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THE PUBLIC DEFENDER'S PIN: UNTANGLING FREE SPEECH REGULATION IN THE COURTROOM†

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ABSTRACT— Recent disputes in Ohio and Nevada about whether lawyers should be allowed to wear "Black Lives Matter" pins in open court expose a fault line in First Amendment law. Lower courts have generally been unsympathetic to lawyers who display political symbols in court. But it would go too far suggest that free speech has no relevance in courtrooms. This Essay argues for a way to strike a balance.

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I. A FIRST AMENDMENT FAULT LINE

On a Tuesday morning in September 2016, Erika Ballou, a deputy public defender in Clark County, Nevada, appeared with her client for a sentencing hearing in a Las Vegas courtroom.[1] She wore a black pin on her lapel. "Black Lives Matter," it said.[2] District Court Judge Douglas Herndon told her to either take it off or hand her case over to another attorney from the public defender's office.[3] Ballou refused and asked the judge to instead recuse himself from her cases. Her boss, Clark County Public Defender Phil Kohn, stood at her side and insisted she should be allowed to wear the pin.[4]

A few days earlier, the Las Vegas Police Protective Association, the main police union in the city, had written a letter to the chief judge of the district court complaining about defense attorneys wearing the pin in court.[5] Judge Herndon, who had been endorsed by the police union during his election campaigns,[6] said that he was simply asking that attorneys "leave any kind of political or opinion protest statements outside the courtroom. . . . Wear it in the hallway. Wear it in front of the courthouse."[7]

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[1] *See* Ken Ritter, *Defense Attorney Sparks 'Black Lives' Protest in Vegas Court*, ASSOCIATED PRESS (Sept. 20. 2016), http://bigstory.ap.org/article/f0812b206ffa4385ae31da44f05e7281/defense-attorney-sparks-black-lives-protest-vegas-court [https://perma.cc/5JS2-Q3LS]. A video of the court hearing is available. David Ferrara & Wesley Juhl, *'Black Lives Matter' Support Swells Among Las Vegas Defense Attorneys*, LAS VEGAS REVIEW-JOURNAL (Sept. 21, 2016, 9:23 PM), http://www.reviewjournal.com/news/las-vegas/black-lives-matter-support-swells-among-las-vegas-defense-attorneys [https://perma.cc/NWW2-MZMS].

[2] Ritter, *supra* note 1.

[3] Ferrara & Juhl, *supra* note 1.

[4] *Id.*

[5] Wesley Juhl & David Ferrara, *Controversy Over Defense Lawyer's Black Lives Matter Pin Delays Hearing*, LAS VEGAS REVIEW-JOURNAL (Sept. 20, 2016, 11:47 AM), http://www.reviewjournal.com/news/las-vegas/controversy-over-defense-lawyer-s-black-lives-matter-pin-delays-hearing [https://perma.cc/3PLT-YBUS].

[6] *See Voter Guide: Douglas W. Herndon*, LAS VEGAS REVIEW-JOURNAL, http://www.reviewjournal.com/voter-guide/candidates/douglas-w-herndon (presenting candidate-submitted information) [https://perma.cc/R79E-APAS].

[7] Ritter, *supra* note 1.

Ms. Ballou insisted that she was acting within her First Amendment rights and argued that she was unfairly being treated differently from Clark County prosecutors—who wear office-issued lapel pins—and uniformed court marshals, who had been allowed to wear black bands commemorating police killed in the line of duty.[8] Judge Herndon adjourned the sentencing hearing. Two days later, they reconvened. Ms. Ballou agreed to remove her pin. Instead, she wore a black arm band, and was flanked by nearly two dozen colleagues who wore both the arm bands and Black Lives Matter pins.[9]

Ms. Ballou was not the first. Earlier in 2016, Ohio defense attorney Andrea Burton settled a contempt of court case against her that began when she wore a Black Lives Matter pin to court.[10] She told journalists that, as part of the settlement, she agreed not to wear the pin inside the courtroom on the condition that police be prohibited from wearing black bands on their badges commemorating slain officers.[11] In that case, the judge told a television reporter, "[t]here's a difference between a flag, a pin from your church or the Eagles and having a pin that's on a political issue."[12]

