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Guidelines for Controlling the Disruptive Defendant

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Note: Guidelines for Controlling the Disruptive Defendant

I. INTRODUCTION

A difficult problem challenging trial judges in recent years has been the increased incidence of intentionally disruptive behavior by defendants in the criminal courtroom. Such disruption is detrimental to the interests of both the state and the defendant in having the defendant's guilt or innocence determined without the intrusion of extraneous influences and in administering criminal justice with order and dispatch. Thus, since the judge bears the ultimate responsibility for the proceedings, it is his obligation to use his judicial power to prevent distractions from and disruptions of the trial.

In Illinois v. Allen\(^1\) the Supreme Court substantially resolved the question of which procedures may be used by trial judges to control disruptive conduct. Specifically, citation for contempt,\(^2\) binding and gagging, and removal of the defendant from the courtroom were approved as constitutionally permissible methods of controlling disruptive defendants.\(^3\) The determination of what conduct constitutes disruption and what method of control should be used was held to lie largely within the discretion of the trial judge.\(^4\)

It is the thesis of this note that it is inappropriate to relegate the control of disruptive defendants to the discretion of trial judges without guidelines designed to minimize the abridgement of constitutional rights that may result from the imposition of controls sanctioned in Allen. The approach will be, first, to examine the law prior to Allen to demonstrate that the use of the approved controls may abridge rights recognized as important constitutional protections of the accused. Second, an analysis of Allen will suggest that although certain limitations on the trial judge's discretion are implicit in the Court's opinion, they are inadequate to protect the rights of the accused. Third, guide-

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2. In using the term "citation for contempt," the Court apparently was treating the term as synonymous with summary conviction for contempt. See cases cited in note 26 infra regarding summary conviction.
3. 397 U.S. at 343-44.
4. Id. at 343, 347.
lines will be suggested which hopefully will aid judges in determining how to control disruptive conduct without unnecessarily abridging the defendant’s constitutional rights.\(^5\)

II. THE LAW PRIOR TO ALLEN

A. Defendant’s Right To Be Present

A fundamental right of any defendant under criminal prosecution is the right to be personally present at the proceedings against him.\(^6\) This right is implicit in the Sixth Amendment

5. It is, of course, true that it was not necessary for the Supreme Court in deciding Allen to establish guidelines to be observed when disruptive defendants are sanctioned since only the propriety of trial after the exclusion of an unruly defendant was at issue. On the other hand, in approving as constitutionally permissible methods of controlling disruption, not only exclusion, the method used in Allen, but also contempt and binding and gagging, the Court went beyond what was strictly necessary for a decision of the case. Furthermore, it is apparent that a Supreme Court decision is vastly more that simply a decision of the particular case before it and that the opinion will be looked to by lower courts for guidance in a wide variety of situations. Thus it is not unfair to say that the Allen Court’s concern over when and how the Allen controls will be used was inadequate.

6. In Lewis v. United States, 146 U.S. 370, 372 (1892), the Supreme Court said that “[a] leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.” The right to be personally present at one’s trial did not originate with the enactment of the Sixth Amendment, but is one of the oldest common law rights. See 2 W. Pollock & F. Maitland, The History of English Law 650 (2d ed. 1898); Goldin, Presence of the Defendant at Rendition of the Verdict in Felony Cases, 16 Colum. L. Rev. 18 (1916). The importance of the right is indicated by its protection by constitution or statute in every jurisdiction in the United States.

At common law the defendant’s right to be personally present was characterized as the right to confront his accusers, and as such is protected by the constitutions of many jurisdictions: ALA. Const. art. 1, § 6; ARK. Const. art. II, § 10; COLO. Const. art. II, § 16; CONN. Const. art. I, § 11; FLA. Const., Decl. of Rights § 11; GA. Const. § 2-105; HAWAII Const. art. 1, § 13; IDAHO Const. art. I, § 9; ILL. Const. art. II; IOWA Const. art. 1, § 10; KAN. Const., Bill of Rights § 10; LA. Const. art. 1, § 9; Md. Const., Decl. of Rights art. 21; MINN. Const. art. 1, § 6; MISS. Const. art. 1, § 26; MONT. Const. art. III, § 16; N.H. Const. Pt. 1, art. 15; N.J. Const. art. 1, § 10; N.M. Const. art. II, § 14; N.C. Const. art. 1, § 11; OKLA. Const. art. II, sec. 20; ORE. Const. art. 1, § 11; PA. Const. art. 1, § 9; R.I. Const., Decl. of Rights art. 1, § 10; S.C. Const. art. 1, § 18; S.D. Const. art. VI, § 7; UTAH Const. art. 1, § 12; WASH. Const. art. 1, § 22.

