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RESTRAINT OR EXPULSION OF AN UNRULY DEFENDANT — DEPRIVATION OF CONSTITUTIONAL RIGHTS?

INTRODUCTION

The right of a defendant in a criminal case to confront his accusers at his trial was recognized at common law. Furthermore, this safeguard, as well as the right to be present at trial, is guaranteed by either constitutional or statutory law in most jurisdictions in this country. As a corollary to these rights, it is recognized that an accused has the right to appear at his trial without restraints. A perplexing problem arises, however, when a court is confronted with a recalcitrant defendant who, by his persistent misconduct in the courtroom, interferes with the orderly progress of a trial. Where the accused insists upon disrupting the courtroom proceedings, the trial judge is faced with the dilemma of assuring a fair trial to a defendant who, by his refusal to behave, seems intent upon preventing not only a fair trial, but any trial at all. Thus, while the constitutional guarantee of due process in criminal proceedings ordinarily encompasses the right of an accused to be present throughout his trial, to be free to conduct his defense, to appear before the jury without restraints, and to confront and cross-examine his accusers,

1 Salinger v. United States, 272 U.S. 542, 548 (1926), where the Court noted that the right of confrontation is a common law right, and that the sixth amendment to the Constitution preserves that guarantee but does not broaden or disturb the exceptions. See also Snyder v. Massachusetts, 291 U.S. 97 (1934).

2 See, e.g., ILL. CONST. art. II, §9 (1870); ILL. REV. STAT. ch. 38, §115-3(a) (1967). For a comprehensive list of the various state statutory and constitutional provisions guaranteeing this right, see Murray, The Power to Expel a Criminal Defendant From His Own Trial: A Comparative View, 36 U. COLO. L. REV. 171 (1964).

3 See, e.g., Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951): “Freedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial.” Id. at 302. See also Way v. United States, 285 F.2d 253 (10th Cir. 1960).

4 See, e.g., United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963); People v. Allen, 37 Ill.2d 167, 226 N.E.2d 1, cert. denied, 389 U.S. 907 (1967); People v. DeSimone, 9 Ill.2d 522, 138 N.E.2d 556 (1956); People v. Loomis, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938).


6 Blaine v. United States, 136 F.2d 284, 285 (D.C. Cir. 1943), indicating that the right of an accused to appear without restraints is necessary to assure that he will not be prejudiced in the eyes of the jury by a connotation of guilt or unlawful inclinations. And in United States ex rel. O'Halloran v. Rundle, 266 F. Supp. 173 (E.D. Pa.), aff'd, 384 F.2d 997 (3d Cir.), cert. denied, 393 U.S. 860 (1967), the court states: “Unnecessary portrayal of a defendant as a criminal may indeed constitute fundamental unfairness.” Id. at 174.

7 See generally In re Oliver, 333 U.S. 257 (1948); In re Nelson’s Will, 210 N.C. 398, 186 S.E. 480 (1936).
it is likewise true that the term "due process" also envisions a
trial conducted in an orderly fashion, according to some established mode of procedure.\textsuperscript{8} As was stated by the District of Columbia Court of Appeals:

In administering criminal justice, the court must conduct its business in an atmosphere of dignity and decorum and there would be neither if the defendant were allowed to disrupt the proceedings. \ldots \textsuperscript{9}

Thus, in addition to society's interest in safeguarding fundamental personal rights of the accused, society also has an interest in assuring fundamental fairness in criminal proceedings by the maintenance of orderly judicial processes and the preservation of the dignity of the court.\textsuperscript{10} These interests cannot be achieved without the necessary rules and procedures directed toward an atmosphere conducive to a prompt trial and an impartial verdict. The question arises as to whether concepts of fundamental fairness are violated when a court proceeds to deal with a recalcitrant defendant by ordering him restrained during the trial, or by expelling him and proceeding in his absence.

**The Right to be Present and To Appear Without Restraints**

In federal courts, the provisions of the sixth amendment of the Constitution, granting to an accused the "right to a speedy and public trial, by an impartial jury \ldots and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. \ldots \textsuperscript{11}" guarantees to an accused the right to be present at least during those stages of his trial involving the confrontation and cross-examination of witnesses.\textsuperscript{12} Thus, the leading case of *Snyder v. Massachusetts* held that an accused has the right to be present at his trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."\textsuperscript{13} In addition,

\textsuperscript{8} See, e.g., United States v. Davis, 25 F. Cas. 773 (No. 14, 923) (C.C.S.D. N.Y. 1869), in which the court warned: "The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance". *Id.* at 774. In Commonwealth v. Reid, 123 Pa. Super. Ct. 459, 187 A. 263 (1938), the court held that the conduct of the defendant was violent, creating an uproar in court, and restraint was necessary to the safety of the parties and the orderly progress of the trial. *See also In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967).

