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ORDER IN THE COURT: DECORUM, RAMBUNCTIOUS
DEFENDANTS, AND THE RIGHT TO BE PRESENT AT TRIAL

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INTRODUCTION

“I’m down here for justice,” Charlie Foster told the state judge presiding over his assault trial.1 “We can do this the easy way or we can do it the hard way, Charles Foster,” the judge responded.2 “You violated my rights,” Foster pleaded.3 “Do you want to stay in this courtroom, sir?” “You violated—” Foster tried to repeat himself, but the judge interrupted him.4 “Take him up to the jail.”5 Foster’s counsel attempted to intercede on Foster’s behalf, and again the judge interrupted: “Allen versus Illinois. Now, he is going back up to the jail.”6 And before the prosecution rested its case, Charlie Foster was removed from his own trial.7

Foster interrupted his judge several times, once in front of the jury.8 These interruptions formed the basis for the decision to expel

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1 Foster v. Wainwright, 686 F.2d 1382, 1385 (11th Cir. 1982). Foster and a co-defendant were charged in Florida court with two counts of assault with intent to commit a felony. Id. at 1385. Foster was represented by a defense attorney, but on the afternoon of the third day of trial he requested to proceed pro se. Id. at 1385. The judge denied the motion and the defense counsel remained. Id. The jury convicted Foster of both counts of assault. Id. at 1383. The judge sentenced him to thirty years in prison (two consecutive fifteen-year sentences). Id.

2 Id. at 1385.

3 Id.

4 Id.

5 Id.

6 Id.

7 Id.

8 Id. at 1384–86.
Foster. Each interruption of the proceedings was a response to a question directed to him, a request for permission to speak, or an “object[ion]”—though he was not representing himself. Once, the judge told him that his disruptions would result in contempt proceedings or removal from the courtroom. When that single warning proved ineffective, the judge took a more extreme and more certain way to stop Foster’s protests: removal from the courtroom under the precedent established in Illinois v. Allen.

After the prosecution concluded its case-in-chief, the court instructed Foster’s attorney to tell Foster that he could return to trial if he behaved. Foster chose to remain in the local jail. His attorney decided, without Foster, not to call any witnesses. 

Foster appealed through the state courts without success, then petitioned for a writ of habeas corpus in federal court. Among other things, Foster alleged that the state trial judge violated Foster’s Sixth and Fourteenth Amendment rights by expelling him from the courtroom and that this was an abuse of the judge’s discretion.

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9 See id. at 1386 (quoting the trial judge: “I’m sending him up the jail because he has disrupted this Court. . . . [H]e is not going to disrupt this Court again.”).
10 For example, during his counsel’s cross-examination of the final prosecution witness, Foster objected to the form of a question: “That’s a leading question. My attorney led him.” Id. at 1385. See id.
11 Id. at 1384–85.
12 At a conference, Foster, intent on ensuring that a missing witness appear, said he would “just have to be forced to take a contempt charge” if the witness did not appear in time to testify. Id. at 1385. See id. at 1385–86.
14 Foster, 686 F.2d at 1386.
15 Id. On being invited to return to the courtroom, Foster stated that “[t]he judge] ordered me out, now I’ll not come down unless I receive a written order [to return to the courtroom].” Id.
16 Id. The only published decision in Foster’s case history does not indicate the defense attorney’s reasons for not calling witnesses. See id. (stating only that “[Foster’s attorney] rested his case for Foster without calling any witnesses”). However, Foster’s co-defendant presented a defense. Id.
17 Id. at 1383.
18 Id. A writ of habeas corpus is “a procedure for obtaining a judicial determination of the legality of an individual’s custody.” A state offender generally uses it to challenge the constitutionality of her state criminal conviction. STEVEN H. GIFIS, BARRON’S LAW DICTIONARY 229–30 (5th ed. 2003).
19 Foster, 686 F.2d at 1383.
District court and the Eleventh Circuit rejected the petition, finding that Foster was properly excluded from his trial.\footnote{22} In 1970, the Supreme Court noted in Illinois v. Allen that “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”\footnote{23} Yet the Court held that an accused loses that right if, through “misconduct,” she upsets the “dignity, order, and decorum” of the courtroom.\footnote{24} The Court gave very little guidance on what behavior qualifies as misconduct.\footnote{25} Further, the Court did not specify the standard of review for appellate courts reviewing trial court decisions to expel, though it suggested a deferential abuse of discretion review.\footnote{26}

Ambiguity in the Allen rule has left trial judges with a complete lack of understanding of when they can remove a defendant from trial, consistent with that defendant’s constitutional rights. This has facilitated violations of the constitutional rights of people like Charlie Foster, who, though he interrupted the proceedings, did so only “for justice”—to pursue his rights through the trial process—not to thwart the trial itself or threaten anyone in the courtroom.\footnote{27} Further, at the appellate level, courts grant excessive deference to the trial court’s decision to remove defendants from the courtroom, thus giving trial judge the discretion to extend the boundaries of an already loose rule and further infringe on defendants’ rights.\footnote{28}

\begin{itemize}
\item \footnote{Id.} at 342–43 (describing defendant misconduct as “behavior . . . so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom,” without providing specific examples of such behavior, other than the defendant Allen’s behavior, see discussion infra Part II.A).
\item \footnote{Id.} at 343 (holding that “a defendant can lose his right to be present at trial . . . [if] he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful . . . ”). However, the Court also stated that “[n]o formula for maintaining the appropriate courtroom atmosphere will be best in all situations.” \footnote{Id.}
\item \footnote{Id.} (noting that the trial judge “must be given sufficient discretion to meet the circumstances of each case”). The Court also found that “there is nothing . . . in [the trial] record to show that the judge did not act completely within his discretion” when he expelled Allen from the courtroom. \footnote{Id. at 347.}
\item Charlie Foster’s behavior was different from William Allen’s, because Allen made very clear that he was trying to stop the trial. \footnote{See, e.g., id. at 340 (describing Allen’s physical disruptions and destruction of court documents and insisting, “[T]here’s not going to be no trial, either.”)}
\item \footnote{See, e.g., United States v. Shepherd, 284 F.3d 965, 968 (8th Cir. 2002) (noting that the court of appeals reviews the district court’s expulsion of a defendant from trial for abuse of discretion, subject to harmless error analysis, and the court of appeals “saw little need to second-guess the trial judge’s decision”); see discussion infra Part III.C.}
\end{itemize}
This Article argues that contrary to the current application of the Allen rule, an accused’s right to be present at his or her trial—particularly when it is a jury trial—cannot be involuntarily waived merely to preserve dignity and proper etiquette in the courtroom. Instead, trial courts should balance the accused’s right to be present in the courtroom against the effect of the disruption on the accused’s ability to receive a fair trial. Courts should remove defendants from the courtroom only if removal will clearly and substantially increase the fairness of the trial. The court must consider the defendant’s motivation, the potential for creating jury bias, and the ability of defense counsel to present a case without the defendant. Providing factors for the trial court to balance will also permit greater appellate oversight, limiting the likelihood of unreasonable extension of the removal rule.

This Article begins with a discussion of the constitutional right to be present at one’s criminal trial and the right to a fair trial. Part II describes the facts and Supreme Court’s analysis of Illinois v. Allen, which established the current removal rule. Part III analyzes and discusses the problems with Illinois v. Allen, and the evolution of the Allen rule from focusing on the court’s ability to conduct the trial into a preoccupation with maintaining an air of “dignity, order, and decorum . . . [in] court proceedings.”

Part IV proposes that, although a court should consider excluding the accused from trial a last resort, when it is forced to do so, it should consider the fairness of the proceedings, not the etiquette and decorum of the courtroom. If the defendant’s continued presence is necessary to the accomplishment of a fair trial, the court must permit her to remain in the courtroom. If her absence will clearly and substantially increase the fairness of the trial, the court will not be violating the defendant’s constitutional rights by ordering her exclusion until she agrees not to cause further disruptions. This section proposes five factors that a trial judge should consider in determining whether removal is appropriate. These factors will not only provide a framework for trial judges to make a determination based on the defendant’s fundamental rights, they will facilitate clearer appellate review of trial court decisions to remove defendants.

