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Bylines behind Bars: Fame, Frustration and First Amendment Freedom

Clay Calvert

BYLINES BEHIND BARS: FAME, FRUSTRATION & FIRST AMENDMENT FREEDOM

By Clay Calvert[*]

I. INTRODUCTION

The Washington Post recently described the Supermax prison in Florence, Colorado[1] as "[t]he most secure federal prison in America."[2] It is home to many notorious and famous criminals,[3] including Theodore J.

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[*] John and Ann Curley Professor of First Amendment Studies and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Thomas Markey and Alexa Santoro of The Pennsylvania State University for their careful analysis and review of an early draft of this article.

1. The prison is located about ninety minutes south of Denver. Editorial, *Supermax Prison is a Terrorist Enclave: The Federal ADMAX Facility in Florence Houses a Notorious Mix of Crooks and Convicted Terrorists in Strict Security and Near-Total Isolation*, DENV. POST, July 31, 2005, at E6.

2. Karl Vick, *Isolating the Menace in a Sterile Supermax*, WASH. POST, Sept. 30, 2007, at A3. *The Denver Post* echoed this sentiment in a recent story, calling the penitentiary "[t]he country's most secure prison." Jennifer Brown, *Supermax Staffing Under Fire: Lawmaker, Union Say Guards Needed: Federal Prison Officials Disagree*, DENV. POST, Aug. 29, 2007, at B2. Similarly, an October 2007 article in *The Atlanta Journal-Constitution* characterized the facility as "the nation's most secure prison" that "is said to be reserved for the worst of the worst," including "Centennial Olympic Park bomber Eric Rudolph, Oklahoma City bombing co-conspirator Terry Nichols, and al-Qaida terrorist Zacarias Moussaoui. All are locked in solitary confinement inside their cells and allowed outside only one hour a day." Bill Rankin, *What Ever Happened to . . . Jamil Abdullah Al-Amin: Supermax Prison Gets New Inmate*, ATLANTA J.-CONST., Oct. 22, 2007, at B4. *See generally* Federal Bureau of Prisons: USP Florence ADMAX, Federal Bureau of Prisons, http://www.bop.gov/locations/institutions/flm (last visited Jan. 22, 2008) (providing, on the Federal Bureau of Prisons' official Website, that "[t]he Administrative Maximum (ADX) facility in Florence, Colorado, houses offenders requiring the tightest controls. It is part of the Florence Federal Correctional Complex (FCC). The ADX supervises a minimum security satellite prison camp (outside the secure perimeter of the ADX) that houses male offenders.").

3. *See* Felisa Cardona, *DU Law Students Win Prisoner Byline Rights*, DENV. POST, Aug. 10, 2007, at B5 (describing the Supermax as "the ultra-high-security prison in Florence where many of the nation's most notorious are held, including Sept. 11, 2001, terrorism conspirator Zacarias Moussaoui and Unabomber Ted Kaczynski").

Kaczynski,[4] Richard C. Reid[5] and Terry L. Nichols.[6] In addition, it holds Eric R. Rudolph, the man responsible for bombing an abortion clinic in Birmingham, Alabama in 1998, and Centennial Olympic Park in Atlanta, Georgia in 1996, as well as two other locations.[7] In total, Rudolph injured 150 people and killed two.[8]

Among the not-so-famous inmates at Supermax is Mark Jordan, incarcerated there for both murder—he stabbed to death a fellow inmate in broad daylight at the recreation yard of the federal penitentiary[9]—and bank robbery.[10] Is Jordan dangerous? Yes. Well known? Not so much. However, in the annals of First Amendment[11] jurisprudence, Jordan could

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4. *See generally* Steve Henson, *Supermax Warden Takes on Critics*, PUEBLO CHIEFTAIN (Colo.), Sept. 12, 2007, at 1 (writing that the facility houses, among others, "*the Unabomber, Theodore Kaczynski*; Olympic Park bomber Eric Rudolph; and Zacarias Moussaoui, involved in the attacks on 9/11") (emphasis added).

5. *Id.* at 1 (describing Reid as "al-Qaida's would-be 'Shoe Bomber'"). Reid is serving a life sentence "for attempting to bring down an American Airlines jet with nearly 200 people aboard on Dec. 22, 2001. Fellow passengers and crew members overpowered him before he could ignite the explosives hidden in his shoes." Corky Siemaszko, *Crazed Bomber Says Allah Will Get Him Out of Supermax Poky*, DAILY NEWS (N.Y.), July 31, 2007, at 3.

6. *See generally* Leslie Reed, *Death Penalty Foes Have Unlikely Ally*, OMAHA WORLD-HERALD, Apr. 12, 2007, at 2B (describing Nichols as "serving a life sentence in federal prison" for his role "in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995").

7. *See* Shaila Dewan, *Victims Have Say as Birmingham Bomber is Sentenced*, N.Y. TIMES, July 19, 2005, at A14 (describing Rudolph's crimes); *see also* Add Seymour, Jr., *Rudolph Gets Life, No Pity*, ATLANTA J.-CONST., July 19, 2005, at 1A (reporting that Rudolph will "spend the rest of his life, much of it in solitary confinement, in a federal prison known as 'SuperMax.' It is designed to hold the 'worst of the worst,' including Unabomber Theodore Kaczynski.").

8. *See* Dewan, *supra* note 7, at A14 (describing Rudolph's crimes); *see also* Seymour, *supra* note 7, at 1A (reporting that Rudolph will "spend the rest of his life, much of it in solitary confinement, in a federal prison known as 'SuperMax.' It is designed to hold the 'worst of the worst,' including Unabomber Theodore Kaczynski.").

9. *See* United States v. Jordan, 485 F.3d 1214, 1226 (10th Cir. 2007) (affirming Jordan's conviction for the 1999 "stabbing to death [of] a fellow inmate in broad daylight at the recreation yard of the federal penitentiary in Florence, Colorado").

10. *See* Jordan v. Federal Bureau of Prisons, 191 Fed. Appx. 639, 641 (10th Cir. 2006), *vacated and replaced*, 2006 U.S. App. LEXIS 32305 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2875 (2007) (writing that Jordan is "serving a seventy-eight-month sentence for one count of armed bank robbery and a 318-month sentence for another count of armed bank robbery and possession of a firearm in relation to a crime of violence"); Chase Squires, *DU Students Take on the Feds—And Win*, DENV. UNIV. TODAY, Aug. 22, 2007, *available at* http://www.du.edu/today/stories/2007/08/2007-08-21-studentsw.html (last visited Jan. 22, 2008) (describing Jordan as "serving terms for bank robbery and murder at the government's maximum security facility near Florence").

11. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local

well become far more famous than any of his more high-profile Supermax companions. That is because, in August 2007, Jordan won a protracted federal court battle[12] challenging the constitutionality of a federal regulation[13] enforced by the Bureau of Prisons. The regulation provides, in pertinent part, that an "inmate may not act as reporter or publish under a byline."[14] During the same month, United States District Court Judge Marcia S. Krieger ruled in *Jordan v. Pugh*[15] that the byline prohibition "violates the First Amendment rights of Mr. Jordan, other inmates in federal institutions, and the press."[16] In reaching her conclusion, Judge Krieger cited the "chilling effect" the regulation has not only on Jordan's expression, but also on "the speech of the more than 198,000 other federal inmates" for whom the only way "to be certain to avoid punishment is to not submit an article to the news media for publication."[17]

Judge Krieger also found insufficient evidence to support the Bureau of Prisons' "big wheel"[18] argument that the byline prohibition was necessary. Their "big wheel" argument posits that "an inmate who publishes under a byline in the news media can become unduly prominent in the prison community, and that such elevated status and power can be used to intimidate other inmates and corrections staff."[19] Judge Krieger rejected this theory, writing that she "cannot discern an association between the status gained by any inmate publication and a security risk."[20]

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government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

12. The word "protracted" seems accurate here because the August 2007 ruling came more than four-and-a-half years after Jordan filed his second amended complaint. *See* Plaintiff's Tendered Second Amended Complaint at 1, Jordan v. Pugh, No. 02-CV-1239-MSK-PAC (D. Colo. Jan. 30, 2003) (copy on file with author) [hereinafter Second Amended Complaint]. Prior to the August 2007 ruling in Jordan's favor, he had lost a facial, void-for-vagueness challenge to the no-byline rule. *See* Jordan v. Pugh, 425 F.3d 820, 830 (10th Cir. 2005). Under the void-for-vagueness doctrine, "[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 910 (Aspen Publishers 2d ed. 2002).

13. 28 C.F.R. § 540.20(b) (2007). In addition to this key provision challenged by Mark Jordan, the same federal regulation provides both that an "inmate may not receive compensation or anything of value for correspondence with the news media" and that "[r]epresentatives of the news media may initiate correspondence with an inmate. Staff shall open incoming correspondence from representatives of the media and inspect for contraband, for its qualification as media correspondence, and for content which is likely to promote either illegal activity or conduct contrary to Bureau regulations." 28 C.F.R. § 540.20(b)–(c).

