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Recidivist Procedures Prejudice and Due Process

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RECIDIVIST PROCEDURES: PREJUDICE AND DUE PROCESS

Our system of criminal justice is grounded in the notion that a man shall be tried only for the particular offense with which he is charged. Justice must be blind to his character, position, and prior conduct. But such impartiality cannot be achieved when the trier of fact knows of an accused's criminal record. Thus, in a recidivist proceeding, when a habitual offender's prior convictions are considered in sentencing, care must be taken to insure that prior crimes affect only the sentence, not the determination of guilt.

Since their inception, recidivist statutes and procedures have weathered constitutional attacks ranging from double jeopardy and cruel and unusual punishment to lack of notice and opportunity to be heard.[1] The most dangerous threat to constitutional rights arises when a jury learns of the defendant's record before determining his guilt. In *Spencer v. Texas*,[2] the Supreme Court reviewed the Texas recidivist procedure,[3] which permitted the prosecutor to introduce evidence of the defendant's prior convictions before the determination of guilt, thereby allowing simultaneous jury consideration of the issues of guilt and recidivism.[4] A closely divided Court found the procedure not sufficiently prejudicial to violate due process.[5]

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1 *E.g.*, Oyler v. Boles, 368 U.S. 448 (1962) (notice and opportunity to be heard); Gryger v. Burke, 334 U.S. 728 (1948) (right to counsel, double jeopardy, and ex post facto); Graham v. West Virginia, 224 U.S. 616 (1912) (due process, double jeopardy, equal protection, and cruel and unusual punishment); McDonald v. Massachusetts, 180 U.S. 311 (1901) (double jeopardy, ex post facto, and cruel and unusual punishment); Moore v. Missouri, 159 U.S. 673 (1895) (double jeopardy).

2 385 U.S. 554 (1967).

3 TEX. PEN. CODE ANN. arts. 62-64 (1952). Whether the defendant had the right to stipulate and thus keep the prejudicial evidence from being admitted is discussed in Chief Justice Warren's dissenting opinion. 385 U.S. at 579-82. The stipulation procedure is described at p. 341 *infra*. Texas has since changed this law. The new statute, effective January 1, 1966, and therefore not applicable to *Spencer*, provides that the recidivist issue will not be submitted to the jury until guilt is found. TEX. CODE CRIM. PROC. ANN. art. 36.01 (1965). Although Texas has changed its procedure, the question remains important, because 16 other states use procedures similar to the old Texas procedure. *See* note 19 *infra*.

4 When the recidivism charge is contested, the issues for the jury are the existence of past convictions and the identity of the defendant. *See* Note, *Methods of Proving Previous Convictions Under the Iowa OMVI and Habitual Criminal Statutes*, 39 IOWA L. REV. 156 (1953); Note, *Recidivist Procedures*, 40 N.Y.U.L. REV. 332 (1965); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U.L. REV. 210, 212 n.19 (1958). If the jury finds that the defendant has previously been convicted, it then assesses the increased recidivist punishment, as in *Spencer*. 385 U.S. at 557.

5 Justice Harlan's opinion for the Court was joined by four other Justices, including Justice Stewart, who also wrote a concurring opinion. The Court concluded that the

Most courts and commentators recognize that information about prior convictions prejudices the defendant to some extent.[6] The seriousness of the effects, however, is widely disputed. Evidence of prior convictions might negate the presumption of innocence normally accorded a criminal defendant.[7] A jury might confuse the issues of guilt and recidivism, and convict the defendant merely because he appears to be a "bad man"; the result would be to strip the defendant of his right to be tried only for the present offense. By taking the past convictions to show a criminal propensity, the jury would be more likely to convict the defendant on insufficient evidence.[8]

The *Spencer* Court concluded that the validity of the state's purpose in introducing evidence of prior convictions outweighs the prejudice to the defendant.[9] If the evidence is admitted, the prejudice is diminished by the judge's instructions directing the jury to disregard

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possibility of prejudice was not sufficient to render the procedure unconstitutional when weighed against the valid state purpose and widespread use. Justice Stewart thought the procedure significantly inferior to more recent statutes, including the Texas revision, *supra* note 3, but not below due process standards. Chief Justice Warren, joined by three other Justices in his dissenting opinion, found the prejudice needless and the procedure "fundamentally at odds with traditional notions of due process." 385 U.S. at 570. For an analysis of these opinions and the case in general, see Note, *Constitutional Law: Supreme Court Indicates Significant Limitation upon Review of State Criminal Procedures*, 1967 DUKE L.J. 857.