right to confront one's accusers and therefore can be said to be a constitutional right in itself. The requirement serves a number of interests: (1) the presence of the defendant helps create a moral force in the courtroom that inhibits adverse witnesses from lying; 7 (2) the defendant's presence may increase the effectiveness of his defense by allowing instantaneous communication of his reaction to adverse evidence to his attorney and by enabling him to observe the vigor of the defense presented in his behalf; 8 and (3) the rule insures to some extent that the jury will be able to observe the defendant's demeanor during the trial and that the defendant will be able to poll the jury after rendition of the verdict. 9 However, a majority of jurisdictions now allow the defendant to waive his right to personal presence in all but capital cases on the theory that the rule requiring his presence is for his own personal benefit, 10 and a few jurisdictions

R. CRIM. P. 38; ARIZ. R. CRIM. P. 231; CAL. PENAL CODE § 1043 (1960); DEL. SUPER. CT. (CRIM.) R. 43; FLA. STAT. ANN. § 914.01 (1967); IDAHO Code §§ 19-106, 19-903 (1948); IND. ANN. STAT. § 9-1801 (1956); IOWA Code Ann. § 777.19 (1949); KAN. STAT. ANN. § 62-1411 (1964); KY. R. CRIM. P. 8.28; ME. R. CRIM. P. 43 (1964); MASS. GEN. LAWS ANN. ch. 278, § 6 (1959); MICH. COMP. LAWS § 768.3 (1968); MINN. STAT. § 631.01 (1967); MO. REV. STAT. § 546.030 (1959); MONT. REV. CODE ANN. § 94-4806 (1947); NEBR. REV. STAT. § 29-2001 (1956); N.Y. CODE CRIM. PROC. § 356 (McKinney 1958); N.D. CENT. CODE § 29-16-03 (1960); OHIO REV. CODE ANN. § 2945.12; OKLA. STAT. ANN. tit 22, § 583 (1969); OR. REV. STAT. § 136.040 (1967); S.C. CODE ANN. § 17.506 (1967); S.D. COMPIL CODE LAWS ANN. § 23-42-1 (1967); TENN. CODE ANN. §§ 40-2001, 40-2405 (1955); TEX. CODE CRIM. PROC. art. 33.03 (1966); UTAH CODE ANN. § 77-27-3 (1953); VA. CODE ANN. § 19.1.240 (1960); WASH. REV. CODE § 10.45.040 (1961); W. VA. CODE ANN. § 42-3-2 (1966); WIS. STAT. ANN. § 957.07 (1957); WYO. R. CRIM. P. 42.


allow waiver even in capital cases. Waiver may be manifested by express language or by conduct, but it must be clear and unequivocal—the defendant must make an "intentional relinquishment or abandonment of a known right."

B. The Right To Be Free Of Physical Restraints

In addition to his right to personal presence, the defendant has the right to appear before the jury free of physical restraints. The primary objection to the use of restraints is that they tend to prejudice the defendant in the eyes of the jury by diminishing the presumption of innocence that he is supposed to enjoy. Also, the more severe forms of restraint such as binding


A few jurisdictions have taken the position that the right to presence is not subject to waiver on the theory that the requirement of presence is for the benefit of the state as well as the accused. Journigan v. State, 223 Md. 405, 164 A.2d 896 (1960), cert. denied, 365 U.S. 853 (1961); Booze v. State, 390 P.2d 261 (Okla. Crim. 1964); Boner v. Boles, 148 W. Va. 402, 137 S.E.2d 418 (1964).

11. See, e.g., Frank v. State, 142 Ga. 741, 83 S.E. 645 (1914); People v. De Simone, 9 Ill. 2d 522, 138 N.E.2d 556 (1958); Boreing v. Beard, 226 Ky. 47, 10 S.W.2d 447 (1928); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918).


15. See, e.g., Blaine v. United States, 136 F.2d 284 (D.C. Cir. 1943); People v. Harrington, 42 Cal. 165, 10 Am. R. 296, (1871); Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916); State v. Kring, 64 Mo. 591 (1877); State v. Williams, 18 Wash. 47, 50 P. 580 (1897); cf. Eaddy v. People, 115 Colo. 488, 174 F.2d 717 (1946) (defendant dressed in prison uniform); People v. Du Plissey, 380 Mich. 100, 155 N.W.2d 850 (1968) (restraints on co-defendants); State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472 (1959) (restraints on defendant's witnesses). The basis of the rule is the defendant's constitutional right to a fair and impartial trial. See Way v. United States, 285 F.2d 253 (10th Cir. 1950); Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), cert. denied, 342 U.S. 873 (1951).

and gagging may interfere with the defendant's ability to con-
front his accusers and to communicate with his counsel,17 and if
the restraint creates considerable physical discomfort, it may
impair the defendant's ability to think clearly, which could be
essential to his defense.18 Finally, the practice of shackling has
been criticized as so inhumane as to be out of place in a court
of justice.19

The defendant's right to appear in court free of physical re-
straints is, nevertheless, subject to certain widely recognized ex-
ceptions. For example, restraints may be used to prevent es-
cape,20 to prevent possible violence to spectators, officers of the
court or to the defendant himself,21 and to prevent disruption of
the trial.22 The general use of such restraints has been held to
lie within the sound discretion of the trial judge.23