14. 28 C.F.R. § 540.20(b).

15. Jordan v. Pugh, 504 F. Supp. 2d 1109 (D. Colo. 2007).

16. *Id.* at 1126.

17. *Id.* at 1118.

18. *Id.* at 1112.

19. *Id.* at 1120.

20. *Id.* at 1121.

In addition to the adverse impact of the byline regulation on the speech rights of inmates, Judge Krieger emphasized the chilling effect it could have on news organizations that might not publish articles by inmates without a byline.[21] She reasoned that the news media have a "right to publish such ideas with attribution to the inmate"[22] because "attribution to an inmate author helps the public to evaluate the merit and credibility of the ideas or facts advanced."[23]

In October 2007, Judge Krieger issued a follow-up order: (1) affirming her August 2007 decision; (2) rejecting a motion by the government to limit the scope of her order in favor of Jordan; and (3) accepting Jordan's motion to make specific and supplemental factual findings in his favor in order "to ensure that the judgment remains valid."[24] To this extent, Judge Krieger wrote in her October 4, 2007 ruling:

> The Court has determined that the Byline Regulation violates the First Amendment rights of the Plaintiff, other inmates and the press. Thus, the Byline Regulation cannot be enforced. The Court has narrowly tailored its injunction to prohibit the Federal Bureau of Prisons from punishing inmates for violating the Byline Regulation. The Court finds that the injunction is as narrow as it can practically be, that it extends no further than is necessary to correct the First Amendment violation, and that it is the least intrusive means necessary to correct the First Amendment violation. As for any adverse impact on public safety or the operation of a criminal justice system, the evidence presented at trial shows there to be minimal or no impact on either.[25]

Ironically, a rule designed to keep inmates from gaining what Judge Krieger called "celebrity"[26] status by preventing them from authoring byline articles for news media outlets may have done just that. The Byline Regulation arguably bestowed convicted murderer Mark Jordan with a measure of cult celebrity status far beyond any fame he may have received for his writings for *Off!* magazine in 2001, which landed him in trouble (at least among free press advocates and First Amendment scholars).[27] Adding

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21. *See* Jordan v. Pugh, 504 F. Supp. 2d 1109, 1118 (D. Colo. 2007).

22. *Id.*

23. *Id.* at 1118 n.22.

24. Jordan v. Pugh, 2007 WL 2908931, at 2 (D. Colo. Oct. 4, 2007).

25. *Id.*

26. *Jordan*, 504 F. Supp. 2d at 1121.

27. *See* Plaintiff's Motion for Partial Summary Judgment at 7–10, Jordan v. Pugh, No. 02-CV-1239-MSK-PAC (D. Colo. Feb. 3, 2006) (copy on file with author) [hereinafter Motion for

to his growing notoriety is that, prior to gaining the *pro bono* legal representation of three law students and a faculty member at the University of Denver's Sturm College of Law,[28] Jordan became his own jailhouse lawyer,[29] handling the case *pro se*[30] and crafting, among other documents, a meticulously hand-written, 36-page motion for partial summary judgment.[31] If Judge Krieger's August and October 2007 rulings withstand an appeal by the Bureau of Prisons, Jordan surely will be transformed. In the free speech circles of law reviews and casebooks, he will ascend from just a number—in particular, Prisoner No. 48374-066[32]—to a First Amendment figure.

This Article addresses the case of *Jordan v. Pugh*.[33] It strives to do more, however, than simply explore and analyze the legal issues and arguments raised in this unique and intriguing case of first impression. In particular, it attempts to place the byline battle between Mark Jordan and the officials at the Supermax detention facility in Florence within a broader journalistic, cultural, and First Amendment context. To this extent, Part I provides background on the history and evolution of the use of bylines in American journalism, including reasons for byline inclusion and the functions bylines serve for readers and to writers. Part II then presents a brief overview of the First Amendment rights of prisoners, including both the right to speak and the right to receive speech behind bars. Importantly,

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Partial Summary Judgment] (describing *Off!* as "the official publication of off campus college meetings at State University of New York at Binghamton").

28. *See* Squires, *supra* note 10 (writing that Donald Bounds, Jack Hobaugh and Michelle Young joined law Assistant Professor Laura Rovner—who acted as supervising attorney under the court's student lawyer provision—to argue for Mark Jordan, who is serving terms for bank robbery and murder at the Colorado Supermax facility in Florence.).

29. *See* JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 192 (1988) (defining a jailhouse lawyer as "any prisoner who has developed legal skills that are recognized by others as a resource in filing suits"); *see also* Evan R. Seamone, *Fahrenheit 451* on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries*, 24 YALE L. & POL'Y REV. 91, 93–94 (2006) (defining "jailhouse lawyers" as "a substantial group of inmates renowned for their established expertise in legal research and advocacy," and defining a "jailhouse lawyer" as "an inmate who has the skills to assess another inmate's legal problems, find valid legal authority, provide accurate and informed legal advice, and, when possible, present legal arguments to judges or other decision-making authorities").

30. *See* BLACK'S LAW DICTIONARY 1258 (8th ed. 2004) (defining this term to mean "for oneself; on one's own behalf; without a lawyer <the defendant proceeded per se> <a pro se defendant>. — Also termed *pro persona*; *in propria persona*.").

31. *See, e.g.*, Motion for Partial Summary Judgment, *supra* note 27, at 7–10.

32. Alan Prendergrast, *The Long Silence: Federal Prisoners' Fight to Get the Word Out Reaches Unprintable Extremes*, DENVER WESTWARD, Sept. 12, 2002, *available at* http://www.westword.com/2002-09-12/news/the-long-silence/ (last visited Feb. 23, 2008).

33. *Jordan*, 504 F. Supp. 2d 1109.

this part illustrates how the use of bylined news articles is a staple (rather than a forbidden taboo) of journalism behind bars as it is practiced at one of the nation's most notorious prisons, the Louisiana State Penitentiary in Angola, Louisiana.[34]

Keeping both the journalistic use of the byline and the First Amendment freedoms of prisoners in mind, Part III turns to a more comprehensive analysis and exploration of the facts, issues and arguments in the case of *Jordan v. Pugh*,[35] including the reasoning behind Judge Krieger's ruling in favor of Mark Jordan.[36] Finally, Part IV concludes by arguing that Judge Krieger reached the correct result—a result that not only does justice for Mark Jordan, but one that fits within a historical context of writing from behind bars. This decision should stop the potential spread or proliferation of similar no-byline policies to other contexts in which individuals, like prisoners, possess generally reduced or lowered First Amendment freedoms—namely, high school journalists.[37] Indeed, as analyzed in the Conclusion, there is a remarkably close similarity in the language used by the Supreme Court in its test for determining when censorship of First Amendment speech rights for inmates is permissible and the test articulated in 1988 in *Hazelwood School District v. Kuhlmeier*[38] for evaluating the censorship of student speech that is school-sponsored and part of the curriculum.

II. JOURNALISTIC BYLINES: CAUGHT BETWEEN CELEBRITY AND CREDIBILITY?

A byline can be defined as "the author's name at the start of a story"[39] or similarly, "the name or title of the writer at the start of the story."[40] As noted in the Introduction, a key rationale behind the Bureau of Prisons' prohibition on inmates submitting bylined articles to news media outlets is the theory that bylined-published articles will turn their inmate-authors into celebrities behind bars—"big wheels," as the government puts it—and, in

34. *See generally* Louisiana State Penitentiary Website, *available at* http://www.doc.louisiana.gov/lsp/history.htm (last visited Feb. 23, 2008).

35. *See generally Jordan*, 504 F. Supp. 2d 1109.

36. *See generally id.*

37. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

38. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

39. STANLEY JOHNSON & JULIAN HARRISS, THE COMPLETE REPORTER: A GENERAL TEXT IN NEWS WRITING & EDITING 407 (1942).

40. F.W. HODGSON, MODERN NEWSPAPER PRACTICE: A PRIMER ON THE PRESS 90 (3d ed. 1993).

turn, lead to security trouble.[41] On the other hand, Judge Krieger sounded more like a journalism professor when she reasoned that bylines help "the public to evaluate the merit and credibility of the ideas or facts advanced."[42] The conflicting arguments in this legal battle suggest that both celebrity and credibility come with (and are consequences of) byline inclusion.[43] How does such reasoning by both the government and Judge Krieger comport or fit within the larger journalistic context of the use of bylines by professional news organizations?

