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October 1, 2020

Robert O. Davies
President, Central Michigan University
Cc: Mary Roy, Associate General Counsel
Andrew W. Brockman, Assistant General Counsel
Dr. Mary C. Schutten, Executive Vice President and Provost
Dennis Armistead, Executive Director, Faculty Personnel Services

Re: Violation of Prof. Tim Boudreau's academic freedom rights

Dear President Davies:

As a black man born in 1922 Detroit, Judge Damon Keith had doubtless been called "nigger" on regrettably many occasions. Yet when he wrote the opinion in *Dambrot v. Central Michigan University*, Judge Keith mentioned the word 19 times. He could have exclusively used an expurgated version of the word. ("N-word" does appear 10 times in the opinion, and "N word" once, in a quote.) But he chose not to, and we think not by accident.

Rather, Judge Keith likely (1) thought it important to accurately quote the facts, even when the facts include offensive words, and (2) drew a sharp distinction between wrongfully using a word as an insult (or perhaps even as an odd compliment, as Coach Dambrot may have misguidedly intended it), and properly mentioning it as a fact. Judge Keith knew the case would be read by many people of all races, and doubtless discussed by many people of all races—in future oral arguments, in law firm conversations about how best to use the precedent, and in classrooms. Yet he precisely and repeatedly discussed the facts, and counted on people to understand that there is a world of difference between factual mentions and insulting uses.

Both these points are largely uncontroversial in universities and among judges for almost all other words. And they're broadly accepted by judges as to "nigger" as well as for any other word: The word appears in nearly 10,000 court decisions (and those are just the ones available on Westlaw) since 2000 alone. These include opinions from Supreme Court Justices including Justices Sotomayor, Thomas, O'Connor, Ginsburg, and a six-Justice per curiam signed on to by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. They include opinions from illustrious federal appellate judges and state court judges, including liberal luminaries who yield to no-one in their desire for racial equality.

The word appears routinely in briefs, including those submitted by prominent advocates for equality; in oral arguments in court; in academic articles on law; and elsewhere. (A draft article cowritten by Harvard Law School's Randall Kennedy lays out a wealth of evidence on this.[1]) Less than two weeks

[1] *See* https://reason.com/wp-content/uploads/2020/08/epithets.pdf.

ago, the word was mentioned 52 times in the opinions in a Connecticut Supreme Court decision (*State v. Liebenguth*), and had been said 6 times by the Justices in that oral argument. Indeed, expurgating Judge Keith's opinion is disrespectful to him as a judge and as an author—as if he is some naughty schoolboy whose carefully chosen wording, based on decades of legal experience and now itself part of the law, is unfit for polite company.

Prof. Tim Boudreau was teaching a class about law, in which doubtless some students wanted to become lawyers and all wanted to learn about the legal system. He was discussing an important case—the earliest appellate precedent on campus speech codes.[2] The case sheds important light on general First Amendment debates; unsurprisingly, the class materials included plenty of cases on such general topics that were not themselves media cases, such as *Brandenburg v. Ohio*, the *Texas v. Johnson* flagburning case, and more. And the case governs the rights of (among others) student newspapers and students on social media, a subject that, equally unsurprisingly, was covered in the class (see the syllabus for Week 6).[3] By following the norms of the legal profession in accurately quoting the case, Prof. Boudreau acted entirely properly.

The same is so of his giving the trademarks "NIGGA" and "NIGGERPLEASE" as analogies in discussing *Matal v. Tam*, a case involving a racial epithet as a trademark ("Slant"). The terms "Nigger" and "N.I.G.G.A.," for instance, appear in the Federal Circuit en banc decision that the Supreme Court affirmed in *Matal*, and in 10 briefs filed with the Supreme Court in that case plus 4 filed with the Federal Circuit. One of those briefs, by the way, was filed behalf of the Fred T. Korematsu Center for Law and Equality, Hispanic National Bar Association, National Asian Pacific American Bar Association, National Bar Association ("the nation's oldest and largest national network of predominantly African-American attorneys and judges in the United States"), National LGBT Bar Association, and National Native American Bar Association as Amici Curiae in Support of Petitioner—groups that few would call racist or racially insensitive.

And Prof. Boudreau was also following practices that are standard in the university more generally for pretty much all other words, and that remain standard among many professors for this word as well. The university, like the courtroom, is supposed to be a place where people accurately and unflinchingly discuss the truth. That some people find certain facts to be offensive, whether facts about the world or

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[2] The Investigatory Report notes that *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), came before the *Dambrot* litigation, but *Doe* was only a one-judge district court decision, and thus not legally binding precedent; *Dambrot* yielded a binding precedent from an appellate panel, 55 F.3d 1177 (6th Cir. 1995). Searching in Westlaw for *Dambrot* citations, *"55 f.3d 1177" & "first amendment"*, yields 168 court cases; searching for *Doe* citations, *("721 f.supp. 852" "721 f. supp. 852") & "first amendment"*, yields only 37 court cases.

