Removal and Restraint of Contumacious Defendants

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REMOVAL AND RESTRAINT OF CONTUMACIOUS DEFENDANTS

I. Introduction

The current advent of the violent, disruptive, obstreperous defendant has challenged some of the concepts implicit in the administration of the judicial process. The most severe challenge seems to be directed at the dignity, decorum, and courtesy which have been the hallmark of the courts of civilized nations. This challenge has raised serious questions about the premises upon which the court's rules are founded.

An accused's contumacious conduct places a court in the dilemma of attempting to preserve two otherwise unopposing interests: the right of the defendant to be present to confront witnesses and the right of the court to maintain the dignity and order of the judicial process in the face of misconduct. This Note analyzes the development of these two interests and shows their culmination in the recent case of Illinois v. Allen. The story is not complete, however, for neither Allen nor any other case provides the trial judge with any "black letter" law in regard to what should be done with any individual, disruptive defendant. All that can be given are guidelines; there is a large grey area within which individual judgment can only be applied in each case.

II. The Right To Be Present at Trial—Its Historical Evolution

The origin of the right to be present in felony prosecutions is found in the early trial practice in England. The common methods of English trial were Trial by Ordeal and Trial by Battle.¹

Trial by Ordeal took two basic forms: fire ordeal and water ordeal. The former was restricted to persons of high rank while the latter was for the common people. Basically, fire ordeal consisted of the accused taking a piece of red-hot iron in his hand or walking barefoot and blindfolded over nine red-hot ploughshares.² Water ordeal required the accused to either plunge his bare arm up to the elbow in boiling water or be thrown into a pond and sink.³ The requirement for innocence in either fire or water ordeal was that the accused escape unhurt. If the accused was injured by the ordeal—as was most likely without some collusion—he was condemned as guilty.

Trial by Battle was an opportunity for the accused to prove his innocence by engaging in combat and emerging victorious. The theory behind such a "trial" was that God would always intervene to preserve innocence and vindicate the guiltless by protecting them from harm.⁴

With such a system of adjudicating the case, the presence of the accused was

¹ Heller The Sixth Amendment 4-12 (1951).
² 4 W. Blackstone, Commentaries *342-43.
³ Id. at 343.
⁴ Id. at 346.
indispensable for a verdict. Without the accused, there would be no ordeal or battle, nor could there be any determination of guilt or innocence.\(^5\)

From this rough origin as a crude limitation upon private war, English criminal justice evolved to the tyrannical Star Chamber proceedings. Trial by jury gained undisputed supremacy after the civil wars of England, but the trials themselves only proved that juries could be as unjust as the Star Chamber.\(^9\)

However, changes instituted in 1640 indicated a significant shift in the spirit of criminal justice toward a more humane trial that was more conducive to the discovery of truth. From this time it could be said:

In every case . . . the accused person had the witnesses against him produced face to face, unless there was some special reason (such as sickness) to justify the reading of their depositions.\(^7\)

Inherent in this recognition of the right to confront witnesses was the necessity of the mutual presence of the accused and the witnesses against him. No legislative enactment prompted this procedural change. It appears to have been a spontaneous reaction to the abuses present in the political trials of the preceding century.\(^6\)

The institution of the jury system strengthened the original basis for the requirement of the accused’s presence. It was essential for the accused to present the dispute, accept the jurisdiction of the court, and defend.\(^9\) Since he was accorded no right to counsel he had to present the dispute and defend as only he could. The jurisdictional aspect was particularly significant because the common law court came to regard the accused’s submission to the court’s jurisdiction as a prerequisite to the commencement and continuation of the trial. In England it was also necessary that the accused accept the authority and capacity of the judge. Pragmatically, the courts were cognizant of the potential embarrassment and futility of decreeing punishment on an absent defendant. In felony cases, there were problems of execution of judgment that were not present in cases where the judgment could be satisfied from the defendant’s property.

A statute passed in 1695 marked the first time the accused was permitted to have a lawyer assist him in defending against charges of treason.\(^10\) Yet even after the institution of the right to counsel, presence was still rigorously required. This was based more on lack of precedent to continue in his absence than on any desire to protect the accused. As stated by Holt:

Judgment cannot be given against any man in his absence, for a corporal punishment; he must be present when it is done . . . . There is no precedent of any such entry; for if we give judgment that he shall be put in the pillory,

\(^5\) Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Colum. L. Rev. 18 (1916). The types of cases in which ordeal was inflicted are set out in 2 Stephen, History of the Criminal Law of England 252-53 (1883). It appears that ordeal fell into disuse in the course of the thirteenth century.
\(^7\) Id. at 358.
\(^8\) Id.
\(^9\) Goldin, supra note 5, at 19.
\(^10\) Clark, The Sixth Amendment and the Law of the Land, 8 St. Louis U. L.J. 1 (1963). It was not until 1836 that the right to counsel was extended to other felonies. In that 141-year span, the best protection the accused received was the aid his physical countenance gave to the confrontation with his accusers and the witnesses against him.
it might be demanded when, and the answer would be, when they can catch him.11