6 Marshall v. United States, 360 U.S. 310 (1959); Michelson v. United States, 335 U.S. 469, 476 (1948); Lane v. Warden, 320 F.2d 179 (4th Cir. 1963); United States *ex rel.* Scholeri v. Banmiller, 310 F.2d 720 (3d Cir. 1962); C. MCCORMICK, EVIDENCE § 157 (1954); F. WHARTON, CRIMINAL EVIDENCE § 232 (12th ed. 1955); J. WIGMORE, EVIDENCE §§ 193-94, 196 (3d ed. 1940); Comment, *Prejudicial Evidence Under the Illinois Habitual Criminal Act*, 48 NW. U.L. REV. 742 (1954); Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961). *But see* Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity To Commit Crime*, 78 HARV. L. REV. 426, 435-45, 449-51 (1964).

In *Spencer*, the majority recognized the prejudice, but believed "the conceded possibility of prejudice . . . to be outweighed by the validity of the State's purpose in permitting introduction of the evidence." 385 U.S. at 561.

7 *See* Comment, *Prejudicial Evidence Under the Illinois Habitual Criminal Act*, 48 NW. U.L. REV. 742, 744 (1954).

8 A recent study of jury behavior indicates that the defendant's record does have a definite prejudicial effect in close cases.

> The jury's broad rule of thumb here, presumably, is that as a matter of human experience it is especially unlikely that a person with no prior record will commit a serious crime, and that this is relevant to evaluating his testimony when he denies his guilt on the stand. As to him, the presumption of innocence has special force. In contrast, defendants with records . . . evoke a different jury calculus of probabilities . . . .

H. KALVEN & H. ZEISEL, THE AMERICAN JURY 179 (1966).

9 385 U.S. at 561.

the evidence for all purposes except that of fixing the sentence. Moreover, the defendant is protected by the trial court's discretion to exclude the evidence. Finally, the convenience of a single proceeding weighs heavily against further limiting prejudice by resorting to cumbersome alternative procedures. The Court concluded that, although the Texas procedure may be somewhat prejudicial, it is not unconstitutional.

> In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases.[10]

I

Excluding Evidence of Prior Convictions

It is a well-estabished general rule that evidence of prior crimes or convictions is inadmissible in a criminal trial to show probability of guilt or propensity for criminal behavior.[11] But such evidence may, of course, come in for other purposes.[12] Since the rationale of admitting the evidence in such circumstances is that it serves a valid and necessary purpose in the determination of guilt, the exceptions are continually tempered by balancing the necessity, value, and purpose of the evidence against its prejudicial effect. For example, a past conviction might be used to impeach the defendant's testimony after he has taken the stand.[13] This evidence is relevant to the jury's determination

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[10] *Id.* at 564.

[11] C. McCormick, *supra* note 6, § 157; F. Wharton, *supra* note 6, § 232; J. Wigmore, *supra* note 6, § 57. Both evidence of prior convictions and evidence of prior crimes (the act itself for which the defendant has not been prosecuted) are included in this general exclusionary rule. This Note, however, only concerns evidence of prior convictions, since crimes for which there was no conviction cannot be used to prove a habitual offender charge.

[12] The evidence is admissible when it is material in proving the intent, scienter, malice, motive, or identity of the defendant, in establishing a scheme of crime by the defendant, and in showing a passion for sex crimes, or when it is used to impeach the defendant's credibility when he takes the stand or impugn his character after he first puts his character in issue. C. McCormick, *supra* note 6, §§ 43, 157; F. Wharton, *supra* note 6, §§ 233-43, 892, 946; J. Wigmore, *supra* note 6, §§ 58, 193-94, 196. There has been much written criticizing these exceptions and commenting on when they are justified. *See, e.g.*, materials cited note 6 *supra*; Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325 (1956); Note, *Use of Prior Crimes To Affect Credibility and Penalty in Pennsylvania*, 113 U. Pa. L. Rev. 382 (1965); Note, *Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence*, 3 Vand. L. Rev. 779 (1950).