29 See Allen, 397 U.S. at 337.
30 Id.
31 Id. at 343.
32 Id. (explaining that these things are not only “hallmarks of all court proceedings” but also explaining that there is “[n]o one formula for maintaining the appropriate courtroom atmosphere . . . “).
DISCUSSION

I: Fundamental Rights: The Right to be Present at Proceedings and the Right to a Fair Trial

The United States Constitution provides that any person accused of a crime is guaranteed a fair trial in which fact finding takes priority over prejudice, unfounded assumptions, and even efficiency. That right derives from protections afforded to individuals in the Fifth, Sixth, and Fourteenth Amendments. The most effective means of guaranteeing this right is by allowing the defendant to be present at her trial so that she can either see the fairness of the process for herself, or observe the lack of fair process and petition for a remedy.

A. The Right to be Present at Trial

The Supreme Court has recognized that “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of [her] trial.” When the defendant’s presence at a proceeding that is “critical” to

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33 See, e.g., Danny J. Boggs, The Right to a Fair Trial, 1998 U. CHI. L. ENG. F. 1, 3–4 (comparing definitions of “fair trial” and concluding that most interpretations agree that it involves “a search for the truth,” and requires “an impartial decision maker, an atmosphere conducive to consideration, with relevant evidence considered and irrelevant evidence excluded . . .”).

34 See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .”).

35 See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”). See, e.g., Estes v. Texas, 381 U.S. 532, 538–59 (1965) (noting that the Sixth Amendment right to “a speedy and public trial” exists for the purpose of “guarantee[ing] that the accused would be fairly dealt with and not unjustly condemned”).

36 See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”). See, e.g., Estes, 381 U.S. at 560 (Warren, C.J., concurring) (arguing that the Fourteenth Amendment requires state prosecutions to “at the least, comport with ‘the fundamental conception’ of a fair trial,” which includes “many of the specific provisions of the Sixth Amendment” (quoting Cox v. Louisiana, 379 U.S. 536, 562 (1965))); Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

the outcome of the criminal process "would contribute to the fairness of the procedure," she has a right to attend the proceeding.\(^{38}\)

The right to be present stems from several fundamental rights. An accused literally cannot "be confronted with the witnesses against her during the proceedings if she is not in the courtroom at the time that those witnesses take the stand."\(^{39}\) In addition, her physical presence can "exert[] a moral force to inhibit [witnesses against the accused] from lying."\(^{40}\) Presence at trial and all other jury proceedings gives the defendant the opportunity to "present" herself to the jury.\(^{41}\)

The right to be present also facilitates the defendant’s ability to communicate with her attorney. The attorney may need to make on-the-spot decisions about case tactics during the proceedings, and the defendant must be present to communicate her preferences and ensure that the "lawyer presents a vigorous defense" and otherwise protects her rights.\(^{42}\)

The right to be present at judicial proceedings is not absolute. It extends only to "critical" proceedings in which the defendant’s presence "contribute[s] to the fairness of the procedure."\(^{43}\) An accused can also choose to waive her right to be present,\(^{44}\) even at critical stages of the proceedings, so long as she comprehends the potential consequences of giving up that right and demonstrates that she is voluntarily waiving her right to be present.\(^{45}\)

Similarly, the defendant loses, or waives, her right to be present if she chooses to leave or voluntarily fails to appear, when she was present at the beginning of trial.\(^{46}\) This rule rests on the assumption that a defendant who attends part of her trial and is informed by the court of her duty to attend the rest of the proceeding would not

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\(^{38}\) See Kentucky v. Stincer, 482 U.S. 730, 745 (1987); see, e.g. Diaz v. United States, 223 U.S. 442, 455 (1912) (finding that voir dire of jurors and jury empanelment is a critical stage); United States v. Rosales-Rodriguez, 289 F.3d 1106, 1110 (9th Cir. 2002) (finding that jury instructions are a critical stage).

\(^{39}\) See generally Criminal Constitutional Law: The Right of the Defendant to be Present (MB) § 14A.02 (2011) [hereinafter “§ 14A.02”] (citing Pointer v. Texas, 380 U.S. 400, 403 (1965)).

\(^{40}\) The Supreme Court, 1969 Term, 84 HARV. L. REV. 90, 98 (1970); see also Oken v. Warden, 233 F.3d 86, 91 (1st Cir. 2000) (quoting Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (internal citations omitted)) (noting that a witness may decide not to testify falsely when "looking at the man whom he will harm greatly" by lying).

\(^{41}\) The Supreme Court, 1969 Term, supra note 40, at 98.

\(^{42}\) Id.

\(^{43}\) Stincer, 482 U.S. at 745.

\(^{44}\) See § 14A.02 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding that waiver must be "an intentional relinquishment or abandonment of a known right or privilege").

\(^{45}\) See § 14A.02.

\(^{46}\) See id. (citing Taylor v. United States, 414 U.S. 17, 19–20 (1973)).
doubt her right to be present, and must therefore be absent by choice. Further, such a defendant should understand that the trial will continue without her if she leaves in violation of her duty to be present. It is assumed that the defendant is aware of both her right to be present and the consequences of giving up that right by absconding.

B. The Right to a Fair Trial

The right to a fair trial, “the most fundamental of all freedoms” in the American legal system, depends on many other rights. In particular, the right to be present at trial and the presumption of innocence help a defendant protect her right to a fair trial. The Sixth Amendment guarantees, among other things, a “speedy and public trial” with an impartial, local jury. The Sixth Amendment also mandates that a defendant receive assistance from both the government (that she be informed of the charges against her) and her attorney. These textual requirements create three major restrictions on the trial: the jury must be shielded from commentary and environmental factors that threaten its ability to be impartial, the judge must carefully avoid creating the impression that she holds any opinion regarding the defendant’s guilt, and the defendant must be able to obtain and communicate with defense counsel.

Sixth Amendment fairness requires that the jury remain impartial whenever possible, presuming the defendant innocent until the government proves, beyond a reasonable doubt, that this is not the case. External factors, including “extensive pretrial publicity,” threaten the ability of jurors to “be fair and impartial” toward the defendant. Jury sequestration or change of trial venue becomes necessary in certain cases to counteract the effects of publicity. In addition, the judge must carefully guard any opinions she holds of the defendant; if the judge’s actions or decisions signal to the jury that the judge be-

47 See, e.g., Taylor, 414 U.S. at 20.
48 Id.
49 Id.
50 Estes v. Texas, 381 U.S. 532, 540 (1965); see also Baker v. Hudspeth, 129 F.2d 779, 781 (10th Cir. 1942) (“There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial . . . .”).
51 U.S. CONST. amend. VI.
52 Id.
53 Id., 381 U.S. at 561 (Warren, C.J., concurring).
54 Id. (quoting Irwin v. Dowd, 366 U.S. 717, 728 (1961)).
55 Id.
lieves the defendant is guilty or dangerous, this threatens the fairness of the trial because jurors are likely to rely on their impression of the judge’s view of the situation, rather than remaining impartial.

The defendant’s appearance can also affect jurors’ perceptions of the defendant, preventing their ability to judge the case impartially. Consider a hypothetical defendant, Claire. When Claire arrives at her trial, she is wearing a bright orange prison-issued jumpsuit, shoes without laces, and handcuffs attached to a chain that wraps around her waist. Jurors might notice Claire’s chains and apparel and assume that the judge determined that the shackling was necessary and the prison apparel appropriate, because Claire poses a danger to everyone else in the courtroom. This, in turn, might lead the jurors to believe that the judge thinks Claire is guilty of the crime with which she is charged. Or, it might lead the jurors to believe that

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56 See Quercia v. United States, 289 U.S. 466, 471–72 (1933) (holding that although the trial judge may comment on the evidence, she must maintain an appearance of impartiality and cannot make comments to the jury implying her belief that the defendant is guilty); see also United States v. Wyatt, 442 F.2d 858, 859–60 (D.C. Cir. 1971) (“[T]he trial judge should maintain an aura of impartiality so as not to give the jury the impression that he believes the defendant is guilty.”).

57 See Marquez v. Collins, 11 F.3d 1241, 1243 (5th Cir. 1994) (discussing this danger with respect to shackling defendant in jury’s presence).

58 See Quercia, 289 U.S. at 470–71 (quoting Starr v. United States, 153 U.S. 614, 626 (1894)) (noting that the judge’s “lightest word or intimation is received with deference [by the jury], and may prove controlling”); Marquez, 11 F.3d at 1243 (“Shackling carries the message that the state and the judge think the defendant is dangerous, even in the courtroom.”).

59 In my personal experience, I witnessed this when prisoners from the Dutchess County Jail appeared for town and village court. See, e.g., Mauricio Guerrero, Stanford Enters Plea; Bail Is Set at $500,000, N.Y. TIMES, June 26, 2009, at B3 (containing image of R. Allen Stanford in orange jumpsuit, handcuffs, and ankle chains).