The Black Lives Matter pin cases expose a fault line in First Amendment law. The Supreme Court has never fully resolved the question of whether speech *in court* is free speech for First Amendment purposes. The Court has found that lawyers may advertise their services to the public, subject to reasonable regulation.[13] And the Court has found that lawyers enjoy constitutional protection for out-of-court political speech critical of the legal system.[14] But these cases did not deal directly with attorney expression in the courtroom. Some lower courts have rejected claims that lawyers' communications in the courtroom enjoy any First Amendment protection at all.[15] But their reasoning has been muddled, and the judges have been divided. It is not clear how they would treat the specific facts that arose in Las Vegas.

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8 *Id.*

9 David Ferrara, *Lawyers Pack Courtroom in Support of 'Black Lives Matter' Movement*, LAS VEGAS REVIEW-JOURNAL (Sept. 22, 2016, 12:10 PM), http://www.reviewjournal.com/news/las-vegas/lawyers-pack-courtroom-support-black-lives-matter-movement [https://perma.cc/9PB9-Z73L].

10 Associated Press, *Las Vegas Lawyers Plan to Defy Judge, Wear Black Lives Matter Pin*, CBS NEWS (Sept. 21, 2016, 10:25 PM), http://www.cbsnews.com/news/las-vegas-lawyers-plan-to-defy-judge-wear-black-lives-matter-pins [https://perma.cc/94C8-YJCC].

11 *Id.*

12 *See* Amanda Smith, *Atty. Refuses to Remove Black Lives Matter Pin, Taken into Custody*, WKBN (July 22, 2016, 11:49 AM), http://wkbn.com/2016/07/22/attorney-jailed-for-refusing-to-take-off-black-lives-matter-button [https://perma.cc/8EVL-4M3W] (including video).

13 Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977).

14 Gentile v. State Bar of Nev., 501 U.S. 1030, 1032–33 (1991).

15 *See infra* notes 29–64 and accompanying text.

In this brief Essay, I outline the reasons why free speech in the courtroom remains somewhat uncharted territory in First Amendment law. Using the Las Vegas Black Lives Matter pin case as an example, I argue for a way to resolve the inherent tension between free speech and the need to maintain order and fairness in the court. Under my proposed solution, judges would be able to impose certain limitations on courtroom speech but could not engage in viewpoint discrimination. Judges should be especially cautious about imposing special restrictions on speech that they regard as more controversial. Instead, judges who are concerned about extraneous expression in their courtrooms need to hew carefully to a neutral approach, applicable to controversial symbols as well as seemingly innocuous speech.

II. THE TROUBLE WITH SPEECH IN THE COURTROOM

Perhaps the most famous Supreme Court case involving free speech in a courthouse is *Cohen v. California*.[16] In that 1971 case, the Supreme Court upheld the constitutional right of Paul Robert Cohen to wear "a jacket bearing the words 'Fuck the Draft'" in the corridor outside of a courtroom.[17] But while this free expression occurred in a courthouse, it did not force the Court to address judges' authority to restrict speech inside the courtroom. Moreover, the Supreme Court refused to treat Mr. Cohen's case as a question of courthouse decorum because he was punished under a broad statute that was applicable everywhere in California.[18]

The only direct guidance that the Supreme Court has offered about courtroom speech came in another case that, like Ms. Ballou's, originated in Las Vegas. In *Gentile v. State Bar of Nevada*, a 1991 case about lawyer free speech, the Supreme Court found that an attorney could not be sanctioned for publicly criticizing misconduct within the criminal justice system.[19] But the lawyer in that case made his critical statements at a press conference a few hours after his client was indicted.[20] Like Mr. Cohen, he did not make the statements in the courtroom. However, the *Gentile* Court did say, in dicta, that "in the courtroom itself, during a judicial proceeding, whatever right to

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[16] 403 U.S. 15 (1971).

[17] *Id.* at 16 (quoting the decision of the California Court of Appeals, 81 Cal. Rptr. 503, 505 (Cal. Ct. App. 1969)).