[13] *E.g.*, Commonwealth v. Gibbs, 167 Pa. Super. 79, 86, 74 A.2d 750, 754 (1950); Commonwealth v. Gold, 155 Pa. Super. 364, 371, 38 A.2d 486, 489 (1944).

of the defendant's credibility and the weight to be given to his testimony. In a recidivist proceeding, however, evidence of past convictions has no bearing on any element of the crime in question or on the issue of guilt.

If the *Spencer* Court had applied the rationale of the prior convictions rule instead of looking to the minimum standards of due process, the result might have been different.[14] Evidence of prior convictions is admitted to punish habitual offenders more severely; this probably constitutes a legitimate state purpose. Although the convenience of a one-step procedure is a valid reason for admitting the evidence during the principal trial, serious prejudice may result. Instructions that the jury limit its consideration of this evidence to its determination of the issue of recidivism do not completely counteract the damage done.[15] At this point the state's purpose might outweigh the prejudice. When a simple alternative procedure is available, however, the prejudice becomes needless and should outweigh the convenience factor.[16]

II

ALTERNATIVE RECIDIVIST PROCEDURES

There are five basic recidivist trial procedures each having minor variations.[17] In choosing the best procedure for the admission of recidivist evidence, prejudice, adequate notice, efficiency, and the fundamental rights of the defendant are relevant considerations.[18]

A. *Texas Procedure*

Under the Texas procedure, held constitutional in *Spencer*, evidence of prior convictions is submitted to the jury before the determi-

14 The Court must, of course, apply constitutional standards rather than its own ideas of what is "best." *See* note 25 *infra*.

15 "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949). This is a disputed point. *See* Note, *Criminal Law: Second Circuit Holds Cautionary Instructions Insufficient To Cure Potential Prejudice Resulting from Admission of Co-Conspirator's Confession*, 1967 DUKE L.J. 202 (concluding that prejudice becomes grounds for reversal as function of importance of confession to prosecution's case); Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264 (1966) (concluding that instructions are ineffective).

16 Spencer v. Texas, 385 U.S. 554, 579-80 (1967) (Warren, C.J., dissenting).

17 For classification and evaluation of the various state procedures, see Spencer v. Texas, 385 U.S. 554, 586-87, nn. 10-12 (1967) (dissenting opinion); Note, *Constitutional Law: Supreme Court Indicates Significant Limitation upon Review of State Criminal Procedures*, 1967 DUKE L.J. 857, 859-62; Note, *Recidivist Procedures*, 40 N.Y.U.L. REV. 332, 333-34 (1965); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U.L. REV. 210 (1958).

18 Spencer v. Texas, 385 U.S. 554, 567 (1967).

nation of guilt. The indictment gives notice to the defendant of the recidivism charge as well as of the principal offense. Because it is the most expeditious method, the Texas procedure appeals to jurisdictions with crowded court calendars. Although it does provide a jury determination of all issues, the procedure causes serious prejudice to the defendant.[19]

B. *Stipulation Procedure*

In several states, if the defendant stipulates to or admits the prior offenses charged in the indictment, evidence of them is not submitted to the jury.[20] Thus, when the recidivism issue is uncontested, the trial proceedings are faster than under the Texas procedure. If the issue is contested, however, evidence of past convictions goes to the jury during trial, and the prejudice to the defendant is the same as under the Texas procedure. Moreover, the defendant is faced with a choice between two undesirable alternatives. He must either stipulate away the right to challenge the prior convictions or have the prejudicial evidence of the convictions admitted during the trial. Even when the defendant's prior convictions are of questionable validity, evidence of them is bound to be prejudicial on the question of guilt. The stipulation technique adds little to the undesirable Texas procedure.

C. *Judicial Determination*

Although submitting the issue of recidivism to the court after the jury has reached a verdict of guilty eliminates the problem of prejudice, it also deprives the defendant of a jury trial on the issue.[21] Moreover, separate determination of guilt and recidivism involves two hearings and therefore sacrifices some of the efficiency of the Texas procedure.

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19 *See* pp. 337-39 *supra*. This is the common law procedure once used by a majority of the states, but now by only 16. Spencer v. Texas, 385 U.S. 554, 587 (dissenting opinion). *See, e.g.*, IND. ANN. STAT. § 9-2208 (1956); KY. REV. STAT. § 431-190 (Supp. 1963).