At the time of the establishment of the American colonies, the principle of confrontation was firmly entrenched as an integral part of the common law. And when the Union was formed, the new states declared their right to use the common law of England. The declaration of rights or the state constitution of most of the new states enumerated, as one of the rights of its citizens, the right of an accused in a criminal proceeding to be confronted with the witnesses against him.12 The concept of presence, although not stated with particularity, was understood to be included in the term "confrontation." The term conveyed more than merely the right to cross-examine witnesses. At the time of the adoption of the sixth amendment the term appears to have been so well understood as to require little or virtually no explanation of the phrase "to be confronted with his accuser and the witnesses against him."13 Historically, all that can be discerned is that the clause was part of Madison's proposed amendments.14 Thus, the Federal Constitution does not expressly confer upon the defendant the right to be present at his trial."15 However, the fact that the word "presence" is not used explicitly can be historically justified on the basis of the accepted understanding and usage of the confrontation principle at common law.

One of the first American cases to expressly recognize the presence requirement was *Sperry v. Commonwealth.*16 In that case the court announced that the rule applicable to trials for felonies in England was, in general, also applicable in Virginia.17 Subsequent courts rigidly and blindly adhered to this principle.18 However, the important factor was overlooked that American courts had long recognized the right to counsel. An accused in America had greater assurance of protection by virtue of having counsel than an accused in England. Although the peculiarly English reason for adopting the rule was missing, the adherence to established principles nevertheless assured the adoption of the rule.

The uniformity of the American decisions on the necessity of defendant's presence leaves no doubt that it was the general rule.19 This did not, however, prevent the courts from recognizing exceptions to the confrontation right that had existed both before and after the adoption of the sixth amendment. The right to confrontation did not bar the admission of dying declarations,20 documentary

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17 *Id.*
19 The following state cases all strongly indicate the accused's right to be present at felony trials: Cook v. State, 60 Ala. 39 (1877); Sneed v. State, 5 Ark. 431 (1844); Barton v. State, 67 Ga. 533 (1867); Sahlings v. People, 102 Ill. 241 (1882); McCorde v. State, 14 Ind. 39 (1860); People v. Perkins, 1 Wend. 91 (N.Y. 1828); Rose v. State, 20 Ohio 31 (1851).
evidence, or the affidavit of witnesses whose absence was due to the defendant’s wrongful procurement. The theory behind these exceptions was that the defendant should not be able to complain about the legitimate consequences of his own actions. Valid jurisdictional arguments, such as execution of the verdict in a capital case on an absent defendant, were advanced to support the rule of presence, but other grounds were also promulgated.

Gradually the courts began to recognize that the privilege, being primarily for defendant’s benefit, could be waived in cases of felonies that involved less than capital offenses. It was also recognized that where the trial was for a misdemeanor it could usually take place and a verdict could be rendered in the defendant’s absence. Some courts indicated that it was possible for a conviction to stand if the accused had missed only insignificant steps in the trial by his absence. The distinction was made, however, that the trial must have been commenced and that the prisoner, by his own wrong (e.g., not returning for trial when on bail), abandoned the case to counsel.

_Hopt v. Utah_ was a felony case in which certain challenges to the competency of the jurors were tried in the absence of the prisoner, but with his knowledge and without objection on his part. The Court held that the action of the lower court in permitting the trial of these challenges in the absence of the defendant, regardless of his failure to object, was such a vital error as to vitiate the proceedings. The Court indicated that neither the accused nor his counsel had the power to waive the right to be present. Mr. Justice Harlan noted that:

The public has an interest in his [the accused’s] life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . . [T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

Justice Harlan also indicated that the accused must be afforded the con-
frontation right from the commencement of the trial. The Court considered the trial to begin from the point of jury selection. The aid which the accused's presence would give to his counsel, the court, and his triers in a matter directly affecting his life or liberty was emphasized. It was recognized that his counsel alone could not adequately defend in his absence.

The Court seemed to uphold an inviolate rule of presence that commenced at jury selection and extended through the examination of witnesses, the argument of counsel, the rendition of the verdict, and the discharge of the jury. At any significant part of the trial the defendant had to be present, but his absence while some insignificant, collateral thing was being done was not necessarily fatal to the court's jurisdiction.

The Hopt principles were strengthened through the strong affirmation of the presence requirement rendered in Lewis v. United States. In that case the right was held to be so absolute that the accused could not waive it either personally or through his counsel. Additionally, the trial record had to indicate the presence of the accused at all essential parts of the trial in order to assure the appellate court that the accused was afforded this substantial right. The making of challenges to the jurors was regarded as an essential part of the trial at which the accused had the right to be brought face to face with the jurors. A secret challenge made out of the presence of the accused was reversible error.