Prior to the 1860s, it seems highly unlikely that Mark Jordan would have had any solid argument, at least from a purely journalistic practice perspective, that he was entitled to submit bylined articles.[44] Why? Because although bylines today are commonplace in American journalism, they were, as Bethany Kandel observed in a 1984 *Washington Journalism Review* article, "rare until the Civil War, when the War Department insisted that dispatches carry the correspondents' names. Even after that, bylines were dispensed sparingly, as a reward for special accomplishment, and the first byline was a cause for celebration."[45] During the Civil War, however, bylines were not instituted for purposes of gaining either personal celebrity for the reporter or public credibility for news media organizations.[46] Michael Schudson,[47] professor of communication at the University of California, San Diego, observed that bylines acted as a means for the government to track and possibly punish purveyors of inaccurate information.[48] Specifically, Civil War General Joseph Hooker viewed bylines "as a means of attributing responsibility and blame for the publication of material he found inaccurate or dangerous to the Army of the Potomac."[49] Even this use of the byline, as Schudson writes, was temporary.[50]

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41. *See* Jordan v. Pugh, 504 F. Supp. 2d 1109, 1120–21 (D. Colo. 2007) (describing the big-wheel argument).

42. *Id.* at 1118 n.22.

43. *See generally Jordan*, 504 F. Supp. 2d 1109.

44. *See* Bethany Kandel, *First Bylines*, WASH. JOURNALISM REV., June 1984, at 30.

45. *Id.*

46. *See* MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 68 (1978) [hereinafter SCHUDSON, DISCOVERING THE NEWS].

47. *See* Michael Schudson, [Faculty], Department of Communication, Univ. of Cal., San Diego Website, http://communication.ucsd.edu/people/f_schudson.html (providing a brief biography of Schudson) (last visited Feb. 23, 2008).

48. SCHUDSON, DISCOVERING THE NEWS, *supra* note 46, at 68.

49. *Id.*

50. *Id.*

Professor Paulette D. Kilmer[51] of the University of Toledo contends that "[t]he replacement of signature lines by the convention of putting the reporter's name in a separate line of type just above the lead probably began in the 1880s."[52] By the 1890s, opines Professor W. Joseph Campbell[53] of American University, "[p]erceptive observers of American journalism called attention to the more frequent appearance of the byline, or what was known then as 'the signed article.'"[54] Moving further ahead in time, Schudson writes that "[a]s more of the stories in the 1920s became interpretive, so too were more by-lined, a phenomenon typical of changes in journalism in that era."[55] This move is indicative, to Schudson, of a "new journalistic reality."[56] The journalist was "no longer merely the relayer of documents and messages"[57] but had "become the interpreter of the news."[58] However, during the 1940s, bylines were not common at all in newspapers, including *The New York Times*.[59] But now, as Bethany Kandel wrote back in 1984, "newspaper bylines are automatically placed on most stories."[60]

Within the historical context of journalistic byline use, is there any validity to either the Bureau of Prisons' fear-of-celebrity argument or Judge Krieger's credibility-enhancement reasoning for their inclusion? It seems that there is some merit, in fact, to both sides.

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51. *See* Paulette D. Kilmer, [Faculty], Department of Communication, Univ. of Toledo Website, http://communication.utoledo.edu/NewFiles/faculty.html#pkilm.Anchor (providing a brief biography of Kilmer) (last visited Oct. 29, 2007).

52. PAULETTE D. KILMER, THE INVISIBLE HISTORY OF BYLINES 7 (Aug. 5-8, 1992) (paper presented to the AEJMC History Division at the Annual Meeting of the Association for Education in Journalism & Mass Communication annual convention in Montreal, Quebec, Canada).

53. *See* W. Joseph Campbell, [Faculty], Am. Univ. Website, http://www.american.edu/universitycollege/faculty/campbell.cfm (providing a brief biography of Campbell) (last visited Oct. 30, 2007).

54. W. JOSEPH CAMPBELL, THE YEAR THAT DEFINED AMERICAN JOURNALISM: 1897 AND THE CLASH OF THE PARADIGMS 124 (2006).

55. MICHAEL SCHUDSON, THE POWER OF NEWS 63 (1995) [hereinafter SCHUDSON, POWER OF NEWS].

56. *Id.* at 62.

57. *Id.*

58. *Id.* Schudson notes in an earlier work, *Discovering the News*, that "[t]he first by-lined Associated Press story appeared in 1925. It was explained away as a special case, but within a few years the by-line was common in AP stories." SCHUDSON, DISCOVERING THE NEWS, *supra* note 46, at 145.

59. *See* Kandel, *supra* note 44, at 32 (quoting A.M. Rosenthal, the late executive editor of *The New York Times*, for the proposition that when he received his first byline in 1945, "bylines were very, very few and very, very far between. I had been on the *Times* as a general assignment reporter for two years and had never seen my name in print. I didn't think this unusual and neither did my colleagues").

60. *Id.* at 30.

With regard to the "elevated status and power"[61] or "celebrity"[62] conferred by a byline, Indiana University Professors David H. Weaver[63] and G. Cleveland Wilhoit[64] write that "[f]or Civil War reporters making twenty-five dollars a week, the top wage of the period, by-lines became a way for some of them also to become *famous*."[65] Similarly, Campbell notes that the use of signed articles in the 1890s resulted in "treating journalists as celebrities,"[66] including women such as Elizabeth Cochrane, who wrote under the famous byline of Nellie Bly.[67] Kilmer also observes that during the early part of the twentieth century, being listed as the author in a byline was "a symbol of celebrity status."[68] In fact, journalist and author James Fallows[69] contends that journalists born before 1965 did not go into the profession to make money.[70] Instead, they sought compensation in non-monetary ways, including "the satisfaction of being known and noticed, with your name in print."[71] Grant Hyde, the author of a 1946 journalism textbook, after describing the increasing use of bylines at that time, openly wondered whether the byline "will become merely a reward to inspire good reporting."[72] Even earlier, in his 1929 textbook on news writing, Harry Franklin Harrington conveyed a brief anecdote (writing in

61. Jordan v. Pugh, 504 F. Supp. 2d 1109, 1120 (D. Colo. 2007).

62. *Id.* at 1121.

63. *See* David H. Weaver, Indiana University Alliance of Distinguished and Titled Professors Website, http://www.indiana.edu/~alldrp/members/weaver.html (providing a brief biography of David H. Weaver) (last visited Nov. 5, 2007).

64. *See* Cleveland Wilhoit, Experts & Speakers Faculty Profile, Indiana University Website, http://newsinfo.iu.edu/sb/page/normal/685.html (providing a brief biography of Cleveland Wilhoit) (last visited Nov. 5, 2007).

65. DAVID H. WEAVER & G. CLEVELAND WILHOIT, THE AMERICAN JOURNALIST: A PORTRAIT OF U.S NEWS PEOPLE AND THEIR WORK 5 (2d ed. 1991) (emphasis added).

66. CAMPBELL, *supra* note 54, at 126.

67. Bly was not the only female journalist to gain celebrity by publishing under a pseudonym byline. Barbara Belford observes that Annie Laurie (Winifred Black) and Dorothy Dix (Elizabeth Meriwether Gilmer) had stories published while working for William Randolph Hearst, "carrying large bylines." BARBARA BELFORD, BRILLIANT BYLINES: A BIOGRAPHICAL ANTHOLOGY OF NOTABLE NEWSPAPERWOMEN IN AMERICA 3 (1986).

68. KILMER, *supra* note 52, at 25.

69. *See* About James Fallows, http://jamesfallows.theatlantic.com/bio.php (providing a brief biography of Fallows and noting that he currently is national correspondent for *Atlantic Monthly*) (last visited Nov. 7, 2007).

70. *See* JAMES FALLOWS, BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY 74 (1996).

71. *Id.*

72. GRANT M. HYDE, JOURNALISTIC WRITING 250 (4th ed. 1946) (writing from his perspective as the director of the School of Journalism at the University of Wisconsin). Because there is little scholarly writing devoted solely to the topic of journalistic bylines, the author of this article decided to review old journalism textbooks as part of his research.

the third-person) about the exhilaration of seeing his own first byline, long before he became director of Northwestern University's Medill School of Journalism: "When the reporter picked up the paper the next morning, he experienced one of the biggest thrills of his life. On the front page, under a two-column heading, appeared his story, with his name attached as author. The by-line!"[73]

Today, it remains a personal goal—a personal sense of celebrity or ego gratification, perhaps—for neophyte reporters to earn a byline. As the authors of a textbook about current news writing and reporting observe, beginning reporters are "hoping to get their names on front-page stories—that is, to get a byline."[74]

In addition to the celebrity and status conferred via bylines, there is substantial merit within journalism circles to Judge Krieger's observation that byline inclusion "helps the public to evaluate the merit and credibility of the ideas or facts advanced."[75] As Campbell writes, advocates of the use of the byline in the 1890s saw the byline as "an important way to promote reliability and accountability among journalists."[76] He adds that, at the time, "bylines promised to be a tool to enhance the quality and *credibility* of journalism."[77] Other scholars also have observed that "[j]ournalists have long used bylines . . . perhaps to enhance a story's *credibility*."[78]

Inclusion of a byline adds to the transparency of the reporting and writing process. To this extent, it is interesting to notice the striking similarity in both language and logic between Judge Krieger's observation that including a byline "helps the public to evaluate the merit and credibility of the ideas or facts advanced,"[79] and the contention advanced

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73. HARRY FRANKLIN HARRINGTON & EVALINE HARRINGTON, WRITING FOR PRINT: A SAMPLE BOOK OF JOURNALISTIC CRAFTSMANSHIP, WITH SUGGESTIONS FOR HIGH SCHOOL PUBLICATIONS 132 (Rev. ed. 1929).