\textsuperscript{9} Pearson v. United States, 325 F.2d 625, 627 (D.C. Cir. 1963).


\textsuperscript{11} U.S. Const. amend. VI.


\textsuperscript{13} 291 U.S. 97, 105-06 (1934). The Court further held: "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel \ldots and cross-examine his accusers." *Id.* at 114.

The Court continued:

The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy
rule 43 of the Federal Rules of Criminal Procedure provides that:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.14

The right of an accused in a state criminal proceeding to be present at his trial is recognized through interpretations of the fourteenth amendment. For example, the sixth amendment rights of confrontation and cross-examination were recently held to be enforceable against the states, by virtue of the fourteenth amendment.15 Previously, if a defendant in a state court could show that his absence at any particular stage of his trial deprived him of fundamental fairness, his right to be present was protected against state interference by the due process clause of the fourteenth amendment.16 The federal district court in In re Hunt,17 has summarized the constitutional right of an accused to be present at his state criminal prosecution as follows:

There is no doubt that 'whenever his [the defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge' . . . a defendant has the right to be present at his trial. . . .

. . . And in Pointer v. State of Texas . . . we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination 'is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment . . .'.

It is abundantly clear that the in absentia trial proceedings violated petitioner's right under Snyder v. Com. of Massachusetts to be present whenever her presence had a 'relation, reasona-

14 FED. R. CRIM. P. 43.
15 Pointer v. Texas, 380 U.S. 400 (1965), held that the "Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Id. at 403.
16 U.S. CONST. amend. XIV. See also United States ex rel. Marelia v. Burke, 101 F. Supp. 615 (E.D. Pa. 1951), aff'd, 197 F.2d 856 (3d Cir), cert. denied, 344 U.S. 868 (1952), where the district court stated:

Had his absence been at the direction of the trial court or over defendant's objection, the trial court might well have lost jurisdiction of the case at that point. The primary basis of such a loss of jurisdiction would be because of the violation of fundamental concepts of justice and fairness which the cases uniformly hold are requisites of due process of law. . . .

Due process of law requires essential fairness and justice in judicial proceedings.
Id. at 619-20.
bly substantial, to the fullness of (her) opportunity to defend against the charge,' and her rights under Pointer and Brookhart to confront and cross-examine the witnesses against her... 18

In addition to federal constitutional guarantees, the right of an accused to be present at trial is specifically guaranteed either by legislative enactments or state constitutions. 19 There is, however, a difference among the various state jurisdictions as to the extent to which this right is recognized, some states requiring the presence of the accused at all stages of the trial, 20 some only at certain critical stages, 21 and others not specifying any particular stage, but only requiring that the defendant be given the opportunity to appear and defend. 22 The state jurisdictions also differ as to whether the right applies in all criminal proceedings, 23 or only in felony or capital cases. 24 Thus, different results have been achieved with regard to the effect of a denial of the accused's right to be present. 25

The right of an accused to appear at his trial without restraints is not guaranteed by any specific provision of the United States Constitution. However, the right is generally regarded as an essential element of fair trial, since due process has been interpreted as embodying fundamental fairness, with the result that the indiscriminate use of restraints would undoubtedly violate this constitutional precept. 26 Thus, it has been held that

18 Id. at 119-20.
20 Id. at 173. See, e.g., Noell v. Commonwealth, 135 Va. 800, 115 S.E. 679 (1923), holding that the presence of the accused is required at all stages of the trial, from arraignment to sentencing, and that the defendant cannot waive his presence. For a list of other jurisdictions so holding, consult Comment, Violent Misconduct In The Courtroom — Physical Restraint And Eviction Of The Criminal Defendant, 28 U. Pitt. L. Rev. 443, 449-50 (1967).
26 See, e.g., Way v. United States, 285 F.2d 253 (10th Cir. 1960); Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951). In United States ex rel. Marelia v. Burke, 101 F. Supp. 615 (E.D. Pa. 1951), aff'd, 197 F.2d 856 (3d Cir.), cert. denied, 344 U.S. 868 (1952), the federal district court, while cautioning against proceeding with the trial in the absence of the accused, where such absence occurred either at the direction of the trial court or over the defendant's objections, and pointing out that in such a situation the trial court could lose jurisdiction of the case because of a violation of society's concepts of fundamental fairness, nevertheless noted: "It appears that the
unnecessary portrayal of a defendant as a criminal may indeed constitute fundamental unfairness" and that, "in a criminal trial the right of the accused to appear before the jury without manacles has always been acknowledged. . . ." The right of the defendant to be unrestrained is regarded as elementary to the preservation of the defendant's freedom to conduct his defense or to appear before the jury unprejudiced by restraints that may imply guilt. In Shultz v. State, the court implied reversible error for the action of bringing an accused, not yet convicted, into the presence of the jury in convict attire, manacled or shackled. And in Hauser v. People, the court stated:

A prejudice might be created in the minds of the jury against a prisoner who should be brought before them handcuffed and shackled, which might interfere with a fair and just decision of the question of the guilt or innocence of such prisoner.

THE PROBLEM OF THE UNRULY DEFENDANT

Where the trial court is forced to deal with a defendant who refuses to behave, and ordinary disciplinary measures have failed to compel the accused's good behavior during his trial, it becomes necessary for the court to consider placing the defendant in restraints or ordering his expulsion from the courtroom. The court's decision to utilize either of these measures, though dependent upon the particular situation confronting the presence of a defendant at every stage of the proceedings against him is not an absolute requirement under the Fourteenth Amendment under all circumstances. . . ."

29 Hauser v. People, 210 Ill. 253, 71 N.E. 416 (1904).
30 See, e.g., Blaine v. United States, 136 F.2d 284 (D.C. Cir. 1943); Shultz v. State, 131 Fla. 757, 179 So. 764 (1938); Hauser v. People, 210 Ill. 253, 71 N.E. 416 (1904).
31 131 Fla. 757, 179 So. 764 (1938).
32 210 Ill. 253, 71 N.E. 416 (1904).
33 Id. at 266, 71 N.E. at 421.
34 See, e.g., United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963); People v. Loomis, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938).
35 See United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963), where reminders by the judge of the necessity of preserving the dignity of the court, bailiffs or marshals restraining the accused and warnings by the court of more stringent disciplinary measures to come, failed to improve the defendant's behavior. See also People v. Allen, 37 Ill.2d 167, 226 N.E.2d 1, cert. denied, 389 U.S. 907 (1967).
36 In People v. Loomis, 27 Cal. App. 2d 236, 80 P.2d 1012 (1938), the appellate court described the behavior of the defendant in the trial court: In the presence of the court and the jury, appellant repeatedly shouted in a loud voice, using profane and obscene expressions. Appellant, on numerous occasions, broke away from, and fought with the officers who were seeking to quiet him, kicked the counsel table, threw himself on the floor and otherwise conducted himself in an improper manner. Despite repeated admonitions from the court, he persisted in such conduct until restrained by order of the court. Id. at 239, 80 P.2d at 1014.
court, likewise involves a consideration of the constitutional problems involved.

The United States Supreme Court has never directly decided whether the restraint of a defendant due to his misconduct constituted a violation of his constitutional rights. In *United States v. Davis*, the court recognized that a defendant's right to appear at his trial may be waived by his misconduct, but the question of a specific constitutional right of prohibiting restraint of the accused was not argued. However, the question has been frequently passed upon by federal and state appellate courts, establishing the principle that the trial judge's decision to impose restraints on a recalcitrant defendant does not constitute a violation of constitutional rights unless it clearly appears that the decision was so unreasonable under the circumstances as to deprive the defendant of fundamental fairness, and the accused is able to show that he was somehow prejudiced thereby. For example, in *State v. Roberts*, the court reversed the defendant's conviction because it appeared the trial judge ordered restraints at the request of state prison authorities, as a means of routine custodial supervision. The court expressed its belief that sound judicial discretion must be exercised in any application of restraints, that the court does have the power to do so in order to preserve the processes of trial, but that, once employing restraints, the court must clearly and emphatically instruct the jury to disregard them in arriving at a determination of the defendant's guilt or innocence.