20 This procedure, a variation of the common law procedure, was used in Texas to some extent prior to *Spencer*. Whether an absolute right to stipulate existed in Texas and whether the defendants in *Spencer* had that right is discussed in Chief Justice Warren's dissenting opinion. 385 U.S. at 580-82. He concluded that the stipulation procedure was applied inconsistently in that state and that the defendants in *Spencer* were either denied the right or not offered it. Some states expressly provide for stipulation. *See, e.g.*, ARIZ. R. CRIM. PROC. 180 (1956); CAL. PEN. CODE § 1025 (West 1956). In others the right to stipulate grew out of case law. *E.g.*, Howard v. State, 139 Wis. 529, 533, 121 N.W. 133, 135 (1909).

21 Only a few states permit the judge without a jury to determine the issue of recidivism. *See, e.g.*, MINN. STAT. ANN. § 609.16(3) (1964); NEB. REV. STAT. § 29-2221(2) (1964).

D. *Separate Trials*

Separate jury trials also eliminate prejudice in determining guilt, but the procedure is inefficient, involving two separate juries and two separate hearings, one for the determination of guilt, and one for the determination of recidivism. Since two trials involve the use of separate indictments, the defendant is not ordinarily notified of the recidivism charge until after the first trial. Notice of the recidivism charge before trial can be vital;[22] it may drastically affect not only the tenor of the defense at trial but also the decision to plead guilty or not guilty.

E. *Two-Stage Trial*

The two-stage trial combines the advantages of stipulation and separate trials without sacrificing efficiency.[23] It also provides a jury determination of the issue of recidivism. A two-part indictment contains allegations of both charges, thus giving adequate notice to the defendant. The recidivism section is not read to the jury unless and until the defendant is found guilty of the principal charge. Since evidence of past convictions is introduced and contested only at this point, it does not prejudicially influence the determination of guilt. Although the procedure entails two deliberations by the same jury, it is much less time-consuming than the separate trial system, which requires two juries. The proceedings are often abbreviated; if the defendant is found not guilty of the principal charge, the recidivism issue is eliminated altogether, and if the defendant stipulates to the prior convictions, no evidence of them need be presented. Because the two-stage trial combines efficiency, adequate notice, lack of prejudice, and due regard for the right to a jury trial, most authorities agree that it is the most desirable procedure.[24] Other procedures may, however,

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22 Lack of notice of the recidivism charge before trial may be unconstitutional. United States *ex rel.* Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953) (lack of notice that sentence would be under recidivist statute held to violate procedural due process). Oyler v. Boles, 368 U.S. 448 (1962), upheld the constitutionality of giving notice of the recidivist charge after the first trial. The Court considered it significant to its decision that the defendant had counsel in the first trial. For examples of this separate trial procedure, see, *e.g.*, FLA. STAT. ANN. § 775.11 (1965); MICH. STAT. ANN. § 28.1085 (1954); OHIO REV. CODE ANN. § 2961.13 (Page 1954).

23 The first procedure of this type was established in England by the Coinage Offence Act, 24 & 25 Vict., c. 99 (1861). The first American jurisdiction to adopt this procedure was Connecticut in State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921).

24 *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 567 (1967). *See also id.* at 585-86 (Warren, C.J., dissenting); Lane v. Warden, 320 F.2d 179, 186 (4th Cir. 1963); Note, *Constitutional Law: Supreme Court Indicates Significant Limitation upon Review of State Criminal Procedures*, 1967 DUKE L.J. 857, 860-61; Note, *Recidivist Procedures*, 40 N.Y.U.L. REV.

meet the minimum standards of fairness required by due process.[25]

III

THE FEDERAL COURTS AND EVIDENCE OF PRIOR CONVICTIONS

Prior to *Spencer* the Fourth Circuit held a Texas-type recidivist procedure too prejudicial to meet the minimum fairness requirement of due process.[26] The Fifth Circuit, on the other hand, approved a similar procedure on the ground that it satisfied due process standards.[27] The Third Circuit held unconstitutional Pennsylvania's procedure in capital cases, under which evidence of prior convictions was admitted during the trial but only for the purpose of sentencing.[28] The court concluded that since the risk of prejudice takes on special significance in a capital case,[29] due process required separate determination of guilt and punishment and exclusion of the defendant's criminal record until after a guilty verdict.[30]