74. BRUCE D. ITULE & DOUGLAS A. ANDERSON, NEWS WRITING & REPORTING FOR TODAY'S MEDIA 7 (7th ed. 2007).

75. Jordan v. Pugh, 504 F. Supp. 2d 1109, 1118 n.22 (D. Colo. 2007).

76. CAMPBELL, *supra* note 54, at 125.

77. *Id.* (emphasis added). Accountability and credibility are related concepts, at least for some people, in the journalism world. *See* David Pritchard, *Introduction: The Process of Media Accountability*, *in* HOLDING THE MEDIA ACCOUNTABLE: CITIZENS, ETHICS, AND THE LAW 1, 1 (David Pritchard ed., 2000) (contending that "[s]ome writers think of media accountability in terms of news credibility"). Although a complete discussion is beyond the scope of this article, it should be noted that media credibility is a multi-dimensional concept that "has been measured with various dimensions such as believability, accuracy, trustworthiness, and fairness." Christopher E. Beaudoin & Esther Thorson, *Credibility Perceptions of News Coverage of Ethnic Groups: The Predictive Roles of Race and News Use*, 16 HOWARD J. COMM. 33, 34 (2005).

78. Hugh M. Culbertson & Nancy Somerick, *Quotation Marks and Bylines—What Do They Mean to Readers?*, 53 JOURNALISM Q. 463 (1976) (emphasis added).

79. *Jordan*, 504 F. Supp. 2d at 1118 n.22.

by Bill Kovach and Tom Rosenstiel in *The Elements of Journalism* that transparency "allows the audience to judge the validity of the information, the process by which it was secured, and the motives and biases of the journalist providing it."[80] Ultimately, any amount of additional credibility derived from adding a byline is important because, as a report issued by the Project for Excellence in Journalism found, thirty-nine percent of surveyed "journalists working at national newspapers, magazines and wire services say credibility is the biggest problem" facing journalism today.[81]

In summary, there is support for *both* the Bureau of Prisons' theory that bylines on news articles could turn inmates into celebrities behind bars[82] and for Judge Krieger's argument that allowing inmates to publish under bylines enhances the credibility of stories.[83] Of course, Krieger's argument assumes that either the reader knows or learns that the writer is an inmate.[84] Using this journalistic context to better understand the dispute in *Jordan v. Pugh*,[85] this Article next presents an overview of the First Amendment speech rights of prisoners, including the right to speak and the right to receive speech behind bars.

III. THE FIRST AMENDMENT RIGHTS OF THE INCARCERATED: PUTTING *JORDAN V. PUGH* INTO CONTEXT

In its 1987 opinion in *Turner v. Safley*,[86] the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[87] The high court rejected applying the much more rigorous strict scrutiny standard of review that typically applies to content-based laws in First Amendment jurisprudence,[88] reasoning that "[s]ubjecting the day-to-

80. BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 80–81 (2001).

81. *See* State of the News Media 2007: An Annual Report on American Journalism, Project for Excellence in Journalism, http://www.stateofthenewsmedia.com/2007/journalist_survey_prc1.asp (last visited Nov. 6, 2007).

82. *Jordan*, 504 F. Supp. 2d at 1120–21.

83. *Id.* at 1118 n.22.

84. *Id.*

85. *Id.* at 1118–21.

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

87. *Id.* at 89.

88. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (writing that a "content-based speech restriction" is permissible "only if it satisfies strict scrutiny," which requires that the law in question "be narrowly tailored to promote a compelling Government interest"); Sable Commc'ns. Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (writing that the

day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[89] In adding substance to its standard,[90] the Supreme Court identified four factors for judicial consideration:

- Whether there is a legitimate, content-neutral objective or goal that is rationally connected to, and logically advanced by, the regulation;[91]
- Whether any alternative means of exercising the right in question remain open to prison inmates despite the regulation;[92]
- Evaluation of the impact that an accommodation of the asserted constitutional right by an inmate "will have on guards and other inmates, and on the allocation of prison resources generally";[93] and
- Whether there is an "obvious, easy"[94] alternative to the prison regulation at issue that "fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests."[95]

This relaxed form of judicial scrutiny, later referred to by the Supreme Court as the "reasonableness standard,"[96] also comports with the Supreme Court's more recent observation in *Overton v. Bazzetta*[97] that "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration."[98] Writing for the court in *Overton*, Justice Kennedy emphasized that the judiciary "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish

government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). *See generally* CHEMERINSKY, *supra* note 12, at 903 (writing that "content-based discrimination must meet strict scrutiny").

89. *Turner*, 482 U.S. at 89.

90. *Id.*

91. *Id.* at 90.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Turner*, 482 U.S. at 91.

96. Thornburgh v. Abbott, 490 U.S. 401, 409 (1989).

97. Overton v. Bazzetta, 539 U.S. 126 (2003).

98. *Id.* at 131.

them."[99]

Turner v. Safley involved a First Amendment speech issue: whether or not a Missouri Division of Corrections' regulation severely limiting inmate-to-inmate correspondence to only a few situations violated the constitutional guarantee of free expression.[100] The Supreme Court upheld the regulation by applying its reasonableness standard,[101] and concluded that "the record clearly demonstrates that the regulation was reasonably related to legitimate security interests."[102] Specifically, the Supreme Court found Missouri's limitation on inmate-to-inmate correspondence to be content neutral, and that it "logically advances the goals of institutional security and safety identified by Missouri prison officials, and it is not an exaggerated response to those objectives."[103]

But *Turner v. Safley* does not always provide the appropriate judicial standard for interpreting and deciding the constitutionality of regulations that arguably impinge on the First Amendment speech rights of inmates. In an opinion given two years after *Turner*, the Supreme Court held that while "regulations affecting the sending of a 'publication' to a prisoner must be analyzed under the *Turner* reasonableness standard,"[104] the "implications of *outgoing* correspondence for prison security are of a categorically lesser magnitude than the implications of *incoming* materials."[105] Thus, when examining the constitutionality of a restriction affecting outgoing correspondence, "a closer fit between the regulation and the purpose it serves may safely be required."[106] In reaching this determination, the Supreme Court looked back to its earlier decision in *Procunier v. Martinez*,[107] where, for the first time, it considered "the appropriate standard of review for prison regulations restricting freedom of speech"[108] in the context of "censorship of prisoner mail."[109] The Supreme Court fashioned a two-part test in *Martinez*, holding that:

> Censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further

99. *Id.* at 132.

100. *Turner*, 482 U.S. at 81–82.

101. *Id.* at 89 (describing the reasonableness standard as "reasonably related to penological interests").

102. *Id.* at 91.

103. *Id.* at 93.

104. *Thornburgh*, 490 U.S. at 413.

105. *Id.* (emphasis added).

106. *Id.* at 412.

107. Procunier v. Martinez, 416 U.S. 396 (1974).

108. *Id.* at 406.

109. *Id.*

> an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.[110]

In a nutshell, the *Martinez* test "simply requires that there be a substantial need to do so and the curtailment be no greater than necessary."[111] Thus, which rule—*Turner* or *Martinez*—did Judge Krieger apply to determine the constitutionality of the no-byline regulation at issue in *Jordan*? The answer is both, a move possibly made in an effort to have the decision upheld in the event of an appeal to the Tenth Circuit Court of Appeals. In deciding to apply both tests, Judge Krieger noted that although she believed *Martinez* provided the appropriate test, the parties themselves had only briefed the case using the *Turner* test.[112] As she put it: "In deference to the parties' arguments, the Court has considered the evidence under both the *Martinez* and *Turner* tests, yet reaches the same outcome under both analyses."[113]

Before moving on to Part III for a review of Judge Krieger's analysis of the case, it is worth noting several other precedents involving speech rights of inmates to provide further context. They are set forth below in Sections A and B. To provide additional background and understanding, Section C examines and illustrates how the use of bylines is a standard practice of journalism-behind-bars as it is practiced today at one of the nation's most notorious state penitentiaries.

A. The Right to Speak

In *Pell v. Procunier*,[114] the Supreme Court rejected the claims of inmates that a California Department of Corrections' regulation "prohibiting their participation in face-to-face communication with

110. *Id.* at 413.

111. Kyrsten Sinema, Note, *Overton v. Bazzetta: How the Supreme Court Used Turner to Sound the Death Knell for Prisoner Rehabilitation*, 36 ARIZ. ST. L.J. 471, 486 (2004).