60 This may be the case even if the defendant chooses her apparel, because the jury might believe that, in the courtroom, the judge makes this kind of decision. A defendant may not be forced to wear “visible shackles” during trial unless there is an identifiable “special need” such as a heightened risk that the defendant will escape. See Deck v. Missouri, 544 U.S. 622, 626 (2005).

61 Marquez, 11 F.3d at 1243 (“Shackling carries the message that the state and the judge think the defendant is dangerous, even in the courtroom.”); see also Deck, 544 U.S. at 630 (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986) (noting that the rules prohibiting shackling defendants in the jurors’ presence exist to protect, inter alia, the principle that a defendant is innocent until proven guilty, and that restraining a defendant “suggests to the jury that the justice system itself sees a ‘need to separate a defendant from the community at large’”)); Kennedy v. Cardwell, 487 F.2d 101, 105–06 (6th Cir. 1973) (discussing the likelihood of juror bias where the defendant is shackled).

62 Cf. Holbrook, 475 U.S. at 567–68 (“When . . . the trial judge assiduously works to impress jurors with the need to presume the defendant’s innocence, we have trusted that a fair result can be obtained.”).
Claire is guilty of something, whether the crime charged or another bad act, and therefore deserves punishment. The inevitable bias against Claire is clear, and the jury is likely to judge her based on these assumptions about her appearance rather than the evidence presented at the trial. This demolishes the impartiality required by the Sixth Amendment and removes the presumption of innocence that must be afforded all criminal defendants—the key protections of the fairness fundamental to American criminal trials. For this reason, courts cannot require defendants to appear at a jury trial in prison apparel or physical restraints without special circumstances. Even so, many real defendants spend their courtroom time, including the trial itself, in shackles or prison-issued apparel, which can have the same bias-inducing effect on the jury as in Claire’s hypothetical case because of an oversight by the defense attorney or misapplication of the law.

The right to communicate with counsel also protects the right to a fair trial. This Sixth Amendment protection was expanded in *Gideon v. Wainwright* to require the appointment of counsel for all persons accused of crimes, including those unable to afford their own lawyer. Contributing to one’s own defense is critical, and a defendant cannot do that unless she has access to a lawyer with whom she can communicate.

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63 See, e.g., Illinois v. Allen, 397 U.S. 337, 344 (1970) (noting the danger that “the sight of shackles and gags might have a significant effect on the jury’s feelings about the defendant”); see also *Kennedy*, 487 F.2d at 105–06.


65 See id. at 503 (citing *In re Winship*, 397 U.S. 358, 364 (1970) (“[C]ourts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”)).

66 See *Estelle*, 425 U.S. at 512; see also *Deek*, 544 U.S. at 626 (describing the practices regarding physical restraints of a defendant during her trial).

67 See, e.g., *Estelle*, 425 U.S. at 512–13 (finding that a trial in which the defendant wore prison garb was constitutional and holding that, although a state cannot force a criminal defendant to appear at trial wearing prison-issued clothing, “the failure to make an objection as to being tried in such clothes” makes the wearing of the clothes voluntary, not compelled); see also United States v. *Stewart*, 20 F.3d 911 (8th Cir. 1994) (noting that, in representing himself, the defendant was required to wear leg shackles).

68 U.S. CONST. amend. VI. A defendant may waive this right, if she does so knowingly and willingly after the trial judge has warned her of the seriousness of the charges against her and the risks of representing herself. See also *Von Moltke* v. *Gillies*, 332 U.S. 708, 724 (1948).


70 Id. at 344–45.

71 See *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (citing *Powell v. Alabama*, 287 U.S. 45 (1932) (“[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a
fendant’s ability to receive a fair trial. However, that right loses much of its value when the defendant and her counsel are unable to communicate.

The Sixth Amendment effectively guarantees a criminal defendant the right to a fair trial. This right “must be maintained at all costs.” A defendant’s presence at trial is a critical tool for maintaining its fairness. A fair trial requires jury impartiality, judge impartiality, or at least the perception of impartiality, and the ability of the defendant to obtain and communicate with an attorney. The defendant can ensure that her trial satisfies all of these requirements only if she is actually present to observe and participate in the proceedings.


The trial itself is the most critical proceeding in the majority of criminal cases that reach that stage. The actual determination of guilt occurs at trial, and it is this proceeding in which the defendant’s presence is most likely to affect the fairness of the procedure. Usually, being present at trial increases the likelihood of having a fair trial, as it allows the defendant to work with her attorney to present a vigorous defense and observe the judge and prosecutor’s behavior, noting potential violations of her rights. However, when a defendant’s in-court appearance or behavior threatens to negatively affect the jury’s opinion of her and create a bias against her, these rights clash. Suddenly, the defendant’s presence detracts from one aspect

sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel.”).

72 See Estes v. Texas, 381 U.S. 532, 560 (1965) (Warren, C.J., concurring) (noting that “the fundamental conception of a fair trial includes . . . the right to counsel” (internal citations omitted)).

73 See Avery, 308 U.S. at 446. But cf. Illinois v. Allen, 397 U.S. 337, 344 (1970) (noting that although binding and gagging a defendant technically does not deprive the defendant of her right to confront witnesses because she remains in the courtroom with the witnesses, it “greatly reduce[s]” her ability to communicate with her attorney and should thus be used only as a last resort in controlling a defendant).

74 See Estes, 381 U.S. at 540.

75 See U.S. CONST. amend. VI (requiring an impartial jury); Avery, 308 U.S. at 446 (noting defendant’s ability to obtain and confer with counsel); Quercia v. United States, 289 U.S. 466, 470–71 (1933) (stating the importance of the appearance of an impartial judge).

76 Cf. Kentucky v. Stincer, 482 U.S. 730, 744–46 (1987) (establishing the right to presence and finding that the defendant did not have the right to attend a hearing to determine whether child witnesses were competent to present testimony because the substance of the actual testimony the children would give at trial was not at issue in that hearing).

77 The Supreme Court, 1969 Term, supra note 40, at 98.
of the fairness of the procedure: the right to an impartial jury.\textsuperscript{78} The Supreme Court faced this problem in the case of \textit{Illinois v. Allen},\textsuperscript{79} in which the defendant was repeatedly threatening and intentionally disruptive in front of the jury.\textsuperscript{80} \textit{Allen} held that a defendant can lose her right to be present at trial if she behaves “in a manner so disorderly, disruptive, and disrespectful of the court that [her] trial cannot be carried on with [her] in the courtroom.”\textsuperscript{81} Although this rule made sense as applied to William Allen, cases following the rule established in his case show a preoccupation with the Court’s dicta regarding maintaining “dignity, order, and decorum” in the courtroom, losing sight of the fundamentality of the rights at stake.\textsuperscript{82}

\textbf{A. The Rule: Illinois v. Allen}

William Allen was charged with armed robbery in Illinois.\textsuperscript{83} At trial, the judge allowed him to represent himself with the assistance of standby counsel to “protect the record . . . insofar as possible.”\textsuperscript{84} During voir dire, Allen argued “in a most abusive and disrespectful manner” after being told to make his questions more brief.\textsuperscript{85} In response, the judge told standby counsel to take over the defense.\textsuperscript{86} Allen continued, saying “[w]hen I go out for lunchtime, you’re (the judge) going to be a corpse here.”\textsuperscript{87} He tore the appointed counsel’s file and threw it to the floor.\textsuperscript{88} The judge threatened to expel Allen from the courtroom if Allen had another outburst.\textsuperscript{89} Allen responded, “[t]here’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.”\textsuperscript{90} Later, after “more abusive remarks,” the judge ordered Allen

\textsuperscript{78} U.S. CONST. amend. VI.
\textsuperscript{80} \textit{Id.} at 339–40.
\textsuperscript{81} \textit{Id.} at 343.
\textsuperscript{82} \textit{See infra} Part II.2 and Part III.
\textsuperscript{83} \textit{Allen}, 397 U.S. at 338.
\textsuperscript{84} \textit{Id.} at 339.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 339–40.
\textsuperscript{87} \textit{Id.} at 340.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
removed from the courtroom. Standby counsel completed voir dire and jury selection without Allen.

Allen was told he could return if he “behaved (himself) and (did) not interfere with the introduction of the case,” and Allen returned. During preliminary matters, Allen again interrupted, saying “[t]here 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.” He was again removed. When the prosecution rested its case-in-chief, Allen returned, promising to behave, and he allowed his appointed counsel to conduct the remainder of the trial.

