NOTES

CONSTITUTIONAL LAW: SUPREME COURT INDICATES SIGNIFICANT LIMITATION UPON REVIEW OF STATE CRIMINAL PROCEDURES

In affirming convictions pursuant to a Texas statute implementing common law recidivist procedure, the Supreme Court attenuated the efficacy of allegations of jury prejudice and of alternative means as constitutional determinants in the consideration of criminal procedures absent potential frustration of specific constitutional provisions. Based upon pragmatic considerations of judicial efficiency and deference to state prerogative, the decision may extend beyond its unique factual situation to narrow significantly the role of due process in defining the range of permissible state criminal procedures.

RECIDIVIST statutes characteristically provide that criminal defendants who have previously been convicted of certain crimes will receive harsher punishment than first offenders.[1] Such statutes do not create an independent crime nor impose additional punishment for past offenses; rather, an increased penalty is assigned for the present crime because of the defendant's recidivist status.[2] Although

[1] Recidivist statutes are found in virtually all states. See, *e.g.*, ALASKA STAT. § 12.55.060 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-1649 to -50 (1956); DEL. CODE ANN. tit. 11, §§ 39-11-12 (Supp. 1966); MICH. STAT. ANN. §§ 28.1082 to .1085 (1954); N.C. GEN. STAT. ANN. §§ 14-19, 15-147 (1953); W. VA. CODE ANN. §§ 61-11 to -18 (1966); 2 WHARTON'S CRIMINAL EVIDENCE § 645 (Anderson ed. 1955) [hereinafter cited as WHARTON]; Note, 32 TUL. L. REV. 765, 768 (1958). See generally RUBIN, THE LAW OF CRIMINAL CORRECTION 392-426 (1963) [hereinafter cited as RUBIN]; G. Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640 (1945); L. Brown, *West Virginia Habitual Criminal Law*, 59 W. VA. L. REV. 30 (1956); Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238 (1948); Comment, 26 TENN. L. REV. 259 (1959).

[2] *E.g.*, Graham v. West Virginia, 224 U.S. 616, 624 (1912); McDonald v. Massachusetts, 180 U.S. 311, 312 (1901); McGarry v. Fogliani, 370 F.2d 42, 43-44 (9th Cir. 1966); State v. Davis, 140 N.W.2d 925 (Iowa 1966); Howard v. State, 422 P.2d 548 (Nev. 1967); State v. Washington, 47 N.J. 244, 220 A.2d 185 (1966); State *ex rel.* Combs v. Boles, 151 S.E.2d 115 (W. Va. 1966). See generally RUBIN 393; Note, 48 COLUM. L. REV. 238 (1948); Note, 33 N.Y.U.L. REV. 210 (1958); Comment, 48 VA. L. REV. 597, 603 (1962). Compare Specht v. Patterson, 386 U.S. 605 (1967).

It is well settled that recidivist laws are not, as a general matter, constitutionally infirm. See, *e.g.*, Oyler v. Boles, 368 U.S. 448 (1962) (constitutionality of statutes no longer open to question); Bryger v. Burke, 334 U.S. 728 (1948) (statutes do not subject defendant to double jeopardy); McDonald v. Massachusetts, *supra* (statutes do not impair right to trial by jury or equal protection of the laws); Moore v. Missouri, 159

recidivist laws are uniform in their ultimate effect, the procedures by which they are implemented differ widely among the various jurisdictions. For example, a Texas statute[3] was formerly interpreted to provide that allegations and evidence of a defendant's past convictions were to be presented to the jury simultaneously with evidence concerning the present crime.[4] In the recent Supreme Court case of *Spencer v. Texas*,[5] it was contended that this procedure, utilized in conjunction with the Texas recidivist statute,[6] unfairly influenced the jury's determination of guilt of the present crime and thus violated the due process clause of the fourteenth amendment. Rejecting this contention, a divided Court reconciled diversity among the courts of appeal[7] and delineated vaguely defined limitations upon Supreme Court intervention in state criminal procedures.

Leon Spencer was indicted for murder with malice of his common-law wife. Pursuant to Texas law,[8] the indictment also alleged that Spencer previously had been convicted of a similar offense which fact, if proved, would require the jury[9] to determine a sentence of death

U.S. 673 (1895) (statutes do not result in double jeopardy, cruel and unusual punishment nor deny equal protection of the laws); Price v. Allgood, 369 F.2d 376 (5th Cir. 1966); Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966); People v. Cohen, 366 Ill. 190, 8 N.E.2d 184 (1937); State v. Zywicki, 175 Minn. 508, 221 N.W. 900 (1928); State v. Rhodes, 408 S.W.2d 68 (Mo. 1966); State v. Roberts, 400 S.W.2d 175 (Mo. 1966); Bailleaux v. Gladen, 230 Ore. 606, 370 P.2d 722, *cert. denied*, 371 U.S. 848 (1962); State v. Lei, 59 Wash. 2d 1, 365 P.2d 609 (1961); Note, 33 N.Y.U.L. REV. 210 (1958); Note, 11 RUTGERS L. REV. 654, 660 (1957). See also Chewning v. Cunningham, 368 U.S. 443 (1962); Chandler v. Fretag, 348 U.S. 3 (1954); Graham v. West Virginia, *supra*; Ughbanks v. Armstrong, 208 U.S. 481 (1908).

[3] TEXAS CODE CRIM. PROC. art. 642 (1941).

[4] Article 642 has since been repealed by TEXAS CODE CRIM. PROC. art. 36.01 (1965). The more recent statute explicitly postpones the presentation of prior crimes evidence to the jury until after a determination of guilt in non-capital cases. See TEXAS CODE CRIM. PROC. art. 37.07 (1965).

[5] 385 U.S. 554 (1967), *affirming* 389 S.W.2d 304 (Tex. Crim. 1965), *rehearing denied*, 386 U.S. 969 (1967).

[6] TEXAS PEN. CODE ANN. arts. 61-64 (1952).

[7] Procedures similar to that utilized in *Spencer* had been held unconstitutional by the Third Circuit in United States *ex rel.* Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963), when applied in capital cases and by the Fourth Circuit in all cases, Lane v. Warden, 320 F.2d 179 (4th Cir. 1963). However, such procedures had been found constitutional by the Eighth Circuit in Wolfe v. Nash, 313 F.2d 393 (8th Cir.), *cert. denied*, 374 U.S. 817 (1963) and the Fifth Circuit in Taylor v. Beto, 346 F.2d 157 (5th Cir. 1965) and Reed v. Beto, 343 F.2d 723 (5th Cir. 1955), *aff'd*, 385 U.S. 554 (1967). *Cf.* Powell v. United States, 35 F.2d 941 (9th Cir. 1929). At least one district court had rejected the Fourth Circuit rule: United States *ex rel.* Jenkins v. Follette, 257 F. Supp. 533 (S.D.N.Y. 1965).