In *Marshall v. United States*,[31] the Supreme Court recognized the serious danger of prejudice where the jury discovers the defendant's past convictions. The jurors learned of the defendant's record during the trial through newspaper articles. The Court ordered a new trial, observing that "[t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."[32] The decision, however, was not constitutionally based; it merely announced a procedural rule for federal courts, the minimum standards for which are apparently stricter than those of due process. When compared with *Jackson v. Denno*[33] and the recent landmark decisions involving the rights of the accused,[34] *Marshall* demonstrates the Court's distinction between

332, 348 (1965); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U.L. REV. 210, 216 (1958).

25 As Justice Cardozo explained, a state "procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

26 Lane v. Warden, 320 F.2d 179 (4th Cir. 1963).

27 Breen v. Beto, 341 F.2d 96 (5th Cir. 1965), *cert. denied*, 386 U.S. 926 (1967).

28 United States *ex rel.* Scholeri v. Banmiller, 310 F.2d 720 (3d Cir. 1962).

29 *Id.* at 724.

30 *Id.* at 725 (by implication).

31 360 U.S. 310 (1959).

32 *Id.* at 312-13. In Michelson v. United States, 335 U.S. 469, 480-81 (1948), the Court expressed concern over the use of evidence of prior convictions, maintaining that the misuse of the practice must be scrupulously guarded against.

33 378 U.S. 368 (1964).

34 *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609

rules of criminal procedure for federal trials and due process requirements for the states. In *Ker v. California*,[35] the Court pointed out:

> [A]lthough the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution.[36]

The decisions of the courts of appeals in the recidivism cases demonstrate a misunderstanding of this distinction; they depend on federal trial procedure cases[37] as precedents to solve due process problems in state procedures.

A. Spencer's *Similarity to* Jackson v. Denno

Some light is thrown on the decision in *Spencer* by comparing it with *Jackson v. Denno*.[38] In *Jackson*, the Court held that simultaneous submission to the jury of the question of guilt and the issue of voluntariness of a confession would not result in a reliable determination of the issue of voluntariness and was therefore so prejudicial to the defendant's rights as to violate due process. *Jackson* and *Spencer* are remarkably similar. In *Jackson* jury confusion of two issues, guilt and voluntariness of a confession, was possible. Since the jury considered both simultaneously, the issue of voluntariness could easily influence the determination of guilt, and vice-versa. Alternative nonprejudicial procedures were available,[39] but the procedure in question was the most commonly used.[40] Defendant's right to a jury trial on all questions of fact and the desirability of using split procedures or two juries were also involved. The *Jackson* Court held that the

(1965); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

35 374 U.S. 23 (1963).

36 *Id.* at 33.

37 Marshall v. United States, 360 U.S. 310 (1959); Michelson v. United States, 335 U.S. 469 (1948).

38 378 U.S. 368 (1964).

39 The orthodox rule is that the trial judge "solely and finally determines the voluntariness of the confession . . . ." 378 U.S. at 378. The so-called Massachusetts procedure gives the trial judge authority to screen out what he finds to be involuntary confessions, letting the jury then pass separately on the voluntary nature of those which he feels were indeed voluntary.

40 The procedure had been approved by the Supreme Court in Stein v. New York, 346 U.S. 156 (1953). *Stein* was overruled by Jackson v. Denno. See 378 U.S. at 396-400 (appendix) and 378 U.S. at 410-23 (Black, J., concurring in part and dissenting in part) for a survey of procedures followed by various state and federal jurisdictions.

Constitution requires separate determinations of the two potentially confusing issues.

> Jackson's position . . . is that the issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence. So far we agree and hold that he is now entitled to such a hearing in the state court.[41]

What is the significant difference between the procedures in *Jackson* and *Spencer* that makes one constitutional while the other is not?