The strengthening of the ability to waive the right to be present was due, in part, to the emasculation of the jurisdictional basis for the argument for absolute presence. Although some courts continued to cling to the rule on the jurisdictional grounds, the Supreme Court in Diaz v. United States recognized that a defendant did have the ability to waive his right to be present. The Court considered a statute from the Philippine Islands which was stated to be the substantial equivalent of the sixth amendment. The defendant's voluntary, temporary absence from his trial was construed to operate "as a waiver of his right to be present [which] leaves the court free to proceed with the trial in like manner and with like effect as if he were present." The old fear of rendering an unenforceable judgment on an absent defendant that was prominent from English precedent was thrust aside. The new rule deprived the accused of the ability to frustrate the court personally, and justice in general, by fleeing the jurisdiction in order to render the court powerless to deliver an adverse verdict. Quoting from Falk v. United States, the Court noted:

Neither in criminal nor in civil cases will the law allow a person to take

31 Id. at 578.
32 Bennett v. State, 62 Ark. 517 (1876); Bearden v. State, 49 Ark. 331 (1884); Sheppard, 49 W. Va. 582 (1901).
33 Tiller v. State, 96 Ga. 431 (1895); Rose v. State, 20 Ohio 31 (1851).
34 See note 19 supra. See also Brister v. State, 26 Ala. 107 (1855) where, after rendition of the verdict, the judge noticed defendant's absence. Although he had discharged the jury, he told them they were not discharged before they left the jury box, and then had the defendant brought in and the verdict received again.
35 146 U.S. 370 (1892).
36 State v. Mannion, 19 Utah 505, 57 P. 542 (1899); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923).
37 223 U.S. 442 (1912).
38 Id. at 455.
advantage of his own wrong. And yet this would be precisely what it would
do if it permitted an escape from prison, or an absconding from the jurisdic-
tion while at large on bail, during the pendency of a trial before a jury, to
operate as a shield.40

Diaz thus ameliorated the strict rule promulgated in Hopt and Lewis—at least
in cases where the charge was a non-capital offense and the accused was not in
custody.

In Snyder v. Massachusetts41 the Court was called upon to determine
whether the presence of the accused was required at a jury view. It was held that
there was no absolute right to be present at a bare inspection by the jury. A bare
inspection is a view where nothing was said by anyone to direct the attention of
the jury to one feature or another. The Court assumed that the sixth amendment
right to confront and examine one’s accusers was “reinforced by the Fourteenth
Amendment, though this has not been squarely held.”42 It was pointed out that
there was no prior ruling which guaranteed the right to be present when presence
would be useless. The presence of the accused constituted a condition of due
process only to the extent that a fair and just hearing would be thwarted by his
absence.43

The Court went significantly beyond recognizing the ability to miss certain
unimportant parts of the trial. In a footnote, Justice Cardozo classified the state-
ments in Hopt and Lewis on presence as dicta.44 He recognized that the right to
be present was not absolute as stated in the previous cases. The Lewis holding
was further diminished when it was noted that the case dealt with the rule as it
existed at common law.45

With the rendering of the Snyder opinion the state of the law reached the
point where a defendant did not necessarily have to be present for his entire trial.
He could voluntarily consent to a waiver of his constitutional right to be present
at stages of the trial at which collateral matters occurred. However, the require-
ment of presence was still a significant force; presence was mandated whenever
evidence was offered to enable defendant to advise with his counsel46 as well as
cross-examine his accusers.47

III. The Right To Be Present at
Trial—Waiver by Misconduct

The early English common law right to be present at one’s trial was con-
tioned upon one’s continued proper conduct throughout the trial. The degree
of misconduct justifying removal was necessarily lower in misdemeanor cases

40 223 U.S. at 458.
41 291 U.S. 97 (1934).
42 Id. at 106. See Pointer v. Texas, 380 U.S. 400 (1965) which held that the sixth
amendment right is applicable to the states through the fourteenth amendment.
43 Id. at 107-08. See also Frank v. Mangum, 237 U.S. 309 (1915) which held that allowing
a waiver in a capital case is not repugnant to the due process clause of the fourteenth
amendment.
44 Id. at 117.
45 Id.
47 Dowdell v. United States, 221 U.S. 325 (1911).
than in felony cases because of the force of the rule of confrontation in capital cases. The jurisdictional arguments were of primary importance in the felony cases because of the lack of "property" that suitable punishment could be levied on. The removal sanction was, however, so rarely invoked that a famous English commentator remarked:

I have never known or heard of this being done, but Lord Cranworth (then Rolfe, B.) threatened to have Rush removed from Court, at his trial for murder at Norwich in 1849, if he persisted in a singularly indecent and outrageous course of cross-examination. . . . It is obvious that in capital cases, or indeed, in any trial involving severe punishment, almost any measures, short of removing the prisoner, should be resorted to.48

The English experience was not, therefore, of substantial aid to the evolving American law of waiver by misconduct.

The first American case to deal with the problem of a disruptive defendant was United States v. Davis49 where the defendant persisted in interrupting the district attorney's opening address. The defendant succeeded in making it impossible for the trial to proceed with dignity and decorum. The judge had the defendant removed from the courtroom to an adjoining room. Defendant's counsel had free access to this room at all times during the proceedings. When Davis had calmed himself and decided to behave, he was permitted to enter the courtroom and rejoin the trial. As to his motion for a new trial based on his exclusion from the courtroom, it was stated:

He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance.50

Thus, the seldom, if ever,51 used English rule was established in American practice. This case did not, however, cite the sixth amendment to enforce or modify any provision contained therein. The absence of authority for such a move is indicated by the lack of citation to any precedent or other source for such extreme action.