C. SUMMARY CONVICTION FOR CRIMINAL CONTEMPT

The use by the trial court of its power to summarily punish
criminal contempt also involves the abridgement of numerous
constitutional rights. Of particular importance when the defend-
ant is summarily punished for contempt for disruptive conduct is
the defendant's loss with respect to the contempt charge of nu-
merous Sixth Amendment rights, including his rights to trial by
jury, to information as to the nature of the accusation, to con-

(1951); Blair v. Commonwealth, 171 Ky. 319, 188 S.W. 390 (1916); State
v. Kring, 64 Mo. 591 (1877).
17. Illinois v. Allen, 397 U.S. 337, 344 (1970); People v. Harrington,
42 Cal. 165, 10 Am. R. 296 (1871).
18. Id.
20. See, e.g., United States v. Myers, 367 F.2d 53 (3d Cir. 1965),
cert. denied, 366 U.S. 920 (1967); Clark v. State, 280 Ala. 493, 195 So. 2d
786 (1967); Commonwealth v. Chase, 350 Mass. 738, 217 N.E.2d 195
(1965).
21. See, e.g., Loux v. United States, 389 F.2d 911 (9th Cir.), cert.
denied, 393 U.S. 867 (1968); United States v. Bentvena, 319 F.2d 916
(2d Cir.), cert. denied, 375 U.S. 940 (1963); State v. Boag, 104 Ariz. 362,
453 P.2d 508 (1969); State v. Coursolle, 255 Minn. 384, 97 N.W.2d 472
(1959).
22. See, e.g., State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967);
People v. Merkouries, 46 Cal. 2d 540, 297 P.2d 999 (1956); State v. Mc-
Ginnis, 441 S.W.2d 715 (Mo. 1969).
23. See, e.g., Glass v. United States, 351 F.2d 678 (10th Cir. 1965);
Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969); State v. Randolph,
523, 238 N.E.2d 508 (1968); State v. Roberts, 86 N.J. Super. 159, 206 A.2d
200 (1965).
frontation of adverse witnesses and to assistance of counsel.\textsuperscript{24} Although the power of trial judges to summarily punish defendants for criminal contempt has been somewhat curtailed by decisions of the United States Supreme Court,\textsuperscript{25} most of these restrictions are not applicable where the contempt power is used to preserve or restore order in the court.\textsuperscript{26}

III. \textit{ILLINOIS v. ALLEN: PRESENT PROCEDURES FOR CONTROLLING DISRUPTIVE DEFENDANTS}

In \textit{Allen} the defendant was convicted of armed robbery and sentenced to 10 to 30 years in prison. His exclusion from his trial because of his obstreperous behavior constituted the basis of his petition for habeas corpus, which was denied by the federal district court\textsuperscript{27} but granted by the Seventh Circuit Court of Appeals.\textsuperscript{28} The United States Supreme Court reversed the Seventh

\begin{footnotes}


\textsuperscript{25} See, e.g., Johnson v. Mississippi, 403 U.S. 212 (1971) (summary punishment of contempt after trial not appropriate when judge has adopted an adversary posture with respect to the alleged contemnor); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (bias presumed when contemnor attacks judge personally so that determination before another judge is necessary); Cheff v. Schnackenberg, 384 U.S. 373 (1966) (criminal contempt sentences imposed without jury trial cannot exceed six months); Offutt v. United States, 348 U.S. 11 (1954) (summary punishment of contempt not appropriate after completion of trial at which allegedly contemptuous behavior occurred).

\textsuperscript{26} E.g., in Mayberry v. Pennsylvania, 400 U.S. 455 (1971), use of summary contempt powers was recommended for purposes of maintaining order in the court even though it was held inappropriate if delayed until after trial. \textit{See also} United States v. Meyer, No. 24,058 (D.C. Cir. decided Jan. 20, 1972), where the court held post-trial use of summary contempt power inappropriate, but stated that “the need to preserve order [in the court] not only supports summary disposition, but also outweighs the possibility of bias on the part of the trial judge.”

\textsuperscript{27} United States District Court for the Northern District of Illinois, May 24, 1968 (no reported opinion).

\textsuperscript{28} United States \textit{ex rel. Allen v. Illinois}, 413 F.2d 232 (7th Cir. 1969). The circumstances leading to Allen's exclusion are set forth in the opinion of the Court of Appeals:

After his indictment and during the pretrial stage, the petitioner [Allen] refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, “I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] \{to\} sit in and protect the record for you, insofar as possible.”

The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge inter-
Circuit's decision. Mr. Justice Black, speaking for the Court, ruled that there are at least three constitutionally permissible ways to handle an obstreperous defendant like Allen: (1) bind and gag him; (2) cite him for contempt; and (3) take him out of the courtroom until he promises to conduct himself properly.