Where the trial court has acted reasonably, there is no

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37 25 F. Cas. 773 (No. 14,923) (C.C.S.D. N.Y. 1869).
39 See, e.g., *United States ex rel. O'Halloran v. Rundle*, 266 F. Supp. 173 (E.D. Pa.), aff'd, 384 F.2d 997 (3d Cir.), cert. denied, 393 U.S. 860 (1967). Generally, imposition of restraints on an unruly defendant will not be held to have deprived him of a fair trial where it appears that the behavior of the accused was so disruptive as to justify such discipline, the court first attempted to control the situation in a less drastic manner, the defendant was clearly warned that his continued misbehavior would result in his being restrained, the amount of restraint imposed was consistent with the degree of misconduct, and the jury was properly instructed that the restraints were to have no bearing on its determination of the defendant's guilt or innocence. See also *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963); *Pearson v. United States*, 325 F.2d 625 (D.C. Cir. 1963).
41 See also *Pearson v. United States*, 325 F.2d 625 (D.C. Cir. 1963), where the court quoted the trial judge's instruction, as follows:

'Now, the defendant has been before you and I want to admonish you not to consider his conduct at all in your determination of his guilt or innocence. You should ignore his conduct because it is not relevant to the issue here involved. ... So you will put that out of your mind entirely when you come to determine his guilt or innocence.' *Id.* at 627. The court explained that it did not require that such an instruction be given in every case but only when requested by defense counsel.
question that the decision to restrain the unruly defendant is best left to its discretion. A rule forbidding the imposition of restraints, under any circumstances, would place the court in the position in which the trial judge would be forced to either discontinue the proceedings until the defendant felt inclined to behave, to continue in a disorderly atmosphere, or to order the defendant expelled. That the court should be forced to await the accused's pleasure is untenable, and for the court to proceed during the defendant's continued disruption of the proceedings could furnish grounds for the accused's later assertion of a deprivation of procedural due process, in that the trial was conducted in a disorderly manner. Furthermore, to order the expulsion of the defendant carries its own constitutional problems. Thus, the response to the defendant's argument that he could not properly conduct his defense would seem to be that he had declined, by his actions, to exercise his constitutionally guaranteed right. The recalcitrant defendant need only be adequately warned that his continued misbehavior will cause a waiver of his rights. The most important consideration would appear to be the right of the court to protect its own role as an orderly tribunal. That a court should be helpless in the face of an attempt to disrupt or halt its proceedings opposes society's interest in maintaining its judicial system, and would, indeed, "produce little less than anarchy."

Where the right of the defendant to be present at trial is involved, a more difficult constitutional problem may arise than that involving restraint of the accused. While some jurisdictions insist that the defendant be present at every stage of his trial and that the court cannot proceed in his absence, other courts have

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42 See, e.g., Odell v. Hudspeth, 189 F.2d 300 (10th Cir. 1951); In re Hunt, 276 F. Supp. 112 (E.D. Mich. 1967); McDonald v. United States, 89 F.2d 128 (8th Cir. 1937), established that a determination by a trial judge to impose restraints was not an abuse of his discretion and was not dependent upon the presence of any or all of the safeguards mentioned above. In addition, it is generally necessary that the defendant show that actual harm resulted to him in being so restrained.

43 In re Hunt, 276 F. Supp. 112 (E.D. Mich. 1967). The court could declare a mistrial, but such a solution would be futile, since the defendant's success in disrupting his first trial would undoubtedly encourage him to employ the same technique in any subsequent trial.

44 See United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963). It might also be noted that it ill befits an unruly defendant to complain of having been deprived of his right to be tried by an impartial jury when the defendant has undoubtedly prejudiced the jury by his own misconduct. An instruction to the jury directing that it ignore the defendant's conduct and his restraints when appraising his guilt or innocence should negate any question of prejudice. But cf. Bruton v. United States, 375 F.2d 355 (8th Cir. 1967).

45 See text at note 47 infra.

46 United States v. Bentvena, 319 F.2d 916, 931 (2d Cir. 1963).

established that an accused does not have the absolute right to be present at every stage of his trial. At certain non-critical stages of the trial, the courts are relatively free to expel the misbehaving defendant without depriving him of fundamental fairness, provided that the expulsion is reasonable under the circumstances and the defendant cannot establish that any actual harm resulted by the trial proceeding in his absence. On the other hand, if the accused's "presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," or where his right of confrontation and cross-examination is involved, the problem assumes one of constitutional proportions. Thus, in speaking of the sixth amendment right of confrontation and cross-examination, the Supreme Court has stated: "[If] there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Similarly, the federal district court in In re Hunt, has declared that: "[i]f we were forced to choose between avoidance of punishment entirely, no matter how richly deserved, and a deprivation of constitutional rights, we would choose . . . the former.