112. Jordan v. Pugh, 504 F. Supp. 2d 1109, 1120 (D. Colo. 2007).

113. *Id.*

114. Pell v. Procunier, 417 U.S. 817 (1974).

newsmen and other members of the general public[], violates their right of free speech under the First and Fourteenth Amendments."[115] In reaching this conclusion, the Court reasoned that:

> A prison inmate retains those *First Amendment* rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit *First Amendment* interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.[116]

The Supreme Court noted in *Pell* that the inmates could still speak to and communicate in person with people outside prison walls under the California regulations, writing that "[i]nmates are permitted to receive limited visits from members of their families, the clergy, their attorneys, and friends of prior acquaintance."[117] In addition, indirect contact with members of the news media was permissible, as "inmates have an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison."[118] The Supreme Court thus concluded that "in light of the alternative channels of communication that are open to prison inmates, we cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional."[119]

Today, in the federal prison system, visits with the news media are governed by a regulation that requires "advance appointments for visits,"[120] and that journalists must "obtain written permission from an inmate before photographing or recording the voice of an inmate participating in authorized programs and activities."[121]

115. *Id.* at 821.
116. *Id.* at 822.
117. *Id.* at 824–25.
118. *Id.* at 825.
119. *Id.* at 827–28.
120. 28 C.F.R. § 540.62(a) (2007).
121. 28 C.F.R. § 540.62(b) (2007).

B. The Right to Receive Speech

The Supreme Court has recognized, in some contexts, that there is an unenumerated or "peripheral" First Amendment "right to receive" speech and a "right to read."[122] As the Court wrote more than sixty years ago, the freedom of speech "embraces the right to distribute literature . . . and necessarily protects the *right to receive it*."[123]

The right of inmates to receive certain forms of expression in prison is limited, particularly when it comes to sexual content.[124] For instance, the United States Court of Appeals for the District of Columbia upheld the Bureau of Prisons' narrow interpretation and enforcement of a regulation related to the Ensign Amendment,[125] which barred the distribution of sexually explicit commercial material.[126] Finding that "the statute and regulation[s] satisfy *Safley*'s demand for reasonableness,"[127] the appellate court in *Amatel* rejected the claims of three inmates who were "each denied receipt of either *Playboy* or *Penthouse*."[128]

Similarly, in March 2007, a federal district court in Pennsylvania upheld the Ensign Amendment and the related federal regulations enforced by the Bureau of Prisons, finding that they were reasonable under *Safley* "as applied to *Playboy* and *Penthouse*."[129] In *Ramirez v. Pugh*, Judge McClure determined, in relevant part, "that prohibiting possession of pornography rationally relates to the rehabilitation of all prisoners."[130] He added that:

> Even if the restrictions promoted only the rehabilitation of sex offenders, the effect such materials have on sex offenders is so obvious and considerable, and the chance of sex offenders receiving such materials from the general population so significant and unchallenged, that preventing the general inmate population access to *Playboy* and *Penthouse* for the sake of the

122. Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965).

123. Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (emphasis added).

124. *See* Amatel v. Reno, 156 F.3d 192, 198–203 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999); Ramirez v. Pugh, 486 F. Supp. 2d 421 (M.D. Pa. 2007) (rejecting inmate rights to receive sexual content).

125. *Amatel*, 156 F.3d at 201–02; 28 C.F.R. § 540.72(b) (2007) (providing definitions of key terms such as "sexually explicit" and "nudity" within the Ensign Amendment); see also 28 U.S.C. § 530C(b)(6) (2007).

126. *Amatel*, 156 F.3d at 194.

127. *Id.* at 202.

128. *Id.* at 195.

129. *Rameriz*, 486 F. Supp. 2d at 437.

130. *Id.* at 436.

rehabilitation of sex offenders is rational.[131]

In addition to limitations on the right to receive sexual materials, the Supreme Court in *Bell v. Wolfish* upheld a federal rule limiting the right of prisoners to receive hardback books only if they are mailed directly from publishers, book clubs or bookstores due to security concerns.[132] The Court reasoned that such a "limited restriction is a rational response by prison officials to an obvious security problem. It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings."[133]

In 2006, a divided Supreme Court upheld, against a First Amendment challenge, a Pennsylvania regulation that denied prisoners housed in the Long Term Segregation Unit (LTSU) access to newspapers, magazines and photographs.[134] The LTSU is home to Pennsylvania's "most incorrigible, recalcitrant inmates,"[135] and Justice Breyer concluded in a four-justice plurality "that prison officials have set forth adequate legal support for the policy."[136]

In a very recent (and, as of the writing of this Article, unlitigated) move affecting the right to receive speech, the Bureau of Prisons "instructed its chaplains to remove all but approved religious texts from the shelves of federal prisons."[137] This policy not only raises free speech questions, but also issues affecting the freedom of religion under the Establishment Clause of the First Amendment.[138] As *The New York Times* reported in September 2007:

> The chaplains were directed by the Bureau of Prisons to clear the shelves of any books, tapes, CDs and videos that are not on a list of approved resources. In some prisons, the chaplains have recently dismantled libraries that had thousands of texts collected over decades, bought by the prisons, or donated by

131. *Id.* at 430.

132. Bell v. Wolfish, 441 U.S. 520 (1979).

133. *Id.* at 550–51.

134. *See generally* Beard v. Banks, 126 S. Ct. 2572 (2006) (holding that prison officials set forth adequate legal support in favor of the policy).

135. *Id.* at 2576.

136. *Id.*

137. Editorial, *Prison Books*, WINSTON-SALEM J., Sept. 19, 2007, at A10, *available at* http://www/journalnow.com (last visited Feb. 23, 2008) (regarding a removal of religious books that advocate violence and terrorism).

138. U.S. CONST. amend. I (providing in relevant part that "Congress shall make no law respecting an establishment of religion").

churches and religious groups.[139]

How this battle plays out remains to be seen, but it clearly affects the right of prisoners to receive speech in a context decidedly unlike the deprivation of sexually explicit magazines like *Playboy* and *Penthouse* noted above.

C. Bylines and Journalism at the Louisiana State Penitentiary

Beyond the legal issues over bylines, there is a strong argument to be made about the therapeutic value of prisoners engaging in journalism – something that is perhaps best exemplified by the inmate-written, byline-laden magazine called the *Angolite* at the Louisiana State Penitentiary in Angola.[140] As *The Washington Post* reported in 2005, convicted murderer Wilbert Rideau in the 1970s "set out on a personal odyssey of redemption, rehabilitating himself as a prison journalist, becoming co-editor of the *Angolite*, a magazine produced by the prisoners at the Louisiana State Penitentiary at Angola that has frequently been a finalist for a National Magazine Award."[141] The November/December 2006 issue of the *Angolite*, for instance, stretches seventy-two pages and includes news briefs, a collection of inmate-written poetry, articles on legal issues, sports and religion, and, notably, an inmate-bylined article on a visit to the prison by erstwhile presidential candidate and current U.S. Senator Sam Brownback, a Republican from Kansas.[142]

If the federal Supermax in Florence, Colorado is known for its colorful cast of notorious inmates, then the state facility at Angola has, as *The New York Times* recently put it, a legacy "soaked in the blood of its inmates. In 1951, 31 prisoners slashed their Achilles tendons to protest Angola's violence and living conditions."[143] Writing certainly did seem to prove redemptive for Wilbert Rideau, who was released in early 2005, after

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139. Laurie Goodstein, *Prisons Purge Books on Faith From Libraries*, N.Y. TIMES, Sept. 10, 2007, at A1.

140. *See* ANGOLITE, http://www.corrections.state.la.us/LSP/angolite.htm (last visited Nov. 10, 2007).

141. Wil Haygood, *The Long Road Out of Lake Charles: Wilbert Rideau, Convicted Three Times for a 1961 Killing, Goes Free*, WASH. POST, Jan. 17, 2005, at A1.

142. *See* ANGOLITE, Vol. 31, No. 6, Nov.-Dec. 2006 (copy on file with author). In October 2007, Senator Brownback dropped his candidacy for the Republican nomination for president. *See also* Michael D. Shear, *Evangelicals Gather at Summit; Brownback, a Top Choice of Many, Ends White House Bid*, WASH. POST, Oct. 20, 2007, at A4 (reporting how Brownback "officially withdrew from the 2008 presidential contest').