Allen was convicted of the charges and the Illinois Supreme Court affirmed his conviction. He sought a writ of habeas corpus in federal court, arguing that his exclusion denied him of his Sixth Amendment rights. The district court dismissed the petition as frivolous, but the United States Court of Appeals for the Seventh Circuit held that Allen had an absolute right to be present at every stage of the proceedings against him, and the district court should have granted the writ.

The Supreme Court granted certiorari to clarify the extent of the right to be present at trial and held that Allen was properly excluded. The Court recognized that the Sixth Amendment right of an accused to “be confronted with the witnesses against” her grants individuals accused in both federal and state courts “the right to be present in the courtroom at every stage of [her] trial,” and that that right is “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause.” In response to the Seventh Circuit’s determination that the right of an accused to be present at proceedings against

91 Id.
92 Id.
93 Id.
94 Id. at 341.
95 Id.
96 Id.
97 Id. at 338–39. Allen argued that he had been deprived of his right to be present at trial and deprived of his liberty without due process of law; he also argued that he was insane at the time of the robbery and the trial. People v. Allen, 226 N.E.2d 1, 3 (Ill. 1967).
99 Allen, 397 U.S. at 339.
100 Id. at 337.
101 U.S. CONST. amend. VI.
102 The Sixth Amendment was incorporated by the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400 (1965).
103 Illinois v. Allen, 397 U.S. 337, 338 (citing Lewis v. United States, 146 U.S. 370 (1892)).
her was absolute, the Court weighed the trial judge’s ability to conduct trials against that right. The Court found that an absolute right to be present would excessively “handicap” the trial judge’s ability to conduct the trial and suggested that a balancing test was more appropriate. The Court determined that

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

The Court added that “[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country.” On that note, it argued that, although having to “banish[]” Allen from his own trial was “not pleasant[,] . . . our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity.”

The Court found that judges may cope with disruptive defendants in two other ways: pausing the trial and holding the defendant in contempt until he cooperates, or binding, gagging, and shackling the defendant while he is in the courtroom. Notably, the Court was concerned with defendants who used “outbursts” to delay or curtail the trial “as a matter of calculated strategy;” it feared that pausing the trial would aid those defendants, rather than deter them. Allen exemplified such a defendant. He repeatedly told the judge that “there’s not going to be no trial” and tore his attorney’s files. The Court noted that even if a defendant loses his right to be present at trial, she could regain that right “as soon as [she] is willing to conduct [herself] consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.”

104 Allen, 397 U.S. at 342.
105 Id.
106 Id. at 343 (internal citations omitted).
107 Id.
108 Id. at 346. For a criticism of this reasoning, see infra Part V.
109 Allen, 397 U.S. at 344–45.
110 Id. at 345 (discussing the potentially fruitless use of contempt as an alternative to exclusion, because defendants might “elect to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time”).
111 Id. at 340.
112 Id. at 343.
B. The Decorum and Respect Inherent in the Concept of Courts

The Court did not define decorum in *Allen*. It seemed, however, to focus on maintaining an atmosphere of dignity and propriety. The Court noted that:

It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. . . . If our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case.

The Court thus shifted its focus from maintaining a basic ability to conduct the trial to preventing “infection” of the proceedings by “scurrilous” language, as if improper language and incongruous behavior threatened to plague the nation’s courtrooms with “humiliating” degradation.

Justice Douglas, dissenting, argued that “sabotage and violence” justifies removal, but no member of the Court would allow the expulsion of a defendant who vocally but not violently “insist[s] on his constitutional rights . . . no matter how obnoxious his philosophy might have been to the bench that tried him.”

Justice Douglas’s comments suggest that he foresaw the expansion of the rule to exclude those who “insist on [their] constitutional rights” in addition to those who threaten the safety of the proceeding.

C. After Allen: The Shift to Courtroom Etiquette

Courts applying *Allen* have used it to guarantee that their courtrooms remain decorous and civil, rather than to guarantee that a defendant’s right to remain at trial be protected unless removal is absolutely necessary. They have been able to do so because *Allen* did not provide them with a workable standard for when removal is appropriate. Three cases highlight courts’ preference for valuing the effect of the defendant’s behavior on courtroom decorum over the relation of the behavior to the defendant’s fundamental rights.

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113 *Id.*
114 *Id.* at 346–47.
115 *Id.*
116 *Id.* at 355–56 (Douglas, J., dissenting).
117 *Id.*
In *Foster v. Wainwright*, discussed in the introduction, Foster attempted to represent himself and objected out of turn, trying to protect his rights. For this the trial judge expelled him from the courtroom. He even respectfully asked for permission to speak on occasion, showing that in spite of his recognized imperfect understanding of courtroom procedure, he was trying to conform his behavior to appropriate standards. The Eleventh Circuit recognized that “Foster’s behavior was not nearly so extreme as was the defendant’s in *Illinois v. Allen*.” Unlike Allen, Foster did not threaten anyone in the courtroom or physically act out; he merely slowed the procedures and did not conform to accepted attorney behavior. His behavior even “fell short of that of most criminal defendants whose expulsions have been upheld under *Illinois v. Allen*.” Yet the Florida District Court of Appeal, the Florida Supreme Court, the United States District Court for the Middle District of Florida, and the Eleventh Circuit found that the trial judge did not violate Foster’s right to be present at trial.

In *Saccomanno v. Scully*, Joseph Saccomanno, accused of possession of stolen property, was excluded from most of his New York City trial under *Allen* based on his disruptive behavior and perceived disrespect for the courtroom. Saccomanno argued with the judge and his lawyer, telling them to call attention to the fact that he had recently been shot. The judge also felt that he was dressed inappropriately. And Saccomanno walked around the courtroom rather than sit-
ting at his table, eventually telling the judge “he would act as his own
counsel and that he was entitled to ‘make [his] own outburst.”

The District Court for the Southern District of New York granted
Saccomanno’s habeas petition, finding that his behavior was “not so
disorderly or disruptive as to make it exceedingly difficult or impos-
sible to carry on the trial in his presence.” The Court of Appeals for
the Second Circuit disagreed. In reversing, the Second Circuit em-
phasized that great deference was due to both the trial court and the
state appellate review of the issue, and that the defendant’s behavior
did satisfy the Allen standard. Saccomanno, like Foster, was unpleas-
ant and upset the proper courtroom environment by wearing inap-
propriate clothing and disagreeing with the judge. However, he did
not materially obstruct the progress of the trial or make any threats.

Finally, David Williams, facing federal drug and firearms charges,
waived his right to an attorney and chose to represent himself during
many of his pretrial hearings and at trial. In his attempt to
represent himself, he objected frequently for illogical reasons, such as
to claim that the court had forced him to “sign a contract under
fraud and misrepresentation.” In response to Williams’ objections,
the trial judge removed Williams from the courtroom three times
during voir dire and after the end of the first day of trial. He did
not return to trial until the close of the evidence, outside the pre-

cence of the jury, and was quickly removed again because he “inter-
rupted the judge and objected to every question.” He watched as a
standby attorney created a theory of defense and proceeded with the

case without him, and watched the jury convict him, on closed-circuit

The Eighth Circuit affirmed Williams’ conviction. It reviewed the
lower court decision for “abuse of discretion” and applied harmless
error analysis. The court determined that under Allen, Williams’
constant objections provided sufficient grounds for the removal.
Yet Williams’ conduct, though nonsensical and undoubtedly out of

130 Id.
131 Id. at 65.
132 Id.
133 Id. at 65–66.
134 United States v. Williams, 431 F.3d 1115, 1117, 1119 (8th Cir. 2005).
135 Id. at 1119.
136 Id.
137 Id.
138 Id.
139 Id. at 1119–20.
140 Id.
place in the criminal trial, did not make continuation of the trial impossible. It probably made the trial’s progression somewhat more difficult, but it was neither dangerous nor intentionally obstructionist.141

These cases demonstrate that the Allen standard has evolved to include defendant behavior that is “not nearly so extreme”142 as Allen’s destructive and threatening performance.143 In particular, they reveal a preoccupation with maintaining proper courtroom etiquette: wearing the proper apparel, remaining seated during the trial, and working entirely within the confines of the rules lawyers learn through years of education and practice, even if the individual lacks that education and practice.


