CONSTITUTIONAL LAW—FIRST AMENDMENT—ATHLETIC COACH'S LOCKER ROOM SPEECH IS NOT PROTECTED UNDER FIRST AMENDMENT, EVEN THOUGH UNIVERSITY POLICY IS FOUND UNCONSTITUTIONAL—*Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995).

I. INTRODUCTION

The First Amendment,[1] the centerpiece of our Constitution,[2] is the codification of the natural law of personal autonomy.[3] Freedom of speech and freedom of thought are indispensable to nearly every freedom our Constitution cherishes.[4] The protections granted by the First Amendment are recognized as fundamental rights and any proscription based solely on the idea expressed in the exercise of those rights should not be tolerated.[5]

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1. U.S. CONST. amend I. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

2. *See* Richard J. Williams, Jr., *Burning Crosses and Blazing Words: Hate Speech and the Supreme Court's Free Speech Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 614-15 (1995) ("[T]he First Amendment has become the centerpiece of the Constitution, representing most clearly, the natural law theory of individual liberty upon which the United States was founded.").

3. *Id.*

4. Palko v. Connecticut, 302 U.S. 319, 327 (1937); *see* Williams, *supra* note 2, at 673 ("[T]he ability to speak freely is essential to maintaining and exercising the various other rights recognized under the Constitution."); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 457 ("Freedom of speech is the lifeblood of our democratic system.").

5. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). The United States Supreme Court declared that the freedom of speech and the freedom of the press "are among the fundamental personal rights and 'liberties' protected by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment . . . ." *Id.*; *see also* Near v. Minnesota, 283 U.S. 697 (1931). In *Near*, the Court articulated:

> It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.

Id. at 707 (citing Stromberg v. California, 283 U.S. 359 (1931). *See also* Fiske v. Kansas, 274 U.S. 380, 382 (1927); Whitney v. California, 274 U.S. 357, 373 (1926); *Gitlow*, 268 U.S. at 666); Schneider v. State, 308 U.S. 147, 161 (1939) ("This [C]ourt has characterized the freedom of speech and that of the press as fundamental personal rights and

Pitted against First Amendment protections of free speech are the need and desire for universities to operate efficiently and effectively.[6] While it is well settled that a public university cannot terminate a teacher because of his exercise of protected speech,[7] the same is not true when the employee's speech is not a matter of public concern. Courts generally give the government employer deference in their employment decisions when speech is unprotected by the First Amendment.[8] In *Dambrot v. Central Michigan University*,[9] the United States Court of Appeals for the Sixth Circuit allowed a coach to be terminated for his choice of words.[10]

The Sixth Circuit also held that Central Michigan University's discriminatory harassment policy was unconstitutionally vague, overbroad and not a legitimate prohibition of fighting words.[11] However, the court found it permissible for the university to terminate its coach because his speech was neither a matter of public concern nor protected under the concept of academic freedom.[12] By permitting the university to dismiss its coach for the words he spoke, the court undermined the signifi-

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liberties . . . . In every case the courts should be astute to examine the effect of the challenged legislation.").

6. *See infra* note 101; *see also* Connick v. Myers, 461 U.S. 138, 150-51 (1983) ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and to mainta[in] proper discipline in the public service.'") (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Belyeu v. Coosa County Bd. of Educ., 998 F.2d 925, 928 (11th Cir. 1993) ("A public employee's right to speak is limited by the government's interest in preserving the efficiency of the public service it performs through its employees.").

7. *See infra* notes 90-95.

8. *See Connick*, 461 U.S. at 146 ("[G]overnment officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."). Justice Powell explained the United State Supreme Court's rationale in Arnett v. Kennedy, 416 U.S. 134, 168 (1974):

> To this end, the Government, as an employer, must have wide discretion and control of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. (Powell, J., concurring).

9. 55 F.3d 1177 (6th Cir. 1995).

10. *Id.* at 1185.

11. *Id.*

12. *Id.* at 1185-91.

cance of its ban on unconstitutional content-based discriminatory harassment policies.

II. Statement of the Case

Keith Dambrot, the head coach of the Central Michigan University men's basketball team, used the word "nigger" while addressing the players of his team in the locker room in January, 1993.[13] According to Dambrot's testimony, he had the team's permission to use the term with reference to them.[14] Dambrot called assistant coach Derrick McDowell[15] and player Sander Scott[16] "niggers." Dambrot used the word to incorporate a vernacular term that the players used among themselves and to impart a positive message to the team.[17]

As news of Dambrot's use of the word "nigger" spread, the university's athletic department conducted an investigation.[18] Some African American players reported that they were not offended by Dambrot's use of the word.[19] However, a former member of the team complained to the university's affirmative

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13. 55 F.3d at 1180. The district court noted:

> According to testimony from some of the players and assertions of plaintiff's counsel at oral arguments, there is some confusion about the actual language used. The term may have been "nigger," a word pronounced with a concluding "r" sound and commonly thought of as insulting . . . "a racial epithet" or "racial slur," as defendants cast it in their representations to the Court and the public. It may also have been something like "nigga" or "niggah," a pronunciation which carries with it a much different, and non-insulting connotation especially when used by blacks themselves. The disposition of this case makes it unnecessary for the Court to determine with finality which of these is more likely true. While the Court will use the more common spelling - "nigger" - as all parties have done in written pleadings, the Court assumes for this Opinion the accuracy of the plaintiff's protestations that he spoke the word, and intended it to be taken, with all positive connotations . . . as though it had been pronounced "niggah" by one familiar with that usage.

Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 479 (E.D. Mich. 1993).