Although it is clear that the Court engaged in a conscious balancing of the rights of defendants against the interests of the state, the foundation of the decision was that disruptive conduct constitutes a waiver of the rights lost. As noted above, however, the long-standing test for waiver of constitutional rights has been whether the defendant intentionally relinquished or abandoned a known right. The "waiver by misconduct" theory of Allen does not appear to meet this standard. The decision requires

ruptured the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the 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. The trial judge thereupon stated to the petitioner, "One more outbreak of that sort and I'll remove you from the courtroom." This warning had no effect on the petitioner. He continued to talk back to the judge, saying, "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he "behaved [himself] and [did] not interfere with the introduction of the case." The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The [petitioner] protested this effort on the part of his attorney, saying: "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me." The trial judge thereupon ordered the petitioner removed from the courtroom.

413 F.2d at 233–34.
30. Id. at 344.
31. See note 14 supra.
32. See Tigar, supra note 14.
a warning before the defendant may be excluded, but he apparently need not be informed that he has a right to be present. No warning of any kind is explicitly required prior to shackling the defendant or citing him for contempt. Thus, when the defendant is engaging in misconduct, waiver may occur where the right is unknown and the waiver is unintentional.

While the Court intended to give trial judges considerable discretion in controlling disruptive defendants, some guidelines for the use of the Allen controls are implicit in the Court's opinion. preliminarily, use of the Allen controls apparently was not condoned in circumstances of slight disruption, but only in cases where the defendant "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on . . . ." Even if this required level of disruption had been articulated more clearly, however,

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33. Specifically, the Court held 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 he continues his disruptive behavior . . . ." 397 U.S. at 343 (emphasis added). Cf. the dictum of Mr. Justice Brennan, concurring: "Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior." 397 U.S. at 350.

34. 397 U.S. at 343. See also Tigar, supra note 14, at 10-11. That the Court is well aware of the importance of informing an individual both of his constitutional rights and of the consequences of waiving them in order for the waiver to be truly informed is clear. Equally clear is the Court's ability to articulate such requirements precisely when it intends to do so. See Miranda v. State, 384 U.S. 436, 469, 471-73 (1966).


36. According to the Court, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." 397 U.S. at 343.

An amendment to Rule 43 of the Federal Rules of Criminal Procedure has been proposed to reflect the Allen decision. The amendment merely provides, however, that "[t]he further progress of the trial to and including the return of the verdict shall not be prevented whenever a defendant, initially present . . . engages in conduct which is such as to justify his being excluded from the courtroom." Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts and the Federal Rules of Appellate Procedure. As the Advisory Committee note points out, "[t]he decision in Allen makes no attempt to spell out standards to guide a judge in selecting the appropriate method to insure courtroom decorum and there is no attempt to do so in the revision of the rule."

37. 397 U.S. at 343. It should be noted, however, that this limitation may apply only where the defendant is expelled, so that possibly binding and gagging, and almost surely contempt, may be used before the defendant has engaged in conduct that would justify expulsion.
it would be inadequate. It does not specifically require judges to distinguish between isolated incidents of disruption and conduct calculated to throw the proceedings into disorder. Neither does it require differentiation between inexcusable disruption and protestation motivated by a justifiable complaint. In view of the harshness of the controls and the attendant loss of rights held in Allen to be constitutionally permissible, such distinctions should not go unrecognized.

As to which sanction is appropriate in a particular situation, the Court expressed some preferences. The binding and gagging of defendants, the Court said, suffers from the defects of inhumaneness, jury prejudice and interference with attorney-client communication. The use of the contempt power, it went on to say, was unlikely to be effective, and, in the case of civil contempt, enabled the defendant to delay the proceedings at will. This presumably leaves expulsion of the defendant as the preferred method of control, even though it controverts the basic right of the defendant to be personally present at his trial.

38. Under the decision's rationale of preserving order and decorum in the courtroom it is not necessary for trial judges to consider the motives of the disruptive defendant, but only to consider the effects of his conduct on the proceedings. Indeed, under the rationale of the case such distinctions probably would not even be desirable because of the strong possibility of discriminator treatment by the judge according to the popularity of the cause the defendant might be espousing. Nevertheless, a trial judge could, consistent with the theory of the decision, be required to distinguish between occasional irreverent outbursts and a course of conduct that unreasonably disrupted the proceedings.

39. Cf. the dissenting opinion of Mr. Justice Douglas, who asked "Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the to the bench that tried him? Would we uphold contempt in that situation?" 397 U.S. at 355. Possibly the answer is not unqualifiedly in the negative. In People v. De Simone, 9 Ill. 2d 522, 138 N.E.2d 556 (1956), defendant was excluded from his trial on account of his obstreperous behavior which may have been directed at least in part to the incompetence of his defense counsel. Without discussion of the issue raised by Mr. Justice Douglas, the court stated that defendant had waived his right to be personally present, but reversed his conviction on the grounds that the ineffectiveness of his counsel had resulted in a denial of due process.


Despite this expression of preference among the controls, the Court refused to go further and establish a mandatory hierarchy or priorities among them. The Court imposed no express requirement that the control selected be correlated to the type or level of disruption the defendant has caused. Nor did the Court suggest that trial judges attempt to restore order by less serious methods, such as a stern warning from the bench, or by a short recess during which the defendant could ponder the cost of future disruption and defense counsel could impress upon him the importance of his presence in court unshackled and the dangers of jury prejudice attendant upon misconduct. Such restrictions by the court would have been desirable because they would prevent or minimize the abridgment of the defendant's rights with virtually no reduction of the judge's ability to deal flexibly with disruptive conduct.

