CONSTITUTIONAL LAW—RIGHT OF CONFRONTATION—DEFENDANT'S CONDUCT AS WAIVER OF RIGHT TO BE PRESENT—*Illinois v. Allen*, 397 U.S. 337 (1970).

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[1]

On August 12, 1956, at about 3:00 a.m., William Allen entered a tavern and, after ordering a drink, took $200 from the bartender at gunpoint. Later that day he was arrested and identified by the bartender as the man who had robbed him. During his subsequent trial, Allen was allowed to represent himself, but he soon became abusive and boisterous[2] and was finally removed from the courtroom. As a result of his obstreperous conduct Allen was excluded from the trial throughout the presentation of the prosecution's case, except to be brought in for identification by witnesses. However, he was permitted to be present during the presentation of his defense by his appointed counsel. Allen's conviction of armed robbery was subsequently reversed[3] on the ground that a defendant in a criminal proceeding has an unqualified right to be present at all stages of his trial, and although such right can be waived, Allen's conduct could not be construed as a waiver. In this landmark decision, the Supreme Court reversed the court of appeals and ruled that Allen, by his conduct, had voluntarily waived his right to be present at his trial.

The confrontation clause of the sixth amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Pointer v. Texas*[4] and *Douglas v. Alabama*,[5] it was es-

1 Illinois v. Allen, 397 U.S. 337, 343 (1970), *rev'g* United States *ex rel.* Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969).

2 United States *ex rel.* Allen v. Illinois, 413 F.2d 232 (7th Cir. 1969):

> [T]he petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, "When I go out for lunchtime, you're [the judge] going to be a corpse here." At that point he tore the file which his attorney had and threw the papers on the floor.

Id. at 233.

3 413 F.2d 232 (1970).

4 380 U.S. 400 (1965).

5 380 U.S. 415 (1965).

tablished that this right of confrontation is a fundamental right, essential to a fair trial, and thus made obligatory on the states by the fourteenth amendment.[6]

"Confrontation" connotes the meeting of two separate entities under circumstances of hostility. In criminal law these two entities are the accused and the witness who will testify against him. From earliest times it was recognized that fundamental fairness required a witness to appear at the trial for the twofold purpose of cross-examination and observation. As the Court stated in *Mattox v. United States*:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, 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.[7]

There is, then, no real distinction between the right of confrontation and the desirability of cross-examination and observation of a witness; the latter is the same right merely exemplified by different terms so as to distinguish the more important right of cross-examination from the observation aspect.[8] It would be an empty gesture if the constitutional guarantee of confrontation merely meant that the witnesses are to be made visible to a defendant so that he could see and hear them, but importing no right of cross-examination. Indeed, so important an aspect of confrontation is this right that an adequate opportunity for cross-examination may satisfy this constitutional requirement even where there is no actual physical confrontation.[9]

It has long been established that in capital cases nothing may be done in the absence of the accused.[10] It is usually stated that the defendant's right to be present at his trial is protected by the confrontation clause of the sixth amendment,[11] although in most states

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6 U.S. CONST. amend. XIV, § 1:
No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

7 156 U.S. 237, 242-43 (1895).

8 *See* Bruton v. United States, 391 U.S. 123 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Brown v. United States, 234 F.2d 140 (6th Cir. 1956), *aff'd*, 356 U.S. 148 (1958).

9 Douglas v. Alabama, 380 U.S. 415, 418 (1965).

10 Lewis v. United States, 146 U.S. 370 (1892).

11 Snyder v. Massachusetts, 291 U.S. 97 (1934):
Thus, the privilege to confront one's accusers and cross-examine them face to face

it is guaranteed by the state constitution or by statute.[12] This privilege has even been held to be derived from the sixth amendment right to an impartial jury,[13] or perhaps from the due process clause of the fifth or fourteenth amendments.[14] For example, the right of confrontation has been stated to be implicit in the concept of ordered liberty and reflected in the due process clause of the fourteenth amendment independently of the sixth amendment.[15] However, it is generally agreed that the right of confrontation on the part of the accused did not *originate* with the Constitution, but rather is a common law right[16] *secured* by the sixth amendment and made obligatory on the states by the fourteenth amendment.[17]

More than a right, the presence of the accused at his trial has been looked upon as a duty:

> [It is] the duty of the defendants to be present and *at the bar* of the Court, and in all criminal proceeding were always supposed to be; and no trial could take place without such presence, but by consent.[18]

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is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts . . . .

Id. at 106. *See also* Gaines v. Washington, 277 U.S. 81 (1928); Dowdell v. United States, 221 U.S. 325 (1911).