[18] *Id.* at 19.

[19] 501 U.S. 1030, 1034–35 (1991) (J. Kennedy, concurring) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct . . . . The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.").

[20] *Id.* at 1033 (J. Kennedy, concurring).

'free speech' an attorney has is extremely circumscribed."[21] The Court also held that states may generally restrict lawyer speech in public if there is "substantial likelihood of material prejudice" to a pending adjudication.[22] Therein lies the problem. Does "extremely circumscribed" mean that an attorney has no free speech rights in court at all? Or does it mean that a careful balance must be struck?

Other than the brief dicta in *Gentile*, the Supreme Court has never clearly explained how we should think about the courtroom as a context for speech. This is a problem because modern free speech law has become extensively focused on categorizing the nature of the forum in which speech occurs in order to determine if and how government may regulate it.[23] The Supreme Court has created three main categories of forums for free speech purposes: the public forum, the nonpublic forum, and the limited public forum, with the most confusion surrounding the "limited public forum."[24]

In very brief terms, free speech rights are at their apex in a traditional public forum, of which the National Mall is the ideal type.[25] By contrast, the government has more latitude to restrict speech in nonpublic fora, including on government property.[26] An obvious example would be a government office building, where public employees are supposed to conduct the regular work of government agencies. If protestors enter, say, a veterans' hospital and begin to shout slogans, the First Amendment does not prevent an official from ordering them to stop and forcibly removing them if necessary. Protestors could of course picket outside on the sidewalk, but they do not have a constitutional right to speak inside. This seems to be the logic behind Judge Herndon's statement that the pin could be worn in the hallway or outside the courthouse, but not inside the courtroom.

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[21] *Id.* at 1071.

[22] *Id.* at 1063.

[23] *See* Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 652 (2010) ("With so much hinging on the label, litigation routinely arises over whether a court should deem a particular location a public forum (where only content-neutral time, place, and manner restrictions are allowed) or a nonpublic forum (where a vast array of restrictions are allowed if they are viewpoint neutral and reasonable in light of the purpose of the forum)." (footnote omitted)); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1731–44 (1987) (tracing the development of the Court's distinction between public and nonpublic fora).

[24] *See* Caplan, *supra* note 22, at 654 (discussing the Court's shifting use of the term). The taxonomy can become more complicated, because a public forum can come in at least two varieties. It can be a "traditional public forum," which has traditionally been held in trust for public use, or it can be a "designated public forum" that the government intentionally opens for that purpose even if it is not traditionally considered to be a public forum. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015).

[25] ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 959 (D.C. Cir. 1995) (Ginsburg, J., concurring in part and dissenting in part).

[26] *See* Caplan, *supra* note 22, at 651.

Yet, a court is not entirely closed to the public the way some government offices are. It might be closer to the third category, the limited public forum. The Court has explained that a limited public forum is "reserv[ed] . . . for certain groups or for the discussion of certain topics."[27] Consider, for illustration, a public municipal board meeting. In this context, government officials can restrict speech quite a bit, for instance by only allowing public comment at a designated time and requiring speakers to limit their statements in duration. Such rules are necessary to allow public bodies to function. But it would be considerably different if, say, a school board only allowed public comment from people who favored a particular bond issue or property tax increase. The Supreme Court has addressed this problem by holding that in limited public fora, authorities can regulate the form and subject matter of speech, but may not discriminate based on viewpoint:

> Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.[28]

This principle of viewpoint neutrality would seem to support Ballou's argument that if police can wear arm bands commemorating violence against police while they are in a courtroom, she ought to be able wear a pin protesting violence by police against people of color.

III. LOWER COURT RESISTANCE

At least three federal circuits have rejected claims that lawyers' expression in the courtroom enjoys First Amendment protection. Two of these cases produced split decisions, and the colorful circumstances of each case help illustrate why judges may be troubled by lawyers' courtroom expression.

