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Constitutional Law - Zal v. Steppe: Ninth Circuit Approval of an In Limine Ban of Specific Words

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CONSTITUTIONAL LAW

ZAL v. STEPPE: NINTH CIRCUIT APPROVAL OF AN *IN LIMINE* BAN OF SPECIFIC WORDS

I. INTRODUCTION

In *Zal v. Steppe*,[1] the United States Court of Appeals for the Ninth Circuit held that, in an abortion clinic criminal trespass case, a defense attorney who violated an *in limine* ban of specific words related to abortion could be held in contempt without violating the First Amendment.[2] Thus, the court determined that the *in limine* ban of 50 specific words and phrases[3] was constitutionally sound.[4] Additionally, the court determined that the *in limine* ban did not violate the defendants' Sixth[5] and Fourteenth Amendment[6] rights to counsel, trial by jury, and due process of law.[7]

The rationale for the Ninth Circuit's holding was two-fold. To establish the extent of an attorney's First Amendment rights in the courtroom, the court cited dicta from the United States Supreme Court case *Gentile v. State Bar of Nevada*[8] stating

1. Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992) (per Farris, J.; Trott, J., concurring; and Noonan, J., concurring in the result in part, dissenting in part), *cert. denied*, 121 L. Ed. 2d 582 (1992).

2. *Id.* at 929. *See infra* note 33 for full text of the first amendment.

3. *See infra* note 64 for a definition of *in limine*. *See infra* note 21 for words and phrases excluded. Additionally, the trial court banned the use of the defenses of necessity, defense of others, mistake of fact, and compliance with international laws, treaties or declarations. *Zal*, 968 F.2d at 925.

4. *Id.* at 928.

5. *See infra* note 34 for full text of the sixth amendment.

6. *See infra* note 35 for full text of the fourteenth amendment.

7. *Zal*, 968 F.2d at 929-30.

8. 111 S. Ct. 2720 (1991). *See infra* note 139 for a discussion of *Gentile*.

that whatever free speech rights an attorney has in the courtroom are extremely circumscribed.[9] To support its conclusion that attorneys could not disobey court orders, the court relied on *Sacher v. United States*[10] which explained that the only right an attorney has when faced with an adverse ruling is to respectfully preserve the point for appeal.[11] The Ninth Circuit thus held that an attorney cannot use the First Amendment as a "shield" to disobey a court order.[12]

Zal set an important precedent. It is the first reported case in *any* jurisdiction where an *in limine* ban of more than one word or phrase has been granted.[13] Because the Ninth Circuit determined that attorneys' rights in the courtroom are circumscribed, the court was able to avoid performing a thorough constitutional analysis of the ban.[14] Consequently, the court condoned the use of word-bans without providing any guidelines to assist lower court judges in determining whether to grant them,[15] and effectively sanctioned unlimited judicial discretion to censor attorney speech in the courtroom.[16]

II. FACTS

Attorney Cyrus Zal, former general counsel for the anti-abortion group Operation Rescue,[17] represented seven anti-abortion activists who were charged with criminal trespass.[18] The ac-

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9. *Zal*, 968 F.2d at 928.

10. 343 U.S. 1 (1952). *See infra* note 168 for a discussion of *Sacher*.

11. *Zal*, 968 F.2d at 928.

12. *Id.* at 929.

13. *See infra* notes 85-101 and accompanying text for a discussion of *in limine* bans of words and phrases.

14. *See Zal*, 968 F.2d at 927-29.

15. *See infra* notes 295-304 and accompanying text.

16. *See infra* notes 306-19 and accompanying text.

17. Associated Press, *Ruling Against Lawyer Upheld*, L.A. TIMES, July 2, 1992 at B8.

18. Criminal Trespass is covered by CAL. PENAL CODE § 602(j) (Deering 1986), which states in pertinent part:

> [E]very person who willfully commits a trespass by any of the following is guilty of a misdemeanor. . . . Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

tivists had blocked the doors of an abortion clinic in La Mesa, California, by physically placing themselves between the clinic doors and clients attempting to enter.[19]

Before trial commenced, Municipal Court Judge Larrie Brainard granted the prosecutor's *in limine* motion, excluding the defenses of necessity, defense of others, compliance with international law, treaties or declarations, and mistake of fact.[20] The court also granted the prosecutor's separate motion *in limine* to exclude any mention or utterance of 50 specific words and phrases[21] such as abortion, fetus, unborn, "death mill" and

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19. The case was People v. Carla Jean Bultsma, Case No. C101464, Municipal Court of California, County of San Diego, El Cajon Municipal District, 1990. Opening Brief for Appellant at 3-4, *Zal* (No. 91-55579).

20. Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992), *cert. denied*, 121 L. Ed. 2d 582 (1992).

21. Memorandum of Points and Authorities in Support of Emergency Motion under Circuit Rule 27-3 at Exhibit 1 and Exhibit 2, *Zal* (No. 91-55579). The prosecution's *in limine* motion was actually in the form of two separate lists. The first list (Exhibit 1) read:

WORDS TO EXCLUDE IN LIMINE BEFORE TRIAL

(1) KILL
(2) KILLER
(3) BABY KILLER(S)
(4) KILLING CENTERS
(5) MURDER and MURDERER
(6) FETUS
(7) DEATHSCORT (FOR ESCORT PERSONNEL)
(8) GENOCIDE
(9) HOLOCAUST
(10) ABORTUARY
(11) ABORTION
(12) ANY REFERENCE TO GOD OR DEITY
(13) "RELIGIOUS BELIEFS" IN ANY MANNER OR FORM
(14) HITLER
(15) NAZI or NAZISM
(16) MANSLAUGHTER and/or CHILDSLAUGHTER
(17) "RIGHTS OF THE UNBORN"
(18) DEATH MILL
(19) RESCUER
(20) ANY WORD WHICH IS INCORPORATED IN NUMERAL (7) LISTED ABOVE.

The second list (EXHIBIT 2) read:

> Pursuant to California Evidence Code sections 210 and 352, there should be no reference to the following items:
> . . . (7) No reference to why the defendant(s) were present if it includes religious beliefs or opinions on abortion, or any of the following: KILL, MURDER, SLAUGHTER, SLAYING, SLAY, DESTROY, DESTRUCTION, EXTERMINATION, BLOODLETTING, SACRIFICE, MARTYRDOM, EXECU-

"baby killer."[22]

At the beginning of trial, the trial court judge participated in voir dire of the jury.[23] He asked prospective jurors if their feelings on abortion would prevent them from being impartial.[24]

During the January 1990 trial, Zal asked witnesses a total of thirteen questions which used one or more of the excluded words and phrases.[25] Zal also asked witnesses seven questions which

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TION, HOMICIDE, GENOCIDE, FRATRICIDE, SORORICIDE, PARRICIDE, INFANTICIDE, ABORTICIDE, FETICIDE, BUTCHER, BUTCHERY, CARNAGE, MASSACRE, BLOODBATH, DECIMATION, MASS DESTRUCTION, CAIN, ASSASSIN, CUTTHROAT, THUG, GORILLA, NAZI, ERADICATION, MONSTER or MONSTROSITY.

The court granted the prosecution's *in limine* motion with the exception of references to "God or Deity" and "[r]eligious beliefs in any manner or form." Opening Brief for Appellant at 5, *Zal* (No. 91-55579). Although the Ninth Circuit determined that the words and phrases were "linked to the excluded defenses," *Zal*, 968 F.2d at 925, both Zal and the prosecuting attorney inferred that the words and the defenses were excluded in separate motions. *See* Opening Brief for Appellant at 5, *Zal* (No. 91-55579); Brief of Appellee at 5, *Zal* (91-55579). Zal's opening brief states "[t]he trial court granted the prosecutor's motion to preclude the above listed defenses and to exclude all evidence pertaining thereto during any phase of the trial." Opening Brief for Appellant at 5, *Zal* (No. 91-55579). "The prosecutor *also* submitted to the court before trial two lists containing . . . words and phrases to exclude *in limine*" (emphasis added). *Id.* Prosecuting attorney Cecil Steppe's opening brief states "[t]he trial court's order dealt with evidence, defenses, and *inflammatory words* before a jury." Brief of Appellee at 5, *Zal* (91-55579) (emphasis added).

22. *See supra* note 21 for word list.

23. Opening Brief for Appellant at 5, *Zal* (91-55579).

24. *Id.*

25. *Zal*, 968 F.2d at 925-26. The questions were:

- Can't we ask anything about *baby-killing* Your Honor?
- Is the *unborn* baby a life you have sworn to protect?
- Did you feel any obligation to protect the children who would be *killed* that day?
- Officer, were you an *unborn* baby at some time in your life?
- Wasn't the safety corridor the place where babies were taken to be *killed*?
- How long have you been in the *baby-killing* business?
- Does the oath you have taken to tell the truth mean anything to someone who is in the *baby killing* business?
- What's done with the bodies of the babies *killed* by your employer?
- Are you concerned that you may some day be charged with *murder* for your role in the *abortion holocaust*?
- Do you think you will always protect the *baby-killers*?
- Are those convictions worth the lives of *unborn* babies?
- Now, is it from your own personal knowledge that you know two babies were saved from *abortions* that day?
- Isn't that a poster of an *unborn* child sucking its thumb?

(emphasis added to words on the "banned" list).

did not contain any of the banned words, but contained similar words and phrases.[26] Zal was held in criminal contempt[27] a total of 20 times[28] for violating the court's *in limine* orders[29] and sentenced to 290 days in jail.[30]

Zal unsuccessfully appealed in both the federal district court and California state courts.[31] Zal then filed a petition for

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26. *Id.* These questions were:

- Is that the place where they empty the contents of a woman's uterus?
- Are you familiar with those facilities where two persons go in and only one person comes out alive?
- What time do the first victims arrive?
- How do you feel about making a living off the blood of babies?
- Are your paychecks bloodstained?
- Where do the bodies go?
- Did you know what babies they were referring to?
- Do you know the time, date and place where a life was going to be taken?
- What do you do when your oath to protect life conflicts with your duties?
- Do you think perhaps the dog knew his duty to protect life better than the police officers?