14. 55 F.3d at 1180. Dambrot testified that he asked his players, "Do you mind if I use the N word?," and that the players indicated their approval. *Id.*

15. *Id.* Central Michigan University men's basketball team had two full-time assistant coaches, Derrick McDowell, an African American, and Barry Markwart, a Caucasian. *Id.*

16. *Id.* Sander Scott was an Academic All-American and a Caucasian. *Id.*

17. *Id.* Dambrot stated that he used the word in the same context that the players did "to connote a person who is fearless, mentally strong and tough." *Id.* The district court found "absolutely no evidence to the contrary" that Dambrot intended to be "positive and reinforcing." *Dambrot*, 839 F. Supp. at 479.

18. 55 F.3d at 1181. Athletic Director, David Keilitz, conducted the investigation. *Id.*

19. *Id.*

action officer concerning an earlier incident in which Dambrot told his players not to behave like "niggers" in the classroom.[20] The officer interpreted Dambrot's use of the term as a violation of the university's discriminatory harassment policy.[21] Dambrot admitted using the term and accepted a five-day suspension without pay in lieu of a more formal investigation.[22]

Reaction to Dambrot's conduct became widespread throughout the university campus.[23] The student body organized a demonstration in opposition to Dambrot's continued presence on the campus.[24] The incident received local, regional and national attention.[25] Consequently, on April 12, 1993, the university informed Dambrot that he would not be retained as the men's basketball head coach for the following season.[26]

Dambrot brought suit in the United States District Court

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20. *Id.* Shannon Norris, a former member of the men's basketball team, told Angela Haddad, the Central Michigan University Affirmative Action Officer, that in November, 1992, Dambrot told his team he wanted them to "play like niggers on the court" but not behave "like niggers in the classroom." *Id.*

21. *Id.* Haddad viewed Dambrot's use of nigger as a violation of Central Michigan University's Affirmative Action Policy and that the word, in her opinion, was incapable of having a positive message. *Id.* Central Michigan University's Plan for Affirmative Action prohibits:

> any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.

PLAN FOR AFFIRMATIVE ACTION AT CENTRAL MICHIGAN UNIVERSITY, § III(B)(1), RACIAL AND ETHNIC HARASSMENT [hereinafter CMU PLAN].

22. 55 F.3d at 1181. Dambrot insisted he had used the word in a positive manner. *Id.* In a March 30, 1993 "Grievance Investigation" memorandum, the university's Affirmative Action Officer concluded that Dambrot should be suspended with a threat of "more severe disciplinary action" in the future should Dambrot or his staff or players not "refrain from such language." *Dambrot*, 839 F. Supp. at 481-82. She also prescribed "sensitivity training" for everyone on ethnic terminology, such training to be conducted at the university's expense by an affirmative action officer from another institution. *Id.*

23. 55 F.3d at 1181.

24. *Id.*; *see* Elton Alexander, *Slug or Slang? Coach's Firing Sparks Debate*, PLAIN DEALER (CLEVELAND), May 9, 1993, at 1A. "When it became known across the CMU campus that Dambrot used the word 'nigger' with his players, public outcry followed. Dambrot was suspended for four days without pay. After campus protests, he was fired April 12." *Id.*

25. *See Foul Words at CMU*, GRAND RAPIDS PRESS, Apr. 9, 1993, at A10; *Coach at CMU Fired Over Remarks*, DETROIT NEWS, Apr. 13, 1993, at 1; *Jurisprudence*, USA TODAY, Apr. 21, 1993, at 7C.

26. 55 F.3d at 1181. The university believed that Dambrot could no longer effectively lead the men's basketball program. *Id.*

for the Eastern District of Michigan against the university and its officials alleging that he was terminated because he used the term "nigger" and that the termination violated First Amendment rights to academic freedom and free speech.[27] Five members of the basketball team joined the action alleging that the university's discriminatory harassment policy was unconstitutionally overbroad, vague and violated their First Amendment rights.[28]

The district court partially granted Dambrot's motion for a preliminary injunction by enjoining Central Michigan University from enforcing its policy on discriminatory harassment.[29] Both parties moved for summary judgment.[30] The court held that the university's discriminatory harassment policy was facially unconstitutional, but that Dambrot's termination was not wrongful.[31] Dambrot filed an appeal, and all the plaintiffs filed a motion for attorneys' fees, in district court.[32] The district court granted the attorneys fees and the defendants appealed.[33]

III. University Harassment Policy is Found Facially Unconstitutional

The United States Court of Appeals for the Sixth Circuit noted that a statute can be unconstitutional on its face.[34] In *Members of City Council v. Taxpayers for Vincent*,[35] the United States Supreme Court stated that there are two ways which a statute can be unconstitutional on its face.[36] The Court announced that a statute can be invalid either because its every application is an unconstitutional suppression of ideas[37] or be-

27. *Id.* The defendants named in the suit were Central Michigan University and Leonard E. Plachta, President of Central Michigan University, Russ Herron, Vice President of University Relations, and David Keilitz, Central Michigan University Athletic Director in their individual capacities. *Id.* at 1180.

28. *Id.* at 1181. Dambrot was joined in the action by his former players: Leonard Bush, Deshanti Foreman, Keith Gilmore, Tyrone Hicks and Amere May. *Id.* at 1179-80.

29. *Id.* at 1181.

30. *Id.*

31. Dambrot v. Central Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993).

32. 55 F.3d at 1182.

33. *Id.*

34. *Id.*

35. 466 U.S. 789 (1984). The petitioner sought to enjoin enforcement of an ordinance which prohibited posting of signs on public property. *Id.*

36. *Id.* at 796.