[8] TEXAS CODE CRIM. PROC. art. 642 (1941).

[9] TEXAS CODE CRIM. PROC. art. 693 (1941).

or of life imprisonment.[10] The defendant unsuccessfully offered to stipulate that he had been previously convicted as alleged in the indictment. Subsequently, his objections both to the reading of the unexpurgated indictment and to the introduction of supporting evidence were denied.[11] Although the jury was charged concerning the choice of penalty if it found the prior conviction proved, it was specifically instructed not to weigh the recidivist evidence in considering guilt upon the substantive charge.[12] The jury found Spencer guilty on both counts and he was sentenced to death.[13]

Imposition of the enhanced penalty under most recidivist statutes requires that the defendant's prior convictions be proved before a jury.[14] Divergence of opinion as to when proof of recidivism should be made has engendered three basic procedures.[15] One of these, the

[10] The applicable article of the Texas recidivist statute, TEXAS PEN. CODE ANN. art. 64 (1952), provides as follows: "A person convicted a second time of any offense to which the penalty of death is affixed as an alternative punishment shall not receive on such second conviction a less punishment than imprisonment for life . . . ."

If the prior convictions were not proved, the sentence could be death or imprisonment for not less than two years. TEXAS PEN. CODE ANN. art. 1257 (1952).

[11] 385 U.S. at 557; Spencer v. State, 389 S.W.2d 304, 306 (Tex. Crim. 1965).

[12] 385 U.S. at 557-58.

[13] *Ibid.* Spencer encompasses three cases sharing common issues and combined for review. The second case, *Bell v. Texas,* involved similar facts as to procedure and objections. *Id.* at 558. However, the allegations of both present and prior crimes were not of capital offenses, but of robbery, and thus fell under TEXAS PEN. CODE ANN. art. 62 (1948) by which punishment is to be the maximum for that particular offense. *Ibid.* Moreover, punishment was set by the judge rather than the jury. *Ibid.* The third case, *Reed v. Beto,* concerned a third-offender prosecution for burglary under TEXAS PEN. CODE ANN. art. 63 (1948) and followed the same procedure as in *Bell.* 385 U.S. at 559. *Reed,* however, arose through petition for habeas corpus. *Id.* at 558 n.4. The majority opinion does not distinguish among the cases; therefore, references to *Spencer* are equally applicable to all three cases. *Id.* at 559.

[14] *E.g.,* ALASKA STAT. ANN. § 12.55.060 (Supp. 1966); COLO. REV. STAT. §§ 39-13-1 to -3 (1963); DEL. CODE ANN. tit. 11, § 3912 (Supp. 1966); FLA. STAT. ANN. § 775.11 (1965); IND. STAT. ANN. § 9-2208 (1956); IOWA CODE ANN. § 747.4 (1946); KY. REV. STAT. § 431. 190 (1962); MD. ANN. CODE, Rule 713 (1963); MICH. STAT. ANN. § 28.1085 (1954) (jury may be waived); MONT. REV. CODE ANN. § 94-7407 (1947); N.H. REV. STAT. ANN. § 591:1 (1955); N.M. STAT. ANN. § 40A-29-7 (1953); OHIO REV. CODE ANN. § 2961.13 (1953) (jury may be waived); PA. STAT. ANN. tit. 18, § 5108 (d) (1963); VT. STAT. ANN. tit. 13, § 11 (1957); VA. CODE ANN. § 53-296 (Supp. 1966); United States *ex rel.* Jenkins v. Follette, 257 F. Supp. 533 (S.D.N.Y. 1965); State v. Salazar, 3 Ariz. App. 114, 412 P.2d 289 (1966); State v. Ferrone, 96 Conn. 160, 113 Atl. 452 (1921); State v. Lovejoy, 60 Idaho 632, 95 P.2d 132 (1939); Cortez v. State, 165 Tex. Crim. 320, 314 S.W.2d 589 (1958); L. Brown, *West Virginia Habitual Criminal Law,* 59 W. VA. L. REV. 30, 47 (1956); Note, 25 MONT. L. REV. 250, 251 (1964); 43 TEXAS L. REV. 392 (1965). *But see* note 15 *infra.* A number of states provide that prior convictions need not be proved if they are admitted or stipulated. See, *e.g.,* COLO. REV. STAT. § 39-13-3 (1963); DEL. CODE ANN. tit. 11, § 3912 (Supp. 1966). *But see* Spencer v. State, 389 S.W.2d 304 (Tex. Crim. 1965).

[15] See generally, Note, *Recidivist Procedures,* 40 N.Y.U.L. REV. 332 (1965). A

"Supplementary Procedure," separates determination of present guilt and of recidivist status into two distinct proceedings. Subsequent to a trial resulting in a guilty verdict, a new indictment is filed alleging prior convictions and a new jury is empaneled to try the charge.[16] If the previous convictions are proved, the penalty prescribed by the recidivist statute is imposed.[17] This procedure thus assures that the initial jury has no knowledge of earlier crimes while considering present guilt, although the defendant may be uninformed at the inception of the first trial of the charges which may ultimately be brought against him.[18]

A second procedure, favored by a number of courts[19] and commentators,[20] is the English-Connecticut two-stage approach.[21] It requires that the indictment be divided into two parts, the first setting forth the substantive charge and the second, the former convictions.

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fourth procedure is utilized by a few states whereby the judge, sitting without a jury, determines proof of recidivism. *E.g.*, MINN. STAT. ANN. § 609.16 (1963); NEB. REV. STAT. § 29-2221 (1964); ORE. REV. STAT. § 168.065 (1963). See Note, 48 COLUM. L. REV. 238, 241 (1948); Note, 33 N.Y.U.L. REV. 210, 215-16 (1958); Note, 11 RUTGERS L. REV. 654, 662-63 (1957).

[16] See, *e.g.*, FLA. STAT. ANN. § 775.11 (1965); MICH. STAT. ANN. § 28.1085 (1954); OHIO REV. CODE ANN. § 2961.13 (Page 1953); W. VA. CODE ANN. §§ 61-11-18, -19 (1966); Note, 48 COLUM. L. REV. 238, 240 (1948). See also Oyler v. Boles, 368 U.S. 448 (1962); Graham v. West Virginia, 224 U.S. 616 (1912).