The Court's requirement of a prior warning is, of course, desirable, but the warning required should be more specific.\textsuperscript{42} Additionally, the trial judge should be required to guard against jury prejudice that may result when the court rebukes the defendant, either by giving the warning after the jury has been excused, or by instructing the jury to disregard the warning as irrelevant to the defendant's guilt or innocence.

Finally, the Court indicated that once a defendant has lost a right because of misconduct, he may "reclaim" it as soon as he is willing to conduct himself properly.\textsuperscript{43} This rule is consistent with the rationale of the decision that Allen controls are not intended to be penalties \textit{per se}, but are imposed only to preserve order and decorum in the courtroom.\textsuperscript{44} It would have been desirable, however, in view of the importance of the constitutional rights waived, to articulate more clearly the procedures to be followed. In view of the difficulty for a shackled and gagged or absent defendant to "reclaim" his right to presence, for example, the judge should be required to inquire periodically regarding the defendant's intentions.

\textsuperscript{42} See note 60 infra.
\textsuperscript{44} Cf. the language of Mr. Justice Brennan, concurring, in which he suggests that while the defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible . . . .

397 U.S. at 351.
Although much can be said for allowing trial judges considerable discretion in controlling disruptive conduct, the Court's failure to articulate specific guidelines for the use of Allen controls is unfortunate for several reasons. First, the absence of definite guidelines allows considerable room for discrimination against and arbitrary treatment of unpopular defendants. Second, the Court's position fails to recognize that decorum in the courtroom can be undermined not only by disruptive defendants but also by harsh and arbitrary treatment of defendants. Third, the lack of guidelines fails to protect against the possibility of loss of express constitutional rights in excess of that necessary to maintain order. Finally, trial in absentia or with strongly fettered defendants, with its connotations of totalitarianism, tends to undercut public confidence in the criminal justice system.

IV. GUIDELINES FOR THE CONTROL OF DISRUPTIVE DEFENDANTS

To meet the need for restrictions on trial judges' power to control disruptive defendants, the following guidelines are proposed. Each guideline attempts to reconcile the acknowledged need for flexibility in dealing with such disruption with the desirability of minimizing the loss of defendants' rights. The guidelines are not intended as mandatory rules, but rather as suggestive of considerations relevant to the problem of how disruption should be dealt with in a particular case. They should serve the additional function of providing standards

45. In addition to being in the best position to assess the disruption of the proceedings caused by the unruly conduct, the judge is also best situated to determine the nature of the defendant's conduct, e.g., whether it is an uncontrollable outburst or conduct designed and intended to disrupt the proceedings. Moreover, the judge is best situated to observe and deal with the likelihood of jury prejudice. Finally, the judge bears the ultimate responsibility for the proceedings and thus must be concerned with such considerations as the safety of the officers of the court, the jurors and the spectators.

46. A function is contemplated similar to that presently accorded to Advisory Committee on Fair Trial and Free Press of the American Bar Association, Standards Relating to Fair Trial and Free Press, to which judges turn for guidance in problems involving publicity of trial proceedings. While nonmandatory guidelines may have less force and effect than formal rules of procedure, they are designed to call attention to all of the issues that arise when disruption occurs or threatens to occur, without unduly infringing on the freedom which judges need to respond to the multifarious situations in which trial disruption arises.
against which the judge's exercise of discretion can be measured in a particular case for purposes of appellate review.

The discussion of the guidelines is organized around the two main questions that arise when the judge is confronted with conduct that threatens to disrupt the proceedings. First, the judge must determine whether the conduct is so intolerable as to require a response from the bench. Second, the judge must determine what the particular response to the disruptive conduct should be. The second question includes the determinations of which response among his alternatives is most appropriate, what procedures should be followed in imposing it and what steps should be taken to mitigate its prejudicial and punitive effects.

A. Identification of Disruptive Behavior

The imposition of an Allen sanction is not an appropriate response to every instance of courtroom discourtesy on the part of the defendant, but should be reserved for situations in which the conduct of the defendant is so serious as to actually disrupt the proceedings. Some types of conduct, although irritating to the judge, do not actually disrupt the trial, and anything more than a warning by the judge would be inappropriate.47

Some conduct, although disruptive or potentially disruptive, may be controlled by procedures short of those approved in Allen, such as a stern warning regarding the possible consequences of defendant's behavior, or a short recess during which the defendant might be persuaded to behave properly, or both. Such procedures, where they may be effective, should be used before resorting to the more severe sanctions approved in Allen since they do not infringe on fundamental rights of the accused and may be employed without undue delay or difficulty. Furthermore, overreaction to minimally disruptive conduct in the