The Allen decision created a barrage of Constitutional problems regarding an accused’s Sixth and Fourteenth Amendment rights. First, the ambiguity of the rule enumerated in the decision allows lower courts to focus on preserving the “dignity, order and decorum” of the courtroom, and ignore whether the trial “cannot be carried on with [the defendant] in the courtroom.”144 Second, the ambiguity of the rule increases the likelihood that jurors will interpret judge-imposed removal of a defendant as the judge’s belief that the defendant is guilty of a crime, dangerous, or undeserving of a place in the courtroom. Third and finally, by giving the trial judge maximum discretion and minimum guidance on when to remove the defendant, appellate courts effectively give free reign to the trial judge to determine when to remove defendants.

A. The Shift from Ability to Conduct the Trial to Dignity and Decorum

Although the Supreme Court noted that a defendant should not be removed from her trial unless her behavior prevents the trial from continuing in her presence, it based this rule on the importance of removing sources of “disorder[], disrupt[ion], and disrespect[]” from the courtroom.145 This focus on the courtroom atmosphere, rather than the defendant’s rights, created ambiguity over how lower courts

141 The Eighth Circuit did not suggest that Williams was trying to obstruct the trial with his outbursts. See id.
142 Foster v. Wainwright, 686 F.2d 1382, 1387–88 (11th Cir. 1982).
143 See supra Part II.
145 Id.
should determine whether removing the defendant is constitutionally permissible.\textsuperscript{146} Lower courts have consequently emphasized the analysis of courtroom decorum while minimizing discussion of the trial judges’ ability to continue the trial, thereby obscuring defendants’ rights to maintain a professional atmosphere in the judges’ place of work.

The defendants discussed in Part II.C behaved in a manner fundamentally different from the way that Allen behaved. Williams, Saccomanno, and Foster did not attempt to delay or entirely prevent the completion of the trial; each of them simply tried to exercise his constitutional rights and work within the trial structure, but as pro se defendants without a legal background, they struggled with this. Although the three defendants argued with the trial judges, they did not threaten anyone in the courtroom, as Allen did.\textsuperscript{147}

Under \textit{Allen}, as trial judges have interpreted that case, a judge can justify ejecting a pro se defendant, who has not communicated with any stand-in attorney, as soon as she makes a few evidentiary errors, on the basis of preservation of the decorum of the courtroom. If a defendant’s flawed attempt to represent himself, without bad motives and without posing a danger to anyone, justifies expulsion, then the rights to have and waive assistance of counsel and to be present at trial have little meaning.\textsuperscript{148}

\textsuperscript{146} Tigar, \textit{supra} note 118, at 11 (“[T]he Court converts waiver into a punitive sanction, but without setting down any new standards or procedures for its application.”).

\textsuperscript{147} See United States v. Williams, 431 F.3d 1115, 1119 (8th Cir. 2005) (describing Williams’ disruptions as he attempted to represent himself); Saccomanno v. Scully, 758 F.2d 62, 64–65 (2d Cir. 1985) (summarizing the defendant’s offensive courtroom conduct); Foster v. Wainwright, 686 F.2d 1382, 1387–88 (11th Cir. 1982) (explaining Foster’s behavior and expulsions from the courtroom during his trial); \textit{cf. Allen}, 397 U.S. at 338–40 (describing Allen’s courtroom behavior, which included threats directed towards the judge).

\textsuperscript{148} This is not to say, however, that all courts applying \textit{Allen} place decorum over ability to continue the trial. For example, in United States v. Ward, the court recognized: \textit{[T]he narrower holding in Allen—a defendant may be removed if he “insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” . . . As this holding makes clear, “[b]ehavior that is merely disruptive is insufficient under Allen to justify removal.” United States v. Ward, 598 F.3d 1054, 1058 (8th Cir. 2010) (citing Tatum v. United States, 703 A.2d 1218, 1223 (D.C. App. 1997)). The Eighth Circuit recognized that “both defense counsel and the judge wanted to be free of Ward’s interruptions,” and his “absence no doubt ensured a smoother trial, probably to Ward’s ultimate advantage.” Ward, 598 F.3d at 1059. The fluidity of the trial, however, was secondary to the “more powerful, constitutionally mandated concern,” Ward’s right to be present. \textit{Id.} The court concluded that a “defendant’s constitutional right to be present at his trial includes the right to be an irritating fool in front of a jury of his peers.” \textit{Id.} As discussed in this Article, the majority of courts do not appear to share that mentality.
B. Effect of Unnecessary Removals on the Jury

The Allen rule increases rather than decreases the risk that the jury will become biased. Jurors are likely to view the forced removal of the defendant as reflecting the judge’s personal conviction about the defendant, and thus removal should only occur when absolutely necessary. With a defendant’s initial “outburst,” there is inevitably a danger that jurors will view the defendant as obnoxious, dangerous, or simply a bad person. This first jury reaction can occur regardless of the rule regarding removal of the defendant. However, when a judge decides to remove the defendant from the courtroom, that action can solidify any negative inferences the jurors make in response to the initial outburst.\(^\text{149}\) The decision to remove the defendant may suggest to the jurors that the judge sees the defendant as a wrongdoer, and that perception might have a strong effect on the jurors’ opinions of the defendant.\(^\text{150}\) However, the jury is not always present during the defendant’s period of disruptive behavior, and in those cases even this danger is not present.\(^\text{151}\)

If the judge removes a defendant like Charles Foster, whose behavior did not conform to accepted practice, but who tried to work within the confines of the judicial process, the jurors might infer that the defendant’s behavior was more than simply distracting.\(^\text{152}\) They might believe that the judge knows something about the defendant that requires his removal.\(^\text{153}\) Perhaps they will believe that the defendant has a history of violent outbursts when provoked. The juror is likely to place undue weight on the judge’s action\(^\text{154}\) and could allow it to influence the outcome of the trial, determining the defendant’s

\(^{149}\) Cf. Peter David Blanck, The Appearance of Justice: The Appearance of Justice Revisited, 86 J. CRIM. L. & CRIMINOLOGY 887, 891–92 (1996) (noting that “juries accord great weight and deference to even the most subtle behaviors of the judge” and that a judge’s belief about the guilt of the defendant often becomes a “self-fulfilling prophecy”).

\(^{150}\) Cf. Marquez v. Collins, 11 F.3d 1241, 1243 (5th Cir. 1994) (noting that the “appearance of a defendant in shackles and handcuffs before a jury in a capital case requires careful scrutiny” because it “carries the message that the . . . judge think[s] the defendant is dangerous . . . ”).

\(^{151}\) For example, Williams’ outbursts occurred during hearings that occurred outside the presence of the jury. United States v. Williams, 431 F.3d 1115, 1120 (8th Cir. 2005).

\(^{152}\) Though jurors may be instructed not to consider a defendant’s removal or absence, they may nonetheless wonder about it during their decisionmaking. See Ward, 598 F.3d at 1060 (featuring jurors deliberating a case in which defendant had been removed sent a note to the judge during deliberation asking why the defendant was not present at trial).

\(^{153}\) Cf. Blanck, supra note 149, at 891–92 (explaining that jurors’ assessments during a trial are shaped by the judge’s behavior); Marquez, 11 F.3d at 1243 (discussing the impression created by shackling a defendant during trial).

\(^{154}\) See Blanck, supra note 149, at 891–92.
guilt or innocence based on factors other than the evidence presented.155

C. Absence of Effective Appellate Review

Finally, the deferential standard of review applied to Allen removals provides trial judges with the opportunity to remove defendants for more minor infractions than the rule imagines. Appellate courts review trial judges’ decisions to remove defendants from trial for abuse of discretion and apply harmless error analysis.156 A court abuses its discretion when it makes a decision that is “erroneous” and “clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable and actual deductions to be drawn therefrom.”157 An error is harmless if it probably did not affect the outcome of the proceeding.158 This means that, in order to obtain a new trial, on direct appeal the defendant must prove that (1) the trial judge’s decision to exclude the defendant was not merely incorrect but so clearly incorrect that it was unreasonable,159 and (2) that error affected the outcome of the trial.160 Under this highly deferential standard, appellate courts may disagree with trial courts’ decisions and even find them “troublesome” without upsetting that decision.161 In addition, the record of the trial court proceedings is often unclear, rendering the reviewing court’s job guesswork.162

In federal habeas petitions, the reviewing court accords a “presumption of correctness” to state court factual findings and applications of law163 and under statutory law the petition cannot be granted unless the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

155 See Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (“Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that ‘one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . circumstances not adduced as proof at trial.’” (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978))).
156 See Williams, 431 F.3d at 1119.
158 See, e.g., United States v. Shepherd, 284 F.3d 965, 968–69 (8th Cir. 2002).
159 See United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006) (noting that appellate review of a trial court’s decision for reasonableness is “akin to our traditional review for abuse of discretion”).
160 See Shepherd, 284 F.3d at 968–69.
161 Id. at 967 (upholding defendant’s removal from the courtroom even though they found that the trial judge’s decision to remove without warning was “troublesome, under the facts of this case,” because of the “deference due the trial judge”).
162 See, e.g., United States v. Mack, 362 F.3d 597, 599 nn.4–5 (9th Cir. 2004).
by the Supreme Court of the United States.\textsuperscript{164} The presumption of correctness alone can require affirmation of removal, as it did in Saccomanno’s habeas case.\textsuperscript{165} Even more than under abuse of discretion review, this standard leaves trial courts with minimal oversight in its decision.

