St. Mary's Law Journal

Volume 6 | Number 4 Article 11

12-1-1974

An Accused May Waive the Privilege to Testify through Disruptive Courtroom Conduct.

Stuart F. Lewis

to sustain a classification where under the defined applicable standard such a classification should be invalidated.

The preemptory rejection of the state's proffered justification indicates the actual test applied was the balancing test utilized in *Reed* rather than the more rigid standard defined by the court. The fact that the majority opinion searches for "apparent justifications" negates the requirement that the "central" purpose must be justified; any reasonable justification would be sufficient to uphold a classification if the purpose outweighs the interests of the challenging party.

The extension of the *Reed* standard of review to cover nonstereotypical sex-based classifications is consistent with the attitude of Congress and the lower courts in prohibiting classifications based on sex. By applying the balancing standard this decision, like *Reed*, refused to declare sex a suspect classification or even to discuss the invidious implications of discriminatory practices; therefore, the case does not provide a valid basis for adjudication of similar controversies. Indeed, implicit in the discussion is an evasion of the stated government purposes, resulting in an indefinite criterion for application of the standard. A more explicit guideline for future analysis would have resulted if the court had presented the reasoning behind its rejection of the school's stated objectives.

There still exists the need for a concise and consistent stringent standard of review. This necessity is underscored by the actions of Congress and the executive in promulgating studies and laws which promote the full realization of women's rights.

Judith A. Johnson

CRIMINAL PROCEDURE—Defendants' Rights—An Accused May "Waive" The Privilege To Testify Through Disruptive Courtroom Conduct

United States v. Ives, 504 F.2d 935 (9th Cir. 1974).

Louis Ives repeatedly disrupted his criminal trial in United States District Court for the Eastern District of Washington by addressing the bench out of turn, shouting accusations and obscenities, arguing with the judge, and physically assaulting various officers of the court. Aware of Ives' previous history of courtroom misconduct,[1] the trial judge frequently warned the de-

1. United States v. Ives, 504 F.2d 935, 942 (9th Cir. 1974). In his first trial, which ended in mistrial, Ives made lewd gestures, assaulted his attorneys, and swore at

fendant that he would be removed from the courtroom if he continued to disrupt the proceedings. In one early conference with prosecution and defense counsel, the judge stated that Ives would be permitted to testify only if he did not disrupt the activities of the court.[2] During his trial Ives was physically removed from the courtroom four times and placed in a special cell equipped with facilities which allowed him to hear the proceedings with a telephone so that he could consult with counsel. After Ives was removed for the final time, the trial judge ruled that he would not be allowed to return to the courtroom. The remainder of the trial, resulting in defendant's conviction, took place in Ives' absence despite his renewed requests through counsel to testify in an orderly manner.[3]

Ives appealed to the Court of Appeals for the Ninth Circuit, principally contending that he had been deprived of his constitutional and statutory right to testify in his own behalf in a criminal proceeding.[4] Held—*Affirmed.* A defendant's privilege to testify can be waived by his disruptive conduct at trial.[5] It is within the discretion of the trial judge, after warning the defendant of the consequences of his actions, to determine that the privilege to testify has been waived.[6]

The privilege of an accused to testify in his own criminal trial developed from a gradual statutory abrogation of the common law rule disqualifying an interested party from being his own witness.[7] Reform movements in England and the United States championed this affirmative privilege as a means of broadening rather than restricting the channels of truth within the criminal trial.[8] By 1884, all states except Georgia had passed statutes establishing the criminal defendant's privilege to testify.[9] A statute removing the common law disability in the federal courts was enacted in 1878 and today remains substantially unchanged.[10]

---

the judge and defense counsel during two occasions on the witness stand. He was removed from the courtroom 16 times.

2. *Id.* at 942-43.

3. *Id.* at 944-45. The trial judge, in denying one such request by defendant's counsel, explained that Ives' past violent conduct made the court unwilling to rely on his promise to behave properly and thereby jeopardize the safety of those who would be in the courtroom during his testimony.

4. *Id.* at 937.

5. *Id.* at 941.

6. *Id.* at 942.