12 State v. Gaetano, 96 Conn. 306, 114 A. 82 (1921); Dutton v. State, 123 Md. 373, 91 A. 417 (1914); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918); People v. Nisonoff, 293 N.Y. 597, 59 N.E.2d 420 (1944), *cert. denied*, 326 U.S. 745 (1945).

13 People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 (1955).

14 *E.g.*, Hopt v. Utah, 110 U.S. 574 (1884):

> 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.

Id. at 579. *See also* Snyder v. Massachusetts, 291 U.S. 97 (1934).

15 Pointer v. Texas, 380 U.S. 400, 408 (1965) (concurring opinion).

16 Salinger v. United States, 272 U.S. 542 (1926); Mattox v. United States, 156 U.S. 237 (1895).

17 Pointer v. Texas, 380 U.S. 400, 404-05 (1965).

18 People v. Mount, 1 Wheeler, Cr. Cas. 411, 412 (N.Y. 1823); *accord*, Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968); United States v. Denno, 355 F.2d 731 (2d Cir. 1966); Kivette v. United States, 230 F.2d 749 (5th Cir. 1956), *cert. denied*, 355 U.S. 935 (1958); People v. Davis, 39 Ill. 2d 325, 235 N.E.2d 634 (1968). *See also* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW, ch. IX, § 3 (1899):

> One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavour to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy . . . . Our law would not give judgment against one who had not appeared. Seemingly we have before us a respectable sentiment that has degenerated into stupid obstinacy. The law wants to be exceedingly fair, but is irritated by contumacy. Instead of saying to the defaulter 'I don't care whether you appear or no,' it sets its will against his will:— 'But you shall appear.'

Id. at 594-95.

This duty is grounded in the common law concept that the possible deprivation of life or liberty is so grave that the accused owes an obligation of defense both to himself and to society.[19]

As a more practical matter it has been stated that it is the duty of the parties and their counsel to "wait upon the court, not the court upon them."[20] In these times of crowded court calendars and public defender programs it would be a travesty upon our judicial system to allow a defendant to absent himself from his trial at his whim or fancy, knowing that despite his action his day in court will not be denied him. A defendant who wishes to assert his right of confrontation has the correlative responsibility of making himself available to the tribunal which will decide his fate.

The question of whether an accused in a criminal case may waive his right to be present at his trial is so multifaceted that no general rule can be set forth. For instance, the right of a defendant to be personally present at a particular stage in the proceeding has been held capable of being waived or not by various state and federal courts.[21] The proponents of the view that the right may be waived usually base their argument on the premise that since the right is essentially for the benefit of the accused, he should be able to dispense with it should he see fit.[22] Those who assert that the right cannot be

19 To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

4 BLACKSTONE, COMMENTARIES 11 (1769).

20 United States v. Noble, 294 F. 689, 692 (D. Mont. 1923), *aff'd*, 300 F. 689 (9th Cir. 1924).

21 *See generally* the following Annotations: 26 A.L.R.2d 762 (1952) (impaneling or selection of jury); 90 A.L.R. 597 (1934) (view by jury); 17 A.L.R.2d 1078 (1951) (absence of accused during making of tests or experiments as affecting admissibility concerning them); 85 A.L.R.2d 1111 (1962) (argument on question of law); 94 A.L.R.2d 270 (1964) (giving additional instruction to jury); 150 A.L.R. 764 (1944) (discharge of jury before reaching verdict); 23 A.L.R.2d 456 (1952) (return of verdict); 69 A.L.R.2d 835 (1960) (hearing or argument of motion for new trial or in arrest of judgment); 6 A.L.R.2d 997 (1949) (pronouncement of sentence).

22 Sahlinger v. People, 102 Ill. 241, 245-46 (1882):

There is no doubt but a prisoner on trial for a felony has the right to be present at every step taken in his case, and it would be error for the court to deprive him of that right without his consent, unless it might become necessary to remove him from the court room, temporarily, for disorderly conduct . . . . The constitutional right of a prisoner to appear and defend in person and by counsel, to demand the nature and cause of the accusation, to meet the witnesses face to face, was conferred for the protection and the benefit of one accused of a crime, but, like many other rights, no reason is perceived why it may not be waived by the prisoner.

Accord, Johnson v. United States, 318 U.S. 189 (1943); Diaz v. United States, 223 U.S. 442

waived, generally do so on the ground that no individual has the power to dispense with procedures aimed at assuring him personally, and as representative of the public, a fair trial.[23] In any event, waiver of fundamental rights is not favored, and it has been held that every reasonable presumption will be indulged against such waiver.[24]

But what is a judge to do when an obstreperous defendant threatens to turn the judicial forum into a fiasco? Several courses of conduct are available. He can practice restraint, either by bearing the attack without retort,[25] or by citing the defendant for contempt during the course of the trial.[26] However, compromising the dignity of the court and the well-being of the judge is an affront to justice, while the threat of contempt will be of little efficacy to an accused who is bent on disrupting the proceedings and has little or nothing to lose by such conduct.[27]

(1912); Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), *cert. denied*, 369 U.S. 825 (1962).

