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PRISONER RIGHTS: THE EVIDENTIARY USE OF PRISONER MAIL  
*State v. Johnson*, 456 S.W.2d 1 (Mo. 1970)

While incarcerated prior to trial on an unbailable charge of first degree murder, defendant Johnson wrote and sought to mail a letter to a friend in which he admitted his guilt to the murder charge. As a part of customary procedure, the letter was censored by jail officials. Discovering the admission, the officials turned the incriminating letter over to the police. Subsequently, the prosecuting attorney obtained, over objection, admission of the letter into evidence at defendant's trial, wherein a conviction followed. Although reversing the conviction on other errors, the Missouri Supreme Court, on appeal, *held*: Neither the censorship of an unconvicted, jailed defendant's outgoing mail by state officials, nor a conviction based partially on admissions obtained by virtue of that censorship, is unconstitutional.<sup>1</sup>

Following the Supreme Court's landmark 1919 decision in *Stroud v. United States*,<sup>2</sup> the Missouri Supreme Court reasoned that: (1) the authorities did not obtain the letter by means of a search because the defendant was aware that his mail would be censored, and therefore, made the incriminating statements voluntarily; (2) there was no compulsory self-incrimination, because the state had exerted no influence over the defendant to compel the admissions of guilt; and (3) no privileged communication was breached, because the letter was not addressed to the accused's lawyer, minister, or to the courts.<sup>3</sup> The court's line of reasoning, except for its last argument, is a fairly accurate representation of the *Stroud v. United States* decision. In *Stroud*, a convicted felon was accused of murdering a guard in the federal prison where he was serving his sentence under the original conviction. While still imprisoned under the original conviction, Stroud wrote several letters which tended to establish his guilt, ". . . and under the practice and discipline of the prison [they] were turned over ultimately to the . . . district attorney."<sup>4</sup> On appeal, following a conviction based in part on

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1. *State v. Johnson*, 456 S.W.2d 1 (Mo. 1970).

2. 251 U.S. 15 (1919). Besides *Stroud*, the court relied on: *Hayes v. United States*, 367 F.2d 216 (10th Cir. 1966); *Lee v. Tahash*, 352 F.2d 970 (8th Cir. 1965); *Adams v. Ellis*, 197 F.2d 483 (5th Cir. 1953); *Medlock v. Burke*, 285 F. Supp. 67 (E.D. Wis. 1968); *In re Bull*, 123 F. Supp. 389 (D. Nev. 1954); *Ex parte Snyder*, 62 Cal. App. 697, 217 P. 777 (1923); *Baker v. State*, 202 So. 2d 563 (Fla. 1967); *Ellis v. State*, 227 Miss. 440, 86 So. 2d 330 (1956); *State v. Hawkins*, 70 Wash. 2d 797, 425 P.2d 390 (1967); *State v. Booker*, 68 W. Va. 8, 69 S.E. 295 (1910).

3. 456 S.W.2d at 3.

4. 251 U.S. at 21.

the admission into evidence of the letter, the Supreme Court affirmed. The Court held that the federal exclusionary rule<sup>5</sup> would not apply to the letters, since the letters were voluntarily written by the defendant, absent any threats or coercion, and came into the government's possession under an established practice reasonably designed to promote prison discipline. As a result, the Court concluded that there had been no unreasonable search or seizure, nor any compulsory self-incrimination.<sup>6</sup>

*Stroud* has been followed almost without exception by numerous lower court decisions,<sup>7</sup> and its rationale has been extended in a few cases to include unconvicted prisoners.<sup>8</sup> Generally, the lower court opinions have interpreted *Stroud* as a broad stamp of approval for both prison mail censorship and use of evidence acquired via the censorship practices.<sup>9</sup>

Prison censorship of mail, as well as other related penal practices, were once justified on the theory that a convict, by his crime and conviction, forfeited his rights, and became a "slave of the state",<sup>10</sup> but this harsh approach has been abandoned. Instead, the general view today is that "a prisoner retains all the rights of an ordinary citizen except those expressly or by implication taken from him by law."<sup>11</sup> Despite this formal change in emphasis, the judiciary has been reluctant to oversee prison administrative rules which allegedly infringe on retained constitutional rights of prisoners. Specifically, courts have avoided any investigation into prison mail restrictions, preferring instead to judicially notice, or presume, that mail censorship in penal institutions is a necessary administrative infringement on the prisoner's rights.<sup>12</sup> The

5. *Weeks v. United States*, 232 U.S. 383 (1914).