7. *See* Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U.L.Q. 454. For a brief but comprehensive summary of the development of the accused's privilege to testify, see Ferguson v. Georgia, 365 U.S. 570, 573-82 (1961). *See also* 2 J. WIGMORE, A TREATISE ON EVIDENCE IN TRIALS AT COMMON LAW § 575, at 674-83 (3d ed. 1972).

8. *See* Ferguson v. Georgia, 365 U.S. 570, 575 (1961).

9. For a compilation of this statutory transition, see Ferguson v. Georgia, 365 U.S. 570, 577 (1961).

10. 18 U.S.C. § 3481 (1970). The American experiment in modern criminal procedure was not adopted in England until 1898. Ferguson v. Georgia, 365 U.S. 570, 577-78 (1961).

Although the importance of the privilege to testify has been frequently proclaimed by American courts,[11] the United States Supreme Court has never given this statutory privilege the standing of a constitutional right. In *Ferguson v. Georgia*,[12] the Court was faced with a challenge to a procedural modification to the Georgia statute which provided that an accused was incompetent to testify at his trial, and declined to rule on the underlying constitutionality of the statute.[13] The majority opinion dealt only with the narrow procedural section "properly" before the court.[14] Concurring in the opinion, Justices Frankfurter and Clark criticized the reluctance of the Court to adjudicate the constitutionality of these "organically inseparable" sections.[15] These Justices found no difficulty in dispensing with formalisms of pleading and reaching "the candid determination that [the incompetency statute] is unconstitutional."[16]

The doctrine of waiver as it applies to constitutional rights and statutory privileges has traditionally followed the standard enunciated by the Supreme Court in *Johnson v. Zerbst*.[17] In that case, involving the waiver of the sixth amendment right to counsel, the Court stated that "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[18] One line of American cases, however, has also based waiver on conduct which is "so inconsistent with the intent to enforce the right in question as to induce reasonable belief that such right has been relinquished."[19]

---

11. The Court of Appeals for the Ninth Circuit described the privilege as one of "inestimable value." Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955), *aff'd in part, rev'd in part*, 355 U.S. 66 (1957); *see* United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969); United States v. Bentvena, 319 F.2d 916, 943 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); Poe v. United States, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

12. 365 U.S. 570 (1961).

13. *Id.* at 572, 596.

14. *Id.* at 572, 573, 596.

15. *Id.* at 600.

16. *Id.* at 601.

17. 304 U.S. 458 (1938); *see* Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).

18. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

19. Jeong Soon v. Beckman, 44 Cal. Rptr. 190, 192 (Dist. Ct. App. 1965), *quoting* Howard J. White, Inc. v. Varian Associates, 2 Cal. Rptr. 871, 875 (Dist. Ct. App. 1960), *quoting* Medico-Dental Bldg. Co. v. Horton P. Converse, 132 P.2d 457, 469 (Cal. 1942); *see, e.g.*, McCoy v. Siler, 205 F.2d 498 (3d Cir.), *cert. denied*, 346 U.S. 872 (1953); Masden v. Travelers' Ins. Co., 52 F.2d 75, 76 (8th Cir. 1931); Frankfurt-Barnett Co. v. William Prym Co., 237 F. 21, 28 (2d Cir. 1916); United Firemen's Ins. Co. v. Thomas, 82 F. 406, 408-09 (7th Cir. 1897); Wagner v. Kevan, 245 A.2d 881, 884 Conn. Super. Ct. 1968); Kessinger v. Anderson, 196 P.2d 289, 295 (Wash. 1948). These cases recognize both express waiver and also implied waiver reasonably inferred from conduct. The pivotal factor in determining either is the intention to relinquish a right. To eatablish an implied waiver of a legal right, there must first be a clear, unequivocal and decisive act which evidences such an intention. The stringency by which acts must infer this intention to constitute a waiver is the interpretative issue which distinguishes

The only American case prior to *United States v. Ives*[20] involving the alleged waiver of the privilege to testify was *United States v. Bentvena.*[21] The Court of Appeals for the Second Circuit held that while the conduct of the accused in this particular situation did not warrant a finding of waiver of the privilege to testify, it would not absolutely preclude such a finding under different circumstances.[22] Significantly, the court also stated that it felt defendant's early serious misconduct merited a warning that further acts of violence "might result in a curtailment of the privilege of testifying."[23]