37. *Id.* The first cases to find a statute unconstitutional on its face were Stromberg v.

cause it prohibits a broad spectrum of protected conduct.[38] The latter cause is termed the "overbreadth" doctrine.[39] The Court

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California, 283 U.S. 359 (1931), in which a statute was construed to prohibit the raising of a red flag to demonstrate opposition to organized government, and Lovell v. Griffin, 303 U.S. 444 (1938), in which a statute was construed to prohibit the distribution of religious pamphlets without a license. The Court in *Vincent* found that the statutes at issue in *Stromberg* and *Lovell* were on their face unconstitutional because any enforcement of them created a risk of suppression of ideas. *Vincent*, 466 U.S. at 797. The Court found the risk unacceptable in the absence of a substantial evil to which the statute seeks to address. *Id.* at n.14. The Court in *Stromberg* wrote:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

283 U.S. at 369-70.

For other cases where the Court has found that a statute's every application produced an intolerable risk of oppression of ideas, *see* Saia v. New York, 334 U.S. 558 (1948) (use of loudspeaker prohibited in public without permission of police chief in whom ordinance gave unlimited discretion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (distribution of religious literature required licensing and ordinance did not set standards for the exercising of licensing discretion); Schneider v. State, 308 U.S. 147 (1939) (distribution of leaflets prohibited by ordinance without a license and ordinance provided no standards for issuance of license).

38. *Vincent*, 466 U.S. at 796 ("The Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are constitutionally overbroad."); *see, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (finding Texas statute prohibiting flag burning to be overbroad because it was not limited to incidents likely to incite a breach of peace); Houston v. Hill, 482 U.S. 451, 460-65 (1985) (striking statute since it could be interpreted to prohibit a citizen from insulting and criticizing police officers, although such conduct was constitutionally protected); Papish v. University of Missouri, 410 U.S. 667, 670 (1973) (supporting a student reinstatement after expulsion for printing newspaper article entitled "Motherfucker acquitted" because "the mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of conventions of decency").

39. *Id.* at 798. The overbreadth doctrine was originated in *Thornhill v. Alabama*. 310 U.S. 88 (1940). In *Thornhill*, the Court explained that the mere existence of a broadly written statute may have a deterring effect on free expression. *Id.* at 104. In overturning an Alabama statute which prohibited loitering or picketing, the Court explained:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefor[e] call into question the whole scheme of licensing when he is prosecuted for failure to procure it. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discrimina-

in *Vincent* found that for a statute to be facially challenged on overbreadth grounds, the statute must pose a realistic threat to recognized First Amendment rights of parties not before the Court.[40]

The court in *Dambrot* relied on the *Vincent* reasoning when it held that the Central Michigan University basketball players had standing.[41] The court in *Dambrot* noted that, in First Amendment cases, the overbreadth doctrine provides an exception to the traditional standing requirements based on the judicial assumption that the overly broad statute may chill the exercise of free expression.[42]

The Court of Appeals for the Sixth Circuit employed a two-step inquiry in *Leonardson v. City of East Lansing*[43] to analyze an overbreadth claim.[44] First, a court must determine whether the statute affects a substantial amount of expression that is constitutionally protected.[45] Then it must determine if the statute is constitutionally invalid because it is overly broad based upon the "void for vagueness" doctrine.[46] The court in *Dambrot* applied the two-step inquiry adopted in *Leonardson*.[47]

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tory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

310 U.S. at 97-98.

40. 466 U.S. at 801.

41. 55 F.3d at 1182.

42. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (noting that parties "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute . . . may cause others not before the court to refrain from constitutionally protected speech or expression"); *see also* Williams, *supra* note 2, at 613 (explaining that the Court has altered the standing requirements, "allowing the individual to challenge the constitutionality of a statute without requiring the individual to allege a deprivation of his or her specific rights").

43. 896 F.2d 190 (6th Cir. 1990).

44. 55 F.3d at 1182.

45. *Id.*; *see also* Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) ("In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.").

46. 896 F.2d at 195-96; *see also* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and defers as to its application violates the first essential of due process of law.").

47. 55 F.3d at 1182-84.

A. Substantial Amount of Protected Speech

Central Michigan University's Plan for Affirmative Action defined racial and ethnic harassment as:

> any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.[48]

The United States Court of Appeals for the Sixth Circuit characterized the language of the discriminatory harassment policy as sweeping, encompassing as many types and forms of expression as possible.[49] Accordingly, the court concluded that the Plan reached a substantial amount of constitutionally protected expression[50] and satisfied the first prong of an overbreadth challenge.[51]

Central Michigan University argued that its policy did not pose a realistic danger to First Amendment rights because the policy had no formal enforcement mechanism and if the university did enforce the policy it would do so with respect for First Amendment rights.[52] The Sixth Circuit summarily rejected Central Michigan's first argument because Dambrot's firing demonstrated to the court that despite the absence of a formal enforcement mechanism, Central Michigan could still pursue policy violations.[53]

The court also rejected Central Michigan's representation

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48. CMU PLAN, *supra* note 21.

49. 55 F.3d at 1182. The district court stated:

> The policy appears to have been drafted to include as much within its ambit as possible, and its language is sweeping indeed. With its guns trained on *"any . . . behavior" either "verbal or nonverbal, . . . intentional [or] unintentional,"* it seems to have covered the waterfront.

Dambrot, 839 F. Supp. at 481 (emphasis in original).

50. *Id.*

51. *Id.*

52. 55 F.3d at 1182-83. The district court was "emphatically unimpressed" with a letter sent by the university's president to the university community which stated that the policy was not intended and would not be enforced in a way that would "interfere impermissibly with individual rights to free speech." *Dambrot*, 839 F. Supp. at 482. The district court was unwilling "to entrust the guardianship of the First Amendment to the tender mercies of this institution's discriminatory harassment/affirmative action enforcer." *Id.*

53. 55 F.3d at 1183; *see supra* note 22.

that the policy would be enforced with respect for First Amendment rights.[54] Relying upon *Vittitow v. City of Upper Arlington*,[55] the court refused to uphold Central Michigan University's discriminatory harassment policy based upon language in the policy protecting free speech.[56]

The court noted that Central Michigan adopted an argument similar to one employed by the University of Michigan in *Doe v. University of Michigan*.[57] The United States District Court for the Eastern District of Michigan in *Doe* rejected the University of Michigan's representation that its anti-discrimi-

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54. 55 F.3d at 1183.