However, it is clear that constitutional rights personal to the accused may be waived, inter alia, the right of a defendant to be present at his trial and to confront and cross-examine his accusers. Such waiver may occur not only as a result of the

49 See, e.g., Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965); McDonald v. United States, 89 F.2d 128 (8th Cir. 1937); United States ex rel. Marelia v. Burke, 101 F. Supp. 615 (E.D. Pa. 1951), aff'd, 197 F.2d 856 (3d Cir.), cert. denied, 344 U.S. 868 (1952). Non-critical stages have been held to be those merely formal or preliminary, where no specific constitutional rights of the accused can be violated by denying him the rights to be present. Conferences between the trial judge and counsel on instructions and purely legal matters are also included.
50 See, e.g., Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965); McDonald v. United States, 89 F.2d 128 (8th Cir. 1937).
51 Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934).
55 Id. at 121.
58 Wilson v. Gray, 345 F.2d 282 (9th Cir.), cert. denied, 382 U.S. 919 (1965), in which the court held: "It has been consistently held that the accused may waive his right to cross-examination and confrontation and that the waiver of this right may be accomplished by the accused's counsel. . . ." Id. at 286.
defendant's express consent to relinquish his rights, but also as a result of his actions inconsistent with an intent to assert such rights.\textsuperscript{59} Since waiver of constitutional rights must meet the federal standard of the "intentional relinquishment or abandonment of a known right or privilege,"\textsuperscript{60} it is suggested that if a court proposes to expel a disruptive defendant, then certain procedures should be observed in order to establish an effective waiver of the defendant's right to be present at important stages of the trial.\textsuperscript{61}

Hence, the trial judge should make certain that the defendant is aware of his right to confront and cross-examine his accusers, and to appear and defend himself. Furthermore, the defendant should be warned that continued misconduct will result in a waiver of these rights. Finally, the court should inform the defendant of the discipline which will result if he persists in his disruptive antics. Where the accused has been properly warned, he is then free to make a knowledgeable choice between reasonable alternatives\textsuperscript{62} — either he may choose to behave and remain in the courtroom, or he may choose to continue his mis-

\textsuperscript{60} Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also Pitts v. State, 395 F.2d 182 (4th Cir. 1968) and Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968), where in the latter case the court said: "The Supreme Court of the United States has always set high standards of proof for the waiver of constitutional rights. . . . The federal courts are to indulge every reasonable presumption against waiver of such fundamental rights." Id. at 376. The court also set out the guiding principle that to have a waiver of a constitutional right there must be an intelligent relinquishment or abandonment of a known right or privilege. In the case of Zerchawsky v. Beto, 396 F.2d 356 (5th Cir. 1968), while agreeing that constitutional rights may be waived by conscious decisions of trial strategy, the court also warned: "To be sure, a defendant can waive only a 'known right or privilege.'" Id. at 358.
\textsuperscript{61} In Bruton v. United States, 375 F.2d 555 (8th Cir. 1967), the court stated the rule that a district court must be required to make a finding that the defendant knowingly and intelligently waived his privileges, and the court record must disclose it. Id. at 360. As to the theory that, while it is essential for the court to warn the jury to disregard a defendant's conduct in assessing his guilt or innocence, it is human nature for a juror to retain some essence of prejudice towards a misbehaving defendant. The prevailing view appears in Opper v. United States, 348 U.S. 84 (1954), where the Court said: "Our theory of trial relies upon the ability of a jury to follow instructions." Id. at 95. And in Golliher v. United States, 362 F.2d 594, 603 (8th Cir. 1966), the court expressed the opinion that it must assume the jury was capable and followed the instructions of the court as bound by oath to do so.
\textsuperscript{62} A problem could arise in those jurisdictions which do not allow any type of waiver under any circumstances. Where a recalcitrant defendant insists upon disrupting his trial, and the trial judge is unable, because of statute or precedent, to expel the accused, the question arises as to whether the only solution is to have the defendant restrained. In an extraordinary situation, even restraint might not be the answer to the continuance of an orderly trial. On the other hand, in the case of a defendant who voluntarily absents himself from his trial in a jurisdiction which does not allow waiver, either express or implied, of the defendant's right to be present, the theory of waiver cannot be utilized. It would seem that the public interest in preserving the integrity and decorum of judicial proceedings should outweigh a defendant's individual rights where the defendant is assuming an arbitrary position contrary to public policy and in derogation of the reasons for his possession of the rights.
conduct and face the consequence of expulsion. In light of recent decisions of the United States Supreme Court regarding waiver of constitutional rights, such precautions would appear to be necessary if the defendant's misconduct is to be regarded as a waiver of his right to be present, at least at important stages of his trial.