Whether waiver is based on intentional relinquishment or on mere conduct, the standard for determining waiver of rights or privileges guaranteed by the Constitution has been consistently described as higher than that for rights or privileges based solely on statute.[24] The Supreme Court has indicated that when a defendant's constitutional rights are infringed during trial, the usual rules requiring a simple showing of harmless error to avoid reversal do not apply.[25] Instead, to avoid reversal, error must be shown harmless beyond a reasonable doubt.[26] A similar conclusion that waiver of constitutional rights is judged by a stricter standard than waiver of statutory privileges is reflected in *Johnson v. Zerbst.*[27] The Supreme Court there noted, "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' "[28]

Although the court in *United States v. Ives*[29] recognized this distinction, it essentially avoided the necessity of applying such differences in the treatment of waivers of constitutional and statutory privileges. For purposes of its opinion the court presumed a constitutional basis for the privilege to testify even though it expressed doubt that the privilege actually has such a status.[30] The court concluded that even if the privilege to testify was impliedly guaranteed by the fifth amendment, the defendant's conduct was nevertheless sufficiently serious to amount to a waiver of this constitutional privilege.[31]

---

most implied waiver cases. No less significant in determining intention to waive is the requirement that the right waived be a known right.

20. 504 F.2d 935 (9th Cir. 1974).

21. 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).

22. *Id.* at 944.

23. *Id.* at 944.

24. This conclusion seems to be a logical extension of the maxim that "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." 16 AM. JUR. 2d *Constitutional Law* § 131 (1964).

25. Chapman v. California, 386 U.S. 18, 23 (1967).

26. *Id.* at 23-24.

27. 304 U.S. 458 (1938).

28. *Id.* at 464, *quoting* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937), Hodges v. Eaton, 106 U.S. 408, 412 (1882), Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937).

29. 504 F.2d 935 (9th Cir. 1974).

30. *Id.* at 940.

31. *Id.* at 940-42.

The uncertain state of the law regarding the waiver of essential defense privileges was recently confronted by the Supreme Court in *Illinois v. Allen*.[32] The trial court in *Allen* held that a disruptive criminal defendant had waived the sixth amendment right to be present in the courtroom.[33] After Allen's writ of habeas corpus alleging deprivation of a constitutional right was denied,[34] the Court of Appeals for the Seventh Circuit reversed, holding that a waiver, whether express or implied, denotes a voluntary, intentional relinquishment of a known right.[35] Thus, a trial court could not set a standard of conduct from which it could infer a waiver of constitutional rights. The criminal defendant's right to be present at all stages of the proceeding was therefore absolute.[36]

The United States Supreme Court reversed the court of appeals, declaring that under proper conditions a judge could expel a criminal defendant from the courtroom for extremely disruptive behavior.[37] Before a defendant can lose this right to be present, he must be warned by the judge that he will be removed if he continues his disruptions.[38] The right, once lost, could be reclaimed as soon as the defendant is willing to adhere to standards of courtroom decorum.[39] The Court made no mention of waiver or the need for voluntariness in its opinion; it characterized a disruptive criminal defendant's expulsion as the "lost" constitutional right to be present and found the deprivation of this right to be a permissible judicial tool to maintain order.[40] Expulsion, a discretionary summary response available to trial judges in handling contemptuous defendants, was justified by the inherent limitations of other means of dealing with such defendants, including binding and gagging within the courtroom and citing for contempt.[41]

The implications of *Allen* were not viewed uniformly in subsequent cases dealing with disruptive defendants.[42] Many cases interpreting *Allen* have discussed its meaning in terms of waiver by conduct or implied waiver of the right to be present.[43] Some have specifically concluded that obstreperous