[17] See, *e.g.*, Oyler v. Boles, *supra* note 16; Graham v. West Virginia, *supra* note 16. See generally Note, *Recidivist Procedures*, 40 N.Y.U.L. REV. 332, 338-47 (1965); Note, 33 N.Y.U.L. REV. 210, 213-15 (1958); Comment, 48 VA. L. REV. 597, 615-16 & n.94 (1962).

[18] It has been argued that the defendant is placed in the position of defending himself against an unknown charge where he is not informed that after his conviction he will be prosecuted as a recidivist. See Note, 40 N.Y.U.L. REV. 332, 339-41 (1965); 48 VA. L. REV. 597, 617 (1962). *But see* Oyler v. Boles, *supra* note 16, at 452; Reynolds v. Cochran, 365 U.S. 525, 530 n.7 (1961).

[19] See, *e.g.*, Lane v. Warden, 320 F.2d 179 (4th Cir. 1963); Haggard v. Henderson, 252 F. Supp. 763 (M.D. Tenn. 1966); Heinze v. People, 127 Colo. 54, 253 P.2d 596 (1953); State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963); Harris v. State, 369 P.2d 187 (Okla. Crim. 1962); Harrison v. State, 394 S.W.2d 713 (Tenn. 1965); State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946); State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44 (1935).

[20] See, *e.g.*, Note, 48 COLUM. L. REV. 238, 242, 247-49 (1948); Note, 25 MONT. L. REV. 250 (1964); Note, 40 N.Y.U.L. REV. 332 (1965); Note, 48 NW. U.L. REV. 742, 747 (1954); Note, 11 RUTGERS L. REV. 654, 663 (1957); Note, 14 TEMPLE L.Q. 386, 394-95 (1940); 43 TEXAS L. REV. 392, 393 (1965).

[21] English law early provided that evidence of previous convictions was not to be presented to the jury until guilt had been determined on the substantive offense. If the prior convictions had been alleged in the indictment, that portion was not to be read until after guilt had been established. Previous Convictions Act, 1836, 6 & 7 Will. IV, c. 111. From this statute there subsequently developed a two-step procedure under which the jury neither received evidence of prior convictions nor determined habitual offender status until it had convicted the defendant of the present crime. See also

In the absence of the jury, the entire indictment is read to the defendant and he is asked to plead to both allegations. If he admits only the prior convictions, then trial is held on the present charge with no further reference to the defendant's record. If the accused denies both parts of the indictment, only the first section is read to the jury, and upon it trial is commenced. Should the defendant be found guilty, the second portion of the indictment is read to the jury, recidivist status is determined, and the appropriate penalty is assigned.[22] Here again the jury remains unaware of prior convictions while determining substantive guilt, but both issues are conveniently tried before the same jury in the same proceeding.[23]

The common law procedure utilized by Texas in *Spencer* was once employed by a majority of states, although its popularity has declined in recent years.[24] It is the only process whereby, in a unitary proceeding, recidivist evidence precedes a determination of guilt. Moreover, the recidivist evidence may be introduced at the trial prior to evidence upon the present charge.[25] The common law procedure is a recognized exception to the general rule that in criminal proceedings the introduction of evidence concerning past convictions constitutes prejudicial error.[26] While this procedure

Larceny Act, 1861, 24 & 25 Vict., c. 96, § 116; Regina v. Shuttleworth, 3 C&K 375, 376, 175 Eng. Rep. 596 (Cr. Cas. Res. 1851).

This dual procedure was first adopted in the United States by the Connecticut Supreme Court of Errors in State v. Ferrone, 96 Conn. 160, 113 Atl. 452 (1921).

[22] See generally Harrison v. State, S.W.2d 713 (Tenn. 1965); Note, 33 N.Y.U.L. REV. 210, 216-17 (1958).

[23] Moreover, under Connecticut procedure, the defendant is fully informed at the inception of his trial as to the full extent of the charges against him. Compare note 18 *supra*.

[24] See RUBIN 394; Note, 33 N.Y.U.L. REV. 210, 211 (1958); Note, 14 TEMPLE L.Q. 386 (1940); Seventeen states presently utilize the common law procedure. See Note 72 *infra*.

[25] See Hamm v. Commonwealth, 407 S.W.2d 138 (Ky. 1966). At Spencer's trial, each juror was informed of the recidivist issue on *voir dire* and the first evidence introduced during the trial proper was of the previous conviction. Brief for Petitioner, pp. 8-10, Spencer v. Texas, 385 U.S. 554 (1967).

[26] It is the general rule that evidence of prior crimes or convictions may not be introduced during a criminal trial. See generally MCCORMICK, EVIDENCE §§ 157-58 (1954 ed.) [hereinafter cited as MCCORMICK]; 1 WHARTON § 232. The exclusionary rule is, however, qualified by a number of exceptions one of which permits the introduction of prior crimes evidence under recidivist laws. See 1 WHARTON § 233. Other exceptions include the following: introduction of prior crimes evidence to prove identity; to establish motive; to prove the existence of a conspiracy; to impeach the defendant as a witness; to show malice; to show admissions of guilt by conduct; to show that the act was not unintentional or without guilty knowledge; or to complete the history of the present crime. MCCORMICK § 157; see Pardo v. United States, 369 F.2d 922 (5th

seems the most convenient to administer because it requires only a single-stage proceeding, the fundamental criticism of the common law approach concerns the potentially prejudicial effect of informing the jury of alleged prior crimes before they determine substantive guilt.[27] According to the allegations in *Spencer,* to require such jury cognizance of the defendant's prior crimes, in the light of feasible alternative means of determining recidivist status, so unfairly influenced the jury as to deny a fair trial in violation of the due process clause of the fourteenth amendment.[28]

Cir. 1966); People v. Ing, 65 Cal. 2d 650, 55 Cal. Rptr. 902, 422 P.2d 590 (1967); Steppe v. State, 193 So. 2d 617 (Dist. Ct. App. Fla. 1967); People v. Clark, 223 N.E.2d 272 (Ill. 1966).

The general exclusionary rule is based upon the notion that evidence of prior crimes may unduly prejudice the jury against the defendant in determining his guilt with respect to the present crime. See, *e.g.,* Swann v. United States, 195 F.2d 689, 690-91 (4th Cir. 1952). Compare Michelson v. United States, 335 U.S. 469 (1948). See generally MCCORMICK § 157; WIGMORE, EVIDENCE §§ 193-94 (3d ed. 1940). The exceptions to this rule denote those situations in which the relevancy and probative value of the prior crimes evidence is considered to outweigh its prejudicial effect. See Orfield, *Relevancy in Criminal Evidence,* 43 NEB. L. REV. 485, 517-31 (1964); Comment, 70 YALE L.J. 763, 763-68 (1961).