While an effective waiver may be made of the right to be present, even at important stages of the trial, it is uncertain whether the expulsion of a recalcitrant defendant must in all cases meet the federal standard of waiver in order to avoid constitutional objections. In cases dealing with one type of misconduct, that is, where the defendant voluntarily absents himself from the jurisdiction after trial has begun, it has been uniformly held that the defendant's voluntary absence results in a loss of his right to be present, without any necessity for determining whether the defendant was aware of the rights he relinquished by such absence. For example, in Diaz v. United States, the Supreme Court stated the question to be one of:

[B]road public policy, whether an accused . . . can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce. . . . Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. Similarly, rule 43 of the Federal Rules of Criminal Procedure provides: "In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." 

Most courts have treated the defendant's misbehavior at trial in the same manner as situations involving his voluntary absence, and have held that in either case, the right to be present was lost by the defendant's misconduct. An important distinction does exist, however, between the two types of conduct. Where the defendant has voluntarily absented himself, it is obvious that, since he is not before the court, he cannot be warned of the constitutional right relinquished by his absence. Nor should the processes of justice be compelled to await his pleasure. In the case of the disruptive defendant, however, he is present before the court, so that the rendering of a warning before expulsion would not unduly burden the court. Such a recommen-

63 See, e.g., Gladden v. Ungsworth, 396 F.2d 373 (9th Cir. 1968); Pitts v. State, 395 F.2d 182 (4th Cir. 1968); Bruton v. United States, 375 F.2d 355 (8th Cir. 1967).
64 See, e.g., People v. Davis, 39 Ill.2d 325, 235 N.E.2d 634 (1968).
65 223 U.S. 442 (1912).
66 Id. at 458. See also Snyder v. Massachusetts, 291 U.S. 97 (1934).
67 Fed. R. Crim. P. 43.
68 See, e.g., Snyder v. Massachusetts, 291 U.S. 97 (1934); People v. DeSimone, 9 Ill.2d 522, 138 N.E.2d 556 (1956).
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dation was expressed in *Pearson v. United States*, a case involving a defendant who was ejected from court after his persistence in disrupting the trial and his expressed desire to absent himself therefrom. The court stated:

> We do not, of course, intimate that the trial court may in all cases proceed without the defendant's presence. If he is in court, with counsel present, he may waive his right to be present by expressly indicating a desire to be absent. In such a case, it may be desirable for the trial judge to inform the defendant of the nature of the right to be present and of the possible advantages to him of being present.

Further, in *Cross v. United States*, which also dealt with a defendant whose trial was conducted in absentia, the same court noted:

> 'It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. . . . This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' . . . This means that where the defendant is available, 'the serious and weighty responsibility' of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.'

**ILLINOIS POSITION**

Illinois has followed the common law by granting every criminal defendant, by constitution and statute, the right to be present at his trial. The Illinois Supreme Court has reaffirmed the constitutional right to be present at trial, with the qualification that the guarantee may be waived by the defendant's voluntary absence. In addition to holding that a defendant will be held to have waived the right to be present by voluntarily absenting himself from the jurisdiction, the Illinois rule appears to be that an accused may likewise waive this right by his misconduct at

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70 *Id.* at 627-28.

71 *Cross v. United States*, 325 F.2d at 629.

72 *Id.* at 631.

73 Ill. Const. art. II, §9 (1870); Ill. Rev. Stat. ch. 38, §115-3(a) (1967); People v. Weinstein, 298 Ill. 264, 131 N.E. 631 (1921).

74 People v. Steenbergen, 31 Ill.2d 615, 203 N.E.2d 404, cert. denied, 382 U.S. 853 (1965), in which the court stated:

> A defendant in a criminal case has an absolute right to be present at his trial and this right can be waived only by the defendant himself. . . . It is not only defendant's right to be present, but it is also his duty, especially where he has been released on bail. . . .

> . . . The right to be present and to meet the witnesses are personal rights which defendant may also waive. Defendant, by being voluntarily absent, waived his right to be present at the trial. . . . [and] he thereby also waived his right to meet the witnesses face to face.