27. Criminal contempt is covered by CAL. PENAL CODE § 166 (Deering 1986). Section 166 provides in pertinent part that willful disobedience of any process or order lawfully issued by any court will result in contempt of court, a misdemeanor. *Id.*

28. *Zal*, 968 F.2d at 926. Sometimes Zal was cited only once for more than one use of a word or phrase. *Id.*

29. Order Adjudging Contempt (C101464B, C, E-M):

> During *in limine* motions the Court ruled that the trial would be restricted to the charge of trespass and that abortion, any "necessity defense," and "the rights of the unborn" would not be issues presented to the jury. Counsel and the defendants were specifically instructed not to attempt to improperly influence or proselytize the jury on the above issues. . . . The Court allowed attorney Cyrus Zal the opportunity to explain his actions after each citation for contempt. Mr. Zal stated that he 'welcomed' said citations and had incurred same intentionally to further his cause. The court finds each act of contempt was done intentionally to improperly influence and proselytize the jury in direct contravention of court orders.

30. Opening Brief for Appellant at 3, *Zal* (No. 91-55579).

31. *Id.* at 3-4. Cyrus Zal filed petitions for writ of habeas corpus in the Superior Court of California, San Diego County, the Court of Appeal of the State of California, and a petition for hearing and stay of proceedings in the California Supreme Court. Each petition was denied. Zal additionally filed petitions for habeas corpus/prohibition/mandamus and for bail in the Superior Court of California, County of San Diego on January 18, 1991. The Court granted bail, but denied the petition. Subsequently on February 8, 1991, Zal filed petitions for habeas corpus/prohibition/mandamus and for bail to remain in force in the California Court of Appeal, Fourth District. The court granted the order keeping bail in force, but denied the petition. On March 28, 1991, Zal filed a petition for review and for bail to remain in force with the California Supreme Court. The petition was denied. Turning to the Federal Courts, Zal filed a petition for writ of habeas corpus in the United States District Court for the Southern District of California. This petition

writ of habeas corpus with the United States Court of Appeals for the Ninth Circuit.[32] Zal's habeas corpus petition claimed that the trial court's *in limine* order violated the following: his First Amendment[33] free speech rights, his clients' Sixth[34] and Fourteenth Amendment[35] rights, and the Fifth[36] and Fourteenth Amendment rights[37] of the unborn.

Although Zal had completed his sentence, the Ninth Circuit

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was also denied. *Id.*

32. *Id.*

33. *Id.* The first amendment provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I.

34. Opening Brief for Appellant at 3, *Zal* (No. 91-55579) (rights to trial by jury and assistance of counsel). The sixth amendment provides that:

> 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.

U.S. CONST. amend. VI.

35. Opening Brief for Appellant at 3, *Zal* (No. 91-55579) (right to due process). The fourteenth amendment provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

36. Opening Brief for Appellant at 3, *Zal* (No. 91-55579) (right to life). The fifth amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence 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; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

37. Opening Brief for Appellant at 3-4, *Zal* (No. 91-55579) (rights to life and equal protection). *See supra* note 35 for full text of the fourteenth amendment.

Court of Appeals granted review. The court explained that the contempt order was not a moot point because, if allowed to stand, Zal would potentially face additional sanctions from the California Bar.[38]

III. BACKGROUND

A. Challenging Court Orders in California

Whether a contemnor can challenge a court order after he has knowingly violated the order varies in different jurisdictions. In federal courts, and in many state courts, a "collateral bar" rule is in effect.[39] This rule prohibits a court order from being "collaterally" challenged after it has been violated.[40]

1. *The Collateral Bar Rule*

The collateral bar rule provides that a person cannot challenge a court order after that order has been violated.[41] The rule is perhaps best demonstrated by the United States Supreme Court Case *Walker v. City of Birmingham.*[42] In *Walker,* the court upheld an Alabama rule which provided that a constitutional challenge to a court order could only be raised before the order was violated.[43] The defendants in *Walker* knowingly disobeyed a temporary injunction that enjoined them from parading without a permit.[44] After the defendants held a civil rights demonstration in violation of the injunction, they sought to challenge the constitutionality of the injunction, arguing that it was vague and overbroad.[45] The Alabama Supreme Court refused to perform a full constitutional analysis of the injunction, reasoning that it had already been defied.[46]

The United States Supreme Court admitted that the in-

38. *Zal,* 968 F.2d at 926.

39. *See* Zal v. Steppe, 968 F.2d 924, 927 (9th Cir. 1992), *cert. denied,* 121 L.Ed. 2d 582 (1992).

40. *See generally* Walker v. City of Birmingham, 388 U.S. 307 (1967).

41. *Id.* at 313-14.

42. 388 U.S. 307 (1967).

43. *Id.* at 313-14.

44. *Id.* at 309-10.

45. *Walker,* 388 U.S. at 317.

46. *Id.*

junction may have been constitutionally defective, but explained that the collateral bar rule provided that a constitutional analysis only needed to be performed if the issuing court lacked jurisdiction, or the defendants had violated the injunction unknowingly.[47] As neither of these situations applied to the defendants, the Court upheld the defendants' contempt citations.[48] The Court relied on its earlier decision in *Howat v. Kansas*[49] to explain that:

> An injunction . . . must be obeyed . . . however erroneous the action of the court may be . . . . It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.[50]

At least one lower federal court has applied the collateral bar rule to prevent abortion protesters from collaterally challenging a temporary restraining order. In *New York State NOW v. Terry*,[51] the defendants blocked abortion clinic facilities in violation of a restraining order.[52] The court refused to allow a First Amendment challenge to the order because it had already been violated.[53]

2. *Berry - The California Rule*

California does not follow the collateral bar rule.[54] The California Supreme Court case *In re Berry*[55] explained that orders

47. *Id.* at 311-12.
48. *Id.* at 321.
49. 258 U.S. 181 (1922).
50. *Id.* at 189-90.
51. New York State NOW v. Terry, 697 F. Supp. 1324 (S.D.N.Y. 1988).
52. *Id.* at 1326.
53. *Id.* at 1334.
54. *Zal*, 968 F.2d at 927.
55. 436 P.2d 273 (Cal. 1968). The defendants in *Berry* disobeyed a temporary restraining order which prohibited them from picketing and engaging in other strike activities. *Id.* at 277-78. They were aware of the restraining order, but believed that it "suffered from constitutional defects which rendered it void," so they decided to continue strike activities as planned. *Id.* at 277. After they were held in contempt, they sought to challenge the order as overbroad. *Id.* at 282. The County of Sacramento (which had obtained the order against the defendants) argued that the defendants were barred from

issued without jurisdiction are void.[56] Furthermore, in California, if an order is found to be unconstitutional, it will be considered to have been issued without jurisdiction.[57] Therefore, in California, a person affected by a court order has two options:[58] (1) comply with the order while seeking a judicial declaration to its validity, or (2) disobey the order and raise "jurisdictional contentions" when punished for violation of the order.[59] A person following the latter route will be vindicated if the court order is found unconstitutional.[60]

The main difference between the *Berry* rule and the collateral bar rule is that when the constitutionality of an order is challenged subsequent to violation, the *Berry* rule requires a constitutional analysis[61] while the collateral bar rule does not.[62] In comparing *Walker* with *Berry*, the California Supreme Court concluded "[i]n California . . . the rule followed is considerably more consistent with the exercise of First Amendment freedoms."[63]

B. *In Limine* Orders

1. *Use of In Limine Orders*

The *in limine*[64] order is a procedural device which precludes opposing counsel from presenting evidence to the jury.[65] Its pur-

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collaterally challenging the order because the issuing court had both subject matter and personal jurisdiction over the defendants when the order was issued. *Id.* at 279-80. The California Supreme Court rejected this argument and determined that an order lacked jurisdiction if it was unconstitutional. *Id.* at 280. The court accordingly granted the defendants' writ of habeas corpus. *Id.* at 286.

56. *Berry*, 436 P.2d at 280.

57. *Id.*

58. *Id.* at 281.

59. *Id.*

60. *Id.*

61. *Berry*, 436 P.2d at 279 ("It is well settled that a court is without jurisdiction to subject a citizen to criminal prosecution for violation of an unconstitutional . . . court order . . . relief is not barred by the failure of petitioners to challenge directly . . . .").

62. *Walker*, 388 U.S. at 316-17 ("The breadth and vagueness of the injunction itself would . . . unquestionably be subject to substantial constitutional question. But the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved.").

63. *Berry*, 436 P.2d at 282 (referring to the collateral bar rule).

64. *In limine* is defined as "[o]n or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary 787 (6th ed. 1990).

65. *See generally* Candace C. Fetscher, *The Motion in limine, A Useful Procedural*

pose is "to avoid the unfairness caused by the presentation of prejudicial or objectionable evidence to the jury."[66] Although prejudicial evidence is usually the type of evidence sought to be excluded,[67] the scope of the motion includes any kind of evidence that could be excluded at trial.[68] Additionally, the scope of the motion encompasses both physical and testamentary evidence.[69] At least one federal court has warned against excluding broad categories of evidence.[70]

Not specifically authorized by statute,[71] the *in limine* order is recognized as within the court's inherent power.[72] Violating an *in limine* order can result in a charge of contempt of court.[73]

The *in limine* order is obtained when an attorney makes a motion *in limine* requesting the judge to exclude certain items of the opposing party's evidence.[74] This motion is usually made prior to trial, but can be made any time before the evidence sought to be excluded is introduced.[75] There is no specific form a motion *in limine* must take.[76]

An *in limine* motion may request either a "prohibitive-preliminary" order or a "prohibitive-absolute" order.[77] The prohibitive-preliminary order restricts an attorney from presenting the

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Device, 35 MONT. L. REV. 362 (1974).

66. Peat, Marwick, Mitchell & Co. v. Superior Ct., 245 Cal. Rptr. 873, 884 (1988), *cert. dismissed*, Peat, Marwick, Main & Co., 490 U.S. 1086 (1989).