6. 251 U.S. at 22.

7. *E.g.*, *Hayes v. United States*, 367 F.2d 216 (10th Cir. 1966); *In re Bull*, 123 F. Supp. 389 (D. Nev. 1954); *Baker v. State*, 202 So. 2d 563 (Fla. 1967); *Ellis v. State*, 227 Miss. 440, 86 So. 2d 330 (1956).

8. *Green v. Maine*, 113 F. Supp. 253 (D. Me. 1953); *Ellis v. State*, 227 Miss. 440, 86 So. 2d 330 (1956); *Bloeth v. Cyrtz*, 39 Misc. 2d 1039, 242 N.Y.S.2d 307 (Spec. T. Suff. Co. 1963).

9. Typical judicial attitudes are exemplified in *Fulwood v. Clemmer*, 206 F. Supp. 370 (D. D.C. 1962). "Ordinarily, regulation of mail of prisoners is matter within administrative discretion of prison officials. Courts lack general supervisory powers over prisons and in the absence of a showing of violation of legal rights or abuse of discretion by prison officials, courts should not interfere." *Id.* at 375-76.

10. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 796 (1871).

11. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 355 U.S. 887 (1945).

12. *E.g.*, *Lee v. Tahash*, 352 F.2d 970 (8th Cir. 1965); *Pope v. Dagget*, 350 F.2d 296 (10th Cir. 1965); *Medlock v. Burke*, 285 F. Supp. 67 (E.D. Wis. 1968); *Labat v. McKeithen*, 243 F. Supp. 662 (E.D. La. 1965); *United States ex rel. Cobb v. Maroney*, 216 F. Supp. 910 (W.D. Pa. 1963); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D. D.C. 1962); *United States ex rel. Thomas v. Fay*, 197 F.

only substantive limitations imposed on mail censorship thus far are that the censorship must not be arbitrary, hamper communication with the courts, or violate the confidentiality of the lawyer-client relationship.<sup>13</sup> *Johnson*, without any discussion of the matter, merely falls into line with this approach.

The difficulty in following these earlier precedents without any further consideration of the issues presented is that the court must conclude that the scope of individual protection afforded under the first, fourth and fifth amendments is today the same as viewed by the Supreme Court in 1919.<sup>14</sup> Recently, the District Court of Rhode Island concluded in *Palmigiano v. Travisono*<sup>15</sup> that the shift in individual protection under those constitutional amendments requires at the very least that prison officials justify in fact the necessity of the censorship. The court, under the facts before it, concluded that total censorship of prisoner mail "serves no rational, deterrent, rehabilitative, or security purpose."<sup>16</sup> The evidence offered by prison administrators to show that inmates, without censorship, would plan escapes, enter into criminal conspiracies, and commit mail frauds was found totally unconvincing by the court.<sup>17</sup> Particularly significant in this regard was the court's finding that prison authorities did not consider it necessary to monitor prisoner conversations with visitors in order to maintain security. As a result, the court concluded that in the absence of a real, factually proven necessity for mail censorship, the practice is an impermissible infringement on both the prisoners' freedom of speech and freedom from unreasonable searches and seizures. Specifically, the court held that censorship of unconvicted prisoners' outgoing mail was, in the absence of a search warrant or a showing of probable cause, an unreasonable search and seizure for which there was no voluntary, as contrasted with required, consent.<sup>18</sup> *Palmigiano*, by requiring a specific showing of necessity, represents a significant departure from the more typical approach of

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Supp. 855 (S.D.N.Y. 1961); see generally Note, *Beyond The Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 515-26 (1963).