143. Paul Von Zielbauer, *Radio Coming to You Live on Death Row at Angola*, N.Y. TIMES, Apr. 12, 2006, at E1.

having served more the four decades behind bars.[144] As Theodore M. Shaw, the director-counsel of the N.A.A.C.P. Legal Defense and Educational Fund, put it, Rideau's tale is "a story of redemption,"[145] pointing "to Mr. Rideau's *journalistic work as proof of his transformation*."[146]

Apparently that writing has also gained Rideau the same type of fame and celebrity that the Bureau of Prisons wants to prevent by excluding bylines from articles submitted to news media outlets. In particular, publishing companies were eager to have Rideau tell his life story in book form—and to pay him handsomely for it.[147] The fame gained for the editors and writers of the *Angolite* is evidenced by the fact that their magazine has "won national prizes including the Robert F. Kennedy Journalism Award, the American Bar Association's Silver Gavel Award and the George Polk Award for special interest reporting."[148] Somewhat striking circumstantial evidence in support of the Bureau of Prisons' bylines-lead-to-celebrity argument is that a February 1999 Associated Press story on Rideau ran under the headline, *Celebrity Inmate is in the Spotlight Again*.[149] The AP story, which ran long before Rideau was released for time-served after a jury on retrial in 2005 found him guilty of manslaughter rather than murder,[150] notes that:

> A typical day last week saw Rideau preparing for visitors from Emory University journalism school and the Southwestern Louisiana criminal justice classes. Celebrity lawyer Johnnie Cochran was expected, *Time Magazine* was phoning, *The New York Times* was back for a second day of interviews. On top of that he had a magazine to get out and was trying to sell another

144. *See* Adam Nossiter, *Found Guilty of a Lesser Charge, La. Prison Journalist to be Freed*, WASH. POST, Jan. 16, 2005, at A5 (describing how Rideau, in a 2005 re-trial of his case before a mixed-race jury, was convicted of the lesser charge of manslaughter (rather than murder, of which he was convicted during his previous trials before all-white, all-male juries) and then released for time served); Michael Perlstein, *Wilbert Rideau Savors Freedom, Mulls Future*, TIMES-PICAYUNE (New Orleans, La.), Jan. 17, 2005, at 1 (describing the future possibilities for Rideau upon his release).

145. Adam Liptak, *Freed After 44 Years, a Prison Journalist Looks Back and Ahead*, N.Y. TIMES, Jan. 17, 2005, at A11.

146. *Id.* (emphasis added).

147. Keith J. Kelly, *Murder He Wrote: Ex-Big House Bard Shops Book in $500k Range*, N.Y. POST, June 10, 2005, at 36.

148. Associated Press, *Famed Prison Journalist Sinclair Paroled*, ASSOC. PRESS ONLINE, Apr. 25, 2006, *available on* LexisNexis Academic Database.

149. Mary Foster, *Celebrity Inmate is in the Spotlight Again*, ASSOC. PRESS ONLINE, Feb. 28, 1999, *available on* LexisNexis Academic Database.

150. Kelly, *supra* note 147.

film.[151]

This fame-behind-bars story for a convict-journalist appears to support the theory advanced by the Bureau of Prisons in *Jordan v. Pugh* to squelch the use of bylines.[152] However, there are not too many Wilbert Rideau's today who have gained such fame for their journalistic writing and documentary development[153] behind bars. He may be the exception and simply represent an isolated case of an inmate-journalist gaining fame both inside and outside the prison walls for his writing.[154]

More importantly, there is no factual record to support the theory that Rideau's "big wheel"[155] status, as the Bureau of Prisons might put it,[156] ever caused any safety or security problems at Angola.[157] Ultimately, then, it is interesting to contrast the no-byline policy of the Federal Bureau of Prisons[158] with the practice of award-winning inmate journalism at a high-profile state penitentiary,[159] as they appear to represent two very different philosophies. The latter practice at Angola has seemed to work successfully,[160] suggesting that there may not be any long-term term negative implications from the enjoinment by Judge Krieger of the federal no-bylines regulation and that, instead, there actually could be therapeutic and redemptive benefits for some prisoners who, like Wilbert Rideau, gain mainstream news media attention for their writing behind bars.[161]

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151. Foster, *supra* note 149.

152. Jordan v. Pugh, 504 F. Supp. 2d 1109, 1111–12 (D. Colo. 2007).

153. The documentary that Rideau helped to develop, "The Farm: Angola, U.S.A.," was nominated for an Oscar in 1999. *See generally* Frank Green, *Oscar Night Down on 'The Farm,'* RICHMOND TIMES DISPATCH (Va.), Mar. 28, 1999, at G-1 (providing background on how the inmates, including Rideau, watched the television broadcast of the Oscars when the documentary was nominated).

154. Although it is beyond the scope of this article, an analysis of the public redemption-through-writing of executed Crips gang founder Stanley "Tookie" Williams is worthy of exploration in future articles. *See generally* Bobby Caina Calvan, *Execution Puts California In Death-Penalty Spotlight*, BOSTON GLOBE, Dec. 25, 2005, at A29 (describing how Williams "became a high-profile symbol of redemption during his quarter-century on California's death row"). While in prison, Williams wrote "books [that] urged young people to avoid the violent life he had chosen." Mary Sanchez, *The Martyring of a Killer*, KANSAS CITY STAR, Dec. 15, 2005, at Commentary.

155. *Jordan*, 504 F. Supp. 2d at 1112.

156. *Id.*

157. *See id.*

158. *Id.* at 1112.

159. Green, *supra* note 153.

160. *Id.*

161. *Id.*

IV. *JORDAN V. PUGH*: OF BIG WHEELS AND BYLINES

When Judge Krieger ruled in August 2007 in favor of Mark Jordan and against the constitutionality of the Bureau of Prisons' no-byline policy,[162] her opinion struck a blow against the generally deferential manner in which federal courts have evaluated restrictions on prisoners' First Amendment rights.[163] As the Supreme Court wrote in 2001, "because the 'problems of prisons in America are complex and intractable,' and because courts are particularly 'ill equipped' to deal with these problems, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge."[164] So what was it that influenced Judge Krieger's decision to go against this tide of deference?

To understand how she reached her conclusion in favor of Mark Jordan,[165] it is helpful to know a little bit more about Jordan himself and, specifically, his writing. In particular, Krieger called Jordan a "prolific writer,"[166] noting that he had published both on the Internet and in print, "sometimes under a byline or with some other form of attribution."[167] His byline woes began in earnest when prison officials discovered, during the screening of his incoming mail, that *Off!* magazine, published by the State University of New York at Binghamton, had run two articles under Jordan's byline in 2001.[168] In both instances, he was punished for violating 28 C.F.R. § 540.2,[169] which provides in relevant part that "*[t]he inmate may not act as reporter or publish under a byline.*"[170]

It was the latter part of this prohibition—publishing under a byline—of which Mark Jordan ran afoul.[171] As for the former part of the regulation, Judge Krieger observed that Jordan "never acted, requested to act or has been requested to act as a reporter."[172] The case thus boiled down to a battle over the bylines.

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162. *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1126 (D. Colo. 2007).

163. *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 229 (2001).

164. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 404–05 (1974)).

165. *Jordan*, 504 F. Supp. 2d at 1126.

166. *Id.* at 1115.

167. *Id.*

168. *Id.* The second of the two articles was published under the byline of Josef Shevitz, "Jordan's religious birth name." *Id.* at 1115 n.15. This fact did not affect either the prison's decision to punish Jordan for this particular article or the analysis of Judge Krieger.

169. *Jordan*, 504 F. Supp. 2d at 1115.

170. 28 C.F.R. § 540.20(b) (2007) (emphasis added).

171. *Jordan*, 504 F. Supp. 2d at 1115.

172. *Id.*

To justify its byline prohibition, the government primarily hung its legal hat on a rather primitive (and, for Judge Krieger, ultimately unsupported) theory: The big wheel security risk that bylines allegedly create.[173] The chain of logic that flows here maps out somewhat simply:

Bylines → Fame/Status/Celebrity→ Security Risk

To evaluate whether this theory was in fact valid, Judge Krieger searched the record for "evidence of past occurrences and the likelihood of future occurrences"[174] caused by an inmate who publishes under a byline in the news media.[175] In reality, this turned out to be pure conjecture.[176] As Judge Krieger wrote, the Bureau of Prisons "presented no evidence of any instance where an inmate who published under a byline in the news media became a 'big wheel,' or more importantly, became a security risk."[177] To the contrary, she observed that Ted Kaczynski, the so-called Unabomber,[178] in fact had been allowed to publish "articles under bylines without disciplinary repercussion,"[179] yet Kaczynski had never been declared a big wheel and, furthermore, his bylined news media publications failed to create any identifiable security risk.[180]

Inconsistency in the enforcement of the federal regulation also plagued and undermined the government's argument that bylined articles submitted to news media organizations could turn prisoners into big wheel security risks.[181] In particular, Judge Krieger noted that the Bureau of Prisons actually encourages inmates to "submit drawings, fiction, non-fiction or poetry for publication as 'manuscripts,' which are reviewed for content by prison officials prior to leaving the prison."[182] It only enforces its byline prohibition on "news media articles."[183] The problem for Judge Krieger was that bylines in allowable publications "could result in similar

173. *Id.* at 1120–21. The author uses the word "primarily" in this sentence because, in addition to the big-wheel security theory, the government also argued that the use of bylines allowed an inmate to run a business behind bars, but this argument was quickly rejected, as Judge Krieger found that "[t]here is, simply, no evidence linking an inmate's outgoing news media correspondence to an inmate conducting a business." *Id.* at 1124. Indeed, Judge Krieger earlier in her opinion had referred to this as a "secondary purpose" behind the regulation. *Id.* at 1117.

174. *Id.* at 1120.

175. *Jordan*, 504 F. Supp. 2d at 1120.