67. Fetscher, *supra* note 65, at 362.

68. *See Peat*, 245 Cal. Rptr. at 884 (irrelevant evidence is within the scope of the motion). *See* CAL. EVID. CODE § 352 (West 1992) (evidence may be excluded in one of four ways: (1) danger of undue prejudice; (2) danger of confusing issues; (3) danger of jury being misled; or (4) danger of undue consumption of time).

69. Ganey v. Doran, 236 Cal. Rptr. 787, 790 (1987).

70. Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975) (*in limine* order excluded any mention of three related cases, order was upheld because the attorney did not object to the order at trial, but the appellate judge warned against excluding such broad categories of evidence in the future).

71. *Peat*, 245 Cal. Rptr. at 884. *See also* J. Patrick Hazel, *The Motion in Limine: A Texas Proposal*, 21 HOUS. L. REV. 919, 933 n.3 (1988).

72. *Peat*, 245 Cal. Rptr. at 884.

73. *See supra* note 27 for contempt statute.

74. Henry B. Rothblatt & David H. Leroy, *The Motion In Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 KY. L.J. 611, 613 (1972).

75. 3 BERNARD WITKIN, CALIFORNIA EVIDENCE § 2011 (3d ed. 1986).

76. *Id.*

77. Rothblatt & Leroy, *supra* note 74, at 615-16.

excluded evidence until he or she has gained express permission from the judge during trial.[78] The prohibitive-absolute order prohibits counsel from offering the excluded evidence or mentioning it in any way at any time during the trial.[79]

2. *Use of the In Limine Order to Exclude Entire Defenses*

Use of the *in limine* order to exclude entire defenses is not uncommon.[80] The most commonly excluded defenses are necessity and duress.[81] In fact, *in limine* orders excluding the defense of necessity have been widely accepted in cases similar to Zal's.[82] Orders excluding the defenses of mistake of fact[83] and defense of others[84] have also been granted in abortion clinic trespass cases.

3. *In Limine Exclusion of Specific Words*

Prior to *Zal v. Steppe*, only one reported case used a motion *in limine* to exclude a specific phrase. In *Cook v. Philadelphia Transportation Company*,[85] the court issued an *in limine* order precluding use of the term "Crazy Bar" to identify the property across the street from where the plaintiff/pedestrian was struck by a car.[86] "Crazy Bar" was disallowed because there was no

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78. *Id.*

79. *Id.*

80. Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1283 (1987). The Colbert article provides an in-depth analysis of the history and use of the motion *in limine*. It particularly focuses on *in limine* exclusion of entire defenses. Additionally, the article demonstrates how an *in limine* motion to exclude over 30 words and phrases was rejected by a trial court. The Colbert article was cited in Judge Noonan's dissenting and concurring opinion in *Zal* to explain the initial development of the motion *in limine* in criminal trials. *Zal*, 968 F.2d at 934.

81. *See* Colbert, *supra* note 80, at 1284.

82. *See, e.g.*, Allison v. City of Birmingham, 580 So.2d 1377, 1379 (Ala. Crim. App. 1991), *cert. denied*, 580 So.2d 1390 (Ala. 1991); People v. Smith, 514 N.E.2d 211, 212 (Ill. Ct. App. 1987), *appeal denied*, 520 N.E.2d 391 (Ill. 1988); State v. Rein, 477 N.W.2d 716, 717 (Minn. Ct. App. 1991); City of St. Louis v. Klocker, 637 S.W.2d 174, 175 (Mo. Ct. App. 1982); State v. Sahr, 470 N.W.2d 185, 187 (N.D. 1991); City of Dayton v. Drake, 590 N.E.2d 319, 320 (Ohio Ct. App. 1990); State v. Clowes, 801 P.2d 789, 791-92 (Or. 1990); State v. Olsen, 299 N.W.2d 632, 634 (Wis. Ct. App. 1980).

83. *Allison*, 580 So.2d at 1379.

84. *Id.* (mistaken belief that the unborn are persons).

85. 199 A.2d 446 (Pa. 1964).

86. *Id.* at 447.

proof that the plaintiff was intoxicated when hit.[87] The court reasoned that reference to the "Crazy Bar" would tend to lead jurors to infer that the plaintiff was intoxicated.[88]

Several times, however, attorneys' attempts to exclude words or phrases *in limine* have been rejected. In one Eighth Circuit products liability case,[89] a tire manufacturer sought to exclude the phrases "widow maker," "man killer," "killer wheel," and "bone breaker."[90] The manufacturer claimed that these terms were prejudicial and inflammatory.[91] The manufacturer's motion *in limine* was denied.[92]

In another federal case,[93] a defendant filed a motion *in limine* to prevent any mention of the word "conspiracy."[94] His *in limine* motion was denied because the court found that the plaintiff had a colorable conspiracy claim.[95]

Prior to *Zal,* no reported cases addressed a motion *in limine* seeking to exclude a large number of words. However, in the unreported case *United States v. Rosenberg,*[96] the government made a motion *in limine* to exclude at least 31 specific phrases.[97] The prosecuting attorneys did not submit a memorandum of law or cite any case to support their motion.[98] In contrast, the defense counsel argued that if the motion was granted, it would prevent his clients from receiving a fair trial.[99] Additionally, the defense counsel argued that the motion was a "wholly irregular . . . extraordinary and overbroad request made without any showing as to the irrelevance of the words or matters [the gov-

87. *Id.*
88. *Id.*
89. Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985).
90. *Id.* at 1333.
91. *Id.*
92. *Id.* (no reason for the denial was given).
93. Peuntes v. Sullivan, 425 F.Supp. 249 (W.D. Tex. 1977).
94. *Id.* at 249.
95. *Id.* at 253.
96. Crim. No. 84-360 (D.N.J. filed Feb. 28 1985), *aff'd,* 806 F.2d 1169 (3d Cir. 1986). *See* Colbert, *supra* note 80, at 1307-09.
97. Notice of Motion at 3-4, *Rosenberg* (Crim. No. 84-360) (words included terrorist, revolution, anarchist, combatants, socialism, fascism, urban guerillas). *See* Colbert, *supra* note 80, at 1308 for full list.
98. *See* Colbert, *supra* note 80, at 1308.
99. *Id.*

ernment] wishes to exclude."[100] The motion was denied.[101]

C. First Amendment Substantive Standards

Governments can regulate speech in two ways: (1) prior restraint, and (2) subsequent punishment. The United States Supreme Court has held that the First Amendment protects against both forms of regulation.[102] When a person challenges the First Amendment constitutionality of a government regulation of speech, the courts will generally balance the government's need to regulate against the challenger's right to speech.[103] However, a court's substantive First Amendment analysis may vary depending on whether the regulation was imposed prospectively (prior restraint), or after the communication has occurred (subsequent punishment).[104]

1. *Prior Restraints on Attorney Speech*

The term "prior restraint" is used to describe judicial orders restricting communications before they occur.[105] Restraint of speech prior to its exercise presents a separate issue from regulation and discipline after the fact.[106] In fact, the United States Supreme Court has determined that "[p]rior restraints on speech are the most serious and least tolerable infringement on First Amendment rights."[107] Although the *term* "prior restraint"

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100. Defendant's Motion in Opposition to Government's Motion *in limine* at 1-2, *Rosenberg* (Crim. No. 84-360). *See* Colbert, *supra* note 80, at 1308.

101. *See* Colbert, *supra* note 80, at 1309.

102. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-102 (1979) ("First Amendment protection reaches beyond prior restraints . . . . Whether we view the statute as a prior restraint or as a penal sanction . . . is not dispositive because even the latter action requires the highest form of state interest to sustain its validity.").

103. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984), *cert. denied*, 467 U.S. 1230 (1984).

104. *See infra* note 105 for a definition of prior restraint.

105. Melville Nimmer, Nimmer on Freedom of Speech § 4.03 (1984) (the term "prior restraint" can also be used to describe administrative orders); *see also* Black's Law Dictionary 1194 (6th ed. 1990) ("A system of prior restraint is any scheme which gives public officials the power to deny the use of a forum in advance of its actual expression.").

106. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557 (1976) ("Cases which deal with punishment based on contempt, however, deal with problems substantially different from those raised by prior restraint."). *See also* State v. Russell, 610 P.2d 1122, 1126 (Kan. 1980), *cert. denied*, 449 U.S. 983 (1980).

107. *Nebraska Press Ass'n*, 427 U.S. at 559.

has only been applied to out of court utterances, prior restraint analysis is arguably not limited to that context.[108] The court in *In re Halkin*[109] suggested that the fact a court order presented many of the same *dangers* as a prior restraint was enough to require "close scrutiny of its impact on protected First Amendment expression."[110]

The rationale for a separate prior restraint analysis was articulated in *Southeastern Promotions Ltd. v. Conrad.*[111] There, the court stated:

> [A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable.[112]

Zal is the first reported case that challenges a restriction of an attorney's speech in the courtroom as a prior restraint.[113] Perhaps this is because prior to *Zal,* judges had not attempted to regulate the use of certain words in their courtrooms except by issuing contempt citations *after* inappropriate communications occurred.[114] However, courts have previously applied prior restraint analysis to judicial orders regulating an attorney's *extra-judicial* speech during pending cases.[115]

When presented with a prior restraint of extra-judicial speech regarding a pending case, courts have applied several balancing tests. Among tests utilized are the "clear and present

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108. *But cf.* Scott v. Anderson, 405 So.2d 228, 231 (Fla. Dist. Ct. App. 1981) (clear and present danger test only applies to out of court statements).

109. 598 F.2d 176 (D.C. Cir. 1979) (analyzing whether an order that prohibited an attorney from disclosing information obtained through discovery was constitutionally deficient).

110. *Id.* at 186. Additionally, the United States Supreme Court has warned against using the *term* "prior restraint" as a "talismanic test." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

111. 420 U.S. 546 (1975).

112. *Id.* at 559.

113. *Zal,* 968 F.2d at 928.

114. *See infra* notes 120-28 and accompanying text for an analysis of contempt.