Three arguments are generally propounded to justify the exception for proof of prior crimes under common law recidivist procedures. Since the former convictions are a constituent fact of the aggravated penalty, it is required that they be proved at a hearing where the defendant has an opportunity to challenge. See, *e.g.,* People v. Stamphill, 166 Cal. App. 2d 749, 333 P.2d 270 (Dist. Ct. App. 1959); People v. Wagner, 78 Cal. App. 503, 248 P. 946 (Dist. Ct. App. 1926); Smith v. State, 243 Ind. 74, 181 N.E.2d 520 (1962); State v. McClay, 146 Me. 104, 78 Atl. 2d 347 (1951); State v. Ruble, 77 N.D. 79, 40 N.W.2d 794 (1950); Palmer v. State, 154 Tex. Crim. 536, 229 S.W.2d 174 (1950); Note, 33 N.Y.U.L. REV. 210, 212 (1958). Some courts have held that it is necessary to place the recidivist issue before the jury to enable that body properly to set the punishment where it performs that function. See, *e.g.,* Yates v. State, 245 Ala. 490, 17 So. 2d 777 (1944); State v. Holman, 86 Ariz. 280, 356 P.2d 27 (1960); Berry v. State, 51 Ga. App. 442, 180 S.E. 635 (1935); Petition of Jones, 144 Mont. 13, 393 P.2d 780 (1964); Redding v. State, 159 Tex. Crim. 535, 265 S.W.2d 811 (1954); Note, 25 MONT. L. REV. 250, 252 (1964). In other cases, the introduction of evidence of prior criminal activity during the trial proceeding has been considered required by the statutory provisions. See, *e.g.,* People v. Hoerler, 208 Cal. App. 2d 402, 25 Cal. Rptr. 209 (Dist. Ct. App. 1962).

[27] See Note, 40 N.Y.U.L. REV. 332, 337-38 (1965); Note, 33 N.Y.U.L. REV. 210, 211, 217-18 (1958); Note, 48 NW. U.L. REV. 742, 744, 750 (1954). Objection to the consequential prejudice produced by the common law procedure has resulted in its abandonment in many states. See, *e.g.,* Miller v. State, 239 Ark. 836, 394 S.W.2d 601 (1965); Shargaa v. State, 102 So. 2d 814 (Fla.), *cert. denied,* 358 U.S. 873 (1958); State v. Johnson, 86 Idaho 51, 383 P.2d 326 (1963); Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, *cert. denied,* 375 U.S. 855 (1963); Harris v. State, 369 P.2d 187 (Okla. Crim. 1962); State v. Stewart, 110 Utah 203, 171 P.2d 383 (1946).

[28] 385 U.S. at 559. Spencer also alleged that his constitutional guarantee to an impartial jury under the sixth amendment had been denied, although the Court did not consider the issue in those terms. Brief for Petitioner, pp. 8, 10, Spencer v. Texas, 385 U.S. 554 (1967).

In rejecting the due process contention, Mr. Justice Harlan, writing for the majority,[29] postulated that interference with state criminal procedures and rules of evidence through the fourteenth amendment should be cautiously undertaken,[30] especially where no "specific constitutional right" is involved.[31] To buttress this point of view, the Court was constrained to emphasize that undue prejudice to the defendant depended upon a finding that the jury failed to discharge its function properly. Weighing the possibility of such a failure, in light of the Court's professed confidence in jury competence,[32] against the state's interest in implementing its otherwise valid statute,[33] the Court found any danger of prejudice resulting from the procedure insufficient to render it an unconstitutional practice.[34]

[29] Mr. Justice Harlan was joined by Justices Black, Clark, and White in an opinion in which Mr. Justice Stewart concurred.

Chief Justice Warren, joined by Mr. Jnstice Fortas, dissented in *Spencer* and *Bell* but concurred in *Reed* on the ground that the invalidation of the Texas recidivist device should not be made retroactive. *Id.* at 583-85. Justices Brennan and Douglas joined the Chief Justice's dissent as to *Spencer* and *Bell* but also dissented in *Reed,* contending that the reversal should be made retroactive since the Texas procednre contravened the " 'integrity of the fact-finding process.' " *Id.* at 588 (qnoting Linkletter v. Walker, 381 U.S. 618, 639 (1965)). Thus the decision in *Reed* was 7-2 and in *Spencer* and *Bell* 5-4.

[30] *Id.* at 562-65.

[31] *Id.* at 564-66. See notes 42-48 *infra* and accompanying text.

[32] 385 U.S. at 561-63, 565. Compare Jackson v. Denno, 378 U.S. 368, 401-10 (Black, J., dissenting in part and concnrring in part), 423-27 (Clark, J., dissenting), 427-40 (Harlan, Clark, and Stewart, JJ., dissenting) (1964). See Delli Paoli v. United States, 352 U.S. 232, 241-42 (1957); Opper v. United States, 348 U.S. 84, 95 (1954); Leland v. Oregon, 343 U.S. 790, 800 (1952).

[33] 385 U.S. at 566-69.

[34] *Id.* at 560-62, 565. Chief Justice Warren found a basis for due process objections in the alleged inability of the jury adequately to separate the recidivist issue from that of present guilt. To him, "it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he committed the crime currently charged . . . ." *Id.* at 575 (Warren, C.J., and Fortas, J., dissenting). Balancing the interest of the accused against that of the state, the Chief Justice did not consider this prejudice counterbalanced by any legitimate state interest. *Id.* at 572-75.

As to the due process infirmity, the conclusion was predicated upon two conteutions. First, the Chief Justice concluded that the introduction of prior crimes evidence under the Texas procedure cannot be justified by the rationale of other exceptions to the general exclusionary rule, that is, relevance to guilt upon the substantive charge. See, 385 U.S. at 576; Note, 40 N.Y.U.L. REV. 332, 336-38 (1965). A conclusion that only evidence so relevant should be admitted follows logically from the basis for the exclusionary rule: the danger of prejudice outweighs the probative value of the evidence unless it is substantially relevant to guilt of the crime charged. MCCORMICK § 157; WHARTON § 232. Although it has been criticized, Comment, 70 YALE L.J. 763 (1961), the basic relevaucy criterion has long been established. See Stone, *The Rule of Exclusion of Similar Fact Evidence,* 51 HARV. L. REV. 988 (1938). The rule, however, is one of evidence and not a coustitutional mandate. But since the issue of recidivism

Furthermore, the Court refused to weigh the existence of alternative means for accomplishing the state's purpose but rather emphasized that greater protection through another procedure cannot be determinative of the validity of the procedure in question.[35]

The Court's refusal to accord Spencer's objections a constitutional basis sufficient to warrant federal interference may seem, at first glance, conservative, and perhaps inconsistent with the Court's previ-

relates only to punishment, *e.g.*, O'Brien v. State, 252 S.W.2d 357 (Mo. 1952), *cert. denied*, 345 U.S. 929 (1953), introduction of such evidence during the guilt-determination phase of the trial is arguably confined, aside from a convenience interest to the state, to the function of showing criminal propensity, a purpose consistently held improper. See Orfield, *supra* note 25, at 518-20.