47. In Commonwealth v. Fletcher, 441 Pa. 28, 269 A.2d 727 (1970), defendant, suddenly unrepresented by counsel after an unexplained denial of his motion for a new counsel, had been sentenced to one year imprisonment on a contempt charge arising from his refusal to answer pre-trial questions of legal strategy in a pro se capacity. On appeal, the conviction was reversed, the Supreme Court of Pennsylvania holding defendant's conduct not contemptuous as a matter of law. The court recognized that the use of the contempt power had been upheld in Allen as a method for controlling courtroom disruption, but suggested that its use be limited to situations of "scurrilous [and] abusive language and conduct." Id. at 33, 269 A.2d at 730, citing Illinois v. Allen, 397 U.S. 337, 346-47 (1970).
form of harsh responses from the bench is as detrimental to the integrity of the judicial process as the disruptive behavior itself.\textsuperscript{48}

Additionally, the judge should distinguish between isolated instances of misconduct, and courses of conduct calculated to disrupt the proceedings. In the former, the judge should adopt a “wait and see” attitude after appropriately warning the defendant. Where the defendant manifests an obvious purpose of disrupting the proceedings, however, the judge should be free to respond more quickly and forcefully.\textsuperscript{49} Since the rationale of the procedures approved in \textit{Allen} is the necessity of order in the courtroom, the likelihood of continued disruption is a variable which the judge should consider in determining whether to respond to disruption and what response is appropriate.

The use of \textit{Allen} controls is inappropriate where the objectionable conduct does not occur while the court is in session.\textsuperscript{50} Logically, such conduct cannot disrupt the proceedings in the manner envisioned in \textit{Allen}. More importantly, however, the warning to the defendant required by \textit{Allen} cannot be given where the defendant’s conduct occurs while the court is not in session.\textsuperscript{51} Finally, the judge should not resort to the procedures approved in \textit{Allen} in reliance solely upon the recommendations

\textsuperscript{48} It should be remembered that where a matter lies within the discretion of the trial judge, appellate courts are reluctant to interfere with the trial judge's decision. But see Benton v. Dover Dist. Ct., 274 A.2d 876, 878 (N.H. 1971), where the defendant was sentenced to six months imprisonment on account of his reference to the court as a “kangaroo court.” The New Hampshire Supreme Court held that in light of “the relative severity of the contempt sentence . . . as compared with the gravity of the contemptuous conduct, we are of the opinion that the portion of the sentence already served by the plaintiff constitutes adequate punishment.”

\textsuperscript{49} In \textit{Morris v. State}, 249 Ark. 1005, 1010, 462 S.W.2d 842, 845 (1971), defendant kicked over a chair, addressed the court in loud language, and announced that he “was going to pull a Bobby Seales [sic].” In chambers the judge explained that defendant would have to observe courtroom decorum if he wished to remain in court during his trial. Upon defendant’s stated refusal to conduct himself properly, the judge ordered defendant returned to jail. Defendant’s subsequent conviction was properly affirmed in reliance upon \textit{Allen}.

\textsuperscript{50} In \textit{Jones v. State}, 262 Md. 61, 276 A.2d 666 (1971), the defendant had been ordered shackled and gagged at the commencement of the trial by the judge who had observed an unexplained altercation between defendant and sheriff’s deputies while the judge was passing the entrance to the courtroom. On appeal, defendant’s conviction was reversed and the case remanded for a new trial on the ground that defendant had been denied due process.

\textsuperscript{51} \textit{Id.} In \textit{Jones} the court assumed that the warning required by \textit{Allen} to be given before the defendant is excluded must also be given before the defendant may be shackled and gagged.
of others without making an independent assessment of the situation.52

The judge should not, of course, be oblivious to conduct of the defendant that occurs before the trial commences or when the court is not in session which is indicative of a threat of disruption.53 He can warn the defendant at the outset of the proceedings about the standard of conduct expected of him and of the results of misconduct during the trial.54 If such information suggests the possibility of violence or attempted escape, the judge should take added security precautions such as increasing the number of guards and searching spectators. In extreme cases, the judge may even restrain the defendant with handcuffs, but before taking such action the possibility of jury prejudice should be weighed.55 Generally, however, conduct that occurs while the court is not in session should not be the sole or final provocation that results in the use of an Allen control.

The judge should not impose Allen controls unless he is personally cognizant of the disruptive conduct.56

52. In United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970), the court said, with regard to precautionary security measures, “We stress that the discretion is that of the district judge. He may not . . . delegate that discretion to the Marshal.”


54. This procedure was suggested by the court in Jones v. State, 262 Md. 61, 276 A.2d 666 (1971). Although the prior warning may be subject to the criticism that it demonstrates prejudice on the part of the judge, it is difficult to see how the practice is more objectionable than requiring the defendant to wear shackles during the proceeding solely on account of his pretrial conduct, a practice which is permitted in many jurisdictions. See, e.g., cases cited in note 53 supra. Furthermore, the judge could avoid the charge of prejudice by giving brief instructions as to the standard of conduct expected of the defendant at the outset of every criminal trial, thereby eliminating the implication that he bears prejudice toward particular defendants. In either case, of course, the instructions should be given out of the presence of the jury.