\textbf{IV: Recalibrating the Balance: Focus on Fairness, Not Etiquette}

To prevent trial judges from placing the decorous atmosphere of their courtroom above the constitutional right of an accused to be present at her trial, the accused must have the right to remain present at her trial unless her absence would clearly and substantially increase the fairness of the trial. Such a test is consistent with \textit{Kentucky v. Stincer}, which states that an accused has the right to be present at any critical proceeding where her presence will contribute to the fairness of that proceeding.\textsuperscript{166} The test is effective in other proceedings such as competency hearings,\textsuperscript{167} and applying it to exclusion from the trial itself will protect the constitutional rights that are disregarded under \textit{Allen}.

First, as the Court recognized in \textit{Allen} with respect to binding and gagging the defendant,\textsuperscript{168} the trial judge must look to removal of the defendant as a “last resort.”\textsuperscript{169} Before considering removal, the judge must employ alternatives such as holding a disruptive defendant in contempt of court for a short period of time, pausing the trial.\textsuperscript{170} Additionally, if the judge determines that the defendant’s objective is not to delay the trial, and the judge has not had success with holding the defendant in contempt, the judge should order a new trial before continuing the trial without the defendant. If the judge finds that these alternatives are not successful, she should determine whether to remove based on whether it will clearly and substantially increase the likelihood of achieving a fair trial, applying the factors listed below and noting in the record how each factor applies. The use of clear factors will provide guidance for both the trial judge in making the

\textsuperscript{165} \textit{Saccomanno}, 758 F.2d at 65–66.
\textsuperscript{166} 482 U.S. 730, 745 (1987); \textit{see also supra} Part I.B.
\textsuperscript{167} \textit{Stincer}, 482 U.S. at 745.
\textsuperscript{169} \textit{Id}.
\textsuperscript{170} The \textit{Allen} Court recognized this option as a feasible first attempt at controlling a disruptive defendant. \textit{See id. at} 345.
decision and the reviewing court in analyzing that determination on appeal.

A. Determining Whether Removal Will Clearly and Substantially Increase the Fairness of the Proceedings

Trial judges should consider five factors in determining whether removing the defendant will clearly and substantially increase the likelihood that she will receive a fair trial. These factors consider the defendant’s right to be present at trial in the context of her right to an impartial jury and the assistance of counsel. If a judge decides to remove a defendant, she must first state, on the record, her application of the factors to the defendant’s behavior. This can be as brief as a sentence about each and should be done in the presence of the attorneys but not necessarily in earshot of the jury. It can be treated like a ruling on an objection that the court makes at a sidebar.

First, to the extent possible, the court should consider the defendant’s motivation in creating the disruption. This is closely related to the consideration of contempt. If it is clear that the defendant’s purpose is to delay the trial, holding the defendant in contempt or requiring a new trial will only encourage the defendant to continue disrupting. In that case, this type of motivation may support removal. However, the court must “indulge every reasonable presumption against the loss of constitutional rights”\(^{171}\) and should thus presume that a defendant does not bear such an ill motive unless it is sufficiently clear.\(^ {172}\) If no such motive is apparent, or it is clear that the defendant is simply trying to exercise her right to represent herself, assist in her defense, or understand the nature of the proceedings, the court should be patient with the defendant and attempt to use other means of addressing the issue, such as providing a standby attorney to assist with evidentiary rules. If the defendant’s objective is to cooperate and work within the constructs of the proceeding, holding her in contempt or pausing the trial will motivate her to correct her behavior because of her desire to complete the trial.

Second, the trial judge should consider the extent to which the defendant is creating a jury bias against herself through her disruption. The judge should consider whether the defendant is using offensive language, acting violently, or making or insinuating threats.

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\(^{171}\) Id. at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal citations omitted)).

\(^{172}\) For example, Allen’s contention that “there’s not going to be no trial” would satisfy this burden. Allen, 397 U.S. at 340.
Threatening, violent, and offensive behavior might make the jury feel
the defendant is guilty regardless of the evidence presented by the
attorneys, undermining the proper function of the trial.\textsuperscript{173} Additionally,
if the accused is frequently arguing with the judge, the judge
should consider whether those clashes are likely to bias the jury
against the defendant, or, on the other hand, if they are comparable
in nature and quantity to the expected tension between an attorney
and a judge. If the defendant only misbehaves outside of the presence
of the jury, there is no danger that her actions will bias the jury.

Third, and closely related to the second factor, the court should
consider the effect on the jury of removing the defendant, particularly
if done by force. In the case of a non-threatening defendant, the
jury might interpret a removal as reflecting a judge’s belief that the
defendant is guilty of the crime charged or another crime, or simply
dangerous and deserving of punishment.\textsuperscript{174} If the jurors are present
during the actual removal, they might view a defendant’s struggle or
protest as further evidence of her guilt or dangerousness. On the
other hand, they might take pity on the defendant and decide that
she has been punished enough, regardless of whether she is guilty of
the crime charged. If the defendant disappears while the jurors are
absent, they may be confused. They may wonder: Did the defendant
choose to leave the trial in the jury’s absence? Did something happen
that required her to leave? Did the judge want to hide something from the jury?
In any case, the jurors rely on improper information to determine their judgment. The trial judge should limit the
risk of this by minimizing the instances in which she removes the def-
endant. In some cases, however, removal may make the jurors feel
more safe, in which case this factor will weigh in favor of removal.

Fourth, where the defendant’s in-court behavior is itself unlaw-
ful,\textsuperscript{175} the judge should consider whether new charges against the de-
fendant will effectively deter disruptions. If so, a momentary pause in

\textsuperscript{173} The judge need not wait until the defendant has acted out in the presence of the jury
before determining that her behavior will negatively bias the jury, but the behavior must
be \textit{clearly and substantially} likely to bias the jury. It is not the judge’s duty to prevent all
potential bias and preemptively remove the defendant. \textit{Cf.} United States v. Ward, 598
F.3d 1054, 1059 (8th Cir. 2010) (“A defendant’s constitutional right to be present at his
trial includes the right to be an irritating fool in front of a jury of his peers.”).

\textsuperscript{174} \textit{See supra} Part III.2.

\textsuperscript{175} For example, a defendant who threatened the judge, as Allen did, would fall into this ca-
 tegory. \textit{Allen}, 397 U.S. at 340 (“When I go out for lunchtime, you’re [the judge] going to
be a corpse here.”) (internal quotations omitted); \textit{see} 18 U.S.C. \S\ 115(a)(1)(B) (2006)
(prohibiting threatening a judge).
the trial for arrest or citation for that illegal action may be sufficient, eliminating the need to remove the defendant.

Fifth and finally, the trial judge should consider whether removing the defendant will substantially hinder counsel’s ability to represent her. This inquiry will be particularly relevant for pro se defendants who have not communicated extensively—if they have communicated at all—with standby counsel if standby counsel has been appointed. If no standby counsel was appointed, the problem is even greater. Removing a defendant from trial under circumstances that make it impossible for the attorney (or standby counsel) to provide effective representation deprives the defendant of both her presence and her assistance of counsel, two fundamental rights. This creates an even more serious deprivation than where the defendant’s attorney is able to effectively defend her client without the client present. In addition to a lack of communication between attorney and client, the need for the client’s presence might occur where the attorney needs on-the-spot feedback from the defendant about a witness’s testimony or defense strategy.

These factors provide a clear structure for the trial judge to assess the effect of removing the defendant on the fairness of the trial, preventing the judge from considering only the atmosphere of her courtroom. The factors should receive equal weight in consideration. Where some factors weigh in favor and some weigh against removal, removal is probably inappropriate unless the “in favor” factors weigh strongly in favor of removal and the “against” factors weigh only slightly against removal. Thus, the court should balance the factors, favoring keeping the defendant in the courtroom.