13. See, e.g., *Dayton v. McGranery*, 201 F.2d 711 (D.C. Cir. 1953); *United States ex rel. Wakely v. Pennsylvania*, 247 F. Supp. 7 (E.D. Pa. 1965); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D. D.C. 1962); see also Note, *Prison Censorship of Attorney—Client Mail*, 22 BAYLOR L. REV. 623 (1970).

14. See generally Note, *The Problems of Modern Penology: Prison Life and Prisoner's Rights*, 53 IOWA L. REV. 671 (1967); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

15. 317 F. Supp. 776 (D. R.I. 1970).

16. *Id.* at 785.

17. *Id.*

18. *Id.* at 791.

*Johnson*. The questions then are: (1) whether the Missouri Supreme Court's adherence to the "old line" in *Johnson*, without any consideration of recent shifts in constitutional criminal procedure, can be justified, and if so (2) are the factual distinctions between *Johnson* and *Stroud* significant enough to negate *Stroud's* precedential value?

Although *Stroud* has never been overruled, its bases have been eroded by subsequent Supreme Court decisions. The scope of fourth amendment protection has been significantly extended since *Stroud*. No longer is it necessary to find physical trespass before invoking fourth amendment claims.<sup>19</sup> The focus now is upon the individual's "expectation of privacy".<sup>20</sup> This shift in emphasis from a physical to a personal reference is most evident in the area of wire tapping.

The Supreme Court first ruled on this issue in 1928 in the case of *Olmstead v. United States*.<sup>21</sup> The Court, holding there was no violation of the accused's rights under the fourth or fifth amendment, stated:

There is no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business. . . . and, there was no searching, there was no seizure. The evidence was secured by the use of hearing and that only. There was no entry of the houses or offices. . . .<sup>22</sup>

This holding prompted Justice Brandeis' dissent<sup>23</sup> and was subsequently overruled in *Katz v. United States*.<sup>24</sup> In *Katz*, the Court held: "For the Fourth Amendment protects people, not places. . . . What [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine . . . can no longer be regarded as controlling. The Government's activities . . . violated the privacy upon

19. *Katz v. United States*, 389 U.S. 347, 353 (1967).

20. *Id.* at 360 (Harlan J., concurring).

21. 277 U.S. 438 (1928).

22. *Id.* at 462, 464.

23. "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. . . . They conferred, as against the government, the right to be let alone . . . . To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment." 277 U.S. at 478 (Brandeis, J., dissenting).

24. 389 U.S. 347 (1967).

which he [the accused] justifiably relied . . . and thus constituted a 'search and seizure'."<sup>25</sup>

Although this position seems to read a right of privacy into the fourth amendment, it is apparent that the "expectation of privacy" still calls for a physical reference.<sup>26</sup> It could easily be argued that Johnson's incarceration and knowledge of censorship practices afforded him no "expectation of privacy". In rebuttal, however, it could be argued that the mere knowledge that a prison official would read his letter and approve its sending to a supposed "confidential" third party does not call for a conclusion that Johnson could expect the contents of the letter to be made "public". Dissemination is not necessarily a corollary of censorship.

If the emphasis is shifted to an expectation of dissemination, Johnson's situation may be closer to that posited by Justice Stewart in his majority opinion in *Hoffa v. United States*.<sup>27</sup> In that case, the Court upheld the use of information gained from an informer who had been privy to several "private" meetings in which incriminating statements were made. Justice Stewart stated that there was no violation of the fourth amendment because:

[N]either this Court nor any member of it has expressed the view that the Fourth Amendment protects a wrongdoer's *misplaced belief* that the person to whom he *voluntarily* confides his wrongdoing will not reveal it.<sup>28</sup>

Attention must therefore be directed to what constitutes "misplaced belief" and "voluntariness". Such an inquiry would recognize a distinction between the risk of disclosing information in a setting of the declarant's own choosing and one imposed upon him by the state. Johnson's imprisonment may have been much closer to the "custodial interrogation" situation described in *Miranda v. Arizona*.<sup>29</sup> Johnson did not choose the surroundings in which he made his disclosure; rather, they were forced upon him by the state. The entire environment in which he was expected to prepare his defense and safeguard his rights—an environment including confinement, censorship, and the fact that he

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25. *Id.* at 351-353.