A. Berner v. Delahanty

Of these three cases, one seems especially similar to Erika Ballou's dispute with Judge Herndon because it also involved a button. In *Berner v.*

[27] *Walker*, 135 S. Ct. at 2250 (alteration in original) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

[28] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) (citations omitted); *see also Rosenberger*, 515 U.S. at 829 (calling viewpoint discrimination "an egregious form of content discrimination" from which the government is forbidden, "even when the limited public forum is one of its own creation").

Delahanty, the Court of Appeals for the First Circuit considered the case of a Maine lawyer, Seth Berner, who in late October 1995 appeared in Judge Thomas Delahanty's courtroom wearing a button opposing an anti-LGBT initiative on the Maine ballot.[29] His button said, "No on 1—Maine Won't Discriminate."[30] Judge Delahanty told him to remove it because "the courtroom is not a political forum."[31] The First Circuit unanimously agreed:

> A courtroom's very function is to provide a locus in which civil and criminal disputes can be adjudicated. . . .
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> . . . Emblems of political significance worn by attorneys in the courtroom as a means of espousing personal political opinions can reasonably be thought to compromise the environment of impartiality and fairness to which every jurist aspires. As an officer of the court, a lawyer's injection of private political viewpoints into the courtroom, coupled with the judge's toleration of such conduct, necessarily tarnishes the veneer of political imperviousness that ideally should cloak a courtroom, especially when the partisan sentiments are completely unrelated to the court's business.[32]

The First Circuit reasoned that a lawyer compromises a courtroom's "cloak" of impartiality by injecting political speech into a proceeding. But is the problem that Mr. Berner's button was "political," or that it was "completely unrelated" to court business? It seems to me that the latter better justifies the First Circuit's decision, and might explain the court's unanimity.[33] Telling him to remove the button was arguably little different from telling someone in the audience to be quiet, or telling a lawyer to not discuss irrelevancies in an argument.

Despite her case's superficial similarity to Mr. Berner's, Ms. Ballou advanced three means of differentiating her speech from Mr. Berner's. She told Judge Herndon that her pin was not supporting or opposing a candidate on the ballot (nor a ballot measure, for that matter).[34] She argued that "Black Lives Matter" referred to "an issue about criminal justice."[35] And, most importantly, she pointed to the fact that police are permitted to wear symbolic bands in court to suggest that her pin was being singled out for its particular message.[36] In other words, she asserted the judge's ruling amounted to viewpoint discrimination. These are rebuttable points, to be

29 129 F.3d 20, 22 (1st Cir. 1997).
30 *Id.*
31 *Id.*
32 *Id.* at 26–27.
33 *Id.* at 22.
34 *See* Ritter, *supra* note 1.
35 *Id.*
36 *Id.*

sure. A lawyer in a sentencing hearing does not necessarily have the latitude to raise any issue that can be related in some manner to criminal justice. Moreover, even if the content of the speech is permissible, a rule of order might require lawyers to make their arguments on the record, rather than through visual signs, symbols, and the like. But once a judge allows some symbolic visual expression in speech, it becomes much harder to justify restricting others.

B. Zal v. Steppe

In 1992, a Ninth Circuit panel issued a split decision on a case involving Cyrus Zal, an antiabortion lawyer from California. Zal had defied a ban on talking about abortion during a trial of a pro-life protestor.[37] The trial judge ordered Zal to avoid using a list of fifty words and phrases, such as "killing centers," "infanticide," "fetus," "abortion," and "extermination."[38] Zal disregarded the banned word list repeatedly, and by the end of the trial the judge had cited him for contempt twenty times.[39] Zal cited the First Amendment in his defense.[40]

Two of the three judges on the appellate panel, Judge Jerome Farris and Judge Stephen Trott, rejected Zal's First Amendment challenge outright.[41] They relied on the dicta from *Gentile* and an older Supreme Court case stating that, when a lawyer disagrees with a trial judge's decision, he may preserve the issue for appeal but may not otherwise disrupt the court or resist the judge's authority.[42] In a concurring and dissenting opinion, Judge John Noonan noted that the Supreme Court had previously struck down a contempt citation for inflamed language used by a pro se defendant.[43] Judge Noonan thought that this meant that trial judges must grant "broad latitude" for abusive language in court.[44] He wrote that "[i]t would be ironic if the Constitution failed to protect its professional defenders—the lawyers—in the very forum dedicated to the Constitution's doctrine."[45] Judge Noonan quoted an earlier Ninth Circuit decision where the court of appeals said, "attorneys and other trial participants do not lose their constitutional rights at the

37 Zal v. Steppe, 968 F.2d 924, 925 (9th Cir. 1992).

38 *Id.*

39 *Id.* at 926.