Secondly, the Chief Justice found that since Texas denied Spencer and all other defendants the right to stipulate as to recidivist status, a procedure which would have obviated the necessity for a jury determination, the state cannot balance a convenience factor against the prejudice to the accused. 385 U.S. at 580-82.

Although one may question the Chief Justice's premise since irrelevance has not been found per se unconstitutional, his conclusions are logically developed. He does not, however, speak to the question which would arise when the accused refused to stipulate. If in that circumstance the recidivist evidence may be properly introduced during the guilt phase, the defendant is faced with a difficult choice: either he must confess to the prior crimes and forego jury determination of that issue or submit to introduction of recidivist evidence. See Note, 48 COLUM. L. REV. 238, 242 (1948); Note, 40 N.Y.U.L. REV. 332, 338 (1965). To avoid this difficulty, a two-stage procedure would seem necessary. Moreover, as Mr. Justice Harlan pointed out, even if the defendant does stipulate, where the jury sets the punishment, a two-stage proceeding would be required to keep the stipulated evidence from the jury when it is determining guilt. 385 U.S. at 568 n.13. The necessity for two stages could be avoidcd in many cases, however, once the stipulation has been made, by having the judge charge the jury merely as to the penalty provided under the recidivist statute without informing them of the rationale for that penalty. This may not be feasible, however, where the severity of the penalty in relation to the ostensible crime would indicate to the jury that more is involved than a single offense. In any event, positing the prejudicial effect of the Texas procedure and the absence of a countervailing state interest, the dissenting Justices deemed retention of the procedure improper in light of alternative methods to achieve the state's legitimate purpose. 385 U.S. at 571-72, 579, 586.

[35] *Id.* at 563, 567-69. The non-determinative effect of alternative means has been emphasized in previous decisions. See, *e.g.*, Buchalter v. New York, 319 U.S. 427, 429-31 (1943) (dictum); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

The majority clearly does not imply that the Texas procedure is the most desirable or the most fair. As Mr. Justice Stewart stated in his concurring opinion: "If the Constitution gave me a roving commission to impose . . . my own notions of enlightened policy, I would not join the Court's opinion. [I]t is clear to me that the . . . procedures adopted in recent years by . . . other States . . . are far superior to those utilized [here] . . . . But the question for decision is not whether we applaud or even whether we personally approve the procedures followed . . . . The question is whether [they] . . . fall below the minimum level the Fourteenth Amendment will tolerate." 385 U.S. at 569. The prevailing opinion is no less explicit: "To say that . . . trial in the English-Connecticut style is probably the fairest, . . . with which we might well agree were the matter before us in a . . . rule-making context, is a far cry from a constitutional determination that this method . . . is compelled by the Fourteenth Amendment." *Id.* at 567-68.

ous determinations of limitations upon the state's permissible choice of trial procedures.[36] Specifically, *Spencer* may be difficult to reconcile with *Jackson v. Denno*.[37] Upon analysis, however, *Spencer* may be seen as an indication of the scope of the fair trial concept and a significant illustration of the Court's role in reviewing state criminal procedures.

In *Jackson v. Denno* a state procedure whereby the jury determined the voluntariness of confessions[38] was held unconstitutional because of the possibility that an involuntary confession would be the *de facto* basis for a guilty verdict,[39] a contingency long held to be constitutional error.[40] That decision implied that state criminal procedures may violate due process not only when they are contrary to "ordered liberty"[41] but also when rationales for their use are attenuated by potential injustice and the availability of viable alternatives.[42] The *Spencer* Court, in dismissing *Jackson,* indicated that

[36] See, *e.g.*, Parker v. Gladden, 385 U.S. 363 (1966); Griffin v. California, 378 U.S. 609 (1965); Pointer v. Texas, 380 U.S. 400 (1965); notes 50-52 *infra* and accompanying text.

[37] 378 U.S. 368 (1964). It is interesting to note that Mr. Justice White, a member of the majority in *Spencer,* wrote the majority opinion in *Jackson*. Thus, he is the only member of the Court who concluded that the two cases should be differently decided. The dissents in *Jackson* were based upon reasoning very similar to that supporting the decision in *Spencer*; *i.e.*, the jury may be relied upon to implement fairly the procedure, *id.* at 405 (Black, J., dissenting), 426 (Clark, J., dissenting); the state may thus validly delegate that function to the jury, *id.* at 430, 439 (Harlan, Clark and Stewart, JJ., dissenting); and the existence of an alternative method is insufficient to impugn the validity of the state procedure, *id.* at 436-40. See note 35 *supra* and accompanying text.

[38] 378 U.S. at 391. Under the New York procedure invalidated in *Jackson,* the trial judge first made a preliminary determination of the voluntariness of a confession. If he found it involuntary, it was excluded. However, if there was a question as to voluntariness, the court submitted that issue, along with others, to the jury. The jury was instructed to disregard the confession if it was found to be involuntary, but if voluntary then the jury was to determine its truth or reliability and weigh it accordingly. *Id.* at 377-78.

[39] *Id.* at 388-91. The Court refused to assume that once the jury had found the confession involuntary they would be able to expunge it from their minds in determining guilt. *Id.* at 388. Moreover, the Court held that even if the confession was found voluntary, the evidence given the jury introduced impermissible considerations of truthfulness into the question of voluutariness, and thus the determination could not be consistently reliable. *Id.* at 386-87.

[40] See, *e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Stroble v. California, 343 U.S. 181 (1952); Turner v. Pennsylvania, 338 U.S. 62 (1949); Malinski v. New York, 324 U.S. 401 (1945); Brown v. Mississippi, 297 U.S. 278 (1936). See generally Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 DEPAUL L. REV. 213, 233-40 (1959).

[41] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[42] See *The Supreme Court, 1963 Term,* 78 HARV. L. REV. 177, 211-12 (1964); Note, 49 MINN. L. REV. 360 (1964).

the constitutional sanction may be successfully invoked only when there is a clear danger that an identifiable and "specific constitutional right,"[43] such as that concerning involuntary confessions, may be denied.