B. *Due Process and Prejudicial Criminal Procedure*

The complete answer does not lie in the degree of prejudice resulting from each procedure.[42] Nor is it likely that the Court in the three years between the two decisions acquired a new faith in the jury's ability to handle confusing and prejudicial issues simultaneously. The distinction between *Jackson* and *Spencer* is not in the procedures used, resulting prejudice, or judicial attitude toward juries; rather, it is attributable to a difference in the constitutional rights at issue. In *Spencer* Justice Harlan explained:

> [T]he emphasis [in *Jackson*] was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury. In the procedures before us, in contrast, no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general "fairness" approach.[43]

The defendant in *Jackson* availed himself of the specific federal protection against the admissibility of a coerced confession. In *Spencer* the defendant could rely only on the general "fairness" protection of the due process clause.[44] Whereas the Court enforces specific rights with

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41 378 U.S. at 394.

42 *Jackson* and *Spencer* are arguably distinguishable on the relative degree of prejudice involved. The confession before the jury in *Jackson* was more directly related to the issue of guilt than was the recidivism in *Spencer*; therefore, it might have been more difficult for the jury in *Jackson* to separate the question of voluntariness and guilt.

43 Spencer v. Texas, 385 U.S. 554, 565 (1967).

44 It might be argued that the procedure in *Spencer* did violate a specific right—the sixth amendment right to an impartial jury. The Court has construed this right to require impartial jury selection, United States v. Wood, 299 U.S. 123 (1936) (holding that goverument employees may be jurors in District of Columbia criminal cases unless removed for cause), and to prohibit outside prejudicial or disruptive influences on the jury, such as trial publicity or an influential bailiff. *E.g.*, Parker v. Gladden, 385 U.S. 363 (1966) (bailiff impressed upon the jury his opinion of the defendant's guilt); Baker v. Hudspeth, 129 F.2d 779 (10th Cir.), *cert. denied*, 317 U.S. 681 (1942) (jury misconduct outside the trial and qualification of jurors). But the right to an impartial jury has never

particular care, the states retain a greater latitude in satisfying the fairness requirements of due process. "In this area the Court has always moved with caution before striking down state procedures."[45]

Although *Jackson* was expressly decided on fourteenth amendment due process grounds, the right to a trial free from the taint of a coerced confession has been so long recognized and so strictly guarded that it may be as "specific" as the rights contained in the first eight amendments. Moreover, the rule excluding involuntary confessions was at the time of *Jackson* very closely related to, if not in fact based on, the fifth amendment privilege against self-incrimination. Justice Harlan's distinction in *Spencer* is quite elusive. If a "specific right" is one that is well-established and rigorously protected, then the distinction begs the question, since the issue is whether the right involved *should* be rigorously enforced. On the other hand, the distinction may have merit if "specific federal right" refers to a right that is either enumerated in the first eight amendments or closely related to a right so enumerated.

Prior to 1964, cases involving confessions in state trials were decided on the basis of voluntariness and were grounded in due process rather than self-incrimination.[46] As a result, the standards of admissibility in federal and state trials differed, at least in theory.[47] *Malloy v. Hogan*,[48] decided one week before *Jackson*, indicated that the difference was minimal. Holding that the fifth amendment applies to the states through the fourteenth, the Court explained:

> [T]oday the admissibility of a confession in a state criminal prose-

been used to exclude prejudicial evidence. Although this right could provide the Court with a tool for establishing stricter constitutional rules of evidence, its meaning is apparently so well established that the dissenters in *Spencer* did not even raise the issue. The natural meaning of "impartial" connotes absence of preconceived bias, and since the purpose of presenting any evidence is to sway the jury, basing the admissibility of evidence on the impartiality requirement would make very little sense. The right to an impartial jury properly extends only to matters affecting initial jury impartiality or affecting the jury from outside the trial or courtroom itself.

45 Spencer v. Texas, 385 U.S. 554, 565 (1967).

46 The rule excluding involuntary confessions was originally a rule of evidence, experience having proven involuntary confessions unreliable. *See* Twining v. New Jersey, 211 U.S. 78, 113 (1908). In Brown v. Mississippi, 297 U.S. 278 (1936), the Court established a constitutional basis for the rule, prohibiting, as a violation of due process, a state's use of an involuntray confession in a criminal trial. The Court there expressly distinguished this right from the privilege against self-incrimination, *id.* at 285, presumably because of the holding in *Twining* that the fifth amendment does not apply to the states.

47 Some states actually used the federal test of voluntariness, while others emphasized the conduct, coercion, and brutality of the officials procuring the confession.