55. 43 F.3d 1100 (6th Cir. 1995). In *Vittitow*, the Sixth Circuit held the city's ordinance regulating picketing to be unconstitutionally overbroad and refused to save the ordinance by accepting the city's counsel's representations on how the ordinance would be enforced. *Id.* at 1106. The court noted, however, that the extraordinary measure of accepting counsel's representation was not unprecedented. *Id.* In Frisby v. Schultz, 487 U.S. 474 (1988), the United States Supreme Court, in a five to four decision, saved an unconstitutionally overbroad ordinance based upon counsel's representation during oral argument on how the ordinance would be enforced. *Id.* The court in *Vittitow* did not feel compelled to follow the procedure adopted in *Frisby* and thought the better solution was provided by Justice Stevens in dissent. 43 F.3d at 1106. Justice Stevens suggested a better alternative would be for the town "to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy . . . ." *Id.* (quoting *Frisby*, 487 U.S. at 499 (Stevens, J., dissenting)).

56. 55 F.3d at 1183. The Central Michigan University discriminatory harassment policy states that "[t]he University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individual rights to free speech." CMU PLAN, *supra* note 21.

57. 55 F.3d at 1183 (citing Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)). In a suit brought by a university graduate student, the federal district court found that the University of Michigan's policy on discrimination and discriminatory harassment of students was overbroad and so vague that enforcement of it would violate due process. 721 F. Supp. at 867-68. The university's policy proscribed persons in the following manner:

> 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that
>   a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>   b. Has the purpose or reasonably foreseeable effect of interfering with an individuals academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
>   c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment, or participation in University sponsored extra-curricular activities.

UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT (1988).

nation policy would not be enforced against speech protected by the First Amendment and struck down the policy as constitutionally overbroad.[58] The court in *Doe* found the University of Michigan policy unconstitutional on its face and as applied.[59] Similarly, the *Dambrot* court found Central Michigan's policy contained no safeguards to prevent the university from prohibiting First Amendment rights.[60] The policy's broad language posed a realistic threat that the university could prohibit such rights.[61]

B. Void for Vagueness

Two forms of vagueness can result in an ordinance denying due process.[62] An ordinance is void for vagueness if it does not provide fair notice to a citizen about conduct for which he will be held accountable.[63] Also, an ordinance will be void for vagueness if it grants an unrestricted delegation of power to enforcement officers to define its terms, and therefore, invites overzealous and arbitrary enforcement.[64] The court in *Dambrot* used a subjective test in deciding whether the Central Michigan University policy presented a problem of fair notice

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58. *Doe*, 721 F. Supp. at 864.

59. *Id.* at 866.

60. 55 F.3d at 1183. The court stated that it was "clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university." *Id.*

61. *Id.* The court relied upon *Doe* in identifying the realistic threat that a broad statute poses to First Amendment protection:

> [T]he University may subject all speech and conduct to reasonable and non-discriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication.
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> What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed
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> .... Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.

Doe, 721 F. Supp. at 863 (citations omitted).

62. 55 F.3d at 1183-84 (citing Washington Mobilization Comm. v. Cullane, 566 F.2d 107, 117 (D.C. Cir. 1977)).

63. *Id*; *see Connally v. General Constr. Co.*, 269 U.S. 389, 391 (1926) ("[C]onsonant ... with ordinary notions of fair play and settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its application violates the first essential of due process of law." (citations omitted)).

64. 55 F.3d at 1183-84.

and unrestricted delegation of enforcement power.[65] The court noted that several players were not offended, yet one student and one university official were offended.[66] The court held that the Central Michigan University policy was void for vagueness because it did not provide fair notice.[67] The court also held the policy void for vagueness because it did not define what was offensive, but left that determination to university officials.[68]

C. *University Policy Unconstitutionally Prohibits Fighting Words*

The United States Court of Appeals for the Sixth Circuit assumed *arguendo* that "nigger" was a fighting word.[69] The court held that Central Michigan University's discriminatory harassment policy was constitutionally prohibited.[70] The Sixth Circuit relied on the United States Supreme Court opinion in *R.A.V. v. St. Paul*[71] to find the University's policy unconstitutional because it fostered both content and viewpoint discrimination.[72]

In *R.A.V.*, the petitioner was charged with violating an ordinance that prohibited bias-motivated disorderly conduct.[73] The Supreme Court in *R.A.V.* assumed *arguendo* that the al-

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65. 55 F.3d at 1184. The court recognized that, "[t]hough some statements might be seen as universally offensive, different people find different things offensive." *Id.*

66. *Id.* Central Michigan University student, Shannon Norris, a former member of the men's basketball team, told the university's affirmative action officer, Angela Haddad, that he was offended. *Id.*

67. *Id.* For a definition of fair notice, *see supra* note 46.

68. 55 F.3d at 1184.

69. R.A.V. v. St Paul, 505 U.S. 377, 381 (1992); *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The "fighting words" doctrine was described by Justice Murphy in *Chaplinsky*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72 (citations omitted).

70. 55 F.3d at 1184. Central Michigan University asserted that its policy was designed to prohibit only "fighting words." *Id.*

71. 505 U.S. 377 (1992).

72. *Dambrot*, 55 F.3d at 1184-85.