Nevertheless, it may be argued that *Spencer*'s dismissal of *Jackson* is unpersuasive as an absolute distinction. The sixth amendment right to trial before an impartial jury has not been explicitly extended to state criminal proceedings.[44] However, if the state grants a jury trial, due process requires that the trial be conducted with fairness, one aspect of which is an impartial jury.[45] Since the constitutional privilege against self-incrimination, which was endangered in *Jackson,* is also encompassed within the fair trial concept, the privilege may seem no more "specific" than the requirement of impartial jurors. Thus, it may be argued that *Jackson* does bear upon *Spencer* on the ground that the danger of jury failure in *Spencer* is no less debilitating to specific constitutional rights than in *Jackson.* The comparability of the two cases is further suggested by the fact that only one of the Justices considered the cases distinguishable.[46]

On the other hand, a narrower construction of the interests involved indicates that a valid distinction between *Jackson* and *Spencer* may be made. In *Jackson,* the challenged evidence introduced to the jury bore directly upon the question of guilt under the substantive charge. Moreover, if a confession is in fact involuntary, the defendant has an affirmative right to have his confession excluded from consideration by the jury, a right which arises directly from the specific provision of the Constitution which protects against self-

[43] 385 U.S. at 565.

[44] See Malloy v. Hogan, 378 U.S. 1, 2-6 (1964); Fay v. New York, 332 U.S. 261 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). *But cf.* Parker v. Gladden, 385 U.S. 363 (1966).

[45] See Note, 60 COLUM. L. REV. 349, 350-51 (1960); note 49 *infra* and cases cited therein. The general concept of a fair trial has been consistently characterized as of fundamental significance. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961). "A fair trial in a fair tribunal is a basic requirement of due process." *In re* Murchison, 349 U.S. 133, 136 (1955). See, *e.g.,* Estes v. Texas, 381 U.S. 532 (1965); Marshall v. United States, 360 U.S. 310 (1959). It has also been emphasized that "a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155 (1878). However, the definition of what constitutes a fair trial, although given specificity in individual cases, remains generally amorphous and unamenable to definitive description. See Comment, 51 CORNELL L.Q. 306-07 (1966).

[46] See note 37 *supra.*

incrimination through compelled testimony.[47] By contrast, the prejudice inhering in evidence of prior crimes has never been deemed so invidious as to bar its admission in all cases.[48] That is, not only is recidivist evidence in particular not directly related to guilt determination on the substantive charge, but in addition the accused has no explicit constitutional right to demand the exclusion of such evidence. Furthermore, the "right" to a fair trial claimed to have been infringed in *Spencer* is an amorphous concept, determined largely as a function of the particular facts and circumstances of each case.[49] In *Spencer,* the Court indicated an unwillingness to intervene under this *broad* doctrine so long as the more *specific* provisions of the Constitution are not infringed, and the state procedure may prejudice the defendant only if the jury fails its duty.[50]

It may also be argued that *Spencer* seems contradictory and perhaps restrictive in light of the Court's previous determinations of permissible trial procedure. It seems difficult to reconcile the prejudicial effect of extra-trial publication of criminal history or character which has been held improper[51] with the constitutionality of in-court publication of similar information when it is irrelevant to the substantive charge. Also, the gains won by assuring counsel to each defendant[52] become less significant when that counsel must

[47] See note 40 *supra* and accompanying text.

[48] See note 26 *supra.*

[49] See Lisenba v. California, 314 U.S. 219, 236 (1941); United States v. Wood, 299 U.S. 123, 145-46 (1936); Snyder v. Massachusetts, 291 U.S. 97, 116-17 (1934); Comment, 51 CORNELL L.Q. 306-07 (1966); Comment, 57 NW. U.L. REV. 217, 221 & n.17 (1962); Comment, 38 SO. CAL. L. REV. 672, 673-76 (1965). "Due process . . . requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept." Snyder v. Massachusetts, *supra* at 116.

[50] See 385 U.S. at 568-69. The prevailing opinion in *Spencer* thus may be seen as a logical sequel to the dissents by four of the Justices in *Jackson,* see note 37 *supra,* whereby the rationale of the latter decision has been limited to situations involving explicit rights where the danger of jury incompetence may seriously threaten the protection they afford. In *Spencer,* doubt as to jury competence did not dispell the Court's general faith in that body because no "specific constitutional right," in the narrow sense, was endangered. Therefore, the Court refused to "take *Jackson* as evincing a general distrust . . . of the ability of juries to approach their task responsibly," 385 U.S. at 565, and limited the extent to which allegations of jury failure may serve as a predicate for unconstitutionality.

[51] See, *e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); Irvin v. Dowd, 366 U.S. 717 (1961); *cf.* Marshall v. United States, 360 U.S. 310 (1959) (jurors during trial read of previous crimes in newspapers, trial held invalid under Court's supervisory power).

[52] See, *e.g.,* Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

contend with a jury prejudiced by information irrelevant to his case but which he is powerless to discredit or eliminate. Moreover, the traditional presumption of innocence under our criminal system[53] may be jeopardized by the free introduction of recidivist evidence.

The decision in *Spencer,* however, is less inconsistent with these strains of the fair trial concept than it is illustrative of the scope and content of that concept. Thus, *Spencer* may be distinguished from two extensive categories of previous decisions concerning criminal procedure. In the first instance, the allegation of unconstitutionality in the instant case was not predicated upon any fundamental constitutional provision,[54] such as that of counsel,[55] confrontation[56] or self-incrimination by compulsion.[57] Secondly, the alleged prejudice emanated from a state statute implementing within the courtroom a legitimate state purpose. *Spencer* is therefore removed from that category of cases dealing with the improper effect of non-legislative or extra-judicial factors.[58] So distinguished, *Spencer* indicates that absent the elements of an explicitly stated constitutional protection or allegations of extra-judicial prejudicial influence, considerations of jury incompetence and alternative means merit little weight as constitutional determinants warranting interference with an area largely considered state prerogative.[59]

The question remains, however, whether a petitioner so situated as Spencer can *ever* succeed in acquiring a reversal of his conviction.

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[53] 9 WIGMORE, EVIDENCE §§ 2497 (1), 2511 (3d ed. 1940).

[54] The petitioner did, however, allege violation of his right to an impartial jury under the sixth amendment, but the Court did not consider this issue. See note 28 *supra.*

[55] *E.g.,* Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963).

[56] Pointer v. Texas, 380 U.S. 400 (1965); see *In re* Oliver, 333 U.S. 257 (1948).

[57] *E.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965); Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959).

