interviews threaten prison security by permitting the intrusion of journalists and their equipment into prison, which creates the opportunity for inmates to smuggle contraband in or out of the prison. Prison officials also argued that media attention on particular inmates turned them into "big wheels" in prison society, which may distract the individual from his rehabilitation or enable him to advocate for violence or disobedience within prison.

However, just as prison officials could not point to a single incidence of violence against a staff member stemming from participation in an execution, they cannot identify any incident of smuggling or violence tied to media interviews. Notwithstanding the decision in *Pell*, one-on-one media interviews were permitted in California from 1974 to 1996 as a result of a state statute, the "Inmate Bill of Rights."

Even after the Inmate Bill of Rights was repealed, the media have been permitted access under revised regulations to conduct "random" prisoner interviews (as opposed to specific inmate

interviews). Prison officials have reported no problem arising from "random" interviews.

Media access for face-to-face interviews with prisoners could be restored under legislation that has twice passed the state Legislature and is now on its third go-around. Prior bills to permit one-on-one media interviews were overwhelmingly approved by the Legislature, only to be vetoed by California Gov. Pete Wilson in 1997 and by Gov. Gray Davis in 1999. The Assembly has again approved the bill, AB 2101, sponsored by Assemblywoman Carole Migden.

Senate passage seems assured, but the measure may run up against Gov. Davis's "tough on crime" stance, which so far has not discriminated between policies that legitimately punish criminals and those that restrict so-called special privileges for prisoners, which, in this case, deprive the media and the public of their right to know what goes on in prisons.

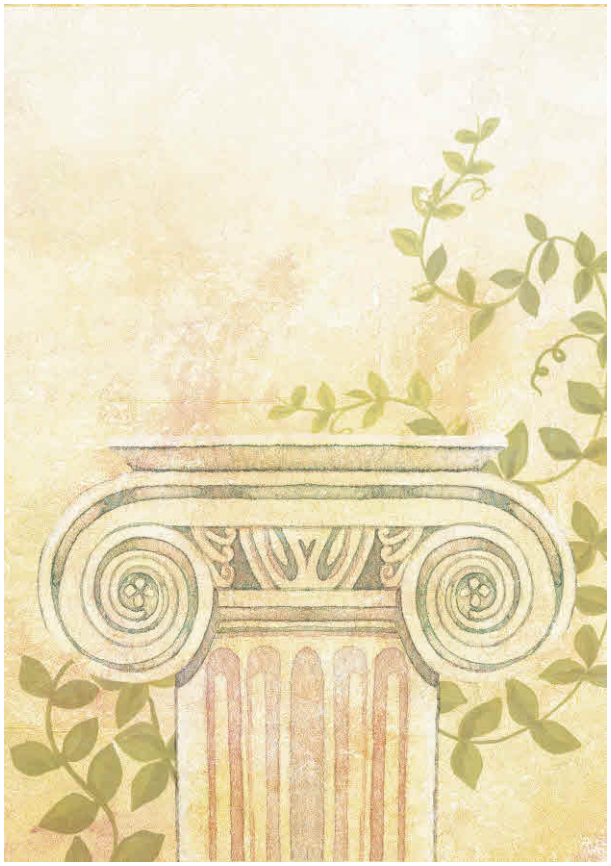
California has nothing to fear from the words of its prisoners.

Given Gov. Davis's past views on the bill, the courts may be a more promising venue for change, especially in light of Judge Walker's decision enlarging media access to executions. Media and prisoner rights organizations have been reluctant to mount a First Amendment challenge to the interview ban because the U.S. Supreme Court in *Pell* upheld California's previous version of an interview ban (instituted in 1971).

While *Pell* appears to be an obstacle, Judge Walker's decision shows us that it is not an insurmountable one. Just as in California First Amendment Coalition, a well thought-out challenge to the interview ban could create a record of substantial evidence showing that the present regulation is an "exaggerated response" to the concerns of prison officials. California had more than 20 years of experience with one-on-one media interviews before the 1996 ban took effect and this experience lends no support to ostensible fears for prison security and safety.

California has nothing to fear from the words of its prisoners. Policy makers must recognize one of the fundamental underpinnings of a free society: Restricting the flow of information-either about executions or about prison life-does not make us safer. The ban on face-to-face interviews only slows the pace of much-needed reform in our scandal-ridden prisons.

Civil rights advocates cannot be sanguine about the condition of freedom of the press in this state until the interview ban is lifted.



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