55. In such cases the Samuel court also required the judge to state for the record, and out of the presence of the jury, the reasons for the extraordinary security measures and to give counsel an opportunity to comment thereon for purposes of appellate determination of whether the judge abused his discretion. 431 F.2d at 615.

56. In Johnson v. Mississippi, 403 U.S. 212, 214 (1971), the Supreme Court, in reversing the defendant's conviction for contempt for disruptively violating courtroom procedure, said that “[i]mmediate action may be necessary where the misbehavior is in the presence of the judge and is known to him and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court.” Because the judge did not take instant action, however, and because he was
ample, an altercation occurs in the courtroom which the judge does not observe fully, the defendant should not be penalized on the strength of a description of the occurrence by the marshal or some other officer of the court without giving the defendant an opportunity to relate his version of the incident. Additionally, the prosecutor and the defense counsel might be given some opportunity to present arguments regarding the propriety of a response from the bench. It must be remembered that the exercise of the judge's discretionary power to control disruption should not be uninformed.

Finally, the judge should consider the cause of the defendant's misconduct. Where the defendant is expressing a legitimate grievance, such as incompetence of his defense counsel, it would seem that the judge ought properly to direct his attention to the cause of the defendant's conduct rather than to the defendant's response to it. It is true, of course, that if the defendant is expressing a legitimate grievance, he would normally be able to raise it on appeal. Nevertheless, it is more efficient and more fair to deal with such situations at the trial level than to make use of the procedures approved in Allen and to trust that the legitimacy of the defendant's complaint will be vindicated in the appellate process.

B. DETERMINATION OF THE PROPER METHOD OF CONTROL

The judge should warn the defendant about the possible consequences of his behavior before resorting to the procedures approved in Allen. The Allen opinion appears to require a warning prior to exclusion of the defendant and may require a

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57. See note 55 supra.
58. See, e.g., People v. De Simone, 9 Ill. 2d 522, 138 N.E. 2d 566 (1956).
59. Even where the defendant is not voicing a legitimate grievance—e.g., disruption resulting from animosity toward an adverse witness—the judge should consider the likelihood of continued disruption once the cause has been eliminated in determining whether and how to react to the defendant's conduct.
60. In particular the judge's warning should call the defendant's attention to what conduct is objectionable and why it will not be permitted, to what actions may be taken if the disruption is continued, to the loss of rights and attendant disadvantages and to the fact that the trial will continue even in defendant's absence. See Flaum & Thompson, The Case of the Disruptive Defendant: Illinois v. Allen, 61 J. Crim. L.C. & P.S., 327, 334 (1970).
warning regardless of the sanction chosen. Moreover, to construe misconduct as an intentional waiver of the constitutional right to presence, the defendant must be cognizant of the fact that his conduct may result in the loss of such a right. Finally, a stern warning from the judge may well have a deterrent effect on future misconduct, thereby rendering more severe procedures unnecessary. In view of the importance of the constitutional rights involved, the gravity of the sanctions that can be imposed and the relative ease with which a warning can be made, a warning should be given prior to sanctioning the defendant’s conduct except where it would be obviously futile.

When the disruption cannot be controlled by a warning, and except where obviously futile, the judge should attempt to control the disruption by notifying the defendant that he will be charged with criminal contempt of court. Even though the use

61. Mr. Justice Brennan, concurring, stated, “Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior.” 397 U.S. at 350. The American Bar Association Advisory Committee on the Judge’s Function has taken a similar position even with respect to use of the contempt power:

No sanction other than censure should be imposed by the trial judge unless (a) it is clear from the identity of the offender and the character of his acts that disruptive conduct was willfully contemptuous, or (b) the conduct warranting the sanction was preceded by a clear warning that the conduct is impermissible and that specified sanctions may be imposed for its repetition. AMERICAN BAR ASSOCIATION PROJECT FOR STANDARDS FOR CRIMINAL JUSTICE, THE JUDGE’S ROLE IN DEALING WITH TRIAL DISRUPTIONS (Tentative Draft), at 18 (1971).

62. See note 14 supra.

63. Rather than giving a pro forma warning in situations where the procedure would obviously be ineffectual both in controlling the defendant’s conduct and in informing him of possible waiver of rights, the judge should recess the proceedings or excuse the jury and then effectively communicate the warning to the defendant.