23 *See, e.g.*, Hopt v. Utah, 110 U.S. 574 (1884):

> The argument [that the presence of the accused may be waived] . . . necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority." 1 Bl. Com. 133. The public has an interest in his 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 . . . .

Id. at 579. *See also* Lewis v. United States, 146 U.S. 370 (1892); Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966); Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963); Journigan v. State, 223 Md. 405, 164 A.2d 896 (1960), *cert. denied*, 365 U.S. 853 (1961).

24 *See, e.g.*, McCarthy v. United States, 394 U.S. 459 (1969) (guilty plea of tax evasion set aside); Fay v. Noia, 372 U.S. 391 (1963) (failure to appeal is not a waiver of that right); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel set aside); Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937) (request for directed verdict is not a waiver of right to jury trial).

25 In the famous Nazi and Communist trials of the 1940's the rigors of this alternative resulted in the death of Judge Edward C. Eicher and the physical exhaustion of Judge Harold Medina. *See* Nizer, *What to Do When the Judge is Put Up Against the Wall*, N.Y. Times, April 5, 1970, § 6, at 30 *et seq.* (Magazine).

26 *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873):

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.

See also In re Savin, 131 U.S. 267 (1889) (attempt to bribe witness); *Ex parte* Terry, 128 U.S. 289 (1888) (fighting with marshall in court); Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969) (abusive name-calling and other outbursts).

27 Illinois v. Allen, 397 U.S. at 345 (1970).

Another alternative available to the judge for the maintenance of order during the progress of a trial is the use of guards around the defendant, but the presence of such guards, especially when armed, can easily create an atmosphere highly prejudicial to the accused.[28] It has long been recognized that

> [t]he presence of uniformed men, the display of arms, in fact anything going to create the impression that the person in custody is an unusually dangerous criminal, has its weight with the jury, and should not be allowed.[29]

A remedy often utilized by the court in handling obstreperous defendants is binding and gagging them. Although an accused is entitled to appear before the court and jury free of shackles,[30] a defendant may be reasonably restrained when necessary to assure his detention or to maintain order in the courtroom. Thus, in *People v. Loomis*,[31] the defendant was strapped to a wheel chair, his arms and legs tied together, and at times a towel placed over his mouth, after he had repeatedly shouted obscene expressions, fought with officers who tried to control him, kicked the counsel table, threw himself on the floor and otherwise conducted himself in an improper manner during the course of his trial, despite repeated admonitions from the court. However, the connotation of guilt attached to such restraint is so obviously detrimental to the maintenance of a fair trial for the accused, that the practice of binding and gagging an unruly defendant, even though he alone may have been responsible for his conduct, is much less desirable than his expulsion from the courtroom.[32] The

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28 *Compare* Dennis v. Dees, 278 F. Supp. 354 (E.D. La. 1968) (precautions, including armed guards, held unreasonable) *with* DeWolf v. Waters, 205 F.2d 234 (10th Cir.), *cert. denied*, 346 U.S. 837 (1953) (presence of guards in courtroom held reasonable); Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), *cert. denied*, 342 U.S. 873 (1951) (presence of guards in courtroom held reasonable); State v. Daniels, 347 S.W.2d 874 (Mo. 1961), *cert. denied*, 369 U.S. 862 (1962) (presence of armed guards held reasonable); State v. Rudolph, 187 Mo. 67, 85 S.W. 584 (1905) (presence of armed guards held reasonable); *and* State v. Duncan, 116 Mo. 288, 22 S.W. 699 (1893) (presence of armed guards held reasonable).

29 State v. Kenny, 77 S.C. 236, 240, 57 S.E. 859, 861 (1907).

30 People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296 (1871); State v. Smith, 11 Ore. 205, 8 P. 343 (1883).

31 27 Cal. App. 2d 236, 80 P.2d 1012 (Dist. Ct. App. 1938). *See also* United States v. Bentvena, 319 F.2d 916 (2nd Cir.), *cert. denied*, 375 U.S. 940 (1963); DeWolf v. Waters, 205 F.2d 234 (10th Cir.), *cert denied*, 346 U.S. 837 (1953); Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), *cert. denied*, 342 U.S. 873 (1951); People v. Chacon, 69 Cal. 2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968); State v. Roberts, 86 N.J. Super. 159, 206 A.2d 200 (App. Div. 1965); DeWolf v. State, 96 Okla. Crim. 382, 256 P.2d 191, *cert. denied*, 345 U.S. 953 (1953).