B. Allen, Williams, and Foster Under the Five-Factor Approach

Under the proposed test for removal of a disruptive defendant, only those defendants that cannot be deterred by other means and are significantly detracting from the fairness of the trial can be removed without violating their right to be present during trial. The comparison of the results of Allen, Williams, and Foster under the proposed test are illustrative.

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176 See United States v. Mack, 362 F.3d 597, 601 (9th Cir. 2004).
177 Cf. Avery v. Alabama, 308 U.S. 444, 446 (1940) (discussing the general importance of communication between attorney and defendant).
179 United States v. Williams, 431 F.3d 1115, 1119 (8th Cir. 2005).
180 Foster v. Wainwright, 686 F.2d 1382, 1387 (11th Cir. 1982).
1. Illinois v. Allen

As the Supreme Court noted, the trial court in Allen’s case could have considered initiating contempt proceedings against Allen before forcibly removing him from the courtroom.\(^{181}\) However, Allen was clearly “determined to prevent any trial;”\(^{182}\) Allen was at least in part interested in subverting his entire trial: he yelled “there’s not going to be no trial” to the judge shortly before being removed.\(^{183}\) This suggests that contempt would not have deterred Allen, and the trial judge could consider removal.

Allen’s behavior weighs strongly in favor of removal under the first, second, and third factors of the test. Allen clearly intended to stop the trial.\(^{184}\) He made threats and was physically aggressive in front of the jury,\(^{185}\) suggesting to the jurors that he was a violent person. This created a great risk of jury bias. Allen’s behavior was probably so prejudicial that his absence would not substantially bias the jury under the third factor. Thus, because Allen’s behavior was highly prejudicial and intended to prevent the trial from continuing,\(^{186}\) not to assist in his own defense, removal from the courtroom would remain appropriate under the proposed standard.\(^{187}\) Although threatening a judge is illegal,\(^{188}\) Allen appears to have been so determined to prevent the trial that another charge would not deter him. Thus, the fourth factor would favor removal. Finally, Allen’s hostility toward counsel (who had been ordered to take over the case) while he was in the courtroom suggests that under the fifth factor the attorney might actually be able to improve representation after Allen left because, at least, no one would tear apart the case files.\(^{189}\)

2. United States v. Williams

The trial judge in Williams’ case does not appear to have considered contempt proceedings before removing Williams, the first re-

\(^{181}\) Allen, 397 U.S. at 344–45.
\(^{182}\) Id. at 345.
\(^{183}\) Id. at 340.
\(^{184}\) Id.
\(^{185}\) Allen told the judge, “you’re going to be a corpse here” and proceeded to tear his attorney’s file and throw the torn papers to the floor. Id. at 339–40.
\(^{186}\) See id. at 340.
\(^{189}\) Allen, 397 U.S. at 340.
quirement of the test.\footnote{190} Under the first prong, Williams’ motive in making the meritless objections appears to have been to represent himself, not to delay the trial: Williams continued to attempt to work within the confines of court procedures by actively “objecting” rather than simply interrupting.\footnote{191} Thus, contempt or a new trial might have persuaded Williams to control his behavior. Under the second prong, Williams did not threaten anyone or act in a physically aggressive way.\footnote{192} The jury probably considered Williams somewhat obstructive and very confused, but not dangerous or necessarily guilty of something. Under the third prong of the proposed analysis, removing Williams could have prejudiced the jury in two ways: either as proof of the judge’s belief that Williams was guilty or as a signal that the judge was unduly harsh. Both of these responses are discussed in the analysis of Foster’s case, below.

Williams represented himself in his trial, though the court appointed standby counsel.\footnote{193} Thus, under the fifth prong the trial court would need to consider whether removing Williams from the courtroom would inhibi the court procedures by actively “objecting” rather than simply interrupting.\footnote{191} Thus, contempt or a new trial might have persuaded Williams to control his behavior. Under the second prong, Williams did not threaten anyone or act in a physically aggressive way.\footnote{192} The jury probably considered Williams somewhat obstructive and very confused, but not dangerous or necessarily guilty of something. Under the third prong of the proposed analysis, removing Williams could have prejudiced the jury in two ways: either as proof of the judge’s belief that Williams was guilty or as a signal that the judge was unduly harsh. Both of these responses are discussed in the analysis of Foster’s case, below.

Thus, under the fifth prong the trial court would need to consider whether removing Williams from the courtroom would inhibit standby counsel’s ability to adequately represent him. Williams continued to object when the judge asked standby attorney to take over.\footnote{194} This suggests that Williams was not willing to communicate with the attorney, and, thus, the attorney might not be aware of the defense that Williams planned to present. On the other hand, Williams does not seem to have had a coherent sense of the proceedings or a theory of the defense himself—he was preoccupied with claiming that his name was copyrighted and that he was an ambassador, even though he was facing drug and gun charges.\footnote{195} If that was the case, Williams absence would not have contributed to his attorney’s ability to present a defense. Thus, the final factor could fall on either side and probably should not be determinative, but the first three factors suggest that removal was inappropriate: Williams did not intend to subvert the trial process, nor did he act in a manner that would engender jury bias against him.

\footnote{190} United States v. Williams, 431 F.3d 1115, 1119 (8th Cir. 2005) (noting that the trial judge repeatedly warned Williams that he would remove him, then actually removed him, without prior or intermediate attempts to subdue Williams).

\footnote{191} Id.

\footnote{192} Compare Allen, 397 U.S. at 340 (noting that Allen told the judge “you’re going to be a corpse” and tore and threw his attorney’s files), with Williams, 431 F.3d at 1119 (noting that Williams made repeated, meritless objections, claiming that his name was trademarked and that he was an ambassador with an “epistle number”).

\footnote{193} Williams, 431 F.3d at 1119.

\footnote{194} Id.

\footnote{195} Id. at 1115.
3. Foster v. Wainwright

Foster’s removal would likewise not have been justified under the five-factor test. The Eleventh Circuit relied on the fact that Foster acknowledged and was undeterred by the threat of criminal contempt. However, Foster’s behavior suggested that although he was confused, he simply wished to protect his rights and actively participate in the trial, not to harass or intimidate anyone or delay the proceedings. Thus, the first prong would militate against removal. Under the second prong, Foster’s behavior probably did not create a major jury bias for the same reasons that Williams’ behavior would not have created a jury bias. Foster’s removal, on the other hand, could have prejudiced the jury in two ways: (1) the jurors might have concluded that removal was an indication that Foster was rightly in trouble for doing something wrong; or (2) they might have concluded that the judge was the wrongdoer, taking offense at the defendant’s attempts to protect himself and evoking excessive sympathy for the defendant. The third factor favors allowing him to remain in trial. Foster’s behavior was not illegal, making the fourth prong irrelevant. The extent to which Foster worked with his attorney is unclear, but there is no indication that he intentionally tried to sabotage his attorney’s work as Allen did. Thus, the removal would have been inappropriate under the proposed test because both the first and third factors suggested that Foster should remain in the courtroom and no factors strongly favored removal.

Under the five-factor test, only defendants that behave in a way that is so negative they prevent the jury from remaining impartial, or who are clearly attempting to subvert the trial process, will lose their right to be present at trial. In each case, the trial judge has more concrete factors with which to determine whether she will be violating the defendant’s right to be present, rather than being left with the ambiguous words of Allen that leave room for judges to exclude

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196 Foster v. Wainwright, 686 F.2d 1382, 1385 (11th Cir. 1982).
197 For example, before swearing in as a witness, Foster said, “I don’t understand. What’s it all about first?” Id. at 1384. This suggests that Foster was simply trying to understand what was happening to him and he was not trying to undermine the process.
198 See id. at 1385–86 (noting that Foster wished to represent himself and occasionally objected to his attorney, but not pointing to any instance in which Foster threatened or acted out toward his attorney).
199 The remaining three factors reinforce this conclusion: Foster’s pleas for justice likely would not bias the jury in the way that a violent defendant’s behavior might, see Illinois v. Allen, 397 U.S. 337 (1970); the activities were not illegal so the fourth prong is irrelevant; and Foster was not assisting his attorney, challenging him but allowing him to continue to represent him, see Foster, 686 F.2d at 1385.
defendants based on their annoying conduct, so long as it arguably upsets the “dignity” of the courtroom.\(^{200}\)

In addition to providing guidelines for trial courts, the five-factor test permits better appellate review because it provides a framework through which to review the decision. This review function will work best if trial judges are required to place their considerations of the five factors on the record, as federal judges are already required to do in sentencings with respect to various sentencing factors.\(^{201}\) This will allow the appellate court to better understand the trial judge’s thought process and to compare the record, which, though cold, will likely give some indication of the events at trial as they pertain to each factor. Even the abuse of discretion standard of review will have more teeth with the five-factor test. Instead of considering only whether the trial judge reasonably concluded that the defendant was preventing the trial from continuing, or offending the dignity of the courtroom, a reviewing court will be able to review concrete, specific factors.