*Id.* at 618, 203 N.E.2d at 406-07.
trial. Thus, in People v. DeSimone,\textsuperscript{75} the accused not only voluntarily absented himself from his trial on various occasions, but was also expelled from the courtroom for brief periods when he disrupted the trial by the use of profanity and other acts of misconduct. Although it appeared that his absence was at a non-critical stage, the defendant alleged that the court's action in proceeding during his absence constituted a violation of his rights under the Illinois Constitution. The Illinois Supreme Court rejected this contention, stating:

The constitutional privilege relied upon was conferred for the benefit and protection of an accused. Like many other rights, however, it may be waived. Thus where a defendant voluntarily absents himself from a courtroom and refuses to be present for further proceedings he is deemed to have waived his right and cannot claim any advantage on account of his absence. . . . The court did not, therefore, exceed its legitimate powers when it proceeded while Gordon DeSimone voluntarily absented himself from the trial. The same result must follow under the circumstances attending this defendant's involuntary absence. It is obvious from the record that defendant's removal was necessary to prevent such misconduct as would obstruct the work of the court; such misconduct was, in turn, effective as a waiver of the defendant's right to be present. The right to appear and defend is not given to a defendant to prevent his trial either by voluntary absence, or by wrongfully obstructing its progress.\textsuperscript{76}

In the case of People v. Allen,\textsuperscript{77} the court was again confronted with a defendant who repeatedly caused trial delays by words and acts of misconduct. At various stages of the trial, the court dealt with the defendant by either shackling him, or ordering him restrained or expelling him from the courtroom. While agreeing with the defendant's contention that he was entitled to participate in every stage of the trial,\textsuperscript{78} and further noting that, where the accused is not present in person, his attorney has no power to waive his right to be present,\textsuperscript{79} the court nevertheless concluded:

The record is replete with rude, boisterous and disrespectful conduct of the defendant toward the court and its orders. The trial judge was both patient and tolerant, and his exclusion of the defendant was justified. . . . It is sufficient to say that the record reflects defendant's awareness of his right to conduct his own defense and his deliberate attempt to use this right to obstruct the trial. By such conduct, he waived any constitutional rights to be present, confront the witnesses against him and conduct his own case. . . .\textsuperscript{80}

\textsuperscript{76} People v. DeSimone, 9 Ill.2d 522, 533, 138 N.E.2d 556, 562 (1956).
\textsuperscript{78} \textit{Id.} at 171, 226 N.E.2d at 3.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 171-72, 226 N.E.2d at 3.
The above Illinois cases would appear to agree with the majority of jurisdictions in holding that a defendant's misconduct at trial will constitute a waiver of his right to be present. However, the Illinois Supreme Court recently expressed reservations with regard to criminal proceedings where the defendant is absent. In *People v. Davis,* the court concluded, by way of dictum, that a defendant, absenting himself from the courtroom voluntarily after the trial had begun, waived his right to be present and had thereby authorized the court to proceed in his absence. Nevertheless, the court quoted with approval the case of *People v. Evans* for the proposition that:

For generations our law has shown an anxious concern lest any semblance of trial in absentia be sanctioned. ... And we should not be quick to hold that the delinquencies of the defendant will work a forfeiture of a right that has been so carefully safeguarded.83

In dealing with the problem of the prejudicial effect on the jury of viewing a defendant in restraints, the Illinois Supreme Court has stated in *Hauser v. People,* that a prisoner on trial before a jury should not be restrained lest it cause prejudice in the minds of the jurors and interfere with their fair and impartial determination of his guilt or innocence. The *Hauser* rule, that the court may not permit a defendant to appear before a jury shackled or manacled so as to be unable to present his defense, has been modified by *DeSimone* and further extended by *People v. Allen,* in which the Illinois Supreme Court said:

When the court failed in its efforts to have the trial proceed with dignity and decorum, it ordered defendant removed from the courtroom. ...

Defendant was permitted in the courtroom, shackled, during the presentation of his defense but was not allowed to conduct his own defense. The record before us indicates that the trial court made every effort to control him, and that the shackling appeared to be a necessary measure to accomplish this end.86

Therefore, the present Illinois position is in accord with the majority of other jurisdictions, which hold that the trial judge,