40 *Id.* at 927.

41 *Id.*; *id.* at 930 (Trott, J., concurring).

42 *Id.* at 927–28 (majority opinion) (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991); Sacher v. United States, 343 U.S. 1, 8–9 (1952)).

43 *Id.* at 935 (Noonan, J., concurring in the result in part and dissenting in part) (citing *In re* Little, 404 U.S. 553 (1972) (per curiam)).

44 *Id.*

45 *Id.* at 934–35.

courthouse door."[46] But despite that broad phraseology, that prior case dealt with restrictions on attorneys talking to the media, rather than on speech in the courtroom.[47]

In response, Judge Trott insisted that the First Amendment did not apply at all in courtrooms because they are not public fora.[48] He thought that to bring the First Amendment into the courtroom would essentially turn judicial order into chaos:

> Does a juror have a First Amendment right to speak or to examine witnesses? Does a court reporter have a right to editorialize during closing arguments? May spectators chafe, chant, and cheer? Could an anti-abortion advocate appear and deliver a right-to-life speech to the jury about to deliberate on the charges against Zal's clients? I would think not.[49]

Like the First Circuit, Judge Trott worried about extending First Amendment protection to courtroom settings. But the dicta in *Gentile* may not go quite to the extreme position that Judge Trott articulated. *Gentile* explicitly states that free speech in the courtroom is "circumscribed," but it does not say it is nonexistent.[50] Judge Trott missed the point when he said, "[a]lthough courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law."[51] The answer is not to dismiss the idea that the First Amendment applies to courtrooms, but to focus on how to apply it in a way that protects decorum and prevents viewpoint discrimination.

C. Mezibov v. Allen

The third relevant court of appeals case involved Marc D. Mezibov, a criminal defense attorney in Ohio, and his dispute with a local prosecutor, Michael K. Allen.[52] During a criminal trial, Mezibov made multiple motions to have Allen disqualified from the case, which the trial judge rejected.[53] Mezibov's client was ultimately convicted, after which Allen told the local press that Mezibov "is a man who doesn't try too many cases and the verdict

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46 *Id.* at 934 (quoting Levine v. U.S. Dist. Court for the Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985)).

47 *Levine*, 764 F.2d at 592.

48 *Zal*, 968 F.2d at 932 (Trott, J., concurring) ("Traditional First Amendment analysis also supports the idea that lawyers (and others) have no First Amendment right to speak freely in a courtroom.").

49 *Id.*

50 Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991).

51 *Zal*, 968 F.2d at 932 (Trott, J., concurring).

52 Mezibov v. Allen, 411 F.3d 712, 715 (6th Cir. 2005).

53 *Id.*

shows that. If I were [the defendant], I would ask for my money back."[54] Mezibov responded by filing a Section 1983[55] suit against Allen, alleging that he had defamed him under color of law in retaliation for filing motions in court.[56] In support of his argument that Allen was using the power of the state to retaliate against him for protected speech in court, he cited the Ninth Circuit's "courthouse door" line that Judge Noonan also echoed.[57]

In *Mezibov v. Allen*, all three Sixth Circuit judges agreed that Mezibov could show no real injury because "a criminal defense attorney of ordinary firmness would not have been chilled" by a prosecutor's public criticism.[58] But they split over the applicability of the First Amendment. Judge Siler and Judge Batchelder, relying on the Ninth Circuit's decision in *Zal*, concluded that courtrooms are nonpublic forums and that "we regularly countenance the application of even viewpoint-discriminatory restrictions on speech."[59] They cited rules of procedure and evidence banning lawyers from discussing irrelevant or prejudicial topics during trial.[60] This drew Judge Moore's dissent:

> By stating that the First Amendment has no place in the courtroom, the majority . . . betrays the historical role of litigation as providing a forum for the expression of core political speech, instead relegating attorney speech to a level heretofore occupied only by such speech as obscenity and fighting words. . . .
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> . . . Far from seeing the courtroom as a place where the First Amendment would "intrude," I view the courtroom as a place where freedom of expression should be embraced and exercised with vigor.[61]

Judge Moore was right to be alarmed at entirely exempting courtrooms from First Amendment protection. Because courts are not stereotypical traditional public fora, and because judges clearly must control their courtrooms, it is tempting to rule out any place for the First Amendment in courtrooms. But this simplistic approach impairs the central role attorneys play in our system of government. The American Bar Association says that

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54 *Id.*

55 42 U.S.C. § 1983 (2012).

56 *Mezibov*, 411 F.3d at 716.

57 *Id.* at 718 (quoting Levine v. U.S. Dist. Court for the Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985)).

58 *Id.* at 715; *id.* at 726 (Moore, J., concurring in part and dissenting in part) (agreeing with the majority opinion that Allen's speech would not "deter a criminal defense attorney of ordinary firmness from" advocating for "his or her client").

59 *Id.* at 718.

60 *Id.* (citing FED. R. EVID. 404(b); FED. R. CIV. P. 11; and FED. R. APP. P. 34, 38).

61 *Id.* at 724, 726 (Moore, J., concurring in part and dissenting in part) (citations omitted).

a lawyer is "a public citizen having special responsibility for the quality of justice."[62] Echoing this sentiment, the Supreme Court has described the role of attorneys in a democracy in grandiose terms:

> One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield" . . . in defense of right and to ward off wrong.[63]

Lawyers play a bedrock role in protecting the values written into our constitutional form of government. It is entirely foreseeable that if lawyers defend right and prevent wrong in our system of justice, they might occasionally ruffle a judge's feathers or express something that seems controversial. In those situations, viewpoint neutral First Amendment protection for lawyers only strengthens a courtroom's "veneer of political imperviousness."[64]

IV. THE STRUGGLE FOR NEUTRALITY

The First Amendment should protect a lawyer's political speech in a courtroom, albeit with considerable restrictions that are necessary for courts to perform their adjudicative functions. The best reading of the Supreme Court case law in this area sees courts as highly specialized, limited public fora. Speech may thus be circumscribed, as the Court said in *Gentile*, but that does not mean that the First Amendment has no place. Speech in court is highly regulated by the rules of court procedure, rules of evidence, and the need to maintain order and decorum. But it would go too far to say, as some lower court judges have, that free speech stops at the courthouse gate.[65] By way of illustration, the Supreme Court has repeatedly defended litigants' freedom to make arguments in court to which judges take offense.[66] The Court has clarified that a judge's desire to maintain order must not impede lawyers' ability to argue for their clients.[67]

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62 MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2016).

63 Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring) (citation omitted).

64 Berner v. Delahanty, 129 F.3d 20, 27 (1st Cir. 1997).

65 *Cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

66 *See In re* Little, 404 U.S. 553, 555 (1972) (per curiam); Holt v. Virginia, 381 U.S. 131, 136 (1965); *In re* McConnell, 370 U.S. 230, 236 (1962). These cases have been decided on due process or statutory grounds, but they reflect latent free speech values as well.

67 *McConnell*, 370 U.S. at 236.

Because courts are limited public fora, the government (usually in the person of the judge) may regulate the form and subject matter of speech in courtrooms, but may not discriminate based on viewpoint.[68] Considering this, the simplest and most defensible way for a court to prevent politically provocative symbols from appearing on clothing in court is to prohibit *any* expressive symbol of any kind from being worn by lawyers or court personnel. A court could, for example, allow only expression permitted by the rules of court. Were this the practice in Las Vegas, prohibiting Black Lives Matter pins would be easily defensible against a First Amendment challenge.