[3] For just some examples of law review articles citing *Dambrot* on such questions, see, e.g., Patrick O. Malone, *The Modern University Campus: An Unsafe Space for the Student Press?*, 85 Fordham L. Rev. 2485, 2505 (2017); Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. Bus. & Tech. L. 1, 7, 10 (2014); Meg Penrose, *Tinkering with Success: College Athletes, Social Media and the First Amendment*, 35 Pace L. Rev. 30, 32 (2014); Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. Marshall Rev. Intell. Prop. L. 509, 513, 525, 528 (2013); Darryn Cathryn Beckstrom, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 Willamette L. Rev. 261, 300, 308 (2008).

facts in a court opinion, cannot require professors to expurgate those facts (just as it does not require judges to expurgate those facts).

We thus think Prof. Boudreau acted properly. But even if we are mistaken, and it would have been pedagogically better for him to use a euphemism instead of an accurate quotation, it is wildly improper to fire a tenured professor for such accurate quotation, especially in the absence of any clear rule prohibiting it. *See, e.g.*, *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001) (which the Report did not discuss); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996) (which the Report did not discuss either).

The prohibition on speech that creates a "hostile learning environment" most certainly is not adequate warning: Court cases make clear that a "hostile education environment" is created only by behavior that is sufficiently severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," *Davis v. Monroe Bd. of Ed.*, 526 U.S. 629 (1999), and no case even hints that accurately quoting two epithets from a court case and the name of a registered trademark in discussing another case would qualify as "severe[and] pervasive" misbehavior. We're quite sure that judges wouldn't conclude that something that courts routinely say in their opinions is a violation of federal hostile environment law when quoted by professors in a law class.

Indeed, in *Savage v. Maryland*, 896 F.3d 260 (4th Cir. 2018), the unanimous panel (all three members of which were appointed by President Obama) specifically held that reading aloud multiple documents that contained the word "Nigga"—repeated "over and over again," *id.* at 266—is *not* hostile environment harassment. There, a prosecutor had been reading letters from suspects, and the arresting officer complained that this created a hostile environment. But the panel concluded that "it would not be reasonable to believe" that reading the letters created "a racially hostile environment" in violation of antidiscrimination law:

> [T]he racial slur read by Oglesby is particularly odious, and "pure anathema to African-Americans." . . . "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates."
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> But context matters, as [*Clark County School District v. Breeden*, 532 U.S. 268 (2001),] instructs, and the question is whether use of a racial epithet has created a "racially hostile" work environment. And while the employer in [one precedent] used racial epithets in his own voice and to express his own insults, and the employer in [another precedent] directed epithets at the plaintiff to "cap explicit, angry threats that she was on the verge of utilizing her supervisory powers to terminate [the plaintiff's] employment," this case is decidedly different. . . . Oglesby was not aiming racial epithets at Savage, or, for that matter, at anyone else, or using slurs to give voice to his own views. Instead, he was reading the word "Nigga" aloud from letters written by criminal suspects, presented to him by a police officer in the course of a trial-preparation meeting.

Id. at 277 (citations omitted). Using epithets to insult employees or students thus may create a hostile environment; but quoting them from case documents does not. Likewise, quoting the *Savage* precedent in a law class—or quoting the *Dambrot* precedent—would not create a hostile environment, either.

Moreover, the Investigatory Report's repeated references to Prof. Boudreau's mentioning of "other racial and homophobic slurs" makes clear that the slippery slope is very real: If the decision is not reversed, Central Michigan University professors should fear for their jobs if they quote the facts from leading Supreme Court precedents such as *Matal v. Tam* (with its reference to the Slants, which the report labels as "language considered to be a racial slur") or *Snyder v. Phelps* (where the Court struck down a damages award for near-funeral picketing by the Westboro Baptist Church that contains signs such as "God Hates Fags"). Indeed, on p. 6, the Report expressly faults Prof. Boudreau for "us[ing] homophobic slurs during his teaching of material associated with the Westboro Baptist Church."

Central Michigan University certainly has an opportunity to make a name for itself in the academy through such an extraordinary action—it's just not a name that we would think the University would seek. And of course the University may also acquire the rare distinction of being the defendant in two separate campus speech suppression cases, though that too is a distinction that we would think best avoided. (We do not even discuss here the seeming lack of due process and Faculty Senate input in a matter that so deeply affects faculty freedom, a topic we leave to others.)

The firing of Prof. Boudreau should therefore be immediately and completely reversed.

Sincerely,

Adam Scales, Professor of Law, Rutgers Law School (Camden, N.J.)

Nadine Strossen, John Marshall Harlan II Professor of Law (Emerita) at New York Law School; former President of the American Civil Liberties Union (1991–2008)

Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA School of Law