---

32. 397 U.S. 337 (1970).
33. People v. Allen, 226 N.E.2d 1, 3-4 (Ill. 1967), *cert. denied*, 389 U.S. 907 (1967).
34. Illinois v. Allen, 397 U.S. 337, 339 (1970).
35. Allen v. Illinois, 413 F.2d 232, 235 (7th Cir. 1969), *rev'd*, 397 U.S. 337 (1970).
36. *Id.* at 234-35.
37. Illinois v. Allen, 397 U.S. 337, 343 (1970).
38. *Id.* at 343, 344.
39. *Id.* at 343, 344.
40. *Id.* at 343, 344.
41. *Id.* at 343-45.
42. *See* United States v. Price, 484 F.2d 485 (9th Cir. 1973); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Bustamante v. Eyman, 456 F.2d 269 (9th Cir. 1972).
43. *See* United States v. Price, 484 F.2d 485, 486 (9th Cir. 1973); United States v. Dougherty, 473 F.2d 1113, 1124, 1125 (D.C. Cir. 1972).

conduct may be the basis for the implied waiver of other rights.[44] By contrast, at least one judge has cited *Allen* as analagous to the strict *Johnson v Zerbst*[45] express waiver standard, holding that a valid waiver of a constitutional right must be an intentional relinquishment of that right.[46] Still another court has characterized *Allen*'s import as that of a carefully drawn exception to the constitutional right to be present.[47]

Although *Allen* has been the subject of differing interpretations concerning its theory of waiver, it has been uniformly interpreted as setting certain specific requirements for the discretionary exercise of the expulsion power. The court in *United States v. Ives*[48] apparently ignored some of these requirements, including the need for a prior specific warning to the disruptive defendant of the consequences of his actions and the right to reclaim a lost right or privilege upon promise to behave properly. *Allen* did not clarify whether a loss of the right to be present implies the loss of other attendant statutory rights and privileges which can be exercised by a defendant only while in court. While some courts have espoused such a derivative loss view with regard to the right to represent oneself,[49] no decision before *Ives* had directly held that an implied loss of the privilege to testify accompanies the loss of the right to be present. In *Allen* the Court studiously avoided the word "waiver," thus obscuring, but not specifically rejecting, the requirement in *Johnson* that an express waiver is necessary in order to deprive a criminal defendant of a fundamental right. *Ives* implicitly recognized "waiver by conduct" as a prevailing legal concept.[50] Thus, *Ives* has shocking and subtle effects on the privilege to testify, the waiver of rights, and the judicial management of disruptive defendants.

Compared with *Allen*, the direct impact of *Ives* can be seen in three major ways. First, *Ives* allowed the court to deprive the defendants of the opportunity to reclaim his lost or waived privileges, although *Allen* required the court to reinstate the defendant's privileges following his earnest promise to

---

44. *See* United States v. Price, 484 F.2d 485, 486 (9th Cir. 1973) (all rights requiring the accused's direct participation at trial); United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972) (the right to represent oneself at trial).

45. 304 U.S. 458 (1938).

46. Harvin v. United States, 445 F.2d 675, 684 (D.C. Cir. 1971).

47. Bustamante v. Eyman, 456 F.2d 269, 274 (9th Cir. 1972). This court held that *Allen* had reaffirmed the constitutional magnitude of the right of the accused to be present, and thus did not erode the right in *any regard* beyond the narrow disruptiveness exception. *Id.* at 274. This exception theory avoids all waiver implications, express or implied, by describing the right to be present as a privilege which simply never arises in certain carefully designated circumstances. For an incisive discussion of the exception theory as it relates to *Allen*, see Note, *Excluding the Unruly Defendant*, 42 U. COLO. L. REV. 485, 487-89 (1971).

48. 504 F.2d 935 (9th Cir. 1974).

49. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1124, 1125 (D.C. Cir. 1972).

50. United States v. Ives, 504 F.2d 935, 941 (9th Cir. 1974).

conform to standards of judicial decorum.[51] *Ives* also disregarded the requirement of specificity in the court's warning which must precede a loss or waiver of privileges. *Allen* had predicated the court's right to exclude the defendant on the necessity of a prior warning by the judge that defendant would be removed if he continued his disruptive behavior.[52] *Ives*, despite its language that "a defendant must be warned of the consequences of his actions," demanded much less than the *Allen* standard would require.[53] The court in *Ives* concluded that defendant had waived his privilege to testify even though he was never warned that these particular consequences might result from his disruptive acts.[54] While the trial judge in *Ives* did inform defendant's counsel of this possibility, the only warning repeatedly made in Ives' presence was that he would be removed if he disrupted the proceedings.[55] Thus, despite its apparent language to the contrary, *Ives* permitted the loss of the specific privilege to testify when preceded only by a generalized warning of removal.