But once courts begin to allow some expressive clothing—a breast cancer awareness ribbon, or even a symbol of allegiance to an NFL team—prohibiting a Black Lives Matter pin becomes more problematic as it appears to be a form of viewpoint discrimination. If it were to be justified, it would likely have to be on the grounds that the slogan "Black Lives Matter" is particularly controversial.

There is some precedent for a controversial speech exception in limited public fora, but it is not clear to what extent the Supreme Court stands by this exception.[69] As a starting point, the idea that controversial expression might be subject to special restrictions is inherently problematic because the First Amendment exists precisely to protect less popular speech, which is more likely to be considered controversial.[70] If there is an exception for controversial speech, this possibility seems to be commonly invoked to restrict political activism by African-Americans, given that the case on point involved a restriction on the activities of the NAACP.[71] Nevertheless, recent Supreme Court decisions that protected Christian speakers against viewpoint discrimination despite the controversial nature of their speech seem to undermine the controversial speech exception.[72] In one of the Court's more

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68 *See supra* notes 26–28 and accompanying text.

69 *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985) (permitting the exclusion of the National Association for the Advancement of Colored People (NAACP) from the Combined Federal Campaign (CFC), which solicits donations from federal employees, because the exclusion is "reasonable").

70 *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (summarizing the First Amendment's strong protection of speech even when society finds the expression "offensive or disagreeable" (quoting United States v. Eichman, 496 U.S. 310, 319 (1990))).

71 *Cornelius*, 473 U.S. at 813 ("We conclude that the Government does not violate the First Amendment when it limits participation in the CFC in order to minimize disruption to the federal workplace, to ensure the success of the fund-raising effort, or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups.").

72 *See also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07, 114–15 (2001) (reiterating strict viewpoint neutrality as the rule in limited public fora, without any evident exception for controversial viewpoints); *cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 899 (1995)

recent cases involving religious speech, the Court explicitly said in dicta that it would be specifically impermissible in a limited public forum for a government agency to exclude particular viewpoints about "racism."[73] This should cause judges to be cautious about imposing special restrictions on expression that seems controversial.

In short, this is dicey territory for a court. In Las Vegas, Judge Herndon told Ms. Ballou that he thought the Black Lives Matter pin was an attack on the court.[74] Offended as he might be, "[j]udges are supposed to be [people] of fortitude."[75] They must "guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[76] Moreover, lawyers, especially criminal defense attorneys, are supposed to raise issues that may make many people uncomfortable. They are not supposed to pretend that all is fine with our system of law enforcement if they do not believe that to be the case.

Clearly, a balance must be struck. Perhaps lawyers may be granted more leeway in a hearing in front of a judge, but must be more circumspect when standing before a jury.[77] Perhaps a judge would be on solid ground to disallow an especially large or visually distracting pin. But the Black Lives Matter pin that Erika Ballou wore was small and simple, with plain white letters on a black background. It attracts attention only because of its message, which is critical of police violence and possibly (in Judge Herndon's view) of some judges. And there's the rub. There is something especially unseemly about an elected judge who depends on police support in his campaigns singling out a defense attorney's pin containing a message police dislike and ordering it removed. It may have happened in the courtroom, but the First Amendment still applies. Black Lives Matter is a deliberately provocative movement and message. But a judge should only

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(Souter, J., dissenting) (arguing that the Court's "holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums," and citing *Cornelius* as representing a different, earlier approach).

73 *Rosenberger*, 515 U.S. at 831 ("Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.").

74 Ritter, *supra* note 1 ("The pin, the judge said, 'is making a political statement, that, "I wear this in protest of how the court is treating minority defendants."'").

75 *In re* Little, 404 U.S. 553, 555 (1972) (per curiam) (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)).

76 *Id.* (quoting Brown v. United States, 356 U.S. 148, 153 (1958)).

77 *See* Juhl & Ferrara, *supra* note 5 (noting that Ms. Ballou's supervisor, Clark County Public Defender Phil Kohn, said no one from his office would wear the pin in front of a jury).

restrict its expression in a manner that does not violate the First Amendment's strict prohibition on viewpoint discrimination in limited public fora.