176. *Id.*

177. *Id.*

178. *See* Henson, *supra* note 4 (noting that Kaczynski is housed at the Supermax facility in Florence, Colorado, and describing him as the "Unabomber").

179. *Jordan*, 504 F. Supp. 2d at 1115.

180. *Id.* at 1120.

181. *Id.*

182. *Id.* at 1120–21.

183. *Id.* at 1121.

'big wheel' status. For example, an inmate might publish a book, or series of essays or poems that become popular in or outside of the prison."[184]

In an effort to counter its problem of inconsistent enforcement, the Bureau of Prisons argued that the security risk created by publishing bylined news media articles is *greater than* the security risk created by publishing in non-news venues.[185] In particular, the government argued:

> There are three alleged differences: (1) the news media has greater credibility (presumably with inmates and prison staff, although this is not clear) than other media; (2) the news media publishes more quickly than other media; and (3) bylined articles in the news media are not subject to staff review before they are submitted.[186]

Krieger rejected these arguments, again finding a lack of factual support in the record:

> No evidence was presented of what news media publications prisoners receive, whether any inmate or member of the corrections staff perceives news media publications differently from other publications, and if so, what differences are perceived. Assuming that the news media has greater credibility with prisoners or staff, such credibility would affect only the author's status, not whether the status creates a security risk.[187]

During the bench trial, Maureen Cruz, associate warden of operations at the Florence Supermax facility, testified "that inmates with lines of communication to the outside world could become 'big wheels' in prison, gaining power and influence over other inmates."[188] Student attorney Jack Hobaugh, however, countered during argument before Judge Krieger that the no-byline was "an irrational and exaggerated response" to such worries.[189]

Applying these facts and arguments to the judicial tests created in both *Procunier v. Martinez*[190] and *Turner v. Safley*[191] described earlier, Judge Krieger found the government had failed to justify its regulation. Applying *Martinez*, Judge Krieger explained that "the Court cannot

184. *Id.*

185. *Jordan*, 504 F. Supp. 2d at 1121 (emphasis added).

186. *Id.*

187. *Id.*

188. Bruce Finley, *Law Students vs. the U.S. DU Team Challenges Restriction on Inmates' Writing, Reporting*, DENV. POST, June 3, 2007, at C2.

189. *Id.*

190. Procunier v. Martinez, 416 U.S. 396, 406–13 (1974).

191. Turner v. Safley, 482 U.S. 78, 89–91 (1987).

conclude that particularized regulation of an inmate's bylined publications in the news media is essential to any security objective."[192] Later Judge Krieger reasoned that there was "insufficient evidence to establish a particular security risk associated with bylined articles published in the news media as compared with any other permissible form of publication."[193] In stark contrast to this absence of evidence to support the regulation, Judge Krieger observed "the chilling effect of the Byline Regulation upon an inmate's freedom of expression of ideas to news media and the news media's right to publish such ideas with attribution to the inmate."[194] Even if the news media organization chooses not to publish an inmate-written, bylined article, the receipt and review of the submission of the article under a byline is significant because an inmate's writing "may inform the news media of facts to be investigated or of the perspective of an inmate or inmates, generally."[195] Ultimately, Judge Krieger concluded that the byline prohibition, as enforced by the Bureau of Prisons, "violates the First Amendment rights of Mr. Jordan, other inmates in federal institutions, and the press."[196] She affirmed her decision in October 2007.[197]

V. CONCLUSION

The more information there is, the better. From the perspective of a newspaper or magazine reader, that alone should justify Justice Krieger's decision striking down the Bureau of Prisons' byline prohibition. If we know who is writing an article, then, at least theoretically, we can learn about the writer's personal history.[198] Then, in turn, we can gain a better perspective and understanding of the biases, beliefs, and predilections that might influence and guide that writer's article and narrative. Thus, at bottom, Judge Krieger's decision validates the First Amendment rights of three groups: (1) inmates; (2) news organizations that might not publish an article unless accompanied with a byline; and (3) readers. As the Venn diagram below illustrates, the trio of interests ultimately intersect with inmate byline use, helping both news organizations and readers.

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192. *Jordan*, 504 F. Supp. 2d at 1124.

193. *Id.* at 1125.

194. *Id.* at 1118.

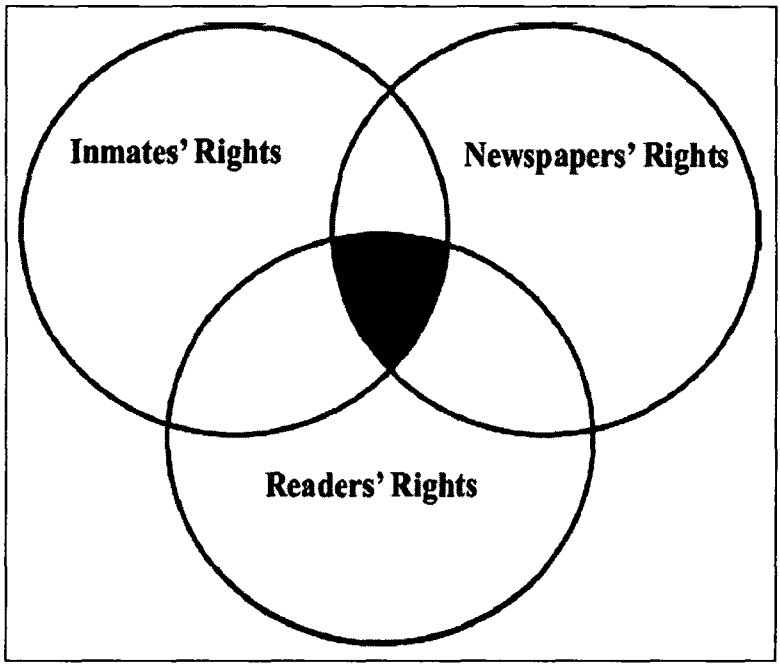
195. *Id.* at 1118 n.21 (footnotes omitted).

196. *Id.* at 1126.

197. Jordan v. Pugh, 2007 WL 2908931 (D. Colo. Oct. 4, 2007).

198. Concerned readers, for instance, can search online for the name of a journalist in order to learn more about them or what else they may have written.

A TRIO OF VINDICATED RIGHTS



The decision also makes sense in a broader context. When one thinks of bylines behind bars, the name "Mark Jordan"—a man of violence[199]—probably does not come readily or first to mind for many people today. But another name—a man of peace, Martin Luther King, Jr.—is remembered in particular, for his "Letter from Birmingham Jail," written in April 1963 while King was jailed for his role in mass demonstrations.[200] King did not intend the letter to be a news article, but instead wrote it "in response to eight white local clergy who criticized his work and ideas as unwise and wrong."[201] Nonetheless, excerpts from it were published under King's name in *The New York Post Sunday Magazine* the month after it was written and, shortly after that, "many other newspapers published the whole text. The publication improved national support for the Birmingham

199. *See* United States v. Jordan, 485 F.3d 1214, 1216 (10th Cir. 2007) (describing how Jordan murdered another inmate).

200. *See generally Birmingham Jail: A City Ponders Place In History*, N.Y. TIMES, Apr. 28, 1986, at A20 (describing the history of the jail and King's writing the famous letter from behind its walls).

201. K. LEE LERNER ET AL., GOVERNMENT, POLITICS, AND PROTEST: ESSENTIAL PRIMARY SOURCES 71 (2006).

campaign against segregation."[202]

It also is significant to note that writing from behind bars (not just writing about crimes *after* individuals are released from jail or prison) has a long tradition. The Supreme Court took note of this fact in 1991 when it referenced the "sobering bibliography listing hundreds of works by American prisoners."[203] The bibliography, which includes such works as inmate Sam Melville's early 1970s book *Letters from Attica*,[204] is found in an amicus brief filed in 1990 by the Association of American Publishers, Inc. in the case of *Simon & Schuster v. New York State Crime Victims Board*.[205]

This Article also has pointed out, citing the situation at the Louisiana State Penitentiary at Angola, the possible therapeutic and redemptive value of bylined journalism for some inmates like Wilbert Rideau.[206] This is yet another rationale to support Judge Krieger's ruling for Mark Jordan.

Finally, there is still, arguably, an additional reason to laud the outcome in *Jordan v. Pugh*: Protection of bylined journalism in the public-school student press. At first glance, it seems like quite a long leap to say that a ruling adverse to inmate Mark Jordan on the byline-inclusion issue could be stretched to the realm of high school journalism at public schools. Upon closer reflection and analysis, however, this Article argues below that this is not necessarily so.

First, it is clear that the First Amendment speech rights of *both* students in public high schools and adults in prison are far more limited than the rights of non-incarcerated adults. Both students and prisoners are, for purposes of speech rights, essentially treated as second-class citizens.[207] For instance, in 2007 in *Morse v. Frederick*,[208] Chief Justice Roberts, writing the majority opinion, quoted favorably the high court's earlier

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202. Rita S. Fierro, *Letter From the Birmingham Jail*, *in* ENCYCLOPEDIA OF BLACK STUDIES 308 (Molefi Kete Asante and Ama Mazama eds., 2005).