The chronologically next important case in this area arose, ironically, in England twenty-eight years later with Regina v. Berry.52 At his arraignment for the felony of burglary the accused proceeded to remove his clothing, and wildly shout and blaspheme so as to make it necessary for the court to have him removed from the courtroom. After a repetition of this performance the next day, he was again removed after which the court entered on his behalf a plea of not guilty. He was found guilty and sentenced to ten years imprisonment. Although this was not a capital felony case, it was still an unprecedented act in a felony case.

Relying upon the authority of Regina v. Berry, the court in Rex v. Browne53

49 25 F. Cas. 773 (No. 14,923) (C.C.S.D.N.Y. 1869).
50 Id. at 774.
51 See note 48 supra.
52 104 L.T. J. 110 (Northampton Assizes 1897).
53 70 J.P. 472 (1906).
convicted an absent defendant. The female accused in this misdemeanor case threw herself down on the floor, and otherwise so misbehaved as to make it impossible to continue the trial in her presence. She was ultimately convicted and sentenced to eighteen months in prison. The case was recognized to stand for the proposition that only in exceptional circumstances could a defendant be excluded even from a misdemeanor case. This case also serves to highlight the standing of Regina v. Berry as the sole precedent and authority for the proposition that a defendant can forfeit his right to be present at a felony trial for extreme misconduct.

IV. Decorum in the Courtroom Versus the Defendant's Right To Be Present at Trial—The Use of Physical Restraints as an Alternative to Removal

With the conjunction of the rules of presence and forfeiture of presence through misconduct, the search for reasonable alternatives to removal centered on the concept of enforced presence through physical restraint. Once again, the American common law precedent was the English experience. The general rule announced by Blackstone was that if there was danger of escape the accused could be restrained by leg irons, but otherwise he was to remain unshackled.

In Cranburne's Case in 1696 the defendant was brought, after arraignment, to the bar in irons. Chief Justice Holt ordered his irons removed on the ground that the prisoner ought to stand and plead at ease when tried. A distinction was made in 1722 in Layer's Case that the prisoner might be brought to the bar in irons for arraignment, but that his shackles must be removed at trial. It was unsuccessfully argued that on arraignment, as at trial, the dignity of the court should be considered. At the highest court, "where the King himself is supposed to be personally present, to have a man plead for his life before them in chains, seems very unsuitable." Although it was recognized that chains are burdensome and must be removed at trial, it was decided that at the arraignment the accused may be kept in chains. The primary reason for this was to prevent the prisoner's escape.

The American courts adopted a similar attitude toward the use of shackles at a trial. The court in People v. Harrington expressed the accepted view that:

[A]ny order or action of the court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.

54 See, e.g., The King v. Lee Kuhn, 1 K.B. 337, 341 (1915).
55 4 W. BLACKSTONE, COMMENTARIES *322. See also STEPPEN, A DIGEST OF THE LAW OF CRIMINAL PROCEDURE 194 (1883).
56 13 How. St. Tr. 222.
57 16 How. St. Tr. 94.
58 Id. at 99.
60 Id. at 167, 10 Am. Rep. at 298.
The general rule today is that the accused is entitled to make his initial appearance free from all forms of restraint.\textsuperscript{61} There is, however, no absolute rule that a prisoner can in no case be fettered.\textsuperscript{62}

Many courts state that special facts or exceptional circumstances have to be found to justify the use of shackles and gags.\textsuperscript{63} Shackling is excused only when it is necessary to prevent the escape or self-destruction of the prisoner, to prevent probable danger to the officers of the court, or to protect bystanders from violence. It is also permissible where the defendant engages in such misconduct as would obstruct the business of the court.\textsuperscript{64}

In \textit{People v. Loomis}\textsuperscript{65} misconduct by the defendant resulted in the court’s ordering that defendant’s arms and legs be strapped together while he was secured in a wheelchair. At times a towel was placed over his mouth to preclude outbursts. Such measures were necessary because the accused kept throwing himself on the floor, kicking the counsel’s table, screaming profanities at the court and jury, and fighting with the officers who sought to restrain and quiet him. No abuse of the trial court’s discretion in ordering such restraints was found.

Gagging and shackling two defendants was also upheld in \textit{United States v. Bentvena}.\textsuperscript{66} One defendant had climbed into the jury box and shoved jurors. Another defendant heaved a chair at an Assistant United States Attorney. The court approved the imposition of restraint saying: “If any one distinct impression is gained from a scrutiny of the record here, it is that the trial judge was justified, indeed was forced, to resort to stern measures to obtain order in his courtroom.”\textsuperscript{67}

Problems may arise in cases where several defendants engage in a course of action designed to make it impossible to proceed with the trial while other defendants do not participate in the actions. In \textit{People v. Duplissey}\textsuperscript{68} several defendants refused to be seated in the courtroom and persisted in interrupting the judge. Although one defendant did not participate in the disruptive actions, all the defendants were handcuffed together in the presence of the jury. It was held that this shackling was so prejudicial to the nondisruptive defendant as to render denial of his motion for a separate trial an abuse of judicial discretion.