115. *See, e.g., Halkin,* 598 F.2d at 183-86.

danger" test,[116] and the "substantial likelihood of material prejudice" test.[117] These tests balance First Amendment rights against government interests and require that restrictions are "narrowly tailored"[118] to assure that they do not infringe upon constitutional rights.[119]

2. *Subsequent Punishment for Attorneys' Speech - the Contempt Order*

Contempt is generally defined as "an act committed in or out of the court's presence, that tends to impede, embarrass, or obstruct the court in the discharge of its duties."[120] When the contemptuous act is performed in court, it is "direct contempt."[121] A court will issue a civil contempt citation if its primary purpose is to preserve litigant rights.[122] When the court's primary purpose is to punish, it will issue a criminal contempt citation.[123]

Like prior restraints, contempt citations must be able to withstand substantive First Amendment analysis. In *In re McConnell,*[124] the United States Supreme Court held that courts were limited in contempt cases to "the least possible power adequate to the end proposed."[125] Any broader contempt power, the court explained, "would permit too great inroads on the procedural safeguards of the Bill of Rights."[126]

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116. Wood v. Georgia, 370 U.S. 375, 388 (1962). *See infra* note 128 for a definition of the clear and present danger test.

117. *See* Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2745 (1991) ("The regulation of attorneys' speech is limited - it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral to points of view . . . and it merely postpones the attorney's comments until after the trial.").

118. *See* Carol v. President and Comm'r of Princess Anne, 393 U.S. 175, 183 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate.").

119. *Gentile*, 111 S. Ct. at 2723.

120. *In re* Shortridge, 34 P. 227, 229 (Cal. 1893).

121. *Ex Parte* Terry, 128 U.S. 289, 319 (1888). In contrast, a contemptuous act done outside the presence of the court is called "constructive contempt." *See id.*

122. Morelli v. Superior Ct., 1 Cal. 3d 328, 388 (1969).

123. *Id.*

124. 370 U.S. 230 (1962).

125. *Id.* at 234 (quoting *In re* Michael, 326 U.S. 224, 227 (1945)).

126. *Id.*

Two common tests used for balancing contemptuous statements against First Amendment rights are whether the statement constitutes: (1) "an imminent threat to the administration of justice,"[127] or (2) "a clear and present danger to the orderly administration of justice."[128]

D. First Amendment Free Speech Rights of Attorneys

Jurisdictions differ as to the extent of First Amendment free speech protections they afford attorneys. Two of the contexts courts have used to evaluate attorneys' free speech rights are prior restraints on extrajudicial speech,[129] and contempt citations for in-court statements.[130] However, prior to *Zal*, the courts had not considered the possibility of a prior restraint on an attorney's free speech rights in the courtroom.[131]

In the contexts that have been considered, two different views have emerged.

1. *A Full Protection View*

One federal district court has held that "[l]itigation itself is a form of expression protected by the First Amendment. It is indisputable that attorneys and parties retain their First Amendment rights even as participants in the judicial process."[132] A New York state court has similarly declared that "[t]he freedom of expression protection afforded by the First Amendment . . . unquestionably extends to the courtroom."[133]

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127. *See, e.g.*, Craig v. Harney, 331 U.S. 367, 373 (1947); Bernard v. Gulf Oil Co., 619 F.2d 459, 474 (5th Cir. 1980), *cert. granted*, 449 U.S. 1033 (1980), *and aff'd*, 452 U.S. 89 (1981).

128. *See, e.g.*, Bridges v. California, 314 U.S. 252, 254-55 (1941) ("The clear and present danger doctrine requires a weighing of evidence and a determination of whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about a substantial interference with the orderly administration of justice."); Wood v. Georgia, 370 U.S. 375, 381 (1962); Estrada v. Bailey, 563 F. Supp. 222, 223 (W.D. Tex 1983).

129. *See supra* notes 104-19 and accompanying text.

130. *See supra* notes 120-28 and accompanying text.

131. Zal argued that the trial court's *in limine* word-ban was a prior restraint on his first amendment rights. *Zal*, 968 F.2d at 928.

132. *In re* Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979) (holding that an order prohibiting extrajudicial disclosure of discovery materials without giving reasons was deficient).

133. Frankel v. Roberts, 567 N.Y.S.2d 1018, 1020 (App. Div. 1991), *appeal dis-*

Another state court has suggested that "[s]tatements made in the presence of the court or outside the presence of the court are protected by the guarantee of freedom of speech."[134]

The Ninth Circuit case *Hawk v. Cardoza*[135] is an example of how attorney free speech rights have been protected. There, the court devised a test that balanced an attorney's First Amendment rights in the courtroom against the need for order in the judicial process.[136] These holdings are consistent with the oft used expression "attorneys do not lose their constitutional rights at the courthouse door."[137]

2. *A Limited Protection View*

Another line of cases has expressed that attorneys' rights while participating in the trial process are limited. These limitations are usually based on the theory that lawyers are "officers of the court" and thus can be regulated by less demanding standards.[138]

The recent Supreme Court case *Gentile v. State Bar of Nevada*[139] seems to follow the second line of cases. For litigants, *Gentile* has modified the "courthouse door" expression:

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missed, 582 N.E.2d 603 (N.Y. 1991) (upholding an attorney's first amendment right to wear a "ready to strike" badge in a non-jury courtroom).

134. Garland v. State, 325 S.E.2d 131, 133 (Ga. 1985) (contempt citation for an extrajudicial statement to the press).

135. 575 F.2d 732 (9th Cir. 1978).

136. *Id.* at 735 (contempt case upheld contempt citations but warned that factors to be considered in such cases included the length of trial, surrounding controversy, prior warnings from the trial judge and prior conduct of the contemnor). The test used was "grave danger to the administration of justice." *Id.*

137. Levine v. United States District Ct., 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). *See also Zal*, 968 F.2d at 927; *Halkin*, 598 F.2d at 186.

138. *See, e.g.*, State *ex rel.* Oklahoma Bar Ass'n v. Porter, 766 P.2d 958, 968 (Okla. 1988); *In re* Hinds, 449 A.2d 483, 489 (N.J. 1982); Kuiper v. District Ct., 632 P.2d 694, 697 (Mont. 1981).

139. 111 S. Ct. 2720 (1991). In *Gentile*, an attorney gave a press conference hours after his client was indicted on criminal charges. *Id.* at 2723. The Nevada State Bar filed a complaint alleging that the attorney violated a Nevada Supreme Court rule prohibiting an attorney from making an extrajudicial statement which would have "a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id.* The Court found that the Nevada Supreme Court rule was (1) void for vagueness as applied by the Nevada Supreme Court because its safe harbor provisions led the attorney to believe that he could give a press conference without being disciplined, *Id.* at 2731, and (2) the "substantial likelihood of material prejudice" test satisfied the first amendment. *Id.* at 2745.

"[a]lthough litigants don't lose their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in this setting."[140] For attorneys, *Gentile* stated in dicta that "[a] lawyer's right to free speech is extremely circumscribed in the courtroom."[141]

Under *Gentile,* it is unclear *which* substantive standards the United States Supreme Court would employ in analyzing an attorney's free speech rights in the courtroom today. Specifically, the *Gentile* court held that attorneys' extra-judicial statements could be regulated under the "less demanding" "substantial likelihood of material prejudice" test employed by the Nevada Supreme Court.[142] The Court explained that adherence to the precepts of the judicial system allowed attorney speech to be regulated under a less demanding standard.[143] Accordingly, the Court determined that the "less demanding" test was a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials."[144]

Although *Gentile* stated that attorney courtroom rights were extremely circumscribed, it did not explicitly provide a different balancing test for those rights. However, *Gentile* did express that "blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny."[145] Thus, *Gentile* seems to provide *some* protection for attorney speech in the courtroom. Which substantive tests the Court would employ is unknown.

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140. *Id.* at 2744.

141. *Id.* at 2722.

142. *Id.* at 2744-45 (less demanding than the "clear and present danger" test).

143. *Gentile*, 111 S. Ct. at 2744 ("Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.").

144. *Id.* at 2745.

145. *Id.* at 2735.

IV. THE COURT'S ANALYSIS

A. THE MAJORITY[146]

1. *Jurisdiction*

To grant jurisdiction, the court needed to address three issues.[147] First, a habeas corpus petition generally becomes moot after a prisoner is released from custody.[148] Zal had already served his contempt sentence and had been released from prison.[149] However, the court noted that *Robbins v. Christianson*[150] recognized an exception to the mootness rule when the prisoner could show that he would suffer collateral legal consequences if his conviction was allowed to stand.[151] The court recognized that Zal could face discipline by the California State Bar if his contempt citations were allowed to stand.[152] Thus, the court found that Zal's habeas corpus petition was not moot.[153]

Second, the court noted that habeas petitions could only be granted for violations of the United States Constitution, federal statutes or treaties.[154] The court focused on Zal's First Amendment claim and cited *Levine v. District Court*[155] in support of its determination that Zal had constitutional rights in this situation.[156] *Levine* held that "attorneys . . . do not lose their constitutional rights at the courthouse door."[157]

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146. Judge Farris wrote a one-justice majority opinion.

147. Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992), *cert. denied*, 121 L. Ed. 2d 582 (1992).

148. *Id.* at 926 (citing Robbins v. Christianson, 904 F.2d 492, 494 (9th Cir. 1990)).

149. *Id.*

150. 904 F.2d 492 (9th Cir. 1990).

151. *Zal*, 968 F.2d at 926.

152. *Id.*

153. *Id.*

154. *Id.* at 926-27. 28 U.S.C. § 2554(a) (1974) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

155. 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

156. *Zal*, 968 F.2d at 927.

157. *Levine*, 764 F.2d at 595.

Third, although many jurisdictions have adopted the collateral bar rule, the Ninth Circuit acknowledged that California had explicitly elected not to follow that rule.[158] The court cited *In re Berry*[159] for this proposition and noted that, under *Berry*, "a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished."[160] And, under *Berry*, an order that is unconstitutional is an order without jurisdiction.[161]

The court explained that while *Berry* was a California procedural standard that allowed Zal to present his constitutional claim, the analysis was properly concluded using substantive federal standards.[162]

2. *The First Amendment Claim*

The court first turned to Zal's First Amendment claim.[163] Zal argued that the trial court's *in limine* orders were prior restraints on his First Amendment free speech rights.[164] As prior restraints, Zal claimed the orders had to be analyzed under the "clear and present danger" standard.[165]

The Ninth Circuit rejected this argument.[166] It concluded that the standards set forth in *Gentile v. State Bar of Nevada*[167] and *Sacher v. United States*[168] were appropriate to measure at-

158. *Zal*, 968 F.2d at 927. *See supra* notes 41-53 and accompanying text for an explanation of the collateral bar rule.