64. Although the Allen Court assumed that use of the court’s contempt power would generally be ineffectual, the loss of rights important to the presentation of the defense of the accused dictates that this less severe control should be used before resorting to shackling or exclusion in situations in which it might be effective. In particular, where the court is faced with a highly excitable defendant who has merely lost control of his conduct, as opposed to a defendant who is consciously and intentionally attempting to disrupt the proceedings, the contempt power should be used. State v. Browder, 486 P.2d 925, 945 (Alaska 1971). Although summary conviction for contempt is within the court’s power for the purpose of maintaining or restoring order in the courtroom, if the contempt power is sufficient to restore order in a particular situation then merely notifying the defendant that he will be charged with contempt is likely to be as effective as summary conviction for contempt. The distinction between charging the defendant with con-
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of the contempt power is more harsh than exclusion or shackling in that it goes beyond mere control of disruption and results in punishment, it is less violative of traditional rights of the accused than is exclusion and is more humane than shackling. Moreover, if citation rather than summary conviction is used, the contempt proceedings will be delayed until the end of the trial and should thus be referred to another judge for proceedings at which the defendant may be able to present evidence relevant to guilt or punishment.65

Expulsion of the defendant is preferable to binding and gagging him.66 Most of the interests to be served by his presence do not exist when he is bound and gagged.67 Moreover, his presence in a highly fettered condition is likely to have a prejudicial effect on the jury not easily corrected by admonitions from the bench.68 Finally, binding and gagging have proved somewhat ineffective in quelling disruption69 and tend to offend the very courtroom decorum the procedure is intended to protect.

When the defendant is removed from the courtroom the judge should attempt to minimize the disadvantages to his temptation and summary conviction can be seen by comparing Fed. R. Crim. P., Rules 42(b) and 42(a).

66. According to the Allen court:
   Trying a defendant for a crime while he sits bound and gagged before the jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort.
397 U.S. at 344.

Cf. Mr. Justice Brennan, concurring:
   In particular shackling and gagging a defendant is surely the least acceptable of [the methods]. It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law.
397 U.S. at 350-51.
67. E.g., although present, the defendant is unable to communicate with his attorney.
68. That the presence of the shackled and gagged defendant will always prejudice the jury against the defendant is not entirely certain. One of the jurors in the conspiracy trial of the "Chicago 8" commented on the impact of the shackling and gagging of defendant Seale: "I am not sure I could have found Seale guilty no matter what the evidence, and I know that the other jurors felt the same." Juror Kay Richard, quoted in Chicago Sunday Sun-Times, Feb. 22, 1970 § 1, at 4, col. 4.
69. Bobby Seale was initially bound with ordinary metal handcuffs and a cloth gag to restrain him. The metal shackles were replaced with leather restraints to prevent jangling, but numerous recesses were required to permit the choking defendant to catch his breath. Chicago Sun-Times, Feb. 22, 1970, § 1, at 4, col. 4.
defense that are created by his absence. Furthermore, the defendant should be given the continuing opportunity to return to the courtroom upon assurance that he will conduct himself properly. The procedures approved in Allen were not, with the possible exception of contempt, intended as punishments in themselves, but were intended to control disruptive behavior. Thus the adverse effects of a particular procedure should be minimized while it is in effect, and terminated when it has served its purpose.

Because of the distraction that will normally accompany disruptive behavior and the judge's attempts to control it, the judge should guard against the possibility of jury prejudice. Wherever possible, the judge should address the defendant with respect to his conduct out of the presence of the jury, either in his chambers or after excusing the jury. Additionally, the judge should instruct the jury to consider disruptive conduct and the court's response to it as irrelevant to the question of the defendant's guilt or innocence.

70. See the language of Mr. Justice Brennan quoted at note 44 supra. With regard to the excluded defendant, many alternatives are available to minimize the disadvantages that result from his absence. First, the length of the trial day could be decreased or the length of recesses increased to permit the defense counsel to inform the defendant about the progress of the trial and to inquire about his desire to return to the courtroom. Second, the defendant could be provided with a transcript or condensed record of the proceedings. Third, the defendant could be provided with an electronic intercommunication link such as closed circuit television. Although this procedure would be highly desirable, it is probably prohibitively expensive for many jurisdictions and in any case is not required where the defendant has, in fact, waived his right to be present. Nevertheless, reasonable efforts should be made by the judge to mitigate the disadvantages of the particular method chosen to control the disruption.

71. According to the Allen court, "the right to be present can, of course, be reclaimed as soon as the defendant is willing" to conduct himself properly. 397 U.S. at 343. Preferably, however, the judge should be required to take the initiative in inquiring at frequent intervals as to whether the defendant intends to behave himself and therefore regain his right to presence. Putting this burden on the judge rather than the defendant is justifiable both because of the practical difficulties involved in the excluded defendant communicating with the judge and in order to minimize mistake on the part of the defendant as to the extent and duration of the sanction imposed on him.

72. Although security problems that arise in cases where there is danger of escape or violence make conferences in chambers undesirable in such situations, generally this procedure is preferable to excusing the jury because of the speed and flexibility of retiring to chambers. In any case the jury should view as little of the disruption and the judge's reaction to it as possible.
V. CONCLUSION

Faced with a rising incidence of disruption in the criminal courtroom, trial judges have been vested with broad powers under the *Allen* decision to control such misconduct on the part of the defendant. Although the judge needs broad and flexible powers to deal with the many and varied problems that arise in connection with disruptive defendants, unwarranted or overly harsh judicial responses to disruptive conduct unduly infringe upon the rights of the accused and are offensive to the decorum the judge is to uphold. Thus guidelines have been suggested that hopefully will aid judges in determining what conduct is disruptive and how disruption is most appropriately controlled.