203. Simon & Schuster v. N.Y. State Crime Victims Board, 502 U.S. 105, 121 (1991).

204. SAMUEL MELVILLE, LETTERS FROM ATTICA (1972).

205. Brief of Amicus Curiae on Behalf of the Association of American Publishers, Inc. in Support of Petitioner, Simon & Schuster, Inc., Simon & Schuster, Inc. v. N.Y. State Crime Victims Board, 502 U.S. 105 (1991), 1990 U.S. Briefs 1059, 1991 U.S. S. Ct. Briefs LEXIS 156.

206. *See* Liptak, *supra* note 145.

207. As Geoffrey R. Stone, the Harry Kalven, Jr., Distinguished Service Professor of Law at the University of Chicago, writes, "in dealing with speech in '*restricted environments*,' such as the military, *prisons*, and *schools*, which are not structured according to traditional democratic principles, the Court has increasingly deferred to the judgment of administrators in the face of claimed infringements of First Amendment rights." Geoffrey R. Stone, *Freedom of Speech* (Update 1), *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1132, 1133–34 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (emphasis added).

208. Morse v. Frederick, 127 S. Ct. 2618 (2007).

observation in *Bethel School District v. Fraser*[209] that "'the constitutional rights of students in public school are *not* automatically coextensive with the rights of adults in other settings.'"[210] To illustrate, Chief Justice Roberts specifically noted that had student Matthew Fraser delivered his sexual innuendo-laden speech "in a public forum outside the school context, it would have been protected."[211] Thus, although it may be that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[212] their rights are more limited, as the pro-school outcomes and results in cases like *Morse*, *Fraser* and *Hazelwood School District v. Kuhlmeier*[213] make clear.

Somewhat akin to the lofty schoolhouse-gate language from *Tinker v. Des Moines Independent Community School District*[214] cited above, the Supreme Court has observed that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[215] But, as with the speech rights of public high school students, the Court has observed that prisoner speech rights "must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration."[216] Furthermore, "this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."[217] Just as the educational setting of a public high school justifies limiting students' expressive rights, the Court has held that "when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security."[218] Those familiar with *Tinker* will quickly recognize how closely this language reflects the *Tinker* philosophy that student speech rights must be "applied in light of the special characteristics of the school

209. Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

210. *Morse*, 127 S. Ct. at 2626 (quoting *Fraser*, 478 U.S. at 682) (emphasis added).

211. *Id.* at 2621 (2007) (quoting *Fraser*, 478 U.S. at 682) (emphasis added).

212. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

213. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

214. *See Tinker*, 393 U.S. 503.

215. Turner v. Safley, 482 U.S. 78, 84 (1987) (quoting Procunier v. Martinez, 416 U.S. 396, 405–06 (1974)).

216. Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) (quoting *Turner*, 482 U.S. at 85).

217. *Id.* at 408.

218. Bell v. Wolfish, 441 U.S. 520, 547 (1979).

environment."[219] While schools have a basic educational mission, the objectives of safety and security loom large in the penal system.

Second, beyond the fact the First Amendment speech rights of both students in public high schools and adults in prison are far more limited than the rights of others, there is a striking similarity between the judicial tests fashioned in the prisoner-rights case of *Turner v. Safley* and the student-rights case of *Hazelwood School District v. Kuhlmeier*. In particular, compare the following language:

> • *Turner*: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related to legitimate penological interests.*"[220]
>
> • *Kuhlmeier*: "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns.*"[221]

There is scant difference between the judicial tests of "*reasonably related to legitimate penological interests*" and "*reasonably related to legitimate pedagogical concerns.*" The terms "interests" and "concerns" are virtually fungible, meaning that the only substantive difference is the substitution of "penological" for "pedagogical." The notion of reasonable relatedness employed in both tests gives wide berth to the enforcing authorities' discretion, be it prison officials or school administrators, as compared to a hypothetically more stringent "directly related" nexus requirement.

Given the way that some public school officials today like to closely control the content of their student newspapers when it comes to anything that might make them, their schools or their students look bad,[222] it would

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219. *Tinker*, 393 U.S. at 506.

220. *Turner*, 482 U.S. at 89 (emphasis added).

221. *Kuhlmeier*, 484 U.S. at 273 (emphasis added).

222. For example, officials at Utica High School admitted that they censored an article written by student Katy Dean about a lawsuit against the school district simply because Dean's article did not take the school district's side. *See* Dean v. Utica Cmty. Sch., 345 F. Supp. 2d 799, 813 (E.D. Mich. 2004) (noting, in pertinent part, that the school's "defense counsel conceded that Dean's article would not have been removed from the *Arrow* if it had explicitly taken the district's side with respect to the Frances' lawsuit against UCS," and reasoning that the school's "explanation that the article was deleted for legitimate educational purposes such as bias and factual inaccuracy is wholly lacking in credibility in light of the evidence in the record").

Another more recent example illustrates this tendency. As the *Atlanta Journal-Constitution* reported in October 2007, the principal at East Coweta High School in Georgia impounded 500 undistributed copies of the student newspaper, *Smoke Signals*, "and told the staff that he wanted more positive and uplifting stories." Maureen Downey, *Our Opinions: A Principal's Immodest*

not be too hard to imagine this hypothetical scenario:

> *A principal prohibits the use of bylines in the student newspaper after a specific student reporter receives adulation and celebrity status among classmates for penning bylined articles that severely criticize and disparage school administrators and officials.*

Had Judge Krieger concluded that the Bureau of Prisons' byline prohibition was reasonably related to legitimate *penological* concerns, a principal at a public school could logically conclude that it was reasonably related to legitimate *pedagogical* concerns to stifle the use of bylines in student newspapers. This is particularly true because, as some have argued, educators today are just as concerned with safety and security inside their schools (a prison warden, of course, is concerned with this too and to a greater extent) as they are with the educational mission.[223] No doubt some public school students feel as they are treated as prisoners when it comes to their speech rights in a post-Columbine world,[224] but that discussion is beyond the scope of this Article. What is important here is that Judge Krieger's ruling in favor of Mark Jordan did not give school districts a possible legal opening for banning bylines in school publications. Although *Jordan* dealt with bylined articles submitted to outside news organizations,[225] this distinction easily could have been glossed over by public school officials (and their legal counsel) targeting bylines on in-school publications.

Ultimately, the long-term implications of *Jordan v. Pugh* remain to be seen. This Article has provided context about the historical journalistic use (and non-use prior to the Civil War) of bylines that Judge Krieger did not

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Response, ATLANTA J.-CONST., Oct. 23, 2007, at 10A. In addition, to prevent negative content in the future, the school created a "newspaper advisory board" to review all content. Caitlyn Vanorden & Justin Jones, *From Smoke Signals: Indian Princess Pageant Shallow, Destructive*, ATLANTA J.-CONST., Oct. 23, 2007, at 10A.

223. As the author of a recent law journal article wrote: "Long gone are the times when an educator's obligation was solely to teach and to prevent students from being impaired by a lack of education. Instead, the role of the modern educator is much broader. In addition to educating students and encouraging their intellectual well-being, the job of the modern educator also encompasses protecting students from an array of physical harms including threats to their lives." Mary Jo Roberts, *Porter v. Ascension Parish School Board: Drawing in the Contours of First Amendment Protection for Student Art and Expression*, 52 LOY. L. REV. 467, 467 (2006).

224. *Cf.* Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 117 (2003) (writing that "[t]he horrific massacre at Columbine High School in Littleton, Colorado had closed out the 1998–1999 school year and was a staple of media coverage and conversation over the summer. The period that followed the murders was marked by a string of suspensions, expulsions, and even criminal charges against students who were deemed to have been engaged in threats").

225. Jordan v. Pugh, 504 F. Supp. 2d 1109, 1112 (D. Colo. 2007).

write about and, apparently, did not consider in her decision. Similarly, her August and October 2007 opinions fail to note that bylines are a regular part of journalism as practiced by inmates in Louisiana at a well-known penitentiary.[226] Should the case later be appealed to the United States Court of Appeals for the Tenth Circuit, such information might provide a broader perspective and framework for the judges, in which to render a decision, a framework more sociological and beyond what Roscoe Pound might have called a "mechanical jurisprudence."[227] In brief, the journalistic precedent for the use of bylines might be able to help influence the legal precedent in this area. Future research in this area might evaluate and study the security risks posed behind bars for inmates *other than* Wilbert Rideau who gained celebrity for their writings behind bars in various state penal systems, such as Stanley "Tookie" Williams in California noted earlier.[228]

226. *See generally* Louisiana State Penitentiary Website, *available at* http://www.doc.louisiana.gov/lsp (last visited Nov. 10, 2007).

227. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

228. Calvan, *supra* note 154; Sanchez, *supra* note 154 (describing the situation including the now-executed Williams).