Similar difficulties arise where one defendant’s witnesses are manacled. A defendant has the right to have his witnesses unmanacled for the same basic reasons that he is allowed the free use of his own limbs.\textsuperscript{69}

Although a defendant’s misconduct at trial is recognized as an adequate

\textsuperscript{61} \textit{See}, e.g., Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); Faire v. State, 58 Ala. 74 (1877); State v. Randolph, 99 Ariz. 253, 408 P.2d 397 (1965); State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472 (1959); State v. Temple, 194 Mo. 237, 92 S.W.869 (1906); Commonwealth v. Reid, 123 Pa. Super. 459, 187 A. 263 (1936).

\textsuperscript{62} Faire v. State, 58 Ala. 74 (1877).


\textsuperscript{64} Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390, 393 (1916).

\textsuperscript{65} 27 Cal. App. 2d 236, 80 P.2d 1012 (1938).

\textsuperscript{66} 319 F.2d 916 (2d Cir. 1963).

\textsuperscript{67} \textit{Id.} at 930-31. \textit{Accord}, People v. Kerridge, 20 Mich. App. 184, 173 N.W.2d 789 (1969), where, during a felony trial, a defendant, who insisted on shouting obscenities and was otherwise uncooperative, was ordered gagged and shackled.

\textsuperscript{68} 380 Mich. 100, 155 N.W.2d 850 (1968).

\textsuperscript{69} Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916).
basis for the court to exercise its discretionary option to have him shackled, there
is some question as to the scope of inquiry by the court. Matters that occur before
the trial were, at first, considered beyond the scope of the court’s inquiry. In
State v. Kring the defendant had assaulted a person in court three months before
the trial in question. The court held that knowledge of such an incident
would not authorize the court to assume that he would be guilty of similar mis-
conduct when he was on trial for his life. The judge’s decision had to be based on
either the conduct of the prisoner at trial or the evidence offered at trial.

There is a distinct group of cases where the judge has taken judicial notice
of facts generally known within the limits of its jurisdiction. The defendant in
such cases has been a known dangerous criminal. In Makley v. State the
defendant was a member of the notorious John Dillinger gang and an escaped
convict. Previously he had participated in breaking into the county jail to free
John Dillinger. The sheriff had been killed in the jailbreak. Facts of the de-
fendant’s criminal exploits had also been revealed at the trial of an accomplice.
The prisoner was required to remain shackled throughout the trial while a
military guard was maintained at the courthouse and jail. Nonmilitary guards
were used in the courtroom as an extra precaution. A pass system was used for
admission to the trial, and persons were searched before admission to the court-
room was permitted. In upholding such extraordinary precautions the court
quoted the opinion in the case of Barnett v. State that “what we know as men,
having common knowledge... we cannot ignore as judges.”

The modern view does not limit the factors influencing the judge’s decision
to the trial itself. Knowledge obtained from the sheriff that the defendant has
made a desperate effort to escape at gunpoint, or that the defendant was bent
on self-destruction and would very likely try to secure some deputy’s pistol in
order to force the officers to kill him is sufficient to justify having the defendant
manacled. The record, however, must disclose sufficient facts to make it clear that
such action was warranted by the court.

Reliance by the trial judge solely on the opinion of the sheriff may be con-
sidered an abdication, rather than an exercise of, discretion. The sheriff’s duty is
to keep the prisoner in safe custody, but his opinion on shackling defendants
should be supported by some satisfactory evidence that creates a reasonable belief
that restraint is necessary in court. A judge’s reliance on the affidavit of a sheriff
has been upheld, however, as:

[M]erely giving proper heed, as he had the right to do, to the sheriff’s
knowledge of the record, tendencies and character of appellant and to his
recommendation as an officer of the court, in relation to the necessity of

70 64 Mo. 591 (1877).
71 State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472 (1959); State v. Temple, 194 Mo.
237, 92 S.W. 869 (1906).
72 49 Ohio App. 359, 197 N.E. 339 (1934).
74 104 Ohio St. 298, 310, 135 N.E. 647, 651 (1922).
76 Hall v. State, 199 Ind. 592, 159 N.E. 420 (1928).
keeping appellant handcuffed during his trial in order to prevent his escape.\footnote{State v. McKay, 63 Nev. 118, 165 P.2d 389, 406 (1946).}

The sheriff's opinion must, however, be supported by facts that are preserved in the record.\footnote{Woodards v. Maxwell, 305 F. Supp. 690 (S.D. Ohio 1969).}

In such situations it is usually advisable for the trial judge to take testimony in regard to the necessity of handcuffs or other restraints.\footnote{People v. Mendola, 2 N.Y.2d 270, 140 N.E.2d 353, 159 N.Y.S.2d 473 (1957).} The judge should then state for the record his reasons for imposing restraints. It was expressly noted in \textit{People v. Mendola}\footnote{\textit{Id.} at 277, 140 N.E.2d at 356, 159 N.Y.S.2d at 478.} that failure to follow this practice is not an abuse of discretion, however, if the record discloses that the sheriff had reasonable cause for handcuffing the prisoner.