C. Potential Criticism of the Five-Factor Test

Although a shift toward fairness might at first seem impractical or nebulous, the *Allen* test is itself ambiguous and provides almost no guidelines for trial judges in determining whether removal is appropriate.\(^{202}\) The *Allen* rule provided only the instruction that when the defendant “insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.”\(^{203}\) As previously discussed,\(^ {204}\) this standard is abstract because it does not provide trial judges with an explanation of what behavior rises to the level of impossibility of carrying on the trial and ambiguous because the Court never clarifies whether the ability to continue the trial or maintaining “appropriate courtroom atmosphere”\(^ {205}\) is the actual focus of the test.\(^ {206}\) Thus, any

\(^{200}\) See *Allen*, 397 U.S. at 343.

\(^{201}\) See, e.g., *Gall* v. United States, 552 U.S. 38, 49–52 (2007) (discussing the district court’s responsibility for considering all of the factors put forth in 18 U.S.C. § 3553(a) in determining the defendant’s sentence).

\(^{202}\) See Tigar, supra note 118, at 11 (“[T]he Court converts waiver into a punitive sanction, but without setting down any new standards or procedures for its application.”).

\(^{203}\) *Allen*, 397 U.S. at 343.

\(^{204}\) See supra Part III.

\(^{205}\) *Allen*, 397 U.S. at 343.

\(^{206}\) For example, immediately after discussing the defendant’s disrespectful conduct as an impediment to conducting the trial (implying that the real problem was the judge’s inability to continue the trial), the Court added, “[i]t is essential to the proper administra-
structure and clarity will constitute an improvement on the *Allen* test. Nor does the proposed test excessively burden the trial judge or grant too much leeway to disruptive defendants. Instead, it reduces the potential for jury bias with a real solution rather than an ameliorating instruction at the close of the case and improves appellate review of removal. Finally, the five-factor test protects the court’s role as an arena for zealously protecting liberty, not for perfecting etiquette.

This Article proposes that the trial judge (and reviewing court) consider five concrete factors in assessing whether removing the defendant will clearly and substantially increase the fairness of the trial. This both provides guidelines for the trial judge in considering what fairness means in this context and forces the judge to justify the removal in the same clear terms of the factors, which a reviewing court will then understand and be able to analyze.

The five-factor test will not impose a burden on the trial judge, though it requires her to consider multiple factors and explain her reasoning during the trial. First, even under the *Allen* test, the trial judge must warn the defendant that her behavior could lead to expulsion before actually removing her. This implies that even under the insufficiently protective *Allen* standard a judge cannot silence a defendant the moment she begins to disrupt the proceedings, and must discuss the disruption with the defendant and, probably the defendant’s attorney, through a warning. Under the proposed rule, the judge will need to shift her focus away from decorum, but the factors are not complicated or unrelated to each other or the proceedings. A judge dealing with an obstreperous defendant will likely consider the nature of the defendant’s disruption—whether the defendant is trying to protect his rights or impede the trial—and the impression on the jury as they observe the defendant from the beginning.

Trial judges frequently make on-the-spot decisions for which they must place their reasoning on the record, including in deciding whether to admit evidence that one party claims is excessively pre-

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207 *Id.* (“[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless [does so].”).

208 This could occur at a sidebar or otherwise out of the jury’s hearing.
judicial and lacks probative value. This determination also hinges on the danger of admitting evidence that may unfairly prejudice the jury, just as the trial judge must determine whether disruptive defendants will unfairly prejudice the jury. It will take only a few moments to list the five factors and give a brief explanation of the judge’s decision on each at a sidebar. The parties need not have the opportunity to make arguments because the goal is to end an undue interruption of the trial, not to extend the interruption. Thus, listing the factors that the judge believes justify removal will not require substantially more effort than the many other determinations she must make throughout the trial.

Nor is it fair to characterize a defendant’s distracting conduct as a waiver of her right to be present. Unlike a defendant’s voluntary departure after the judge tells her that she has the right to remain in the courtroom and that the trial will continue without her should she leave, the disruptive defendant may not be trying to defy the judge—she simply may be asking questions or attempting properly to object. Thus, the removal is not voluntary and thus cannot be considered a waiver.

A simple jury instruction will not suffice to solve the problem of an unruly defendant or to erase an outburst from the memory of the jury. Unfairly prejudicial evidence cannot be included and then made not prejudicial with an ameliorating jury instruction; rules of exclusion exist to prevent such a situation. Similarly, excessively prejudicial behavior, on the part of the judge or the defendant, cannot be mended with a jury instruction.

The Supreme Court’s desire to protect the dignity of American courtrooms, “palladiums of liberty as they are,” cannot serve as an excuse to take away the liberties that define the American legal, and particularly judicial, system. Such a claim follows the reasoning of Justice Rehnquist in his dissent in Texas v. Johnson. The case involved a Texas statute that prohibited desecration of the American

209 In federal court, Federal Rule of Evidence 403 states, in relevant part, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . .” Fed. R. Evid. 403.
210 See id.
211 See supra Part I.B.
212 See Tigar, supra note 118, at 10–11 (discussing the Court’s problematic conversion of waiver into a punitive sanction in Allen).
213 See id. at 21 (noting the importance of exclusionary rules’ deterrent effect to procedural fairness).
flag. The majority struck down the law as a violation of the First Amendment right to free speech, as burning the flag constituted symbolic speech critical of the United States.

Dissenting, Justice Rehnquist argued that because the flag symbolizes all of the liberties the United States protects, including speech, it should be regarded as special and criticism by desecration should fall outside the protection of the First Amendment in the same way that obscenity is regarded as outside the scope of the First Amendment. In Allen, the Court emphasized the liberties protected by the judicial process to justify limiting one of those liberties, just as the speech that the American flag protects, for Justice Rehnquist, justified limiting speech. Yet, as Justice Kennedy stated in his concurrence, we do not protect liberties by constricting them; we protect liberties by upholding them.

CONCLUSION

Since 1970, American trial courts have too frequently removed defendants from their trials—procedures that determine whether the defendant’s future will be spent in confinement, with a tarnished reputation, or as a free individual, cleared of the charges against them. Rather than consider the defendant’s fundamental right to be present at the trial, the courts concern themselves with preserving an air of decorum and proper etiquette in their courtrooms. Practiced trial attorneys understand the expectations of the courtroom, but defendants are dragged into the courtroom without the education, experience, or desire to be there that the lawyers hold. It is inappropriate and offends the defendant’s dignity to be rebuked for failure to take Trial Advocacy before being arrested, or for forgetting to tuck in her shirt before entering the courtroom.

Rather than expect the accused to perfect her etiquette, or the pro se defendant to memorize and comprehend every rule of evidence and procedure before she represents herself, judges must employ a fairness standard when determining whether removing a disruptive defendant is permissible. The trial judge will properly balance the defendant’s right to be present at trial against the prob-

216 Id. at 400 (Brennan, J.).
217 Id. at 420.
218 Id. at 430 (Rehnquist, C.J., dissenting).
219 Allen, 397 U.S. at 346.
220 Johnson, 491 U.S. at 421 (Kennedy, J., concurring) (“It is poignant but fundamental that the flag protects those who hold it in contempt.”).
lems arising from disruptions only if she uses the fairness of the proceedings as her scale. She will protect the defendant’s rights to be present and to a fair trial only if she only resorts to removing that defendant from the courtroom where removal will clearly and substantially increase the fairness of the trial. If the courts are to remain “palladiums of liberty,”221 they must be flexible enough to allow defendants who recognize that they are in court “for justice”222 the right to protect their liberty and their constitutional rights by staying in the courtroom during trial.

221 Allen, 397 U.S. at 346.
222 Foster v. Wainwright, 686 F.2d 1382, 1385 (11th Cir. 1982).