73. *R.A.V.*, 505 U.S. at 380-81. The petitioner burned a cross on the lawn of a black

leged expression covered by the St. Paul ordinance was proscribable under the "fighting words" doctrine.[74] The Court found that the St. Paul ordinance was facially unconstitutional because it placed limitations on content and viewpoint.[75]

The Court in *R.A.V.* recognized that the First Amendment imposes a limitation upon content discrimination preventing the government from imposing prohibitions on those who speak on disfavored subjects.[76] The Court noted, however, that while an ordinance can prohibit the use of fighting words, it cannot pick and choose the target audience to be protected.[77] The St. Paul ordinance prohibited fighting words based upon race, gender and religion but was silent upon use in regard to sexual orientation or political affiliation.[78] A prohibition on disfavored topics in an ordinance constitutes content discrimi-

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family and was charged with violating the Bias-Motivated Crime Ordinance of St. Paul, Minnesota. *Id.* The ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 381 (citing St. Paul Bias-Motivated Crime Ordinance, St. Paul, MINN. LEGIS. CODE § 292.02 (1990)).

74. For a definition of "fighting words", *see supra* note 69.

75. 505 U.S. at 391. The Court examined the St. Paul ordinance in light of constitutional protection:

> The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. In its practical operation, . . . the ordinance goes even beyond mere content discrimination, to actual view point discrimination.

Id. (citations omitted).

76. *Id.* at 382. The Court noted that such statutes are "presumptively invalid." *Id.* The Court has upheld reasonable "time, place, or manner" restrictions, but only when they are "justified without reference to the content of the regulated speech." *Id.* at 386 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

77. *Id.* at 391.

78. *Id.* The Court stated:

> Although the [ordinance has been limited] to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas — to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality — are not covered.

Id.

nation which violates the First Amendment.[79]

In addition, the Court in *R.A.V.* found the St. Paul ordinance facially unconstitutional because it fostered viewpoint discrimination.[80] The permissibility of using certain phrases depended in large part on whether the speaker spoke in favor of a subject or against it.[81] The Court concluded that certain fighting words would be tolerated because of a speaker's ethnic or racial identity, but the same words would be prohibited if used by another speaker.[82]

The United States Court of Appeals for the Sixth Circuit held that Central Michigan University's policy was facially unconstitutional because of limitations on content.[83] The policy prohibited any expression that made negative inferences about race or ethnic affiliation.[84] The policy made it necessary for university officials to assess the ethnic or racial content of speech.[85]

In addition, the court found that the identities of the speaker and listener played an essential role in determining whether there was a violation under the policy.[86] The Sixth

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79. *Id.* at 396.

80. *Id.* at 391-92.

81. *Id.* The Court gave two examples:

> [A]spersions upon a person's mother . . . would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying . . . that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

Id.

82. *Id.* at 392.

83. 55 F.3d at 1184.

84. *See supra* note 21. The policy prohibited "written literature, . . . symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation." *Id.*

85. 55 F.3d at 1184. The district court found the university's policy confined to specific topics of race and ethnicity:

> Fighting words having to do with other, non-targeted topics may be used ad libitum on campus no matter how vile or harmful to the proper conduct of the university's educational mission. It therefore imposes upon a speaker the kind of "special prohibitions" mentioned in *R.A.V.* because he has spoken on an officially condemned topic.

Dambrot, 839 F. Supp. at 483.

86. 55 F.3d at 1184-85. The district court noted:

> A campus speaker may thus go on at length recounting what he supposes to be the ethnic attributes of . . . the Irish. So long as he speaks in a way which ap-

Circuit surmised that the university's policy produced the type of viewpoint discrimination prohibited in *R.A.V.*[87] In sum, the court held that the policy was an impermissible prohibition against fighting words and violated the First Amendment.[88]

IV. Coach's Termination is Affirmed as Proper

The United States District Court for the Eastern District of Michigan held that Dambrot was properly terminated.[89] The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision, reasoning that in order for Dambrot's termination to be impermissible, his speech would have to be protected under the First Amendment.[90] The Sixth Circuit concluded that Dambrot's speech was not protected because it was neither a matter of public concern, a part of the marketplace of ideas nor within the realm of academic freedom.[91] While the First Amendment does not require the government as an employer to accept the view of its employees,[92] the court concluded that the university had the right to terminate Dambrot and "to disapprove of the use of the word 'nigger'

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pears, from the viewpoint of the university's enforcers, to be either positive or neutral, the speaker is on safe ground so far as university policy is concerned. The speaker's tally of ethnic attributes, though, would be the only viewpoint allowed to be heard on the CMU campus, because all speakers with a differing view on that issue are prohibited by the policy from responding: in their words the speech police can "infer negative connotations about an individual's . . . ethnic affiliation" or something "hostile" on those ethnic grounds.

Dambrot, 839 F. Supp. at 483.

87. 55 F.3d at 1184.

88. *Id.*

89. *Dambrot*, 839 F. Supp. at 490. While the district court found that Dambrot had been permissibly dismissed, the court agreed with the proposition that "although at-will Government employees may be fired with or without reason, they may not be fired for exercising their constitutional rights." *Id.* at 485; *see also* Perry v. Sindermann, 408 U.S. 593 (1972) (holding that an untenured professor was entitled to hearing on whether non-renewal of his contract violated First Amendment right to free speech).

90. 55 F.3d at 1185; *see* Rankin v. McPherson, 483 U.S. 378, 383 (1987) ("It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of expression."); Scallet v. Rosenblum, 911 F. Supp. 999, 1009 (W.D. Va. 1996) ("It is axiomatic that '[a] state may not dismiss a public school teacher because of the teacher's exercise of speech protected by the First Amendment.'") (citation omitted).

91. 55 F.3d at 1185-91.