159. 436 P.2d 273 (Cal. 1968). *See supra* notes 54-63 and accompanying text for a discussion of *Berry*.

160. *Zal*, 968 F.2d at 927 (citing *Berry*, 436 P.2d at 281).

161. *Id.*

162. *Id.* at 927 ("There is only one *substantive* standard - that prescribed by federal law.").

163. *Id.*

164. *Zal*, 968 F.2d at 928.

165. *Id.*

166. *Id.* at 928.

167. 111 S. Ct. 2720 (1991). *See supra* note 139 for a discussion of *Gentile*.

168. 343 U.S. 1 (1952). In *Sacher*, an attorney was cited for contempt of court for repeatedly provoking useless bickering and insulting the trial court judge during a long trial. *Id.* at 4. Instead of issuing contempt citations at the time of the attorney's contemptuous behavior, the judge issued contempt citations at the end of the trial. *Id.* at 3. The attorney did not dispute the fact that the judge could have properly held him in contempt at the time his contemptuous behavior occurred, but he believed that, at the time the trial had ended, the judge's summary contempt power had expired. *Id.* at 7.

torneys' rights in the courtroom.[169] *Sacher* expressed that the zeal of counsel is important, but can disrupt the judicial process:

> unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice. . . . Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. *But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge - his right is only respectfully to preserve his point for appeal.* During trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.[170]

Gentile reaffirmed *Sacher*'s holding that if a ruling is adverse, counsel can only preserve the point for appeal.[171] *Gentile* additionally determined that "lawyers representing clients in pending cases could be regulated under a less demanding standard than the 'clear and present danger' test established for regulation of the press in *Nebraska Press Ass'n v. Stuart.*"[172] Further, *Gentile* stated in dicta that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[173]

Using these guidelines from *Sacher* and *Gentile*, the Ninth Circuit determined that the trial court's *in limine* orders did not violate Zal's First Amendment rights because they did not infringe on his right to preserve his or his clients' right to appeal.[174] Additionally, the court noted that Zal could have prop-

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The Court rejected the attorney's argument and held that summary contempt citations can properly be issued after a trial has ended. *Id.* at 11.

169. *Zal*, 968 F.2d at 928.

170. *Id.* at 928 (quoting *Sacher*, 343 U.S. at 8-9) (emphasis in *Zal*).

171. *Zal*, 968 F.2d at 928 (citing *Gentile*, 111 S. Ct. at 2743).

172. *Gentile*, 111 S. Ct. at 2744 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 543 (1976)).

173. *Zal*, 968 F.2d at 928 (quoting *Gentile*, 111 S. Ct. at 2743).

174. *Id.*

erly filed for an interlocutory appeal after the *in limine* order was issued.[175]

The court next addressed arguments presented in Judge Noonan's dissent. Judge Noonan argued that the United States Supreme Court case *In re Little*[176] applied First Amendment protection to broad and even obscene language in the courtroom.[177] In rejecting this argument, the court observed that *Little* was inapposite because it involved the violation of a general contempt statute whereas Zal violated a specific court order.[178]

The court also rejected Judge Noonan's "interpretation"[179] of *Sacher* which required that an attorney "make impossible an orderly and speedy discharge of the case" to be held in contempt.[180] The court declared that this requirement was a misinterpretation and reiterated that *Sacher* held that an attorney's only right is to preserve his point for appeal. The court additionally noted that the holding in *Sacher*[181] was not altered by *Berry* and its progeny.[182] It explained that *Berry* "provides only that a contempt citation is void if its underlying order is unconstitutional."[183]

Finally, the court rejected Judge Noonan's argument that Zal should not be punished for questions that did not contain words banned in the *in limine* order.[184] The court found that Zal had intentionally violated the trial court's orders excluding defenses.[185] It concluded that Zal "knew this" and therefore did not raise an argument about non-included words in his briefs or

175. *Id.*

176. 404 U.S. 553 (1972) (per curiam). *See infra* note 218 for a discussion of *Little*.

177. *Zal*, 968 F.2d at 935.

178. *Id.*

179. Although Judge Noonan had pointed out that the defendant in *Sacher* did whatever he could to make impossible a speedy and orderly dispatch of the case, he did not appear to argue that *Sacher* was inapplicable because Zal had not acted similarly. *See Zal*, 968 F.2d at 935. Nevertheless, the court interpreted Judge Noonan's discussion of *Sacher* accordingly. *Id.* at 928.

180. *Id.* at 928.

181. Here the court additionally noted that the holding in *Sacher* was reaffirmed by *Gentile*. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 929.

185. *Id.*

oral arguments.[186]

In closing its First Amendment analysis, the court concluded: "[t]he only question before us is who controls the trial. Under our current system, the trial judge is charged with preserving the decorum that permits a reasoned resolution of issues. Zealous counsel cannot flout that authority behind the shield of the First Amendment. We hold nothing more."[187]

3. *Zal's Other Claims*

Zal also argued that the contempt citations issued against him violated his clients' Sixth Amendment rights to trial by jury and effective assistance of counsel, and his clients' Fourteenth Amendment right to due process of law.[188] The court concluded that Zal had standing to assert these claims because Zal had alleged "a personal injury fairly traceable to the defendants' allegedly unlawful conduct and likely to be redressed by the requested relief."[189]

In addressing Zal's Sixth and Fourteenth Amendment claims, the court only analyzed the impact of the defenses which were excluded *in limine*.[190] It determined that Zal's clients' rights could not have been violated by defense exclusion unless the court erred "as a matter of *federal law*" in excluding any of the defenses.[191] The court held that Zal had no right to present evidence simply to bring out his clients' reasons for their actions.[192]

The only defense that the court analyzed individually was the necessity defense.[193] It found that Zal's clients could not invoke the necessity defense[194] because they were not seeking to

186. *Id.*

187. *Zal*, 968 F.2d at 929.

188. *Id.*

189. *Id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).

190. *Zal*, 968 F.2d at 929 ("[T]he evidentiary orders did not violate Zal's clients' Sixth and Fourteenth Amendnment rights unless the court erred . . . in excluding those defenses.").

191. *Id.*

192. *Id.*

193. *See id.*

194. According to the Ninth Circuit, the necessity defense requires that "(1) they

avert a legally recognized harm.[195] The court emphasized further that Zal's clients had legal alternatives available to them that did not involve violating the law.[196] These alternatives included marching, distributing literature and telephone solicitation.[197]

Although Zal also presented constitutional claims on behalf of the unborn, the court did not analyze them.[198] Instead, it simply stated that it would address his non-First Amendment claims "without deciding whether a fetus has Fifth and Fourteenth Amendment rights."[199] Accordingly, the Ninth Circuit affirmed all of Zal's contempt citations.[200]

B. THE CONCURRENCE[201]

Judge Trott concurred with the majority opinion, but wanted to expand on the First Amendment "right" of an attorney or his client to speak freely in the courtroom, and the Sixth Amendment "right" to jury nullification[202] of the law.[203]

1. *First Amendment Issues*

Judge Trott rejected Zal's argument that attorneys retain their First Amendment rights in the courtroom.[204] He concluded that the cases which provided that "attorneys . . . do not lose their constitutional rights at the courthouse door"[205] were inap-

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were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law." *Zal*, 968 F.2d at 929 (citing United States v. Schoon, 955 F.2d 1238, 1239-40 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2980 (1992)).

195. *Zal*, 968 F.2d at 929.

196. *Id.*

197. *Id.* (citing Northeast Women's Center v. McMonagle, 868 F.2d 1342, 1350-52 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989)).

198. *See Zal*, 968 F.2d at 929.

199. *Id.*

200. *Id.* at 925.

201. Judge Trott authored a separate concurring opinion.

202. Jury nullification has been described by the United States Supreme Court as "the naked power to return a verdict of 'not guilty' even when acquittal is inconsistent with the law given by the court." Dunn v. United States, 284 U.S. 390, 393-94 (1932).

203. *Zal*, 968 F.2d at 930.

204. *Id.* at 931.

205. *See, e.g.*, Levine v. United States Dist. Ct., 764 F.2d 590, 595 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986); *In re* Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979).

plicable, reasoning that those cases involved out-of-court communications with the media as opposed to courtroom speech.[206]

Judge Trott noted that attorneys have no independent First Amendment rights in the courtroom but only have the rights derived from their clients' trial rights.[207] Judge Trott reiterated that under *Gentile* and *Sacher*, an attorney's rights in a courtroom are "extremely circumscribed" and that an attorney could only preserve his point for appeal.[208] However, he suggested that *Gentile* and *Sacher* were potentially misleading.[209] Although they discussed attorneys' First Amendment rights, they were actually discussing the rights derived through clients which allowed attorneys to speak.[210] That, Judge Trott explained, "is why *Gentile* uses quotation marks when it discusses a lawyer's right to free speech."[211] Accordingly, he concluded, under *Sacher* and *Gentile*, an attorney's only First Amendment remedy when faced with an adverse judicial order is his *objection* to the order.[212]

Judge Trott further argued that traditional First Amendment analysis distinguishes between the types of forums in which speakers seek to express their rights.[213] Judge Trott