[58] See, *e.g.,* Miller v. Pate, 386 U.S. 1 (1967) (knowing use of false evidence by prosecution); Parker v. Gladden, 385 U.S. 363 (1966) (bailiff told jury defendant was guilty); Sheppard v. Maxwell, 384 U.S. 333 (1966) (prejudicial publicity); Estes v. Texas, 381 U.S. 532 (1965) (television disrupting trial hearing); Turner v. Louisiana, 379 U.S. 466 (1965) (sheriffs in custody of jury were chief prosecution witnesses); Rideau v. Louisiana, 373 U.S. 723 (1963) (prejudicial pre-trial publicity); Irvin v. Dowd, 366 U.S. 717 (1961) (jurors read of defendant's criminal record in newspapers); Alcorta v. Texas, 355 U.S. 28 (1957) (perjured testimony known to prosecution). See generally McCarthy, *Fair Trial and Prejudicial Publicity: A Need for Reform,* 17 HASTINGS L.J. 79 (1965); Comment, 51 CORNELL L.Q. 306, 308-13 (1966).

[59] See note 69 *infra* and accompanying text.

Theoretically, a sufficient indication of the jury's lapse would swing the balance in favor of the challenges. Yet *Spencer* seems not to be based upon mere failure of proof of prejudice; rather, the Court attempted to preclude effective proof by adopting an attitude of judicial restraint in the state evidentiary procedures.[60] Two related themes may be postulated as bases for the Court's cautious approach in *Spencer*. On a pragmatic level, *Spencer* implies that the Court is unwilling to open itself for determination of a broad range of difficult procedural problems which could arise under state evidentiary rules. Mr. Justice Harlan referred to two examples: multiple offenses tried against a single defendant and a single trial of joint defendants in which evidence as to one crime or to the guilt of one of the defendants is introduced regardless of a potentially prejudicial effect upon the other issues.[61] Similarly, there is a problem when the confession of one defendant is admitted in the course of a joint trial.[62] With reference to evidence of prior crimes in particular, a number of other applications may be claimed to give rise to a constitutional issue on the basis of collateral prejudice.[63] Unquestionably, some rules are potentially more prejudicial than others. Moreover, there is considerable diversity among the jurisdictions concerning the permissible scope of cross-examination, the extent to which and when the defendant may waive his privilege against self-incrimination, and the manner in which the voluntariness of confessions should be properly determined.[64] Further evidentiary prob-

[60] *Ibid.*

[61] 385 U.S. at 562. See, *e.g.*, United States v. Margeson, 261 F. Supp. 628 (E.D. Pa. 1966); People v. Cerullo, 18 N.Y.2d 839, 222 N.E.2d 605 (1966).

[62] See, *e.g.*, United States v. Bozza, 365 F.2d 206 (2d Cir. 1966) (confession of one defendant held inadmissible), 1967 DUKE L.J. 202; Note, 22 WASH. & LEE L. REV. 285 (1965).

[63] Other problems involving the use of prior crimes evidence concern the range of crimes which may he introduced and the degree of relevance required for introduction when such evidence is produced for purposes of impeaching the defendant as a witness. The standards also differ when such evidence is used to discredit other witnesses. See Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267 (1952); Comment, 70 YALE L.J. 763, 774-82 (1961). While the exceptions in these instances are supported by arguments of probative value, questions concerning the extent to which this justification may be carried lend themselves to a fair trial controversy. Similar difficulties arise with respect to the other exceptions to the exclusionary rule. See Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 J. CRIM. L., C. & P.S. 15, 18-23 (1962). See generally MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, EVIDENCE 561-613 (1965).

[64] See generally Note, *Procedural Protections of the Criminal Defendant*, 78 HARV. L. REV. 426, 426-32 (1964).

lems involve the prejudicial effect of gruesome exhibits, qualifications for expert witnesses, and the extent to which stipulation will prevent introduction of relevant, but potentially prejudicial, facts.[65] Although the Court has been in contact with some of these questions,[66] *Spencer* manifests disdain for any but the most necessary interference where the "rules concerning evidence . . . are complex, and vary from jurisdiction to jurisdiction."[67] Any other holding might subject the Court to a deluge of evidence-oriented "fair trial" issues, in consideration of which the Court would be unable to apply a specific constitutional provision such as in *Jackson* but instead would be required constantly to evaluate the ill-defined interests of state and defendant. Although the opposite result in *Spencer* would have been relatively easy to rationalize, it would have at least furnished a basis for objection to each of the other exceptions to the general rule excluding evidence of prior crimes. Cognizant of this, the Court chose to avoid the problem in cases where the state rule may be supported by reference to valid state interest and the prejudice resultant from the rule is deemed less serious in the absence of an alleged violation of a specific constitutional right.[68]

In addition to and embracing the pragmatic considerations, the *Spencer* majority emphasized the propriety of limiting the federal role in governing state evidentiary procedures because of the states' traditional discretion in that area.[69] In so doing, the Court did not

[65] See Wall, *supra* note 62, at 15-25.

[66] See, *e.g.*, Delli Paoli v. United States, 352 U.S. 232 (1957) (admission of co-defendant's confession in federal trial upheld); Opper v. United States, 348 U.S. 84 (1954) (exculpatory extrajudicial statements require corroboration in federal courts).

[67] 385 U.S. at 560.

[68] See notes 38-42, 46-49 *supra* and accompanying text.

[69] Mr. Justice Harlan repeatedly emphasized that the Texas procedure was chosen by that state through a valid exercise of its power to select criminal procedures which it determined were best suited to the circumstances. 385 U.S. at 560, 562-64, 567-68. Therefore, federal judicial interference "would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as . . . not prohibited by . . . the . . . Constitution, which these rules are not." *Id.* at 568-69.

In so grounding the majority opinion, Mr. Justice Harlan reaffirmed his persistent campaign involving respect for the state's inherent powers in the federal system and opposition to over-zealous review of state procedures. For the Justice, the separation of powers lies "at the root of our constitutional system." Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A.J. 918, 920 (1964). See Reynolds v. Sims, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting). Thus Mr. Justice Harlan would not only impose a different standard on the states from that governing the federal courts with regard

specify that the presumption of constitutionality will be stronger where the general concept of due process is alleged to have been violated than where an explicit provision of the Bill of Rights is asserted. However, the decision does imply that the absence of allegations under such a specific provision is a factor which may weigh heavily upon the Court's willingness to interfere with state criminal procedures.