In \textit{Loux v. United States}\footnote{389 F.2d 911 (9th Cir. 1968).} the trial judge ordered a hearing on the use of restraints when he received pre-trial information that the defendants might attempt to escape during the trial. The hearing disclosed that the courtroom was not very secure, that the defendants as well as the witnesses had an exceptionally high propensity toward violence, and that preparations had been made for an escape.\footnote{\textit{Id.} at 919.} As a result of these findings, leg irons, handcuffs, and a belt attaching the shackles to the chains were used. Such hearings seem to be the fairest way to adequately determine the necessity of the restraints. However, simply stating the reasons for the shackles on the record and allowing the defendant to controvert any of the supporting facts would be sufficient.

The courts resorted to the use of physical restraints to enforce the accused's right to be present at his trial. Restraints were considered an alternative to expelling, or at least risking the possibility of expelling, the defendant's right by compelling his presence at his own felony trial.

Expulsion had been upheld on the lower court level, however, in some instances. The \textit{Diaz} holding had reaffirmed the holding of \textit{United States v. Davis} and thereby emphasized the interrelationship between the concepts of presence and waiver by misconduct. Thus in \textit{People v. De Simone,}\footnote{9 Ill. 2d 522, 138 N.E.2d 556 (1956).} where the defendant both left the courtroom of his own volition on several occasions and was forcibly expelled after making obscene remarks both to the witnesses and judge, the court specifically stated that his misconduct was an effective waiver of his right to be present. Although his absence was involuntary in the sense that he was expelled, it was his voluntary conduct that forced his removal. He chose to be so deprived of his right.

The rules of presence, waiver, and waiver through misconduct were established yet uncorrelated authoritatively. Jurisdictions that maintained the strict rules of presence as a mandate under the sixth amendment would go to any lengths to avoid removal. Defendants in these jurisdictions were subject to being bound and gagged for misbehaving. The Supreme Court had not approved this as a constitutionally permissible alternative. In courts where voluntary waiver was recognized in regard to insignificant parts of the trial and where presence was
conditioned on proper conduct, the judges were hesitant to banish a defendant. The fear was that he would miss some significant event of the trial or that the dictum in Snyder v. Massachusetts would not withstand the force of an actual case. Such was the state of the law before the decision in Illinois v. Allen.

V. Decorum in the Courtroom Versus the Defendant's Right To Be Present at Trial—Illinois v. Allen

The accepted rules were subjected to their severest test to date in the Allen case. Allen had been convicted of a non-capital felony. During the trial he had been excluded because of his disorderly, disruptive, and disrespectful conduct. The exclusion took place without any initial physical restraint being imposed on Allen. In this case of first impression, the Supreme Court held, in an explicit overruling of the court of appeals' position, that the right of a contumacious defendant to be present was not absolute. The Court, through Justice Black, made it clear that it was rejecting the dicta of both Hopt and Lewis in favor of the dictum in Snyder. Because of this, it became obvious that the Brookhart v. Janis, and Barber v. Page formulation of an effective waiver was now encompassed within, and in retrospect had foreshadowed, the Allen holding. Brookhart indicated, although it did not so hold, that a defendant's constitutional right to confrontation could be effectively waived. The Court stated that there was a presumption against such a waiver. For a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right within the Johnson v. Zerbst formulation for waiver. The Allen mandate to the courts includes the duty to warn a defendant of a court's power to punish disruptive acts. This warning would appear to be the factor upon which both knowledge and intentional relinquishment of the right could be founded should the disruptive conduct be continued.

The Allen Court expressly noted that the right could be reclaimed as soon as the defendant agreed to behave. The Court thus reaffirmed the statements of United States v. Davis made 101 years earlier.

In addition to removing a disruptive defendant, the Court enumerated two other alternatives: (1) cite the defendant for contempt, or (2) bind and gag him. The priority of the alternatives depends on the circumstances of the individual case.

The contempt remedy seems to be the least offensive alternative, although it may eventually prove to be the least efficacious in many circumstances. A defendant who desires to be a martyr may not be dissuaded by a court's threat to cite him for contempt. A defendant who believes that the ultimate result of a

86 291 U.S. at 106. The dictum is to the fact that the privilege may be lost through misconduct.
89 397 U.S. at 342.
90 384 U.S. 1 (1965).
91 390 U.S. 719 (1968).
92 Brookhart v. Janis, 384 U.S. 1, 4. See also Harlan's separate opinion in Brookhart. Id. at 8-10.
93 304 U.S. 458, 464 (1938).
trial will be jail for him is not going to be intimidated by the threat of a jail sentence for contempt. In fact, the accused may believe that it would be to his advantage to delay the trial for a while. The political climate may change or witnesses may become unavailable. Thus, the remedy which logically should be considered first may very well be the one disregarded in order to uphold the words of the Court that "neither in criminal cases nor in civil cases will the law allow a person to take advantage of his own wrong." This is, however, by no means a foregone conclusion meant to preclude the contempt power as a viable alternative. Preferably it should be invoked as the least likely to offend the dignity of the court or the administration of the judicial process.