48 378 U.S. 1 (1964).

> cution is tested by the same standard applied in federal prosecutions . . . "the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' "[49]

The Court continued: "The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."[50]

In *Miranda v. Arizona*,[51] the Court applied the *Malloy* language[52] to a confession case, remarking:

> Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the *privilege* . . . .[53]

Apparently, the involuntary confession rule was, at the time of the *Jackson* decision, virtually identical to the fifth amendment privilege against self-incrimination. As such, it qualified as a "specific right" deserving rigorous protection, whereas the right involved in *Spencer*, predicated on general fairness, was accorded a lesser degree of protection.

C. *Specific Rights Standards v. General Fairness Standards*

In *Griffin v. California*,[54] the trial judge had allowed the prosecutor in a murder trial to comment to the jury on the defendant's failure to take the stand and had instructed the jury that a reasonable inference could be drawn from the defendant's silence concerning facts that he could be expected to know. The Supreme Court found this procedure unconstitutional. In *Delli Paoli v. United States*,[55] the Court reviewed a joint trial at which an allegedly prejudicial procedure had been used. The trial court admitted into evidence a confession of one

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49 *Id.* at 7. The shift to the federal standard in state cases represented a change in emphasis from brutality to involuntariness. *See* 78 HARV. L. REV. 223, 224 (1964).

50 378 U.S. at 7.

51 384 U.S. 436 (1966).

52 *Malloy* involved not a confession but rather potentially incriminating statements before a court-appointed referee. Thus, the Court's language concerning confession cases may be seen as dictum.

53 384 U.S. at 464 (emphasis added).

54 380 U.S. 609 (1965), *rehearing denied*, 381 U.S. 957 (1965).

55 352 U.S. 232 (1957). *Delli Paoli* concerned a federal trial court procedure, but since it was held valid, a similar state court procedure should also be valid. *See* p. 344 & note 36 *supra*.

of the petitioner's co-conspirators which had clear references to the petitioner, thereby implicating him in the crime. Although the court could have deleted the reference to the petitioner, it merely instructed that the confession was to be used only in reference to the party making it. The Supreme Court affirmed the conviction.

Analysis of these two cases and of the procedures involved does not reveal measurable differences in the prejudice to the defendant that would explain the opposite results. The defendant is not put at a significantly greater disadvantage by comment on his failure to testify than by the implications of his co-defendant's confession. The difference in results apparently reflects the nature of the right involved in each case.

The procedure at issue in *Griffin*—the comment by the prosecutor and the instruction by the court permitting the inference—infringed the defendant's fifth amendment privilege against self-incrimination, a specific right made applicable to the states by *Malloy v. Hogan*.[56] In *Delli Paoli* no specific right was involved.[57] As in *Spencer*, simple and nonprejudicial alternative procedures were available; separate trials could have been ordered, or the reference to the petitioner in the confession could have been deleted. But the Court upheld the procedures used, expressing confidence in the measures taken to diminish the prejudicial effects of the evidence.[58]

Similar differences in the Court's treatment of specific and general rights are evident from analysis of other cases. *Chandler v. Fretag*[59] began as a trial on a single larceny offense, to which the defendant pleaded guilty. At the trial he was informed that he was being charged as a habitual offender, and that conviction would result in a life sentence. He asked for but was denied a continuance to procure counsel for the recidivist hearing. The Supreme Court found this denial of the right to counsel a violation of the defendant's fourteenth amendment rights. In *Williams v. New York*,[60] the jury had returned a verdict of guilty in a murder trial and recommended life imprisonment. Nevertheless, the judge sentenced the defendant to death, basing his decision on evidence not introduced at trial, namely, the defendant's prior record and information from the probation department and

56 378 U.S. 1 (1964).

57 Since the Court was reviewing a federal trial, constitutional grounds were never reached; the procedure was found valid under the federal supervisory powers of the Supreme Court.

58 352 U.S. at 239-42.

59 348 U.S. 3 (1954).

60 337 U.S. 241 (1949).

other unnamed sources. The Court held that this denial of the opportunity to examine the adverse evidence or confront the adverse witnesses was permissible.