26. *Id.* at 361 (Harlan J., concurring).

27. 385 U.S. 293 (1966).

28. *Id.* at 302 (emphasis added).

29. 384 U.S. 436, 444 (1966) (" . . . questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."); *but see* State v. Billings, 84 Nev. 55, 436 P.2d 212 (1968).

apparently did not realize that his admission could be used against him—was created by the state. The state, it might be argued by analogy to *Miranda*, by placing Johnson in this milieu, in effect secured a confession from him.<sup>30</sup>

If this distinction is recognized, Johnson's "misplaced belief" must be analyzed in light of the state's active duty to inform him of the consequences of his actions.<sup>31</sup> Consequently, his knowledge must include not only the fact that his mail will be censored but the possible dissemination also. This environmental setting is also important if the term "voluntary" is to be used as a basis for a waiver of rights. Once again, *Miranda* dictates that a waiver must be "knowledgeable" and "intelligent", and the burden of proving waiver is on the prosecution.<sup>32</sup> This is a further indication that knowledge of potential dissemination may be important.

If analyzed merely in the setting of *Hoffa*, however, still a serious question arises as to whether Johnson's actions were voluntary. Certainly, he voluntarily wrote the letter to the *intended addressee*. But if he had no right to withhold the letter from the prison official, can it also be said he "voluntarily" confined the information to that party? It must be remembered that Justice Stewart in *Hoffa* speaks of *voluntarily confiding to the informer*, and it is the informer that is the reference for any "misplaced belief" or "voluntariness". If *Miranda* or *Hoffa* guidelines are followed, therefore, a "search and seizure" might be recognized, even though Johnson ". . . himself laid in front of the jailer . . ." <sup>33</sup> the incriminating letter.

Once this determination is made, the inquiry then turns to the reasonableness of that search.<sup>34</sup> Although the "slave of the state"

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30. See generally *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("No distinction can be drawn between statements which are confessions and statements which amount to 'admissions' of part or all of an offense."); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 630, 633 (1886) (" . . . we are unable to perceive that the seizure of a man's private . . . papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.").

31. 384 U.S. at 469 ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.").

32. *Id.* at 475.

33. 456 S.W.2d 1, 3 (1970).

34. U.S. CONST., amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . ." (Emphasis added).

doctrine has been rejected, incarcerated persons necessarily suffer some diminution of rights.<sup>35</sup> One of the restrictions that has been historically recognized is the censorship of prisoner's mail. This restriction has been accepted as an essential function of prison administration and maintenance of order and discipline.<sup>36</sup> Despite this historical foundation, the growing recognition of prisoner rights<sup>37</sup> requires a more precise analysis of infringements of these rights. This is particularly true when fundamental constitutional privileges are concerned.<sup>38</sup> As discussed earlier, there is a clear distinction between censorship and dissemination. This distinction is critical in ascertaining the extent of the prison officials' right to censor prisoner communication.<sup>39</sup>

Prison censorship practices have been based on institutional discipline and security. To the extent that they are directed toward these ends,

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35. *Price v. Johnston*, 334 U.S. 266 (1948).

36. *E.g.*, *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967); *Lee v. Tahash*, 352 F.2d 970 (8th Cir. 1965); *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964); *Adams v. Ellis*, 197 F.2d 483 (5th Cir. 1952); *Medlock v. Burke*, 285 F. Supp. 67 (E.D. Wis. 1968); *Garrison v. Maine*, 89 F. Supp. 244 (D. Me. 1950).