Although binding and gagging a defendant was enumerated first, it would appear from the text of the opinion to be the least desirable in the Court's view since it is mentioned as a remedy of "last resort." This alternative alone would seem to be the most inconsistent with the "decorum and respect inherent in the concept of courts and judicial proceedings."

The use of restraints brings with it the inherent danger of prejudice. The determination to be weighed here is the resultant prejudice to the case that is caused by having the accused appear in shackles before the jury. In some circumstances shackles and gags are degrading and pernicious in the minds of some, but to others, and in different circumstances, shackles would create sympathy and favor. The defendant's appearance could result in prejudicing either his own or the prosecution's case before the jury. The real danger is the erosion of the presumption of innocence until proven guilty. The connotation of guilt is certainly manifest in the bound and gagged defendant who appears by his very condition to have already been judged guilty by the court prior to the rendition of the verdict by the jury.

To bind and gag a defendant is to ignore the fundamental reasons behind the presence concept. The Supreme Court has said in a recent case:

Mr. Justice Holmes stated no more than a truism when he observed that "Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environging atmosphere."

Certainly the spectacle of a defendant in bondage—especially one who was still struggling—would upstage and overshadow to a degree the testimony being rendered before the court. Assuredly the jury would guess at the reasons for the defendant's struggle, at the same time sacrificing that degree of attention or concentration that might be necessary to discern the credibility of the witness on the stand that may ultimately prove crucial to the decision. An erroneous determination of guilt, or degree of guilt, through a juror's fear or conjecture cannot be obviated by observing that the defendant caused the spectacle himself.

94 397 U.S. at 350.  
95 Id. at 344.  
96 Id. at 343.  
97 Lee v. State, 51 Miss. 566, 574 (1875).  
98 In State v. Kring, 64 Mo. 591, 593 (1877) it is stated that "the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers."  
The Court has often noted with respect to the confrontation clause that:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits... being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.\textsuperscript{100}

The effect of a face-to-face confrontation is diminished to the extent the accused is handicapped by shackles and gags. The demeanor of the accused is considered to be of such importance that where the effects of drugs may have communicated a damaging impression of the accused’s attitude to the jury the case has been reversed.\textsuperscript{102} The accused may virtually be turned into a witness against himself by being forced to remain before the court in an unnatural state. The inquiry would then be whether the court was compelling him to incriminate himself against his will. It may be true that he brought the actions upon himself, but now that there is a recognized alternative of removal it would seem that the court in binding and gagging him would be forcing him to accept a condition that would tend to incriminate him after he has waived the right to be present. If it is true that actions speak louder than words, then the defendant should condemn himself by his own actions, and not be condemned by those of the court. One court has so eloquently put the case against shackling that its words serve to point up the paradox inherent in the maintenance of dignity through shackling:

Though biologically speaking, man may be an animal, it was never intended that he be treated as such in the realm of criminal jurisprudence. If we permitted the subjection of man to such treatment before the courts of our land, we have paved the way for him to be tried while tied to a log or in a steel cage, as well as chains and shackles. Barbarism has been abandoned and must never be permitted to creep back through the crevices created by lenient rules of law.\textsuperscript{102}

If such statements are adequate justification for a defendant to have the right to make his initial appearance free from shackles, it logically follows that, given the right to counsel and the power of the court to remove him for misconduct, such reasons militate against ever using such methods even as a last resort. It is difficult to envision the case where it would be "the fairest and most reasonable way to handle a defendant."\textsuperscript{103} This course of conduct has caused one judge to observe that:

\textsuperscript{100} Mattox v. United States, 156 U.S. 237, 242-43 (1895).
Shackles, chains, gags and a courtroom full of deputy marshals engaged in trying to keep the defendants off the floor may prove to be the climax in following "the proper course." I cannot believe that the Federal Constitution requires that any such farce take place.\textsuperscript{104}

Removal of a defendant from his trial may be the better method of achieving a fair adjudication of the issues. The historical basis for the necessity of a defendant's presence has been eroded to the point where presence is more a formalized right than an absolutely inviolate right. Presupposing the right to counsel and the continued ability to communicate with him after removal, the right of the court to remove the defendant does not fail to surmount the historical basis for the rule. The right should be maintained, however, wherever possible, for any beneficial effect that might accrue from the face-to-face confrontation. Part of the rationale for requiring the accused to be present, at least when the verdict was returned, was predicated on the idea that he would have an opportunity to poll the jury.\textsuperscript{105} Thus he could personally see that the verdict was individually sanctioned by the jurors. He stood face-to-face not only with the witnesses, but also with his triers.\textsuperscript{106} The psychical effect of that confrontation may be, in itself, enough to insure an honest determination. That the right to be present can be waived or forfeited by defendant's misconduct can no longer be doubted. The voluntary misconduct in effect constitutes a waiver of the right to be present even though, paradoxically, his ultimate absence is involuntarily enforced on him.