32 397 U.S. at 344:

> [S]uch a technique . . . arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight

decision that an obstreperous defendant can be removed from the courtroom and tried in absentia is a good one, it is submitted; the wonder of it, however, is that it took so long in coming.

In arriving at its decision, the Supreme Court quoted the late Justice Cardozo who, in *Snyder v. Massachusetts*,[33] stated that the right of a defendant to be present at his trial "may be lost by consent or at times even by misconduct."[34] In that case, the accused had been denied permission to accompany the jurors, counsel and the judge to the scene of his alleged crime. Cardozo's statement as to waiver by conduct, then, would seem to be no more than dictum. In fact, few cases can be found in which it is held that a defendant waived his right of confrontation by his unruly conduct.

In *United States v. Davis*,[35] the defendant was present, with his counsel, during the impaneling of the jury and during a portion of the opening statement by the prosecution. During the opening,

> he commenced interrupting the district attorney, and persisted in denying his statements, in a loud voice, although admonished by the court to refrain from interrupting. The action of the prisoner continuing to be such as to make it impossible to proceed in the trial with due decorum, he was ordered to be removed from the courtroom by the marshal, and to be detained in an adjoining room, with liberty of access for his counsel. The trial then proceeded, under the objection of the prisoner's counsel, so far as to conclude the opening. The trial was then postponed to the next day, when, the defendant having become composed, it was continued and concluded without further disturbance.[36]

The defendant's motion in arrest of judgment and for a new trial was denied, the court stating that where the conduct of the accused, on being brought before the court, is such as to disturb the proceedings he may be removed from the courtroom, and in such case he will not be heard later to claim that his conviction is invalid on the basis of his absence during the trial. "The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance."[37] This case, however, was not decided under the sixth amendment.

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of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

33 291 U.S. 97 (1934).

34 *Id.* at 106.

35 25 F. Cas. 773 (No. 14,923) (S.D.N.Y. 1869).

36 *Id.* at 774.

37 *Id.*

Another case holding that an unruly defendant can waive his right of confrontation is *People v. DeSimone*[38] where, upon much the same facts, the court held that the state constitutional privilege of being present at trial was conferred for the benefit and protection of the accused, but like many other rights may be waived.[39] Again, no mention of the sixth amendment was made.

It may be argued that a defendant has the right to use his trial as a forum for political reform. However, merely because speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.[40] Although the first and fourteenth amendments guarantee to every man freedom of speech, this privilge is not an absolute right; the opportunity to gain the public ear by obstreperous conduct in a courtroom is no more protected by the Constitution than the proverbial shouting of "fire" in a crowded theater.

The effect of the decision, then, is to warn potentially contumacious defendants that their sixth amendment right to be present is not absolute, and does not preclude their expulsion from the courtroom. But it is difficult to conceive how any other result could, in justice, be reached. If the courts are to perform their function of affording a tribunal for the just adjudication of disputes, accused and their lawyers cannot be permitted to ignore their responsibilities as citizens and officers of the court, respectively. The business of the courts cannot be conducted effectively, if indeed at all, if an unruly defendant is allowed to disrupt the decorum of the courtroom, secure in the knowledge that he cannot be expelled.

A presiding judge must see that the trial is conducted in an orderly manner,[41] and if the defendant by his obstreperous conduct unduly hampers the administration of justice he should, in the discretion of the judge, be expelled and tried in absentia until he "is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."[42] The term "obstreperous conduct" may not have the preciseness of a mathematical formula, but when interpreted with reason and good judgment in light of the circumstances, a standard is established which will permit an intelligent application by the judge. A defendant has the

38 9 Ill. 2d 522, 138 N.E.2d 556 (1956).

39 *Id.* at 533, 138 N.E.2d at 562. *See also* People v. Durant, 105 Ill. App. 2d 216, 245 N.E.2d 41 (1969).

40 Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

41 United States *ex rel.* Long v. Pate, 418 F.2d 1028, 1031 (7th Cir. 1970).

42 397 U.S. at 343.

right to be present at his trial, but he must exercise that right in consonance with peace, order and regard both for his rights and the rights of others. A half century ago Judge Learned Hand warned of the evil of leniency toward criminals:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[43]

In *Allen*, the Supreme Court, in recognizing that the "flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated,"[44] has dealt a deserving blow to the archaic formalism which required a defendant, no matter how unruly his conduct, to be present at his trial.

Joseph Anthony Hallock

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43 United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

44 397 U.S. at 343.