206. *Zal*, 968 F.2d at 931.
207. *Id.* at 931-32.
208. *Id.* at 931.
209. *Id.*
210. *Id.*
211. *Zal*, 968 F.2d at 931.
212. *Id.*
213. *Id.* at 932. Traditional public forums include streets, parks and places which "have immemorially been held in trust for the use of the public, and . . . have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939). In such traditional public fora, the state has no right to exclude all speech and can only enforce content-based exclusion of speech if the exclusion is narrowly drawn and serves a compelling state interest. Carey v. Brown, 447 U.S. 455, 461 (1980). The second type of forum includes public property "which the State has opened for use by the public as a place for expressive activity." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). This type of forum is called a "designated open forum" and is subject to the same standards of first amendment regulation as a traditional public forum. *Id.* at 46. The third type of forum is the "non-public forum" which includes publicly-owned facilities which have been "dedicated to use for either communicative or non-communicative purposes but have never been designated for indiscriminate expressive activity by the general public." Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1376 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 253 (1990) (citing United States Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 131 (1981)). In this type of forum, the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on

pointed out that the courtroom was not technically a public forum.[214] Although the courtroom met the "public forum" criteria of being a place traditionally devoted to assembly and debate, it never had been devoted to "free debate."[215] Traditionally, the courtroom had only been open to debate within the confines set by the trial judge and the law.[216] Since Zal had no independent free speech rights in the courtroom, and his clients had no right to use words forbidden by the trial judge, neither was protected by the First Amendment.[217]

Concluding his First Amendment analysis, Judge Trott rejected Judge Noonan's assertion that broad and even obscene language in the courtroom is constitutionally protected.[218] Judge Trott determined that the case Judge Noonan cited for that proposition was inapplicable, reasoning that its decision was based upon Fourteenth Amendment due process rights rather than First Amendment free speech rights.[219]

2. *Jury Nullification*

Judge Trott also discussed Zal's Sixth Amendment jury trial and assistance of counsel claims.[220] Zal had argued that his clients had a right to explain their actions (through Zal) to the jury.[221] Both Judge Trott and Judge Noonan found that each of Zal's clients actually had been given one chance to explain why they had blocked the abortion clinic doors.[222] Although Judge Trott noted that Zal's clients had been allowed to explain, he disagreed with Judge Noonan's opinion that this explanation

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speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Greenburgh*, 453 U.S. at 131.

214. *Zal*, 968 F.2d at 932.

215. *Id.*

216. *Id.*

217. *Id.* at 933.

218. *Id.* at 932.

219. *Id.* The case was *In re* Little, 404 U.S. 553 (1972), which reversed a summary contempt conviction of a *pro se* defendant who had argued in closing that he was a political prisoner and the trial court judge was biased against him. (He also called the judge a 'M-____ F-____,' but that expletive was not part of the case). *Zal*, 968 F.2d at 932.

220. *Id.* at 930.

221. *Id.*

222. *Id.* at 930-31.

was a "right."[223]

Judge Trott was convinced that an attorney has no right to present evidence that is irrelevant to an element of a crime or a legal defense.[224] He described the "right" to explain oneself to the jury as the right to jury nullification.[225] Further, he described jury nullification as an "illegitimate" and "fundamentally lawless" act.[226] Judge Trott asserted that "[i]f society deems important certain 'explanations,' those explanations explicitly can become part of the law. But until then, we should not allow litigants to slip through the back door when the front door is locked."[227]

C. The Concurrence and Dissent[228]

Judge Noonan agreed that thirteen of Zal's contempt citations should be upheld, but he disagreed with the majority as to the remaining seven citations.[229] Additionally, Judge Noonan agreed with Judge Trott that Zal's First Amendment rights should be measured by his clients' trial rights.[230] Further, he agreed that jury nullification was not a right, but expressed that Zal did have a right to explain his clients' actions.[231] Finally, Judge Noonan expressed that, under *Berry*, Zal had not acted unprofessionally in defying the trial court's *in limine* orders.[232]

1. *Separating the Contempt Citations*

Before addressing constitutional issues, Judge Noonan disagreed with the majority's view that Zal's questions presented the excluded defenses.[233] In Judge Noonan's opinion, Zal only violated the word-ban.[234] Thus, he stated that since Zal only ac-

223. *Id.* at 930.
224. *Id.*
225. *Id. See supra* note 202 for a definition of jury nullification.
226. *Zal*, 968 F.2d at 930.
227. *Id.*
228. Judge Noonan concurred in the result in part and dissented in part.
229. *Zal*, 968 F.2d at 933.
230. *Id.* at 935.
231. *Id.* at 933.
232. *Id.* at 936.
233. *Zal*, 968 F.2d at 933.
234. *Id.*

tually used banned words thirteen times, the other citations should be reversed.[235] If the trial court chose to form its *in limine* motion in terms of specific words, Judge Noonan noted, it should not be able to punish by analogy.[236]

2. *First Amendment Issues*

Judge Noonan's dissent neither measured nor determined an attorney's own First Amendment rights, but concluded that when Zal used the banned words, he was acting on behalf of his clients.[237] Therefore, Judge Noonan believed Zal's First Amendment rights in this case should be measured by his client's rights.[238]

Citing *In re Little*[239] and *Eaton v. City of Tulsa*,[240] Judge Noonan stated that vehement and even obscene language in the courtroom was traditionally protected by the First Amendment.[241] The test used in those cases to determine whether speech was constitutionally protected in the courtroom was the "imminent threat to the administration of justice" test.[242] Judge Noonan observed that the test had upheld the constitutionality of vehement words *unconnected* to the substance of a litigant's case. He reasoned that it followed that language like Zal's which was *connected* to the case being tried would also be protected by the First Amendment.[243]

However, Judge Noonan conceded, the *Gentile* dicta which "circumscribed" attorney speech was likely a standard the United States Supreme Court would use today.[244] Thus, Judge Noonan agreed that the *in limine* order did not violate Zal's First Amendment rights because "[i]t was within the discretion of the court to prevent what it thought to be unnecessary recur-

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235. *Id.*
236. *Id.*
237. *Zal*, 968 F.2d at 935.
238. *Id.*
239. 404 U.S. 553 (1972). *See supra* note 219 for a discussion of *Little*.
240. 415 U.S. 697, 698 (1974) (reversing a defendant's contempt citation for use of the phrase "chicken shit" during cross examination).
241. *Zal*, 968 F.2d at 935.
242. *Id.*
243. *Id.*
244. *Id.*

rence to this [abortion] theme."[245]

3. *Zal's Other Claims*

Judge Noonan agreed with Judge Trott that jury nullification was not a right.[246] However, he observed that Zal did have a right to explain his clients' actions.[247] The right to explain is essential to separating humans from subhumans even if such explanation does not present a legally recognized defense.[248] But, Zal's clients were given one chance to explain.[249] So Judge Noonan conceded that Zal had to yield to the trial court judge's order.[250]

4. *The Berry Rule*

Judge Noonan argued that Zal had the right to violate the *in limine* order and challenge the contempt citations.[251] *In re Berry*[252] states that, under California law, a contempt citation is void if it is based on an unconstitutional court order.[253] Further, under California procedure, if an attorney is willing to take the risk, he can ignore the void order and be vindicated.[254] Thus, the holdings of *Sacher* and *Gentile* that an attorney's only right is to preserve an issue for appeal do not contemplate a system like that in California under *Berry*.[255] Additionally, Judge Noonan stated that Zal had reason to challenge the *in limine* orders as

245. *Zal*, 968 F.2d at 936.
246. *Id.* at 933.
247. *Id.* at 934. Judge Noonan explained:

> As counsel for those accused of a crime, Zal had an obligation to them to present their defense and to present it not half-heartedly, not mechanically, but zealously. . . . Zal, accordingly, had the right to bring out the reason for his clients' actions. Even if the reason . . . did not constitute a good defense under applicable law, an explanation allowed the jury to see his clients not as monsters mindlessly invading the rights of other[s], but as human beings.

248. *Id.*
249. *Zal*, 968 F.2d at 934.
250. *Id.*
251. *Id.* at 935.
252. 436 P.2d 273 (Cal. 1968) (en banc).
253. *Zal*, 968 F.2d at 935 (citing *Berry*, 436 P.2d at 280).
254. *Id.*
255. *Id.* at 935.

overbroad.[256] Under California law, Judge Noonan declared that Zal did not act unprofessionally in resisting the *in limine* orders.[257] While Zal had a right to disobey those orders, Judge Noonan conceded that Zal's constitutional challenges had failed.[258]

V. CRITIQUE

Zal's case raised the issue of whether, in an action for criminal trespass at an abortion clinic, an *in limine* ban of specific words relating to, *inter alia*, abortion, was constitutional.[259] While the Ninth Circuit held that the ban passed constitutional muster, it failed to perform a thorough substantive analysis of the ban itself.[260] The court justified its limited analysis by relying on *Sacher* procedural guidelines that are inapplicable in California under *Berry*, and *Gentile* substantive guidelines which are necessarily incomplete.[261]

By sanctioning the use of *in limine* word-bans without providing guidelines for analyzing them, the court has opened the door for unfettered judicial discretion.[262] Under *Zal*, there is no need for judges to determine that banned words would be prejudicial or irrelevant in all possible contexts. In fact, under *Zal*, judges are not required to provide *any* reason for excluding certain words. *Zal* thus effectively gives a trial judge complete discretion to censor attorney speech in the courtroom.

Undoubtedly, judges may need to exclude certain evidence from trials to preserve both the rights of the parties and courtroom decorum.[263] However, since words are the tools of a trial attorney, unfettered censorship could prevent an attorney from zealously advocating his client's case as well as encroach on an attorney's own First Amendment rights. *Zal* has given trial court judges a new and virtually unlimited power. Without

256. *Id.* at 936.
257. *Id.*
258. *Id.*
259. Zal v. Steppe, 968 F.2d 924, 925 (9th Cir. 1992), *cert. denied*, 121 L. Ed. 2d 582 (1992).
260. *See Zal*, 968 F.2d at 927-29.
261. *See infra* notes 264-77 and accompanying text.
262. *See infra* notes 296-305 and accompanying text.
263. *See infra* note 292 and accompanying text.

guidelines for the use of this power, judicial discretion may become judicial abuse.