Third, *Ives* had the subtle effect of further obscuring the ambiguities of *Allen*. The two most disturbing features of *Allen* were the uncertainties it created over the meaning of "waiver" and the lack of clear standards for the expulsion power. *Allen* failed to discuss the subject of waiver, and this omission has resulted in confusion concerning the paradigm of voluntary, understanding, and irrevocable waiver.[56] *Ives* exacerbated this problem by couching the loss of the testimonial privilege in terms of an irrevocable "waiver by conduct."[57] By failing to adequately distinguish *Ives* from *Johnson* and *Allen*, the Ninth Circuit perpetuated the prevailing confusion over the meaning of the term "waiver." Instead, *Ives* serves to further expand the concept of waiver from its traditional limitation as the knowing and intentional relinquishment of a right, to the broader standard of implied relinquishment through voluntary disruptive action.

Although *Allen* set some procedural limits for the use of the expulsion power,[58] it provided no standards for the exercise of the judge's discretion in this matter beyond condemning "speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial."[59] *Ives* added little to the search for more precise stand-

51. *Id.* at 941, 942.
52. Illinois v. Allen, 397 U.S. 337, 343 (1970).
53. United States v. Ives, 504 F.2d 935, 942 (9th Cir. 1974).
54. *Id.* at 943-44.
55. *Id.* at 943-44.
56. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
57. United States v. Ives, 504 F.2d 935, 941 (9th Cir. 1974).
58. Illinois v. Allen, 397 U.S. 337, 343 (1970). These procedural limitations include the defendant's right to reclaim the lost right on a bona fide promise to behave properly and the requirement that the defendant be specifically warned as to the consequences of his actions. *Id.* at 343.
59. *Id.* at 338.

ards except for encouraging judicial consideration of "the probability of continued disruption and violence."[60] The addition of this language, which may itself be implicit in the use of discretion prescribed in *Allen*, merely broadened the scope of conduct available to a judge in making his critical decision which will affect the privilege of the accused to defend himself against a criminal charge.

Appearing in the wake of the Supreme Court's historic delineation of expulsion power in *Allen*, *Ives* might at first seem to represent the reasonable efforts of one court to resolve existing ambiguity by implementing the spirit of developing case law. In applying *Allen*'s principles to a different privilege and to an extreme instance of calculated disruption by a criminal defendant, however, the Ninth Circuit disregarded two procedural safeguards to discretionary expulsion explicitly required by the Supreme Court—a warning of the specific consequences of a defendant's disruptive actions and a right to reclaim the lost right upon a good faith promise to behave properly.[61] By characterizing the "lost right" standard of *Allen* in terms of "waiver by conduct," *Ives* needlessly obscured and weakened the concept of waiver as "the intentional relinquishment or abandonment of a known right or privilege."[62] Without adequate warning, even conduct directed at thwarting the judicial process cannot reasonably be regarded as an *intentional* relinquishment of a *known* right.[63]

The cumulative effect of *Ives* could be to broaden greatly the discretion of judges in denying a defendant's rights in the trial process through the expulsion power. While the underlying logic of *Allen* in protecting courtroom sanctity at the expense of the right to be present is sound, the extension of this logic to permit the involuntary and irrevocable loss of defense privileges violates principles of fairness which are implicit within the judicial process. Rather than inviting abuse of discretion and the inequitable denial of essential rights, the courts should protect the "palladiums of liberty"[64] only by fundamentally fair procedures, including specific warning, a right to reclaim upon bona fide promise to behave properly, and clearly defined guidelines for use of the expulsion power.

Stuart F. Lewis

60. United States v. Ives, 504 F.2d 935, 942 (9th Cir. 1974).
61. Illinois v. Allen, 397 U.S. 337, 346 (1970).
62. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
63. Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 10, 11 (1970).
64. Illinois v. Allen, 397 U.S. 337, 346 (1970).