The search for alternatives to removal has encompassed a wide variety of methods to ameliorate the absence of the defendant. Sound-proof, enclosed glass booths,\textsuperscript{107} closed-circuit television, radio, tapes of the proceedings, and an ante-room with one-way glass and a telephonic connection to counsel have all been suggested. The Supreme Court seemed to leave an opening for the consideration of such technological assistance in Justice Brennan's concurring opinion.\textsuperscript{108} The point for consideration, then, would seem to be the feasibility, rather than the permissibility, of such systems.

Booths of glass or plastic conjure up spectres of the Eichmann trial. The idea of keeping a man in a cage is foreign to our system, and certainly subject to the same criticisms as binding and gagging an accused. The expense of constructing such booths would seem to be one practical limitation on their use—especially in the poorer or smaller jurisdictions. Their effectiveness in controlling a contumacious defendant is also open to serious question since the 1958 Merkouris sanity trial where the accused first tried to smash the booth with a chair and later feigned sleep.\textsuperscript{109}

\textsuperscript{104} United States ex rel. Allen v. Illinois, 413 F.2d 232, 236 (7th Cir. 1969) (Hasting, J., dissenting).
\textsuperscript{105} State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411 (1841); Harriman v. State, 2 Greene 270 (Iowa 1849); People v. Perkins, 1 Wend. 91 (N.Y. 1828); Sargent v. State, 11 Ohio 472 (1842).
\textsuperscript{106} A verdict rendered in the absence of the accused has been considered so erroneous that it could not be cured even by reassembling the jury, with their consent, after they had rendered their verdict — and had been once discharged. Cook v. State, 60 Ala. 39 (1877).
\textsuperscript{107} A description of the booth used in the Merkouris sanity trial can be found in Newsweek, Mar. 2, 1970, at 26.
\textsuperscript{108} 397 U.S. at 351 "... to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances."
Technological systems designed to provide some mechanical presence, if not physical presence, seem to be a more viable and acceptable alternative than booths or binding and gagging. At least in this way the defendant still retains the benefits of any aid he can lend to his counsel in the defense or cross-examination. Furthermore, the prosecution, or the entire judicial process, retains the benefit of an accurate, fair determination through the adversary process as exercised at near capacity.

VI. Decorum in the Courtroom Versus the Defendant's Right To Be Present at Trial—The Trial Judge's Duty and Responsibility

The primary responsibility for the maintenance of dignity and decorum within the judicial process has to rest with the court. The judge is responsible for the peaceful progress of the trial, and no one else can make a better determination of what the accused's demeanor will necessitate in order to insure a fair and impartial trial. This is an awesome responsibility in view of the court's discretionary power to remove the defendant, cite him for contempt, or order him bound and gagged. The lack of definitive standards as to what conduct warrants a contempt citation and what warrants removal or shackling subjects this power to a greater potential for abuse through misapplication or misunderstanding. It has to be recognized as the judge's duty to adequately inform and warn those before his court of the necessary standard of conduct and the nature and extent of his power to deal with any and all violations of that standard.110 To effectively waive a right, the defendant must know of the right and must intend to so waive it.111

The judge, too, must understand the function and application of his powers. The American College of Trial Lawyers notes that:

The power of a judge to punish contempt committed in his presence is not designed to protect his own dignity or person, but to protect the rights of litigants and the public by ensuring that the administration of justice shall not be thwarted or obstructed.112

The judge should exercise his power consistently, efficiently, and impartially, as called for by the circumstances presently before the court. The expeditious and efficient judge, in handling an obstreperous person during the course of a trial, must do all that is humanly possible to avoid prejudicing the defendant's case—either for or against him. An attitude of impartiality, and an absolute refusal to become embroiled in a controversy, should be the hallmarks of the judge's function in the administrative process.

The lawyer's function is primarily to insure that his client does not, through miscalculation or misapprehension of the nature or extent of the rules, waive his constitutional right through misconduct. A lawyer should, pragmatically, seek to restrain his client from any conduct which could create a prejudicial effect on

110 Such a warning appears to be required by Illinois v. Allen. See 397 U.S. at 343, 350.
the jury and disrupt the fair administration of the judicial system.\textsuperscript{213} It would seem that the lawyer is in the best position to exert such a restraining influence upon his client. The lawyer's duty should be \textit{in addition to} the court's duty to warn; his duty, however, never replaces, but only supplements, the trial judge's rule.

VII. Conclusion

In light of the social and political climate prevalent in America, there does not appear to be the likelihood that disruption will be abandoned as a trial tactic by militant defendants. The \textit{Allen} case is the significant decision that will shape the policy to deal with such tactics. The effectiveness of the courts in administering the constitutionally permissible methods to control the disruptions will depend on the development of a recognized consensus as to the viability of each alternative in given circumstances. Historically, the justification for the alternatives is recognized, but the future nature of our judicial process may very well depend on the \textit{post-Allen} application of the court's power.

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\textsuperscript{213} ABA Code of Professional Responsibility, Canons 1, 7, 8, 9. \textit{See also} ABA Canons of Judicial Ethics, Canons 34, 36.