The significance of *Spencer* is likely to be in its application of judicial restraint rather than in its effect upon recidivist procedures. Objections to the unfairness of the common law procedure have steadily depleted the ranks of its practitioners insofar as the practice

to the rights of the accused, Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring), but he maintains that it is the "essence of our federalism that the States should have the widest latitude in the administration of their own system of criminal justice." Hoag v. New Jersey, 356 U.S. 464, 468 (1958). See Jackson v. Denno., 378 U.S. 368, 427-40 (1964) (Harlan, J., dissenting); Mason, *The Supreme Court and Federalism,* 44 TEXAS L. REV. 1187, 1188, 1200-04 (1966).

Mr. Justice Black has also recently urged a measure of judicial self-restraint upon the Court. While differing from Mr. Justice Harlan on the application of the Bill of Rights to the states, which he feels should be specifically incorporated into the fourteenth amendment (Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865 (1960)), Mr. Justice Black complements his brother by criticizing the use of the fourteenth ameudment as a vehicle to impose the personal predilections of the judge upon the states. See Mason, *supra* at 1204. Mr. Justice Black's concern with judicial restraint was expressed in Griswold v. Connecticut, 381 U.S. 479 (1965), where he objected to that decision's implication of a "great unconstitutional shift of power to the courts" which would "take away much of the power of States to govern themselves which the Constitution plainly intended them to have." *Id.* at 521 (dissenting opinion). This view had earlier been presented in the trial procedure context. Dissenting in part to Jackson v. Denno, *supra* at 407-08, Mr. Justice Black concisely stated his objection to peripheral broadening of the due process clause: "My wide difference with the Court is in its apparent holding that it has the constitutional power to change state trial procedures because of its belief they are not fair. [N]o constitutional provision . . . gives this Court any such law-making power." This objection is underlined in *Spencer's* refusal to invalidate the Texas procedure on grounds of "fairness." See 385 U.S. at 567-68.

Mr. Justice Stewart likewise has objected to notions of propriety as constitutional standards and the unimpeded interference of the Court in state criminal procedures. See Jackson v. Denno, *supra* (joining the dissenting opinion of Harlan, J.); Griswold v. Connecticut, *supra* at 527-31 (dissenting opinion of Stewart, J.); Griffin v. California, 380 U.S. 609, 617-23 (1965) (dissenting opinion of Stewart, J.); MASON, THE SUPREME COURT 169 (1962). Although Justice White's position may seem ambiguous, *compare* Jackson v. Denno, *supra with Spencer,* both he and Mr. Justice Clark have counseled a tolerant approach to issues raised by state procedures. See Miranda v. Arizona, 384 U.S. 436, 499-504 (opinion of Clark, J.), 526-45 (White, J., dissenting; note also his joinder in the dissent of Harlan, J.); Escobedo v. Illinois, 378 U.S. 478, 495-99 (1965) (White, Stewart, and Clark, JJ., dissenting); Jackson v. Denno, *supra* at 423-27 (Clark, J., dissenting); Griffin v. California, *supra* at 623 (Stewart and White, JJ., dissenting) ("formulation of procedural rules to govern the administration of criminal justice in the . . . states . . . is a matter of local concern"); MASON, *supra* at 169; Weihofen, *Supreme Court Review of State Criminal Procedures,* 10 J. LEGAL HIST. 189, 196-97 (1966).

has been abandoned or modified by courts[70] and legislatures.[71] It seems unlikely that *Spencer* will reverse this voluntary trend. Moreover, as a bow to the federal system, the decision perhaps should not be extended beyond the circumstances in which it arose. From a practical viewpoint, the Court dealt largely with a dying issue. Since only a few states presently retain the procedure in its most objectionable form,[72] it may be argued that *Spencer* is largely an exercise in judicial expendiency. More realistically, however, *Spencer* indicates an important restriction upon the Court's willingness to define the limits of permissible state criminal procedure.[73] The decision may mean that where a state procedure complies with the fundamental provisions of the Constitution, the procedure may be retained if disapproval would require a delicate balancing of the indefinite interests of state and individual not only in the case at hand but also in an entire range of related problems. If *Spencer* is in fact so directed, it represents less a pragmatic sidestep than a significant limitation upon the scope of the fair trial concept.

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[70] See note 19 *supra*.

[71] See, *e.g.*, MICH. STAT. ANN. § 28.1085 (1954); N.M. STAT. ANN. § 40A-29-5 (1953).

[72] ALA. CODE tit. 15, § 331 (1959); Yates v. State, 245 Ala. 490, 17 So. 2d 777 (1944); GA. CODE ANN. § 27-2511 (Supp. 1966); HAWAII REV. LAWS ch. 258, §§ 28, 43 (1955); IND. ANN. STAT. § 9-2208 (1956); IOWA CODE ANN. §§ 747.1-.7 (1950); KY. REV. STAT. § 431.190 (1962). *But see* Tuttle v. Commonwealth, 331 S.W.2d 891, *overruled*, Etherton v. Commonwealth, 335 S.W.2d 899 (Ky. 1960); MASS. ANN. LAWS ch. 279, § 25 (1956); MONT. REV. CODE § 94-4713 (1947); N.H. REV. STAT. ANN. § 591.1 (1955); N.C. GEN. STAT. ANN. § 15-147 (1953); R.I. GEN. LAWS ANN. § 12-19-21 (1956); S.C. CODE ANN. § 17-553.1 to .3 (1962); VT. STAT. ANN. tit. 13, § 11 (1957); WYO. STAT. ANN. § 6-11 (1957). Three states expressly provide for stipulation: ARIZ. R. CRIM. PROC. 180 (1950); CAL. PEN. CODE § 1025 (j); Wisconsin, State v. Meyer, 258 Wis. 326, 46 N.W.2d 341 (1951).

[73] Since *Spencer*, the Court has reversed one decision invalidating the common law recidivist procedure, United States *ex rel.* Johnson v. Rundle, 349 F.2d 416 (3d Cir. 1965), *rev'd*, 386 U.S. 14 (1967) (per curiam), and refused to consider several other appeals arising under the Texas procedure, *e.g.*, Barlow v. State, 398 S.W.2d 933 (Tex. Crim. 1966), *appeal dismissed*, 386 U.S. 16 (1967) (per curiam); Platt v. State, 402 S.W.2d 898 (Tex. Crim. 1966), *cert. denied*, 386 U.S. 929 (1967); Ross v. State, 406 S.W.2d 464 (Tex. Crim. 1966), *cert. denied*, 386 U.S. 938 (1967); Howard v. State, 387 S.W.2d 387 (Tex. Crim. 1965), *cert. denied*, 386 U.S. 938 (1967); Stoneham v. State, 389 S.W.2d 468 (Tex. Crim. 1965), *cert. denied*, 386 U.S. 928 (1967).