92. *Id.* at 1190; *see, e.g.*, Hetrick v. Martin, 480 F.2d 705, 708-09 (6th Cir. 1973) (finding that a university's non-renewal of an untenured teacher based on her teaching style did not violate constitutional rights to academic freedom and freedom of speech).

as a motivational tool."[93]

A. *Speech Touching a Matter of Public Concern*

The United States Supreme Court, in *Pickering v. Board of Education*,[94] announced that a public employee could not be terminated for speaking out on an issue of public concern absent a showing of knowingly or recklessly making false statements.[95] In *Pickering*, a teacher wrote a letter to the editor of a local newspaper, criticizing the school board's allocation of financial resources.[96] The newspaper published the letter.[97] The teacher was subsequently dismissed.[98]

The Court in *Pickering* held that school financing was a matter of public concern[99] and teachers, as informed members of society, should be able to speak out freely without fear of reprisal.[100] The Court created a balancing test, which requires that the interest of a teacher, as a member of society commenting upon a matter of public concern, be weighed against the interest of the state in promoting the efficient running of public services.[101] The Court applied this test and concluded that

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93. 55 F.3d at 1190.

94. 391 U.S. 563 (1968).

95. *Id.* at 574. The Court declined to decide whether it would be permissible to terminate a public employee who knowingly or recklessly made a false statement concerning a public matter. *Id.* at n.6.

96. *Id.* at 566.

97. *Id.*

98. *Id.* at 571.

99. *Pickering*, 391 U.S. at 571-72. The Court reasoned that the judgment of the school administration was not conclusive and that society leaves the granting of additional funds for the school system to be decided by a public vote. *Id.* The Court concluded that "[o]n such a question free and open debate is vital to informed decision making by the electorate." *Id.*

100. *Id.* at 568. The Supreme Court rejected the Illinois Supreme Court's suggestion that a teacher, as an employee of the State, relinquishes his First Amendment rights in commenting on the operation of public schools. *Id.* "'[T]he theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Id.* (quoting Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)).

101. *Pickering*, 391 U.S. at 568. Courts have applied the *Pickering* balancing test in determining whether the termination or disciplining of a public employee was violative of the First Amendment. *See, e.g.*, Stern v. Shouldice, 706 F.2d 742 (6th Cir.), *cert. denied*, 464 U.S. 993 (1983) (termination of non-tenured professor an impermissible violation of the First Amendment as it was motivated by college's retaliation for professor advising student to seek legal counsel concerning student's suspension); Anderson v. Evans, 660 F.2d 153 (6th Cir. 1981) (dismissal of tenured teacher permissible as interest of

Pickering was impermissibly terminated.[102]

In *Connick v. Myers*,[103] the United States Supreme Court built upon the *Pickering* decision, holding that the First Amendment protects a government employee who speaks out on matters of public concern from fear of reprisal by the government employer.[104] The Court in *Connick* incorporated the *Pickering* balancing test into a two-part analysis for deciding when the dismissal of a public employee is impermissible under the First Amendment.[105] Before applying the *Pickering* test, a court must determine whether the speech to be protected can be fairly characterized as a matter of public concern.[106]

The Supreme Court characterized matters of public concern as those related to political, social or other affairs of the community.[107] In deciding whether speech touches a matter of

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school board in maintaining efficient school system and employing effective school teachers outweighed teacher's interest in announcing her attitude toward black persons).

102. 391 U.S. at 574. The Court found:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the school generally.

Id. at 572-73.

103. 461 U.S. 138 (1983). In *Connick*, Myers, an assistant district attorney, was dismissed for insubordination after distributing a questionnaire to other members of the staff concerning the office's work environment. *Id.*

104. *Id.* at 140 (citing *Pickering*, 391 U.S. at 574); *see also* Matulin v. Village of Lodi, 862 F.2d 609, 612 (6th Cir. 1988) ("It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.").

105. 461 U.S. at 146.

106. *Id.* The Court stated that, "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." *Id.*; *see* Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) ("The focus is . . . upon whether the 'public' or the 'community' is likely to be concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee.").

107. 461 U.S. at 146. For examples of where courts have found speech not to touch a matter of public concern, *see* Knowlton v. Greenwood Indep. Sch. Dist., 957 F.2d 1172 (5th Cir 1992) (employee's complaint working without compensation while supplying food at school board meeting a personal matter); Dodds v. Childers, 933 F.2d 271 (5th Cir. 1991) (teacher's complaints concerning favoritism to other teacher not a matter of public concern); Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991) (complaint about poor evaluation was personal).

public concern the Court in *Connick* looked to the record as a whole to give meaning to the speech in terms of context, form and content.[108]

The United States Court of Appeals for the Seventh Circuit applied the *Connick* test in *Linhart v. Glatfelter*,[109] and held that a chief of police's personal opinion concerning the competency of a government official was not protected by the First Amendment when made in private.[110] The court in *Linhart* focused its attention on the employee's intention when he spoke.[111] The court decided that speech advancing purely private interests does not invoke First Amendment protection.[112]

The United States Court of Appeals for the Fifth Circuit also applied the *Connick* test and likewise focused on the speaker's intent.[113] In *Martin v. Parrish*,[114] a teacher was terminated for using profanity in the classroom.[115] The teacher argued that his use of profanity reflected his disgust in the progress of the class and was meant to motivate his students.[116] The Fifth Circuit held that because Martin's sole intent was to

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108. 461 U.S. at 147-48. The question is one of law for which the court has *de novo* review. *Id.* at 148 n.7; *see* Pennekamp v. Florida, 328 U.S. 331 (1946) ("The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . are of a character which the principle of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.") (footnote omitted).

109. 771 F.2d 1004 (7th Cir. 1985).

110. *Id.* at 1011. The court noted that the police chief's speech would have been protected by the First Amendment had he publicly accused the government official of incompetence. *Id.*

111. *Id.* at 1010. The court pondered whether it was the police chief's intent "to bring wrong doing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Id.*

112. *Id.* The court noted:

> [T]he difference between matters of public concern and matters of personal interest:
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> > when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, . . . a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. (quoting *Connick*, 461 U.S. at 147).

113. Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

114. 805 F.2d 583 (5th Cir. 1986).

115. *Id.* at 584. Martin, an economics instructor at Midland College, cursed at students, using words that included: "bullshit," "damn," "God damn," "hell," and "sucks." *Id.*

116. *Id.* at 585.

express his displeasure with his students' efforts in an attempt to motivate them, he conceded his case under *Connick*.[117] The court found that his attitude toward the students was not a matter that would occasion public discussion.[118]

In *Dambrot*, the United States Court of Appeals for the Sixth Circuit looked to the content, form and context under *Connick* to evaluate Dambrot's use of "nigger," and could not find any relation to any matter of social, political or other community concern.[119] The court found the district court's construction of a "form and context" test under *Connick* instructive of Dambrot's intent.[120] The district court found it difficult to envision Coach Dambrot grabbing a microphone and stating publicly that he wanted his players to play like niggers.[121] The district court concluded that because Dambrot's speech was made to players in the locker room, as far as form and context, the speech was not a matter of public concern.[122]

The Sixth Circuit noted that the coach's locker room speech

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117. *Id.* The court stated, "The profanity described Martin's attitude toward his students, hardly a matter that, but for this lawsuit, would occasion public discussion." *Id.*

118. *Id.*

119. 55 F.3d at 1187. The district court noted, "A coach's distress about the degree of aggressiveness shown by his players on the basketball court is a reasonable matter of concern, certainly, to the coach, but not the kind of question that is fairly cast as a 'public' issue." *Dambrot*, 839 F. Supp. at 487.

120. *Id.*

121. 55 F.3d at 1188. The district court constructed the following form and context test:

> One way to evaluate the possibility of the "public concern" component in questioned speech is to imagine it being discussed in public. The political compulsion of public employees partially at issue in *Connick*, the allegations of corruption noted in *McMurphy*, and comments concerning the level of fire protection in a town discussed in Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985), all can easily be envisioned as the subjects of heated disputation, with the contesting points of view hashing it out from soapboxes in the public square. It is considerably more difficult to imagine Coach Dambrot stepping up to the microphone and letting everyone know that his basketball players were expected to be "niggers" during games. Therefore, the facts that Dambrot's speech was given in the particular words chosen, and made in the locker room for his players' private consumption, only add further support to the conclusion that, at least to the "form and context" of it, his speech was not on a matter of public concern.

Dambrot, 839 F. Supp. at 488.

122. *Id.* (citing *Connick*, 461 U.S. at 146; Smith v. Martin, 819 F. Supp. 733 (N.D. Ill. 1992)). The court acknowledged that speech does not have to take the form and context of deep philosophical or intellectual debate to be protected, but it has to be something more meaningful than a coach's locker room speech. *Id.*

contained no relevant social or political message.[123] The court likened Dambrot's use of the word "nigger" to the teacher's use of profanity in *Martin,* and concluded that it was intended to be motivational and therefore not protected.[124]

B. Realm of Academic Freedom and Marketplace of Ideas

The guiding force behind the principle of academic freedom is the free exchange and public discussion of ideas.[125] The Supreme Court considers academic freedom a special concern of the First Amendment that requires vigilant protection.[126] The court in *Dambrot* noted that the linchpin in determining

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123. 55 F.3d at 1187-88. The Court of Appeals relied upon the district court's finding that:

> [T]he coach was intending to be motivational and . . . thought he was permitted through circumstances or by specific agreement of the players to make use of such language in the locker room. The Court further assumes the truth of Dambrot's assertion that he was attempting to flatter some players by applying the term to them as they often did to themselves in his presence, He thought he would humiliate (or motivate) others by withholding the description from them (or by referring to them as only "half-nigger"). In these ways he was using their "street language" as shorthand to call their attention to enthusiasm and toughness on the basketball floor, or to their lack of it.
>
> A coach's distress about the degree of aggressiveness shown by his players on the basketball court is a reasonable matter of concern, certainly, to the coach, but not the kind of question that is fairly cast as a "public" issue.

Id. (citing Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 487 (E.D. Mich. 1993)).

124. *Id.* The court reasoned that "like the use of profanity in *Martin,* Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed." *Id.* at 1187.

125. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). In terms of freedom of expression in academia:

> [M]ost writers share a fundamental belief that academic freedom requires that faculty possess the freedom to pursue and convey their own ideas of truth, at least within an area of professional expertise and often extending to extramural utterances as well. Correlatively, students must be free to learn a full range of ideas with out imposition of others' orthodoxy, and academic institutions must support these efforts without undue outside interference. . . . [Academic freedom] is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher to pursue his ends without interference from the academy.

Linda E. Fisher, A Communitarian Compromise on Speech Codes: Restraining the Hostile Environment Concept, 44 CATH. U. L. REV. 97, 107 (1994) (citations omitted).

126. *Keyishian,* 385 U.S. at 603 (quotation omitted). Justice Douglas, in *Keyishian,* noted:

> [A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . . The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that ro-

both academic freedom and matters of public concern is the extent to which the speech to be protected transcends personal opinion or interest, and impacts social and or political concerns.[127]

The court in *Dambrot* compared two decisions by the United States Court of Appeals for the Second Circuit that involved academic freedom under the First Amendment.[128] In *Levin v. Harleston*[129] and *Jeffries v. Harleston*,[130] the City University of New York (CUNY) disciplined two professors for making derogatory remarks concerning people of certain ethnic or racial groups.[131] While the respective courts found that the professors' remarks were repugnant, they concluded that the remarks should receive protection under the First Amendment concept of academic freedom because their purpose was to inform or influence public debate.[132] The United States Court of Appeals for the Sixth Circuit summarily concluded that Dambrot's speech did not serve such a purpose.[133]

The court in *Dambrot* next considered whether a communicative act[134] is entitled to protection.[135] The court examined

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bust exchange of ideas which discovers truth "out of a multitude of tongues [rather] than through any kind of authoritative selection."