37. Several areas of prisoner rights have received considerable judicial attention. Although prison officials have been given considerable discretion in censoring mail, this authority is curtailed when the correspondence involves legal matters addressed to the courts, public officials, or the prisoner's attorney. *E.g.*, *Spires v. Dowd*, 271 F.2d 659 (7th Cir. 1959); *Palmigiano v. Trivisono*, 317 F. Supp. 776 (D. R.I. 1970); *Vraniak v. Randolph*, 161 F. Supp. 553 (E.D. Ill.), *aff'd*, 261 F.2d 234 (7th Cir. 1958), *cert. denied*, 359 U.S. 949 (1959); *Brabson v. Wilkins*, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965). Another area that has resulted in considerable litigation is prisoner freedom of religion. This issue has received increasing attention because of the growth of the Black Muslim religion. Some courts have condoned total or partial deprivation of some religious practices. *Jones v. Willingham*, 248 F. Supp. 791 (D. Kan. 1965); *In re Ferguson*, 55 Cal. 2d 663, 361 P.2d 417, 72 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961); *Cooke v. Tramburg*, 43 N.J. 514, 205 A.2d 889 (1964). There is, however, a growing recognition that a prisoner's freedom of religion is a privilege which will receive judicial protection. *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); *Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963), *rev'd per curiam*, 378 U.S. 546 (1964); *Pierce v. La Valle*, 293 F.2d 233 (2d Cir. 1961); *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961), *appeal dismissed per stipulation*, 304 F.2d 670 (4th Cir. 1962) (without prejudice); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D. D.C. 1962). For other areas of attention, see *Singer, Censorship of Prisoner's Mail and the Constitution*, 56 A.B.A.J. 1051 (1970); Note, *The Problems of Modern Penology: Prison Life and Prisoner's Rights*, 53 IOWA L. REV. 671 (1967); Note, *Prison Restrictions—Prisoner Rights*, 59 J. CRIM. L.C. & P.S. 386 (1968); Comment, *Prisons and Prisoners*, 5 SUFF. L. REV. 259 (1970); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

38. *Lanza v. New York*, 370 U.S. 139, 143-44 (1962) (" . . . though it may be assumed that even in a jail, or perhaps especially there, the relationship which the law has endowed with particular confidentiality must continue to receive unceasing protection. . . ."); *Thomas v. Collins*, 323 U.S. 516, 530 (1944) (" . . . these liberties [(1st amendment) have] a sanctity and a sanction not permitting dubious intrusion.").

39. *Berger v. New York*, 388 U.S. 41 (1967) (authorized search or seizure should involve no greater invasion of privacy than is necessary).

ensorship could be considered appropriate and reasonable.<sup>40</sup> Interpreting this right to include the confiscation and evidentiary use of incriminating information can not be supported by the avowed purposes and reasons for the imposed censorship. Just as an otherwise authorized search and seizure can become tainted if the authority is abused,<sup>41</sup> so can an otherwise "reasonable" censorship become "unreasonable" if it is abused.

Here, there is no legitimate connection between the purposes and reasons for prison censorship on the one hand and the evidentiary use of Johnson's letter on the other. Had the Missouri Supreme Court recognized the increased scope of individual protection under the first, fourth and fifth amendments, the diminution in precedential value of *Stroud* should have become obvious.<sup>42</sup>

Regardless of the outcome of a *Stroud* analysis, however, the Missouri Supreme Court skirted another important constitutional issue when it made that doctrine generally applicable to prisoners awaiting trial. It should be kept in mind that *Stroud* had been convicted of a previous crime when subjected to the prison censorship regulations. Even the archaic "slave of the state" doctrine was predicated upon the forfeiture of rights resulting from conviction of a crime.<sup>43</sup> If the same restrictions are to be applied to accused as to convicted individuals, it is even more important that these restrictions be directed toward and limited to valid administrative and security purposes.<sup>44</sup> The legal

40. *But see* Palmigiano v. Travisano, 317 F. Supp. 776, 785 (D.R.I. 1970).