A. *In Re Berry* - The California Law?

Zal claimed that the *in limine* word-ban violated his First Amendment free speech rights.[264] He filed a writ of habeas corpus challenging the constitutionality of the trial court's *in limine* word-ban.[265] Zal had a right to do so under *Berry*.[266]

Berry provides for a substantive constitutional analysis of a court order after the order has been violated.[267] If the order is unconstitutional, the contemnor's disobedience of that order will be excused.[268] Thus, it is the underlying order, not the contemnor's defiance of the order, which must be analyzed.[269]

The Ninth Circuit, however, failed to provide an in-depth First Amendment analysis of the trial court's evidentiary orders.[270] Instead, the Ninth Circuit analyzed Zal's *reaction* to the orders, specifically, his behavior in court.[271] The Ninth Circuit, by relying on *Sacher* and *Gentile*, simply stated that Zal would not be protected by the First Amendment if he disobeyed the orders.[272] By using *Sacher* and *Gentile* in this manner, the court effectively imposed the kind of "collateral bar" *Berry* forbids.[273]

The court used *Berry* inconsistently in its opinion. It specifically cites *Berry* to exercise jurisdiction over Zal's claims.[274] It directly quotes language stating that a person may disobey a court order and then challenge that order at the contempt pro-

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264. *Zal*, 968 F.2d at 925.
265. *Id.*
266. *See Berry*, 436 P.2d at 279.
267. *Id.*
268. *Id.* at 281.
269. *See Berry*, 436 P.2d at 282.
270. *See Zal*, 968 F.2d at 927-29.
271. *Id.*
272. *Id.* at 929 ("Zealous counsel cannot flout that authority behind the shield of the First Amendment.").
273. *See Berry*, 436 P.2d at 282.
274. *Zal*, 968 F.2d at 927 ("[A]lthough a state *may* adopt the collateral bar rule, it need not do so as a matter of federal law. Since California has explicitly elected not to do so, *see Berry*, . . . we can address the merits of Zal's First Amendment claim.").

ceedings.[275] However, in ruling on Zal's First Amendment claim, the court ignored the *Berry* rule. Instead, it cited *Sacher* (a federal case) to hold that Zal's only right was to respectfully preserve his point for appeal.[276] This holding is wholly inconsistent with California law under *Berry*.[277] In fact, reconciling these two rules would seem to be impossible.

B. INAPPLICABILITY OF *SACHER*

The court relied on *Sacher* for the proposition that an attorney may not resist a court order but may only "respectfully . . . preserve his point for appeal."[278] Close analysis of *Sacher* reveals that the challenge the attorney made in *Sacher* was *purely procedural*: whether contempt citations could be issued *summarily*.[279] Zal's challenge, however, is a purely *substantive* one.[280] As the portion of *Sacher* the Ninth Circuit relied upon does not address substantive constitutional law, and its procedural analysis does not apply to attorneys who defy court orders in California under *Berry*, it is inapplicable to Zal's challenge.

C. *GENTILE* HAS LIMITED APPLICABILITY

Gentile reiterated *Sacher*'s inapplicable procedural rule that a court ruling could not be resisted beyond the point necessary to preserve a claim for appeal.[281] Additionally, *Gentile* determined that an attorney could be regulated under a less demanding standard than the clear and present danger test.[282] Finally, *Gentile* dicta stated that an attorney's free speech rights

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275. *Id.*

276. *Id.* at 928.

277. *See Berry*, 436 P.2d at 281 ("[A] person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience.").

278. *Zal*, 968 F.2d at 928 (quoting *Sacher*, 343 U.S. at 9).

279. *Sacher*, 343 U.S. at 5-7 ("[T]he importance of clarifying the permissible practice [of how contempt citations can properly be issued] in such cases persuaded us to grant certiorari, limited to one question of procedure on which there was disagreement in the court below.").

280. *Zal*, 968 F.2d at 925 (Zal did not challenge any of the procedural methods used by the trial court).

281. *Id.* at 928.

282. *Id.*

in the courtroom were extremely circumscribed.[283]

The Ninth Circuit's application of *Gentile* seems to lead to the conclusion that attorneys are *without* constitutional rights in the courtroom. However, *Gentile*, in fact, rejected arguments that attorneys lacked constitutional rights as participants in the judiciary process.[284] Substantively, *Gentile* warned against blanket rules restricting attorneys' First Amendment rights.[285] Additionally, *Gentile* counseled that *any* rules restricting those rights warrant careful analysis.[286] Specifically, *Gentile* held only that the "substantial likelihood of material prejudice" standard properly balanced government interests and attorneys' First Amendment rights.[287]

Although *Gentile* dicta states that attorneys' courtroom rights are circumscribed, its holding and rationale lead to the conclusion that attorneys are afforded some (albeit limited) First Amendment protection in the courtroom.

D. What Remains After *Sacher* and *Gentile* are Offset by *Berry*

Sacher and *Berry* are polar opposites and cannot exist in the same jurisdiction. *Berry* is the California rule and should apply to all California cases.[288]

After *Sacher* is eliminated from *Gentile*, *Gentile* can be reconciled with *Berry*. *Berry* requires a substantive analysis and *Gentile* allows that analysis to be performed utilizing "less demanding" or even "extremely circumscribed" constitutional standards. Since both *Berry* and *Gentile* provide for *some* substantive analysis, the court had a duty to perform this analysis.

As *Gentile* did not specifically provide a substantive test to

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283. *Gentile*, 111 S. Ct. at 2743.

284. *Id.* at 2726.

285. *Id.* at 2735.

286. *Id.* at 2726 ("[I]n cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' ").

287. *Gentile*, 111 S. Ct. at 2745.

288. *See Berry*, 436 P.2d at 281-82.

balance attorneys' free speech rights in the courtroom against competing interests, the court had two options. It could have adopted a test that regulated attorneys' speech in a different context, such as *Gentile's* "less demanding" "substantial likelihood of material prejudice" test.[289] Alternatively, it could have opted to devise its own balancing test.[290] Regardless of which standard it selected, the court needed to apply the substantive standard to the *in limine* orders themselves (not the defiance of those orders).

Instead, the *Zal* court failed to perform even a minimal substantive analysis. By failing to adequately analyze the *in limine* orders, the Ninth Circuit has effectively imposed an impermissible collateral bar on Zal's First Amendment claim. Furthermore, by failing to analyze the word-ban, the Ninth Circuit has effectively sanctioned future bans without providing guidelines for their use.

E. THE *IN LIMINE* WORD-BAN

In *Zal*, the Ninth Circuit focused on the need to preserve courtroom decorum in order to protect parties' trial rights.[291] Although the need to preserve courtroom decorum is undoubtedly important,[292] the Ninth Circuit's decision is problematic for two reasons: (1) it failed to provide guidelines for granting or deny-

289. *Gentile*, 111 S. Ct. at 2745.

290. *See supra* note 118 and accompanying text for some traditional factors considered in a balancing test.

291. *See Zal*, 968 F.2d at 929 ("The *only* question before us is who controls the trial. Under our current system, the trial judge is charged with preserving the decorum that permits a reasoned resolution of issues. Zealous counsel cannot flout that authority behind the shield of the First Amendment. We hold nothing more.") (emphasis original).

292. *See Sacher*, 343 U.S. at 8 ("[S]trife can pervert . . . the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice with power to curb both adversaries."); United States v. Young, 470 U.S. 1, 10 (1985) ("We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; the judge is not a mere moderator, but is the governor of the trial for assuring its proper conduct."); Scott v. Anderson, 405 So.2d 228, 231 (Fla. Dist. Ct. App. 1981) ("[C]ourts have continuously had the authority and power to maintain order in their courtrooms and to assure litigants of a fair trial."); People v. Pennisi, 563 N.Y.S.2d 612, 615 (Sup. Ct. 1990) ("[T]here is clearly an inherent discretionary power in our courts to preserve order and decorum in our courtrooms and in the pursuance of such power, to protect the rights of all parties and witnesses and generally to further the administration of justice . . . .").

ing word-bans;[293] and (2) it failed to perform a thorough constitutional analysis of such bans.[294] Because the Ninth Circuit failed to express any sensitivity to the these issues, the decision in *Zal* is troubling.

1. *The Potential for Abuse of Judicial Discretion*

Trial court judges are given great discretion to determine whether evidence should be excluded from trial.[295] This discretion, however, is not unlimited.[296] Commentators emphasize that the potential for abuse of discretion when excluding "irrelevant"[297] or "prejudicial"[298] evidence is particularly high.[299] When

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293. The *Zal* court stated "the record does not contain the trial court's orders, which apparently were made orally . . . . " *Zal*, 968 F.2d at 925. Since the court approved the trial court's orders without *any* showing of findings that the banned words were prejudicial or irrelevant, it has implied that another court may do the same.

294. *See Zal*, 968 F.2d at 927-29.

295. *See* United States v. Kahn, 472 F.2d 272, 280 (2d Cir. 1973), *cert. denied*, 411 U.S. 982 (1973); Krist v. Eli Lilly & Co., 897 F.2d 293, 298 (7th Cir. 1990); Malave-Felix v. Volvo Car Corp., 946 F.2d 967, 973 (1st Cir. 1991).

296. Korsak v. Atlas Hotels, Inc., 2 Cal. App. 4th 1516, 1523 (1992) ("[T]he discretion to admit or exclude evidence is not unlimited. The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion which is subject to the limitations of legal principles . . . .").

297. CAL. EVID. CODE § 210 (Deering 1986) describes relevant evidence as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Id.*

298. Arguably, CAL. EVID. CODE § 352 (Deering 1986) governs both prejudicial and irrelevant evidence. It provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *Id.* Although the trial court judge in *Zal* exercised his *inherent* power to issue orders *in limine*, the record suggests that his decision was based on California Evidence Code sections 210 and 352. *See supra* note 21 (the prosecutor asked that words be excluded in accordance with sections 210 and 352).