It is difficult to distinguish these cases on the basis of the prejudice resulting from the procedures used. In both instances, the prejudice is substantial. Again, the results are different because of the nature of the rights involved. Like *Jackson, Chandler* concerned a specific right with a history of strict protection—namely, the due process "right to counsel" akin to the sixth amendment right.[61] On the other hand, the right asserted in *Williams*—namely, to contest evidence used in the sentencing process—was based on the general fairness requirement inherent in fourteenth amendment due process.[62]

Apparently, when a specific right is involved, even a slightly prejudicial procedure will induce the Court to protect the right by overturning a conviction or by taking other appropriate action. Much greater prejudice is needed when the general fairness requirement is relied on. The fairness standard was defined by Justice Cardozo in the following manner:

> [A state] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[63]

In short, when "justice will be outraged,"[64] due process is lacking. The vagueness of the standard means, in practical terms, that general fairness is lacking when a particular procedure shocks the consciences of five Justices. In *Spencer, Delli Paoli,* and *Williams* the prejudice was not sufficiently shocking to the Court to warrant reversal on due process grounds, and, since specific rights were not at issue, the Court allowed the prejudicial state procedures to stand.

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61 Although the "right to counsel" in *Chandler* was based on fourteenth amendment due process, the right was intimately related to the sixth amendment right to counsel. Gideon v. Wainwright, 372 U.S. 335 (1963), has since applied the sixth amendment right to counsel to the states through the fourteenth amendment. See pp. 346-47 *supra* for an analogous discussion concerning the privilege against self-incrimination.

62 Since this decision, the sixth amendment has been made applicable to the states. Gideon v. Wainwright, 372 U.S. 335 (1963). Nevertheless, the sixth amendment right to confront witnesses applies to the trial of guilt, not to punishment hearings. For a discussion of the different evidentiary and procedural limitations traditionally involved in guilt determinations and punishment determinations, see Williams v. New York, 337 U.S. 241, 246-47 (1949).

63 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

64 *Id.* at 115.

How prejudicial must a state's practices be to fall below the general fairness standards of due process? Cases in which the Court has found prejudice sufficient to violate general due process have involved convictions based on perjured testimony,[65] or on a complete lack of evidence,[66] or the televising of a sensational trial,[67] or apparent bias on the part of the trial judge.[68] The prejudice must be truly outrageous before a conviction will be overturned. Although the prejudice in *Spencer*, *Delli Paoli*, and *Williams* might have been substantial enough to justify protection of a specific right, it was not sufficiently outrageous to violate the general fairness requirement. Justice Stewart's concurring opinion in *Spencer* reflects the difference in standards. Although he personally disapproved of the Texas procedure, he did not find it sufficiently prejudicial to "fall below the minimum level the Fourteenth Amendment will tolerate."[69]

CONCLUSION

When no "specific" right is at issue, a state's procedure that results in significant but not outrageous prejudice to the criminal defendant is not prohibited by the general fairness requirement of the fourteenth amendment, even though the same procedure would be struck down if a specific right were involved. It is no justification to say that those specific rights explicitly written in the Constitution deserve stricter protection. Indeed, *Jackson* demonstrates that many of the specific rights are unwritten.

The distinction may be explained in terms of federalism. Perhaps the Court is reluctant to dictate to the states the procedures that should be used in the administration of criminal justice, preferring to let the states experiment in areas that require no special uniformity. But this seems to pervert the federal scheme; the very limits placed expressly on the federal government—the fourth, fifth, and sixth amendments —now apply more strictly to the states than does the fourteenth amendment, the one direct limit on the states.

A more convincing explanation is that the specific rights are simply more sacred than the general fairness right. But results such as those in *Jackson* and *Spencer*—where the jury is not permitted to consider the voluntariness of a confession together with the question

65 Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

66 Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. City of Louisville, 362 U.S. 199 (1960).

67 Estes v. Texas, 381 U.S. 532 (1965).

68 *In re* Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510 (1927).

69 Spencer v. Texas, 385 U.S. 554, 569 (1967) (concurring opinion).

of guilt but is allowed to consider prior convictions together with guilt—cast doubt on the validity of the distinction. Talk of sanctity seems hollow when the prejudice involved is of similar magnitude. The difference in treatment might be easier to accept if the minimum standards of fairness were somewhat higher—high enough, at least, to preclude procedures such as those in *Spencer*.

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