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81 39 Ill.2d 325, 235 N.E.2d 634 (1968).
82 21 Ill.2d 403; 172 N.E.2d 799 (1961). It is apropos to question why a trial court will ordinarily allow a trial to continue in the absence of the defendant where he was in attendance at least at its inception, but will generally not proceed at all when the defendant has made no personal appearance. It would seem that the rationale in the first instance is that the court has acquired jurisdiction of the body of the accused and is thus qualified to administer justice even if he subsequently becomes absent. There is also the implication that the requirement of notice has been met. The defendant, having been present and later absenting himself, is presumed to have voluntarily waived his right to be present and thus either expressly or impliedly authorized the court to proceed in his absence. Any other rule would result in a monumental slow-down in the judicial process.
83 Id. at 405-06, 172 N.E.2d at 800.
84 210 Ill. 253, 265-67, 71 N.E. 416, 421-22 (1904).
85 37 Ill.2d 167, 226 N.E.2d 1, cert. denied, 389 U.S. 907 (1967).
86 Id. at 169-70, 226 N.E.2d at 2-3.
in his discretion, shall decide whether or not restraint need be applied to an accused in the interests both of preserving the dignity of the court and of promoting the orderly progress of justice. The same discretion must be exercised by the trial court before the expulsion of an unruly defendant. Unless a clear abuse of discretion is shown, a court of appeals will refuse to substitute its judgment for that of the trial court.

CONCLUSION

In summary, the doctrine of Snyder v. Massachusetts\(^87\) would still seem to stand for the proposition that a federal constitutional right may be lost by a defendant's consent or misconduct. Thus, the United States Supreme Court would follow the Snyder rule of requiring the defendant's presence only to the extent that he receive a fair and just hearing. Further, restraint or expulsion of a recalcitrant defendant under the proper conditions and in the reasonable discretion of the trial judge would be deemed proper. One of the elements of this "reasonable discretion" is undoubtedly a knowledgeable waiver, if such was applicable to the circumstances.

Federal appellate courts have generally stated that the trial judge has extraordinary discretion in maintaining the proper trial atmosphere and in protecting the safety of officers and spectators in the courtroom further indicating that an accused may, and probably does, waive his right to appear, defend and confront his accusers when his conduct requires him to be restrained or expelled for the purpose of preserving the dignity and decorum of the court.\(^88\) The federal standard of waiver requires that the defendant be made aware of his rights and privileges in addition to the ways in which he may lose them if he continues to flaunt the authority and integrity of the court. In considering the grounds upon which a defendant who has been excluded or restrained might assert a violation of constitutional rights, it might be well to ask: What right is it of which the defendant has been deprived? By his misconduct he has placed the court in a position where it can no longer function as a court. Once he is warned, the choice is the defendant's: if he wishes to remain in the courtroom and be free of restraints, he must be-

\(^{87}\) 291 U.S. 97 (1934).

\(^{88}\) See, e.g., Hilton v. Peyton, 267 F. Supp. 719 (W.D. Va. 1967); DeWolf v. Waters, 205 F.2d 234 (10th Cir.), cert. denied, 346 U.S. 837 (1953), which states: "The use of guards in the court room during a criminal trial and the necessity of the use of manacles and shackles on the defendant were matters resting within the discretion of the trial court . . . ." Id. at 235.

McDonald v. United States, 89 F.2d 128 (8th Cir. 1937), held: "Absent incontrovertible evidence of hurt, the trial court should be permitted to use such means . . . as the nature of the case . . . shall reasonably call for . . . ." Id. at 136.
have himself; if he does not choose to remain orderly, he has, by
his conduct and by weight of present authority, voluntarily
waived his right to be present. Unless the trial judge was guilty
of such abuse of discretion as to shock the conscience and render
the trial fundamentally unfair, it is unlikely that his decision to
expel or restrain an unruly defendant would be overturned.

In those jurisdictions which do not permit any waiver of the
accused's right to be present, the best, and probably the only
alternative to expulsion, would be to permit the unruly defendant
to remain in the courtroom, but with the application of such re-
straints as are necessary to allow the court to proceed with its
business in a normal manner, with a proper warning to the jury
that such restraints have no bearing on the accused's guilt or
innocence.

In order that the Illinois courts avoid constitutional diffi-
culties, due to the restraint or expulsion of a recalcitrant de-
fendant, it is suggested that the federal standard of waiver be
applied. Furthermore, the Illinois judiciary should adopt a prac-
tice by which the trial judge must warn the defendant that by
his misconduct he may effectively waive his right to be present
and unrestrained at his trial. Finally, the court should determine
whether the defendant clearly understands the meaning of the
judge's warning and of the effect of an involuntary waiver, with
a specific finding made as part of the record of proceedings.

John W. Donahue

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89 See, e.g., Lewis v. United States, 146 U.S. 370 (1892); United States
v. Neal, 320 F.2d 533 (3d Cir. 1963); Near v. Cunningham, 313 F.2d 929
(4th Cir. 1963); State v. Reed, 65 Mont. 51, 210 P. 756 (1922).