299. *See* Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 61 (1984) ("Rule 403's grant of discretion has been taken by the courts as license for an unprincipled, ad hoc approach to each case. Most courts are content to conclude evidence has probative value or is unfairly prejudicial without considering the meaning of those terms.") (Rule 403 is the federal equivalent to CAL. PENAL CODE §352). One early state case discussed the problems inherent in judicial discretion:

> When the chancellor is bidden to exercise his discretion . . . how is he to judge? Is he to make a law? Is he to formulate a rule governing such cases? Then he becomes the legislature . . . . And is one chancellor to make one rule and another chancellor a different rule? Then we live under a government

such discretion is not balanced against a duty to explain *why* the judge acted as he or she did, a judge may fail to carefully consider the factors of each case,[300] and may grant orders arbitrarily, aimlessly or reflexively.[301] One commentator has explained the situation of unbridled discretion as follows:

> Unbridled discretion leads to unpredictability, inequality of treatment and the elevation of individual whim over principles validated by experience as well as by the popular will. The need to limit discretion in the application of laws of evidence is particularly great. Leaving the resolution of those issues to unrestrained discretion does not simplify the law; it merely shrouds the law in a cloud of arbitrariness.[302]

Another commentator further argues that abuse of judicial discretion is rarely vindicated by appellate courts:

> Some of the most conspicuous abuses of . . . discretion are to be found in appellate opinions. Too often these opinions treat [the rule] as a grant of unfettered discretion to the trial judge . . . rather than a rule requiring a careful balancing of factors so as to check discretion.[303]

The possibility for abuse of discretion increases where word-bans are concerned. Judges are generally experienced in determining how physical or testamentary evidence can be used. Thus, a judge can easily anticipate whether such evidence will be irrelevant or prejudicial.

In contrast, mere words, taken out of context, have *not* tra-

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of men, not laws . . . .

Hubbard v. Hubbard, 58 A. 969, 970 (Vt. 1904).

300. *See* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 54 WASH. L. REV. 497, 500-01 (1983) ("[M]ost cases utterly fail to conduct the required balancing test, or purporting to balance, give no hint as to how or why a particular balance was struck. The appellate courts commonly excuse these lapses on the grounds that Rule 403 grants courts discretion . . . .").

301. *See generally* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971). A partial goal of the Rosenberg article was to "help judges approach the problem of discretion reflectively and . . . fully in order to avoid using its power reflexively and aimlessly." *Id.* at 636.

302. Gold, *supra* note 300, at 500.

303. David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1163 (1992).

ditionally been viewed as "evidence."[304] In most cases, a judge would have difficulty anticipating how a specific word would be used. For example, in Zal's case, it is unlikely that the trial court judge considered *all* possible uses of the *fifty* excluded words and phrases. Accordingly, it would be difficult to determine whether a word was "prejudicial" or "irrelevant" unless the word was *per se* inflammatory, or lacked *any* legitimate use. For example, some of the phrases excluded in *Zal,* such as "abortion," "fetus," and "unborn," were not *per se* inflammatory, and were clearly relevant to Zal's case.[305] Thus, taken together, the lack of guidelines governing word-bans and the difficulty of predicting how words will be used has increased potential for the abuse of judicial discretion.

2. *How Potential Abuse in Granting In Limine Word-Bans Could Conflict with Constitutional Rights*

In a situation where a judge is exercising discretion with respect to an attorney's speech, an abuse of this discretion could potentially abridge an attorney's First Amendment rights. Because this threat exists, a more exacting analysis than the Ninth Circuit provided to analyze *in limine* word-bans should be required.[306]

Regardless of whether or not an *in limine* word-ban is technically a prior restraint, it is an order that restricts words before they are spoken.[307] Accordingly, it is *analogous* to a prior restraint and thus requires close scrutiny to insure that it does not improperly intrude on First Amendment rights.[308]

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304. In fact, CAL. EVID. CODE § 140 (Deering 1986) describes evidence as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

305. The trial court judge himself questioned potential jurors about their feelings on abortion. *See supra* notes 23-24 and accompanying text. This leads to the conclusion that the judge thought that abortion was a relevant subject.

306. *See* Speiser v. Randall, 357 U.S. 513, 525 (1958) ("As cases decided by this court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied.") (citations omitted).

307. *See supra* notes 105-15 and accompanying text for a definition and discussion of prior restraints.

308. *See In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979). In discussing an order that prohibited an attorney and his clients from disclosing information obtained through dis-

The Ninth Circuit's failure to provide guidelines governing the proper use of *in limine* word-bans effectively permits trial court judges to censor attorney speech in the courtroom.[309] Censorship is one of the areas that First Amendment doctrine most clearly prohibits,[310] and censoring specific words an attorney may use in the courtroom is particularly dangerous. Specifically, censorship in the courtroom may impair an attorney's ability to zealously represent his or her client.[311] An *in limine* word-ban may thus run afoul of a client's Sixth Amendment right to effective assistance of counsel in addition to resulting in the suppression of an attorney's own First Amendment rights.

Zal's own use of the words banned by the trial court judge probably did not impair his clients' right to effective assistance of counsel.[312] Some of the banned words were arguably *per se*

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covery, the *Halkin* court determined that the "fact that the order poses many of the dangers of a prior restraint is sufficient to require close scrutiny of its impact on protected First Amendment expression." *Id.* at 186. *See also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH §4.04 (1984) (suggesting that one of the most important grounds for distinguishing prior restraints from subsequent punishment is the difficulty of knowing in advance what a given individual will say, thus running the risk that constitutionally protected speech will be forbidden).

309. *See Halkin*, 598 F.2d at 185 n.18 ("A judicial order restraining speech casts the judge in a role comparable to that of a censor."). Although most censorship cases involve the censorship of obscenity, at least one commentator has noted that censorship is not limited to that context. *See* Henry P. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 524 (1970) ("Nothing in the rationale of *Freedman* and its predecessors suggests that their principles are confined to the obscenity area."). Additionally, one United States Supreme Court case has noted that judges themselves can censor in an unconstitutional manner. Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) ("That a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered."). Further, another United States Supreme Court case has suggested that the fact that a censor has control over the forum is additionally dangerous. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use.").

310. *See* Freedman v. Maryland, 380 U.S. 51, 57 (1965) (suggesting that censorship is "fraught with danger and viewed with suspicion").

311. *See* Gallagher v. Municipal Ct., 192 P.2d 905, 913 (Cal. 1948) ("Attorneys must be given substantial freedom of expression in representing their clients. . . . An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his clients case."); Weiss v. Burr, 484 F.2d 973, 980 (9th Cir. 1973) ("A court cannot deprive attorneys of their liberty or property in order to avert perceived threats to the administration of justice if the court's action would unduly impair legitimate, nondisruptive advocacy.").

312. As one federal case counsels, "an attorney is not free to say literally anything and everything imaginable in a courtroom under the pretext of protecting his client's rights to a fair trial and fair representation." United States v. Cooper, 872 F.2d 1, 3 (1st Cir. 1989).

prejudicial.[313] For example, *baby killing*, *murder*, *assassin* are particularly graphic. Additionally, Zal used *innocuous* banned words in a potentially inflammatory manner when he asked witnesses if they knew that babies were saved from *abortions* on the day of the trespass, and whether a witness was an *unborn* baby himself at some time.[314] Accordingly, the judge in *Zal* could have held Zal in contempt for disorderly conduct.[315] Instead, Zal was cited for violating the *in limine* word-ban.[316] While the result (contempt) is the same in both cases, the fact that the *in limine* ban was the *reason* Zal was cited sets a dangerous precedent. The holding in Zal permits a judge to censor potentially innocuous words.

For example, it is possible that Zal could have used banned words in a manner that was neither irrelevant nor prejudicial. Additionally, words used in this manner might be necessary to effectively argue his clients' case. The word *abortion* provides the best example. The judge himself inferred that the word was relevant when he asked potential jurors if their feelings on that subject would prevent them from being impartial.[317] To put testimony into context, Zal could have asked a witness whether she knew where the abortion clinic was, or why she was at the abortion clinic. Surely, these questions would not be prejudicial.

Although the power of the trial court judge to exercise discretion to "control" the courtroom serves important interests, judges must be wary of exercising this discretion at the expense of constitutional rights.[318] The Ninth Circuit did not express any

313. *See supra* note 21 for the full list of banned words.

314. *Zal*, 968 F.2d at 926. *See supra* note 25 for a list of the questions Zal asked which contained banned words.

315. CAL. PENAL CODE § 166 (a) (Deering 1986) provides, in pertinent part, that a person may be held in criminal contempt for engaging in courtroom behavior that is "[d]isorderly, contemptuous, or insolent . . . directly tending to interrupt its proceedings or to impair the respect due to its authority."

316. *Zal*, 968 F.2d at 925 ("Zal . . . challenge[s] his state court contempt citations for violating the trial court's evidentiary orders."). *See supra* note 29 for relevant text from the contempt citation.

317. *See supra* notes 23-24 and accompanying text.

318. *See* Baldwin v. Redwood City, 540 F.2d 1360, 1367 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977) ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty."). A reasonable balance between the need for judicial control and an attorney's first amendment rights has been counseled by two New York state courts as follows:

> [W]hile it is the duty of a judge to preserve order and to in-

sensitivity to the possibility of abuse of judicial discretion. It failed to provide substantive guidelines to assist trial court judges in deciding whether to grant *in limine* word-bans, and thus effectively sanctioned unlimited discretion to censor attorney speech in the courtroom.

VI. CONCLUSION

In *Zal v. Steppe*,[319] the United States Court of Appeals for the Ninth Circuit held that a defense attorney who violated an *in limine* ban of specific words related to abortion could not seek refuge in his First Amendment free speech rights.[320] By concluding that the attorney was not protected by the First Amendment in this circumstance, the Ninth Circuit was able to avoid performing a thorough analysis of the constitutionality of the *in limine* word-ban itself. Consequently, the court has sanctioned word-bans without providing guidelines for when and how they should be granted. By leaving trial court judges with unfettered discretion to grant word-bans, *Zal* has effectively given them a license to censor attorneys' speech in the courtroom.

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> sure that justice is not obstructed, it nevertheless follows that any order or regulation imposed upon attorneys practicing before him, must be based upon factual conditions which leave no doubt that a continuance of the proscribed conduct will result in a disrespect for order and an impairment in the administration of justice. To this end, therefore, any such order or rule must have a reasonable or plausible basis, else this discretionary power is subject to being declared arbitrarily exercised.

Frankel v. Roberts, 567 N.Y.S.2d 1018, 1020 (App. Div. 1991) (quoting *In re* Peck v. Stone, 304 N.Y.S.2d 881, 884 (App. Div. 1969)).

319. Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992), *cert. denied*, 121 L. Ed. 2d 582 (1992).

320. *Id.* at 929.

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