41. *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Warden of Md. Pen. v. Hayden*, 387 U.S. 294 (1967).

42. Such a result seems totally consistent with the judicial process. Justice Cardozo wrote, ". . . the content of constitutional immunities is not constant, but varies from age to age. . . . A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. . . . [W]hile it is true to its function, it maintains its power of adaptation, its suppleness, its play." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 82-84 (1921).

43. "He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state." *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 796 (1871).

44. *Warden of Md. Pen. v. Hayden*, 387 U.S. 294, 310 (1967) (scope of search must be "strictly tied to and justified by" the circumstances which make it permissible); *Lee v. Tahash*, 352 F.2d 970, 972 (8th Cir. 1965) (" . . . there could be refusal or restriction as to correspondence which would be regarded by some courts as shocking to general conscience and fairness."); *Bailleaux v. Holmes*, 177 F. Supp. 361 (D. Ore. 1959) (" . . . right to inspect should not be used unnecessarily to delay communication to attorney or courts, since such delay could amount to an effective denial of a prisoner's right to access to court, and right to inspect and censor does not give prison authorities right to pass upon sufficiency of legal pleadings.").

One state court answered an accused's contention that he should not be subject to the same restrictions as convicted individuals since accused individuals freed on bail are not subject to such

incarceration of an accused should in no way diminish the duty of the state to prove its own case.<sup>45</sup> Any use of censorship procedures to procure convictions from the accused is tantamount to coerced testimony.<sup>46</sup>

From the foregoing it is apparent that there is “. . . no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasions which the search [or seizure] entail.”<sup>47</sup> The Missouri Supreme Court foreclosed this balancing by applying an outdated concept of “a search”. In light of recent developments, this seems inappropriate. Once the courts recognize the retention of constitutional privileges by incarcerated individuals, there seems a duty on their part to analyze an alleged infringement as they would any other constitutional infringement. The fact of incarceration and the unique problems of prison society necessarily affect the balance. They should not, however, foreclose the use of the scale.

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restrictions by saying: “While it is true that petitioner’s status is now that of an accused rather than one who has been convicted, the fact remains that by virtue of the applicable law he is required to be confined in jail and is, therefore, subject to the rules and regulations that the jail authorities have found it necessary to promulgate for the proper functioning of that institution. . . . Prisoners who furnish bail are no longer subject to the control of the jail authorities. . . . On the other hand, inmates of the jail of necessity must be subject to the proper regulations . . . if orderly procedures are to obtain.” *Bloeth v. Cyrta*, 242 N.Y.S.2d 307, 309 (Spec. T. Suff. Co. 1963). For another aspect of this same problem see H. PARKER, *THE LIMITS OF THE CRIMINAL SANCTION* ch. 8 (1968).

*Johnson* was jailed on an unbailable offense. A more complex issue could have been raised, however, had he been detained in jail because of his inability to pay the bail. Studies indicate there is a correlation between pre-trial detention and likelihood of conviction. See Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67, 87-88 (1963); Rankin, *The Effect of Pre-Trial Detention*, 39 N.Y.U.L. Rev. 641, 643 (1964); Wald, *Pre-Trial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. Rev. 631 n.1 (1964). An inability to communicate freely and privately is certainly an important factor in hindering an inmate’s capacity to defend himself. It might be argued that pre-trial restrictions on constitutional privileges because of inability to pay bail violates the standards of equal protection set forth in *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353, 355, 357 (1963) (“. . . State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty . . . we think an unconstitutional line has been drawn between rich and poor.”).

45. *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) (“. . . American system of criminal prosecution is accusatorial, not inquisitorial . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.”).

46. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Boyd v. United States*, 116 U.S. 630 (1886).

47. *Camara v. Municipal Ct.*, 387 U.S. 523, 536-37 (1967).