Id. (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); *see also* Healy v. James, 408 U.S. 169, 188 (1972) (stating that the First Amendment must protect freedom of speech of ideas that we hate or it will eventually be denied to ideas that we cherish); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

127. 55 F.3d at 1189.

128. *Id.*; *see* Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992); Jeffries v Harleston, 21 F.3d 1238 (2d Cir.) *vacated*, 115 S. Ct. 502 (1994).

129. 966 F.2d 85 (2d Cir. 1992).

130. 21 F.3d 1238 (2d Cir.) *vacated*, 115 S. Ct. 502 (1994).

131. *Levin*, 966 F.2d at 87. Professor Michael Levin wrote three letters that were published by the New York Times, Quadrant, an Australian journal, and the American Philosophical Association Proceedings. *Id.* These letters contained derogatory comments pertaining to the intelligence and social characteristics of African Americans. *Id.* In a similar case, Professor Leonard Jeffries made a speech concerning racial biases in New York's public school systems in which he expressed repugnant comments about Jews. *Jeffries*, 21 F.3d at 1242.

132. *See Levin*, 966 F.2d at 87; *Jeffries*, 21 F.3d at 1245.

133. 55 F.3d at 1189; *see Dambrot*, 839 F. Supp. at 489. The district court noted that Dambrot's use of the word stirred public debate in the form of demonstrations and media coverage, but it did "not vitiate the requirement that the actual speech itself . . . address a matter of public concern." 55 F.3d at 1189.

134. *See* Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989). The court explained that "because the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor's communicative act is entitled

Parate v. Isibor[136] where the Dean of the School of Engineering and Technology at Tennessee State University forced a college professor to change a student's grade. The court in *Parate* held that the school's forcing the professor to change the grade was a violation of the professor's right to free speech.[137] The court reasoned that the grade was the essence of the teacher's communicative act, sending a specific message to the student, and was entitled to protection.[138]

In *Dambrot,* the Sixth Circuit contrasted Dambrot's use of the word "nigger" with Parate's grade change and concluded that Dambrot's communicative act was not analogous.[139] The court found Dambrot's statements did not serve an academic message and were merely an attempt to motivate or humiliate his players.[140]

The Sixth Circuit acknowledged that the First Amendment protects a person espousing general characterizations but the protection is not unlimited.[141] The First Amendment does not mandate that a university employer accept these views as a legitimate means of motivating his players.[142] The court concluded that Central Michigan University had a right to terminate Coach Dambrot.[143]

V. Conclusion

While the Sixth Circuit properly determined that the Central Michigan University discriminatory harassment policy

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to some measure of First Amendment protection." *Id.* at 827; *cf.* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (holding that wearing black armbands by students was expressive conduct entitled to protection under First Amendment); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (finding that sit-in by African American students was symbolic speech); Monroe v. State Court of Fulton Cty., 739 F.2d 568, 571 (11th Cir. 1984) ("If [plaintiff] shows '[a]n intent to convey [a] particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it,' the activity falls within the scope of the [F]irst and [F]ourteenth [A]mendments.") (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

135. *Id.* at 1189-90.
136. 868 F.2d 821 (6th Cir. 1989).
137. *Id.* at 829.
138. *Id.* at 827.
139. 55 F.3d at 1190.
140. *Id.*
141. *Id.*
142. *Id.*; *see Hetrick, supra* note 92, at 708-09.
143. 55 F.3d at 1190.

was an unconstitutional prohibition on the freedom of speech, the court also endorsed the dismissal of an athletic coach, that, in effect, was the net result of the policy's implementation. The court justified its decision by concluding that Coach Dambrot's locker room speech was not a matter of public concern, thereby affording the speech First Amendment protection. The *Dambrot* decision is a clear statement to coaches throughout the country that locker rooms, dugouts, sidelines and huddles are not sacred grounds where coaches are free to say or do anything they please.

The court in *Dambrot* did not completely shut the door on locker room speech, noting that there may be times when a coach's speech to his team will be protected.[144] Despite Coach Dambrot's positive intentions,[145] his use of racial epithets is unacceptable. The context in which he used the word did not invite debate.[146] Questioning a coach's authority, especially concerning game tactics, is rarely tolerated.[147] What Coach Dambrot did here was use an offensive term[148] while addressing his team, and a school administration should not endorse this type of behavior.

With there being little chance of an open dialogue and free exchange of ideas, locker room speeches intended purely to motivate, to humiliate, to get a team to play harder, or to raise the level of performance can be curbed by school administration. What seems like a blow to the First Amendment is really an affirmation of common sense and moral decency. A university

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144. *See Dambrot*, 839 F. Supp. at 489 n.17. "It is conceivable that someone in the coach's position could assert that he had used the term only in the course of a lecture to his players on his ideas of the relationship between race and athletic ability. Whether such ideas were valid or not, he would be in a better position to argue that the expression of them conferred 'public concern' status." *Id.*

145. *See supra* note 17.

146. A coach holds a position of authority over the student-athletes, leaving little chance that there will be room for robust debate in locker room settings.

147. The coach has the authority to decide which students can participate on a given team and plays an instrumental role in determining which students receive athletic scholarships. *See Dambrot*, 55 F.3d at 1190 ("[T]he coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas which might have taken place.").

148. "Nigger" is defined as "disparaging and offensive." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 966 (1989); "Nigger . . . is now generally regarded as virtually taboo because of the legacy of racial hatred that underlies the history of its use among whites, and its continuing use among a minority of speakers as a viciously hostile epithet." WEBSTER'S NEW WORLD DICTIONARY 916 (3d ed. 1994).

should not be forced to sit idle while a figure of authority under its employ invokes terms of hate under the guise of motivation.

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